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When this journal began four years ago, the lesbian, gay, bisexual, transgender, and queer (LGBTQ) community in the United States faced a legal and political landscape characterized by what most considered to be shifting, growing, and positive momentum; a federal appellate court had overturned California’s Proposition 8, “Don’t Ask, Don’t Tell” had been repealed, and marriage equality had been achieved in New York. In the past year, the U.S. Supreme Court struck down the Defense of Marriage Act, the Senate passed the Employment Non-Discrimination Act, and marriage equality expanded to New Jersey, Illinois, and Hawaii. The pace of progress, it seems, has only quickened.

Yet, it is also true that the lived realities of LGBTQ communities encompass far more variegated issues than are immediately evident from the targeted campaigns for marriage equality and employment rights. Abroad, the Winter Olympics in Sochi brought visibility but little change to the plight of the Russian queer community, while passage of Uganda’s Anti-Homosexuality Bill spotlighted the very real, and potentially deadly, conditions under which many African LGBTQ communities fight for survival. Here in the United States, transgender activist CeCe McDonald was freed after nineteen months in prison, but her experience exposed and problematized the intersections of race and gender identity in the American justice system and prison-industrial complex. Homeless LGBTQ youth remain largely invisible to policy makers despite their astoundingly high numbers, and poverty continues to be a defining, yet largely neglected, structural characteristic of life for LGBTQ people in rural communities.

Indeed, change has not uniformly benefitted all LGBTQ communities. To the extent that the LGBTQ Policy Journal strives to serve as a stimulus for policy design and implementation, it is our belief that addressing the manifold circumstances of a community that is not monolithic in its needs or desires requires drawing inspiration from the same diversity that defines what it means to “be” LGBTQ.

This year’s journal selections continue to reflect this theory of policy change—that formulation of policy must necessarily be interdisciplinary, borrowing impetus from not just analysts and

their data, but also individual and community narratives, activists' struggles, and critical theorizing around the assumptions and biases that undergird existing policy. These pages will take you from Tanzania to Sudan and Egypt, from the impact of school sex education for sexual minority youth to crossdressing among female-assigned-at-birth members of the transgender community—and much more. We trust that the exciting work being done and shared here will motivate meaningful reflection and debate within and across traditional spheres of policy influence.

The privilege afforded by the institution of Harvard entails a corresponding responsibility on the part of its students and affiliates to deploy that power for transformative, tangible change. I hope that in some small way, we are contributing to much-needed critical dialogue in that spirit—about progress made and the work that remains for the LGBTQ community, as well as the voices heard, unheard, and silenced as a part of that tension.

Upwards and onwards.

Albert J. Lee  
Editor-in-Chief  
Cambridge, MA

# Queering International Development?

*An Examination of New “LGBT Rights” Rhetoric, Policy, and Programming Among International Development Agencies*

By Rachel Bergenfield and Alice M. Miller<sup>1</sup>

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## ABSTRACT

Starting in late 2011, “LGBT (lesbian, gay, bisexual, and transgender) rights” became a prominent and contentious part of the international development agenda. While most of the resulting attention has been directed to questions of aid conditionality, this essay instead aims to preliminarily map the range of policies set out by twelve of the largest development agencies on “LGBT” or “SOGI” (sexual orientation and gender identity) rights. We seek to further research and policy discourse in this dynamic field by suggesting frameworks for assessing our findings and future changes in light of the histories of development, rights, and sexual diversity and also with regard to contemporary concerns within development studies about listening, accountability, “do no harm” concepts, and attending to distinctions between policies and practices that transform unequal power relations and those that sustain them.

## INTRODUCTION

Beginning largely in late 2011, leaders from the United States, Europe, and some multilateral institutions made statements in support of “LGBT people” globally. For the first time, many major world figures were speaking not only about the plight of lesbian, gay, bisexual, and transgender (LGBT) people generally but proposing to leverage the resources and authority of their own states and institutions,

particularly international development institutions, on behalf of this marginalized population. United Kingdom Prime Minister David Cameron called for an end to the British colonial-era laws that criminalize sexual relations between people of the same sex, still in effect in many countries, and noted that the U.K. should consider making its development aid conditional upon adherence “to proper human rights” for LGBT people.<sup>2</sup> In 2011, then U.S. Secretary of

State Hillary Clinton stated, “Gay rights are human rights, and human rights are gay rights.”<sup>3</sup> Following her speech, President Barack Obama directed all U.S. agencies involved in foreign policy and international development to ensure that their work protects and promotes the human rights of LGBT people.<sup>4</sup> UN Secretary-General Ban Ki-moon voiced his solidarity with LGBT people: “Your struggle for an end to violence and discrimination is a shared struggle . . . and I call upon all countries and people to stand with you.” Supporting UN action but opposing the calls by other leaders for conditioning aid, he concluded, “I firmly oppose conditionality on aid. We need constructive actions.”<sup>5</sup>

Never before have so many major world leaders spoken publicly in support of the rights of people in aid-recipient countries who are not normative in their sexual orientation and/or gender identity/expression. Never before have they publicly suggested that there should be a relationship between international development policy and the circumstances of this population. By 2012, a major global change was fully underway, as was a disagreement about whether this change should happen and what shape it should take.

While the initial round of speeches was globally applicable and broadly directed, it had impacts on the daily lives, risks, and support systems of real people in specific places. In Ghana, for example, political and religious leaders responded by speaking against “homosexuality.”<sup>6</sup> The president at the time condemned Cameron’s statements, noting that he would not kowtow to the “threat” of imposing “gay aid.”<sup>7</sup> Community violence in the country toward self-identified or perceived LGBT people was reportedly increasing in the months prior to the statement, and activists reported that the statement served to

invigorate this mounting moral panic by inadvertently positioning homosexuality as a “Western import” and making it “difficult” and “risky” to continue to implement support programs.<sup>8</sup> Diverse aid-recipient countries, from Pakistan to Jamaica and Nigeria, have also experienced greater and/or more visible violence and oppression toward people who are nonnormative in their sexual orientation and/or gender identity/expression in recent years. U.S., European, and multilateral leaders had thus injected this new rhetoric into complex, tense, and high-stakes contexts.<sup>9</sup>

This article seeks to examine this new rhetoric, to carry out a preliminary mapping and exploration of related changes in development policy and practice, and to suggest some frameworks for analyzing the potential effects of the changes with a practical eye toward improvement given that agencies will undoubtedly continue to work around “LGBT” issues. We begin by flagging some challenges in terminology, recalling that “LGBT” and “development” have specific histories and limits. We then briefly historicize development’s engagement with human rights and take stock in broad terms of the changes in development agency policy and leadership statements as they pertain to sexual orientation and/or gender identity as described in publicly available documents. We find that most of the leaders from twelve of the largest international development donors have made high-level statements in support of “LGBT rights” in aid-recipient countries and/or globally since 2011. In terms of policy change, we look at inclusion of this population in strategic and core policy, internal nondiscrimination policy, and external nondiscrimination policy. We note that seven of the twelve have integrated LGBT rights or sexual orientation and/or gender

identity into their institutional mission or core policies, or have a public policy specifically on the matter. And yet strikingly, nearly all of the development agencies lack clear, publicly available policies ensuring that aid is not used by implementing partners in ways that could discriminate against or harm people based on sexual or gender difference.<sup>10</sup>

In the next section, we raise and analyze three potential areas of concern. First, we flag questions about insufficient consultation with affected activists and communities in some initial high-profile announcements about development aid and LGBT rights. Second, we note that current “LGBT-specific” efforts work in isolation of an assessment of overall programming, such that agencies have no sense of harms arising from general programs for people marginalized based on their sexual or gender difference. Finally, we emphasize that the development policies and rhetoric to date have tended to focus on a reified set of identities and terms, a practice that may rob development agencies of engaging in a more transformational project that addresses the underlying factors that generate violence and oppression, thus encompassing a benefit for all people who differ from mainstream conceptions of sexual or gender normality in a particular community, not just LGBT-identified people. Finally, we conclude by offering two overarching takeaways about the state of LGBT rights and development policy conversation.

## NOTE ABOUT LANGUAGE

### Sexual Diversity and Gender Diversity

In this essay, we are faced at all turns with the difficulties posed by the choice of terms: what are the right

words to describe the populations of concern for development agencies? The senior leaders whose statements and policies we study in this essay typically use the terms “LGBT” (lesbian, gay, bisexual, or transgender) or occasionally LGBTI (adding intersex), “homosexuality,” “gay,” and occasionally “sexual minorities.” Since approximately 2007, “SOGI” (sexual orientation and gender identity) has also become a dominant term in some sectors. We think it is important to ask who is identified, who appears, and who is rendered invisible in these terms. Nuance and care in terminology contributes to improved clarity and understanding and to more productive interventions.<sup>11</sup>

We have opted to put these terms (when not direct citations from policy) in quotation marks to indicate that these are the generally chosen phrases by a given agency or leader, but are not to be taken as validated descriptors. When not referring to the terms used by an agency, we use more general terms, such as “people who are of marginalized sexual orientations (or practices) and/or gender expressions/identities.” We hope that the awkwardness of these terms, which lack the crisp assertion of “gay” or “LGBT,” reminds readers to question assumptions about the populations in discussion. Similarly, we use the terms “homophobia” and “transphobia,” which are in circulation globally but also require great caution when deployed across borders and contexts.<sup>12</sup>

## International Development

The international development sector is most narrowly understood as the provider of development aid and related implementation policies. Aid includes “all resources, physical goods, skills and technical know-how, financial grants (gifts), or loans (at concessional rates)—transferred by donors to recipients.”<sup>13</sup>

In other words, development aid is a resource transfer from donor countries to aid-recipient countries and is situated in the context of the vast net of global resource transfers, which also run in the opposite direction. Much aid is either tied to particular policies or comes in the form of a particular program implemented by nongovernmental organizations (NGOs) or private companies. Development aid comes from both the agencies of particular countries (bilateral) and agencies with member countries (multilateral). A broader definition of development would include various domestic and international policies that are not explicitly related to aid but affect people in low- and middle-income countries throughout the world, such as security, migration, and trade policies.<sup>14</sup> Because the changes that we are examining in this essay are changes within development agencies, we will utilize primarily the first, narrower definition.

### Countries of Interest

In this essay, our countries of interest have wildly different histories and attributes. In many settings, they would be referred to as “developing” or possibly “low-income.” These terms, particularly “developing,” are fraught. Some argue that employing “developing” as an adjective with regard to a country, which is common among nearly all of the development agencies of study in this essay, has exploitative and/or paternalist undertones or may be inaccurate because of its connotation that all countries undergo a similar, predefined path to a universally defined end state (“developed”). Acknowledging this debate, we use the more specific term “aid-recipient country”; our diverse countries of interest are related only in that they receive development aid and are thus affected by the policy changes studied here.

## MAPPING POLICY CHANGE AMONG DEVELOPMENT AGENCIES

During the past five years, many of the most powerful North American and Western European leaders have made statements calling attention to the well-being and/or rights of people throughout the world who are marginalized based on their sexual orientations and/or gender identities/expressions and who live in aid-recipient countries. While much of the media and policy conversation focus has been on their statements, a number of lesser-known, but potentially high-impact, changes have also emerged with the new rhetoric. In this section, we catalog three such types of change at twelve of the largest development agencies.

Our cataloguing provides a mere snapshot of the present. It does not and should not be used as a basis of normative evaluations or comparison among agencies regarding their commitment to LGBT issues or support for sexual and gender diversity. Agencies have different strategies for engaging with sexual rights and vulnerable populations, and in some cases not making bold public statements or issuing formal policy changes might be a sensitive, strategic decision.<sup>15</sup>

### Historical Context

Before cataloguing changes in development policy with regard to “LGBT” rights, it is important to situate our exercise within the historical relationship between human rights and development more broadly. Despite the two fields always sharing a stated concern with improving “the human condition,” there was little room for conversation about linkages between them until slightly more than two decades ago. Their scope of work,

practices, actors, languages, and funding were largely separate until the late 1980s.<sup>16</sup> Broadly speaking, development work was primarily focused on areas such as agriculture, infrastructure, and gross domestic product (GDP) growth, although there were always alternative theories of development, such as the “women and development” critiques of the 1970s.<sup>17</sup> Human rights work was primarily focused on protecting the individual from state predations through documentation and advocacy.

As the Cold War ended, human rights organizations began to take up integrated economic and civil rights, gender analysis, and new approaches, ranging from linking advocacy to institutional training and considering rights within health policy. During this time, development actors faced new pressure to account for the impact of their work and design programs that were relevant in the contexts of the rising identity politics and ethnic conflicts of the post-Cold War era. This led to an integration of questions of equity, inclusion, and “do no harm.”

Emerging from these histories is the approach of “rights-based development.” It has varying definitions and may be an imprecise methodology<sup>18</sup> but at a minimum includes rights principles such as nondiscrimination and participation by people who will be affected by a development program in that program’s design and assessment.<sup>19</sup> Rights-based development has not been uniformly adopted and implemented across development agencies, but its wide acceptance is a key contextual factor in providing an entry point into development for sexuality and gender, especially as sexuality, bodily diversity, and gender have increased their purchase on human rights work.

The historical and/or current exploitation of aid-recipient countries

by aid donor countries and their constituents is an additional, key context in which the current policy changes are situated. This may include colonial rule, enslavement, the social effects of structural adjustment, and human and environmental harm from natural resource extraction. These histories and dynamics profoundly shape how policy intervention is heard and experienced.

### Methods: Cataloguing Major Donors by Their Policies on Sexual and Gender Diversity and Rights

We reviewed changes among ten of the largest agencies that are members of the Development Assistance Committee (DAC).<sup>20</sup> All are European or North American except for Japan’s International Cooperation Agency. They provide net official development assistance of approximately \$5 billion to \$30.5 billion.<sup>21</sup> We also selected two of the most prominent and large multilateral development agencies, the United Nations Development Programme (UNDP) and the World Bank.

Select development agencies:

1. French Development Agency (AFD)
2. Federal Ministry of Economic Cooperation And Development (BMZ)
3. U.K. Department For International Development (DFID)
4. Europe Aid (EU)
5. Japan International Cooperation Agency (JICA)
6. Norwegian Agency for Development Cooperation (NORAD)
7. Netherlands Development Cooperation
8. Swedish International Development Cooperation Agency

(SIDA)

9. Swiss Agency for Development And Cooperation (SDC)
10. United Nations Development Programme (UNDP)
11. U.S. Agency for International Development (USAID)
12. World Bank (WBG)

No agencies from low- and middle-income countries are present on the list due to the smaller size of their aid budgets, absence from the list of twenty-nine DAC donor countries, and our sense that the history between European and North American countries with aid-recipient countries is highly relevant. Regardless, the increasing development activities of many middle-income and rapidly growing countries, such as China, Brazil, and the newly proposed BRICS (Brazil, Russia, India, China, and South Africa) Development Bank, will impact the questions explored in this essay and are an important topic of further study.<sup>22</sup>

We reviewed four dimensions of change. They are not the only ones of importance but provide a starting point for conceptualizing what change looks like beyond conditionality:

1. **Rhetoric/senior leadership statements** — the most senior leaders of the development agency or country behind it have made at least one explicit, publicized statement (a) supporting the rights or well-being of people of marginalized sexual orientations and/or gender expression/identity in aid-recipient countries and (b) linking their circumstances with development.
2. **Guiding policy** — the core development policy or strat-

egy at the agency explicitly includes sexual orientation and gender identity/expression, or the agency has a standalone, high-level policy clarifying its commitment.

3. **Inwardly directed SOGI nondiscrimination** — employees of the agency are formally protected against employment discrimination on the basis of sexual orientation or gender identity/expression; this is either a national policy or, if not, a policy specifically of the agency.
4. **Outwardly directed SOGI nondiscrimination** — the agency explicitly prohibits discrimination in its programming by requiring implementing partners not to discriminate against, marginalize, or otherwise harm people of marginalized sexual orientations and/or gender expressions/identities in their programming and employment.

We reviewed *publicly available* documents on these four dimensions of change, which we identified through searches on the Web sites of the agencies and search engines. In some cases of ambiguous or difficult to locate policy statements, we contacted current or former employee of the agency to ask for direction.

We also interviewed or spoke with over ten activists from aid-recipient countries, shadowed their work in two countries, and reviewed documents and statements by nearly twenty organizations in aid-recipient countries. While these sources are not part of our policy review, it informed our selection of the policies to study and guides our subsequent analysis.

## Findings: Preliminary Cataloguing of Development Agency Policy in Regard to Sexual and Gender Diversity and Rights

Of the twelve agencies studied, ten have senior leaders who have made public statements since 2011.<sup>23</sup> We argue that this rhetoric has translated into substantive institutional policy commitments to LGBT populations through at least two pathways: foreshadowing and reaction. A statement by a leader may merely be an announcement of a substantive change that is already underway within the relevant development institution, or the statements may be a reaction to high-profile rights contests, such as the Ugandan Anti-Homosexuality Bill.<sup>24</sup> With regard to substance policies, at least nine of the agencies have inwardly directed policies that protect employees from discrimination due to their sexual orientation and gender identity/expression or are based in countries that have such laws. Seven include SO and/or GI in their strategic policies or have a specific policy about LGBT rights and issues in development. Only the EU development apparatus clearly prohibits externally directed discrimination.

For agencies that have implemented core policies that touch on SO and/or GI, a common approach is to “update” a preexisting commitment to pursuing human rights within a development agenda and or rights-based development. For example, DFID notes that “LGBT equality is a focus area for DFID’s budget support policy, where human rights is a key partnership principle guiding decisions on providing aid to governments.”<sup>25</sup> Other European development institutions, such as those in Norway, the Netherlands, and Sweden, have similarly framed their engagement with LGBT issues via different but pre-

existing commitments to human rights within development policy.

Unsurprisingly, development institutions that don’t engage with human rights as a matter of high-level institutional policy tend to have less obvious entry points for SOGI issues and were less likely to have a high-level publicly available institutional policy, such as the Japan International Cooperation Agency and the World Bank. World Bank staff has framed LGBT issues in terms that resonate with its institutional mission; a recent Bank-hosted event explored the economic costs and development impacts of homophobia and transphobia.<sup>26</sup>

Even in the absence of a formal policy commitment, agencies often take action on specific issues. For example, the World Bank pursued a delay to its loan to Uganda in 2014 following the signing into law of the Anti-Homosexuality Bill.<sup>27</sup> The Swiss Agency for Development Cooperation does not explicitly include LGBT or SOGI issues in its policy thematic domains, despite including human rights more generally, but it has supported LGBT-related work, such as providing funding toward research.<sup>28</sup>

It is ironic that policies attending to the discrimination that can occur through development programs in aid-recipient countries are the rarest given that agencies generally do not implement programs but rather provide grants or contracts to NGOs, such as private companies, faith-based organizations, and other actors. Indeed, participants in development programs primarily interact with the policies and staff of these “implementing partners,” not the development agencies themselves, arguably making this area of policy one of the most important dimensions of change.

Notably, only the EU clearly and

explicitly prohibits discrimination on the basis of SOGI in procurement guidelines,<sup>29</sup> although five of the agencies that we reviewed did not have sufficient information about their grant making and contracting guidelines publicly available to definitively determine whether they indeed do not systemically prohibit such discrimination. Most European bilateral development agencies require contractors' to comply with the eight International Labour Organization (ILO) core standards, which do not unequivocally include SO and/or GI protections.<sup>30</sup> USAID *recommended* in 2012 that recipients of USAID development contracts not discriminate on the basis of SOGI in their human resources policies and practices.<sup>31</sup> World Vision, one of the largest international NGOs, mobilized legal and lobbying challenges on the basis of unfair public contracting practices that violate religious freedom.<sup>32</sup>

In addition to these public changes, development agencies have also increased research, programming, and convening around issues of sexual and gender difference. USAID funded the Astrea Foundation to work with over 338 civil society organizations working on LGBT issues in eighty-one countries.<sup>33</sup> UNDP and USAID jointly funded research on the legal and social environment for LGBT people throughout diverse Asian countries;<sup>34</sup> UNDP recently hosted an affiliated three-day community dialogue in China that brought together officials and activists from diverse sectors to discuss the situation for LGBT people in the country.<sup>35</sup> The World Bank convened at least two events for staff on the experiences of LGBT people in the countries that the Bank serves.<sup>36</sup> The programs seem to be increasingly numerous and thoughtful as development agency staff expand their knowledge and increas-

ingly engage with LGBT leaders from aid-recipient countries.

### Reflections on Development Agency Practices: Concerns Regarding Listening, Unintentional Harms, and the Focus on Identity

Three potential concerns emerge from our current understanding of the changes in policies and practices at development agencies. First, based on limited interviews with activists from places as diverse as South Asia and East Africa, it seems that agencies did not fully consult activists and local populations before making major policy announcements in 2011-2012 that were used to incite and/or increase violence. Second, we note that current efforts do not yet identify development programs as one source of intentional and unintentional harm against people who are marginalized based on their sexual or gender difference. Finally, there is a risk that singling out self-identified or perceived "gay" or "LGBT" people may lead to in-group marginalization and a stymied opportunity for transformational change.

### Listening, Solidarity, and Accountability

Many of the activists we interviewed and whose writing we consulted critiqued development agency and implementing partners' efforts to engage with sexually and gender diverse communities based on insufficient or questionable listening, solidarity, and accountability. The critique centers on development agencies and/or their implementing partners dictating the terms and language of interactions rather than listening to or working in solidarity with those who will actually be affected by a given program or policy that engages with sexual and gender dif-

ference. For example, following David Cameron's announcement about linking some types of aid with the human rights records of countries, including as the record relates to "homosexuals," fifty-three African social justice organizations signed a letter explaining that they had not been consulted about this policy decision and that it would actually be harmful to their efforts. They wrote, "While the intention may well be to protect the rights of LGBTI people on the continent, the decision to cut aid disregards the role of the LGBTI and broader social justice movement on the continent and creates the real risk of a serious backlash against LGBTI people."<sup>37</sup> In the view of this coalition of highly respected prominent activists and organizations, the lack of consultation led to an approach that catalyzed violence toward the very people that Mr. Cameron's statement was aimed at supporting.<sup>38</sup>

These challenges are not unique to the new linkage between "LGBT" issues and development, but rather are a common fixture and tension in development more broadly. Critics express concern that development agencies design and implement prescriptive programs and policies without sufficient consultation or solidarity with those who will be affected.<sup>39</sup> Agencies and implementing partners have taken numerous steps across different levels of policy to address these challenges, ranging from the Paris Declaration on Aid Effectiveness and the Accra Agenda for Action to developing inclusive and participatory development methodologies.<sup>40</sup> While there have been improvements, the problem is built into the political economic structure of development: agencies are structurally most accountable to their funding sources, typically political representatives allocating public funds, yet they are also charged with being ac-

countable to people who live thousands of miles away from where allocation decisions are made. They must deliver the best possible and least harmful development assistance for these populations, and they also must be good shepherds of public funding.

Even the agencies and program teams that are most committed to listening and solidarity may face challenges because local voices on any particular issue will never be homogeneous. Participation and consultation requires a nuanced understanding of a community's structure, diverse histories, fractures, fluidity, and nodes of action. This sensitivity does not always sync with more structured processes at development agencies and their implementing partners that may prefer to hold a limited number of consultations, take the expressed views as authoritative, and move forward.

Implementing partners are often best positioned to facilitate communication between affected communities and development agencies. Washington, DC-headquartered development NGO IREX recently held an event that featured activists from some aid-recipient countries advising attendees from development agencies and NGOs about how to improve.<sup>41</sup> There is also evidence that many development agencies are better at listening to activists and communities in aid-recipient countries; for example, German officials stated that they would not withdraw aid to Uganda due to the Anti-Homosexuality Bill because Ugandan activists informed them that this would be counterproductive to their LGBT rights work and could cause backlash.<sup>42</sup>

### Harm Perpetrated by Development Agencies

To date, LGBT- or SOGI-focused policy changes and rhetoric do not act



to reform other existing policies and practices within development agencies or implementing partners that may seem unrelated to LGBT issues but could harm or have harmed people who are marginalized based on their sexual orientation and/or gender identity. For example, the U.S. President's Plan for Emergency AIDS Relief (PEPFAR) provided small grants to Ugandan pastor Martin Ssempe's church, which has incited anti-gay violence.<sup>43</sup> In Haiti, local activists reported that implementing organizations funded by the UN World Food Programme and USAID distributed food rations first or exclusively to female heads of households, a common good practice and operating procedure with the unintended effect of excluding gay men and transgender people.<sup>44</sup> The rare implementation of the fourth type of public change that we included in our cataloguing exercise—barring discrimination on the basis of sexual orientation and/or gender identity/expression by third parties receiving aid funding to implement programs—underscores this point. Only one of the twelve agencies reviewed had a clear public policy to this effect, although it could certainly be strengthened. This creates contradictions and tensions. For example, while USAID aims to “elevate LGBT equality”<sup>45</sup> in both its development work and workplace, it still provided over 100 million dollars in funding to World Vision in 2013,<sup>46</sup> a faith-based NGO that is known to discriminate on the basis of sexual orientation and possibly gender identity in human resource policies<sup>47</sup> and to engage in programming that can have the effect of marginalizing or restricting access to resources for people who are of nonnormative sexual orientations or gender identities.<sup>48</sup> This is a highly complicated matter, as World Vision implements important and frontline work in many emergen-

cies throughout the world. In 2011, USAID had issued a policy stating that it “strongly encourages all its contractors (at all tiers) to develop and enforce comprehensive nondiscrimination policies for their workplaces.”<sup>49</sup> Despite the nonbinding language and the fact that it does not apply to program framing, but rather human resources, World Vision and other development organizations expressed outrage and engaged in legal and lobbying actions to counter the recommendation.<sup>50</sup>

A serious commitment to the rights and well-being of people who are marginalized based on their sexual orientation and/or gender identity/expression will require development agencies to review all programming for its effects, and reforms are needed to ensure that past harms do not arise in the future. This is a more sensitive and fraught change than merely adding a new priority or program.

### Identity Recognition and Transformation

Development agencies are engaging with the human rights of persons with diverse sexualities, bodies, and genders in aid-recipient countries largely by focusing on *identities*—namely, lesbian, gay, and occasionally trans identities—and the recognition of their value and subsequent inclusion in the development system. This approach risks contributing to in-group marginalization, misrecognition, and fracturing; “LGBT” is a term that arguably grew out of political movements in the United States, is not always the preferred or common term among people in aid-recipient countries, and may not reflect the groups that are actually included in a program. Recent research suggests that development funding around gender identity, gender expression, and transgender and intersex issues—as

compared to sexual orientation—is particularly low.<sup>51</sup> The approach may also blur the important, complicated truths about the intersectional nature of oppression.<sup>52</sup> For most people, oppression and deprivation originate from multiple, overlapping causes and are experienced as an interaction. A young gay man from a West African city who participated in a development agency-funded program aimed at increasing safer sex practices among gay men and men who have sex with men explained this to a program staff member: “Every day you are talking about condom and lubricant. Are we going to eat condom and lubricant? You are coming to talk about HIV when people are beating us!”<sup>53</sup> This man emphasized that the myopic focus of the program only addressed one aspect of his life (sexual behavior), while neglecting his interrelated experiences of hunger, economic deprivation, and violence.

Transformation is an approach that is often contrasted with identity recognition and inclusion. Nancy Fraser broadly defines it as providing “remedies aimed at correcting inequitable outcomes precisely by restructuring the underlying generative framework.”<sup>54</sup> Transformative justice is thus about altering the power relationships and their corresponding institutions and processes that generate injustice. Transformative programs that build solidarity across and understanding between diverse experiences of oppression, rather than recognizing narrow identity groups, offer tremendous potential yet are extremely difficult to implement in ways that resonate with good practices and norms at development institutions, such as clearly defined outcomes and measurement methods. Controversial former USAID administrator Andrew Natsios described this tension: “Development programs that are most pre-

cisely and easily measured are the least transformational, and those programs that are most transformational are the least measurable.”<sup>55</sup> Process-focused changes, such as outwardly facing non-discrimination policies, offer the possibility of fundamentally reorganizing the resources and dynamics that underlie the development system and its encounter with sexual and gender difference in aid-recipient countries.

### CONCLUSION

Development agencies have implemented unprecedented and significant changes around supporting the rights of people with nonnormative sexualities and/or gender expressions/identities. Remarkably, ten of the twelve largest development agencies have senior leaders who have made public statements linking development with “LGBT” rights in aid-recipient countries. Seven reference LGBT or SOGI issues as an institutional priority in a strategic policy. The effects of these contested changes, situated within preexisting global power dynamics, are still unfolding. We highlight three concerns for development agencies to monitor and address as they move forward. First, insufficient listening to sexual and gender diverse activists and communities affected by development interventions may result in backlash or ineffectual and/or unintentionally harmful work. Second, most changes to date have not addressed development policies and processes that are seemingly unrelated to “LGBT” communities but may intentionally or unintentionally harm such populations. Third, agencies currently emphasize recognition of single axis identities, potentially missing an opportunity to contribute to transformational change.

We also offer two overarching takeaways about the state of the current policy conversation about “LGBT”

rights and development. First, many leaders of aid-recipient countries argue that development agency involvement in “gay” rights is interventionist. These critiques should not be written off as merely homophobic instrumentalist reactions but also understood as generated in reference to long histories of colonialism and/or exploitation, yielding understandable, if sometimes also disingenuous, protests about policy intervention. The current and historical context for intervention in aid-recipient countries profoundly matters and should inform the approach and tactics that North American and European activists and agencies use when aiming to support the sexual and gender justice movements there. Second, the focus of the “development and LGBT rights” discussion to date has largely emphasized aid conditionality, but our research reveals that a far more diverse array of policies and programs are at play and require critical analysis and conversation. Researchers have an important role to play in establishing the specific histories, reach, and impact of these changes, and we hope that our study will help to provoke further investigation into the diverse range of emerging approaches and policies, their power structures, and their often surprising and unintended effects.

Rachel Bergenfield works in international development strategy and applied research. She has held diverse roles, including as an evaluation officer in East Africa and vice president of an investment firm in West Africa. She is currently at The Rockefeller Foundation, where she focuses on opportunity identification and analysis. Bergenfield’s experience with LGBTQ issues includes working with USAID’s inaugural LGBT Policy Unit, supporting early thinking on LGBTQ issues while at the National Democratic Institute, and researching sexuality, gender diversity, and development as a Yale LGBT studies grantee. She holds a master’s degree from Yale University, where she was a merit scholar and research assistant to former World Bank President James Wolfensohn.

Alice M. Miller is codirector of the Global Health Justice Partnership between the Law and Public Health Schools at Yale University, assistant clinical professor in the Yale School of Public Health, and lecturer in global affairs at the Jackson Institute for Global Affairs. Miller’s work focuses on critical engagement with the theory and practice of women’s rights, sexual and reproductive rights, including LGBT rights, the role of the criminal law in human rights, health as a human right, and the interplay of domestic and international law in developing new rights norms. Her experience encompasses more than two decades of advocacy and training with NGOs and the various UN agencies, with the goal of facilitating theoretically informed, reflective practitioners. Previously, she taught in policy, law, and public health schools at Columbia University and Berkeley as well teaching in independent sexuality and rights institutes in Turkey and India.

## ENDNOTES

- 1 We are grateful to Joe Fischel, PhD, Susanna Fried, PhD, Alexia Koritz, JD, Paull Randt, MBA 2014, Graeme Reid, PhD, Chloe Schwenke, PhD, and Ryan Thoreson, DPhil and JD 2014 for their thoughtful and critical contributions to various versions of this essay. Their intelligence and generosity of time were crucial to its development. Many insights in this essay grew from discussions with them and several anonymously consulted activists working on the ground, but all errors are ours. Funding for the research carried out by Rachel Bergenfield was provided by the LGBT Studies Program at Yale University and is gratefully acknowledged.
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- 10 It is important to note that this essay does not explicitly address the question of timing, or why these changes are taking place now; policy shifts on sexuality and gender diversity seem to have arisen but with a lower profile in 2007-2008,

with a great increase in momentum and profile in 2011, and accelerating through the present. Many of the drivers of timing seem to be connected to the domestic LGBT rights movements and their legal, political, and social victories in North America and Europe where the largest development agencies are based. This suggests to us that any examination of timing should be a somewhat separate endeavor from our examination of the changes within development agencies and their potential effects.

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- 18 Cornwall, Andrea, and Celestine Nyamu-Musembi. *What Is the “Rights-Based Approach” All About? Perspectives from International Development Agencies*. IDS Working Paper 234. Institute of Development Studies, November 2004.
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# Human Rights Challenges for Sexual Minorities in Dar Es Salaam, Tanzania

By Christian D. Pangilinan

## ABSTRACT

Sexual minorities in Dar es Salaam, Tanzania, face significant human rights challenges in critical areas. Based on a survey conducted with Dar es Salaam-based organizers, this article finds that sexual minorities face challenges in obtaining protection against physical harm, face dangers from arrest and detention, and experience barriers to accessing basic services such as health, education, and public transportation. Widespread hostile or discriminatory attitudes toward sexual minorities are also reported. Practical steps that can assist lesbian, gay, bisexual, and transgender (LGBT) organizers in Tanzania include supporting nondiscriminatory funding streams through Tanzanian or regional organizations that assist sexual minorities.

## INTRODUCTION

Using interviews with sexual minorities as well as discussions with community organizers and leaders, this article reports on human rights issues faced by sexual minorities in Dar es Salaam, Tanzania, in key areas including discrimination, harassment, physical safety, family relationships, access to health and education, and protection by authorities. Sexual minorities in Dar es Salaam face threats to their safety such as sexual violence, vulnerability to engaging in survival sex, and discrimination from authorities. However, many

respondents expressed optimism about the integration of sexual minorities in Tanzania in the future.

Optimism on the part of some respondents as to the future of sexual minorities in Tanzania is promising. That Tanzania has not experienced the same degree of political hostility toward gays and lesbians that has been seen in other countries might also suggest a possible improvement in attitude from the government and public. However, homosexuality continues to be criminalized.<sup>1</sup> In order to improve the climate for lesbian, gay, bisexual, and transgender (LGBT) advocacy, I argue that aid

donors should try to ensure that assistance to civil society supports advocacy and assistance for sexual minorities.

## BACKGROUND

Dar es Salaam is the largest city in the United Republic of Tanzania. Homosexuality has been criminalized in Tanzania and its predecessor state of Tanganyika since at least 1954, when the Penal Code was amended to criminalize “unnatural offences” and “acts of gross indecency.”<sup>2</sup> In 1998, the penalties for these offenses increased.<sup>3</sup>

At present, the Tanzanian Penal Code penalizes a person who “has carnal knowledge of any person against the order of nature” or “permits a male person to have carnal knowledge of him or her against the order of nature.” Penalties include life imprisonment or a term of imprisonment of not less than thirty years.<sup>4</sup> Attempts to commit an “unnatural offence” or to have an “unnatural offence” committed against oneself carry the penalty of imprisonment of not less than twenty years.<sup>5</sup> Applying specifically to acts between males, Section 157 of the Penal Code imposes a penalty of five years imprisonment for acts of “gross indecency,” whether in private or public, or attempts to procure an “act of gross indecency” by a male or between males.<sup>6</sup> The penalties provided in the Tanzanian Penal Code are among the highest in the world.<sup>7</sup> They are rarely directly applied, but organizers and activists have been arrested on charges of prostitution and vagrancy.<sup>8</sup> In 2012, one gay activist with connections to LGBT nongovernmental organizations (NGOs) was found killed in his home—though government involvement does not appear to be suspected.<sup>9</sup>

To my knowledge, there have been no efforts at the national level to introduce amendments to current laws either to relax the penalization of

homosexuality or to expand prohibitions on homosexuality to include the “promotion” of homosexuality, as has been enacted in some countries.<sup>10</sup> While Tanzania is currently undergoing a process of drafting a new constitution, the revised constitutional draft does not refer to sexual orientation.

Some government policies, namely those produced by or under the auspices of the Tanzania Commission for AIDS (TACAIDS), address strategies to reduce rates of HIV/AIDS, and have called for the inclusion of men who have sex with men (MSM) in prevention and treatment strategies.<sup>11</sup> Prevailing government attitudes toward sexual minorities nonetheless appear negative. The present administration of President Jakaya Kikwete responded negatively to reports that British foreign aid could be linked to LGBT rights, with the foreign minister stating that, “homosexuality is not part of our culture and we will never legalise it.”<sup>12</sup> In May 2013, allegations that an opposition party held views in favor of tolerance of homosexuality led to an outraged denial on the part of that opposition party.<sup>13</sup> An official of the Commission for Human Rights and Good Governance (CHRAGG)—the national focal point for human rights—told Human Rights Watch that sexual minorities are not included in its work.<sup>14</sup>

At the level of civil society, while Tanzania has prominent national human rights NGOs, the Legal and Human Rights Centre—one of the most prominent of these NGOs—has publicly taken the position that homosexuality is contrary to Tanzanian culture.<sup>15</sup> Accordingly, the main annual human rights report published by the Legal and Human Rights Centre does not contain specific language on violations of human rights of sexual minorities.<sup>16</sup> To my knowledge, other established human

rights and legal aid organizations in the country, while providing assistance to vulnerable populations, do not assist or advocate for sexual minorities.

For the purpose of this article, I spoke with persons representing five registered or unregistered organizations in Dar es Salaam that work with sexual minorities. Of these, two organizations were part of a network of organizations that addressed issues pertaining to sexual minorities, prostitution, and drug use. Another organization indicated that it had established a coalition of smaller community-based groups and was engaged in advocacy toward the inclusion of sexual minorities in the process of Tanzania's ongoing constitutional review.<sup>17</sup> Established organizations stated that they did not officially register themselves as organizations working with sexual minorities.<sup>18</sup> Under Tanzanian law, NGOs or other social groups must officially register with the government.<sup>19</sup> Registration is also usually a prerequisite for funding from local nongovernmental and international sources.<sup>20</sup> As a result, civil society organizations seeking to register and obtain funding usually operate with careful attention to their public profile.

Prior research on sexual minorities in Tanzania exists but has tended to focus on responses to HIV/AIDS.<sup>21</sup> Research in this category usually focuses on health risks associated with HIV/AIDS among MSM. In 2009, one Tanzanian and two international NGOs submitted a shadow report, primarily citing news reports, on the rights of LGBT persons in Tanzania in relation to Tanzania's periodic report to the UN Human Rights Committee.<sup>22</sup> In 2012, Human Rights Watch released a report on sexual minorities, prostitutes, and drug users in Tanzania.<sup>23</sup> Focusing primarily on Dar es Salaam, the Human Rights Watch report documented

egregious instances of maltreatment of sexual minorities and other vulnerable populations by government authorities, including physical abuse, rape and other forced sexual acts by police against sexual minority men, and refusal by police to address complaints by sexual minorities about crimes perpetrated by private persons.

## METHODOLOGY

The primary research for this article was conducted between July and October 2012. During this period, I was working for a small legal aid NGO in Dar es Salaam. The primary purpose of the research was to obtain more information on the status of sexual minorities in Tanzania, given the absence of information on sexual minorities and the continued criminal prohibition of homosexuality in the country. I partnered with a small community-based NGO that worked with sexual minorities to conduct a survey with gay and lesbian respondents. The survey was first piloted with five respondents, with the assistance of another organizer.

The survey instrument was drafted to address human rights issues in certain key areas: physical safety, access to public services, abuse by government authorities, and employment discrimination. Discussions with activists and organizers informed the selection of areas of focus. Identifying whether sexual minorities had suffered abuse, discrimination, or mistreatment by private parties in areas like education, safety, and housing was designed to provide further information on the level of protection afforded to sexual minorities by the government. Authorities can be responsible for human rights violations when they are unwilling or unable to protect individual human rights.<sup>24</sup> Questions about mistreatment by government authorities in the areas of arrest and de-

tion more directly addressed whether sexual minorities were subject to direct human rights violations by authorities.

Although the pilot survey in July included questions on sexually transmitted diseases and testing, I removed these questions because of their intrusiveness. Other questions relating to safe spaces and social networks were also removed to facilitate the efficient administration of the surveys. One question on public transportation was added as a result of a focus group with LGBT respondents in July and August 2012 at the office of the partner organization, which identified discrimination and safety in public transportation as an issue for sexual minorities.

All respondents referred to in this article self-identified as MSM, gay, lesbian, or bisexual. A total of thirty-six surveys were usable. The partner organization referred persons who were invited to participate in the survey. Consequently, the survey is not necessarily representative of all sexual minorities in Dar es Salaam.

A minority of respondents were women. All respondents in the survey provided oral consent, and the purposes of the survey were explained at an initial focus group at the office of the organizational partner. Respondents were reimbursed approximately U.S. \$6 each for their time and transportation costs. Interviews were conducted in English with Swahili interpretation where necessary.

## DISCUSSION

### Self-Identification as Sexual Minorities

Of respondents, 83 percent identified as male and the remainder as female. There were no active organizations that worked primarily with

women, and some organizations, including the main partner organization, worked primarily with men. No respondents identified themselves explicitly as transgender.<sup>25</sup> Throughout this article, the term "sexual minorities" is used in place of "LGBT" as respondents did not necessarily self-identify specifically as lesbian, gay, bisexual, or transgender. Several respondents self-identified as MSM, which is not necessarily synonymous with homosexual.<sup>26</sup> A few respondents also described their sexual orientation as including "top" or "bottom." Overall, about 69 percent of respondents identified as gay or MSM, 8 percent identified as lesbians, and 19 percent as bisexual.

The median age of respondents was twenty-eight years old. Half of respondents described themselves as not currently being in a relationship, 28 percent were currently in a relationship, and 11 percent were married to persons of the opposite sex. One respondent described himself as being married to another man as a result of having lived together for a long time.<sup>27</sup>

### Socioeconomic Status and Sex Work

Only a minority of respondents indicated that they were employed, or engaged in work in the informal sector, outside of sex work. This leaves more than 70 percent of respondents stating that they were unemployed, engaged in sex work, or dependent on others for support. Nearly half (47 percent) of respondents stated that they continued to live with family members, though not necessarily with parents, and were dependent on family members for their survival.<sup>28</sup> In some cases, respondents reported staying with or being supported by family members other than their parents as a result of their sexual orientation.<sup>29</sup>

The percentage of respondents engaged in work in the formal and informal sectors is below the national average, according to which more than 60 percent of Tanzanians are engaged in regular or casual employment.<sup>30</sup> Lower socioeconomic status can also be inferred from respondents' places of residence, such as Vinguguti and Mwananyamala, which are less developed and have poor infrastructure.<sup>31</sup> Because of the low percentage of respondents engaged in formal or informal employment, few respondents were asked questions about employment discrimination. The few respondents who were asked about employment discrimination generally replied that their sexual orientation could have resulted in loss of employment, with one respondent describing his sexual orientation as being an "automatic disqualification" for employers.<sup>32</sup> One respondent stated that his sexual orientation was an advantage for his hairdressing position because customers associated his sexual orientation with skill.<sup>33</sup>

More than one-third of respondents stated or indicated later that they had engaged in sex for pay. Reasons provided for engaging in sex for pay included the need for income, lack of financial support from families, as well as, in the case of one respondent, having become accustomed to sex work.<sup>34</sup> In some cases, respondents connected their engagement in sex work with social attitudes toward homosexuality.<sup>35</sup> "We cannot be employed. We just look for men," said one man.<sup>36</sup> Another said friends advised him to engage in sex work after he could not find other employment.<sup>37</sup>

Some respondents spoke about friends or acquaintances who had suffered threats or had been arrested in connection with sex work.<sup>38</sup> In addition to arrest, persons engaging in sex for pay may be vulnerable to disputes with

persons soliciting sex.<sup>39</sup> One respondent described having been hit by a person who sought a "relationship" and consequently having to seek medical help.<sup>40</sup>

### Relationships with Family

Questions about relationships with family members were included since family members' attitudes toward sexual minorities can play a significant role in the protection of sexual minorities.<sup>41</sup> Results from this survey indicate that family members can be sources of support but are frequently unsupportive or reject respondents when respondents are discovered to be sexual minorities. Of respondents, 64 percent indicated that they had been ejected from the family home as a result of their sexual orientation. One woman explained that her father ejected her from her family home after she tried to explain that "[t]hat's the way I am. It's inside me. I feel like I don't want to have sex with a man, but I have feelings for a woman."<sup>42</sup> Another respondent described family members attempting to change him "into a masculine person using local medicine" before he left his family.<sup>43</sup>

At worst, family members subjected respondents to significant abuses. One respondent described going to a hospital with his father "to be tested."<sup>44</sup> The doctor then checked his semen for "chemicals" and asked him to disrobe in front of the respondent's father, who happened to be a police officer. The doctor examined the respondent for signs of anal sex. According to the respondent, the father subsequently threatened him with a shotgun and had him detained at a prison where the father directed inmates to have sex with the respondent. Among respondents who reported being threatened with harm or of having been physically assaulted, respectively 23 percent and 13 percent of incidents were attributed to

family members.

Of respondents who disclosed whether family members knew of their sexual orientation, slightly less than 15 percent indicated that they purposefully disclosed their sexual orientation to family members. Many respondents described having been involuntarily "outed" by neighbors, relatives, or teachers.<sup>45</sup> One respondent described having been expelled from his school after engaging in relationships with other men.<sup>46</sup> Because he could not explain the reason for his expulsion to his uncle, with whom he lived, the uncle contacted the school, which informed him of the reason for the expulsion. The uncle subsequently beat the respondent and expelled him from his home.

Relationships with family members could be critical for respondents in terms of access to education.<sup>47</sup> Respondents who were expelled from their family homes sometimes described discontinuing their education as a consequence of the loss of family support.<sup>48</sup>

Not all respondents described their family relationships negatively. A few respondents described family members as maintaining relationships with the respondents, or even becoming supportive, after the disclosure of their sexual orientation.<sup>49</sup> One woman described being permitted to remain in the family home after "begging for forgiveness."<sup>50</sup> Some respondents described living with other family members who were more accepting of them.<sup>51</sup> However, only 13 percent of respondents described family attitudes toward sexual minorities as being either neutral or positive.

### Cultural Attitudes Toward Sexual Minorities and Physical Vulnerability

General attitudes toward sexual minorities in Tanzania were overwhelmingly described as negative. Several respondents described sexual minorities as not being treated as people.<sup>52</sup> Several others referred to sexual minorities being perceived as *shetani* (Satan), *lana* (cursed or abomination), and *haram* (forbidden).<sup>53</sup> Some described a cultural attitude in which homosexuality was seen as foreign or un-African.<sup>54</sup>

A small number of respondents expressed more optimism about prevailing cultural attitudes. Some stated that attitudes were mixed<sup>55</sup> or that greater exposure to sexual minorities had begun to effect a change in cultural attitude: "I think they consider it normal now because it is practiced in so many places in Tanzania. It is normal now."<sup>56</sup> Another respondent expressed a similar view:

In the past, the situation was worse because we didn't have a chance . . . The other problems we had in the past are less. They are trying to understand that these people are also human beings.<sup>57</sup>

Nonetheless, a majority of respondents reported experiencing verbal harassment or insults, threats of physical harm because of their sexual orientation, and having experienced a physical and/or sexual assault because of their sexual orientation or gender identity (see Table 1).

	Yes	No
Verbal harassment/insults	28 (85%)	5 (15%)
Threats of physical harm	29 (82%)	6 (16%)
Physical/sexual assault	25 (71%)	10 (29%)

**Table 1 - Respondent Replies Regarding Experience of Harassment, Threats, and Assault**

Some verbal harassment and insults came from family members such as parents and siblings.<sup>58</sup> Another woman described family members threatening to kill any of her female partners.<sup>59</sup> Verbal harassment or abuse can also come from members of the general public such as “street boys” or “hooligans” (*wahuni*).<sup>60</sup> One respondent described receiving insults from classmates in school.<sup>61</sup>

Family members of romantic partners were also potential sources of threats; for instance, “They said I was trying to mislead their son so they frightened me” and “My friend has a brother and that brother told me stop meeting his brother. If I continue seeing him, he was going to beat me.”<sup>62</sup>

A small number of respondents explained that threats did not affect them:

They only frighten me but they never do it. They have been doing that for some time, but they no longer do it because I’m always courageous and I’m never scared of them.<sup>63</sup>

During nighttime where I’m staying, there are *piki piki* (motorcycle taxi) people who try to provoke me. One day, I stood on my feet and denounced it very strongly and up to now, nobody tries to provoke me.<sup>64</sup>

Threats from members of the public sometimes arose when respondents were at public places or events such as clubs or traditional dances.<sup>65</sup> In a few instances, respondents described narrowly escaping serious harm.<sup>66</sup> All respondents were asked if there were public spaces they tended to avoid. Some spaces in Dar es Salaam were considered safer than others. Several respondents spoke of avoiding places where their sexual orientation was

known.<sup>67</sup> Some places were considered generally unsafe—either specific areas of Dar es Salaam (Kariakoo, Ubungu, Mwananyamala, Mbagala)<sup>68</sup> or specific types of spaces including football fields, bars, and government institutions such as hospitals and police stations.<sup>69</sup>

Nearly three-quarters (71 percent) of respondents reported having been the victim of physical or sexual assault. One reported sexual assault involved a lesbian woman raped by a man who “wanted to know if I am really a lesbian.”<sup>70</sup> The woman never reported the assault to anyone out of fear.<sup>71</sup> Another instance involved a man who engaged in sex work who was forced to have sex with four men, one of whom had drawn a knife.<sup>72</sup> The man also did not report the incident to anyone because he “cannot go to the police.”<sup>73</sup>

Respondents reported perpetrators of assaults as including strangers/members of the public, partners, and family members.<sup>74</sup> Incidents of assaults on sexual minorities included an instance where a woman’s male partner beat her after hearing rumors that she had previously had female partners,<sup>75</sup> and beatings by family members because of the perceived sexual orientation of respondents.<sup>76</sup> Another instance involved a man who was beaten after refusing a “relationship” with another man.<sup>77</sup> Other physical assaults involved attacks from strangers or members of the public—sometimes by several people at once.<sup>78</sup> These incidents sometimes arose because the respondent was present in a public place and then attacked because of the respondent’s reputed sexual orientation. Respondents were also asked if they had experienced domestic violence from either same- or opposite-sex partners without reporting the incident; 47 percent of respondents indicated that they had.<sup>79</sup>

When asked if they felt safe from

	Yes	No	Maybe/Don’t Know
Do you fear that you will suffer a physical assault within the next five years?	16 (44%)	15 (42%)	5 (14%)
Do you or another sexual minority you know fear for your life?	27 (75%)	9 (25%)	0 (0%)

Table 2 — Respondent Replies Regarding Fear of Physical Assault

harm, 57 percent of respondents replied “yes” or “sometimes yes,” though that reply was sometimes qualified with safety in specific situations only:

Sometimes, right now, here I feel safe. If I’m out there, I will pretend to feel safe.<sup>80</sup>

Yes, I feel safe because I have another place where I’m staying. I don’t want anyone to know it.<sup>81</sup>

For those who continued to feel unsafe, or were unsure about their safety, reasons included a lack of freedom or liberty as well as fear of the public.<sup>82</sup> Respondents were also asked if they feared a physical assault occurring to them within the next five years, and whether they or any other sexual minorities ever feared for their lives (see Table 2).

Respondents who did not fear physical assault in the next five years sometimes explained their belief that the situation of sexual minorities in Tanzania would improve for the better:

For the time being, it’s ok. But in the next five years, it will be safer. The world has stepped up to defend these kinds of things—human rights. We are struggling for the same rights as other people.<sup>83</sup>

Those who feared assault were more pessimistic:

There’s nothing in that five years to be safe. You cannot get by without being assaulted.<sup>84</sup>

When speaking of fear for their own or other sexual minorities’ lives, some respondents referred to the current social status of sexual minorities, including low standing in the community.<sup>85</sup> One respondent referred to his sex work,<sup>86</sup> and another referred to an incident in 2013 when a gay member of an organization advocating for sexual minorities was killed.<sup>87</sup> One respondent explained that he lacked the funds to “change myself to look more normal”—a reference to appearing more conventionally “masculine.”<sup>88</sup>

### Official Misconduct and Availability of Protection

All respondents were asked questions relating to arrest and detention, as well as questions regarding access to public amenities and services. Finally, all respondents were asked specific questions regarding education, housing, and public transport. The latter was added after the initial focus group suggested that access to Dar es Salaam’s public transportation sometimes caused difficulties. (See Tables 3 and 4.)

Respondents who reported on whether they sought assistance after having been physically or sexually assaulted generally indicated that they had not, or that turning to the authori-

	Yes	No
If suffered a physical or sexual assault, sought assistance from authorities?	7 (28%)	18 (72%)
Ever arrested or detained because of sexual orientation or gender identity?	13 (57%)	23 (43%)
Do you know of others who have been arrested or detained because of their sexual orientation or gender identity?	26 (76%)	8 (24%)
Ever been charged with a crime because of sexual orientation or gender identity?	1 (4%)	26 (96%)

**Table 3 — Respondent Replies Regarding Arrest and Detention**

ties had been ineffective. Reasons for nonreporting were usually fear of having to disclose the reasons for the assault or fear of the police in general.<sup>89</sup> In instances where respondents had to report to the police to obtain a form that was required to receive medical treatment, some respondents reported falsifying an explanation that would not require disclosing the true motive for the assault.<sup>90</sup>

In some cases, respondents stated that turning to the police would be ineffective because of their sexual orientation or gender identity:<sup>91</sup>

I was afraid of the police because if I go to the police, it's the same thing. If you have been raped, it's OK, go home. I cannot go to the police.<sup>92</sup>

Several respondents said that they had reported to the police, or had been reported to the police, and that the police responded negatively to them on the basis of their sexual orientation.<sup>93</sup> In a few cases, law enforcement authorities (either the police or the *sungu sungu* [village police]) were also accused of directly threatening to harm sexual minorities.<sup>94</sup>

Reasons provided for arrests or detention, either of respondents or oth-

ers, included detention at the request of family members,<sup>95</sup> detention on the basis of appearance or the perception of being a sexual minority,<sup>96</sup> as well as detention because of sex work or the perception of being engaged in sex work.<sup>97</sup> Detained persons were sometimes required to pay bribes for release.<sup>98</sup>

Discrimination on the part of health care providers was a concern for several respondents. Of those who said that they had refrained from accessing a public service because of their sexual orientation, eleven respondents explained that they had refrained from accessing health services.<sup>99</sup> Some stated that they had encountered hostile or negative treatment at hospitals or health centers.<sup>100</sup>

Some one-third of respondents reported having left or changed public or private schools because of their sexual orientation. Of these, slightly more than half stopped studying altogether. Reasons for change of school or having left school include the discovery of the respondent's sexual orientation by the school or by the respondent's family, resulting in the termination of financial support.<sup>101</sup>

In Dar es Salaam, "public" transportation consists primarily of a network of government-licensed private buses called *dala dala*.<sup>102</sup> Half of

	Yes	No
If suffered a physical or sexual assault, sought assistance from authorities?	7 (28%)	18 (72%)
Ever arrested or detained because of sexual orientation or gender identity?	13 (57%)	23 (43%)
Do you know of others who have been arrested or detained because of their sexual orientation or gender identity?	26 (76%)	8 (24%)
Ever been charged with a crime because of sexual orientation or gender identity?	1 (4%)	26 (96%)
Ever been a victim of a crime and refrained from reporting it because of your sexual orientation or gender identity?	17 (61%)	11 (39%)
Ever refrained from accessing any form of public service because of sexual orientation or gender identity?	15 (47%)	17 (53%)
Ever left an educational institution because of sexual orientation or gender identity?	16 (44%)	20 (56%)
Ever had to change residence because of sexual orientation or gender identity?	11 (31%)	24 (69%)

**Table 4 — Respondent Replies Regarding Public Amenities and Services**

respondents stated that transportation within Dar es Salaam can be a difficult experience, with some reporting conductors refusing to let them board the buses or having been permitted to board but being subjected to verbal abuse.<sup>103</sup>

### Future Plans

All respondents were asked if they had contemplated leaving Tanzania. Of those who replied, 79 percent said that they had considered it, with the remainder rejecting the idea. Of those who contemplated leaving the country, reasons were mixed and included an absence of freedom, discrimination and harassment, a desire to live freely with or to marry a partner, and economic conditions.<sup>104</sup> One respondent, however, expressed opposition to leaving Tanzania:

No. I don't think about leaving the country. Running away from the problem is not solving the problem. If you want to solve the problem, you have to stay here.<sup>105</sup>

## CONCLUSION AND RECOMMENDATIONS

Sexual minorities in Tanzania face significant human rights challenges. With homosexuality criminalized—itsself a violation of human rights<sup>106</sup>—sexual minorities frequently are unable to access authorities when needed or face de facto penalties such as detention on the basis of sexual orientation. The inability of sexual minorities to obtain protection from authorities indicates that sexual minorities are often outside the protection of the state—a situation that can leave sexual minorities vulnerable



to harm. Such harm implicates Tanzania's responsibility to protect the human rights of its citizens.

In addition, interviews with sexual minorities suggest that access to health services, education, and public transportation can be precarious, all of which jeopardizes sexual minorities' rights to health, education, and an adequate standard of living.<sup>107</sup> That some sexual minorities further suggest that they must rely on survival sex—which is also criminally prohibited in Tanzania<sup>108</sup>—as a means of survival also indicates a failure to permit sexual minorities to work in satisfactory conditions.<sup>109</sup>

Despite sexual minorities' rights to freedom of association and assembly, the ability of sexual minorities to organize freely to support each other is limited by the inability of LGBT organizations to operate openly or to register formally as LGBT organizations.<sup>110</sup> While smaller organizing efforts to assist or advocate for sexual minorities exist, all nongovernmental organizations are required to register with the Tanzanian government. Conversations with LGBT organizations suggest that direct registration as an organization for sexual minorities would not be permitted. Since registration is a prerequisite for obtaining funding from nongovernmental sources,<sup>111</sup> difficulties with registration can inhibit mobilization or assistance with social and other needs.

While conditioning international aid on support for LGBT advocacy may foster a hostile reaction from the Tanzanian government and civil society, practical measures are available to assist sexual minorities in Tanzania. Organizers expressed concern about being able to fund activities such as outreach or legal assistance or to pay for basic needs such as rent for office space. Respondents to this survey suggested other programs that they believe

would be beneficial to sexual minorities: several respondents called for efforts to “educate” the public on sexual minorities,<sup>112</sup> and a few called for the establishment of a platform or Web site for sexual minorities to be able to engage in discussions, report problems, or seek assistance.<sup>113</sup> One practical step that donors may take is to require locally based distributors of funds to adopt nondiscrimination policies when distributing funds from foreign sources or to set aside funds to assist particularly vulnerable populations. Another would be to provide further support to regional organizations that support sexual minorities and that can serve as knowledgeable direct conduits to support for sexual minority groups.<sup>114</sup>

Although the accounts provided indicate that the situation of sexual minorities in Tanzania remains negative, there is some reason for optimism. Several respondents expressed their belief that the situation for sexual minorities in Tanzania would improve rather than deteriorate in the near future.<sup>115</sup> As one respondent put it, “things are changing.”<sup>116</sup> Increasing awareness of sexual minorities can foster the understanding that sexual minorities are normal.<sup>117</sup> Moreover, accounts by respondents of personal courage are inspiring<sup>118</sup> and help to dispel a notion that sexual minorities in Tanzania are uniformly victims. Nonetheless, more work and support are needed to address major human rights challenges.

Christian Pangilinan is a C.V. Starr Lecturer at the Peking University School of Transnational Law. He was previously Interim Legal Services Director and Georgetown Fellow at Asylum Access Tanzania.

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# Discrimination Against State and Local Government LGBT Employees

*An Analysis of Administrative Complaints*

By Christy Mallory and Brad Sears

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## ABSTRACT

This article documents evidence of recent discrimination against lesbian, gay, bisexual, and transgender (LGBT) public sector workers by analyzing employment discrimination complaints filed with state and local administrative agencies. We present information about 589 complaints of sexual orientation and gender identity discrimination filed by public sector workers in 123 jurisdictions. We find that discrimination against LGBT people in the public sector is pervasive and occurs nearly as frequently as discrimination in the private sector, and at rates similar to discrimination based on sex and race. Currently, no federal law prohibits discrimination against LGBT people, and most states do not have laws prohibiting such discrimination.

## INTRODUCTION

There are slightly more than 1 million lesbian, gay, bisexual, and transgender (LGBT) people working for state and local governments in the United States, and approximately 200,000 LGBT federal civil service employees.<sup>1</sup> LGBT people employed in the public sector have faced a long history of discrimination in the workplace dating back to at least the 1940s.<sup>2</sup> Currently, LGBT people continue to face severe, and even violent, harassment and discrimination in government workplaces.<sup>3</sup>

Legal protection from discrimina-

tion for these employees remains an incomplete and complicated patchwork. Currently, no federal law explicitly prohibits discrimination based on sexual orientation or gender identity. However, the Supreme Court has interpreted Title VII of the Civil Rights Act of 1964—prohibition on sex discrimination—to protect against discrimination based on sex stereotypes, and several lower courts and the U.S. Equal Employment Opportunity Commission (EEOC) have interpreted the provision to also prohibit discrimination based on gender identity.<sup>4</sup> These interpretations have allowed some LGBT employees to bring

successful cases under Title VII. LGBT employees of state and local governments have also found some protection under the U.S. Constitution, but, to date, courts have applied only rational basis review to employment decisions based on sexual orientation—the most lenient form of scrutiny. However, one federal circuit court decision suggests that gender identity discrimination, like sex discrimination, is to receive a more rigorous form of review.<sup>5</sup> At the state level, most states do not have statutes prohibiting sexual orientation or gender identity discrimination.<sup>6</sup>

In those states and localities that have laws explicitly prohibiting discrimination against LGBT people, data on the number of complaints filed under such laws shows that employees are using the laws to seek remedies for discrimination they experience at work.<sup>7</sup> Additionally, two studies by the Williams Institute demonstrated that when the number of complaints is adjusted for the number of people with a particular minority trait, the rate of complaints filed alleging sexual orientation discrimination in employment is nearly as high as the rate of complaints filed by women and people of color on the basis of sex or race.<sup>8</sup>

The current study updates past research on employment discrimination complaints filed with state and local administrative agencies by LGBT people who work for state or local governments. The study is based on a survey of 20 states and 201 localities that had sexual orientation and gender identity nondiscrimination laws as of June 2009. Of these jurisdictions, 123 responded to the survey and provided information about 589 complaints filed by public sector employees. In states and localities that provided information about a final administrative decision reached in the case, favorable outcomes

for the employees resulted in an average of 12 percent of the state filings and 19 percent of the local filings. When we adjust the number of complaints for the relevant population, using a methodology similar to the Williams Institute studies,<sup>9</sup> we find that sexual orientation filings with state agencies are slightly lower but similar for employees in the public sector when compared to the private sector.

Several factors suggest that the actual rate of workplace discrimination against LGBT people may be higher than what was found in the analysis. First, we found evidence that some state and local agencies lack the resources and staff necessary to effectively enforce nondiscrimination laws. Second, LGBT people may be hesitant to file complaints because of a perception of judicial unresponsiveness. Third, LGBT people may choose not to file complaints in order to avoid further “outing” themselves in the workplace. Finally, research suggests that many of these matters are handled internally before formal legal enforcement procedures become necessary.

## **PRIOR RESEARCH ON SEXUAL ORIENTATION AND GENDER IDENTITY ADMINISTRATIVE COMPLAINTS**

Administrative filing data on sexual orientation and gender identity employment discrimination complaints has been collected twice by the U.S. Government Accountability Office (GAO).<sup>10</sup> In 2002, GAO collected 4,788 complaints of sexual orientation and gender identity employment discrimination filed with administrative agencies in eleven states and the District of Columbia.<sup>11</sup> The time period for which the data was available varied by state but averaged 6.6 years. In 2009, GAO collected

4,946 complaints of sexual orientation and gender identity employment discrimination filed with administrative agencies in twenty states and the District of Columbia from 2006 to 2008.<sup>12</sup> These numbers include complaints filed by public and private sector employees.

In 2009, the UCLA-RAND Center for Law and Public Policy gathered data on all employment discrimination complaints filed with California’s Department of Fair Employment and Housing between 1997 and 2008.<sup>13</sup> The study found 6,317 complaints of sexual orientation discrimination—1.8 percent of all employment discrimination complaints filed during that period.<sup>14</sup>

In 1996, researchers Norma M. Riccucci and Charles W. Gossett published a study focused on sexual orientation discrimination in public sector employment.<sup>15</sup> They gathered a total of 809 complaints filed under 9 state statutes or executive orders, and 67 complaints filed under local ordinances.<sup>16</sup> Though the research was focused on discrimination against state and local government employees, in many instances, the agencies were unable to separate out complaints filed by private sector employees or to separate employment discrimination complaints from housing or public accommodations complaints.<sup>17</sup>

Two studies by researchers at the Williams Institute demonstrated that when the complaint rate is adjusted for the relevant population, the rate of complaints filed alleging sexual orientation discrimination in employment is nearly as high as the rate of complaints filed on the basis of sex or race.<sup>18</sup>

## **METHODOLOGY**

Using Riccucci and Gossett’s survey methodology, we updated their administrative data collection. In 2008-2009, we contacted the agencies responsible

for enforcing nondiscrimination statutes in twenty of the twenty-one states that then offered statutory protection from sexual orientation and/or gender identity discrimination. An exception was made for Delaware because its statutory protection had not gone into effect at the time the study was conducted. We also contacted 201 city and county agencies in localities with nondiscrimination ordinances prohibiting sexual orientation and/or gender identity discrimination in employment. The inquiries were made over a period of approximately ten months, from September 2008 through June 2009.<sup>19</sup>

Using the data gathered in the survey, we then replicated the methodology of two Williams Institute studies<sup>20</sup> to determine the population-adjusted complaint rate for LGB people working in the public sector. This analysis allowed us to compare the rate of discrimination against LGB employees in the private sector to the rate of discrimination against LGB employees in the public sector. We were not able to do a population-adjusted analysis of gender identity complaints due to the lack of available data.

For our analysis, we included only those states that had at least one full year of data between 2003 and 2007 for complaints filed by state and local employees and for complaints filed by employees in all sectors. We included data only for years during which a state’s sexual orientation nondiscrimination statute had been in effect for the full year; for this reason, no data from Iowa was included. We also excluded data from Oregon, which had been collected after the nondiscrimination statute was passed by the legislature but before it went into effect.

State agencies were unable to separate local employee complaints from total complaints filed in California

for the years 2003 through 2007 and in New York in 2007, but did separate those filed by state employees. We included all nonstate employee discrimination complaints as private complaints for California because the small number of local government employees compared to private sector employees (local employees are only 12 percent of private sector employees) suggests that it would be unlikely that the rate of local employee complaints would have a significant impact on the complaint rate for private sector employees. For 2007 in New York, we reported the number of state employee complaints provided by the agency for that year and used the average number of local employee complaints filed in the previous four years to estimate the number of complaints filed by local employees in 2007. We subtracted these two figures from the total number of complaints filed in order to estimate the number of complaints filed by private sector employees that year. For each state, we then calculated an average annual number of complaints per protected group for 2003 to 2007.

To calculate the population-adjusted rates for each state, we divided the average number of complaints filed annually by LGB state and local employees in a state, by the LGB state and local workforce in the state. While no existing surveys provide precise estimates of the size of the LGB workforce in the public and private sectors, estimates of employment patterns of the LGB population can be derived by extrapolating information from nationally representative data sources.

Analyzing data from several population-based surveys, Gary J. Gates estimated that 3.5 percent of adults in the United States identify as LGB.<sup>21</sup> Applying this 3.5 percent figure to all adults implies that there are approximately 8.2

million LGB adults in the United States. We estimated how many of these 8.2 million LGB adults work for state or local governments in each state using data from the U.S. Census Bureau. Data from the Census Bureau's American Community Survey (2005-2007) provides information about individuals in same-sex couples (those who identify as either as "husbands/wives" or "unmarried partners" on the Census form), including whether they work for federal government, state government, local government, or a private sector employer. Using this data, we determined what percentage of all individuals in same-sex couples work in each of these sectors, in each state. Assuming that single LGB individuals have the same distribution and employment patterns as individuals in same-sex couples, we then applied these percentages to the total number of LGB adults in the U.S. (8.2 million) to estimate the size of the LGB workforce in federal government, state government, local government, and the private sector in each state.

We then divided the average number of complaints filed annually by LGB state and local government employees, by the LGB state and local government workforce in each state. We did the same for complaints made by private sector employees. We then multiplied each of those figures by 10,000 to generate population-adjusted complaint rates for the public and private sector. Thus, the adjusted rates represent the number of discrimination complaints per 10,000 LGB workers in each sector. For California, we included private sector and local employees in the underlying population used to calculate the adjusted complaint rate for the private sector because that data could potentially include complaints by local employees. To determine a national rate, we combined the rates of all the states,

weighting each state's population-adjusted rates by the proportion of the relevant workforce in that state. The proportion of the relevant workforce in a given state is calculated by dividing the number of employees in the relevant workforce of that state by the total number of employees in the relevant workforce of all states included in this study.

## FINDINGS

### Survey Responses

#### State Agencies

Thirteen state administrative agencies responded to the survey, providing

a record of 460 complaints filed on the basis of sexual orientation or gender identity by state or local employees from 1999 through 2007 (see Table 1). At least 265 of these complaints were filed by state employees (see Table 2). Five state agencies explicitly refused to provide data in response to the survey; two other state agencies did not respond to the survey (see Table 3).

Although gender identity complaints were requested from all agencies, we did not receive a report of any gender identity discrimination complaint filed by a state or local employee at the state level. Only one state, New Mexico, noted that it had received two complaints of gender identity discrimination, but both were filed by

**Table 1 — Administrative Complaints Filed with State Enforcement Agencies on the Basis of Sexual Orientation or Gender Identity by Public Sector Employees Against State and Local Governments Combined**

	1999	2000	2001	2002	2003	2004	2005	2006	2007	Total
California	+	16*	22*	23*	27*	24*	22*	26*	23*	183
Iowa	*	*	*	*	*	*	*	*	3	3
Maine	*	*	*	*	*	*	0	5	7	12
Minnesota	4	5	2	4	8	3	4	0	2	32
Nevada	0	2	4	3	3	3	3	4	5	27
New Jersey	2	1	1	2	1	1	4	5	1	18
New Mexico	*	*	*	*	4	7	8	8	4	31
New York	*	*	*	*	18	24	21	26	10*	99
Oregon	*	*	*	*	*	*	*	*	2	2
Rhode Island	0	1	0	0	0	0	2	2	0	5
Vermont	+	+	+	1	2	2	0	3	2	10
Washington	*	*	*	*	*	*	*	3	4	7
Wisconsin	+	+	+	3	11	3	5	5	4	31
<b>Total</b>	<b>6</b>	<b>25</b>	<b>29</b>	<b>36</b>	<b>74</b>	<b>67</b>	<b>69</b>	<b>87</b>	<b>67</b>	<b>460</b>

\* No statutory protection in the given year

+ Data not available

× State complaints only

	1999	2000	2001	2002	2003	2004	2005	2006	2007
State	State	State	State	State	State	State	State	State	State
	Local	Local	Local	Local	Local	Local	Local	Local	Local
California	+	16	22	23	27	24	22	26	23
	+	+	+	+	+	+	+	+	+
Maine	*	*	*	*	*	*	0	2	2
	*	*	*	*	*	*	0	3	5
Minnesota	2	1	0	1	3	1	0	0	1
	2	4	2	3	5	2	4	0	1
New Jersey	2	0	0	0	1	0	2	2	0
	0	1	1	2	0	1	2	3	1
New Mexico	*	*	*	*	1	3	4	5	1
	*	*	*	*	3	4	4	3	3
New York	*	*	*	*	2	5	5	2	10
	*	*	*	*	16	19	16	24	+
Oregon	*	*	*	*	*	*	*	*	1
	*	*	*	*	*	*	*	*	1
Vermont	+	+	+	1	2	2	0	2	0
	+	+	+	+	+	+	0	0	1
Washington	*	*	*	*	*	*	*	1	2
	*	*	*	*	*	*	*	2	2
Wisconsin	+	+	+	1	5	1	2	3	2
	+	+	+	2	6	2	3	2	2

**Table 2 — Breakdown of Administrative Complaints Filed with State Enforcement Agencies on the Basis of Sexual Orientation or Gender Identity by Public Sector Employees Against State and Local Governments**

State	State Employee Response
Colorado	At time of request, protection too recently enacted to have compiled and maintained data in a way that made release feasible.
Connecticut	Limited data provided.
Hawaii	Refused to provide data because of confidentiality requirement in nondiscrimination law (Haw. Rev. Stat. § 368-4).
Illinois	Unable to provide because Commission does not create or maintain the information requested.
Maryland	Legal Department would not provide the information because it would require them to look up every case. When caller asked if there was a formal request procedure, Legal Department told caller to write a letter to the Executive Director. Executive Director did not respond to the request.
Massachusetts	No response.
New Hampshire	No response.

**Table 3 — Responses and Inaction of State Enforcement Agencies that Did Not Provide Data**

employees in the private sector. Three states—Maine, Minnesota, and Washington—indicated that gender identity complaints, if any, were included in their sexual orientation complaint data, and they could not separate out any such complaints. Similarly, California codes complaints of gender identity discrimination as complaints of sex discrimination and was unable to separate out the number of complaints filed on the basis of gender identity for that reason.

Five states provided information about the disposition of complaints for at least some period of time and for at least some complaints filed within that period. When evaluating complaint dispositions for the state complaints, we considered settlements and findings of probable cause to be successful outcomes. For those complaints where the agency had already reached a known disposition (eighty-four total), the rates of successful outcomes in these five states were: 50 percent (Oregon), 31 percent (New Mexico), 25 percent (Wisconsin), 13 percent (New York),

and 0 percent (California) (see Table 4). Although there were no successful outcomes in California, many complainants in California requested an immediate right-to-sue (61 percent of complaints filed where there was a known disposition), in order to have their claim heard in court rather than through the administrative process. The average rate of successful outcomes for all cases with known dispositions across the five states that provided such data was 24 percent (see Table 4). The average rate of successful outcomes for cases with known dispositions in the four states other than California was 30 percent.<sup>22</sup>

### Local Agencies

Of the 201 local agencies contacted, 105 cities and counties responded.<sup>23</sup> Twenty-five reported that they had received 138 complaints filed on the basis of sexual orientation (131 complaints) or gender identity (7 complaints) by public sector employees (see Tables 5 and 6).<sup>24</sup> Several agencies in large metropolitan areas failed to respond,

**Table 4 — Dispositions of Administrative Complaints Filed with State Enforcement Agencies on the Basis of Sexual Orientation or Gender Identity by Public Sector Employees Against State Governments**

State	Period	Settlement	No Probable Cause or Other Dismissal	Probable Cause	Other Administrative*	Unavailable	% Successful Outcomes <sup>o</sup>
California	2005 – 2007	0	14	0	28*	29	0%
New Mexico	2003 – 2007	3	8	1	1	1	31%
New York	2003 – 2007	2	12	0	1	9	13%
Oregon	2007	1	0	0	1	0	50%
Wisconsin	2002 – 2007	2	6	1	3	2	25%

\* Cases closed in absence of a merit decision, settlement, or other defined category

<sup>x</sup> Includes 26 requests for immediate right-to-sue

<sup>o</sup> Based on settlement and probable cause outcomes among all cases with available dispositions.

including those in New York City, San Francisco, and Chicago. Sixteen localities explicitly refused to provide data in response to the survey (see Table 7).

The average rate of successful outcomes among complaints where a

known disposition had been reached was 19 percent.<sup>25</sup> Successful outcomes ranged from findings of probable cause by the administrative agency to settlements and the recovery of damages by the complainant after litigation (see

Locality	Period*	Number	Basis	Disposition
Tucson, AZ	2004 – 2009	1	1 sexual orientation	1 withdrawn by complainant
Berkeley, CA	2004 – 2009	4	4 sexual orientation	3 discrimination found
				1 unsubstantiated
City of Los Angeles, CA	1999 – 2009	9*	9 sexual orientation	Not available
San Jose, CA	2006 – 2009	9	9 sexual orientation	7 unsubstantiated
				2 substantiated
Hartford, CT	2002 – 2009	1	1 sexual orientation	1 currently under review
Gainesville, FL	Not available	1	1 sexual orientation	1 pending
Miami Beach, FL	Not available	1	1 sexual orientation	Not available
Tampa, FL	1995 – 2009	1	1 sexual orientation	1 no reasonable cause
Atlanta, GA	2002 – 2009	12	12 sexual orientation	12 no probable cause
Louisville, KY	Not available	1	1 sexual orientation	1 unsubstantiated
Cincinnati, OH	Not available	3	3 sexual orientation	1 sustained
				1 not sustained <sup>o</sup>
				1 offender disciplined and moved to resolve
Columbus, OH	Not available	2	2 sexual orientation	2 no probable cause
Portland, OR	2000 – 2009	7	6 sexual orientation 1 gender identity	3 unsubstantiated
				3 substantiated
				1 withdrawn
Providence, RI	2005 – 2008	5	5 sexual orientation	3 no probable cause
				2 probable cause
Harrisburg, PA	Not available	5	5 sexual orientation	2 withdrawn
				1 no probable cause
				1 administrative closure
				1 unknown closure

**Table 5 — Administrative Complaints Filed with Local Enforcement Agencies on the Basis of Sexual Orientation and/or Gender Identity by City Employees Against City Governments**

\* "2009" means approximately May 1, 2009—date on which data requests were made  
<sup>x</sup> There may also have been complaints of gender identity discrimination filed, however these are coded as sex discrimination and the number cannot be ascertained from the record kept by City of Los Angeles  
<sup>o</sup> Though the complaints was not sustained in the city administrative process, the employee filed a complaint in court and prevailed

**Table 5 — continued**

Locality	Period*	Number	Basis	Disposition
Philadelphia, PA	1982 – 2009	40	35 sexual orientation	5 substantiated
			5 gender identity	1 settlement
				13 unsubstantiated
				3 withdrawn
				2 right to sue
				8 other administrative closure
				1 unknown
Pittsburgh, PA	1990 – 2009	6	6 sexual orientation	2 withdrawal of complaint
				2 withdrawal with benefits 2 no probable cause
Seattle, WA	2000 – 2009	3	3 sexual orientation	2 withdrawal without benefits 1 no cause
Spokane, WA	Not available	1	1 sexual orientation	1 no discrimination
Tacoma, WA	Not available	1	1 sexual orientation	1 no probable cause
Milwaukee, WI	Not available	1	1 gender identity	Not available
<b>Total</b>		<b>114</b>		

**Table 6 — Administrative Complaints Filed with Local Enforcement Agencies on the Basis of Sexual Orientation and/or Gender Identity by County Employees Against County Governments**

\* "2009" means approximately May 1, 2009—date on which data requests were made

Locality	Period*	Number	Basis	Disposition
Santa Cruz County, CA	Not available	1	1 sexual orientation	1 withdrawn and filed in court where complainant recovered monetary damages
Miami-Dade County, FL	2003 – 2009	3	3 sexual orientation	2 settlement
				1 no probable cause
Pinellas County, FL	Not available	1	1 sexual orientation	1 resolved through mediation
King County, WA	1987 – 2009	19	19 sexual orientation	10 no reasonable cause
				2 administrative closure (filed in court)
				1 withdrawn to litigate
				1 withdrawn with settlement
				2 prefinding settlement
				2 no jurisdiction
<b>Total</b>		<b>24</b>		1 administrative closure (failure to cooperate)

Locality	City or County Employee Response
San Diego, CA	Information requested is confidential.
San Mateo County, CA	County does not track the information requested.
Breckenridge, CO	Human Resources employee “not at liberty to discuss” the number of filings based on sexual orientation, but if there were complaints, the Colorado Civil Rights Commission would handle them, rather than the city.
Lake Worth, FL	Due to lack of city resources, city will not compile data.
Indianapolis, IN	EEOC handles complaints by city employees against the city.
Cedar Rapids, IA	Complaints against the city are referred to the Iowa Civil Rights Commission.
Davenport, IA	Complaints against the city are referred to the Iowa Civil Rights Commission.
Covington, KY	Complaints are referred to the Kentucky Commission on Human Rights.
Portland, ME	No established body to oversee administrative process so only civil action enforcement is available.
Prince Georges County, MD	Information requested is confidential.
Amherst, MA	Due to budget constraints, City will not compile the data.
Cambridge, MA	Complaints are referred to the Massachusetts Commission Against Discrimination.
Boston, MA	City lacks resources to handle the complaints so they are referred to the Massachusetts Commission Against Discrimination.
Kansas City, MO	EEOC handles complaints by city employees against the city.
Albany County, NY	Records cannot be sorted as requested.
Salt Lake City, UT	Caller was referred to the Utah Antidiscrimination & Labor Division (UALD). Director of UALD told caller that there was no protection for sexual orientation in employment at any level within the state. Director maintained this position even after caller mentioned Salt Lake City ordinance prohibiting discrimination based on sexual orientation in city employment—City Code ch. 2, art. 53 § 35.

Table 7 — Responses Given by City and County Agencies that Refused to Provide Data

Tables 5 and 6).<sup>26</sup> Another 3 percent sought an immediate right-to-sue letter or withdrew the complaint to litigate the claim in court (see Tables 5 and 6).

### Population-Adjusted Complaint Rates

The rate of discrimination complaints filed by LGB state and local employees was slightly lower than, but similar to, that of filings by LGB employees in the private sector: 3.0 per 10,000 LGB public sector employees compared with 4.1 per 10,000 LGB

private sector employees (see Table 8).

For eight of the eleven states, we were able to compare complaints filed by state employees with those filed by local employees (see Table 9). The rates were similar, with 2.8 sexual orientation complaints filed for every 10,000 state LGB employees and 3.2 filed for every 10,000 local LGB employees.

By using data from a study by the Williams Institute for eight of the eleven states,<sup>27</sup> we are able to compare complaints filed by LGB employees in all sectors with those filed on the basis of race and sex. When comparing sexual

State	Sexual Orientation – State and Local	Sexual Orientation – Private
California	4.3 (state only)	5.9 (private and local)
Maine	14.9	3.4
Minnesota	1.7	1.8
Nevada	6.5	5.4
New Jersey	0.9	0.9
New Mexico	5.1	6
New York	2.8	2.7
Rhode Island	2	1.2
Vermont	10.6	0.8
Washington	1.2	0.3
Wisconsin	2.4	6.7
All	3	4.1

Table 8 — Population-Adjusted Complaint Rates (per 10,000) for Sexual Orientation Discrimination Complaints Filed by State and Local Government Employees and Private Sector Employees, 2003-2007

State	Sexual Orientation – State	Sexual Orientation – Local
California	4.3	NA
Maine	8.2	25.1
Minnesota	1.1	2.2
Nevada	NA	NA
New Jersey	0.8	0.9
New Mexico	6.2	4.3
New York	1.5	3.6
Rhode Island	NA	NA
Vermont	15	6.7
Washington	1.1	1.5
Wisconsin	1.9	3.3
All	2.8	3.2

Table 9 — Population-Adjusted Complaint Rates (per 10,000) for Sexual Orientation Discrimination Complaints Filed by State Government Employees and Local Government Employees, 2003-2007

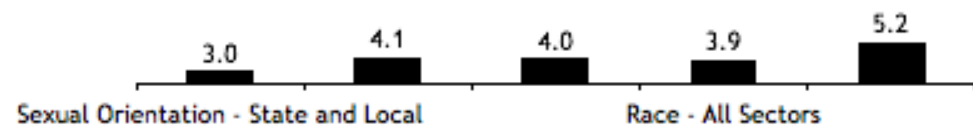


Figure 1 — National Population-Adjusted Complaint Rates Per 10,000

orientation complaints in all states against those based on race and sex, the population-adjusted rates for all three groups were similar: 4.0 for every 10,000 LGB employees; 3.9 for every 10,000 people of color employees; and 5.2 for every 10,000 female employees (see Figure 1, Table 10).

### DISCUSSION

Data provided by the states and localities that responded to our survey show that sexual orientation and gender identity discrimination is continuing

to occur in state and local government employment. Our population-adjusted analysis of this data indicates that employment discrimination against LGB people in the public sector is almost as prevalent as it is in the private sector (3 complaints per 10,000 LGB public sector workers and 4.2 complaints per 10,000 LGB private sector workers, across states). This finding is fairly consistent across states. Only Maine, which has a smaller population, stood out in having a pattern that was significantly different. Maine had a higher population-adjusted rate for state and



State	Sexual Orientation – State	Sexual Orientation – Local	Sexual Orientation – State & Local
California	4.3	NA	4.3 (state only)
Maine	8.2	25.1	14.9
Minnesota	1.1	2.2	1.7
Nevada	NA	NA	6.5
New Jersey	0.8	0.9	0.9
New Mexico	6.2	4.3	5.1
New York	1.5	3.6	2.8
Rhode Island	NA	NA	2
Vermont	15	6.7	10.6
Washington	1.1	1.5	1.2
Wisconsin	1.9	3.3	2.4
All	2.8	3.2	3

Sexual Orientation – Private	Sexual Orientation – All Sectors	Race – All Sectors
5.9 (private and local)	5.9	3.5
3.4	4.1	20.8
1.8	1.8	5
5.4	5.5	NA
0.9	0.9	1
6	5.8	NA
2.7	2.7	4.4
1.2	1.3	3.9
NA	NA	NA
0.3	0.4	1.4
6.7	5.8	25.9
4.2	4	3.9

**Table 10 — Population-Adjusted Complaint Rates (per 10,000) for Complaints Filed on the Basis of Sexual Orientation, Race, or Sex, by Employment Sector, 2003-2007**

local employees. However, the high rate might reflect the limited data available (only two years).

Our analysis also indicates that the frequency of discrimination against LGB employees is similar in state and local government employment, but state filings are slightly lower (2.8 complaints per 10,000 LGB state government workers and 3.2 complaints per 10,000 LGB local government workers, across states). Although the data is limited, this pattern of fewer complaints filed by state employees was seen when comparing the data in six out of the eight states that provided data. Vermont, the only state with two different enforcement agencies—one that handles complaints against the state and one that handles all other complaints—was the only state with a sizeable departure from this pattern. Possibly differences in the effectiveness, outreach, and education efforts of the separate agencies in Vermont may have contributed to its different complaint rates.

We also found fairly high percentages of successful outcomes in four of the five states for which we had information about complaint dispositions. One state, California, reported no successful outcomes in the available data. In Gary Blasi and Joseph Doherty’s analysis of sexual orientation discrimination complaints filed in California by employees in all sectors, they found that 6.6 percent of cases resulted in a successful outcome—a rate lower than what we found for any other state.<sup>28</sup> This could be because complainants with strong claims are likely to seek an immediate right-to-sue in order to take their complaints straight to court rather than proceed through the administrative system. Almost two-thirds of the known dispositions in the data we received from California were immediate right to sues (61 percent). Blasi and Doherty found a similar rate of right to sues (59 percent) when they looked at complaints filed on the basis of sexual orientation by employees in

all sectors.<sup>29</sup> A request for an immediate right to sue letter often means that the complainant has an attorney willing to take his or her case.<sup>30</sup>

Our findings suggest that the rate of successful outcomes in state and local discrimination cases may be higher in recent years than in the years prior to 1996 for which Riccucci and Gossett collected data. Both our study and the Riccucci and Gossett study found that the rate of successful outcomes was significantly higher at the local level than at the state level. Riccucci and Gossett found only three successful outcomes among the 226 state-level complaints they gathered which had known dispositions (1.3 percent).<sup>31</sup> Of the fifty-one local agency complaints with known dispositions, eight (16 percent) resulted in a successful outcome.<sup>32</sup> We found a much higher rate of successful outcomes. In our study, 12 percent of state-level complaints resulted in a successful outcome. This calculation includes California data where most (61 percent) of

the known dispositions were immediate right-to-sues. If California data is not included in this calculation, the rate of successful outcomes was 30 percent. At the local level, 19 percent of complaints resulted in a successful outcome.

Two caveats to note are that, first, for some states, Riccucci and Gossett’s data included complaints filed by private sector workers and in arenas other than employment, while our data was strictly limited to public sector employment. It is possible that this difference could have an impact on the rate of successful outcomes. Second, due to variations in how outcomes were reported by the agencies, we likely categorized cases differently than Riccucci and Gossett.<sup>33</sup> Applying our methodology to Riccucci and Gossett’s data results in a higher successful outcome rate than they reported.<sup>34</sup>

While our research shows that LGBT people are using state and local nondiscrimination laws, several factors suggest that this record of administra-

tive filings understates the pervasiveness of discrimination against LGBT people. These factors are mostly related to the capacity of often underfunded state or local enforcement agencies or to the nature of the discrimination.

First, enforcement agencies may not be able to effectively handle complaints of sexual orientation or gender identity discrimination. Survey responses from enforcement agencies that were unable to provide complaint data indicate that local agencies in particular face limited budgets, insufficient training for staff, and generally lack resources necessary to effectively enforce nondiscrimination laws. Two local agencies that responded to our survey stated that they referred all complaints to the U.S. Equal Employment Opportunity Commission (EEOC), even though there is no federal statute that explicitly prohibits discrimination based on sexual orientation or gender identity.<sup>35</sup> Similarly, two localities said that they referred complaints to the state agency that handles employment discrimination complaints, even though the states' (Kentucky and Utah) nondiscrimination statutes do not include sexual orientation or gender identity. Five other localities, in states where state law covers sexual orientation and gender identity, noted that they referred complaints to state administrative agencies, suggesting that they did not have enough resources to enforce claims. One local agency incorrectly said that the city did not provide protection from sexual orientation discrimination. Another said that there was no administrative enforcement mechanism for such complaints and callers had to file in court. Additionally, four localities and two states indicated that they could not compile the data because of limited or inadequate resources, and ninety-six local agencies, almost half of those con-

tacted, never responded in any manner to repeated phone calls, e-mails, letters, and formal requests for information. If these agencies do not have enough resources to compile data or to respond to inquiries, they may not have enough resources to effectively enforce claims.

Other researchers have reported similar experiences with enforcement agencies when studying administrative complaints of sexual orientation or gender identity discrimination. Rodrick A. Colvin concluded that a lack of committed and skillful enforcement staff partially explained why he found fewer complaints of sexual orientation or gender identity discrimination than he expected, given the extent of discrimination reported in surveys.<sup>36</sup> Similarly, in their review of public sector discrimination, Riccucci and Gossett found that many state and local laws lacked effective enforcement practices.<sup>37</sup> Moreover, approximately 50 percent of the local agencies contacted did not respond at all to their requests for information, a rate of nonresponse similar to what we found.<sup>38</sup>

Second, LGBT people may be hesitant to file complaints due to a perception of judicial unresponsiveness. In an early review of sexual orientation-based employment discrimination cases, Rhonda Rivera noted that gay and lesbian people "know that a fair shake in the court system is remote."<sup>39</sup> Rivera pointed to several homophobic comments courts made prior to 1985 that could explain why gay and lesbian people might be reluctant to bring their claims in front of a judge or jury.<sup>40</sup> More recent examples from South Dakota,<sup>41</sup> Delaware,<sup>42</sup> and Mississippi<sup>43</sup> demonstrate that some judges are still hostile toward LGBT people.

Third, LGBT people may also be hesitant to file complaints out of fear that they will publicly "out" themselves

by doing so.<sup>44</sup> Surveys have routinely shown that many employees are not "out" in the workplace; often because they fear discrimination.<sup>45</sup> Surveys also show that employees who are more open about their sexual orientation in fact report higher percentages of discrimination.<sup>46</sup> The fear of discrimination could be particularly acute where an employee of one state or local department is required to file a complaint with another department operated by the same state or local government—in smaller cities, these departments may even be located in the same building.

Fourth, fewer complaints may be filed than expected given the extent of discrimination because the matter may be resolved before formal legal procedures become necessary. A 2002 study assessed the effectiveness of nondiscrimination laws that include sexual orientation or gender identity by surveying employment attorneys who had personally handled such cases. The attorneys reported that in all situations but one, the claims were settled before going to court and, in most situations, were settled via letters and negotiation.<sup>47</sup>

Survey data corroborate the existence of underreporting. For example, the Minnesota State Bar Association Survey found that 67 percent of employees who had experienced employment discrimination or harassment based on their sexual orientation or gender identity did not report the incident.<sup>48</sup> Transgender respondents to the Good Jobs NOW! survey disclosed similar rates of nonreporting with only 12 percent of those discriminated against filing a complaint of any kind and only 3 percent having done so with an agency that had the authority to enforce a nondiscrimination law.<sup>49</sup>

## CONCLUSION

LGBT employees who work for state and local governments continue to face discrimination in the workplace. Complaints of sexual orientation and gender identity discrimination filed with state and local administrative agencies provide one source of documented evidence of discrimination against LGBT people. Our analysis of these complaints shows that discrimination against public sector LGBT employees is pervasive. LGB employees of state and local governments are filing complaints under state nondiscrimination laws almost as frequently as LGB employees in the private sector. The rate at which LGB people file complaints under these laws is similar to the rate at which women and people of color file complaints under sex and race nondiscrimination laws. Our analysis also shows that the record of administrative complaints we compiled likely understates the actual rate of discrimination against LGBT people.

Christy Mallory is senior counsel at the Williams Institute. Her research is focused on state-level laws and policies across the United States that impact LGBT people and same-sex couples.

Brad Sears is the executive director and Roberta A. Conroy Scholar of Law and Policy at the Williams Institute, and assistant dean of the UCLA School of Law. His research is primarily focused on discrimination against LGBT people in the workplace and HIV discrimination in health care. He has taught courses on sexual orientation and gender identity law, disability law, and U.S. legal and judicial systems at the UCLA School of Law and Harvard Law School.

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11 GAO, “Sexual Orientation-Based Employment Discrimination.”

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13 Blasi and Doherty, California Employment Discrimination Law, 27.

14 Ibid.

15 Riccucci and Gossett, “Employment Discrimination in State and Local Government.”

16 Ibid., 183-184.

17 Ibid.

18 Badgett, Ramos, and Sears, Evidence of Employment Discrimination, 2-3; Rubenstein, “Gay Rights Laws,” 76-87.

19 Agencies that did not provide data, or a reason for refusing to provide data, upon first contact were contacted approximately four additional times. Contacts were made by phone, through e-mail, or by written request sent through regular mail.

20 Badgett, Ramos, and Sears, Evidence of Employment Discrimination, 2-3; Rubenstein, “Gay Rights Laws,” 76-87.

21 Gates, Gary J. How Many People Are Lesbian, Gay, Bisexual and Transgender? Williams Institute, April 2011, 1.

22 The multistate rate was calculated by averaging the individual state successful outcome rates.

23 Ninety-six localities did not respond to the survey: Scottsdale, Arizona; Long Beach, California; Los Angeles County, California; Oakland, California; San Francisco, California; Arvada, Colorado; New Haven, Connecticut; Stamford, Connecticut; Rehoboth Beach, Delaware; Wilmington, Delaware; Broward County, Florida; Gulfport, Florida; Key West, Florida; Monroe County, Florida; Orlando, Florida; Palm Beach, Florida; Sarasota, Florida; West Palm Beach, Florida; Decatur, Georgia; DeKalb County, Georgia; Bloomington, Illinois; Chicago, Illinois; Cook County, Illinois; DeKalb, Illinois; Peoria, Illinois; Springfield, Illinois; Urbana, Illinois; Bloomington, Indiana; Lafayette, Indiana; Michigan City, Indiana; Terre Haute, Indiana; Tippecanoe County, Indiana; Lawrence, Kansas; Jefferson County, Kentucky; Lexington-Lafayette County, Kentucky; Lexington, Kentucky; Brookline, Massachusetts; Malden, Massachusetts; Newburyport, Massachusetts; Worcester, Massachusetts; Baltimore, Maryland; Howard County, Maryland; Montgomery County, Maryland; Rockville, Maine; Castine, Maine; Falmouth, Maine; Hallowell, Maine; Orono, Maine; Westbrook, Maine; Ann Arbor, Michigan; Detroit, Michigan; East Lansing, Michigan; Flint, Michigan; Grand Rapids, Michigan; Hamtramck, Michigan; Huntington Woods, Michigan; Kalamazoo, Michigan; Traverse City,

Michigan; Ypsilanti, Michigan; Duluth, Minnesota; Moorhead, Minnesota; St. Paul, Minnesota; Columbia, Missouri; St. Louis, Missouri; Albuquerque, New Mexico; Buffalo, New York; Ithaca, New York; New York City, New York; Onondaga County, New York; Peekskill, New York; Rochester, New York; Tompkins County, New York; Westchester County, New York; Chapel Hill, North Carolina; Raleigh, North Carolina; Cleveland, Ohio; Dayton, Ohio; Beaverton, Oregon; Benton County, Oregon; Hillsboro, Oregon; Lake Oswego, Oregon; Multnomah County, Oregon; Allentown, Pennsylvania; Easton, Pennsylvania; Lancaster, Pennsylvania; Lansdowne, Pennsylvania; Scranton, Pennsylvania; York, Pennsylvania; Brookings, South Dakota; Dallas, Texas; Alexandria, Virginia; Arlington County, Virginia; Burlington, Vermont; Morgantown, West Virginia; Dane County, Wisconsin; Madison, Wisconsin.

24 Sixty-four localities reported that they had received no complaints: Birmingham, Alabama; Phoenix, Arizona; Cathedral, California; Costa Mesa, California; Davis, California; Laguna Beach, California; Sacramento, California; City of Santa Cruz, California; Santa Monica, California; West Hollywood, California; Aspen, Colorado; Boulder, Colorado; Crested Butte, Colorado; Fort Collins, Colorado; Telluride, Colorado; Oakland Park, Florida; St. Petersburg, Florida; Ames, Iowa; Bettendorf, Iowa; Council Bluffs, Iowa; Des Moines, Iowa; Carbondale, Illinois; Champaign, Illinois; Evanston, Illinois; Normal, Illinois; Fort Wayne, Indiana; Topeka, Kansas; New Orleans, LA; Somerville, Massachusetts; Bangor, Maine; Bar Harbor, Maine; Long Island, Maine; South Portland, Maine; Grand Ledge, Maine; Saugatuck, Michigan; Minneapolis, Minnesota; Woodbury, Minnesota; Boone County, Missouri; University City, Missouri; Albany, New York; Nassau County, New York; Syracuse, New York; Athens, Ohio; Toledo, Ohio; Yellow Springs, Ohio; Ashland, Ohio; Bend, Oregon; Corvallis, Oregon; Eugene, Oregon; Lincoln City, Oregon; Salem, Oregon; Erie County, Pennsylvania; New Hope, Pennsylvania; Swarthmore, Pennsylvania; Austin, Texas; El Paso, Texas; Fort Worth, Texas; Houston, Texas; Charlottesville, Virginia; Virginia Beach, Virginia; Burien, Washington; Olympia, Washington; Vancouver, Washington; Charleston, West Virginia.

25 The multilocality rate was calculated by averaging the individual locality successful outcome rates.

26 We considered the following dispositions to be successful outcomes: finding of discrimination, complaint substantiated, complaint sustained, offender disciplined and moved to resolve, finding of probable cause, settlement, withdrawal with benefits, withdrawn and filed in court where

complainant received monetary damages, prefinding settlement, withdrawn with settlement, moved to resolve, finding of probable cause, set sustained, motion, for which we have data, the ve their claim hea

27 Badgett, Ramos, and Sears, Evidence of Employment Discrimination, 4.

28 E-mail from Joseph W. Doherty, director, Empirical Research Group, UCLA School of Law, to authors, 29 August 2012. (On file with authors.)

29 Ibid.

30 Blasi and Doherty, California Employment Discrimination Law, 36.

31 Riccucci and Gossett, “Employment Discrimination in State and Local Government,” 184.

32 Ibid.

33 It appears from the tables in the study that Riccucci and Gossett considered only “successful conciliations” to be successful outcomes for employees in their study. Riccucci and Gossett, “Employment Discrimination in State and Local Government,” 183-184. By contrast, we considered a wider range of dispositions to be successful outcomes for the employees (see Table 4 and accompanying text).

34 If Riccucci and Gossett had applied our methodology to their data, they would have determined that 16 percent of state and 25 percent of local complaints resulted in a successful outcome for the employee.

35 At the time of the study, the EEOC had not yet interpreted Title VII’s prohibition on sex discrimination to also prohibit discrimination based on gender identity.

36 Colvin, Rodrick A. “Improving State Policies Prohibiting Employment Discrimination Based on Sexual Orientation.” Review of Public Personnel Administration 20(2): 5-19, April 2000.

37 Riccucci and Gossett, “Employment Discrimination in State and Local Government,” 182.

38 Ibid.

39 Rivera, Rhonda R. “Queer Law: Sexual Orientation Law in the Mid-Eighties—Part I.” University of Dayton Law Review 10: 459, 1984-1985.

40 Ibid.

41 In 1992, the South Dakota Supreme Court wrote in a published opinion: “Until such a time that she can establish, after years of therapy and demonstrated conduct, that she is no longer a lesbian living a life of abomination (see Leviticus 18:22), she should be totally stopped from contaminating these children . . . Her conduct is pres-

ently harmful to these children. . . . There appears to be a transitory phenomenon on the American scene that homosexuality is okay. Not so. The Bible decries it. . . . [E]ven the pagans, centuries ago, before the birth of Jesus Christ, looked upon it as total defilement.” *Chicoine v. Chicoine*, 479 N.W.2d 891, 896-97 (S.D. 1992) (J. Henderson, concurring).

42 In 1997, a judge in Delaware dismissed a domestic abuse case involving two lesbians, whom the judge threatened to send to jail because he wanted nothing to do with “funny relationships.” In dismissing the case, he told the parties, “You all have these funny relationships—that’s fine—I have nothing to do with it, but don’t bring it in here for me to try to decide, I don’t know how to handle it. Now take this stuff out of here, I’m dismissing the case, you all control your business another way, get out of here. It’s too much for me. Don’t bring it back—the next time you come back, I’ll put somebody in jail.” *Lambda Legal. “First Known Judicial Misconduct Complaint Based on Sexual Orientation Involves Domestic Abuse Case.”* *Lambda Legal*, 20 June 1996.

43 A Mississippi judge wrote in 2004, in response to an article in the *George County Times* on the expansion of rights for gay couples in other states, “[I]n my opinion, gays and lesbians should be put in some type of mental institute instead of having a law like this passed for them.” *Mississippi Commission on Judicial Performance v. Wilkerson*, 876 So. 2d 1006, 1008 (Miss. 2004).

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46 Sears, Brad, and Christy Mallory. *Documented Evidence of Discrimination and Its Effects on LGBT People.* Williams Institute, July 2011, 1.

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48 Minnesota State Bar Association Task Force on Diversity in the Profession. *2005 Self-Audit for Gender and Minority Equity: A Research Study of Minnesota Law Firms, Non-Firm Employers and Individual Lawyers.* September 2006.

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*the Workplace: Hearing before the Subcommittee on Health, Employment, Labor and Pensions, 110th Congress 81, 26 June 2008.*

# Progressive or Regressive?

## *An In-Depth Policy Analysis of the Decision to Include Gender Identity in the Federal Hate Crimes Law*

By Lisa Mottet

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### Part I: Understanding the Critique

This paper comprises Part I of a two-part multimedia series by Lisa Mottet on this topic. Part II will be published online in Summer 2014 and will be available on the LGBTQ Policy Journal Web site.

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#### ABSTRACT

The decision to advocate for, and achieve, the inclusion of the term “gender identity” in the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act has been criticized by some scholars and activists as a mistake in strategy for the transgender movement. This article first examines the reasoning and strategies of transgender advocates behind adding gender identity to this legislation. It then analyzes the following critiques of the hate crimes law: that people of color and those with low income are likely to be targeted by these laws for prosecution; that hate crimes laws increase the resources available to law enforcement, empowering them to do more harm to marginalized communities; that sentence enhancement makes those imprisoned leave prison with increased rage and thus more likely to commit more violent crimes; that hate crimes laws do not result in a decrease in hate crimes; and that supporting these laws lends credibility to law enforcement as an appropriate societal response to crime in general, as opposed to law enforcement being viewed as a perpetrator of crimes itself.

## INTRODUCTION

The decision to advocate for, and achieve, the inclusion of the term “gender identity” in the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act<sup>1</sup> has been criticized by some scholars and activists as a mistake in strategy for the transgender movement. Hate crimes laws, and the federal hate crimes law in particular, have been criticized for providing more tools and resources to an inherently unjust law enforcement system, while providing no reduction of hate crimes against transgender people.

This article delves deeper into the political, cultural, and practical reasons why transgender and allied leaders decided to pursue inclusion of gender identity in the federal hate crimes bill. This article, Part I of a two-part series, focuses on describing with precision the critiques of hate crimes legislation, and it provides initial analyses on whether these critiques are valid. Given my role in the transgender movement,<sup>2</sup> in this article I endeavor to separate fact and opinion, allowing readers to come to their own conclusions about the merits of the decision to seek inclusion.

In Part II of the series, both the potential and realized negative effects of the bill and law<sup>3</sup> will be balanced against the positive effects of passage, including: facilitating the inclusion of gender identity in the Employment Non-Discrimination Act (ENDA) through education and sensitization of members of Congress; promoting cultural change and awareness of transgender people; precipitating the training of law enforcement officers; and adding gender identity to the Department of Justice’s conflict resolution efforts.

## HISTORY OF GENDER IDENTITY INCLUSION IN THE MATTHEW SHEPARD AND JAMES BYRD, JR. HATE CRIMES PREVENTION ACT

The federal hate crimes bill was first introduced in 1997<sup>4</sup> after the White House Conference on Hate Crimes.<sup>5</sup> Among other items, the original bill added federal jurisdiction for violent hate crimes based on actual or perceived gender, sexual orientation, and disability, and it removed jurisdictional barriers faced by Department of Justice prosecutors for hate crimes based on race, color, religion, and national origin, which had been included in the law since 1968.

The effort to add “gender identity”<sup>6</sup> to the bill was one of the initial aims of the Transgender Civil Rights Project at the National Gay and Lesbian Task Force (the Task Force). From the beginning, other organizations were also interested in securing gender identity in the bill’s language: Parents, Family, and Friends of Lesbians and Gays (PFLAG)<sup>7</sup> offered its support in 2001, and the National Center for Transgender Equality (NCTE) became engaged after its founding in early 2003.<sup>8</sup> A range of organizations expressed various levels of support in those early years, with many at times maintaining that “actual or perceived gender”<sup>9</sup> was sufficient to cover anti-transgender hate crimes, especially if Congress created legislative history to clarify that Congress intended to cover transgender people.<sup>10</sup>

The hate crimes bill was managed by the Hate Crimes Task Force (better known as and hereinafter referred to as the Hate Crimes Coalition) of the Leadership Conference on Civil Rights (now known as the Leadership Conference on Civil and Human Rights). In 2001, a multiyear educational effort began to

educate the more than thirty organizations<sup>11</sup> that comprise the Hate Crimes Coalition and lesbian, gay, bisexual, and transgender (LGBT) organizations that were not fully supportive, on two issues: first, the importance of covering anti-transgender hate crimes and, second, the legal inadequacy of relying on “actual or perceived gender.” In 2002, Mara Keisling, who would go on to found NCTE a year later, and two local transgender community members<sup>12</sup> told their stories about the risk of violence they faced in their everyday lives during an initial educational session for the Hate Crimes Coalition.

Congressman Barney Frank was also an early vocal supporter of gender identity inclusion in the hate crimes bill, despite his initial opposition to adding gender identity to ENDA. As early as 1999, during a hearing on the hate crimes bill in the House Judiciary Committee, Frank expressed his view that there should be explicit protections for transgender people.<sup>13</sup> According to a recent interview, he was compelled by the fact that transgender people experience a disproportionate amount of hate violence. In his view, the rate of such violence is second only to hate crimes perpetrated against African Americans.<sup>14</sup>

Due to the collective efforts of Congressman Frank and many organizations, in 2005, Congressman John Conyers, the lead sponsor of the hate crimes bill in the House, agreed to introduce a version of the hate crimes bill that included the term “gender identity.”<sup>15</sup> Later that year, the bill passed the House as an amendment to a child safety bill,<sup>16</sup> with the gender identity language intact.

As the Senate considered passing its own version of the hate crimes bill, which did not yet enumerate gender identity, as an amendment to the Senate

version of the child safety bill, many organizations, led by the Task Force, sent a statement to Senators asking the Senate to pass the House version.<sup>17</sup> Ultimately, the Senate did not add any version of the hate crimes legislation to the child safety bill, and the conference committee merging the two versions of the child safety bill removed the hate crimes language from the final child safety legislation.<sup>18</sup>

Despite the strong and uniform pressure put on the Senate by the Hate Crimes Coalition to vote for a hate crimes bill that included gender identity in 2005, the bill’s primary sponsor, Senator Edward Kennedy, was still reluctant to change the bill’s language. Kennedy’s office provided two reasons for his reluctance: (1) fear of losing momentum for the bill’s passage, and (2) belief that “actual or perceived gender” would be sufficient to cover hate crimes against transgender people.<sup>19</sup> In fact, after a while, Kennedy’s office staff began to resist scheduling any more meetings with LGBT advocates about this issue.<sup>20</sup> Thus, in 2006, the Task Force and NCTE asked allies at the National Organization of Women to schedule a meeting with the Senator’s office to speak about the bill and asked that they be allowed to bring additional organizational representatives. By this time, educational efforts directed at the Hate Crimes Coalition had worked; nearly every LGBT organization, in addition to several non-LGBT organizations, strongly supported adding gender identity to the bill. In the Senate meeting, the leading voices on gender identity inclusion (the Task Force, PFLAG, and NCTE) were able to remain in the background while more than twenty organizations implored the Senator’s staff to update the bill’s language to include gender identity. When the bill was introduced in the next session, the Senate bill

contained gender identity.<sup>21</sup>

Beginning in 2001, the motivation to add gender identity to the hate crimes bill was driven primarily by the assumption that its inclusion would pave the way for inclusion of gender identity in the Employment Non-Discrimination Act. It was thought by the core group of transgender/allied advocates at the time and even today that ENDA, if passed, would do much more to combat the violence that transgender people face than passage of the federal hate crimes bill.<sup>22</sup> Because of rampant employment discrimination, many transgender people are homeless and/or make a living on the streets, which puts them at much higher risk for violence.<sup>23</sup> It was believed that ensuring that transgender people have access to employment opportunities, specifically traditional employment, was a more important, lifesaving, aim.<sup>24</sup>

## THE POTENTIAL COSTS OF HATE CRIMES LAWS

A handful of scholars and activists have published articles that question or criticize hate crimes laws in general, most often focusing on penalty enhancement provisions.<sup>25</sup>

### General Opposition to Hate Crimes Laws

In 2001, the American Friends Service Committee (AFSC) published a working paper<sup>26</sup> calling into question the wisdom of state hate crimes bills and the federal hate crimes proposal. In doing so, they stated that advocates should consider the “probable unintended harmful consequences of many hate crimes laws . . . that compound rather than counteract the systemic violence of racism, misogyny, homophobia, poverty, and economic exploitation.”<sup>27</sup>

Noting that “the U.S. criminal jus-

tice system . . . is itself a key institutional perpetrator of violence and hatred and is responsible for massive abuses of civil and human rights,”<sup>28</sup> the AFSC explained the risk that hate crimes laws, most notably sentence enhancement laws, potentially pose:

For hate crimes, no empirical data is available that correlates sentencing outcomes with race and economic status of victims of perpetrators. In other areas of criminal justice policy, however, a great deal of data is available—and it demonstrates that racial and class bias by police, prosecutors, and courts is the most important fact in determining who receives the longest prison sentences. Again, we see no reason to assume the system will operate differently when it comes to hate violence. For all of these reasons, AFSC believes that penalty enhancements are a dangerously misguided response to the problem of hate violence, and we find ourselves unable to support legislation that utilizes such an approach.<sup>29</sup>

They continue:

In almost every instance, the underlying offense of a hate crime—whether threat, malicious intimidation, assault, or murder—is already subject to criminal penalties. Penalty enhancements, which almost invariably involve longer sentences, have been widely favored as the best way to signal the seriousness of hate violence and to recognize the harm it does to the larger community as well as the individual victim. In an ideal world, such an approach might be defensible. In

the real world of the U.S. criminal justice system, however, whenever penalty enhancements have been enacted to underline the seriousness of certain types of offenses, they are not applied against those responsible for causing the greatest harm. Instead, they are overwhelmingly applied to defendants with the fewest resources: the least access to counsel, the least sophistication about the system, and not coincidentally, the least social status (that is, the least human value) in the eyes of prosecutors, judges, and juries. In other words, poor people, people of color, and youth.<sup>30</sup>

They further note that hate crimes laws may have the opposite effect on those who are incarcerated for longer sentences:

Penalty enhancements are equally if not more likely to make our communities more dangerous, given that current conditions in U.S. prisons are so violent and dehumanizing that many people return to the community more filled with uncontrollable rage than when they entered the system.<sup>31</sup>

### Specific Opposition to Hate Crimes Laws from the Transgender Community

Opposition to hate crimes laws has been voiced by the transgender community. Based in large part on the AFSC report, the Sylvia Rivera Law Project (SRLP), an organization based in New York City that works for transgender people with an emphasis on those most marginalized, put out a much stronger statement in opposition to the federal

hate crimes law in 2009 after its passage. In it, the organization stated:

What hate crimes laws do is expand and increase the power of the same unjust and corrupt criminal punishment system. Evidence demonstrates that hate crimes legislation, like other criminal punishment legislation, is used unequally and improperly against communities that are already marginalized in our society. These laws increase the already staggering incarceration rates of people of color, poor people, queer people and transgender people based on a system that is inherently and deeply corrupt.<sup>32</sup>

An even more forceful critique came from scholar and activist Professor Dean Spade, one of the founders of SRLP and a member of SRLP when the above statement was made. Spade published a book in 2012 entitled *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of the Law*,<sup>33</sup> which criticizes the transgender movement’s focus on both hate crimes and nondiscrimination laws. With regard to hate crimes laws, he asserts:

- That hate crimes laws create “primarily symbolic change” that do nothing to stop hate crimes.<sup>34</sup>
- They “co-opt the fear, grief, and rage of trans communities at the high levels of violence we face and the low worth our lives are given into the project of expanding a system that targets us.”<sup>35</sup>
- The federal hate crimes law “provides millions of dollars to enhance police and prosecutorial resources, which increases the amount of harm police can

direct at people of color and other marginalized communities.”<sup>36</sup>

- Advocates for these laws “participate in the false logic that criminal punishment produces safety, when it is clear that it is actually the site of enormous violence. Criminal punishment cannot be the method we use to stop transphobia when the criminal punishment system is the most significant perpetrator of violence against trans people.”<sup>37</sup>
- “Hate crimes laws do nothing to prevent violence against transgender people, but instead focus on mobilizing resources for criminal punishment systems’ response to such violence. Because trans people are frequent targets of criminal punishment systems and face severe violence at the hands of police and prisons every day, investment in such a system for solving safety issues actually stands to increase harm and violence.”<sup>38</sup>

### Initial Analysis of the Critiques of, and Potential Harms Caused by, Hate Crimes Laws

Collectively, critics of hate crimes laws make five arguments against these laws: (1) people of color, and those with low income, are likely to be targeted by these laws for prosecution; (2) hate crimes laws increase the resources available to law enforcement, empowering them to do more harm to marginalized communities; (3) sentence enhancement makes those imprisoned leave prison with increased rage and thus more likely to commit more violent crimes; (4) hate crimes laws do not result in a

decrease in hate crimes; and (5) supporting these laws lends credibility to law enforcement as an appropriate societal response to crime in general, as opposed to law enforcement being viewed as a perpetrator of crimes itself.

It is important to note that, with regard to the first and second concrete harms listed above, some critics of hate crimes laws, notably SRLP, have stated that such laws are enforced in a manner that leads to the incarceration of more people of color and other marginalized people (the first harm). AFSC and Professor Spade make a different argument, contending that these laws cause *resources* to be invested in the criminal system, which in turn makes the system more capable of inflicting harm on marginalized groups (the second harm).

The first asserted harm, that people of color are disproportionately prosecuted under these laws, was asserted by SRLP but not Spade or AFSC. In fact, AFSC noted itself that there is no data on the question of whether or not *hate crimes* laws are used disproportionately against people of color. Transgender and allied advocates were skeptical that it was actually the case that people of color were disproportionately prosecuted under hate crimes laws. To analyze this potential harm objectively, one could design a study of all of the prosecutions under state and federal laws; such research is beyond the immediate scope of this paper. However, whether the previously existing hate crimes statute, enacted in 1968, was used disproportionately against people of color and others can be more easily examined. The provisions of 18 U.S.C. 245 [hereinafter “Section 245”] concerned crimes based on race, religion, and national origin. For this article, I researched twenty-seven cases brought under Section 245, which represent all cases brought between 1992 and

1997.<sup>39</sup> The results showed that only 8 percent of the defendants were people of color, while 92 percent were White or probably White.<sup>40</sup> Thus, for at least that five-year period, Section 245 was not used disproportionately against people of color, given that 30.6 percent of the general population were people of color at the time of the 2000 Census.<sup>41</sup> Whether Section 245 was used disproportionately against those who were of low income generally is not easily detectable without undergoing a major research study.

Furthermore, one of the lesser-known facts about Section 245 is that it was not used often—on average, four to six times per year, and never more than ten times per year.<sup>42</sup> Advocates expected that the hate crimes bill would mean just a few more federal prosecutions per year, because it was meant as a back stop to local and state authorities when they do not or cannot take appropriate action to address bias-motivated crime.<sup>43</sup>

The second harm, that more resources are provided to law enforcement through these laws, which in turn will harm people of color, is evaluated in Part II of this series, as this is an easily measurable potential harm that can be assessed by examining the funding granted through the law. To fully understand the magnitude of this harm, however, it is important to understand that Spade, SRLP, and AFSC are correct that the U.S. criminal justice system has inherent racial and economic bias and that increases in funding available to law enforcement likely does increase law enforcement’s ability to harm people of color, transgender people, and other marginalized communities.<sup>44</sup>

The third harm, that those subjected to sentence enhancement would leave prison more likely to commit additional violent crimes—potentially

hate-motivated crimes—is more difficult to directly measure. In Part II, it is explained that the law was primarily not about sentence enhancement, with only one minor part that had a sentencing enhancement aspect. Canadian researchers conducted a major study in 1999 on how the length of time in prison affects recidivism rates by reviewing the extant literature, much of which was based on research in the United States. They concluded that a longer sentence results in a 2-4 percent increase in recidivism rates.<sup>45</sup>

The fourth critique is less of a cost than an observation. Professor Spade and others made forceful arguments that these laws do not deter crimes in any real way.<sup>46</sup> According to Mara Keisling, she and other advocates never expected the hate crimes bill to lead to a discernible decrease in hate crimes; she saw the main positive direct effect on hate crimes to be the data collection and police training/awareness required by the bill, which are described in Part II. Indeed, advocates were careful to not say that the law would lead to a decrease in hate crimes.<sup>47</sup>

The fifth critique—that is, supporting these laws lends credibility to the law enforcement system, which allows law enforcement to continue to disproportionately target marginalized communities without public awareness of the injustice—is relatively theoretical. Spade and AFSC’s critiques explain that there are alternatives to the criminal justice system, such as community processes for healing and mediation that do not resort to imprisonment as the primary means of dealing with violent crime. Since the criminal justice system, as we know it, is not going to be eliminated in any real way for the foreseeable future, and there is no active debate in this country about eliminating it as a legitimate societal institution,

the marginal harm of lending it more legitimacy would seem to be small.

## CONCLUSION

Here, in Part I, I have endeavored to provide a balanced overview of the critiques of scholars and activists about hate crimes legislation and the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act. I then provided initial analyses of these critiques showing that they are less powerful than they appear at first glance, including to those who have a thoughtful and strong belief system that includes the awareness of the race and class bias in the current U.S. criminal justice system.

In Part II of this article (forthcoming), I will describe the bill's provisions and intended and actual effects and analyze these from a progressive, social justice viewpoint. This includes the creation of new federal jurisdiction for potential federal prosecution of anti-transgender crimes, federal financial and technical assistance authorized by the bill to be given to local law enforcement authorities, expansion of federal mediation services, expansion of statistics collection and law enforcement training, sentencing enhancement, cultural awareness created by the bill, and the political effect on gender identity inclusion in other legislation of unambiguous benefit to the transgender movement such as the Employment Non-Discrimination Act.

Lisa Mottet is the deputy executive director of the National Center for Transgender Equality in Washington, DC, after having served for thirteen years as the director for the Transgender Civil Rights Project at the National Gay and Lesbian Task Force, where she worked on local, state, and federal legislation and policy. Mottet is a coauthor of the "2011 National Transgender Discrimination Survey," the groundbreaking study of transgender people's experiences in the United States. Mottet graduated from Georgetown University Law Center in 2001, where she was an editor of the *Georgetown Journal of Gender and the Law*.

## ENDNOTES

- 1 The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act was signed into law by President Barack Obama in 2009, as an amendment to the National Defense Authorization Act for Fiscal Year 2010, H.R. 2647, 111th Cong. (2009). It can be found starting on page 646 of the enrolled bill.
- 2 In 2001, I founded the Transgender Civil Rights Project at the National Gay and Lesbian Task Force with initial funding provided by a two-year fellowship with the Equal Justice Works Foundation. Until 2013, I was the sole full-time staff person on the project, deeply involved in developing the strategy to ensure that gender identity was included in the federal hate crimes law. Since the law's passage, I have worked directly with the Federal Bureau of Investigation (FBI) to shape training of law enforcement on these issues. Because of my central role as an advocate, I have a first-hand understanding of the nuances of the intended and the actual effects of the law; this experience also puts me at risk for bias. In this article, I try diligently and objectively to describe the provisions of the law and the facts concerning its implementation, leaving my opinions aside. Today, I serve as the deputy executive director of the National Center for Transgender Equality (NCTE).

3 Throughout this article, I refer to the hate crimes bill (before passage) or to the law (after passage). The bill's content stayed generally the same from the time it was introduced in 1997 through its reintroduction every two years in both the Senate and the House; however, the name changed several times. It was known as the Hate Crimes Prevention Act, the Local Law Enforcement Enhancement Act, the Local Law Enforcement Hate Crimes Prevention Act, and finally, the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act.

4 The first version was introduced by Senator Edward Kennedy in the Senate (S. 1529) in the 105th Congress and then-Representative Charles Schumer in the House (H.R. 3081) in November 1997.

5 Interview with Michael Lieberman, general counsel, Anti-Defamation League, by author, on 13 December 2012.

6 While on the state and local level, the Task Force and other advocates have pushed for "gender identity or expression," a decision was made to use the seemingly more limited term "gender identity" in federal legislation. This decision was based on a calculation of the legal implications of using the term "expression." Advocates were concerned that as courts determined what was meant by "expression" in hate crimes and other statutes, that could limit the interpretation of the term as used in the First Amendment of the Constitution, or vice versa.

7 Lisa Weiner-Mahfuz supported this effort as staff at PFLAG National.

8 Mara Keisling was involved before she started NCTE as one of a handful of trans activists engaged in federal advocacy, though without a staffed organization.

9 I prepared, in 2002, a memorandum explaining that "actual or perceived . . . gender" was not sufficient to guarantee coverage of anti-transgender hate crimes because most courts interpreting "sex" and "gender" in federal statutes had, at that time, determined that transgender people were not covered by these terms. Today, the case law is much more positive on this legal question, although not so positive that this language would guarantee coverage.

10 Creating legislative history would help courts conclude that transgender people were covered, but would not guarantee coverage. However, it was important to make sure this legislative history was created in case efforts to add gender identity failed. Thus, I worked with Senator Kennedy's and Senator Gordon Smith's offices to get stories of anti-transgender violence in the record, on the floor, and in committee reports. Committee on the

Judiciary, Local Law Enforcement Act of 2001, S. Rep. No. 107-147 (2002) (mentioning anti-transgender crimes several times and providing an example of an anti-transgender crime as a reason the bill was needed). Compare this to the 1998 Senate Hearing Report, with transgender used only twice, in a footnote that cited two reports that included transgender as part of their titles. S.J. Res 1529, A bill to enhance federal enforcement of hate crimes, Hearing Before the Committee on the Judiciary, 105th Cong., S. Hrg. No. 105-904 (1998).

11 To quantify the membership of the Hate Crimes Coalition is difficult, because there is no official membership list. According to Michael Lieberman, cochair of the Hate Crime Coalition, there are representatives from dozens of organizations on the e-mail list, and more than three hundred national organizations endorsed the legislation. In my personal experience since 1999, approximately thirty organizations regularly attend meetings.

12 The local speakers were affiliated with Transgender Health Empowerment, a community organization that had recently been founded to primarily support transgender African Americans using funding from

HIV-prevention grants.

13 Hate Crime Violence: Hearing of the Committee on the Judiciary, House of Representatives, 106th Congress 102 (1999).

14 Interview with Congressman Barney Frank by the author, 20 December 2012.

15 While the definition of gender identity agreed to at that time was sufficient for hate crimes purposes, it is inappropriate for nondiscrimination legislation and should not be replicated elsewhere. The definition included in the bill is as follows: "gender identity" means actual or perceived gender-related characteristics." This language is acceptable in the context of hate crimes because such crimes are usually triggered by a gender-related characteristic of the victim, such as identity, appearance, mannerism, dress, or physical characteristics. However, in the context of discrimination, this language is not sufficient because it is anticipated that the highly paid corporate defense attorneys would be able to convince judges that the employer was not basing its discrimination against a transgender person on the basis of "gender-related characteristics."

16 Children's Safety Act of 2005, H.R. 3132, 109th Cong. (2005); National Gay and Lesbian Task Force. "Task Force Hails Historic First—House of Representatives Votes to Extend Protections for Lesbian, Gay, Bisexual and Transgender People." Task Force press release, 14 September 2005.



17 Statement delivered in person and via facsimile. “House Vote Creates Historic Opportunity for Hate Crimes Legislation this Congress,” 2005, on file with author. Signatories were: American Association of People with Disabilities; American Association of University Women; American Civil Liberties Union; American Humanist Association; American Jewish Committee; American-Arab Anti-Discrimination Committee; Anti-Defamation League; Asian American Justice Center; Children of Lesbians and Gays Everywhere; DignityUSA; Disciples Justice Action Network (Disciples of Christ); the Episcopal Church; Equal Partners in Faith; Equality Federation: Statewide Advocates for LGBT Justice, Family Pride Coalition; Gay, Lesbian and Straight Education Network; the Interfaith Alliance; International Foundation for Gender Education; Japanese American Citizens League; Log Cabin Republicans; Mautner Project (The National Lesbian Health Organization); National Association of LGBT Community Centers; National Association for the Advancement of Colored People (NAACP); National Black Justice Coalition; National Center for Lesbian Rights; National Center for Transgender Equality; National Coalition for the Homeless; National Coalition of Anti-Violence Programs; National Council of Jewish Women; National Gay and Lesbian Task Force; National Latino/a Coalition for Justice; National Organization for Women (NOW); National Stonewall Democrats; National Transgender Advocacy Coalition; New York City Gay & Lesbian Anti-Violence Project; People for the American Way; PFLAG: Parents, Family & Friends of Lesbians and Gays; Presbyterian Church (U.S.A.); Pride at Work (AFL-CIO); Sikh American Legal Defense and Education Fund; Transgender Law Center; Transgender Law and Policy Institute; Unitarian Universalist Association of Congregations; United Church of Christ Justice and Witness Ministries; United States Student Association; and the Woodhull Freedom Foundation.

18 As a technical matter, the Senate never passed H.R. 3132, but instead passed a similar second child’s safety bill, H.R. 4472 (Adam Walsh Child Protection and Safety Act of 2006), that passed the House without hate crimes legislation attached to it.

19 Interview with Mara Keisling, by author, 20 December 2012.

20 Ibid.

21 Senate Bill 1105 was introduced on 12 April 2007 by Senator Kennedy and the other lead sponsors.

22 The core group included the National Gay and Lesbian Task Force, PFLAG, National Organization for Women, and NCTE. Interview with Mara Keisling, by author, 20 December 2012.

23 According to the National Transgender Discrimination Survey (NTDS), 16 percent turned to sex work or other criminalized activity in order to earn an income due to the discrimination they face as transgender people. Grant, Jaime M. 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.

24 Employment discrimination is rampant: 26 percent of transgender people have lost a job due to anti-transgender bias, 50 percent have experienced harassment at work, and 44 percent were not hired due to bias. Due to this severe discrimination, the transgender community sees a federal law prohibiting discrimination as a top policy priority. *Ibid.*

25 The American Friends Service Committee (AFSC) notes it is particularly concerned with “the central role of penalty enhancements” in hate crimes legislation. AFSC. *In a Time of Broken Bones: A Call to Dialogue on Hate Violence and Limitations of Hate Crimes Laws*. AFSC, 2001, 7.

26 AFSC, *Broken Bones*.

27 *Ibid.*, 7.

28 *Ibid.*, 8.

29 *Ibid.*, 18.

30 *Ibid.*

31 *Ibid.*

32 Sylvia Rivera Law Project (SRLP) Web site. “SRLP on Hate Crimes Laws.”

33 Spade, Dean. *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of the Law*. South End Press, 2012.

34 Spade, *Normal Life*, 56.

35 *Ibid.*, 156.

36 *Ibid.*, 89.

37 *Ibid.*, 90.

38 *Ibid.*, 36.

39 These cases were taken from the written submission of Eric Holder, Deputy Attorney General. S.J. Res 1529, A bill to enhance federal enforcement of hate crimes, Hearing Before the Committee on the Judiciary, 105<sup>th</sup> Cong., S. Hrg. No. 105-904, 68-71 (1998). These are all of the cases from fiscal years 1992-1997. This period of time is not entirely random because it was mostly during the Clinton administration. A longer list of all cases, dating back to 1969, was also available (at pages 80-88); however, this list included few details, making it nearly impossible to track down their facts. With the shorter list, I success-

fully identified the facts of the cases using online research tools.

40 Analysis available from the author. Those identified as White by the court or media sources, as well as supremacists or skinheads, were counted as White. Where information was not available, surname research was used to determine the probable race of the defendant, in combination with the facts of the incident, to come to a relatively reliable conclusion. Fifty-five percent were identified as White, 32 percent were almost assuredly White, and 5 percent were likely White.

41 Catalyst. *People of Color in the U.S.* Catalyst, 2009.

42 Committee on the Judiciary: Local Law Enforcement Enhancement Act of 2001, Sen. Rep. No. 107-147, 10 (2002) (“As stated above, it is both the intent and the expectation of Congress that the enactment of the Hate Crimes Act will result in only a modest increase in the number of hate crimes prosecutions brought by the Federal Government. In the more than 30 years since 18 U.S.C. 245 was enacted, the Federal Government, on average, has prosecuted four hate crimes a year.” See also Statement of Eric Holder, Deputy Attorney General, S.J. Res 1529, A bill to enhance federal enforcement of hate crimes, Hearing Before the Committee on the Judiciary, 105<sup>th</sup> Cong., S. Hrg. No. 105-904, 7 (1998) (“Now, I truly want to emphasize that State and local law enforcement agencies would continue to play the primary role in the investigation and prosecution of all types of hate crimes. From 1992 through 1997, the Department of Justice brought a total of 33 Federal hate crimes prosecutions under 18 U.S.C. Section 245, an average of fewer than 6 per year. We predict that the enactment of the Hate Crimes Prevention Act of 1998 would result in only a modest increase in the number of hate crimes prosecutions brought each year by the federal government.” See also Statement of Michael Lieberman, Matthew Shepard Hate Crimes Prevention Act of 2009: Hearing Before the Committee on the Judiciary, S. Hrg. No. 111-33, 36 (“In no year from 1968-2009, were there ever more than 10 indictments under 18 USC 245.”).

43 Interview with Mara Keisling, by author, 20 December 2012.

44 One objective study that demonstrates the chronic, widespread racial bias in the U.S. criminal justice system found that there is racial bias in sentences with young Black males being given harsher sentences than similarly situated White males. U.S. Sentencing Commission. *Demographic Differences in Sentencing*, Booker Report 2012: Part E. U.S. Sentencing Commission, 2012. The problem of bias and violence against transgender people interacting with police and the criminal

justice system more generally is also well documented. Overall, 7 percent of transgender people report being arrested or held in a cell due solely to police bias against transgender people, with 41 percent of Black transgender respondents and 21 percent of Latino or Latina respondents reporting the same. In prison, transgender people report being harassed more by correctional officers than their peers (37 versus 35 percent). National Transgender Discrimination Survey, 158.

45 Gendreau, Paul, Claire Goggin, and Francis T. Cullen. *The Effects of Prison Sentences on Recidivism User Report: 1999-3*. Public Works and Government Services Canada, 1999.

46 Spade points out that those interested in committing crimes do not consult law books and decide not to commit a hate crime because the sentence is longer. Spade, *Normal Life*, 87.

47 Interview with Mara Keisling, by author, 20 December 2012.

# Homosexuality in Sudan and Egypt

## *Stories of the Struggle for Survival*

By Susanna Berkouwer, Azza Sultan, and Samar Yehia

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### ABSTRACT

Egyptian and Sudanese legal systems and societies have long led to discrimination and violence against homosexuals. Through a series of anecdotes, this article explores the daily struggles faced by individuals in these conservative and largely Muslim societies. We look for the sources of the discrimination and violence they confront, and we acknowledge that much is rooted in societal gender and sexual norms. Therefore, we question whether regional political change following the Arab Spring will necessarily transform the societal circumstances for homosexuals in the near future. Nonetheless, we remain optimistic that change is possible, provided LGBT rights advocacies maintains support internationally, nationally, and within their local communities.

In order to protect the privacy of the individuals involved, some of the names in this article have been changed.

Gay and lesbian Sudanese and Egyptians struggle daily to cope with the constant fear, discrimination, and physical abuse that they and their peers face, harboring a relentless feeling of hopelessness in the face of a relatively conservative society with a majority Muslim population and traditional societal gender roles. We describe the discrimination and abuse that these communities commonly face and analyze what causes such systemic prejudice against this particular minority.

While the legal and political systems of both Egypt and Sudan have contained homophobic elements for decades, we find that much of the discrimination is rooted in private, social, and religious beliefs held by the majority of the population. We do not attempt to predict whether political Islam will intensify or subside in the near future as a result of the Arab Spring. However, we worry that discrimination and abuse against sexual and gender minorities in Egypt and Sudan will continue regardless of

the political outcome. Lesbian, gay, bisexual, and transgender (LGBT) organizations like Bedayaa, which work hard to empower their communities and fight for social change, nonetheless provide hope that a public fight for LGBT rights may one day be possible.

Homosexuality is a complex topic in Sudanese society. Due to social norms and prevailing constructs of femininity and masculinity in society, it is considered socially unacceptable by the overwhelming majority of the population. Few people dare talk about it publicly, because doing so would likely lead to personal attacks from members of society at large. Many Sudanese fail to understand the emotional roots of homosexuality and gender diversity, viewing them instead as physical illnesses. They tend to associate homosexuality with sexual harassment and pedophilia, which makes it nearly impossible to discuss it from social, legal, and human rights perspectives. Frequent stigmatization and discrimination have made homosexuals invisible; consequently, they often lack access to basic rights including personal security, legal protection, health care, and social acceptance.

Several organizations are working to tackle issues related to sexual orientation and gender identity in Sudan, two of which focus exclusively on LGBT rights. Freedom Sudan, formed in December 2006, was the first Sudanese LGBT association. The second is the Bedayaa organization for LGBTQI (lesbian, gay, bisexual, transgender, queer, and intersex) in the Nile Valley region of Egypt and Sudan, which was created in July 2010 by volunteers who recognized the similarities between the struggles in these two countries, particularly in regard to criminalization, religious prohibition, and cultural perception of homosexuals. Bedayaa seeks to help LGBTQI people live a life free of

discrimination and stigma and believes that the best way to tackle societal LGBTQI rights issues is to confront them within their community first. Like their peers, members of this community grew up harboring negative feelings regarding homosexuality, and they struggle to reconcile their sexual orientation with societal norms. Bedayaa's strategy is to build an active and self-motivated LGBTQI movement in the region by empowering members to accept themselves for who they are and to promote that acceptance among their friends and acquaintances.

Because many problems affecting the homosexual community are rooted in a lack of education, Bedayaa has in the past hosted workshops to discuss gender and sexuality issues, mobile sexual awareness workshops for low-income community members to spread knowledge about health and well-being, and a series of movie nights where gays and lesbians discussed current issues and shared their personal experiences in an open and supportive environment. Given that tackling the unique issues facing gays and lesbians in Sudan and Egypt will require collaborative efforts, Bedayaa continues to connect with individuals and organizations at the local, regional, and international levels, supporting LGBT rights for assistance and information. In keeping with this spirit, Bedayaa encourages anybody who feels motivated by this piece to reach out to the organization.

### ISLAM AND SHARI'A LAW

Religious influence plays an important role in the rejection and prohibition of homosexuality. A number of scholars argue that the Qur'an encourages diversity under the reasoning that individuality and tolerance are all part of divine intent.<sup>1</sup> The Qur'an nonetheless explicitly condemns homosexual

behavior. In Chapter 26, Verses 165-166 of the Qur'an, Lut asks, "How can you lust for males, of all creatures in the world, and leave those whom God has created for you as your mates? You are really transgressing all limits." The Prophet Muhammad then adds, "Doomed by God is who does what Lot's people did [homosexuality]."<sup>2,3</sup> Other non-Qur'anic texts that have become part of the Muslim tradition, including *hadith* reports and *fiqh* decisions, often stigmatize Muslims who engage in homosexual acts and criminalize their actions. As a consequence, many Muslim authorities regularly assert that homosexual behavior is sinful and sick.<sup>4</sup>

Because of the strict adherence to the story of Lut in the Qur'an by the majority of Muslim clerics, Islamic Shari'a law prohibits homosexuality with a maximum punishment of death by stoning; as a result, Sudanese homosexuals frequently face persecution. A lesbian Sudanese woman is quoted in an article published by the Inter Press Service as saying, "Talk about lesbian or gay rights is illegal. We are not allowed to express our sexuality, partly because it is considered to be a foreign culture and partly because we lived in a Islamic-Catholic dominated society which does not allow people to live in the way they want." She went on to say, "The death sentence for gays or lesbians has been in the Islamic book of laws for years, since the teachings of the prophet [Muhammad] emphasizes that it is a duty of the Islamic state to eliminate sodomy, and those who are guilty of it should be punished by death."<sup>5</sup>

Not all Muslims interpret the Qur'an this way. Many homosexual Muslims seek to reconcile their faith with their sexual identities, and most ultimately do not see a contradiction between their faith and their sexual orientation. In fact, in the same way that

faith is a coping mechanism for dealing with poor living conditions, faith plays an important part in preserving hope and strength in the lives of many homosexuals. One community member reported relying on her Muslim faith in order to find the strength and courage to live honestly and openly.

The criminalization of homosexuality is a common element of political systems that base their legitimacy on Shari'a law. In Iran, the Islamic Penal Code subjects the perpetrators of same-sex crimes to the death penalty or, when committed by a minor, to receive lashes. Homosexuals and other sexual minorities are often victims of abuse and violence, and the state unofficially sanctions the harassment and abuse of homosexuals that members of society often engage in, according to a Human Rights Watch report released in 2010.<sup>6</sup> In the 2008 "Human Rights Report: Saudi Arabia," the U.S. Department of State notes that "sexual activity between two persons of the same gender is punishable by death or flogging" and describes numerous cases where citizens engaging in same-sex activities were arrested and given sentences of up to 7,000 lashes.<sup>7</sup>

The Criminal Code in Sudan is equally strict on this matter and explicitly states that same-sex sexual activity is illegal. Article 148 of the Sudanese Criminal Act of 1991 provides as follows:<sup>8</sup>

1. There shall be deemed to commit homosexuality, every man who penetrates his gland or the equivalent thereof in the anus of . . . another man's or permits another man to penetrate his gland or its equivalent, in his anus.
2. (a) Whoever commits the offence of homosexuality shall be

punished with 100 lashes and he may also be punished with imprisonment for a term not exceeding five years.

(b) Where the offender is convicted for a second time he shall be punished with 100 lashes and with imprisonment for a term not exceeding five years.

(c) Where the offender is convicted for a third time he shall be punished with death or with life imprisonment.

In 2002, the Sudanese government voted against the application by the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) for consultative status with the United Nations Economic and Social Council (ECOSOC).<sup>9</sup> In 2008, it voted against the UN declaration on sexual orientation and gender identity, signing a counterdeclaration stating that personal choices related to sexual orientation and gender identity extend "beyond the individual's sexual interest in copulatory behavior with normal consenting adult human beings, thereby ushering in the social normalization and possibly the legitimization of many deplorable acts including pedophilia."<sup>10</sup> Its actions in the framework of international law demonstrate that the Sudanese government does not consider LGBT rights to be human rights.

## SOCIAL DISCRIMINATION

Because of the importance of family and honor in Sudanese society, little is made public about homophobia in public reports or in the media in general. Yet the experience of many Sudanese homosexuals that Bedayaa interacts with is that the majority of their families and communities strongly condemn homosexuality.

Many do not consider the act of a male penetrating another male to be a homosexual act; usually only the man in the passive role of receiving penetration is considered to be engaging in a homosexual act. Azza Sultan, one of the authors of this article, recalls the story of Khalid, a thirty-eight-year-old Sudanese gay man, who was abused by two police officers in Khartoum in 2012. As he was returning home late at night, the police officers stopped him, pointed their guns at him and ordered him to perform oral sex on both of them for thirty minutes. This experience reinforces the idea that traditional gender roles, along with notions of power and control associated with masculinity, strongly influence which sexual roles are considered socially acceptable.

Social discrimination against homosexuals in Sudan is widespread, and the mere existence of anti-homosexual legislation poses psychological and social threats for Sudanese homosexuals. Many can recall incidents of police harassment against members of their community. In March 2012, the family of twenty-three-year-old Ahmed, one of the members of the Bedayaa community in Sudan, discovered that he was gay. His family locked him in his room for a month, separating him from the rest of the LGBT community and beating him in an attempt to convert him to heterosexuality. Ahmed ran away, but several months later his family found out where he was hiding. They convinced him to come back to Khartoum, pretending that they had accepted his homosexuality. Upon his return, Ahmed was killed by his brother.

The excerpt below was previously published by Bedayaa and Freedom Sudan on their and other online media outlets. In it, Ali, a cofounder and the former president of Freedom Sudan, recalls his own terrifying story. In April

2009, while Ali and eleven of his friends were at a private party in one of their homes, agents from the Sudanese intelligence agency raided their party, arrested them, and took them to an unknown location. Ali recalls how each of them was put in solitary confinement cells of 1.5 meters long and deprived of water and food for two days. Of his interrogation, Ali recalls the following:

They stripped me naked and they started to interrogate me. They asked me about . . . my friends, family, and political and LGBT association activities. They started to hit me. One of them put a pistol to my head and said, “I wish I can kill you right now.” They dragged me from my legs and tied me upside down, and they started hitting me with a metal stick all over my body. . . . They [stuck] the stick in my [anus] while laughing out loud, and asked me “Do you like it, do you want more?” I was screaming from pain, and I was bleeding from everywhere; urine came out. They did that until I lost consciousness.<sup>11</sup>

He remained there for almost four weeks and spent another three and a half months in prison. While waiting for the trial by which he was expecting to be sentenced to death, family members succeeded in smuggling him out of prison, and he was able to leave the country using a fake passport. Of Ali’s eleven friends, eight later received one hundred lashes each. The fate of the remaining three members, including Ali’s boyfriend, was never determined. This is but one of many cases that remain largely unknown except to the victims and their friends. Like Ali, many victims end up leaving their homes or the country out of shame and fear.

Even Sudanese homosexuals who have not faced persecution by police forces frequently encounter discrimination, verbal abuse, and physical abuse at home. Lesbians are frequently forced by their families to marry men, though Samar Yehia, one of the authors of this article, notes that many of her married lesbian friends have informal homosexual relations outside of their marriage. While Samar has been lucky to not have been forced into a marriage, she must live at home while she remains unmarried. Of Samar’s parents and six siblings, only her mother and two siblings know that she is a lesbian—her mother discovered her sexuality by opening text messages on her mobile phone. They confront her about it regularly:

I get all types of beating: slapping, hair pulling, kicking, belt, wire. The worst type is being beaten by leather whip. Whatever is available will be used on me if I get caught talking to one of my lesbian friends, or spend the weekend out of my room in the family house. My mother tells me I am sick. She tells me I disgust her; that there is nothing more disgusting than lesbians, and that she regrets giving birth to me. She will tell me that homosexuals were the first carriers of AIDS, and that God is punishing her by giving me the homosexuality disease. She says, “Stay away from your sisters; I don’t want them to be like you.” She tells me I’m disgracing the whole family and that I should be ashamed.

Samar explains that many Sudanese believe that the Sufi Sheikh can cure homosexuality. A Sheikh is a religious scholar and a community and spiritual leader of Sufism, which is a spiritual and philosophical school of

thought within Islam. It is believed that the Sheikh can use the Qur’an to cure people from their diseases by expelling the bad spirit, the devil, from the body. When a girl cannot find a spouse, it is common for her family to take her to the Sheikh so that she will be blessed and thereby find a suitable husband. Hoping to cure her daughter from the “disease” of homosexuality, Samar’s mother sought the help of their local Sheikh. Samar describes the experience as follows:

The Sheikh ordered me to burn sheets of penciled script and inhale the smoke twice a day. On our last visit he asked me if I had prayed that day, and I told him that I had not. He started fumbling around near his chair. I asked what he was looking for and he said he wanted his *tawse*—a long leather whip. I was shocked, as I knew what he would use this for. I was ordered to go to his sister’s abode next door and fetch it. I walked off in tears, feeling an overwhelming sense of pain, fear, and desolation. I left the Sheikh’s house and went home. All I could think of was to get as far away from this man as possible.

My mother was worried that I ran away permanently. I avoided any clashes with her. I never went back to the Sheikh, nor did my mother suggest any more visits—it was a truly harrowing experience. I wish society would give us a chance to live and love one and all.

A well-known incident took place in August 2010, when Alnezam Alaam, the Sudanese public order police, raided a private party celebrating the informal

wedding of two homosexual men in Khartoum, where several attendees were reportedly crossdressing. Since none of the attendees were caught engaging in any sexual acts, the charges against them were limited to breaking public morality codes by wearing feminine clothes, applying makeup, and dancing “in a womanly fashion.”<sup>12</sup> Reuters reported that nineteen of the attendees were flogged publicly with thirty lashes and fined, quoting a lawyer as stating that “public opinion and the media prejudged them and lawyers were too scared to come and defend them.”<sup>13</sup> The *Sudan Tribune* later reported the arrest of twenty-five people in Khartoum at the country’s first mixed-gender fashion show, where several male models wore unbuttoned Western outfits.<sup>14</sup> One of the men reported having been warned by the police that Islamic law allows for up to forty lashes for wearing indecent clothing. *Gay Star News* reported that in February 2013, nine men were arrested and beaten by Sudanese police for being gay, after a private gathering of gay friends was raided.<sup>15</sup> Police stated that the raid occurred in response to neighbors who were “angered” by the attire of several of the men, who were reported to be wearing women’s clothing or indecent underwear. These stories emphasize the strict gender roles in Sudanese society, which the government feels must be protected. With religious and legal endorsement of such norms, discriminatory and violent responses to incidents related to fashion and makeup by Sudanese police are common. Perhaps more worrisome is that Sudanese citizens and media encourage these acts of discrimination, suggesting that this is not merely a legal or political issue. These cases can be expected to continue until real social change takes place; more effort needs to be dedicated to changing the current stereotypes of

gender roles in Sudanese society.

Much discrimination and violence takes place in lower-income communities. Several members of upper-class communities, particularly in Khartoum, find greater freedom and space for dialogue on these issues. In part due to the social protection that wealth provides, Sudanese homosexuals from wealthier families are able to more freely organize or attend LGBT events than members from lower-income families. While these private events are rarely attended by non-LGBT people, the existence of an LGBT social scene is commonly acknowledged in the upper-class communities of Khartoum. Individuals who are wealthy enough to afford international travel acknowledge cooperation with and support from LGBT networks in countries like Lebanon and in the Middle East and Africa more broadly.

## POLITICAL CHANGE

Homosexuals in many Middle Eastern countries have suffered immensely through decades of oppression by secular and religious political systems. In Egypt, former President Hosni Mubarak and his administration were known to be intolerant of the gay community for much of their almost thirty-year rule. While the Mubarak regime was largely secular in comparison to many other Middle Eastern governments, it kept strong ties with its conservative base and the mainstream Muslim Egyptian society, partially in order to prove that the regime shared their traditional Muslim values. The regime was largely supported by society in targeting and jailing groups of gay people on numerous occasions.

In 2001, fifty-two gay men were arrested at a disco onboard the luxury cruise ship *Queen Boat* and accused of offending religious doctrine by practicing obscene behavior; many supported

the government's subsequent physical abuse, falsely justified by the claim that they were conducting medical examinations to determine whether the men had gay sex. The media contributed to this discrimination by naming those arrested, and many served extended prison sentences or performed hard labor. In 2004, Human Rights Watch reported that it knew of hundreds of gay men who had been harassed, arrested, and often tortured, frequently without trial, in the years leading up to the report.<sup>16</sup>

After decades in power, several regimes in the Middle East were dramatically overthrown by massive popular uprisings during the Arab Spring. The uprisings brought political change across many Arab countries and gave millions of people hope for greater freedom. But what will be the long-term outcomes of the popular protests that have shaken the region since the beginning of 2011 in terms of sexual freedom and gender equality? Will the Arab Spring bring change for Arab homosexuals?

Egypt succeeded in holding elections, but many Egyptians fear that many politicians who gained power do not believe in democracy. In a statement broadcast on YouTube, Abdel Moneim El-Shahat, the spokesperson of al-Da'wa al-Salafiya (the Salafist Call), one of Egypt's largest Sufi societies, said that democracy itself is *haram* (forbidden) and *kufr* (blasphemous).<sup>17</sup> The effects of the Arab Spring were magnified by the existence of Islamic organizations that, despite exerting strong influences throughout the country, existed without legitimate or recognized power throughout decades of secular dictatorship. As the Arab Spring intensified, Islamist groups organized themselves and assumed leadership roles. Today, homosexual Egyptians fear that societal values and beliefs will not change

soon—and if they do, that they will change toward conservatism rather than increase sexual and gender freedom. Because Islamic political systems have historically discriminated against homosexuals, members of this community should be concerned when the threat of religious fundamentalism appears to increase.

After the 25 January 2011 revolution, which witnessed the forced resignation of then-president Mubarak, the Muslim Brotherhood gained political power and influence. They won a majority of seats in the Shura Council, and their candidate Mohamed Morsi was elected president of Egypt. In December 2012, parliament passed a constitution declaring that Egyptian law should be grounded in the principles of Islamic law. Liberals feared that proclaiming Islam the state religion would set Egypt on a path toward conservatism and Shari'a rule of law. The Muslim Brotherhood continued to increase its power and influence until facing what has been deemed a military coup in June 2013.

During the revolution and while the Muslim Brotherhood was in power, physical and sexual violence against women and sexual minorities increased significantly and visibly. No reliable statistics on violence against homosexuals have been published by the UN or by any other international organization, but the societal construct of masculinity that contributes to widespread violence against women frequently purports to justify violence against male homosexuals, who are considered more feminine. The experiences of women who are harassed by police can therefore be compared with the experiences of homosexuals who find themselves in similar situations. A United Nations report released in April 2013 noted that 49 percent of Egyptian women experienced increased rates of harassment since the

revolution, with 44 percent stating that the rates had stayed the same and only 7 percent saying that their situations had improved.<sup>18</sup> This data is especially worrisome given the already high rates of sexual harassment in the country; in fact, 61 percent of women report having been subjected to rape.<sup>19</sup> The UN report further states that in nearly 20 percent of female sexual harassment cases, the only police "intervention" was the police officer actually contributing to the verbal and/or physical harassment.<sup>20</sup> Nonetheless, Egypt's Ministry of Interior reported 9,468 cases of harassment, 329 sexual assaults, and 112 cases of rape during 2012.<sup>21</sup> While high, these figures are significantly lower than UN estimates. Government statistics likely underestimate the true number of cases, as women frequently fear reporting harassment to the police because of consequences imposed by their families or by the police.

A 2012 survey collected by Bedayaa of 140 homosexuals in Egypt ages 18-35 years old living in different socioeconomic circumstances in Cairo, Alexandria, and other cities confirms that the high rate of violence against women is indicative of widespread violence against homosexuals. Of those surveyed, 80 percent reported having experienced verbal abuse, of which 49 percent reported having also experienced physical abuse. A majority of them felt that they could not live a normal life as a homosexual person in Egypt. The majority of people wanting to leave the country were from middle-class families, while those from the upper-class families generally did not want to leave. This is likely due to upper-class families holding more power within the government, and members of those families, regardless of sexual orientation, being less likely to face abuse or harassment, which is similar to the experiences of

homosexuals in Sudan.

While the Muslim Brotherhood is no longer in power, many Egyptian homosexuals fear that widespread religious conservatism will contribute to continued discrimination in the future. According to the Pew Research Center, 82 percent of Egyptian Muslims endorse the stoning of people who commit adultery.<sup>22</sup> Because adultery and homosexuality are referred to with similar language in many religious texts, groups who endorse this form of punishment are likely to display similar attitudes toward homosexuality. Because discrimination against homosexuals is rooted in traditional family values and religious beliefs of the Egyptian people rather than in the legal system alone, this fear is understandable. If political Islam gains power, the threat to the safety of Egyptian homosexuals is obvious. Even if the influence of Islam on the political landscape weakens, the existing social stigma and discrimination attached to homosexuality is unlikely to improve in the short term.

## LOOKING AHEAD

The Arab Spring has not yet caused political change in Sudan. Shari'a law is still firmly in place and the current president of Sudan has been in power for nearly twenty-five years. While the killing of a demonstrator by government security forces in September 2013 triggered a series of demonstrations by the Sudanese people against their government, these were met with force by the national army and failed to cause political change, resulting only in the arrest of hundreds of demonstrators. While the political future of Egypt remains uncertain, any government is likely to want to reach out to Egypt's conservative base and support long-held societal traditions and expectations, including limitations on sexual and gen-

der rights. Therefore, many Sudanese and Egyptian homosexuals feel hopeless in the face of daily rejection and discrimination without any prospect for improvement in the near future.

Nonetheless, some homosexual Egyptians are optimistic about the future. Egyptians started protesting against the Muslim Brotherhood after having stopped believing in many of the slogans that they used to appeal to a strongly Muslim public. Many Egyptians felt the Muslim Brotherhood failed to create the social justice and prosperity that they had promised with phrases like "Islam is the solution" and "the Qur'an is our constitution"; this culminated in the overthrow of the Muslim Brotherhood during the coup of 30 June 2013, with President Mohamed Morsi and many other top leaders currently in jail awaiting trial. Political liberals and Muslim moderates, strongly supported by the 9 percent of the population who are Coptic Christians, have been particularly vocal about their opposition to a potential transformation of the Egyptian state into an Islamic nation such as Saudi Arabia or Iran. Optimists therefore have reason to believe that cultural conservatism has been losing political influence in Egypt. Despite the present political instability in both Egypt and Sudan, Bedayaa has faith that the LGBT communities in these countries will continue to fight for their rights through empowerment, advocacy, and raising awareness. They hope that this determination will lead to a strong and active movement in the region that will continue its struggle with hope for a bright and promising future for LGBT Egyptians and Sudanese.

Susanna Berkouwer is a research fellow at the John F. Kennedy School of Government at Harvard University. She holds an MA in international and development economics from Yale University, where she also worked as a research assistant with Innovations for Poverty Action and was a teaching fellow for courses in poverty alleviation and natural resource economics. She worked in Egypt, South Africa, Kenya, and the United Kingdom before joining Harvard. She is particularly interested in issues in development economics, environmental economics, and political economy.

Azza Sultan is a Sudanese progressive activist who works on issues related to LGBTQI persons, women, and human rights in both Egypt and Sudan. Sultan is a cofounding member and chairperson of the Bedayaa organization for LGBTQI in the Nile Valley area of Egypt and Sudan, a group that works to foster greater acceptance of sexual orientation and gender identity issues in the Middle East and North Africa region.

Samar Yehia is a Sudanese woman living in Khartoum, Sudan. She has been an active member of Bedayaa Sudan since 2012, working within the media team. Her work falls within the educational arena and covers training and facilitating programs as well as raising awareness of issues in the community. She has extensive experience coordinating and liaising with members in Sudan and abroad. She has taken part in a number of meetings and events in the area including LGBT movie night, Bedayaa Saloon, International Day Against Homophobia (IDAHO), and gender and sexuality training.

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# Rethinking Kinship

## *A Strengths-Based Perspective on LGBTQ Foster and Adoptive Parents*

By Sarah Mountz

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### ABSTRACT

This article examines and dismantles the body of claims used to exclude lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals from fostering and adopting children. LGBTQ individuals continue to face stigma and discrimination in the United States, including in the child welfare system, which significantly shapes their views of family and society. These experiences of marginality may actually enhance their capacity as adoptive and foster parents. Rejection from families of origin has sometimes led LGBTQ people to establish kinship networks or “families of choice.” This ideological approach to creating family may enhance the flexibility and openness that are trademarks of exceptional adoptive and foster parenting.

This article examines and dismantles the body of claims used to exclude lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals from adopting and fostering children through the public and private child welfare systems. With hundreds of thousands of children in the child welfare system in the United States, prospective LGBTQ adoptive and foster parents can provide a supportive and loving family to children desperately in need of a stable home environment. However, evidence indicates that LGBTQ adoptive and foster parents are all too often discriminated against based on their sexual orientation or gender identity. This discrimination occurs both for-

mally through laws prohibiting LGBTQ individuals from serving as adoptive and foster parents, as well as informally through exclusionary policies and behaviors from anti-LGBTQ service providers. While many policy makers and child welfare agencies have taken steps to ensure equal access and nondiscrimination in adoption and foster parenting for LGBTQ individuals, the continued discrimination and exclusion of LGBTQ would-be adoptive and foster parents denies thousands of children a loving home environment based on factors that have no bearing on a parent’s ability to care for a child (i.e., their sexual orientation and gender identity).

This paper argues that LGBTQ

individuals' experiences of marginality ultimately shape their views of family and society. It further argues that this may actually serve to enhance their capacity as adoptive and foster parents to children whose lives are often characterized by an experience of marginality or pervasive feelings of "otherness." Additionally, the kinship networks, or "families of choice," that LGBTQ people frequently forge to buffer the impact of alienation from families of origin, in conjunction with historical legal exclusion from marriage and mainstream discourse around the nuclear heterosexual family, afford these potential parents the flexibility and openness to embrace creative conceptualizations of family that are trademarks of exceptional adoptive and foster parenting.

## LGBTQ PARENTS AND THE CHILD WELFARE SYSTEM IN THE UNITED STATES

As of 2013, there were nearly 400,000 children in the child welfare system in the United States.<sup>1</sup> Over 100,000 of these children were awaiting permanent placement amidst a scarcity of homes and resources.<sup>2</sup> LGBTQ parents are currently raising an estimated 65,000 adopted children, or 4 percent of the 1.6 million adopted U.S. children.<sup>3</sup> Approximately 14,000 children, or 3 percent of all foster children, currently live with LGBTQ parents.<sup>4</sup> Same-sex foster parents are more likely to be families of color than heterosexual married foster parents.<sup>5</sup> LGBTQ parents have also demonstrated a greater willingness than heterosexual parents to adopt children with special needs.<sup>6</sup> These patterns are significant given that both youth of color and youth with special needs are disproportionately represented in the child welfare system and face heightened barriers to permanency as

compared to the general population of foster youth.<sup>7</sup> Understanding how youth and families of different backgrounds and orientations (e.g., LGBTQ families) come to interface with the child welfare system is also critical to envisioning collective solutions to broader problems within the system.

Data from the U.S. Census reveals that married heterosexual couples raising their biological children together only comprise about 22 percent of households.<sup>8</sup> This indicates that a "traditional" conceptualization or standard of the American family characterized by a mother, father, and their progeny is largely nonexistent. The persistence of this ideal stigmatizes children with an LGBTQ parent as well as children in other family configurations that fall outside the nuclear married heterosexual family model. Same-sex romantic and sexual relationships very rarely result in children who are genetically connected to multiple biological parents in a romantic or sexual relationship with each other. Therefore, understanding LGBTQ parents' motivation for becoming parents and experiences of creating families requires a more expansive understanding of family than current policy and ideology generally afford.

In contemporary U.S. society, the White, male-headed, heterosexually grounded nuclear family is held as the gold standard in models of union and family. Therefore, it is not surprising that LGBTQ people have been pushed to the margins within public policy. This loss of status and privilege within notions of family and romantic union—in conjunction with not uncommon estrangement, fracture, or distance from families of origin—has resulted in the establishment of kinship networks, or families of choice, among many LGBTQ people.<sup>9</sup> Historically, society has long valued kinship, or extended family

networks, as viable family structures outside of Western dominant cultural norms. The reification of nuclear family structures grounded in genetic connection has resulted in the marginalization of many families whose configuration is nonnuclear or nongenetic. In addition to LGBTQ families, these families include single-headed households, cohabiting nonmarried couples, multi-generational households, and various other kinship arrangements that fall outside of Eurocentric and heterosexual norms.<sup>10</sup>

## BARRIERS TO LGBTQ FOSTER AND ADOPTIVE PARENTING

### De Jure Restrictions

Discrimination against LGBTQ people rooted in homophobia and transphobia manifests throughout the child welfare system in the United States.<sup>11</sup> Within the United States, five states explicitly prohibit same-sex couples from jointly adopting (Louisiana, Mississippi, Michigan, North Carolina, and Utah); six states explicitly restrict same-sex couples from accessing second-parent adoption (Kentucky, North Carolina, Nebraska, Ohio, Wisconsin, and Utah); two states restrict fostering by LGBTQ parents (Utah and Nebraska); and policy makers in seven states (Alabama, Kentucky, Indiana, Tennessee, Texas, Virginia, and Arkansas) have unsuccessfully attempted to institute bans on fostering and adoption by LGBTQ people.<sup>12</sup> Laws like these contribute to a child welfare crisis in which there are currently insufficient adoptive and permanency resources to meet the needs of over 100,000 children waiting to be placed in an adoptive or foster parent home.<sup>13</sup>

### De Facto Restrictions

In addition to state laws that formally exclude LGBTQ individuals from serving as adoptive and foster parents, informal practices of exclusion and bias deny prospective foster and adoptive parents access to the child welfare system. This kind of discrimination most often occurs when service providers assess prospective parents to have children placed in their care.

Informal exclusion takes a variety of forms, ranging from mild discriminatory practices to explicit prohibition and outright denial of services based on an individual's sexual orientation or gender identity. For example, in a qualitative analysis of one agency's practices with regard to LGBTQ prospective adoptive and foster parents, Devon Brooks and Sheryl Goldberg found that child welfare agencies scrutinized LGBTQ applicants more intensely with regard to their ability to serve as adoptive or foster parents.<sup>14</sup> This study also found evidence that homophobic supervisors have intentionally matched openly LGBTQ individuals with caseworkers they knew exhibited homophobic behaviors.<sup>15</sup> The same study also found that existing child placements had reportedly been interrupted by child welfare workers on several occasions when a foster parent either disclosed their LGBTQ identity or it was otherwise revealed.<sup>16</sup>

It was additionally noted that the agency lacked a formal policy with regard to sexual orientation of prospective parents. Therefore, within a context of state-based legal restrictions on placing children with unmarried couples, child placement workers' attitudes toward LGBTQ parenting tended to determine whether or not prospective parents' applications were successfully shepherded through the assessment process via informal avenues.<sup>17</sup>



Finally, while child placement workers were generally less likely to consider LGBTQ adults as viable resources for fostering and adoption of children perceived to be “healthy,” workers were more likely to call upon LGBTQ individuals as parenting resources for children with disabilities or who were otherwise perceived to be “hard to place.”<sup>18</sup>

### Debunking Arguments Against LGBTQ Foster and Adoptive Parents

Anti-LGBTQ officials in the child welfare system generally oppose LGBTQ individuals from serving as adoptive and foster parents based on the perceived threat that LGBTQ adults pose to maintaining “the best interests of the child.” These arguments take many forms, but all hinge on the belief that children of LGBTQ parents will suffer psychological abuse, “gender damage,” and what sociologist Erving Goffman referred to as “courtesy stigma,” or secondary stigmatization resulting from being associated with LGBTQ parents.<sup>19</sup> One popular claim in opposition to LGBTQ adoptive and foster parenting is that children of LGBTQ parents will grow up with distorted gender role models, resulting in a confused gender identity due to lack of constant, proximal exposure to normative representations of “maleness” and “femaleness.” A related argument against allowing LGBTQ parents from adopting or fostering children is that children of LGBTQ parents are more likely to grow up to be LGBTQ themselves. However, a wealth of empirical research has demonstrated that this is not the case. In fact, these arguments are intrinsically homophobic and transphobic, and not based on scientifically sound research.

More broadly, others claim that children raised by LGBTQ parents

are more likely to suffer from a host of negative developmental outcomes due to the sexual orientation or gender identity of one or both of their parents. These assertions have motivated a body of research about the developmental outcomes of children of LGBTQ people as compared to those with non-LGBTQ parents. Specifically, numerous empirical studies have looked at the areas of emotional functioning, sexuality, stigmatization, gender role behavior, behavioral adjustment, gender identity, and cognitive functioning.<sup>20</sup> This research has consistently shown that the development of children of LGBTQ parents mirrors that of children with heterosexual parents, and that in some cases, children with LGBTQ parents fare even better in particular areas, such as self-esteem.<sup>21</sup> The research has informed nondiscrimination policies supported by the Child Welfare League of America, the American Psychological Association, and the National Association of Social Workers, among others that mandate equal treatment with respect to sexual orientation and gender identity.<sup>22</sup>

Opponents of LGBTQ adoption further argue that children who are already going to experience stigma by virtue of their status as fostered or adopted children should not be subjected to the additional stigmatization that will invariably result from having LGBTQ parents.<sup>23</sup> This argument centers around the construct of “double jeopardy,” or the idea of exposure to multiple forms of stigma. However, this argument fails to unsettle the discourses that hold both families created through foster care and adoption and families with LGBTQ parents as inferior. Moreover, it holds members of these families responsible for their stigmatization rather than illuminating the structural forces and personal biases that generate and maintain these attitudes.

Finally, discourses of deviance and criminality and their accompanying tropes continue to inform and reinforce anti-LGBTQ and discriminatory child welfare policy and practice. Significant among these is the conflation of same-sex desire and attraction with pedophilia. For example, Stephen Hicks conducted an institutional ethnography in which he observed that this construction raises particular concerns among workers and agencies with regard to placing male children with gay male foster and adoptive parents.<sup>24</sup> This is despite the fact that those who perpetrate childhood sexual abuse are overwhelmingly heterosexually identified men, with the majority of victims being young girls.<sup>25</sup>

Arguments against LGBTQ parenting, adoptive or otherwise, and more general arguments against extension of rights to LGBTQ individuals, couples, and families, are also grounded in a fear that these lives and identities pose a threat to the maintenance and reproduction of heterocentric and patriarchal norms and values. Queer theorist Judith Butler describes cultural responses to what she refers to as “the specter of homosexual parenting”:

Variations on kinship that depart from the normative, dyadic heterosexually based family forms secured through the marriage vow are figured not only as dangerous for the child, but perilous to putative natural and cultural laws said to sustain intelligibility.<sup>26</sup>

The repercussions of explicit mechanisms of exclusion and stigmatizing attitudes and practices are resounding for prospective LGBTQ foster and adoptive parents. For example, in his overview of the home study assessment process for

LGBTQ people, Gerald Mallon noted that, although the number of LGBTQ foster and adoptive parents has greatly increased in recent years, the widespread perception that they are generally rejected as parental applications continues to dissuade LGBTQ people from pursuing the possibility of parenting through foster care and adoption.<sup>27</sup> Other LGBTQ applicants may find it necessary to hide or omit their identities or relationship status based on the perception that child welfare agencies will not otherwise seriously consider them as prospective parents either due to worker or agency prejudice or as a result of formal legislation depending upon their geographic context.<sup>28</sup>

### THE RESILIENCY AND CAPACITY OF LGBTQ FAMILIES CREATED THROUGH ADOPTION AND FOSTER CARE

Despite the numerous formal and informal policies of exclusion discussed above, agency workers have observed that LGBTQ foster and adoptive parents contribute unique offerings to children. This can take the form of extended community and kinship networks that provide elaborate resources and support systems, or the flexibility and openness that LGBTQ parents bring to unique and “nontraditional” family configurations.<sup>29</sup> These observations warrant further exploration into the ways in which LGBTQ relationships and identities may in fact be amenable to foster and adoptive parenting.

The families of choice that many LGBTQ people create are based upon a symbolic connection and commitment rather than genetic relation, as are families created through adoption and fostering of children. Also, not unlike families of choice, many people think of

families created through adoption and foster care as “less than” or a substitute for ideals of family rooted in biological relationships headed by heterosexual parents. This status discrepancy results in the stigmatization of such families, and particularly of the child or children who are adopted or fostered and whose lives are frequently pervaded by feelings of otherness.<sup>30</sup> In a qualitative research study performed with adoptees, Karen March found that a main motivating factor for adoptees who search for unknown birth family members is a desire to neutralize the stigma of adoption.<sup>31</sup>

Indeed, being a strong foster or adoptive parent requires a unique parental skill set that includes a capacity for and a willingness to understand the feelings of otherness that adopted or fostered children may experience as well as flexibility in thinking about what constitutes a family.<sup>32</sup> This latter factor is particularly important given the increasing practice of open adoption, or adoptive arrangements in which adoptive parents and birthparents maintain a relationship based upon a lifelong commitment to one another and to the child or children who connects them. Open adoption results in the creation of an extended family or kinship network that is based upon both biological and symbolic or spiritual understandings of family.<sup>33</sup>

In her article on stigma and adoption, Katarina Wegar notes that alternative views of kinship and parent-child bonding tend to be more common among members of already stigmatized and marginalized groups.<sup>34</sup> She goes on to argue that it is those individuals who experience marginality or stigma outside of the world of adoption who tend to be least embraced within it:

Ironically, the minority communities (ethnic and others), which

appear to embrace a more flexible family ideology are the very same groups who traditionally have been discriminated against or altogether denied the possibility to adopt by adoption agencies. In order to alleviate the social stigma attached to adoption, researchers as well as practitioners would do well to learn from these new communities.<sup>35</sup>

These sentiments are echoed in the following narrative of lesbian adoptive mother Jane McDermott:

We are pioneers in re-defining “relationship” and “family” and we have a tremendous amount to offer children who will always be different and will have to carve out very complicated identities from difficult and challenging histories.<sup>36</sup>

## CONCLUSION

Child welfare practitioners and policy makers should ground their work with LGBTQ people in an understanding of LGBTQ communities’ resiliency and creativity with regard to conceptualizations of family and kinship. A deficiency-based model that views LGBTQ parents as inferior fails to acknowledge that they might actually be some of the most capable permanency resources for young people whose own identity processes and understandings of family are often necessarily very complex. A paradigm shift within child welfare policy and practice toward a strength-based perspective will necessitate an expansion of the notion of what we collectively honor as viable family structures.

Some have argued that we move beyond the body of research that makes

claims to “sameness.” This line of thinking advocates for asserting the strengths and uniqueness that LGBTQ people bring to the experience of parenting, not only within their own families, but to the ideological structure of the child welfare system more broadly.<sup>37</sup> For example, a recent study found that children of lesbian parents have higher levels of self-esteem as compared to their non-LGBTQ-parented counterparts. This seems to indicate that there is a uniqueness to lesbian parenting that stands to benefit some children in some cases.<sup>38</sup>

It is important that resources be allocated for multiple forms of research into the experiences of LGBTQ prospective foster and adoptive parents and LGBTQ families created through foster care and adoption. We know little, for example, about the distinct experiences of transgender foster and adoptive parents. Moreover, there is scarcely any research looking at the ways in which the intersection of race, class, and gender of parents and children impact the experiences of LGBTQ families created through foster care and adoption. This research is needed to determine what resources child welfare agencies and practitioners could offer to allow these families to thrive over time. Ultimately, it is in the urgent interest of the 100,000 children who linger in foster care awaiting permanency to continue to identify and harness these unique parenting strengths.

Sarah Mountz is an assistant professor of social work at California State University, Northridge. Her research focuses on the experiences of LGBTQ youth in the juvenile justice and child welfare systems. Her work has been published in *Youth and Society*, the *Journal of Social Work Education*, and the *LGBTQ Policy Journal*. She has also created a master in social work course, “Creating Permanency for LGBTQ Youth in Out of Home Care.”

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# School Sex Education After DOMA

*Why Policy Reform Is Still Needed to Improve the Health and Safety of Sexual Minority Youth*

By Craig Pulsipher

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## ABSTRACT

The United States has undergone a dramatic shift in the legal recognition of same-sex marriage, yet the majority of school sex education programs continue to focus almost exclusively on heterosexual relationships and marriage. These programs do not portray same-sex couples in vignettes and hypothetical dilemmas or discuss variations in sexual orientation and gender identity. While health disparities among sexual minority youth are well documented, policy makers continue to promote school sex education programs that are not inclusive or responsive to their needs. This article begins with a brief discussion of health disparities among sexual minority youth, followed by an overview of sex education programs and policies in the United States. It then examines the effects of noninclusive sex education programs and concludes with recommendations for policy makers to ensure that sexual minority youth receive relevant and complete sexual health information.

## INTRODUCTION

In 2013, the Supreme Court ruled Section 3 of the Defense of Marriage Act (DOMA) unconstitutional, requiring the federal government to recognize same-sex marriages performed legally in the states.<sup>1</sup> Since that time, the number of states recognizing same-sex marriages has increased dramatically, with more than one-third of the U.S. population now living in a state that either has marriage equality or honors out-of-state

marriages of same-sex couples.<sup>2</sup> Additionally, according to a 2014 *Washington Post*-ABC News poll, 59 percent of Americans now support allowing gays and lesbians to marry legally.<sup>3</sup> Despite the increasing acceptance of same-sex marriage, however, the majority of school sex education programs in the United States continue to focus exclusively on heterosexual relationships and marriage. These programs do not include same-sex couples in vignettes and hypothetical dilemmas or use language

that would be inclusive of lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals. The relative absence of inclusive school sex education programs in the United States suggests that recent advancements for same-sex couples have done little to benefit those most in need—sexual minority youth.<sup>4</sup>

## HEALTH DISPARITIES AMONG SEXUAL MINORITY YOUTH

Sexual minority youth are in urgent need of relevant and complete sexual health information. When compared to their exclusively heterosexual peers, sexual minority youth experience significant health disparities, including higher rates of unintended pregnancy and sexually transmitted infections (STIs). Gay, bisexual, and other young men who have sex with men, for example, are among the populations most at risk for human immunodeficiency virus (HIV). In 2011, approximately 93 percent of all diagnosed HIV infections among young men aged thirteen to nineteen were contracted through male-to-male sexual contact.<sup>5</sup> Elevated risk for HIV among gay and bisexual young men has been attributed to multiple factors including higher rates of substance use, poor mental health, and ineffective prevention programs.<sup>6</sup>

Similar health disparities have been documented among transgender youth. Many transgender youth experience family rejection and receive little social support, leading some to engage in substance use and risky sexual behaviors as a way to cope with these challenges.<sup>7</sup> Transgender youth are at extreme risk of acquiring HIV, and recent studies have found that they have limited knowledge regarding HIV transmission.<sup>8</sup>

Although HIV is less common among lesbian and bisexual young

women, they experience their own unique challenges. A recent study found that when compared with their exclusively heterosexual peers, sexual minority young women are less likely to use contraception and are at significantly increased risk for unintended pregnancy.<sup>9</sup> The reasons for these disparities are unclear, although the authors note that “factors associated with teen pregnancy in the general population such as earlier sexual initiation, more sexual partners, and ineffective contraception are more common in sexual minorities.”<sup>10</sup> Some researchers suggest that lesbian and bisexual young women may engage in risky sexual behaviors because of homelessness, as a way to cope with stigma about their sexual orientation, or because they lack adequate sexual health information.<sup>11</sup>

## OVERVIEW OF SCHOOL SEX EDUCATION PROGRAMS AND POLICIES

While there are many ways to provide sexual minority youth with sexual health information, this article is focused on the potential within schools. All adolescents are required to attend school in the United States, and sex education programs hold immense potential for ensuring that sexual minority youth receive relevant and complete sexual health information. Unfortunately, the majority of school sex education programs in the United States do not provide sex education that is inclusive and responsive to the needs of sexual minority youth. According to the Centers for Disease Control and Prevention (CDC), fewer than half of schools in every state provide inclusive sex education instruction (e.g., curricula or materials use inclusive language or terminology).<sup>12</sup> For example, *Choosing the Best* is one of the most widely used sex educa-

tion programs in the United States and it completely ignores the existence of same-sex couples and sexual minority youth. A review of the program found that “all of the curriculum’s references to sexual activity and even relationships are specific to male-female couples.”<sup>13</sup> The program also perpetuates gender stereotypes and does not discuss variations in sexual orientation and gender identity. This failure to include relevant and inclusive information for sexual minority youth is a common characteristic of sex education programs across the country.

The content of sex education programs is primarily regulated by state governments, and only nine states have enacted explicit policies requiring sex education instruction to be inclusive of sexual minority youth.<sup>14</sup> In California, for example, the law states that sex education programs must be appropriate for use with students of all sexual orientations and materials may not reflect or promote bias against any person on the basis of gender identity, gender expression, or sexual orientation.<sup>15</sup> Meanwhile, eight states have enacted “no promo homo” policies that either prevent teachers from discussing sexual orientation or require them to portray same-sex relationships as unnatural and dangerous.<sup>16</sup> Alabama law, for example, mandates that sex education programs include “an emphasis, in a factual manner and from a public health perspective, that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under the laws of the state.”<sup>17</sup> Laws like these remain even after the Supreme Court invalidated state sodomy laws more than a decade ago.<sup>18</sup>

As the primary funder of school sex education, the federal government has a significant influence on program content. Prior to 2010, the majority of

federal funds were dedicated to abstinence-only-until-marriage programs.<sup>19</sup> The primary message of these programs is that students should abstain from sexual activity outside the context of marriage, and contraception is discussed solely in terms of failure rates, if at all. These programs not only prevent youth from acquiring knowledge to protect themselves from unintended pregnancy and STIs, but they also stigmatize sexual minority youth who live in states that do not legally recognize same-sex marriage. Because LGBTQ individuals cannot get married in over half of the states, sexually minority youth in these states are essentially being told that they should never become sexually active. As one scholar noted, “Heteronormativity is a central tenet of abstinence-only-until-marriage sex education. Curricula operate from the presuppositions that all students are or should be heterosexual, that all students will and shall marry someone of the other sex, and that all students should engage in heterosexual relations only within the context of marriage.”<sup>20</sup> In light of mounting evidence that abstinence-only-until-marriage programs are ineffective at reducing behaviors associated with unintended pregnancy and STIs, federal funding for these programs has been significantly reduced in recent years.<sup>21</sup> However, they continue to receive funding through Title V of the Social Security Act and the Competitive Abstinence Education (CAE) Grant program.<sup>22,23</sup>

The majority of federal funds are now devoted to comprehensive sex education programs through the President’s Teen Pregnancy Prevention Initiative (TPPI), the Personal Responsibility Education Program (PREP), and the CDC’s Division of Adolescent and School Health (DASH).<sup>24</sup> Unlike abstinence-only-until-marriage programs, compre-

hensive sex education programs discuss the importance of abstinence while also providing adolescents with complete and accurate information about contraception. This information is crucial in order for all youth, regardless of sexual orientation and gender identity, to adequately protect themselves from unintended pregnancy and STIs. However, many comprehensive sex education programs funded by the federal government are still not inclusive of sexual minority youth.

## EFFECTS OF NONINCLUSIVE SCHOOL SEX EDUCATION

School sex education programs that are not inclusive of sexual minority youth have a significant negative impact on their health and safety. First, these programs contribute to a hostile school climate for sexual minority youth and prevent all students from developing respect for diversity. According to the 2011 National School Climate Survey, more than three-quarters of sexual minority students reported being verbally harassed because of their sexual orientation or gender identity and approximately one-third reported being physically harassed.<sup>25</sup> Noninclusive sex education curricula miss an ideal opportunity to teach students about variations in sexual orientation and gender identity as well as the diverse relationships and family structures that exist in society. By refusing to discuss these issues in the classroom, students with strong negative opinions are allowed to guide the discussion and create a hostile school climate.<sup>26</sup> According to one scholar, “While children need not be taught to celebrate same-sex relationships, toleration, acceptance, and political recognition of others ought to be fostered in children, consistent with

the fundamental principles of freedom and equality in liberal pluralist societies.”<sup>27</sup>

Second, noninclusive sex education programs contribute to feelings of isolation among sexual minority youth, which prevents them from receiving crucial social support and may exacerbate their risk of unintended pregnancy and STIs. A recent study of gay and bisexual young men’s experiences with abstinence-only-until-marriage sex education found that “the silence perpetuated by abstinence-only sexuality education reinforced a heteronormative environment which led participants to feel excluded, depressed and psychologically disadvantaged.”<sup>28</sup> Inclusion and social support are a critical part of identity development, yet noninclusive sex education programs prevent sexual minority youth from being open and honest about their sexuality and developing supportive social networks.<sup>29</sup> Additionally, feelings of isolation and loneliness may lead sexual minority youth to engage in risky behaviors including substance use and unprotected sex, contributing to an elevated risk of unintended pregnancy and STIs.<sup>30,31</sup>

Third, although many sex education programs have been proven effective at reducing behaviors associated with unintended pregnancy and STIs, failing to include relevant information for sexual minority youth prevents them from receiving the full benefits of these programs. Social learning theory suggests that personalization is an important aspect of behavior change.<sup>32</sup> According to sexual health education experts, “. . . students are more likely to personalize from learning activities in which they see something of themselves, for example, in the people depicted, in the situations they are likely to encounter or have already experienced, and even in the group leader. Therefore,

materials that present and discuss a diversity of images, relationships, and sexual behaviors help each learner relate more easily to a topic.”<sup>33</sup> Consistent with this theory, a 2001 study of high school students in Massachusetts found that sexual minority youth who received inclusive sex education reported fewer sexual partners and less frequent substance use prior to sexual activity than sexual minority youth in schools that did not provide such instruction.<sup>34</sup> Thus, inclusive school sex education is most effective at changing behavior because sexual minority students are able to personally relate to the material that is presented.

## RECOMMENDATIONS

Policy reforms at the federal, state, and local levels are urgently needed to ensure that school sex education programs are inclusive and responsive to the needs of sexual minority adolescents.

### Federal Policy

- *Eliminate federal funding for abstinence-only-until-marriage programs.* President Barack Obama and Congress should eliminate funding for ineffective and discriminatory abstinence-only-until-marriage programs by removing discretionary funding for CAE and not seeking reauthorization of the Title V abstinence-only-until-marriage program. The Repealing Ineffective and Incomplete Abstinence-Only Program Funding Act, introduced by Representative Barbara Lee (D-CA), would end the Title V abstinence-only-until-marriage program and transfer funding from this program to PREP.<sup>35</sup>

- *Increase federal funding for comprehensive sex education programs.* President Obama and Congress should increase funding for comprehensive sex education programs through TPPI, PREP, and DASH to ensure that sexual minority youth receive complete and accurate information about contraception.
- *Ensure that federal funds are only used for inclusive sex education programs.* The Office of Adolescent Health (OAH) must ensure that federally funded sex education programs are inclusive of sexual minority youth. The Real Education for Health Youth Act, introduced by the late Senator Frank Lautenberg (D-NJ) and Representative Lee, would ensure that no federal funds are used for sex education programs that are insensitive or unresponsive to the needs of sexual minority youth.<sup>36</sup>

### State Policy

- *Repeal discriminatory “no promo homo” laws.* State legislatures should repeal outdated statutes that prevent teachers from discussing sexual orientation or require them to portray same-sex relationships as unnatural and dangerous. These policies currently exist in eight states: Alabama, Arizona, Louisiana, Mississippi, Oklahoma, South Carolina, Texas, and Utah.<sup>37</sup>
- *Enact legislation requiring comprehensive, inclusive sex education.* State legislatures should pass legislation mandating that all school districts provide com-

prehensive sex education that is inclusive of sexual minority youth. Only twenty-two states and the District of Columbia mandate sex education. Of these, only five require that sex education be comprehensive and inclusive: Delaware, New Jersey, New Mexico, Oregon, and Rhode Island.<sup>38</sup>

## Local Policy

*Implement comprehensive, inclusive sex education programs.* School district administrators should enact policies at the local level requiring comprehensive, inclusive sex education. For example, Chicago Public Schools passed a sex education mandate in 2013 requiring sex education in every grade including discussion of sexual orientation and gender identity. The mandate follows the National Sexuality Education Standards, which outline the essential minimum content for sex education that is age-appropriate for students in grades K-12.<sup>39</sup>

*Evaluate curricula and textbooks.* School district administrators and other district employees should evaluate sex education materials to ensure that they are inclusive of sexual minority youth. Curricula should represent same-sex couple in vignettes and hypothetical dilemmas, use unbiased language, and include discussions of sexual orientation and gender identity.

*Train and support teachers.* School district administrators should provide educators with training and support that will allow them to effectively address the needs of sexual minority students. A recent survey of high schools teachers and staff found that a hostile school climate and lack of staff training were the main barriers to providing adequate support to sexual minority students.<sup>40</sup>

## CONCLUSION

Although the legal recognition of same-sex marriage in the United States is a tremendous victory, we must not ignore the needs of sexual minority youth who continue to endure some of the most harmful effects of society's animus toward the LGBTQ community.<sup>41</sup> These youth experience significant health disparities, including higher rates of unintended pregnancy and STIs, and the virtual nonexistence of inclusive school sex education in the United States is exacerbating these poor health outcomes. Not only will inclusive sex education programs improve the health and well-being of sexual minority adolescents, but they will also encourage students to develop respect for diversity and create a safer school climate. Inclusive sex education programs enjoy broad support from professional organizations and members of the general population. Advocates of inclusive sex education include the American Medical Association, the National Education Association, and the American Psychological Association. Additionally, a 2004 poll found that 73 percent of parents believe that school sex education should include discussion of sexual orientation.<sup>42</sup> Schools may be one of the only opportunities for sexual minority adolescents to receive accurate sexual health information, and requiring schools to provide inclusive sex education is a crucial step toward ensuring their safety and well-being.

Craig Pulsipher received his master of public policy and master of social welfare degrees from the University of California, Los Angeles, in 2014. As a graduate student, he conducted extensive research on various LGBTQ and HIV/AIDS-related policy issues including school sex education and HIV/AIDS prevention among LGBTQ youth. Pulsipher was an intern for both the Law and Policy Project at Lambda Legal and the Religion and Faith Program at the Human Rights Campaign. He received a BA in psychology from Brigham Young University in Provo, Utah.

## ENDNOTES

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identified as bisexual. When asked whom they were attracted to, 0.7 percent reported being attracted mostly to males and 1.1 percent reported being attracted only to males. Measures of sexual identity and attraction were included only for adolescents aged eighteen to nineteen because these characteristics may not yet be known or accurately reported among younger adolescents. See Chandra, Anjani et al. Sexual Behavior, Sexual Attraction, and Sexual Identity in the United States: Data from the 2006-2008 National Survey of Family Growth. National Health Statistics Reports 36, 3 March 2011.

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# Finding Genders

## *Transmasculine Crossdressers in the National Transgender Discrimination Survey*

By Jack Harrison-Quintana, Julian Glover, and Sandy E. James

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### ABSTRACT

Unlike their transfeminine counterparts, transmasculine crossdressers do not have a major national social, education, and advocacy organization like Virginia Prince’s Society for the Second Self, Tri-Ess. They do not hold conferences, as such, or maintain as significant a Web presence, but when asked to articulate their gender identity in the first four questions of the National Transgender Discrimination Survey (NTDS), 192 female-assigned-at-birth respondents identified themselves strongly as crossdressers, living part of their lives as women and part either as men or crossdressed on a masculine spectrum. This article seeks to create a foundation for the critical exploration of crossdressing among female-assigned-at-birth people, shedding light on an all-too-often-forgotten group under the transgender umbrella. We will examine the demographic patterns of transmasculine crossdressers in the study as well as the patterns of discrimination reported by transmasculine crossdressers in the areas of health and health care, housing and homelessness, education, employment, and family life.

In the opening to her seminal 2003 memoir and manifesto, *My Husband Betty: Love, Sex, and Life with a Crossdresser*, Helen Boyd describes a scene of a wife dressing up in her husband’s clothes. The wife smells the fabric of his shirt, thinking of him. She admires the way it looks in a full-length mirror. She watches herself buttoning it, before grasping another shirt still on the hanger and then falling onto their bed, relishing the moment.

It could be an ad for sheets, cotton, or cologne. It could be the beginning of a porn film. In any case, it does not seem sexually deviant. We decide that the woman is missing her husband or boyfriend—wherever he is—and never consider the fact that she might be enjoying the clothes for the power they imply. It never crosses our minds that she could be single and trying these clothes

on secretly just for a thrill. We give the whole scenario a comfortable meaning even when we are given nothing more than the images.<sup>1</sup>

Boyd notes that this scenario would inspire shock in very few and then, of course, goes on to describe the alternate scenario that very much would—a scene in which the genders are changed, a man admiring and dressing up in women’s clothes. But what if we linger on this first image longer? Boyd correctly suggests that we tend to “give the whole scenario a comfortable meaning,” but what if that meaning is, in fact, incorrect?

Today, unlike in the early 20<sup>th</sup> century, women can be seen wearing pants in virtually every part of the United States. Furthermore, the anti-crossdressing laws that allowed for the oppression of queer women and other feminists who were found wearing fewer than three women’s garments are entirely invalidated or repealed. Nonetheless, a line in the sand still remains about acceptable and unacceptable dress for those assigned female at birth in the United States; transmasculine crossdressers, female-assigned-at-birth genderqueers, and trans men all cross that boundary as expressions of their gender identity. Within this group, transmasculine crossdressers are perhaps the least visible.

Unlike their transfeminine counterparts, transmasculine crossdressers do not have a major national social, education, and advocacy organization like Virginia Prince’s Society for the Second Self, Tri-Ess.<sup>2</sup> They do not hold conferences, as such, or maintain as significant a Web presence, but when asked to articulate their gender identity in the first four questions of the National Transgender Discrimination

Survey (NTDS), 192 female-assigned-at-birth respondents identified themselves strongly as crossdressers, living part of their lives as women and part either as men or crossdressed on a masculine spectrum.<sup>3</sup>

This has called attention to the research gap that this essay seeks to fill. This article seeks to create a foundation for the critical exploration of crossdressing among female-assigned-at-birth people, shedding light on an all-too-often-forgotten group under the transgender umbrella. Here we will examine the demographic patterns of transmasculine crossdressers in the study, as well as the patterns of discrimination reported by transmasculine crossdressers in the areas of health and health care, housing and homelessness, education, employment, and family life.

Finally, this essay is a call to action for researchers and activists in the ongoing movement to recognize the full range of gender identity/expression in our communities.

## METHODOLOGY

The National Transgender Discrimination Survey was developed and fielded by the National Gay and Lesbian Task Force and the National Center for Transgender Equality (NCTE). Links to the online NTDS survey instrument were distributed through a network of 918 trans-serving and trans-led advocacy and service organizations, support groups, Listservs, and other social networks around the United States. Nearly two thousand paper surveys were distributed to hard-to-reach transgender and gender nonconforming populations. A total of 6,456 completed questionnaires were included in the final data set, of which 192 respondents fall into the category of transmasculine crossdressers.

In Question 3 of the survey—“What is your primary gender identity to-

day?”—these 192 respondents distinguished themselves from transmasculine genderqueers and trans men by choosing the option “Part time in one gender, part time in another” and by marking “strongly identify” for the term “crossdresser” in Question 4, “For each term listed, please select to what degree it applies to you (not at all, somewhat, strongly).”

The demographic and discrimination patterns explored in this article would not be demonstrable without the nuanced five-question opening of the questionnaire, which sought to engage and support respondents in articulating their full selves. We have reported elsewhere the ways in which similarly complex gender questions can continue to serve the trans movement from a grassroots research perspective.<sup>4</sup>

In this article, we employ Pearson’s chi-square tests of independence to assess relationships between variables. Pearson’s chi-square tests are only generalizable when used with random samples, which the NTDS is not. However, we use the test here in order to crudely measure a statistical relationship between two variables within this sample and to lay the foundation for future research.<sup>5</sup>

## LITERATURE REVIEW

Although this article is distinct in spotlighting the experiences of transmasculine crossdressers, it does contribute to a growing body of research on those who do not identify simply or completely with their birth sex or with the “opposite sex” of that which they were assigned. It also provides the first quantitative analysis to stand alongside work in the humanities on crossdressing, female-assigned-at-birth masculinity, and subjectivity.

In terms of quantitative research, the experiences of transfeminine cross-

dressers and genderqueers of all birth sexes have been explored in “Injustice at Every Turn: A Report of the National Transgender Discrimination Survey”; “A Gender Not Listed Here: Genderqueers, Gender Rebels, and OtherWise in the National Transgender Discrimination Survey”; and the forthcoming collaboration between the National Gay and Lesbian Task Force, NCTE, and Tri-Ess, “Injustice at Every Turn: A Look at Crossdresser Respondents in the National Transgender Discrimination Survey.”

Among these, “A Gender Not Listed Here” provides the most important extension of the research presented in this article because more work must be done to compare and contrast the unique demographic patterns as well as patterns of discrimination of transmasculine genderqueers and those who identified as crossdressers in the NTDS.

In *The Lives of Transgender People*, Genny Beemyn and Susan Rankin also examine respondents and interviewees whose identities challenge the constructed male-female gender binary. In referring to these respondents, the authors proposed the terms “female-to-different-gender” and “male-to-different-gender” to complement the transgender-identified constructs of female-to-male and male-to-female.<sup>6</sup> Accordingly, there is a great deal more diversity of experiences around nonbinary gender identity and experiences of discrimination to be explored in both data sets.

Also notable is the related work in the humanities, especially that conducted by Jack Halberstam in *The Drag King Book*, *Female Masculinity*, and the debates the latter sparked in transmasculine and queer women’s discourse, including in “Transgender Butch: Butch/FTM Border Wars and the Masculine Continuum” and “Butch/FTM Border Wars: A Note on Collaboration.” In



communities of color, Daniel Peddle’s film *The Aggressives* does the crucial work of qualitatively exploring masculine gender expression across a number of classed and raced, culturally situated identities.

## DEMOGRAPHIC PATTERNS

Table 1 — Demographic Data of Transmasculine Crossdressers Compared to Transfeminine Crossdressers and the Overall NTDS Sample

	Category	Transmasculine Crossdressers
Age	18-24	**40%
	25-44	**51%
	45-54	**6%
	55+	**2%
Race/Ethnicity	White	**83%
	Black or African American	*5%
	American Indian or Alaska Native	7%
	Hispanic or Latino	**8%
	Asian or Pacific Islander	3%
	Multiracial or mixed	**12%
Visual Conformity	Not conforming	**48%
	Somewhat conforming	**47%
	Conforming	**5%

\*Chi-square test of independence =  $p < .05$   
 \*\*Chi-square test of independence =  $p < .01$

In this section, we discuss the demographic patterns exhibited by transmasculine crossdressers in the areas of age, race, and visual conformity in the NTDS. Overall, transmasculine crossdressers were young, White, and visually nonconforming.

### Age

The vast majority (91.81 percent) of transmasculine crossdresser respondents fell between the ages of eighteen and forty-four years old. This is younger than the overall NTDS sample and younger than the transfeminine crossdresser respondents.

### Race

The overwhelming majority of transmasculine respondents identified their race as White (83 percent). The next largest racial cohort was multiracial (12 percent). This mirrors the racial makeup of the overall sample of White (83 percent) and multiracial (11 percent) respondents. Despite the White majority, each of the racial identities specified on the survey questionnaire was represented among transmasculine crossdressers.

Transfeminine Crossdressers	All NTDS Respondents
**17%	19%
**45%	52%
**18%	17%
**20%	11%
**92.02%	83%
*2%	6%
4%	6%
**3%	6%
2%	3%
**2%	11%
**9%	22%
**54%	56%
**37%	21%

### Visual Conformity

Transmasculine crossdresser respondents were far more likely than the respondents in the overall sample to exhibit visual conformity. Close to half (48 percent) of the transmasculine crossdresser respondents were categorized as visual nonconformers, meaning that others were routinely able to tell they were trans without being told. The term is meant to be inclusive of both visual and auditory recognition, based on the respondent’s voice.

This rate of 48 percent compared

with a full NTDS sample rate of 22 percent. However, compared to other cohorts who reported high rates of visual nonconformity, this did not correspond to high rates of employment and housing discrimination for transmasculine crossdressers.

## TRANSITION-RELATED CARE

**Table 2 — Desired and Received Transition Related Care of Transmasculine Crossdressers Compared to Transgender Men**

	Category	Transmasculine Crossdressers
Counseling	Unwanted	**16%
	Wanted but not received yet	**34%
	Received	**43%
	Not applicable	**7%
Hormone treatment	Unwanted	**42%
	Wanted but not received yet	**38%
	Received	**6%
	Not applicable	**14%
Chest surgery	Unwanted	**35%
	Wanted but not received yet	**49%
	Received	**5%
	Not applicable	**11%
Hysterectomy	Unwanted	**50%
	Wanted but not received yet	**33%
	Received	**2%
	Not applicable	**15%
Metoidioplasty	Unwanted	**66%
	Wanted but not received yet	**17%
	Received	**0%
	Not applicable	**17%

\*Chi-square test of independence =  $p < .05$

\*\*Chi-square test of independence =  $p < .01$

Transgender Men
**7%
**9%
**82%
**2%
**8%
**22%
**68%
**2%
**7%
**48%
**42%
**3%
**20%
**56%
**20%
**4%
**41%
**50%
**3%
**6%

In the health chapter of the original publication “Injustice at Every Turn: A Report of the National Transgender Discrimination Survey,” statistics were given for various forms of desired and received transition-related care only for transgender men and transgender women. However, it is notable that many cohorts of nonbinary respondents such as transmasculine crossdressers also sometimes desired or sought medical care in order to navigate the process of identity development and to align aspects of their bodies with their felt sense of a gendered self.

This analysis paints a portrait that illustrates the individual nature of the decisions nonbinary trans people make about their transitions. It also clearly reveals policy implications for making the varied forms of transition-related health care more accessible by removing financial and gatekeeper-related barriers. The high costs of transition-related surgeries and their exclusion from many health insurance plans in the United States render these life-changing—in some cases, lifesaving—and medically necessary procedures inaccessible to most transgender people. Furthermore, additional

barriers can block the way of nonbinary people’s ability to tailor their transition process to their individual desires and needs. Gatekeepers often express hesitancy and skepticism about appropriate treatment of transmasculinities that fall outside of a full and unchanging male identity. This is despite the current version of the World Professional Association for Transgender Health’s (WPATH’s) “Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People”<sup>7</sup> making clear that gender fluidity should not be a barrier to care.

## PATTERNS OF DISCRIMINATION

**Table 3 — Discrimination and Life Outcomes Data of Transmasculine Crossdressers Compared to Transfeminine Crossdressers and the Overall NTDS Sample**

Category	Transmasculine Crossdressers	
Health and Healthcare	Rate of being HIV-positive	0%
	Rate of not knowing their HIV status	11%
	Rate of suicide attempts	**44%
	Rate of smoking	48%
	Rate of lifetime alcoholism and drug abuse to cope with mistreatment	**30%
	Refusal of medical care	**6%
	Postponement of medical care when sick or injured due to discrimination	**28%
Housing and Homelessness	Lifetime rate of homelessness	*4%
	Evicted from home or apartment due to bias	3%
	Refused a home or apartment due to bias	**6%
Employment	Fired due to bias	**13%
	Not hired due to bias	**24%
	Unemployment	**13%
	Underground economy	**14%
	Harrassed at work	**37%
	Physically assaulted at work	*3%
	Sexually assaulted at work	*7%
Family Acceptance	Accepted by family	56%

\*Chi-square test of independence =  $p < .05$

\*\*Chi-square test of independence =  $p < .01$

In this third section of the study, we discuss the patterns of discrimination and negative life outcomes experienced by transmasculine crossdressers in the areas of health and health care, housing and homelessness, employment, and family life.

### Health and Health Care

Rates of negative health outcomes for transmasculine crossdressers mirror those of other female-assigned-at-birth respondents. The rate of being HIV-positive is zero among transmasculine crossdressers. This represents a major distinction between transmasculine crossdressers, transfeminine crossdressers (1.01 percent), and the overall

NTDS sample (2.64 percent). It is also much smaller than the general U.S. population rate of 0.6 percent.<sup>8</sup>

The lifetime suicide attempt rate among transmasculine crossdressers (44 percent) is higher than that of transfeminine crossdressers (21 percent), as well as the overall sample (41 percent). Here, all three rates are higher than the general U.S. population rate of 1.6 percent. Transmasculine crossdressers reported

Transfeminine Crossdressers	All NTDS Respondents
1%	3%
10%	8%
**21%	41%
29%	30%
**13%	26%
**3%	15%
**11%	28%
*7%	19%
4%	11%
**6%	19%
**13%	26%
**18%	44%
**7%	14%
**7%	16%
**34%	50%
*4%	7%
*6%	6%
60%	43%

high rates of smoking (48 percent) as well as alcoholism and drug abuse to cope with mistreatment (30 percent).

### Housing and Homelessness

The lifetime rate of homelessness is quite low among transmasculine crossdressers (4 percent) compared to transfeminine crossdressers (7 percent) and all NTDS respondents (19 percent). Similarly, transmasculine crossdressers'

rates of eviction (3 percent) and being refused a home or apartment due to bias (6 percent) were lower than those of the overall sample (11 percent and 19 percent, respectively).

### Employment

Both transmasculine and transfeminine crossdressers were exactly half as likely as the overall sample to be fired from a job due to bias (13 percent and

26 percent, respectively). Further, transmasculine (24 percent) and transfeminine (18 percent) crossdressers were less likely not to be hired due to bias than those of the overall sample (44 percent). Similarly, the rate of unemployment among both transmasculine (13 percent) and transfeminine (7 percent) crossdressers was lower than that of the overall sample (14 percent).

Transmasculine crossdressers were twice as likely (14 percent) to work in the underground economy as transfeminine crossdressers (7 percent). Additionally, transmasculine crossdressers were more likely to be harassed at work (37 percent) than transfeminine crossdressers (34 percent), but less likely to be harassed than those in the overall sample (50 percent). Finally, transmasculine crossdressers were less likely to be physically assaulted at work (3 percent) than transfeminine crossdressers (4 percent) and those in the overall sample (7 percent), but more likely to be sexually assaulted (7 percent) than both transfeminine crossdressers (6 percent) and those in the overall sample (6 percent).

### Family Acceptance

Transmasculine crossdressers were accepted by their families at a rate of 56 percent. This was slightly less than the 60 percent rate for transfeminine crossdressers but higher than the overall sample rate of 43 percent.

### CONCLUSION

Existing trans discourse focuses too narrowly on transgender men and transgender women. It is widely assumed that those living in two or more genders and those who split their time and their aspects between gendered worlds do not experience discrimination and do not need or want transition-related health care. But this analysis

dispels those myths by providing a more nuanced portrait of a particular identity cohort based on self-reporting in the National Transgender Discrimination Survey. Demographically, the 192 respondents that created the foundation for this article proved first that they exist and second that their experiences are worthy of further study.

Julian K. Glover is originally from the Midwest and was raised in a strict Pentecostal household. He attended Southern Illinois University Edwardsville, where he received both departmental and university honors upon graduation. He holds a degree in speech communication (public relations) and a double minor in music (cello performance) and sociology. Glover is currently a candidate for the master of public affairs degree at Indiana University and has been a Jaime Grant Research Fellow at the National Gay and Lesbian Task Force. His work explores transgender-inclusive policies in governmental and educational settings in addition to trans-inclusive public education and outreach.

Jack Harrison-Quintana is a queer Latino activist and researcher currently serving as the manager of the Policy Institute at the National Gay and Lesbian Task Force. In 2010, he was a contributing author for "Outing Age 2010: Public Policy Issues Affecting Lesbian, Gay, Bisexual, and Transgender Elders," and in 2011, he was a coauthor of "Injustice at Every Turn: A Report of the National Transgender Discrimination Survey." His other work has addressed issues of sexual liberation, racial justice, and anti-genderqueer discrimination. Before coming to the Task Force, he

did fellowships with the National Center for Transgender Equality in Washington, DC, and Khemara in Phnom Penh, Cambodia. A native of Signal Mountain, Tennessee, he earned his BS and MA from Georgetown University.

Sandy E. James earned a JD from Georgetown University Law Center and a master of arts from the Georgetown University Department of Government. He is a PhD student in the Georgetown University Department of Government, where he is conducting research on civil rights issues affecting the LGBT community with a particular focus on legislation and policies that impact the transgender community. He is currently an Urvashi Vaid Research Fellow in the Policy Institute at the National Gay and Lesbian Task Force.

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# The United Nations and the Global Struggle for LGBT Equality

By Pedro Garcia

On 31 March 1994, a historic decision was made at the United Nations regarding lesbian, gay, bisexual, and transgender (LGBT)<sup>1</sup> human rights. The UN Human Rights Committee ruled that an Australian law criminalizing all sexual relations between consenting adult men violated the human rights of Tasmanian activist Nicholas Toonen and subjected him to the threat of arbitrary arrest and detention.<sup>2,3</sup> For the first time in history, the UN made clear that the human right to live free from discrimination applies to everyone, regardless of sexual orientation.

Now twenty years later, “homosexual acts” are illegal in seventy-six countries and punishable with the death penalty in five.<sup>4</sup> Moreover, in all regions of the world systematic homophobic and transphobic violence has been recorded, including murders and rapes, driven by a desire to punish those seen as defying gender norms.<sup>5</sup> For example in South Africa, which was the fifth country in the world to legalize same-sex marriage, “corrective rape” is a documented form of sexual assault in which women perceived as lesbians are raped to “be cured” from their sexual orientation.<sup>6</sup> Additionally, in a survey of fifty-seven

countries, approximately 1,123 murders of trans people were reported between 2008 and 2012.<sup>7</sup>

Is the United Nations sufficiently engaged in protecting the human rights of LGBT people? Radical progress was made during the past twenty years, but the road ahead is still long. Potential levers of change for greater equality include marshaling allies to openly and effectively protect LGBT human rights, collecting usable data on abuses against LGBT people, fully supporting LGBT employees within the UN, and associating with local civil society organizations struggling for sexual orientation and gender identity rights.

## A CONCERT OF NATIONS: THE GEOPOLITICS OF LGBT RIGHTS

When thinking about progress at the UN, it is essential to consider its role as an intergovernmental organization—a political entity formed by 193 countries. For instance, resolutions that are introduced at the General Assembly (UNGA) are voted on by all member states and require a majority to pass. The short history of LGBT issues in

the UNGA demonstrates that member states have the authority to effectively support LGBT rights or to rally against any reference to LGBT rights in UNGA declarations.

In late 2008, for example, France and the Netherlands cosponsored the UN Declaration on Sexual Orientation and Gender Identity, which pushed for the specific protection of LGBT people at the UNGA for the first time in history. The declaration stated that “human rights [must] be applied to all human beings, regardless of their sexual orientation or gender identity.”<sup>8</sup> Only sixty-six member states, mostly in Europe and Latin America, supported the declaration, and it was not adopted. An opposing statement followed the declaration, arguing for the right of countries to “decide on morality, public order and the general welfare in society.”<sup>9</sup> Nearly sixty countries voted for the opposing statement, led by the Organization of the Islamic Conference and with the backing of the Holy See’s observer mission.<sup>10</sup> Some countries refused to support either document, including the United States,<sup>11</sup> Russia, and China.<sup>12</sup> Recognition of LGBT rights at the UN has historically proven deeply divisive.

The politics of LGBT rights also manifest themselves in indirect ways. In 2012, for example, a resolution called on member states to protect people from unlawful executions on the basis of their gender identity, among other grounds. While protection on the basis of sexual orientation had been included for the past twelve years, the introduction of gender identity sparked controversy and the resolution had to be put up for a vote. The reference was ultimately kept, with eighty-six countries in favor, forty-four opposed, thirty-one abstaining, and thirty-two absent.<sup>13</sup> Indeed, the success of LGBT protections greatly depends on the willingness of

member states to promote and engage with principles of equality.

## HOMOPHOBIC STATES, HOMOPHOBIC PEOPLE

State-sponsored declarations at the General Assembly are only one of the various ways in which LGBT issues are discussed or advanced at the UN. A growing number of UN bodies, such as the High Commissioner for Refugees (UNHCR), the Children’s Fund (UNICEF), or the UN Development Programme (UNDP) are including LGBT perspectives to their agendas. Prior to 2008, for example, the Joint United Nations Programme on HIV/AIDS (UNAIDS) had already publically opposed the criminalization of same-sex relationships, for it increased stigma and discrimination, ultimately fuelling the AIDS epidemic.<sup>14</sup>

Nongovernmental organizations, for example ARC International or the International Gay and Lesbian Human Rights Commission (IGLHRC), work every day to push sexual and gender minorities’ issues into the agendas of UN bodies. In partnerships with human rights activists, they carry out research on the situation of LGBT people around the world to advocate for safety and equality. Often, their main challenge comes down to overcoming preconceptions among UN representatives and urging them to integrate sexual orientation and gender identities into the scope of their work. As the executive director of IGLHRC puts it, “Perhaps our greatest disappointment is with UN experts who aren’t committed to a truly universal human rights framework. At IGLHRC, we make great progress alongside our allies within the UN system, but we also see how much education there is to be done—even with some UN experts themselves.”<sup>15</sup>

The recognition of LGBT rights is a delicate matter even for LGBT employees within the UN. Remarkably, there is currently no unified policy when it comes to recognition of same-sex couples, as there is for opposite-sex couples. Recognition for same-sex couples depends on the staff member's country of nationality.<sup>16</sup> More importantly, LGBT staff that work in countries where their sexual conduct is criminalized often lack adequate support. "I don't think the UN has fully grasped what inclusiveness means," says Hyung-Hak Nam, president of UN-GLOBE, the organization's LGBT employee group. "Inclusiveness is ensuring conditions of service that are equivalent for all staff in a world where there is great homophobia. It is not simply saying, 'Well, there's nothing we can do,' if a country won't grant same-sex visas, for example. It is asking instead, 'Well, what can we do, what can we come up with to remedy this for our own LGBTI staff?'"<sup>17</sup>

## A GLOBAL SHIFT FORWARD

While LGBT advocacy at the UN faces a number of challenges, there is evidence that the institution is making progress. In 2011, South Africa put forward a declaration along with Brazil and thirty-nine cosponsors from all parts of the world, requesting the High Commissioner for Human Rights to prepare a study on violence and discrimination on the basis of sexual orientation and gender identity. The resolution—passed with twenty-three member states in favor, nineteen against, and three abstaining—expressed grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity.<sup>18</sup> The agreed study was released later in 2011 and highlighted, among other things, that "LGBT people are of-

ten targets of organized abuse from religious extremists, paramilitary groups, neo-Nazis, extreme nationalists and others, as well as family and community violence, with lesbians and transgender women at particular risk."<sup>19</sup> The report was first in its kind to officially document discriminatory laws and practices and acts of violence specifically against LGBT people.

In June 2013, the UN launched its first LGBT public education campaign, "Free & Equal," designed to raise awareness of homophobic violence and discrimination. The campaign is an ongoing effort to address the issue of sexual orientations and gender identities from within the United Nations. It followed the blatant evidence of LGBT human rights abuses globally and it obeyed to the full commitment of the UN Office of the High Commissioner for Human Rights (OHCHR) to combat all forms of discrimination. Finally, it grew with the firm support of LGBT rights by UN Secretary-General Ban Ki-moon and UN human rights chief Navi Pillay. When denouncing discrimination against LGBT people, the secretary-general has remarked: "We need public education to change the popular attitudes. Some will oppose the change. [...] Such arguments have been used to try to justify slavery, child marriage, rape in marriage, and female genital mutilation. I respect culture, tradition and religion – but they can never justify the denial of basic rights."<sup>20</sup>

## THE ROAD AHEAD

To advance the rights of LGBT people, UN bodies ought to openly support and actively engage in LGBT rights. In addition to the secretary-general's public advocacy, encouragement from other high-level officials would give the UN a stronger and more unified voice. Furthermore, agencies and staff need to

recognize the intersectionality of sexual orientation and gender identities with other disciplines. This means more actively integrating these perspectives into their overall daily work. The Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity published in 2008 by UNHCR offers a valuable example on this.

Such horizontal approaches significantly contribute to the prevention of abuses against LGBT people. "For us at *Juventud Con Voz*, it was critical to provide the space for groups who have been traditionally marginalized such as indigenous peoples, afro-descendants or LGTB youth groups," says Pablo Gago, who leads a project within UNDP aimed at facilitating access to information on inclusive policy making and democratic governance for the Latin American and Caribbean youth. "Rising social awareness about the positive role of youth in national development implies a full recognition of diversity and rights."<sup>21</sup>

A second lever for change lies in the collection of usable data on human rights violations against LGBT individuals. Thorough data collection would shed more light on the intersectionality of sexual orientation and gender identity. In the past, one entry-point for studies on LGBT data has been the work to end the HIV epidemic. A 2012 report by UNDP, for example, discussed access to health services of transgender people in the Asia-Pacific Region.<sup>22</sup> However, further research is needed in order to build a stronger case that links LGBT discrimination and other pillars of the UN, including human rights, income growth, peace building, social and political freedoms, gender equality, and public health.

Having inclusive diversity strategies in place within the UN and accompanying LGBT employees would

also open roads for equality. Through the efforts of LGBT staff and allies, for example, UN-GLOBE reported that seventeen heads of UN agencies, funds, programs, and senior leaders released public statements celebrating the 2013 International Day Against Homophobia on 17 May. In order to thrive fully at work, UN employees need to know that they have their organization's support, especially in countries where same-sex relationships or gender nonconformity is criminalized.

Finally, one of the most valuable levers for change is supporting civil society organizations engaged in protecting LGBT people. The UNDP-USAID joint project Being LGBT in Asia,<sup>23</sup> for example, emphasizes partnerships with grassroots organizations and community leaders. Oppressed populations often lack the resources for organizing, civil advocacy, or public outreach. Through funding and training, the UN can contribute to bring about change at a local level that would eventually have nation-wide impact. If minorities gain voice and leverage in their communities, it is more likely that they will hold politicians accountable for state-led homophobia and encourage effective policies toward global LGBT equality.

The identities of LGBT people have gradually become more political, as nonconforming sexual orientations and gender identities gain momentum in the public debate. These communities, in various forms and identities all over the world, are claiming for the right to participate fully in society and live free from discrimination. It is important that the UN hears these voices and engages in the struggle for global equality, which is nothing more than the continuous reminder that all human beings are born free and equal in dignity and rights.

Pedro Garcia is currently working as a program officer at SIS International, a nongovernmental organization promoting global health through the use of mobile and Internet-based technologies. Prior to joining SIS, he worked as a consultant for the Regional Bureau of Latin America and the Caribbean at the United Nations Development Programme (UNDP) and as a Fellow at the International Gay and Lesbian Human Rights Commission (IGLHRC). Garcia holds a master's degree in political science and communications from the Paris Institute of Political Studies (Sciences Po Paris).

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# The Power of LGBT Travel

## *Anecdotal Insights from Successful LGBT Tourism Ventures*

By Allister Chang

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### ABSTRACT

By generating economic benefits, the LGBT travel market has pulled LGBT perspectives into the strategies of private companies and the concerns of governmental bureaus. Through insights from thirteen leaders of the LGBT travel industry interviewed for this article, we explore the dynamics behind private and public partnerships in the LGBT travel industry. The article focuses on three examples—the Las Vegas Convention and Visitors Authority, the Tourism Authority of Thailand, and Lima Tours—and raises questions regarding the impact of the pink dollar on public policy more generally.

For this article, I spoke with thirteen leaders and experts of the lesbian, gay, bisexual, and transgender (LGBT) travel industry: Matthew Breen, editor-in-chief of *The Advocate*; Ylan Chrem, U.S. sales representative at Lima Tours; Nathan DePetris, chief operating officer of Pride Travel; Chad Intrachooto, marketing executive at the Tourism Authority of Thailand; Merryn Jones, editor-in-chief of *Curve Magazine*; Donovan Kaneshiro, creative strategy manager for Gay Vegas Travel; Jerry Portwood, executive editor of *Out Magazine*; Mya Reyes, former director of diversity marketing at the Las Vegas Convention and Visitors Authority; Sandi

Robinson, senior event manager at the Godfrey Hotel Chicago; Ed Salvato, editor-in-chief of *Man About World*; John Tanzella, president of the International Gay and Lesbian Travel Association (IGLTA); Don Tuthill, publisher of *Passport Magazine*; and Bob Witeck, president and founder of Witeck Communications.

Based on survey results from more than 40,000 respondents, Out Now Consulting estimated the 2013 international LGBT<sup>1</sup> travel market size at over \$180 billion.<sup>2</sup> This article provides anecdotal evidence supporting the claim that active engagement with LGBT travelers generates economic benefits

for both public and private entities. This article further highlights three particular insights drawn from these interviews that are relevant to policy makers: (1) economic justifications have created space to integrate LGBT perspectives into the tourism industry; (2) efforts to reach out to LGBT travelers have spearheaded work to make destinations more LGBT-friendly; and (3) the public sector plays a significant role in developing LGBT travel markets. In order to sketch out these three ideas more vividly, this article shares the experiences of Mya Reyes, Chad Intrachooto, and Ylan Chrem. Further research in this arena should focus on how the public sector engages with the LGBT travel industry and how the LGBT travel industry shapes public policy.

### MYA REYES, LAS VEGAS CONVENTION AND VISITORS AUTHORITY (PUBLIC-PRIVATE PARTNERSHIP)

In 2004, the Las Vegas Convention and Visitors Authority (LVCVA) hired Mya Reyes to target minority communities as part of the city's broader marketing initiatives. Prior to Reyes, the LVCVA—a public-private partnership between the city of Las Vegas and local commercial enterprises—placed little emphasis on diversity programming or outreach. In bringing on Reyes, the LVCVA set its sights on tapping into new markets that would boost hotel bookings in Las Vegas and thereby generate tax revenue for the city government.

Before working for the LVCVA, Reyes had no prior associations with the LGBT community. At tourism and hospitality conferences, she solicited advice on best practices for LGBT marketing and outreach. According to Reyes, she was “happily surprised”

by the positive feedback she received for spearheading this outreach in Las Vegas. This lack of pushback from the hospitality industry is congruous with Sandi Robinson's analysis of the LGBT travel industry after more than ten years working in hotel administration. Robinson, who currently serves as the senior event manager at the Godfrey Hotel Chicago, attributes the general acceptance of LGBT marketing campaigns due to the large presence of LGBT people within the industry itself: “I think we're at the frontline of LGBT marketing because so many people who work in the hospitality industry are themselves LGBT.”

Reyes's outreach to the LGBT community proved so economically successful that the LVCVA shifted her focus from broad diversity engagement to a portfolio that focused entirely on LGBT marketing from 2009 to 2012. In one example of her success, Reyes points to an LGBT outreach trip in Washington, DC, where she “met a gentleman who gave me one of the largest single bookings of my career: 6,000 room nights at the Caesars.” In 2010 alone, Reyes booked over 83,000 room nights for LGBT meetings and conventions in Las Vegas.

Reyes believes her proactive approach was a defining factor in the LVCVA's success in its LGBT outreach efforts. Reyes often traveled around the United States to attend the events of LGBT nongovernmental organizations and interest groups. Reyes also invited leaders of the LGBT community to visit Las Vegas for a few days, and she would take them out and show them around the city in person. To ensure that LGBT guests were welcomed and understood, Reyes also spearheaded LGBT diversity training programs for hotel staff in Las Vegas.



### CHAD INTRACHOOTO, THE TOURISM AUTHORITY OF THAILAND (PUBLIC-PRIVATE PARTNERSHIP)

Since the first Asian Symposium on Gay and Lesbian Tourism in 2011, Community Marketing, Inc.—an LGBT travel marketing consulting firm—has ranked Thailand the “most desired” Asian destination for LGBT travelers.<sup>3</sup> Chad Intrachooto, marketing executive at the Tourism Authority of Thailand (TAT), attributes Thailand's popularity among LGBT travelers to the TAT's proactive LGBT marketing strategy. The roots of LGBT-targeted marketing in Thailand trace back to 2010, when Intrachooto successfully persuaded TAT management to pilot his proposal to reach out to LGBT foreigners. “It took a fair amount of push to convince my boss,” Intrachooto explained, “because some people are still conservative in Thailand.” Intrachooto responded to TAT management's initial resistance by presenting Community Marketing's estimates of the LGBT travel market potential.

In May 2012, Intrachooto spearheaded the TAT's launch of a new Web site for LGBT travelers called “Go Thai Be Free” (separate from the TAT's tourismthailand.org Web site). The Web site provides background information on LGBT life in Thailand, travel stories,

reviews, and resources on LGBT-specific travel agents, events, venues, and hotels. The TAT promoted the Web site through ads (like the example shown in this article) in LGBT blogs and magazines (e.g., *Passport Magazine* and Carlos Melia Blog), sponsored press trips, and presentations at conferences such as the annual IGLTA convention.

Though Intrachooto was not at liberty to share the TAT's specific calculations of its LGBT marketing return on investment, he confirmed the TAT received a positive and healthy profit on its investments. At the same time, Intrachooto acknowledged the limitations of the TAT's existing estimations: “Without directly asking all travelers entering Thailand if they are gay or straight, it is difficult to provide specific numbers on the impact of our LGBT-specific marketing campaigns.” To circumvent these challenges, Intrachooto has harnessed data from the TAT's private partners, including qualitative anecdotes from hotels, in order to estimate the size of Thailand's existing LGBT travel market. According to Intrachooto, the TAT has trusted his estimates and accordingly increased the funding allocated to LGBT marketing every year since it began targeting LGBT populations in 2010. Today, two out of the eight total employees in the TAT's New York office work on LGBT marketing full time.



## YLAN CHREM

### Lima Tours (Private)

Ylan Chrem has worked with Lima Tours—one of the largest private tour companies in Peru—for over fifteen years. The company is one of the first pioneers of LGBT travel, helping to bring “male-only groups” to Machu Picchu as early as 1972. In this early work, Chrem explains, Lima Tours would rent out entire hotels and charter private boats in order to provide safe and private space for gay men to visit Machu Picchu. Lima Tours formalized an LGBT marketing strategy in 2000. Today, Chrem estimates more than five hundred LGBT-identified travelers visited Peru with Lima Tours in 2013, with each visitor spending an average of \$3,000 per week.

Despite these successes, Chrem explains that the Peruvian government has consistently ignored his attempts to establish a public-private partnership, which would jointly work toward expanding Peru’s LGBT tourism market. According to Chrem, Peru is a Catholic country with few LGBT legal protections. In order to make Peru accessible for LGBT travelers without any partnerships with the Peruvian public sector, Chrem explains that private companies had to expand the Peruvian LGBT tourism market alone. In other words, whereas private LGBT tourism businesses like Gay Vegas Travel can build off of and expand upon foundations set by the LVCVA, Lima Tours had to set Peru’s LGBT-friendly infrastructure (e.g., running diversity training programs for hotel staff) and build Peru’s reputation as an LGBT-friendly destination without public partnerships. The Peruvian government’s hesitancy to engage directly with the LGBT travel market, Chrem suggests, explains why

the Argentinian and Brazilian slices of the LGBT tourism market are growing faster than Peru’s.

### LESSONS LEARNED

Reyes’s, Intrachooto’s, and Chrem’s stories elucidate the dynamics behind how private companies and public governments have successfully engaged with LGBT travelers. Their experiences also highlight three critical insights into the LGBT tourism industry that reflected the understandings of many of the other thirteen interviewees from this study and that are particularly relevant for questions concerning public policy.

First, the tourism industry’s focus on the bottom line has created spaces for LGBT perspectives to be pulled into the tourism industry. The thirteen interviewees of this study generally agree that high returns on investment are the fundamental priority of decision makers in the travel industry. Both public bureaus like the TAT and private companies like Lima Tours continue to target outreach to LGBT travelers because they have found that their LGBT marketing yields positive economic benefits.

As a result of these economic benefits, the global tourism industry itself has become more LGBT-friendly over the years. In Lima Tours, for example, we also see how the goal of gaining economic benefits from LGBT travelers in Peru prompted the private sector to fill gaps in public services for LGBT people. Chrem explains that Lima Tours not only ran diversity training workshops for hotel staff throughout Peru, but also convinced many hotels to implement nondiscrimination policies for their staff before the government passed any antidiscrimination laws in employment for LGBT people.<sup>44</sup>

Second, efforts to reach out to

LGBT travelers have, in turn, spurred some cultural shifts by making certain destinations more LGBT-friendly. According to Ed Salvato, editor-in-chief of *Man About World*, the creation of the magazine *Out and About* in 1992 was a “game changer,” as it began to rate the gay travel industry through editorials rather than just take advertisements from hotels that pasted a rainbow flag next to their name. Salvato explains that after *Out and About*, LGBT travel magazines increasingly pressured travel destinations to actually follow through with their claims of being LGBT-friendly. Knowing that they could not lie about their destinations being LGBT-friendly, Reyes, Intrachooto, and Chrem have all conducted diversity trainings for hotel staff and other venues.

Interestingly, the Thai government began funding LGBT marketing for the TAT in 2010 before passing any LGBT hate crime or civil rights laws. Though there are certainly multitudes of factors involved with public policy decisions, this chronology suggests that pulling LGBT perspectives into Thai public policy was spurred on by the power of the pink dollar.

Third, the LGBT travel industry has benefited significantly from public sector engagement. As we see with the LVCVA and the TAT, public tourism bureaus have taken on important roles in creating some of today’s top LGBT travel destinations. Other notable public tourism bureaus that have successfully expanded new LGBT travel markets include the Greater Fort Lauderdale Convention and Visitors Bureau and Tourisme Montreal. Though the Lima Tours example shows us that government partnerships are not a prerequisite to expanding LGBT travel markets, Chrem’s experiences suggest that an earlier partnership with the Peruvian government could have greatly in-

creased the number of LGBT tourists in Peru today.

### A CALL FOR FURTHER RESEARCH

The anecdotal evidence provided here suggests that the tourism industry’s engagement with LGBT consumers has generated economic benefits for both public tourism bureaus and private companies. With LGBT international human rights concerns in Russia, Uganda, and elsewhere, however, this discussion about LGBT international travel suggests a number of important directions for future research. Descriptively, what are the dynamics behind the intertwined relationships between private companies and public tourism bureaus in the LGBT travel industry? More generally, how does this profit-driven engagement with LGBT customers shape public policy? Prescriptively, how do LGBT activists leverage the power of the pink travel dollar to advocate for LGBT rights and protections at local, national, and international levels of government? Answering these questions will help policy makers leverage the power of the pink dollar to forward LGBT rights internationally.

Allister Chang is managing editor of the LGBTQ Policy Journal. He is an MPP candidate at the John F. Kennedy School of Government at Harvard University and has worked with LGBTQ nongovernmental organizations in the United States, the United Kingdom, France, and Taiwan. He won the International Gay and Lesbian Travel Association’s Student Tourism Award in 2012.

## ENDNOTES

1 Though the LGBT acronym is used throughout this article, most of the insights drawn from this article are focused on gay men and lesbian women. Several of my interviewees pointed to the travel industry's lack of engagement with bisexual or transgender travelers.

2 Out Now Consulting. Out Now Global LGBT2020. Out Now Consulting, 2013.

3 Community Marketing, Inc. (CMI). CMI's 18<sup>th</sup> Annual LGBT Travel Survey. CMI, November 2013.

4 Today, neither Thailand nor Peru has anti-discrimination laws that protect LGBT employees.

# Expanding the Battleground

## *Health Care Refusal Legislation and the Unaddressed Threat to LGBT Equality*

By Ashland Johnson

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Recently, the lesbian, gay, bisexual, and transgender (LGBT) equality movement has faced a very visible threat as several states have attempted to expand protections for religious-based discrimination. Georgia, Arizona, Mississippi, Idaho, Kansas, and Missouri have all attempted to pass laws that essentially would have permitted business owners to refuse services to patrons based on their religious beliefs.<sup>1</sup> These efforts have mostly failed, largely due to rising public awareness and outrage at the local, state, and national levels.<sup>2</sup> Yet, while these overly broad “religious freedom” bills might be at the forefront of LGBT equality discussions, these political measures are not the only way legislative attempts to expand the right to discriminate threaten LGBT equality. A more insidious yet largely unaddressed issue in the LGBT community is the potentially harmful threat posed by health care refusals legislation.

This commentary explores trends in health care refusal legislation, high-

lighting the intersection between reproductive health discrimination and LGBT equality and the impact of health care refusal laws (i.e., conscience clauses) on LGBT health.

While often overlooked as an issue of LGBT equality, these health care refusal laws negatively impact the LGBT community. Legislative efforts across the country to expand health care refusals threaten to increase negative health care outcomes among LGBT people. Several legislative attempts on the state and federal level have included bills with refusal language drafted so broadly that it would allow health care providers to discriminate against a patient based on their sexual orientation or gender identity. In fact, from 2010 to 2014, there was an influx of legislative measures designed to grant broad health care refusal rights for health care individuals and institutions based on conscientious objections.

In this commentary, I will illustrate how these current efforts to expand

health care refusal laws to curtail advances in reproductive rights threaten to increase health care discrimination. I will further discuss the real impact, both immediate and long-term, that such refusals will have on LGBT health. Lastly, I will suggest several policy strategies LGBT advocates and reproductive justice advocates can take to ensure LGBT health rights are protected.

## WHAT ARE REFUSAL CLAUSES?

Health care refusal clauses are provisions that allow individuals and/or entities to refuse to provide, pay for, counsel for, participate in, or provide referrals for medical services to which they object, often for moral or religious reasons.<sup>3</sup> These provisions are sometimes called “conscience provisions” but are more accurately referred to as “refusal clauses” because they give medical providers the right to refuse services but not the right to proactively provide services based on their conscience.<sup>4</sup> These laws usually pertain to medical services related to abortion and contraception.<sup>5</sup> They can cover a wide range of “health care providers,” and they exist in various forms at the federal and state levels.

Health care refusal laws already exist at the federal and state level. Federal law permits health care professionals to refuse to provide a limited set of medical services—including abortion care and contraception coverage.<sup>6</sup> These initial federal refusal laws were enacted in direct response to the *Roe decision* to allay fears that health care providers would be forced to perform abortions against their will.<sup>7</sup> The most recent federal refusal law stems from the contraceptive coverage mandate under the Affordable Care Act. This rule exempts religious entities from complying with the mandate and was implemented to

assuage conservative concerns that religious employers would have to pay for contraception for their employees.<sup>8</sup>

Most states also have laws that permit certain medical professionals to refuse to provide reproductive health services.<sup>9</sup> These laws can cover a wide range of health care professionals, including doctors, nurses, and pharmacists. Like federal health care refusal laws, these state laws were created in direct response to reproductive health gains that went into effect after *Roe*.<sup>10</sup> Currently, nearly every state has a religious refusal law that covers abortion services, contraception, and/or sterilization services.<sup>11</sup>

## ALARMING TREND: THE NEXT WAVE OF HEALTH CARE REFUSAL CLAUSES

No health care provider shall be civilly, criminally, or administratively liable for declining to participate in a health care service that violates his or her conscience.<sup>12</sup>

There has been a growing trend in state legislatures to expand the scope and reach of health care refusals laws during the past decade.<sup>13</sup> Such efforts have become more aggressive in the past three years.<sup>14</sup> Following conservative model polices on health care refusal legislation,<sup>15</sup> these new refusal measures greatly expand the scope of health care services that can be refused, expand the classes of health care entities with refusal rights, and undermine traditional patient protections.

### Scope of Services

In the last three legislative cycles, state legislatures all over the country have taken measures to expand the

scope and reach of health care religious refusals. Going beyond the now common practice of limiting refusals to reproductive services such as abortion, contraception, and sterilization, these legislative measures have become broader. For example, several bills in the 2012-2013 and the 2013-2014 legislative cycles targeted reproduction-related issues outside of abortion and contraception. Arkansas,<sup>16</sup> Missouri,<sup>17</sup> South Carolina, and Pennsylvania<sup>18</sup> proposed laws that would allow health care providers to refuse to provide fertility services, stem cell-related procedures, or fertility counseling if doing so would violate their conscience. Several states even proposed measures that allow health care providers to refuse to perform *any* procedure with which they disagree by defining health care “services” or “procedures” in open-ended ways.<sup>19</sup> For example, Kansas’s refusal bill defined health care services to mean “any phase of patient medical care, treatment, or procedure, including but not limited to . . . any other care or treatment rendered by health care providers or health care institutions.”<sup>20</sup> Moreover, these measures include non-exhaustive lists of procedures that many patients typically do not associate with health care actions that would trigger a conscience clause; for example, recent bills in Michigan, Nebraska, and South Carolina allow health care providers to refuse to “counsel,” “refer,” or “provide information” about a patient’s health if the health care provider finds that doing so would be morally objectionable.<sup>21</sup>

### Scope of Providers

Another alarming aspect of this new wave of conscience clause legislation is that it drastically expands the scope of entities that have refusal rights. Whereas post-*Roe* refusal clauses protected the right of *individual* health care

workers to not engage in reproductive health services due to personal beliefs, these new clauses grant “conscience” protections to entities that never had them before. Now, these measures allow “health care *institutions*” such as private corporations, hospitals, and insurance companies to refuse to provide services. These laws also define “health care providers” to include a broad range of individuals. For example, New Hampshire’s recent refusal bill defined “health care provider” as “any individual who may be asked to participate in any way in a health care service.”<sup>22</sup> This includes not only doctors, pharmacists, and nurses but also hospital employees and medical school employees. North Carolina also recently introduced legislation to expand the scope of providers covered under its refusal law.<sup>23</sup> Consequently, many of these measures allow health care refusals at every level of the health care system, from the insurance company to the hospital receptionist.

### Undermining Patient Protections

The proposed refusals severely undermine patient protections. Model policy for these broad refusal bills does not require individual health care providers to provide any notice to their patients.<sup>24</sup> There is no duty for individual providers to inform patients about potential service refusals.<sup>25</sup> As such, patients are denied access to critical information to make informed decisions about choosing health care professionals. Several bills also remove a patient’s right to hold a health care professional legally liable for their discriminatory behavior. For example, Pennsylvania’s recent refusal bill states that health care providers that “decline to provide or participate in a health care service that violates its conscience may not be civilly, criminally, or administratively liable.”<sup>26</sup>

## IMPACT ON THE LGBT COMMUNITY

Health care discrimination, especially in the form of treatment denials, has long been a problem for the LGBT community. Systemic bias and pervasive discrimination already create significant health care disparities. For example, LGBT individuals and people living with HIV consistently report health care discrimination that includes verbal abuse, physical abuse, and outright refusals of treatment. In a recent survey on LGBT health care discrimination, approximately 56 percent of LGB respondents reported experiencing discrimination, ranging from health care workers being physically or verbally abusive to outright refusals of treatment.<sup>27</sup> Nearly 8 percent of LGB respondents were denied health care as a result of their sexual orientation.<sup>28</sup> In a similar survey on transgender discrimination, 19 percent of respondents reported being denied health care due to their transgender status.<sup>29</sup> Additionally, 28 percent reported experiencing harassment, and 2 percent were victims of violence in health care settings.<sup>30</sup>

Existing discrimination and disparities can only be expected to be exacerbated by an increase in these broad religiously motivated exemptions.

### Immediate Impact on LGBT Health

Under such broad refusal laws, health care professionals would be able to justify the denial of important time-sensitive and lifesaving health care to LGBT people and people living with HIV seeking medical treatment, based on their personal beliefs. For example, following a car accident, paramedics allowed a transgender woman to bleed to death because of their bias toward her gender identity; they withheld lifesaving treatment for her serious injuries when

they discovered she was transgender.<sup>31</sup> Refusing treatment to LGBT individuals also results in patients experiencing severe and prolonged pain. A recent report on the discrimination of transgender individuals highlighted how a transgender patient seeking treatment for injuries sustained from a fall on the ice was forced to wait in pain for two hours after a health care provider discovered she was transgender.<sup>32</sup>

Not all refusals of time-sensitive treatment are fatal; however, they can lead to other severe consequences including potentially exacerbating the underlying condition that prompted the patient to seek medical treatment. For patients living with HIV, this can be especially dangerous as they are particularly susceptible to sudden declines in health. For these patients, missing as few as two doses of medication can have a significant impact on maintenance of proper medication levels.<sup>33</sup> Therefore, a pharmacist who refuses to fill a prescription for an HIV-positive patient due to a religious belief that HIV is proof of a sinful lifestyle could be putting that patient's health in serious jeopardy.

### Family Formation Equality

Many of these refusal laws allow health care providers to deny LGBT people equal access to reproductive technologies. LGBT people already face systemic discrimination in relationship and family rights, especially family formation. This includes denying LGBT people access to adoption services and access to assisted reproductive technologies.<sup>34</sup> Several states in the past two legislative cycles, including Missouri,<sup>35</sup> Philadelphia,<sup>36</sup> and Arkansas,<sup>37</sup> have put forth bills that would allow health care professionals to deny patients access to assisted reproductive technology. If this trend continues unchecked, more LGBT

people will be legally exposed to such discrimination by health care providers.

### Impact on the Transgender Community

Health care refusals disproportionately impact transgender and gender nonconforming patients. One study noted that 15 percent of transgender individuals report having been refused medical treatment because of their gender identity.<sup>38</sup> The study further indicated that the rate of denial increased to 23 percent when transgender patients disclose their gender identity.<sup>39</sup> Health care refusals are more common when patients seek sexual and reproductive health care needs and often lead to painful and unnecessary complications. Moreover, the refusal of health care services can be especially harmful for transgender and gender nonconforming patients in the context of sexual and reproductive health. In the same study, a transgender man reported "living with excruciating pain in [his] ovaries" because he was unable to find a doctor who would examine his reproductive organs.<sup>40</sup> Transgender patients, like the above example demonstrate, are at equal if not greater risk than the general population to be susceptible to HIV infection<sup>41</sup> and sexual assault.<sup>42</sup>

### Increased Stigma and Distrust in the Health Care System

The consequences of health care professionals who refuse to treat LGBT people and patients living with HIV for personal discomfort perpetuate stigmas that have dangerous outcomes. LGBT patients are already victimized by the health care system at a higher rate than their non-LGBT counterparts. The mistreatment of LGBT patients cultivates a distrust in the health care system and the avoidance or delay of medically nec-

essary treatment. A recent study by the Centers for Disease Control found that 48 percent of transgender men avoided seeking essential preventative reproductive health services such as pelvic exams and sexually transmitted infection screenings because they feared they would be discriminated by their medical provider.<sup>43,46</sup>

Too often, those most in need of health care services, like LGBT patients and people living with HIV, report a higher frequency of mistreatment from health care providers. Moreover, the fear of stigma and discrimination from health care professionals often discourages LGBT patients from disclosing personal information that could be essential to their care. The mistrust, stigma, and subsequent avoidance of seeking medical care can have pervasive emotional and physical consequences. Ultimately, these negative experiences contribute to the many health disparities among the LGBT community.

## CONCLUSION

The current legislative efforts to broaden the scope of health care refusal laws along with the political climate strongly suggest that these legislative attempts will continue. Considering the broad impact of refusal clauses on marginalized communities, particularly within the LGBT community, LGBT rights and health policy advocates should begin to address this growing threat. To do so, LGBT movement leaders must begin to treat these health care refusals as an LGBT health issue and mobilize accordingly. LGBT groups should do the following:

1. Reestablish and cultivate partnerships with reproductive health and reproductive justice groups to coordinate a national and intersectional strategy to curtail the

efforts to erode patient rights.

2. Allocate movement resources to fight these measures on the state level. Many of these high-priority places remain under-resourced and the knowledge of local organizers is underutilized.

3. Create public education campaigns to educate targeted communities about their rights and responsibilities. Health care professionals should be made aware of the impact refusals have on marginalized communities. They should also be made aware of their obligations under the law. Patients too should be educated about rights, particularly if they live in a state with LGBT protections.

Ultimately, while these laws did not begin as an attempt to undermine LGBT equality, they have evolved and expanded into legislation in ways that will negatively impact LGBT patients. More members of the already marginalized LGBT community could very well be refused a wide range of medical services, by any health care provider or institution, for any reason, without any notice, and without any recourse if this new style of refusal measures is not adequately acknowledged and addressed by the LGBT movement.

Ashland Johnson is policy counsel for the National Center for Lesbian Rights. Johnson's work includes advocacy in many areas including federal legislation and regulations on housing, family policy, health, and employment.

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