

MALCOLM WIENER CENTER FOR SOCIAL POLICY

The Malcolm Wiener Center is a vibrant intellectual community of faculty, masters and PhD students, researchers, and administrative staff striving to improve public policy and practice in the areas of health care, human services, criminal justice, inequality, education, and labor.

The work of the center draws on the worlds of scholarship, policy, and practice to address pressing questions by:

- carrying out research on important policy issues affecting the lives of those most vulnerable and needy
- providing professional education for those in the world of practice
- educating the next generation of academics and policy scholars
- ensuring that research and education are closely tied to and draw from politics and practice in the field
- developing working partnerships with the broader policy community

For more than two decades the Malcolm Wiener Center has been an influential voice in domestic policy through faculty work on community policing, welfare reform, youth violence, education, urban poverty, youth and the low-wage labor market, American Indian economic and social development, and medical error rates.

Our research portfolio is both broad and deep, spanning many academic disciplines, encompassing traditional research as well as executive sessions, case-based research and action research, and employing a variety of research methodologies. It is inspired by our focus on bettering the lives of our fellow citizens, particularly those who are most vulnerable and needy.

WEB SITE: www.hks.harvard.edu/centers/wiener

LGBTQ POLICY JOURNAL

at the John F. Kennedy School of Government
at Harvard University

VOLUME VII
LGBTQ Legal Justice: At the Intersection of Policy & Law
2016-2017
WWW.HKSLGBTQ.COM

TABLE OF CONTENTS

2017 Edition—*LGBTQ Legal Justice: At the Intersection of Policy & Law*

iv • Acknowledgment & Appreciation

v • Letter from the Editors

ARTICLES

- 1 • Tremendo Show: Performing and Producing Queerness in Asylum Claims Based on Sexual Orientation
Amanda María Gómez Harvard Law School
- 9 • One Small Step for Wisconsin, One Giant Leap to the Back Burner for the Other Forty-Nine States: Injustice in Trans Inmates' Rights
Pamela Newell Nading & Newell, PLLC
- 27 • Reflections on New National Data on LGBQ/GNCT Youth in the Justice System
Angela Irvine & Aisha Canfield Impact Justice
- 37 • Workplace Equality in International Organizations: A Survey of LGBT Staff at the World Bank Group
Caroline Vagneron The World Bank Group
- 49 • “All the Same”: *Lampião da Esquina* and Violence as a Narrative Instrument of a Homosexual Identity
Igor Costa Pereira de Souza & João Filipe de Araújo Cruz
Universidade de São Paulo

All views expressed in the *LGBTQ Policy Journal* are those of the authors or interviewees only and do not represent the views of Harvard University, the John F. Kennedy School of Government at Harvard University, the staff of the *LGBTQ Policy Journal*, the advisory board, or any associates of the journal.

© 2017 by the President and Fellows of Harvard College. All rights reserved. Except as otherwise specified, no article or portion herein is to be reproduced or adapted to other works without the express written consent of the editors of the *LGBTQ Policy Journal* at the John F. Kennedy School of Government at Harvard University.

ACKNOWLEDGMENT & APPRECIATION

EDITORIAL STAFF

Charles Fletcher · Jonathan Lane Editors-in-Chief

Jenny Weissbourd Managing Editor

James Evans · Andrew Kyprianidis · Ewelina Rudnicka Editors

ADVISORY BOARD

Masen Davis Global Action for Trans* Equality

Jeff Krehely Roosevelt Insititute

Louis Lopez US Office of Special Counsel

Timothy McCarthy John F. Kennedy School of Government at Harvard University

Carl Sciortino AIDS Action Committee

Winnie Stachelberg The Center for American Progress

JOHN F. KENNEDY SCHOOL OF GOVERNMENT AT HARVARD UNIVERSITY SUPPORT

Douglas Elmendorf Dean

Richard Parker Faculty Advisor

Martha Foley Publisher

María Victoria Pizzini Web Presence Management

The Harvard Kennedy School Student Government (KSSG)

A SPECIAL DEBT OF GRATITUDE

Tarah Demant · Kaitlyn Denzler · Emily McGranachan Amnesty International

Caroline Dessert San Diego LGBT Community Center

Matt Kidd Reaching Out MBA

Gautam Raghavan Gill Foundation

Jackie Yodashkin Immigration Equality

A particular thanks to James Evans, for his visual interpretation of this year's "LGBTQ Legal Justice" theme, a design which we have gratefully been permitted to use for our cover.

Finally, thank you to those who support the global cause of LGBTQ rights in ways large and small—not only in speaking out when those rights are threatened and standing up when democrats and autocrats try to marginalize and delegitimize our existence; but in reaching out and reaching across all ideological lines, having the tough conversations to change hearts and minds that will someday pay invaluable dividends to our collective social, political, and legal progress.

Letter from the Editors

Friends,

In the past year, the legal landscape for the lesbian, gay, bisexual, transgender, and queer (LGBTQ) community has changed tremendously.

The US Department of Justice and Department of Education issued guidance to expand Title IX protections that prohibit sex discrimination in schools by allowing students to use the restroom corresponding to their gender identity. The Department of Defense also amended its policy to allow transgender service members to serve openly and proudly in the US Armed Forces.

However, as some rights have expanded, others have been rolled back. Numerous challenges to marriage equality have arisen to undermine this constitutional right in the name of religious liberty. North Carolina passed House Bill 2 (HB2) to bar people from using public restrooms and other facilities that do not match their biological sex, and to prohibit municipalities from creating their own antidiscrimination policies. Despite blowbacks and boycotts by musicians, sports leagues, and major corporations, other states have willfully followed suit.

Under a newly inaugurated President Trump, the Department of Justice rescinded the previous guidance on Title IX, effectively removing federal recognition of the right of transgender children in schools to be free from discrimination and hindering their ability to simply and safely use the restroom.

Now, it is more important than ever to understand how public policy and law intersect to grant, shape, and define the rights of the LGBTQ community. Justice is a central concept in the law, but one that is still denied to too many Americans. This denial in areas of employment, health care, immigration and refuge, education, and other core areas of life impact LGBTQ individuals, their families, and even their friends and allies.

It is for these reasons that Volume 7 of the LGBTQ Policy Journal at the John F. Kennedy School of Government at Harvard University highlights the intersection of policy and law. Through articles on asylum status, criminal justice and gender identity, juvenile justice, and international development, we hope to educate, spark conversation, and motivate readers to take action. The policy discussion and advocacy do not end with these pages. Policy occurs at every level of government: federal, state, local, and even at the level of a school board or town hall meeting.

LGBTQ rights have made incredible strides since the protest at the Stonewall Inn in 1969, and there are many future strides yet to come. It is our unremitting—if measured—hope that the next year will bring more progress, even if that progress is only realized as incremental steps towards the full realization of equality for all LGBTQ persons, both within the United States and around the world. Keep moving forward.

Onward and upward,

Charles Fletcher & Jonathan Lane
Co-Editors-in-Chief
Cambridge, MA

Jenny Weissbourd
Managing Editor
Cambridge, MA

Tremendo Show: Performing and Producing Queerness in Asylum Claims Based on Sexual Orientation

By Amanda María Gómez

BIOGRAPHY

Amanda María Gómez is a third-year student at Harvard Law School. She is currently the executive Submissions Editor for the Harvard Journal of Law & Gender, and the Co-president of Harvard Queer and Trans People of Color (QTPOC). She was also a research assistant for Professor Deborah Anker, conducting research in immigration and asylum law, and has worked as a legal intern at Immigration Equality. Amanda graduated summa cum laude from the University of Miami in 2012, with a degree in English and a minor in gender studies. She enjoys cycling, do-it-yourself projects, contemporary Latinx fiction, and making friends with other people's dogs.

ABSTRACT

In sexual orientation-based asylum claims, identities are both formed and performed. This article considers the elements of well-founded fear and membership in a particular social group, crucial pieces in every claim, and suggests they work together to create narratives that tell a story of a monolithic homosexual identity that is rooted in injury and loss. Through repetition, these ideas become material, in turn privileging asylee narratives that reproduce white, Western benchmarks of queerness, and ultimately writing an essentialist and one-dimensional queer character into law.

.....

THE NUMBER OF PEOPLE WHO HAVE sought asylum in the United States with claims based on sexual orientation discrimination is growing daily, reflecting expanding notions of identity-based rights and protections. These claims have been successful for many applicants, and have undoubtedly yielded positive and life-changing individual results. As sexual orientation claims become a fixture in United States asylum law, however, a number of potentially dangerous precedents are being set regarding what queerness looks like globally, and what the outer limits of queer identity might be. My discussion of queer asylum narratives will consider the elements of well-founded fear and being part of a particular social group, and unpack the ways in which these two crucial pieces of

an asylum claim work together to create an essentialist homosexual identity that ultimately depends on imagining queerness as a strikingly one-dimensional site of disempowerment and injury.

BACKGROUND

The conversation surrounding refugees took off in earnest following World War II. The United Nations Convention Relating to the Status of Refugees, the key legal document defining the rights of refugees, was open for signatures in 1951 and later updated in 1967 by the United Nations Protocol. It was not until 1980, however, that the United States enacted its own Refugee Act, which codifies the protocol and creates the standard that asylum seekers looking to settle in the United States must meet. The US law requires that an applicant for asylum (1) must have “a well-founded fear of persecution;” (2) the fear must be based on past persecution or the risk of future persecution; (3) the persecution must be “on account of race, religion, nationality, membership in a particular social group, or political opinion,” and (4) the persecutor must be the government or someone whom the government is unwilling or unable to control. That is to say, asylum hinges on the (intersecting) elements of fear and identity, and defining persecution is consequently tied to the formulation of a social group, and vice versa.

PARTICULAR SOCIAL GROUP AND A MONOLITHIC QUEER IDENTITY

The landmark case *In re Toboso-Alfonso*, in which the applicant—Toboso-Alfonso—asserted that “he [was] a homosexual who ha[d] been persecuted in

Cuba and would be persecuted again on account of that status should he return to his homeland,” first established homosexuality as a basis for a social group in 1990. This subset of “particular social group” is more ambiguous, and therefore more malleable than the other categories of race, religion, political opinion, and nationality. While this translates to it being flexible enough to create claims for uniquely specific groups such as Colombian “noncriminal drug informants” and “wealthy Guatemalans,” along with queer individuals, its malleability also makes it uniquely contentious. In looking at petitions based on queer identity, a rather Foucauldian struggle arises between homosexuality as conduct and homosexuality as status, as well as a back-and-forth regarding the mutability and visibility of said status or conduct. *In re Toboso-Alfonso* is therefore a notable case not only in that it sets the precedent for queer migration, but also in that it created a set of norms surrounding how the United States conceptualizes queerness. These norms have since been powerfully deployed in asylum law, creating not only the threshold for entrance into the country, but also a stock queer character.

Rather than creating space for complex identities, the grey area of having a particular social group has arguably created a low-scale panic about defining homosexuality; specifically, defining homosexuality in such a way that fits comfortably within an adjudicator’s conception of what a gay identity should look like. The tension between conduct and status is at the crux of this issue. A few years before *Alfonso*, *Matter of Acosta* established the current standard of a particular social group as “a group of persons who share a common immutable characteristic that

members of the group cannot or should not be required to change.” Although courts have made it clear that biological innateness is not a requirement of immutability, “the characteristic must be seen . . . as having some greater significance to the individual through its innateness.” Thus, the debate within asylum law becomes one of “defining the valid parameters of human identity and expression capable of protection through a human rights framework.”

In her article “Not Gay Enough for the Government,” Deborah Morgan suggests the standard for an immutable gay identity grew out of the activism following *Bowers v. Hardwick*. This decision, which upheld the constitutionality of sodomy laws in Georgia in 1986, was a catalyst for a very particular breed of gay rights organizing. Because the Supreme Court legitimized the states’ right to criminalize homosexuals by virtue of their private conduct, activists assumed a rhetoric of demanding equality while saying nothing about sexual behavior. “Much LGBT litigation activity until *Lawrence v. Texas*,” Morgan further notes, “. . . employed a ‘discourse of equivalents’ rhetoric whereby LGBT activists asserted their right to equality based on an immutable homosexual identity analogous to race,” such that intersectionality is erased entirely. The construction of a homosexual identity that became a basis for asylum thus grew out of this historical background, which relies heavily on the idea of an inborn and unchangeable gay identity that privileges a white, Western gay experience.

In spite—or perhaps because—of adjudicators’ reliance on immutability as an indicator of membership in a particular social group, queerness seems to function differently from other claims.

Post *Toboso-Alfonso*, the question is no longer whether a group exists, but rather, whether an applicant is truly part of that social group. That is to say, queerness must be proven in a way that race, gender, and so forth does not. In addition to raising some wide-sweeping theoretical concerns, this raises some very practical ones for asylum seekers as well.

GAY ENOUGH

The burden of proof in asylum claims rests on the claimant, and it is often the claimant’s affidavit—their own account of self-identity—that is at the claim’s core. If we turn, once again, to queer history in the United States, this is somewhat paradoxical in that the representation of homosexuality has historically never had anything to do with truth. On the contrary, “it was about masks, secrets, and deceptions.” This is, of course, entirely the product of wide-sweeping homophobia; stigma necessitated a “double-life,” and a double-life necessitated discretion. But the result was nevertheless that homosexuality was often linked to treacherousness. Scholars point to the homophobic dimension of McCarthyism in the mid-1950s, and more recently, to black men who live on the “down low,” as evidence of characters whose perceived untruthfulness makes them inherently suspect, be it as traitors or as deviant spreaders of disease. Even now, the requirement for extrinsic evidence to confirm an applicant’s testimony “lies in the belief that the sexual-orientation asylum system is vulnerable to fraud and false claims.” Of course, this is not to say that adjudicators in asylum cases consciously frame each asylee as treacherous or deceitful, but neither are they immune to decades

of historical baggage, which asylum seekers must inevitably shoulder. Therefore, in a legal process that rests so heavily on credibility, it is hardly remiss to say that this history helps set the scene.

“Social visibility” plays a considerable role in the calculus of credibility. For one’s experience of queerness to merit the legitimacy and legal cognizance of belonging to a particular social group, it must be performed publicly. While decisions from the Board of Immigration Appeals (BIA) have indicated social visibility is not the only factor courts should take into account, neither have they truly indicated how much sway it should hold, nor what actually qualifies as “highly” visible. Often, that means that adjudicators’ preconceived ideas of what queerness looks like turns into an unofficial legal standard, usually to the detriment of asylum seekers, especially queer women and people of color. In addition to reinforcing harmful stereotypes, this test has the effect of punishing those who are able to “cover” their queerness successfully in order to avoid persecution; in fact, it often demands what Kenji Yoshino—professor of constitutional law at NYU—describes as “reverse covering,” or over-performing traits that are coded as gay. For example, in *Shahinaj v. Gonzalez*, a case in which an Albanian gay man petitioned for asylum, the immigration judge decided that “Neither [Shahinaj]’s dress, nor his mannerisms, nor his style of speech give any indication that he is a homosexual.” Although the decision was later overturned, the immigration judge’s message to Shahinaj was essentially that he was not gay enough, because his performance of gayness failed to “vividly corroborate U.S. connotations of LGBT status.” Essentially, identity is being

formed through discursive practices in the asylum process.

Mockeviciene v. Attorney General, a claim for asylum based on a queer Lithuanian woman’s sexual orientation, stands out as another salient example. In this case, the immigration judges did not find Mockeviciene’s claim credible specifically because they did not believe she was a lesbian. They provided the following reasons for their skepticism:

- (1) Mockeviciene defined being a lesbian as a woman who wants to be around other women and it does not necessarily involve sexual relationships;
- (2) although she had been in the United States for four years, she had not had a lesbian partner, so that she was at best a nonpracticing lesbian;
- (3) she had no documents to establish that she is a lesbian;
- (4) she had not joined any groups while [in the United States] that involved lesbian activities, [and]
- (5) she did not produce any witnesses to ‘attest to the fact that she is indeed a lesbian.’

In both of these cases, a contextual analysis of what it means to be queer in Albania or Lithuania seems to matter less than Western benchmarks of queerness, such as effeminacy in men, an active sex life, or participation in highly visible groups and clubs. To win asylum, it appears, one must “employ a narrative that resonates with the values, beliefs, and assumptions of the judge by draw[ing] upon prevailing norms and beliefs, no matter how problematic they might be.”

It is noteworthy that in a system where there is so much fear of fraud, this very reliance on stereotypes to get to the heart of the truth likely facilitates the

same fraudulent claims that fact finders fear. The inherent simplicity of stereotypes makes them remarkably easy to adopt and regurgitate. Canadian immigration attorney Robert Moorhouse has represented more than 60 gay refugees throughout his career, and notes, “I used to call it Gay 101. Immigration and Refugee Board members ask claimants what day the Gay Pride parade was on, where the gay bars in Toronto are located, and whether they were in a relationship.” Some women report that stereotyping has gone even further; they have been asked whether they read Oscar Wilde, while others have been told they did not look like a lesbian. The almost comical reinforcement of tired gay tropes aside, these absurd criteria aggressively exclude a wide swath of asylum seekers who may not have the knowledge or the means to meet these Western benchmarks. Frequenting gay bars requires a disposable income, reading Oscar Wilde requires a formal education (as well as an assumption that other countries do not have celebrated queer authors of their own), and celebrating Gay Pride requires a straightforward comfort with one’s sexuality that a history of trauma and persecution may simply not accommodate. A claimant’s cultural differences are entirely undercut when adjudicators assume a global, homogenous idea of queer identity. Judith Butler famously writes that identity is formed through a “stylized repetition of acts;” taken as

true, we will find that when stereotypical depictions are relied on over and over again, they become the legal truth of what “homosexuality” looks like—white, monogamous, public, moneyed, easily legible—and set the bar for future cases queer asylees bring forward.

In *Gender Trouble*, Butler argues that the categories of sexuality and gender are socially and culturally constructed, writing, “The notion that there might be a ‘truth’ of sex, as Foucault ironically terms it, is produced precisely through the regulatory practices that generate coherent identities.” Although she is referring specifically to the production of “feminine” and “masculine,” the root of the problems surrounding proving membership in a particular social group in an asylum claim is this very notion of a monolithic “truth.” Sexuality, like gender, is arguably socially constructed, rather than emanating from a preexisting essential core, but as it stands, adjudicators often treat pieces of gay “trivia” as markers of an imaginary absolute truth. Therefore, applicants like Tavera Lara, a queer woman and mother from Colombia, baffle adjudicators. In evaluating her claim, the court “placed the identities of lesbian and mother in opposition,” arguing that her fear of persecution as a lesbian could not have been real if she was willing to return to Colombia on one occasion to see her children. In this case “the credibility of her subjective fear is challenged by [her] deviation from a pre-

.....

The almost comical reinforcement of tired gay tropes aside, these absurd criteria aggressively exclude a wide swath of asylum seekers who may not have the knowledge or the means to meet these Western benchmarks.

.....

sumed universalized notion of the fundamental characteristic.” Here, identity is expressed as a “normative ideal rather than a descriptive feature of experience,” and consequently, when a multitude of queer experiences are brought forward, an American adjudicator’s normative ideal is bound to leave many of them out.

FEAR OF PERSECUTION

Membership in a particular social group is inextricably linked to the central prong in asylum claims—fear of persecution based on either past experience or a well-founded expectation of persecution in the future. Indeed, in *Constructing the Personal Narrative of LGBT Claimants*, authors Laurie Berg and Jenni Millbank suggest “the emotional condition is at the heart of the legal definition.” In order to rise to the level of persecution, the harm must be severe. Although a pattern of repeated discrimination can sometimes be considered grave enough to rise to the level of persecution, typically, discrimination alone does not meet the threshold. The requisite serious harm generally entails threats to life or freedom, or other kinds of grave human rights violations. Extrinsic pieces of evidence, such as police reports, hospital records, letters of support from witnesses, or even testimony about country conditions, can help build a case, but it ultimately rests on the asylum seeker to lay out their history of persecution in their affidavit. As discussed above, adjudicators’ understanding of sexuality is such that membership in the social group of homosexuals unites its members and their experiences enough to collectively place them at risk of persecution; therefore, just as it is useful to present a version of queer identity that is

in line with adjudicators’ perceptions, it is useful to trot out a narrative of persecution that will resonate with them too.

The Real ID Act states that the identity characteristic must be a “central reason” for persecution. In a landscape where the identity characteristic of queerness is fixed, immutable, and fundamental, however, the line between queer identity as a central reason for persecution and persecution as a central part of queer asylee identity blurs. Like most, if not all, asylum seekers, queer asylum seekers have endured and survived incredibly difficult ordeals. These events and these experiences of trauma, however, vary widely, and are as unique and nuanced as the applicants themselves. Nevertheless, when there is a single narrative of fundamental homosexuality, it serves to equate the identity with the persecution.

WOUNDED ATTACHMENTS

The conflation of these factors has a number of troubling results. It is helpful to look once again to the case of Shahinaj, who was not considered effeminate enough to fall within the particular social group of homosexual. The other possible side to a case like this is that even if a claimant like Shahinaj is considered part of the particular social group, adjudicators may still read a claimant’s lack of effeminacy, or ability to “cover” and avoid severe mistreatment as an indication that homosexuals are not sufficiently persecuted as a group. Jose Salkeld, a gay man from Peru, was denied asylum on these very grounds. The immigration judge, and later the BIA, found that “there are no criminal penalties for homosexuals in Peru” and that while “living an openly homosexual lifestyle

in Peru may provoke a reaction from private citizens or the police . . . Salkeld did not reveal his status while living in Peru and there are no laws requiring homosexuals to register with the government.” The judge also pointed out that just as there are places in the United States that are safer than others, there are some areas in Peru where queer men can live safely, implying that if Salkeld could successfully hide his sexuality and live in a “more tolerant” area, he could avoid risk of attack. Thus, in a case like Salkeld’s, an applicant’s credibility as to his sexuality is not what is at issue, as it was with Shahinaj. Instead, it is his supposed ability to avoid persecution that either results in a finding that maltreatment is not sufficient to reach the level of persecution of the group, or, more interestingly, forces him outside of the social group category altogether.

Asylum claims are hardly the only times queer people, as a social group, are imagined as wounded subjects. In *Feeling Backward: Loss and the Politics of Queer History*, Heather Love writes, “The history of western representation is littered with corpses of gender and sexual deviants.” It hardly feels like an exaggeration; we see this trope deployed in both cultural representations of queer characters as well as in case law, most notably in the string of marriage equality cases that discuss woundedness as directly oppositional to dignity. This language of injury goes hand-in-hand with queer identities and echoes professor Wendy Brown’s argument that identity politics may deepen a group’s reliance on “wounded attachments.” She explains:

In locating a site of blame for its powerlessness over its past—a past of injury, a past as a hurt will—and locating a “reason” for the “unen-

durable pain” of social powerlessness in the present, it converts this reasoning into an ethicizing politics . . . Politicized identity thus enunciates itself, makes claims for itself, only by entrenching, restating, dramatizing, and inscribing its pain in politics . . .

The overarching worry is that when past injuries play a significant part in forming group identity, the group may become dependent on these wounds to keep its shape and remain legally cognizable.

Although some queer asylum claimants undoubtedly manage to craft affidavits that underscore empowerment and strength amidst persecution, countless others rely on a steady and uncomplicated refrain of violence, sexual abuse, rejection, and shame to make their claim. Indeed, this is a tried and true—and therefore strategically valuable—course of action, although not without its attenuating costs. Brown ultimately suggests a wounded subject “engage in something of a Nietzschean ‘forgetting’ of this history” in order to avoid entrenching themselves in a wounded subjectivity, but the very structure of the asylum process makes this a nearly impossible feat. An asylum seeker must be ready to repeat their story countless times, to attorneys, social workers, interpreters, and adjudicators. This is true for claimants on all grounds, but sexual orientation claims are arguably “unique in the sense that extremely private experiences infuse all aspects of the claim;” this means feelings of pain, shame, and woundedness “manifest distinctively” in these claims. There is no room for forgetting. In fact, the reality for queer asylum seekers is that their “dreams for the future are founded on a history of suffering, stigma, and violence.”

Another way in which the emphasis of persecution as a fundamental part of the queer asylee identity is problematic is the way in which it allows Western countries to preserve a sense of cultural superiority as it shapes the dialectic around what it looks like to be a queer asylum seeker. Courts look most favorably upon the sort of persecution that is both severe and straightforward; when persecution begins to resemble what a queer person in the United States could conceivably experience, asylum is typically denied. Victoria Nielsen, legal director at Immigrant Justice Corps notes, “You’d ask, could this happen in the United States? If the answer is yes, there’s no asylum claim.” Queer asylees, it seems, must be Western enough to be easily legible while remaining sufficiently other so as to not create any anxieties or pose any difficult questions about the United States’ own treatment of queer individuals. Rather, the identity of persecuted homosexuals is co-opted, and used in a sort of homonationalist project to support the state’s idea of its own exceptionalism. A fundamental and uncomplicated homosexual identity that is built on a queer asylee’s injury at the hands of foreign (un-American) subjects is particularly useful in furtherance of this goal.

Perhaps there is a certain power in claiming a history of injury and using it to move through the asylum process. The wounded body can be used as a way to communicate pain, and demand its acknowledgment. Pain becomes an important currency for those who are otherwise shut out of a larger economy of power, as asylum seekers often are. Nevertheless, deploying trauma in this way seems to confirm Brown’s anxiety about a group’s dependency on its “wounded attachments” to remain cohesive. If ad-

judicators have set a precedent in asylum law that favors a narrow and essentializing homosexual experience informed by persecution, utilizing these tropes to establish a credible fear of persecution and membership in a particular social group is the surest avenue toward asylum. In subscribing to this narrative of wounded and monolithic homosexuality in the asylum process, however, we are turning stereotypes based on quiet homophobia and misinformation into law.

End notes are to be found online at: www.hkslgbtq.com.

One Small Step for Wisconsin, One Giant Leap to the Back Burner for the Other Forty-Nine States: Injustice in Trans Inmates’ Rights

By Pamela Newell

BIOGRAPHY

Professor Pamela Newell is a legal writing scholar. She is known for her legal appeals on behalf of children. She is currently working on a noncriminal way to approach domestic violence matters. She received her BA in English from the University of North Carolina at Chapel Hill in 1997 and her JD from UNC School of Law in 2000. She received her LLM in law and government from American University in 2009. After law school, Professor Newell clerked at the North Carolina Supreme Court with former Chief Justice Henry E. Frye. She is now in private practice.

ABSTRACT

Prisons with policies that allow them to refuse to treat inmates suffering from gender dysphoria arguably violate the inmates’ Eighth and Fourteenth Amendment rights against cruel and unusual punishment and discrimination. Examples of cruel and unusual punishment include prison officials’ failure to continue cancer treatment for inmates, deciding to offer cheaper and less effective treatments, and refusing medical treatment altogether to inmates with medical needs.

To keep taxpayers from paying for sex reassignment surgeries for inmates with gender dysphoria, Wisconsin passed the Inmate Sex Change Prevention Act. The act prevented prisoners with gender dysphoria from receiving certain medical treatment, up to and including sex reassignment surgeries. Three Wisconsin inmates sued, stating that the act was unconstitutional. The federal district court agreed with the inmates. Wisconsin appealed to the Seventh Circuit Court of Appeals, which also decided that the act was unconstitutional.

Federal courts across the nation disagree about how to treat cases regarding inmates diagnosed with gender dysphoria. Usually, when federal courts (which are regional) are in disagreement, also called a “split in authority,” the United States Supreme Court (which all courts must follow) will hear a case to decide the issue once and for all, resolving the split. However, when Wisconsin petitioned to be heard by the United States Supreme Court, the court refused. The Supreme Court passed on

a perfect opportunity to resolve the split in authority and decree that no state shall withhold transgender treatment to prisoners pursuant to the Eighth and Fourteenth Amendments.

IN 2005, THE WISCONSIN STATE legislature passed the Sex Change Prevention Act, a law that prevented all hormone treatments and sex change surgeries in the state of Wisconsin. Multiple inmates sued, challenging the act in *Fields v. Smith*. A United States district court found in favor of the transgender inmates, and the Seventh Circuit Court of Appeals upheld the district court's decision. The State of Wisconsin appealed to the United States Supreme Court. However, the court decided not to hear the case in 2012, which allowed the circuit court's decision to stand.

Although this is a victory for Wisconsin state prisoners, the law does not extend beyond Wisconsin's borders. The United States Supreme Court should have accepted the case and decreed that anti-transgender laws violate the United States Constitution, particularly in the wake of so many prisoners in other states suing for treatment, and the split among the circuit courts about specific state policies that prevent treating gender dysphoria (GD).

DEFINITION OF TRANSGENDER AND GENDER DYSPHORIA

The Diagnostic and Statistical Manual of Mental Disorders (DSM), Fourth Edition (DSM-IV) was published in 1994, followed in 2000 by the DSM-IV, Text Revision, or DSM-IV-TR. It was in use during the *Fields v. Smith* case. These editions include transgender identity and gender identity disorder (GID) as disorders.

Transgender "is an umbrella term for persons whose gender identity, gender expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth." Gender dysphoria, or gender identity disorder (GID), is a "mental disorder [whereby individuals] are uncomfortable with their apparent or assigned gender and demonstrate persistent identification with the opposite sex."

There are four components of GID: (1) evidence of a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is of the other sex; (2) evidence of persistent discomfort with one's assigned sex or a sense of inappropriateness in the gender role of that sex; (3) the individual must not have a concurrent physical intersex condition (e.g., androgen insensitivity syndrome or congenital adrenal hyperplasia); and (4) evidence of clinically significant distress or impairment in social, occupational, or other important areas of functioning. Furthermore, the cross-gender identification should not merely be a wish for any perceived cultural advantages of being the other sex. Instead, GID adults are preoccupied with their desire to live as a member of the other sex.

People suffering from GD were considered disabled under the DSM-IV. They tend to be socially isolated, which causes low self-esteem. Adults regularly experience anxiety and depression. The disability is so strong that gender dysphorics are preoccupied only with pursuits that will lessen their gender dis-

stress. For example, they frequently immerse themselves in their appearance. There are no physical abnormalities.

Based on evaluations at adult gender clinics, those with GD tend to be male, although the disorder is present in females as well. Some males will attempt, or successfully perform, castration or penectomy upon themselves. Additionally, some males may work as prostitutes, attempt suicide, and engage in substance abuse. Females experiencing GD tend not to be as socially ostracized as men.

BACKGROUND FOR INMATE RIGHTS

Eighth Amendment

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment. Most of the case law regarding the Eighth Amendment is about excessive penalties and capital punishment; however, the Eighth Amendment also requires that the government must provide for the basic necessities of life. For example, a federal court stated that "a state must provide within such living space reasonably adequate ventilation, sanitation, bedding, hygienic materials, and utilities (i.e., hot and cold water, light, heat, and plumbing)." Within the demand that prisons offer sanitary living conditions to inmates, a prison must also provide them with medical care. Failure to provide medical treatment, indicating a "deliberate indifference to serious medical needs of prisoners," results in "the 'unnecessary and wanton infliction of pain' . . . proscribed by the Eighth Amendment."

Accordingly, there are two parts to the test to determine whether an alleged deprivation is cruel and unusual pun-

ishment. The first part of the test is objective: was the deprivation sufficiently serious? The second part is subjective: did the prison officials act with sufficiently culpable states of mind?

Serious Medical Need

The first element of an Eighth Amendment violation, "serious medical need," is defined as a need that has been diagnosed by physicians as mandating treatment, or one that is so obvious that even a layperson would easily recognize necessity for a doctor's attention. The Eighth Amendment's ban against cruel and unusual punishment obliges prison authorities to provide medical care for prisoners' serious medical needs. Additionally, a "serious medical need," for purposes of an Eighth Amendment claim, occurs where denial or delay of medical assistance causes an inmate to suffer a lifelong handicap or permanent loss. The Eighth Amendment protection against deliberate indifference to prison health problems extends to conditions that threaten to cause future health problems, as well as current serious health problems. It is evident when physical ailments are serious. For instance, an inmate with a broken limb would need immediate medical aid. Likewise, it is a serious condition when a physician refuses to remove a suture wire from an inmate's abdomen after hernia surgery.

Another example of a serious medical need can be found in *Perez v. Oakland County*, where an inmate suffered from schizophrenia that made him suicidal. Perez attempted suicide in his cell in October 2002, a month before his successful suicide in November 2002. The October attempt prompted the caseworker/counselor to place Perez in an observation cell under an active suicide

watch. During this time, the prison psychiatrist failed to continue to treat the inmate for his schizophrenia. A federal court reversed the trial court's decision that favored the prison and sent the case back to trial because the jury needed to decide whether Perez suffered from a serious medical need.

On the contrary, in *Desroche v. Strain*, the inmate suffered from attention deficit hyperactivity disorder (ADHD). The federal court held that his ADHD was not a serious condition and, thus, any denial of medical care for such a condition did not violate his Eighth Amendment rights. Courts have discussed other examples of injuries that do not qualify as a serious medical need, including when an inmate failed to complain of broken fingers for two days; swollen, bleeding wrists from handcuffs that were too tight; and when an inmate had full range of motion in his shoulder despite continuing pain from an old injury. In none of these cases did the prisoner show that denial or delay of medical assistance would cause a lifelong handicap or permanent loss of some kind.

Deliberate Indifference

The second element in an Eighth Amendment violation is deliberate indifference to the prisoner's medical need(s). The test is whether the prison official acted with wanton disregard for the inmate's rights. Obduracy or wantonness, not inadvertence or good faith error, characterizes prison officials' deliberate indifference to a prisoner's constitutionally protected needs.

For example, in *Richardson v. Penfold*, a prisoner was attacked and sexually assaulted after reporting that other inmates were threatening him. The prisoner told prison officials about being

raped but did not reveal the names of the perpetrators because he was afraid of retaliation. He asked simply to be left inside his cell at all times. Prison officials did not respond to the inmate's request. Subsequently, the inmate was raped multiple times. At trial, the inmate argued that prison officials acted with deliberate indifference by failing to protect him from the attack. The trial court decided in favor of the prison officials. On appeal, the court reversed the decision, reasoning that "[a] defendant acts recklessly when he disregards a substantial risk of danger that either is known to him or would be apparent to a reasonable person in his position."

.....
Unfortunately, inmates with gender dysphoria are treated differently from other inmates with recognized mental health issues, because prison officials do not understand their condition and dismiss gender dysphoric inmates' requests as passing whims.
.....

Likewise, in *United States ex rel. Miller v. Twomey*, a different appellate court noted that "[the Eighth] amendment may be violated either by the intentional infliction of punishment which is cruel or by such callous indifference to the predictable consequences of standard prison conditions that an official intent to inflict unwarranted harm may be inferred."

Unfortunately, inmates with gender dysphoria are treated differently from other inmates with recognized mental health issues, because prison officials do not understand their condition and dismiss gender dysphoric inmates' requests as passing whims.

Fourteenth Amendment

In *Farmer v. Hawk-Sawyers*, a federal district court addressed the issue of whether prison officials violated Farmer's Fourteenth Amendment rights. The Fourteenth Amendment protects citizens from discrimination based on gender. Farmer was a preoperative male-to-female transsexual. Farmer claimed that the Federal Bureau of Prisons (BOP) was discriminating in its treatment of transsexuals and had failed to treat her GD.

The BOP has policies regarding medical treatment of inmates. Prison officials will give inmates "medically mandatory" or "presently medically necessary treatment," but prison officials will maintain a transsexual inmate at the level of hormone therapy existing upon admission. Inmates suffering from other mental disorders—such as schizophrenia, depression, or manic depression—need not submit documentation of prior treatment in order to receive treatment for their illnesses while incarcerated. Thus, there is an extra burden on GD inmates to find and submit documentation.

The BOP had not provided Farmer with hormone therapy as treatment for her GD, despite her assertion that she was prescribed and had been undergoing hormone therapy for several years prior to incarceration. Even if Farmer met the qualification to receive the hormone therapy, the BOP would still not administer hormones to Farmer because she had AIDS, and they were concerned

about complications and risks to her health.

Accordingly, the court decided that even though Farmer had correctly articulated a Fourteenth Amendment argument, she was not guaranteed any particular treatment since the BOP had given a reasonable excuse to deny the treatment.

ILLUSTRATIVE GD CASES

Federal District Court Cases Where Prisons Had Policies Against Treating GD

The "Standards of Care" set forth by the World Professional Association for Transgender Health give guidelines for treating GD. The guidelines state that the following are appropriate ways to diagnose GD: "Initiation of hormone therapy requires that the patient has: (1) persistent, well-documented gender dysphoria; (2) the capacity to make informed treatment decisions; (3) attained the age of majority; and (4) has reasonable control over any medical or mental health concerns." As to the proper means of treatment, "[t]he vast majority of follow-up studies have shown an undeniable beneficial effect of sex reassignment surgery on postoperative outcomes such as subjective well-being, cosmesis, and sexual function."

In *Brown v. Coombe*, an inmate filed a lawsuit claiming that prison officials exhibited deliberate indifference to her GD. Although the inmate told prison officials that she believed she suffered from GD, the court decided that the inmate did not have a case because she had never been diagnosed with GD.

In *Soneeya v. Spencer*, a prisoner sued prison officials for infringing upon her

Eighth and Fourteenth Amendments rights. The inmate was diagnosed with GID in 1990; her records showed that she had a history of self-mutilation, including an attempt to castrate herself, and suicidal tendencies.

However, in 2010, the Department of Corrections (DOC) adopted a policy that forbade laser hair removal, cosmetic surgery, and sex reassignment surgery as treatments for GD inmates, no matter the circumstances. A federal court noted that the blanket ban on certain types of treatment, without consideration of the medical requirements of individual inmates, is exactly the type of policy that was found to violate Eighth Amendment standards in other federal cases. Even though the Department of Corrections offered to treat resulting depression or anxiety, “treating the symptoms is not a substitute for treating Soneeya’s underlying condition.” The DOC could not claim that Soneeya was receiving adequate treatment for her serious medical needs because it had not performed an individual medical evaluation aimed solely at determining the appropriate treatment for her GID under community standards of care.

Split in the Circuit Courts of Appeal Regarding the Appropriate Treatment(s)/Policies for GD Sufferers

The federal circuit courts of appeal do not have a universal way of dealing with GD/GID cases. This causes a split, meaning that federal circuit courts, which are all on the same appellate level, decide these cases in a nonuniform way. An inmate suing for treatment in one federal district may receive a court ruling very different from the exact claim of an inmate in another district, thereby causing confusion in the law. The US Supreme

Court often resolves such “circuit splits” by providing a uniform law to be applied across all circuit courts. This is why the US Supreme Court should have agreed to hear arguments in *Fields v. Smith*, to resolve the inconsistencies in the law regarding prison officials treating inmates for GD/GID.

First Circuit

In *Battista v. Clarke*, a prisoner with GD requested hormone therapy, female garb, and female accessories. The prison’s health care provider “offered strong support for the GID diagnosis, [and] asserted that harm could easily occur without adequate treatment, and recommended hormone therapy [for Battista] as medically necessary.” Despite the recommendation, prison officials were concerned with Battista’s safety and decided that a feminine appearance would put him at risk for sexual assault. Eventually, after doctors had been prescribing hormones for Battista, prison officials administered the hormones once but caused delays in administering additional doses. At trial, the district court required the prison officials give Battista hormone therapy due to their deliberate indifference to her GID. The Court of Appeals for the First Circuit affirmed this decision and determined that although the prison officials correctly took Battista’s safety into consideration, the unnecessary delays in treating Battista showed deliberate indifference.

Second Circuit

In *D’Villa v. Schriver*, D’Villa sued prison officials because a corrections officer told other inmates that D’Villa was HIV-positive. As a result, other prisoners harassed and attacked D’Villa. The trial court pointed out that D’Villa had

not shown an injury harmful enough to be “sufficiently serious” to fall under the Eighth Amendment’s “cruel and unusual” umbrella. The second circuits set the trial court’s decision aside, stating that the trial court had acted arbitrarily and did not give a real reason as to why the harm was not serious enough.

Third Circuit

In *Wolfe v. Horn*, inmate Wolfe sued after the prison medical director abruptly discontinued the hormones she was taking prior to her incarceration. Even after a psychiatrist recommended the hormones be reinstated, the medical director still refused to treat Wolfe. As a result, all hormonal effects dissolved and Wolfe suffered severe withdrawal symptoms, including migraines, nausea, cramps, hot flashes, and hair loss. As Wolfe reacquired masculine physical features, she became suicidal.

The third circuit stated that inmates were only entitled to “some” kind of medical attention and noted that some courts have rejected demands for hormonal therapy by transgender people who did not take hormones outside of the prison setting. However, since Wolfe had a private doctor prescribe the hormones before she was incarcerated, circuit court allowed the lawsuit to progress.

Fourth Circuit

In *De’lonta v. Johnson*, the inmate sued the prison for failing to provide GID treatment. De’lonta had been diagnosed with GID and was a preoperative transsexual prior to being incarcerated. While in prison, De’lonta attempted to castrate herself in efforts to perform her own sex reassignment surgery because the GD distress was so overwhelming. However, prison officials offered her no

real treatment because of the Virginia DOC’s policy that prevents medical staff from treating gender dysphoria. Her only treatment was a continuance of her hormone therapy and counseling, which only heightened her urge for castration. Her symptoms persisted, and in 2010, she had to be hospitalized after another self-castration attempt. De’lonta asked to stop seeing her counselor and repeatedly requested sex reassignment surgery pursuant to the GD treatment guidelines established by the “Benjamin Standards of Care.” The standards call for one year of hormone therapy as the opposite sex and then sex reassignment surgery for those with serious symptoms. Nonetheless, the prison denied the treatment. De’lonta was never evaluated by a specialist concerning sex reassignment surgery.

De’lonta sued, claiming that the prison consistently denied her appropriate treatment. The federal district court determined that De’lonta had not been approved for the surgery and threw out her Eighth Amendment claim. On appeal, the prison argued that De’lonta was just complaining about her preferred choice of treatment, and the surgery was not approved, although the prison conceded that De’lonta suffered from a serious medical need. The fourth circuit decided that De’lonta had proved a deliberate indifference to her serious medical need for the following reasons: (1) the defendants were always aware of De’lonta’s GD and its effects on her; (2) the Standards of Care include sex change surgery as an option to treat GD; and (3) the medical staff refused to evaluate her about the suitability of surgery. The court concluded that it did not matter that the prison provided other treatment to De’lonta. In fact, it gave this analogy:

Imagine that prison officials prescribe a painkiller to an inmate who has suffered a serious injury from a fall, but that the inmate's symptoms, despite the medication, persist to the point that he now, by all objective measure, requires evaluation for surgery. Would prison officials then be free to deny him consideration for surgery, immunized from constitutional suit by the fact they were giving him a painkiller? We think not.

The court ordered that De'lonta's case move forward.

Fifth Circuit

In *Praylor v. Texas Department of Criminal Justice*, prison officials refused to provide Praylor with hormone treatment because of its policy that prevents medical staff from performing certain treatments

to other circuits, stating that “[o]ther circuits that have considered the issue have concluded that declining to provide a transsexual with hormone treatment does not amount to acting with deliberate indifference to a serious medical need.” The court then listed cases in only three other circuits where the plaintiff was not able to prove serious medical need and/or deliberate indifference.

The fifth circuit erred in *Praylor* by failing to consider that there are just as many cases in circuits that show plaintiffs able to prove serious medical need and/or deliberate indifference. The circuit also failed to address the policy to see if it treated transsexuals differently. Furthermore, the fifth circuit did not even address “serious medical need;” it just made assumptions about this first element.

.....

The fifth circuit erred in Praylor by failing to consider that there are just as many cases in circuits that show plaintiffs able to prove serious medical need and/or deliberate indifference. The circuit also failed to address the policy to see if it treated transsexuals differently.

.....

for gender dysphorics. Praylor sued so that the prison would provide her with “hormone therapy and brassieres.” The medical director testified that Praylor did not qualify for hormone therapy because of: (a) the length of her term; (b) the prison's inability to perform a sex change operation; (c) lack of medical necessity for the hormone; and (d) disruption to the all-male prison. The fifth circuit admitted that it had never reviewed this type of case and looked

Sixth Circuit

In *Titlow v. Correctional Medical Services, Inc.*, the plaintiff was biologically male, but considered herself a woman. She had been diagnosed with GID prior to her incarceration and had received silicone injections in her breasts to make them bigger. During her incarceration, several physicians recommended that Titlow receive a surgical consultation, but the Michigan DOC denied the consultations.

Under the medical claims review policy, only the prison physician can appeal a treatment decision from the Correctional Medical Services. Titlow was treated by three doctors, and the Correctional Medical Services Committee considered Titlow's request for surgery three times. It approved her request only on the third appeal. The court held that the committee denied Titlow's requests twice with no reason provided. Accordingly, the Sixth Circuit Court of Appeals held that the medical director interfered with a constitutional right and knew of Titlow's problems, but did not do anything about them.

Seventh Circuit

In *Fields v. Smith*, the subject of this article, the Court of Appeals for the Seventh Circuit reviewed the Inmate Sex Change Prevention Act, a Wisconsin statute that prohibited medical treatment for GD inmates, including hormone therapy and sex change surgeries. The district court invalidated the statute because it was unconstitutional based on the Eighth and Fourteenth Amendments.

On appeal, the Court of Appeals for the Seventh Circuit noted that an argument about cost is no longer effective for prisons because prisons spend so much money on other ailments and so little on GD treatment. Further, the defendants did not produce any evidence that another treatment could be an adequate replacement for hormone therapy. Plaintiffs' expert witnesses repeatedly made the point that, for certain patients with GD, hormone therapy is the only treatment that reduces dysphoria and can prevent the severe emotional and physical harms associated with it. The appellate court held that “[h]aving determined that the district court properly

held that [the] Act violates the Eighth Amendment, both on its face and as applied to plaintiffs, we need not address the district court's alternate holding that the law violates the Equal Protection Clause.”

Eighth Circuit

In *White v. Farrier*, an inmate, White, suffered from GD and “requested electrolysis, cosmetic surgery, hormone therapy, a sex change operation, female clothes and cosmetics, and a transfer to a women's prison.” She wrote several letters to the warden indicating her extreme distress with her GD. The warden responded denying the request. Prison officials referred White's request to a psychiatrist and medical consultant, who decided that White did not need any specific medical treatment. As a result, White went on hunger strikes, threatened to commit suicide, and attempted to castrate herself several times. In response, prison officials provided medical care for her physical injuries and placed her in protective custody or administrative confinement.

White brought an action under the Eighth Amendment and the federal district court determined that the prison did not provide White with any medical treatment when a minimal treatment plan could have been put in place. The court noted that the treatment plan might not preclude hormone therapy. On appeal, the Court of Appeals for the Eighth Circuit stated that transsexualism is a serious medical need and that the prison officials did not have the expertise to diagnose White or decide upon treatment.

Eight years later, in *Long v. Nix*, the eighth circuit reviewed another case where the inmate suffered from GD.

Long arrived at the prison in female attire, but prison officials would not allow her to wear female clothes until after Long went on a hunger strike. As a result, prison officials allowed her to wear makeup and female attire until 1981, when a member of the Iowa Parole Board complained. Long repeatedly requested hormones and a sex change operation; the prison refused. A psychologist evaluated Long and found that Long's cross-dressing had developed into intense gender dysphoria. He suggested that Long needed treatment for depression and anxiety, but he did not recommend hormone therapy or surgery because he opined that Long did not meet the criteria.

Long sued, alleging that the defendants violated her Eighth Amendment right by refusing to provide appropriate living conditions and medical treatment. At trial, the district court decided that Long's Eighth Amendment rights were not violated because her GD did not constitute a serious medical need for which treatment was mandated and the defendants were not deliberately indifferent to her needs. The eighth circuit upheld the district court's decision based on the fact that the issue was merely a dispute over type of treatment that did not rise to the level of cruel and unusual punishment.

These two cases illustrate that even in the eighth circuit alone, there is a split as to whether GD is a serious medical need. It was assumed to be one in *White*, but not discussed thoroughly in *Long*.

Ninth Circuit

In *Allard v. Gomez*, Allard sued prison officials for deliberate indifference to her GD in violation of the Eighth Amendment. Allard was incarcerated at the California Medical Facility, which had

a department-wide policy that denied therapy for GD, regardless of the medical recommendations for treatment of any given individual.

The state referred Allard to a psychologist experienced in the area of GD, who conducted a thorough evaluation over a period of months. He recommended that Allard receive hormone therapy. Yet, in Allard's repeated appeals seeking hormone therapy, the prison officials based their denials on a general policy of approving hormonal treatment only on the basis of medical need, ruling that Allard's GD could not qualify as a medical need. The district court determined that there was no dispute that GD is a serious medical need. The only issue before the court was whether prison officials acted with deliberate indifference. The Court of Appeals for the Ninth Circuit disagreed with the district court and stated that there was still the issue of whether hormone therapy was denied on the basis of an individualized medical evaluation or as a result of a blanket rule, and the issue should be determined by a jury.

Tenth Circuit

In *Supre v. Ricketts*, Supre, a biologically male inmate with GD, asked prison officials about the types of treatment available to her. She requested female hormones, but the request was denied. Prison officials entered her into a treatment program and were advised of the dangers of hormone treatment by psychologists and psychiatrists. Nonetheless, after continued self-mutilations, Supre's testicles became severely injured and had to be surgically removed by a physician at what was known as the Colorado State Hospital in 1981. She was evaluated by several doctors, but the prison physician overruled recommen-

dations of estrogen therapy and instead ordered testosterone replacement therapy and counseling. Supre went back to self-mutilation of her genitals. Prison officials eventually paroled Supre early because she was becoming so difficult.

deny medical care, to approve referral and consultation requests, and the duty to supervise other medical staff and ensure the provision of adequate medical care to inmates. The prison also refused to allow Kothmann to see a specialist.

.....
This case is an example of the fact that prisons are not ready for gender dysphorics. Prisons only know how to fight strongly against hormones and sex reassignment surgery, or to parole people so that they do not have to deal with the issue, through some "policy," without understanding the reasons.
.....

This case is an example of the fact that prisons are not ready for gender dysphorics. Prisons only know how to fight strongly against hormones and sex reassignment surgery, or to parole people so that they do not have to deal with the issue, through some "policy," without understanding the reasons.

Eleventh Circuit

In *Kothmann v. Rosario*, Kothmann sued the chief health officer at a female prison operated by the Florida DOC for violating his Eighth Amendment rights. Six years before becoming incarcerated, Kothmann was diagnosed with GID. His doctor prescribed hormone therapy, a hysterectomy, an oophorectomy (removal of ovaries), and a double mastectomy, as part of Kothmann's medical treatment for GID. When Kothmann arrived at the penitentiary, he advised the medical staff of his GD diagnosis and continuing sex reassignment therapy. However, the defendant repeatedly denied his requests for hormone treatment and did not treat his GD at all. The defendant had the authority to grant or

The defendant did not allow the GD treatment because: (a) Kothmann's prison medical records only showed that Kothmann had received some outpatient mental health counseling, but did not show that it was for GD; (b) Kothmann did not arrive at the prison with a prescription for testosterone; (c) Kothmann was not diagnosed with GD while at prison; (d) GD was not a life threatening condition; and (e) Kothmann did not present with gender dysphoria during his mental health and psychiatric evaluations while incarcerated.

The district court decided in favor of Kothmann. On appeal, the defendant argued that no law clearly establishes that inmates have a right to receive hormone therapy as treatment for GD, and the Florida DOC had a policy that specifically prevented doctors from prescribing hormones to inmates. The Eleventh Circuit Court of Appeals agreed that although an inmate does not have a right to any particular type of medical treatment, the prison must provide constitutionally adequate medical treatment. The court decided that the defendant

was deliberately indifferent to a serious medical need because (1) in the medical community, hormone therapy is the medically recognized, accepted, and appropriate treatment for GD; (2) the defendant knew of Kothmann's diagnosis, his hormone treatment history, and his medical need for continued hormone treatment; and (3) the defendant knowingly refused to provide Kothmann with medically necessary hormone treatment.

District of Columbia Circuit

In *Farmer v. Moritsugu*, The Court of Appeals for the District of Columbia Circuit faced the question of whether the medical director of the BOP can be held personally liable under the Eighth Amendment for injuries a GD inmate suffered. Farmer is a preoperative male-to-female transgender inmate who was in and out of jail. The BOP had a separate policy regarding treatment for inmates with GD, which provided maintenance at the level of change when the inmate was admitted. The defendant (the medical director) responded that Farmer had received counseling, but belittled her transsexualism as just a general emotional state that did not present a specific mental health problem that he could isolate for treatment. The circuit court decided that the defendant was not the correct person to address Farmer's treatment requests and decided that Farmer failed to establish an Eighth Amendment violation, even though Farmer begged for treatment for her GD.

The circuit court did not examine the policy itself. Even if Farmer and other plaintiffs in different jurisdictions never challenged the unfair policy on treating inmates with GD, some court should have considered the question of these policies. Because the courts have not re-

solved this and there is a split among the circuit courts regarding treatment for transgender inmates, the US Supreme Court should have stepped in to mend the split after the Wisconsin Inmate Sex Change Act was struck down.

WISCONSIN'S INMATE SEX CHANGE PREVENTION ACT

Konitzer's Prison History

The Wisconsin Sex Change Prevention Act arose out of the *Konitzer v. Frank* decision. In April 1982, "Donna" Konitzer, a male-to-female transgender inmate, was first incarcerated in the Wisconsin Department of Corrections (WDOC). She was released three separate times with her most recent period of incarceration beginning in December 1994. In 1988, she told a prison psychiatrist that she believed she was transgender. When she was out of prison on a release, she began receiving treatment from a counseling center, which diagnosed her with GID, enrolled in group therapy, and was referred for hormone therapy. Konitzer initiated electrolysis, dressed as a woman, and only dealt with people who supported her belief that she was a woman.

However, after taking hormones for three months, Konitzer became addicted to cocaine and stopped her treatment. Her female development ended. While still addicted to cocaine, she committed several crimes, which led to her arrest in June 1994. Konitzer was transferred to several prisons. In one prison, she used a razor blade to attempt a castration, resulting in one exposed testicle and excessive blood loss. She also tried to disfigure her scrotum with nail clippers.

The DOC diagnosed Konitzer with GID in December 1999 and prescribed

hormone therapy. The disconnect between Konitzer's male body and her female identity caused her a great deal of stress, and as a result, she was also diagnosed with post-traumatic stress disorder. To relieve this stress, Konitzer tried her best to live as a female while incarcerated.

When Konitzer's current period of incarceration began, she did not have any physical female development. Nonetheless, her GD did not subside, and her distress worsened because she was living as a male. Konitzer attempted to obtain prescribed female hormones, but a nurse denied her request. In November 1999, Konitzer wrote defendant Sharon Zunker, then director of the Bureau of Health Services, requesting hormone therapy and an orchiectomy (surgical removal of one or both testes). Again, her request was denied. Nonetheless, Dr. Metodio Reyes requested authorization to continue Konitzer's hormone therapy. The following day, WDOC Medical Director George Daley approved the request.

While at a different prison, Konitzer sought the help of Dr. Gerald Wellens in getting makeup and female undergarments. The warden, Daniel Bertrand, did not allow Dr. Wellens to provide the items because, "if you let one inmate wear a bra and panties, then they'll all want to wear a bra and panties." Despite this, Konitzer found a way to make cosmetics and obtain female undergarments.

In early January 2001, Konitzer attempted to hang herself because she was depressed over a prison guard sexually assaulting her, and because she was not receiving treatment for her GD. Also in January 2001, "Konitzer cut skin away from [her] scrotum and tied a cord around [her] testes to cut off the blood flow because [she] hated living as

a male." Konitzer was taken to a hospital, where surgeons removed her left testicle and portions of the right testicle. Konitzer sued because the doctors would not remove the entire right testicle. In September 2002, she was again moved to another prison, the Wisconsin Resource Center (WRC), because she continued to disfigure her genitals. One of the defendants, Byran Bartow, was the WRC director, responsible for making and signing all of the policies and procedures, including ones for medical treatment. The inmates at WRC were all male and had mental health issues. However, there are no set diagnoses for WDOC to send inmates to WRC. When a prisoner is sent to WRC, the staff at WRC performs a medication review, medical assessment, and psychiatric evaluations. The staff formulates a plan for the prisoner and places them in a program or series of programs based on the intake.

When Konitzer was transferred to the WRC, she had "three sets of women's underwear, three bras, one nightgown, and six sets of men's bikini style underwear. The WRC confiscated the items. Konitzer filed an offender complaint, stating that a prison official had confiscated the six sets of men's bikini underwear as female clothing and that they should be returned. The staff returned the underwear to Konitzer.

Konitzer v. Frank

In 2003, Konitzer sued the Wisconsin DOC for violating her Eighth Amendment rights by failing to administer the proper treatment for GD for herself and all other Wisconsin prisoners.

Konitzer absolutely did not want to live life as a male and attempted suicide several more times by electrocution and

by crushing the hyoid bone in her neck with a nylon cord. On May 15, 2006, in an effort to help herself with her GD symptoms, Konitzer attempted to castrate her remaining testes. She was rushed to the hospital, and doctors had to remove the remaining testicle. Since 17 May 2006, she has lived in a WRC cell containing a private toilet. A window shutter over the door prevents other inmates from viewing Konitzer in compromising situations, such as when she uses the toilet, but staff are still able to see her during rounds. Since this change was implemented, inmates have not insulted Konitzer about her living situation. Moreover, she has stopped being assaulted.

Contemporaneously, the WRC medical staff requested that Konitzer be referred to a specialist for recommendations on her treatment. In September 2006, Dr. Roger Kulstad recommended that Konitzer use (1) Vaniqa cream, a hair growth retardant, for a hair follicle infection on her face; (2) Rogaine; and (3) a bra, for adequate breast support.

Meanwhile, director Bartow, leader of the WRC, decided that the center would not treat any male inmate as a female and especially would not do so in Konitzer's case due to WDOC policy. Bartow maintained that "if our team was convinced and had a convincing argument that is what really needed to be done for his case, I would arrange to have him go somewhere else, by whatever means it took, because we don't do that here." Yet, Konitzer continued to wear makeup and feminize her appearance at the WRC, despite the policy.

Many specialists have seen Konitzer; collectively, they have diagnosed her with GD and an assortment of other conditions including post-traumatic stress disorder and antisocial disorder.

All of the doctors suggested similar, but vaguely different treatments. Konitzer hired Dr. Frederic Ettner, who recommended that she receive the following: (1) complete physical examination and laboratory testing including hormonal assessment; (2) HRT (hormone replacement therapy), specifically nonconjugated estrogens such as estradiol valerate (bio-identical) in the form of patch, gel, or cream; (3) anti-androgen finasteride to block exogenous androgens and stimulate scalp hair and decrease body hair; (4) consistent follow up every three months; and (5) coordination with psychiatrists and psychological recommendations.

Dr. Ettner stated that "refusing to provide Konitzer with the real-life experience puts [her] at risk for castration and self-harm, and that the frustration of living with an untreated gender condition always has disastrous consequences." He further testified:

Standard of care does not specify a list of particular ingredients that will create the image that Donna Down Konitzer needs to establish a level of well-being. It does, however, provide a guideline, and in that guideline, the thrust of it is to help these people consolidate an identity that is ego-syntonic and causes them to feel comfortable and safe in this world, therefore, the real-life experience, so they get practice in living 24 hours a day, seven days a week in their preferred gender.

The doctors still disagreed over whether Konitzer was receiving the standard level of medical care needed. In the lawsuit, the defendants argued that there was no evidence that Konitzer had a serious medical need to which they

were deliberately indifferent. The defendants also argued that the district court should not require them to allow: (a) only female officers to do strip searches on Konitzer; (b) Konitzer to use makeup and wear female undergarments; (c) Konitzer to be addressed by her female name; and (d) Konitzer the use of hair removal/growth products.

The District Court for the Eastern District of Wisconsin discussed similar cases in other circuits and noted that there would be a different result in a case where there had been a total failure to provide any kind of medical attention at all.

The district court, although part of the seventh circuit, agreed with the tenth circuit that a federal court should defer to the informed judgment of prison officials as to the appropriate form of medical treatment. However, the district court admitted that no such informed judgment had been made with Konitzer. The district court determined that Konitzer was entitled to some kind of medical care, although the court refused to order a specific type of treatment.

The defendants appealed to the Court of Appeals for the Seventh Circuit, which looked at almost every similar case in the circuit courts for guidance. The seventh circuit stated that Konitzer's GD was a serious medical need, which was evidenced by Konitzer's disfiguring of her genitals and attempted suicide. Yet, the circuit court entertained the defendants' argument that they had not been deliberately indifferent to Konitzer's GD. It noted that the defendants' argument was based on the fact that Konitzer has constantly been evaluated and "treated" by doctors. The defendants stated that their treatment just happened to be different from what Konitzer and her doctors be-

lieved was the right treatment.

The circuit court agreed with the district court's decision and stated that the prison's refusal to provide Konitzer adequate medical treatment put her at risk of self-harm. The court determined that a reasonable jury could find that the defendants were deliberately indifferent to Konitzer's serious medical need when they failed to provide her with the second step of treatment from the Standards of Care, the real-life experience, in the face of her repeated self-mutilations and suicide attempts. What the defendants were doing to treat Konitzer was not working. The circuit court sent the case back to the district court for a jury trial.

The Passage of the Wisconsin Inmate Sex Change Prevention Act

Prior to the passing of the Inmate Sex Change Prevention Act, Wisconsin allowed its DOC to treat inmates suffering from GD; the DOC provided hormone therapy for severe cases of gender dysphoria, but refused to provide surgical therapy. In response to Konitzer's lawsuit, the Wisconsin legislature passed act 302.386(5m) in 2005 and it went into effect on January 24, 2006. The act's purpose was the following:

An Act to create 302.386 (5m) of the statutes; relating to: a prohibition against using state funds or resources or federal funds to provide or to facilitate the provision of hormonal therapy or sexual reassignment surgery to alter the appearance of a prisoner or forensic patient so that the prisoner or forensic patient appears more like the opposite gender.

In response, five inmates filed suit in *Fields v. Smith* against the warden, prison

doctor, manager of the prison's health services unit, director of the Wisconsin DOC's Bureau of Health Services, and the DOC secretary. The number of plaintiffs dropped from five to three after two were released from jail. The Wisconsin DOC recognized that all of the inmates suffered from GD.

Fields v. Smith

The three remaining plaintiffs were “Andrea” Fields, Matthew “Jessica” Davison, and Vankemah Moaton. Fields is a male-to-female transgender inmate, who has taken female hormones since 1996 and underwent a breast augmentation in 2003 before being incarcerated in 2005. Davison is a male-to-female transgender inmate, who had attempted suicide before being put on hormone therapy in 2005. Moaton is a male-to-female transgender inmate, who had been taking female hormones since the 1990s. In 2006, the DOC stopped the hormone therapy based on the act. All of the inmates who lost their hormone therapy experienced nausea, muscle weakness, loss of appetite, increased hair growth, skin bumps, body aches, voice deepening, breast reduction and leaking, mood swings, mental and emotional instability, hot flashes, and depression. The plaintiffs sued to reinstate their hormone therapy. The district court ordered that the hormone therapy continue, and the plaintiffs' negative symptoms subsided after their hormone therapy was restored.

The plaintiffs also claimed that the defendants subjected them to cruel and unusual punishment, violated their rights to equal protection, and asserted that the Wisconsin Act was unconstitutional. At trial, Dr. Ettner, who was also Konitzer's expert witness, testified to facts about GD similar to what he advo-

cated for Konitzer. All parties had medical doctors, but just like Konitzer's case, they differed in their opinions regarding whether or not GD was a serious medical need. Only one of the defendants' witnesses actually said that GD was not a mental disorder.

The Wisconsin DOC set up a “gender identity committee” in 2002, which consisted of two psychiatrists, the director of the Bureau of Health Services, a warden, and a psychologist. The committee was created to consult on gender dysphoria policy, in addition to reviewing individual cases and making determinations about hormonal treatment, and consulting with psychologists and psychiatrists about gender dysphoria issues. This should have been an innovative way to treat gender dysphoria in prisons. Prior to the committee's formation, a prisoner simply continued whatever treatment s/he was taking at the time of incarceration. Ideally, if an inmate wanted a new prescription for hormones, the GD committee would meet and come up with a treatment plan. However, this approach took prison doctors' discretion to treat GD away and left the decision to bureaucrats. In no way would this positively affect inmates.

At the end of the medical testimony, the district court held that:

[t]he statute applies irrespective of an inmate's serious medical need or the DOC's clinical judgment if at the outset of treatment, it is possible that the inmate will develop the sexual characteristics of the opposite gender. The reach of this statute is sweeping inasmuch as it is applicable to any inmate who is now in the custody of the DOC or may at any time be in the custody of the DOC, as well

as any medical professional who may consider hormone therapy or gender reassignment as necessary treatment for an inmate.

On appeal, the seventh circuit determined that the district court was correct and agreed with the invalidation of the Wisconsin Act. Yet, the United States Supreme Court refused to hear a further appeal, which could have restricted any other state outside of the reach of the seventh circuit from attempting to pass a similar statute.

Supreme Court and National Impact

The law is set in Wisconsin and the other states of the seventh circuit—Illinois and Indiana; there can be no blanket rule against treating gender dysphoria. The US Supreme Court's refusal to hear the appeal essentially means that it agrees with the seventh circuit, the lower court, and did not believe further action needed to be taken because the federal court in the seventh circuit ruled correctly. But the question is still open in all of the other circuits. The United States Supreme Court could have set the law for the nation by taking the case and formally extending the law to protect gender dysphoric inmates nationwide. Even in the face of the split in authority among the federal circuit courts as demonstrated above, the US Supreme Court—in what some may argue was an irresponsible move—refused to review the seventh circuit's decision, which is only binding in the states of the seventh circuit: Wisconsin, Illinois, and Indiana. This leaves an outstanding opportunity wasted, perhaps, until another inmate in another circuit commits suicide, tries to castrate himself, or is repeatedly sexually assaulted based on gender dysphoria.

.....
Prisons are made to keep unlawful members of society separated from the community. However, separation does not require policies to humiliate prisoners in need of medical treatment. Even if a medical need seems unusual, its uniqueness does not mean it should be ignored.
.....

CONCLUSION

The justices should be ashamed that they shied away from an issue of this magnitude. The Eighth Amendment is part of the Bill of Rights, which encompasses perhaps the most important constitutional rights. The Eighth Amendment protection against cruel and unusual punishment keeps a measure of decency in our penal system. The United States is not a developing country with an openly corrupt government that seeks to make examples of its inmates or engage in fear tactics. Prisons are made to keep unlawful members of society separated from the community. However, separation does not require policies to humiliate prisoners in need of medical treatment. Even if a medical need seems unusual, its uniqueness does not mean it should be ignored. If a medical professional does not understand a medical need, a specialist should be called in. Many of the problems stem from a lack of understanding of gender dysphoria and discrimination

against gender dysphorics. There is no room in the penal system for either. As the highest administrator of penal rights, the US Supreme Court should have ensured that constitutional rights against cruel and unusual punishment and discrimination apply to all, especially transgender inmates.

End notes are to be found online at: www.hkslgbtq.com.

Reflections on New National Data on LGBTQ/GNCT Youth in the Justice System

By Angela Irvine and Aisha Canfield

BIOGRAPHIES

Angela Irvine, PhD. For more than 20 years, Dr. Irvine has been working to change policy and erase disparities through education and systems reform. She is currently a Vice President at Impact Justice and is leading a project to identify risk factors that drive suspended students into the justice system. She has also led multiple research projects on the pathways that drive LGBTQ youth of color into the juvenile justice system. Raised in Santa Cruz, California, Angela earned her bachelor of arts from UC Berkeley, her secondary teaching credential from St. Mary's College of California, and her PhD in sociology from Northwestern University, while also serving as a National Science Fellow.

Aisha Canfield, MPP. After deciding to get an MPP from Mills College, Aisha steered her focus toward juvenile justice, particularly preventing system-involvement for LGBTQ/GNCT youth of color and improving outcomes for those already caught in the system. Aisha has conducted national research on the disproportionate detention of LGBTQ/GNCT youth, identifying systemic points of disparity, such as contact with child welfare. In addition to her research, Aisha trains juvenile probation departments across the state to implement data collection systems, and to address the intersectional identities of the youth they serve. She also evaluates community-based providers serving system-involved youth.

ABSTRACT

The purpose of this paper is to report new national data on the over-representation of lesbian, gay, bisexual, questioning, gender nonconforming, and transgender youth in the juvenile justice system and to provide recommendations for key justice stakeholders on how to best serve these youths. This paper is based on surveys collected from 1400 youth in seven juvenile detention halls across the country.

.....

INTRODUCTION

THE AUTHORS OF THIS ARTICLE partnered with seven juvenile detention centers across the country to obtain an

unprecedented snapshot of youth in custody to determine if lesbian, gay, bisexual, questioning, gender nonconforming, and transgender (LGBTQ/GNCT) youth are overrepresented in the juvenile justice system. Specifically, the authors

were interested in understanding how disparate system practices impacted youth with multiple identities across race, sexual orientation, gender identity, and gender expression (SOGIE).

Alameda and Santa Clara counties in California; Cook County, Illinois; Jefferson County, Alabama; Jefferson and New Orleans parishes, Louisiana; and Maricopa County, Arizona all participated in the study and provided the authors a total of 1400 completed, one-time surveys.

This paper presents new data from the surveys and provides recommendations for policy and practice reforms to promote fair and equitable treatment of LGBQ/GNCT youth in the juvenile justice system.

LITERATURE REVIEW

A growing body of literature suggests that LGBQ/GNCT youth—particularly those of color—are exposed to social and systemic experiences that drive their over-representation in the juvenile justice system.

One of the first articles on the over-representation of LGBQ/GNCT youth found that 15 percent of the justice-involved youth who participated in an anonymous survey indicated they identified as lesbian, gay, bisexual, questioning, gender nonconforming, or transgender. Moreover, 92 percent of the youth in the survey—whether straight or LGBQ/GNCT—were of color. These numbers are likely to be conservative because of the risks of harassment and abuse youth potentially face when coming out while incarcerated. Many youth may decide not to disclose a nonheterosexual identity or may falsely identify as heterosexual to protect themselves.

The following literature review provides an overview of research on the forces that drive this overrepresentation.

Highlighting Race and Birth Sex

Despite the national success of juvenile decarceration across all youth, the proportion of youth of color in the juvenile justice system continues to grow at a disproportionately alarming rate. Youth of color represented 43 percent of detained youth in 1985. That number rose to 56 percent in 1995, and to 80 percent in 2012. Overall, general population data shows that the number of black youth especially does not justify their incarceration numbers, nor does crime data show a spike in violent crime. In 2006, only 31 percent of incarcerated youth, including youth of color, were being punished for violent crimes. This means that 69 percent of detained youth were incarcerated for property crimes, drug offenses, probation violations, or status offenses such as curfew violations and truancy.

The court system further reinforces disparities. Data reveals white youth are less likely to be detained and formally processed in the juvenile justice system than youth of color who are charged with the same crime. Once a case makes it to court, blacks and Latinos receive harsher sentences than white people, and are more likely to receive gang enhancements, lengthening their stay in detention.

Few studies exist showing how race, gender, and sexual orientation combine to drive young people into the juvenile justice system, though there are a few exceptions. Author and social justice scholar Monique Morris addresses the intersection of race and birth sex, finding that girls of color are becoming overrepresented in the juvenile justice

system, and now have some of the highest rates of suspension and incarceration amongst their peers. She attributes these patterns to a cycle in which black girls are victimized at home or school, respond to the trauma publicly in ways that are perceived as disruptive, and are then punished through school discipline and the justice system rather than being referred to support services.

How Social Responses to Sexual Orientation, Gender Identity, and Gender Expression Drive Youth Involvement in the Juvenile Justice System

LGBQ/GNCT youth are also driven into the justice system along a pathway from trauma to punishment. Research reveals a pathway of trauma, family conflict, social isolation, and exposure to multiple punitive systems. LGBQ/GNCT youth experience higher rates of neglect, abuse, and rejection from family members than their straight counterparts. These youth are also more likely to be removed from their home for abuse or neglect, suspended or expelled from school, and to be homeless.

.....
Research reveals a pathway of trauma, family conflict, social isolation, and exposure to multiple punitive systems. LGBQ/GNCT youth experience higher rates of neglect, abuse, and rejection from family members than their straight counterparts.
.....

Rejection of youths' SOGIE by parents, guardians, or placements in the foster care system leads to high rates of running from home and homelessness among LGBQ/GNCT youth. Once youth are on the street, they may engage in sex work or other informal economies for survival. Survival crimes expose LGBQ/GNCT youth to the possibility of juvenile justice involvement. In fact, when it comes to juvenile justice system involvement, Kathryn Himmelstein and Hannah Brückner found that youth who experience same-sex attraction and youth who self-identify as lesbian, gay, or bisexual are more likely to be stopped by police, arrested, and convicted of crimes when engaging in the same behaviors as straight youth.

How Disparate System Responses Exacerbate the Overincarceration of LGBQ/GNCT Youth

For many LGBQ/GNCT youth of color, run-ins with law enforcement are not out of the ordinary. Many LGBQ/GNCT youth of color tell traumatic stories of run-ins with law enforcement. Gender nonconforming and transgender youth of color are harassed more often than their white and gender-conforming peers. For example, police are more likely to use homophobic and transphobic slurs when interacting with transgender people of color, and more likely to arrest transgender people of color when they are calling for help. Additionally, gender nonconforming black girls are stopped for assumed gang affiliation or drug possession. It is thus submitted that racial and SOGIE stereotypes exacerbate the experiences of system-involvement for LGBQ/GNCT youth of color.

Once LGBQ/GNCT youth are brought into a secure juvenile facility, they may

be subject to verbal and physical assaults and discrimination by facility staff and other youth residents. Bureau of Justice Statistics statistician Allen Beck found that 10 percent of LGBT youth were sexually assaulted by other youth in facilities, compared to 1.5 percent of straight youth. Problems often arise because departments do not commit to training staff on how to protect LGBTQ/GNCT youth in confinement. When a youth enters a facility, probation uses actuarial instruments to collect data about romantic relationships, linkages to school, and family conflict. This information is designed to guide placement decisions and the selection of treatment programs that can help address the difficulties youth are facing. Unfortunately, fewer than 25 jurisdictions use instruments that ask questions that allow youth to disclose nonheterosexual identities and same-sex relationships. Probation officers miss a crucial opportunity to learn if a young person's identity places them at risk for abuse or harassment in the facility, and if the behavior that warranted their arrest is rooted in conflict around their SOGIE.

LGBTQ/GNCT youth are also susceptible to other harmful practices while in detention. For example, standard practice for facilities is to house all inmates and residents according to their sex assigned at birth (i.e., their genitalia). This forces transgender and gender nonconforming youth to be placed in housing units with the opposite gender, wear clothing that does not reflect their present gender identity, and places them at risk for harassment because their gender expression does not match that of the other inmates or residents in the housing unit. Some facilities may not place transgender and gender nonconforming

youth with other youth at all, and instead house them alone in isolation where they have limited interaction with other youth and staff to avoid conflict.

Release from secure facilities offers little reprieve from harassment and abuse. As LGBT youth are more likely to have languished in detention for longer than their heterosexual and cisgender peers, they are at increased risk of abuse, injury, and trauma. Gender expression was not considered in this study. LGBT youth may also have difficulty successfully meeting their probation terms, such as obeying their parents/guardians, attending school on time every day, and attending a community-based organization. Terms of probation can be challenging for LGBTQ/GNCT youth who may not have supportive families or are experiencing SOGIE-related abuse at home, are unsafe at school due to bullying, and cannot find community-based organizations that are affirming of their multiple identities and prepared to address their system experiences. It is suggested that for LGBTQ/GNCT youth, meeting their probation terms may require surviving in unsafe spaces.

NEW NATIONAL SURVEY FINDINGS

This article reports on findings from an updated national survey of detention halls around the country. The survey results show that, overall, 20 percent of youth in the detention centers that were surveyed identified as LGBTQ/GNCT. The differences across current gender identity, however, are stark: while 13 percent of boys identify as GBQ/GNCT, 40 percent of girls identify as LBQ/GNCT. Additionally, 85 percent of these LGBTQ/GNCT youth are of color.

Methods

Probation departments administered surveys within their own halls, ranches, and camps. Probation chiefs were tasked with identifying staff members to serve as research liaisons for their departments. Each liaison participated in a training facilitated by the authors that provided context for the need to conduct this research and how to administer the research while protecting the participants.

Following the trainings, each site determined an appropriate time to survey each youth in their facilities according to their size, programming, and staff availability. Incoming youth were surveyed four to eight hours after entering the facility, and the other youth were surveyed on one day either during school or mealtime.

The one-page survey instrument and a one-page consent form sheet were written at a fifth-grade reading level and were offered in both English and Spanish. The consent forms were read aloud by the research liaisons and only required youth to mark an "X" in a box in lieu of their signatures to maintain anonymity and ensure protection. Youth were not required to complete the survey at all or in its entirety, and were not required to disclose their decision to participate to the research liaisons. Once the youth completed the surveys, they folded them up and sealed them in envelopes, which were mailed back to the authors.

From a research perspective, it was important that the facilities offer the opportunity to every youth to participate in the survey for two reasons. The first reason was to avoid making assumptions about, and ostracizing, youth staff believed to be LGBTQ/GNCT. The second was that the authors wanted to also

capture the experiences of heterosexual youth who may identify as or be perceived to be gender nonconforming as this puts them at risk for similar treatment of LGBTQ youth.

Research sites were Alameda and Santa Clara counties, California; Cook County, Illinois; Jefferson County, Alabama; Jefferson and New Orleans parishes, Louisiana; and Maricopa County, Arizona. Each site collected surveys during a period of two to four months, or until they collected a minimum of 200 youth surveys. Surveys were collected during 2013 and 2014.

Respondents varied across gender, race/ethnicity, and sexual orientation:

- The majority of respondents identified as cisgender males. Seventy-seven percent of respondents identified as cisgender males, 22.4 percent of respondents identified as cisgender female identity, and 0.6 percent of respondents had a different gender identity.
- Youth of color are overrepresented within the incarcerated LGBTQ/GNCT population: 85 percent of respondents were youth of color. Broken down, 37.9 percent of respondents were African American or Black, 1.7 percent of respondents were Asian, 32.6 percent of respondents were Latino, 2.3 percent of respondents were Native American, 13.1 percent of respondents were white, 11.8 percent of respondents had a mixed race or ethnic identity, and 0.6 percent of respondents had another race or ethnic identity.
- Youth of color disclosed being LGBTQ/GNCT at the same rate as white youth.
- Twenty percent of respondents

identified as either lesbian, gay, bisexual, questioning, gender non-conforming, or transgender.

- ▶ 7.5 percent of respondents were straight and gender non-conforming or transgender;
- ▶ 4.8 percent of respondents are lesbian, gay, or bisexual, and gender nonconforming or transgender;
- ▶ and 7.7 percent of respondents were lesbian, gay, or bisexual, and gender conforming.

Gender Differences

We explain these differences in disclosure rates across gender in more detail below.

Boys

Disaggregating sexual orientation from gender identity provides a more detailed description of incarcerated youth. Chart 1 splits boys into four groups:

- **86.4 percent** of boys are straight, gender conforming, and cisgender (these are straight boys who behave and/or dress in the way that society expects them to);
- **7.3 percent** of boys are straight and gender nonconforming (these are straight boys who behave and/or dress in a way that is more feminine than society expects them to);
- **3.5 percent** of boys are gay, bisexual, and questioning, gender conforming, and cisgender (these are gay boys who behave and/or dress in the way society expects them to); and
- **2.8 percent** of boys are gay, bisexual, and questioning, and gender nonconforming (these are gay boys who behave and/or dress in a way that is more feminine than society

expects them to);

- Added up, this is **13.6 percent** of boys that are GBQ/GNCT.

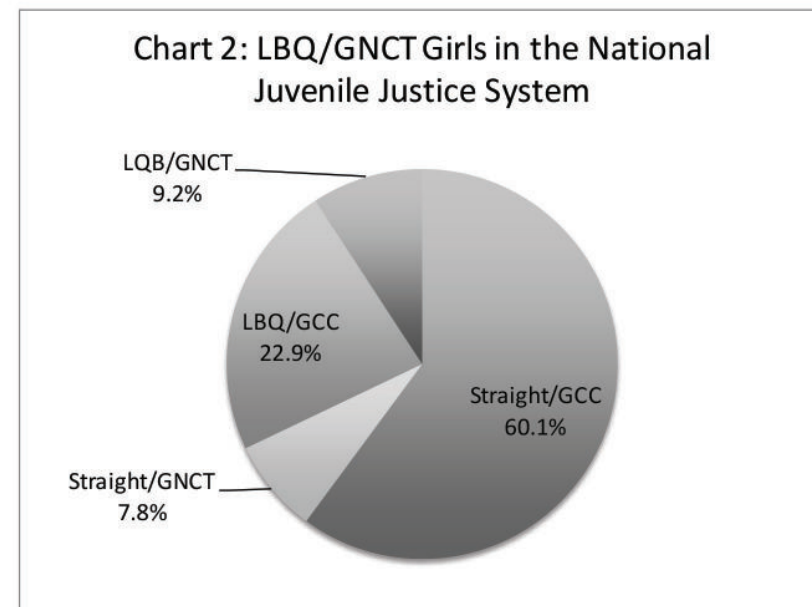
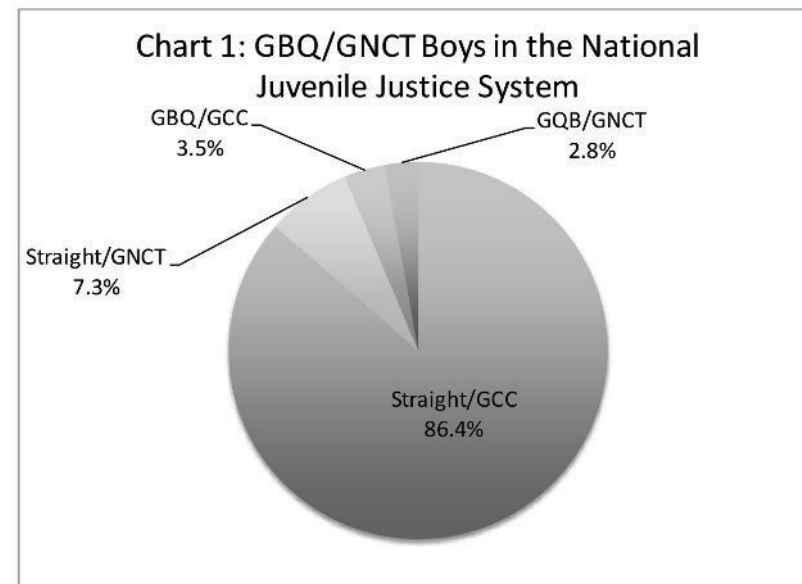
Girls

Chart 2 uses the same methodology for girls:

- **60.1 percent** of girls are straight, gender conforming, and cisgender;
- **7.8 percent** of girls are straight and gender nonconforming or transgender;
- **22.9 percent** of girls are lesbian, bisexual, and questioning, gender conforming, and cisgender and;
- **9.2 percent** of girls are lesbian, bisexual, questioning, and gender nonconforming or transgender;
- Added together, this is **39.9 percent** of girls who are LBQ/GNCT.
- Additionally, the survey found that LGBQ/GNCT youth are approximately twice as likely to have a history of running away and homelessness—prior to entering the justice system—compared with their straight, gender conforming, and cisgender peers.

RECOMMENDATIONS TO POLICY RESEARCHERS AND ADVOCATES

LGBQ/GNCT youth of color are resilient. They exude confidence, authenticity, and courage each day they step outside of their doors. However, they also carry the heavy burden that comes along with being LGBQ/GNCT. LGBQ/GNCT youth endure threats to their safety, well-being, and healthy development by family rejection, school bullying, and system involvement. It is imperative that juvenile justice stakeholders do no further harm to these youths while they



are in custody, and that they seek to be affirming of both their racial/ethnic identities and their SOGIE.

There are several measures that juvenile justice stakeholders, practitioners, and community-based organizations can take to successfully respond to the unique needs of system-involved LGBQ/GNCT youth of color. These suggestions are in detail below.

Developing Anti-Discrimination Policies that Promote Equitable Treatment of LGBQ/GNCT Youth

Juvenile probation departments should partner with local LGBT centers or advocates to draft and adopt anti-discrimination policies that enforce the safety of LGBQ/GNCT youth in the system, and ensure their equitable and respectful treatment. Policies must protect LGBQ/GNCT youth from harassment and abuse by other youth, residents, staff, and contracted services providers on the basis of their actual or perceived SOGIE. A comprehensive policy should include:

- Respectful communication with and about LGBQ/GNCT youth.
- Meaningful and accessible grievance procedures for youth to confidentially report abuse, harassment, or discrimination without risk of retaliation.
- Use of preferred names and pronouns.
- Housing and placement decisions on a case-by-case basis that consider youths' current gender identities rather than the sex assigned at birth. This is particularly important for transgender youth who have transitioned to a gender other than their birth sex.
- Pat downs and searches of transgender and gender nonconforming

youth by staff members that are of the youths' same gender identity.

- Accommodations that ensure the privacy and safety of transgender youth in showers, changing clothes, etc.
- Provision of transition-related medical needs of transgender youth.

Policies should be developed in collaboration with advocates/community members, line staff, and decision-makers. Advocates have a deep understanding of the experiences of LGBQ/GNCT youth and can provide context and insight into the unique needs of LGBQ/GNCT youth outside of confinement. Buy-in from line staff is equally important as implementation and adherence to the policy is more likely to be successful if staff have been given meaningful roles in the policy's development.

Additionally, agencies and organizations should align their policies with state and federal laws and regulations. For example, the Prison Rape Elimination Act (PREA) is a set of federal standards that have identified lesbian, gay, bisexual, transgender, and intersex (LGBTI) inmates and residents as a priority population for protection from sexual victimization. The standards provide detailed guidance on the appropriate treatment of LGBTI searches, housing, clothing, medical treatment and programming. PREA does not include questioning or queer inmates as part of the identified priority population.

Improving Intake Assessments to Include SOGIE Questions

Juvenile facilities, probation departments, and community-based organizations commonly assume they are not serving LGBQ/GNCT youth. It is imper-

ative that these entities know how the youth in their care identify to effectively respond to their needs, understand the complexity of their experiences, and ensure that any referrals are culturally affirming. Additionally, jurisdictions that collect SOGIE data can make better, data-driven decisions to mitigate disparities and ensure reform efforts target populations that are most in need.

Jurisdictions should consider updating their intake and booking processes to include SOGIE data questions which would guarantee that each youth is asked how they identify when they enter a facility. It is important that the youth who cycle in and out of the secure confinement are asked each time they return as answers may change between stays.

Asking questions about SOGIE is particularly important as most LGBQ youth are gender conforming. This means they do not fit the physical stereotypes of someone who identifies as gay or lesbian and may go unnoticed when it comes to appropriate referrals. By universally asking all youth about their sexual orientation and gender identity, a systematic practice with several benefits can be created. The onus of starting the conversation about SOGIE should be placed on the adult professionals rather than burdening youth with the risks of self-disclosing. Finally, as youth begin to disclose more frequently, the visibility of LGBQ/GNCT youth is increased, making justice agencies even safer.

Providing Training and Technical Assistance to all Probation Personnel

Juvenile justice reform that is affirming of youths' race/ethnicity and SOGIE cannot happen without ongoing education and training for facility staff. Staff often want to "do the right thing," but feel out

of touch with the community or believe it is inappropriate to discuss youths' SOGIE. Juvenile probation departments can support their staff in becoming comfortable and skilled at interacting with LGBQ/GNCT youth in custody by providing training to all department staff by a skilled trainer/facilitator.

Training and coaching should cover a variety of topics that would increase general understanding of LGBQ/GNCT youth including: general background on the experiences of LGBQ/GNCT; including risk factors for systems involvement; respectful language, engagement, and nonverbal communication; collecting SOGIE data; biases, fears, and misunderstandings; the intersections of race/ethnicity, SOGIE, class, and system-involvement; and identifying and vetting services to ensure appropriate placement of LGBQ/GNCT youth. Technical assistance should be offered following the training so that facilities have real-time access to expert advice as challenges arise.

Expanding Gender Responsive Programming to be Affirming of Various Gender Expressions

In the mid-2000s, the field of juvenile justice began to promote "gender-specific" or "gender-responsive" programming with the intention of improving services for girls. Researchers argued that programs were inappropriately geared towards boys and needed to be specifically tailored for girls. One excellent example is Girls Circle. This curriculum was developed to provide support groups for girls in the justice system. Each meeting is structured to have a welcome ritual and to then dive into discussions of relationships, drug use, and trauma. The same organization has more

recently developed a similar curriculum for boys called One Circle.

Typically, youth are referred to gender-specific programs based on their birth sex. In contrast, under the Prison Rape Elimination Act Standards, justice professionals make housing decisions for youth based on their current gender identity—which may not match a young person’s birth sex. The field of community supervision has not yet followed the practice of making decisions based on gender identity or expression.

There are unintended consequences to sending a gender-nonconforming young person to a gender-specific program based on birth sex. While all youth should have some agency in deciding what programs they are referred to, it is especially important that gender-nonconforming and transgender youth be given the opportunity to participate in activities or programs that align with their current gender identities. For example, a gender nonconforming girl who must take parenting classes may not identify as her child’s “mother” and would feel more comfortable and supported in a parenting class designed for fathers. Every effort should be made to enroll her into a class and an environment that speaks to her identity and sets her up for success.

GLOSSARY

For the purposes of this paper, the terms below are defined as the following. The authors acknowledge that language varies across region and generation and that this list is not fully representative of the LGBTQ/GNCT community.

Bisexual is defined as an individual who is romantically, emotionally, and physically attracted to both men and women.

Gay is defined as a man who is romantically, emotionally, and physically attracted to other men.

Gender expression refers to how one performs their gender through dress, speech, behavior, etc. Gender expression is not indicative of sexual orientation.

Gender nonconforming refers to someone who does not perform their gender through dress, speech, and behavior in a way that meets society’s expectations of how their birth sex should be expressed.

Intersex is a medical condition in which an individual’s chromosomal make up or anatomy is not easily distinguishable as solely male or female.

Lesbian is defined as woman who is romantically, emotionally, and physically attracted to another woman.

Sexual orientation is defined as who you are physically or romantically attracted to.

Transgender refers to someone who does not presently identify as the sex they were assigned at birth.

Questioning refers to someone who is still exploring their sexual and gender identity.

End notes are to be found online at: <http://www.hkslgbtq.com/>.

Workplace Equality in International Organizations: A Survey of LGBT Staff at the World Bank Group

By Caroline Vagneron

BIOGRAPHY

Caroline Vagneron is senior operations officer in the global program on forced displacement at the World Bank Group (WBG), and the president of GLOBE, the World Bank Group’s lesbian, gay, bisexual, and transgender employee resource group. During her career at the World Bank Group, Caroline has worked across Africa, South Asia, the Middle East, and the Caribbean, in both operations and communications. She holds a master’s degree in political science and a masters in contemporary history from Paris-Sorbonne University. Caroline has worked on workplace diversity and inclusion issues for six years and has received several awards for her contributions.

ABSTRACT

The business case for greater diversity and inclusion of lesbian, gay, bisexual, and transgender, and intersex (LGBTI) staff is now well-documented, and the corporate world continues to promote workplace LGBTI equality. Within the World Bank Group (WBG), the conversation around LGBTI workplace equality has progressed over the past five years. GLOBE, the WBG’s employee resource group representing the interests of LGBTI staff, has documented issues of LGBTI diversity and inclusion through two surveys in 2011 and 2015. Building on GLOBE’s first employee survey in 2011, when data on the challenges faced by LGBTI staff members was non-existent, the 2015 GLOBE Workplace Climate Survey attempted to highlight issues that were previously overlooked by the institution. The survey provided insights into attitudes toward LGBTI staff, experiences of discrimination and harassment, and career development and mobility. The survey also produced recommendations from respondents to improve both GLOBE and institutional practices at the WBG to better foster LGBTI-inclusive workplaces, which resulted in WBG leadership and human resources enacting two pro-LGBTI reforms, although substantial challenges to LGBTI employees remain. This article addresses key lessons learned from GLOBE, and recommendations for other organizations attempting to better engage LGBTI employees, including how to cultivate diversity, how to initiate conversations around LGBTI diversity and inclusion, the role of leadership in pushing for greater LGBTI inclusion, and approaches to institutional advocacy that yield the most success.

THE BUSINESS CASE FOR GREATER diversity and inclusion of lesbian, gay, bisexual, and transgender, and intersex (LGBTI) staff is now well-documented, and the corporate world is making solid progress towards LGBTI equality in the workplace, as recognized by the Human Rights Campaign Corporate Equality Index. Today, 75 percent of companies in the United States include gender identity, and 93 percent include sexual orientation, in their nondiscrimination policies. The percentage of Fortune 500 companies offering domestic partner benefits increased from 14 percent in 1999 to 64 percent in 2015, and those offering transgender-inclusive health care coverage increased from zero in 2002 to 40 percent in 2015. Research increasingly highlights the positive impact of diversity on productivity, collaboration, innovation, and creativity, as well as reputation, recruitment, and retention among LGBTI employees. Businesses now engage in sustained efforts to acknowledge today's increasingly diverse workforce and to implement policies aimed at creating safe and productive workplaces for all staff. As author Lord John Browne discusses in his book *The Glass Closet*, promoting an inclusive environment for LGBTI employees isn't just a moral imperative for companies, it is a smart business decision.

2015 GLOBE WORKPLACE CLIMATE SURVEY AT THE WORLD BANK GROUP

Within the World Bank Group, the conversation around LGBTI workplace equality has been one of the most discussed diversity & inclusion (D&I) top-

ics in recent years. These conversations have been primarily driven by GLOBE—the employee resource group (ERG) for LGBTI staff members at WBG, created in 1993—which documents the necessity of greater D&I to improve staffing and operations at WBG. A turning point took place in 2011 as GLOBE embarked on its first Workplace Climate Survey in an attempt to collect data on the challenges facing LGBTI staff members working for the World Bank Group. The survey helped shed light on issues that had, to date, been in large part overlooked by the institution.

The 2015 GLOBE Workplace Climate Survey builds on the baseline established by GLOBE's 2011 Workplace Climate Survey. Both surveys respond to challenges and analyze perceptions of the workplace for LGBTI staff. The survey aims to assess the workplace climate, identify issues, and develop proposals that would help the WBG foster a more inclusive workplace, and provide insights into the experiences of LGBTI staff at the World Bank Group. As with the 2011 GLOBE survey, the 2015 survey was sent to all World Bank staff at headquarters (HQ) and in country offices (COs) by the organization's human resources senior management. As with 2011, participation in the 2015 GLOBE survey was voluntary and anonymous, and respondents were asked to self-identify their sexual orientation and gender identity.

The 2015 GLOBE survey questionnaire was designed to produce comparative data vis-à-vis the 2011 GLOBE survey and the 2015 World Bank Group Employee Engagement Survey (EES), as well as new data on emerging issues and trends pertaining to the World Bank

workplace climate. In designing the survey, GLOBE kept most questions from the 2011 survey to identify changes in specific issues over time, however, some questions were removed or changed to reflect recent developments at the WBG. For example, questions were added about benefits and visas, and more detailed response options were added for questions on contract type and country of origin. GLOBE also consulted with the Human Rights Campaign (HRC) team responsible for the Corporate Equality Index, which measures the degree of LGBTI inclusion in business and organizations. Greater alignment with HRC's benchmark allowed GLOBE to put survey results in perspective and to find best practices that could be replicated in the context of an international institution. GLOBE also ensured that issues specific to the WBG workplace and its operations were covered, such as the international and multicultural makeup of its staff, their experiences in country offices, and communication from senior management. Furthermore, GLOBE utilized WBG human resources' Employee Engagement Survey (EES) and other reports to the board on diversity and inclusion strategy.

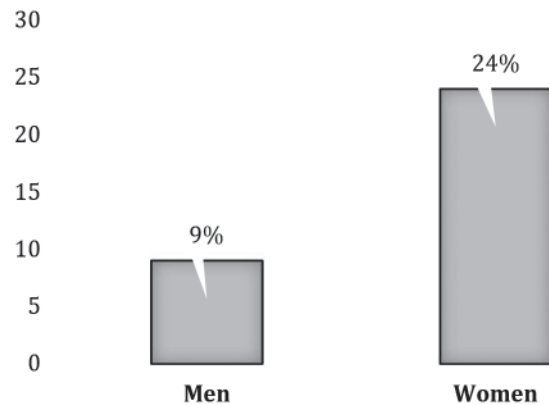
The possibility of selection bias exists in the survey data as completion of the survey was voluntary. It is likely that heterosexual staff who completed the survey are limited to those who identify strongly either in favor, or against, LGBTI equality at the World Bank Group, resulting in under-representation by heterosexual employees. Unfortunately, the sample of transgender and gender nonconforming individuals responding to the survey was too small to analyze independently. GLOBE recognizes the diversity of the gender spectrum, but for

the purposes of data representation the survey includes transgender and other gender identities with respective overlapping categories (for example, a transgender woman would be included with the female population).

Key Findings about the LGBTI Population at the WBG

A total of 1,753 staff members from headquarters and country offices responded to the 2015 GLOBE survey. The survey's outcome was mixed, with 70 percent of respondents agreeing that the World Bank Group is respectful of LGBTI employees, and some even reporting improvement in the workplace climate for LGBTI staff. A majority of the population, however, still hides their identity in the workplace, and LGBTI respondents view the WBG workplace more negatively than their heterosexual peers. The survey results indicate that there continue to be significant gaps in the way the company addresses LGBTI staff, with too much responsibility left to the discretion of managers who, despite best efforts and intentions, fail to adequately respond to LGBTI staff concerns. Problems are exacerbated for more vulnerable staff, including women, staff in country offices, younger employees, and staff on more precarious contracts. Only 32 percent of LGBTI respondents are fully open about their identity at work, and 13 percent of LGBTI staff are still completely closeted at work (see Figure 1).

FIGURE 1: LGBT STAFF NOT OUT TO ANYONE AT WORK (%)



Seventy-one percent of survey participants self-identified their sexual orientation. While most survey participants (56 percent) identified as heterosexual, 11 percent identified as gay men, 2 percent as lesbian women, and 3 percent as bisexual (men and women) adding up to a total of 276 LGBTI respondents. By comparison, 281 out the 10,152 respondents—around 2.7 percent—of the World Bank Group’s Employee Engagement Survey self-identified as LGBTI. The similarity in the number of LGBTI respondents across both surveys likely confirms the size of the LGBTI population that is open in the workplace at the WBG. The fact that 11 percent of respondents preferred not to answer this question, and that 18 percent skipped the question altogether, suggests a possible discomfort with identifying as LGBTI at the World Bank Group and, therefore, the number of LGBTI staff working at the company may be higher.

Workplace Climate and Visibility

Consistent with the 2013 and the 2015

EES, the GLOBE survey confirms that, despite a shared sense of pride in working at the World Bank Group, LGBTI staff view the World Bank workplace climate more negatively than their heterosexual peers. Notably, although staff feel that the WBG treats LGBTI employees with respect in general, the survey highlighted perceived divisions in the company’s organizational structure. For example, the World Bank Group president’s leadership and personal commitment to D&I were contrasted with the lukewarm support for D&I from members of the World Bank Group’s executive leadership. In addition, although about 60 percent of all employees feel that their immediate supervisor is supportive of LGBTI staff—a similar percentage as in 2011—this was not the case among lower grade administrative and client support LGBTI respondents. Furthermore, LGBTI respondents from country offices held a much less favorable view of the WBG’s diversity and inclusion efforts compared to their LGBTI colleagues at headquarters (a 20 per-

centage point difference).

Despite evidence suggesting more openness (or less concealment) is linked to improved job commitment, workplace relationships, and health outcomes including psychological distress, being out at work remains an important hurdle for LGBTI staff. Indeed, the number of LGBTI workers hiding their identity at work provides a clear indication that more work needs to be done to translate inclusive policies into an inclusive climate. Only 32 percent of LGBTI respondents are fully open about their identity at work and 13 percent remain closeted in the workplace. Among LGBTI respondents, women reported facing greater challenges in being open about their sexual orientation and gender identity at work. In addition, LGBTI staff working in country offices are less likely to be fully out than those working at headquarters. In terms of age groups, older staff tend to be more open, which could be because they have been working at the World Bank Group longer and thus feel more comfortable; they have also had more time to come out. Older staff also tend to have a more favorable view of the workplace climate. As in 2011, LGBTI staff in a relationship are more likely to be out at work than their single peers, and bisexual staff members find it even more challenging (see Figure 2).

Importantly, respondents who are partially or fully private about their sexual orientation or gender identity—29 percent of survey respondents—reported that this was due to the perceived potential impact on their career. This perceived inability to be both out and successful at work could be due to only half of respondents knowing at least one senior manager who is openly gay. Interestingly, older staff tend to be more open and hold more favorable views of the workplace—possibly because they have more job security—and it is important that these individuals are more visible to younger cohorts that identify as LGBTI, to show that openness is not a barrier to career advancement.

Attitude Towards LGBTI Staff

When asked whether the World Bank Group should value the presence of LGBTI staff as part of a diverse workplace, about 65 percent of heterosexual staff agreed. There is a sharp contrast between headquarters and country offices, with only 50 percent of country office staff agreeing with this statement (see Figure 3). The pattern by age is consistent with the general trend of acceptance of LGBTI people: younger staff hold more favorable views of LGBTI inclusion. Across grade level, administrative and client support staff show the most

FIGURE 2: LGBTI STAFF IN A RELATIONSHIP ARE MORE LIKELY TO BE OUT AT WORK THAN THEIR SINGLE PEERS (%)

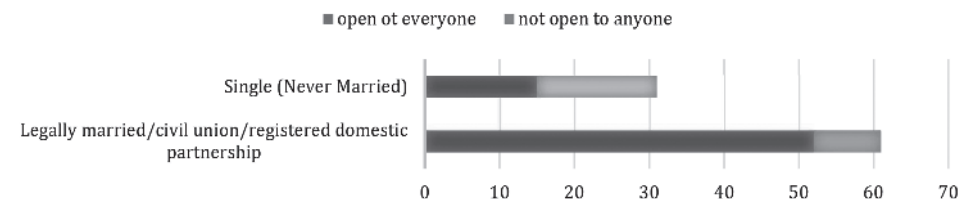
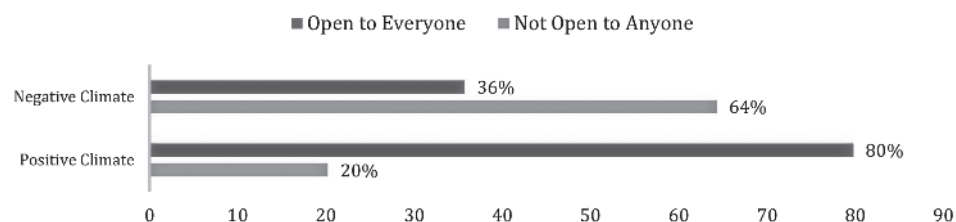


FIGURE 3: RELATIONSHIP BETWEEN PERCEIVED CLIMATE AND BEING OPEN (%)



unfavorable view of LGBTI inclusion. Notably, 15 respondents felt that LGBTI staff “do not belong in the workplace in the WBG.” Those holding this view tended to be less senior and were exclusively based in country offices, primarily in countries with strong anti-LGBTI laws.

Discrimination and Harassment

LGBTI staff continue to face discrimination and harassment at the WBG, with one in 12 respondents personally witnessing or being subjected to discrimination or harassment based on sexual orientation and/or gender identity, a higher percentage than in 2011. These results are likely understated because of the number of individuals who choose not to reveal their sexual orientation and/or gender identity to their peers. Most witnesses or subjects of discrimination or harassment did not report their case to WBG management, with only 16 percent of cases reported, and of these cases most were in headquarters. Despite a so-called zero tolerance policy of bullying, disrespectful treatment, discrimination, and harassment, the reality is bleak. Written comments suggest that derogatory remarks are still made at work, something that was mentioned noticeably fewer times in 2011. Staff feel that managers are generally not held accountable when their actions or behavior are contrary to the institu-

tion’s values, and these actions are not systematically discouraged by the institution. Indeed, when asked why they did not report discrimination or harassment cases, respondents said that the primary factor was the possible negative impact on their career, or because they did not see a positive outcome from their reporting. This indicates that there are serious failures in current reporting mechanisms, including a lack of understanding that staff members have an obligation to report, and that the onus of responsibility for reporting situations of discrimination does not fall upon the victim. Of the 135 instances of harassment or discrimination that respondents witnessed or had been subjected to, only three—2.2 percent—resulted in actions taken by the WBG in a manner that satisfied the respondent. The limited resources seemingly available—in particular to CO staff—coupled with no clear, single method of reporting and low resolution satisfaction, question the quality of the systemic response offered by the WBG in cases of harassment and/or discrimination.

Career Development

LGBTI staff face multiple additional barriers to their career development compared with their non-LGBTI peers. In an increasingly decentralized organization there are challenges with potentially un-

friendly environments for LGBTI staff, or even active discrimination from managers. In both the 2015 EES and GLOBE surveys, LGBTI staff were up to 8 percent less likely to be satisfied with their career advancement. The combined negative impact of sexual orientation and gender identity on career advancement is compounded for lesbian women, who reported a lower level of job satisfaction compared to other groups. Mostly based in HQ, LGBTI women confirmed what research by UK-based, LGBTI charity Stonewall named a “double-glazed glass ceiling” in terms of being less open and having more negative views of the workplace than gay men.

Interestingly, newly appointed managers are themselves not satisfied with efforts to train them in how to address issues faced by LGBTI staff, with 38 percent of managers indicating that the WBG’s current training left them unprepared. Despite the survey’s highlighting of managers’ preparedness as a key issue, younger staff are more willing to ask for additional LGBTI-focused training, while older staff appear more comfortable with the status quo. Indeed, as many as half of LGBTI respondents (compared with 14 percent of heterosexual respondents) disagreed that the WBG prepares managers to effectively address workplace issues faced by LGBTI employees, and among managers only one in five said that they were adequately trained to effectively address LGBTI staff in the workplace. Training is an important vehicle to help ensure managers are aware of responsibilities to their staff and their employer’s expectations.

International Staff Mobility

As an international organization, the WBG has a global workforce with 135

country and satellite offices. In many of the countries where the WBG operates, however, there is a stark lack of LGBTI rights. Throughout the 2015 GLOBE survey, there was a clear difference in LGBTI acceptance and openness between headquarters and country offices, with many issues exacerbated in country and satellite offices that affect not only staff performance in the field, but also staff mobility. While this is not a new issue, the survey highlights the challenges faced by LGBTI regarding global movement, including concerns about staff visibility in the field, difficulties formalizing LGBTI relationships abroad, and visa challenges for LGBTI couples. Although 85 percent of LGBTI staff reported that their sexual orientation or gender identity limited their country assignment options, only 6 percent of staff on international contracts reported that their sexual orientation was considered when determining their country posting. Additionally, 74 percent of respondents said that WBG would not necessarily support the physical safety of LGBTI employees in a CO. Even for short-term business travel, nearly half of LGBTI respondents reported not feeling comfortable traveling to countries with anti-LGBTI laws. Considering the importance of country experience to career growth at the WBG, LGBTI staff are often faced with difficult decisions about their work location. Mitigating this challenge is critical if the WBG wants to recruit the best talent to implement its mission.

RECOMMENDATIONS FROM SURVEY RESPONDENTS

The 2015 report recommends changes to both the GLOBE survey and WBG’s organizational practices and policies,

with the aim of fostering a more inclusive work environment for LGBTI employees. These recommendations were based on extensive written comments by survey respondents on ways that GLOBE could improve the services it provides to its members and WBG at large. These comments addressed GLOBE's role in the institution's broader diversity and inclusion agenda, and focused on five broad categories:

GLOBE's Role and the WBG's Diversity and Inclusion Agenda

Respondents recommended that GLOBE should better communicate its role in promoting a more supportive work environment for LGBTI employees. This includes better publicity of its activities across WBG, promoting a culture of openness and inclusion, adopting best-practice anti-discrimination policies and practices, participating in LGBTI recruitment events, and encouraging gatherings with spouses or partners. Feedback from the survey also recommended that WBG should better understand how to support LGBTI staff more systematically, as opposed to its current structure which relies heavily on individual managers. This could be achieved by promoting inclusive corporate communications—such as celebrating Pride Month across both headquarters and country offices—including LGBTI in the institution's diversity compact, better supporting ERGs, and focusing more on the "T" in LGBTI. Inclusive communication from the WBG should be used in all corporate communications to demonstrate a commitment to diversity and convey messages that LGBTI staff are welcome, (i.e., inviting both spouses and partners, regardless of gender, to events including families of employees).

Training on LGBTI Issues

Diversity trainings play an important role in increasing awareness, dispelling myths and stereotypes, and encouraging dialogue about diversity and inclusion. Respondents recommended immediately implementing mandatory training on LGBTI issues for managers and human resources staff—with a focus on women and LGBTI families, staff mobility options, tools available to managers, training on cultural competencies, and awareness of unconscious bias, safe zones, and inclusion of LGBTI issues in ethics and business conducts office trainings. In addition, there was encouragement for WBG to continue using anonymous surveys to measure the effectiveness of LGBTI diversity policies and programs, and regularly communicate about how the institution supports its LGBTI workplace.

Country Offices and Mobility

The continued gap between headquarters and country offices in terms of LGBTI acceptance necessitates increased attention on country offices, especially regarding staff support and staff mobility. This includes physical and legal protection for LGBTI staff and their families, creating dialogues with offices in countries with anti-LGBTI laws, better communication, and more WBG-organized events tailored to LGBTI employees in COs, setting up local GLOBE chapters in country offices with adjusted membership fees according to local earnings, and setting up a confidential hotline for LGBTI staff in country offices.

Accountability

There is currently limited accountability for anti-LGBTI actions by individual

employees at the WBG. Respondents therefore recommended implementing a zero tolerance policy for all forms of discrimination and harassment, protecting whistleblowers, and promoting a more inclusive corporate culture.

Employee Benefits and HR Support for LGBTI Employees

Survey respondents recommended immediate changes to WBG's formal HR processes, including benefits, institutional support, and inclusion of statistics about LGBTI employees in HR metrics and performance reviews for managers. These recommendations included:

Enforcing Equal Policies & Benefits

The WBG should immediately recognize same-sex couples and their families with full, equal access to all benefits. Global health coverage should also include

.....

Respondents therefore recommended implementing a zero tolerance policy for all forms of discrimination and harassment, protecting whistleblowers, and promoting a more inclusive corporate culture.

.....

complete health benefits for transgender staff. Furthermore, antidiscrimination policies, practices, and programs must be enforced across the institution. While the ethics and business conducts office did raise awareness of LGBTI concerns regarding fair treatment, it did not track and report cases of discrimination or

harassment of LGBTI staff, highlighting the continued need to recommend LGBTI-inclusive policies.

Providing Institutional Support for LGBTI Staff, Among Others through Employee Resource Groups

Exclusion from networks is a major workplace barrier for minorities. ERGs offer members access to potential mentors, role models, and career-advancing information. The WBG should determine how it will support such entities, for example: through financial support or leadership training. Providing structures and forums through which ERGs can interact, developing toolkits to help ERGs grow, and formally partnering with ERGs would help move the D&I agenda forward.

Develop Strategies for Including LGBTI Identity in Diversity Metrics

The WBG has, for over a decade now, used scorecards and metrics to track the advancement of specific employee groups such as women, staff from developing countries, and staff from the Caribbean and sub-Saharan Africa. Recruiting practices and promotion methods, however, have often overlooked candidates from certain groups. Tracking LGBTI employees as a "diverse" demographic group is currently not an option, considering the WBG's legal and cultural environment (for example, disclosing one's LGBTI identity could prove to be a challenge in some locations). While HR has recently permitted the option to self-identify, the level of trust among staff is so low this resource may not be fully utilized for a while. Ultimately, staff privacy must be respected.

Managers' performance, however, should include statements regarding di-

versity. Annual performance evaluations should highlight how managers perform on diversity to hold them accountable, and HR management should in turn be accountable for promoting the D&I agenda in hiring and at the corporate level.

Successful Steps Taken by WBG Based on GLOBE Recommendations

Although many of the above recommendations also came out of GLOBE's 2011 survey, there was a lack of coherent institutional support for LGBTI development, the D&I agenda, and ERGs, until November 2016 when senior management began to better support GLOBE's advocacy. Indeed, between November 2016 and January 2017, several steps were taken to respond to some of the critical issues raised by the surveys, for example:

- ERGs, including GLOBE, were formally recognized in November 2016 with HR awarding each ERG a budget of \$10,000 for the 2017 fiscal year.
- Parental benefits were updated to include a new child planning benefit, as part of the effort to explore and implement solutions that further strengthen the WBG's employment value proposition. The benefit provides financial assistance to staff who are planning to have a child either through legal adoption or birth through reproductive planning. While the WBG is not unique in offering a benefit for child planning purposes, it is the first international financial institution to do so. Staff members will be able to claim services retroactively from July 2016.

These changes indicate the increasing willingness to promote pro-LGBTI policies at the WBG, as well as highlight the impact of GLOBE's advocacy over the past five years. By beginning to support these policies, the institution recognizes that family models are changing, and that the institution's staff are becoming increasingly diverse.

While there have been some distinct improvements in the workplace over the past five years, critical challenges remain for the WBG's LGBTI staff. The number of closeted staff remains high—especially among women, younger employees, and those on more precarious contracts—out of fear of adversely affecting their careers, and a widespread lack of awareness of the issues faced by LGBTI staff perpetuates. Experiences of discrimination and harassment continue and remain unanswered in the absence of systemic responses, visibility of LGBTI staff is low—with the low visibility of transgender staff a particular concern—and those in country offices continue to feel isolated. Furthermore, the WBG still doesn't offer equal benefits to its staff and WBG managers are still ill-equipped to manage LGBTI staff and be inclusive of all. Consequently, despite recent progress for LGBTI staff in ERGs and parental benefits, deep challenges remain.

LESSONS LEARNED FROM THE 2016 GLOBE SURVEY AND RECOMMENDATIONS FOR OTHER ORGANIZATIONS

.....
To fully harness the power of its diverse staff, the highest hurdle for the WBG is to foster greater understanding of an inclusive workplace. It is not simply about “being diverse,” but about leveraging that diversity beyond race, gender, or ethnicity, and creating work environments where different voices are encouraged and heard.
.....

An examination of the participant recommendations from the 2016 survey indicates that there are areas in which GLOBE can be improved in time for the next survey. For example, the fact that only a small percentage of LGBTI staff are GLOBE members (for example, a third of survey respondents are not members), and almost one in five respondents did not even know that GLOBE existed, has sent a very strong signal in terms of visibility and presence across the institution. The recommendations for improving GLOBE, however, not only help improve the service, but also serve as examples for how other organizations can better engage LGBTI employees.

Diversity by Default is not Enough

With staff that represents over 180 nationalities working in more than 120 countries, the WBG has always been diverse “by default.” While some important progress has been made to build and retain a diverse workforce and promote an inclusive workplace, the institution is still a long way from a fully equal playing field. Policies promoting workplace equality have improved tremendously in the past 20 years, however, institutional culture has lagged in terms of fully accepting LGBTI staff. To fully harness

the power of its diverse staff, the highest hurdle for the WBG is to foster greater understanding of an inclusive workplace. It is not simply about “being diverse,” but about leveraging that diversity beyond race, gender, or ethnicity, and creating work environments where different voices are encouraged and heard.

Data Drives the Conversation

To understand and help bridge the gap between policy and practices, GLOBE focused first on data. In an institution mostly consisting of economists, numbers are literally worth a thousand words. In 2011, there was no data available on LGBTI staff members at the WBG, meaning that GLOBE's 2011 survey helped expose issues that had previously been overlooked by the institution. Data from the 2015 survey provided statistical evidence to help develop proposals to promote a more inclusive workplace for all. The data collected in both surveys also built credibility for GLOBE as the partner of choice in the WBG's conversation on D&I.

Leadership Has a Critical—but Not Exclusive—Role to Play

In comparison to the limited institutional support for LGBTI staff between

2011 and 2016, this past year has seen a tremendous improvement in senior management's support for GLOBE's bottom-up advocacy. This is most apparent in the recognition of the role played by employee resource groups and the extension of key family benefits for LGBTI families, both of which were supported by the bank's president. These critical steps forward in the conversation on LGBTI inclusion—notably the recognition that family models are changing—should not hide the deep challenges that remain across the WBG. However, they indicate the wide-reaching impact of pro-LGBTI policies implemented by leadership. The WBG has a unique opportunity to lead the way as the most attractive international financial institution for all professionals, regardless of race, age, ethnicity, sexual orientation, or gender identity. These efforts to create an atmosphere where all voices, experiences, and perspectives are heard, valued, and considered, will hopefully inspire other organizations to follow the lead and embrace the strength of their own diversity.

Advocacy Requires a Phased Approach

The lack of available data before 2011 on LGBTI employees highlights not only a key challenge to GLOBE's ability to convince leadership of the need to address LGBTI issues in the workplace, but also emphasizes the need to address LGBTI advocacy in phases. For example, after recognizing that “diversity by default” was insufficient support for LGBTI employees at the WBG, it was necessary to collect the appropriate data through the first GLOBE survey in 2011. The inaction of leadership until 2016 further enforces the subsequent need to continuously

promote findings from collected data, as well as suggest practical and attainable solutions in formal policies to gather the necessary support from leadership, managers, and staff members. The next step for GLOBE concerns accountability, notably ensuring that managers across the institution are trained and given the tools to respond to the many challenges LGBTI staff face in our offices around the world, and that a zero tolerance policy on discrimination and harassment is strictly implemented.

End notes are to be found online at: www.hkslgbtq.com.

“All the Same”: *Lampião da Esquina* and Violence as a Narrative Instrument of a Homosexual Identity

By Igor Costa Pereira de Souza and João Filipe de Araújo Cruz

BIOGRAPHIES

Igor Costa Pereira de Souza holds undergraduate degrees in history and social sciences. He is currently a master's degree candidate in anthropology at the University of São Paulo. He has published articles on literature, cinema, and sociology, and has participated in several conferences in Brazil and internationally.

João Filipe de Araújo Cruz has a degree in social sciences and is currently a master's candidate in sociology at the University of São Paulo. He has published several articles on race and homosexuality in social movements. He is currently researching right wing political parties and their adoption of LGBT issues in the national Brazilian congress.

ABSTRACT

This article aims to explore one of the most sensitive issues present in the platforms of the Brazilian Homosexual Movement (MHB). It surveys the reports published in the Brazilian newspaper *O Lampião da Esquina* (The Lantern on the Corner) which ran from 1971-1981, part of an extensive network of publications called the “nânicos,” the aim of which was to discuss the construction of a homosexual identity. *Lampião* compiled a combination of reports of violence against gueis (gay), travestis (transgender), lésbicas (lesbians), and other minorities, in conjunction with accusations of silence, community relations, and even the wide persecution of sexual minorities by state authorities. The analysis of this article focuses on how the construction of public mourning formed the basis for a political and social agenda that has guided the MHB in the past and reverberates to this day.



“From a simple masquerade to a mask: from a character to a person, to a name, to an individual; from a metaphysical and moral value; from a fundamental form of thought and action; that's how the journey (notion of a person) began.”

INTRODUCTION

UNTIL RECENTLY, SURVEYS ON VIOLENCE against homosexuals, lesbians, and other sexual minorities have used data provided by journals and other publications on assaults, murders, and other violence against the LGBT population. In a symbolic and practical maneuver, and in the absence of official (governmental) data of the aforementioned universe, annual reports such as those by Grupo Gay da Bahia (GGB; The Gay Group of Bahia) in the 1980s, offered encouragement in the face of state silence. This created a pressure on the government from transnational organizations; some of which had deep connections with the Brazilian State. In this sense, much of the research conducted in Brazil in the last thirty years concludes that Brazil is one of the leading areas of LGBT murders, with institutionalized and everyday homophobia one of their main theoretical concerns and focuses in activism.

Between the 1960s and 1980s in Brazil, the *nânico* alternative press, operated by artists and diverse political groups (such as political parties and clandestine associations), became a point of cultural and political agglutination. This propagation of ideas and the simultaneous condemnation of the political-cultural repression reigning at the time of the military regime, assisted in the formation of a wide range of critical action by journalists, progressive intellectuals, and members of the student movement. Usually short-lived, these publications were present not only during the dictatorship, but also before. The alternative press, in existence since the time of the Regency (1831-1840), performed—and still performs—research and sociopolitical analyses normally excluded by the

mainstream press. It is worth noting that the political-economic contexts are diverse, and that the roles occupied by the alternative press (in the 1970s and 1980s), are different from the current day. As Brazilian journalist and political scientist Bernardo Kucinski states:

In the periods of major depression of intellectuals and the left, each paper functioned as a spiritual meeting place, a virtual point of aggregation and disaggregation in the hostile environment of the dictatorship. You can draw a distinction between the conventional and alternative press in Brazil by their roles either in uniting or dividing actors of civil society, particularly, of journalists, intellectuals and activists.

One such alternative newspaper, *Lampião da Esquina*, came onto the scene in 1978, proposing to get out of the ghetto by using editorials, interviews with national and international personalities, letters from readers (called “Letters on the Table”), reports on violence against gueis, columns on political activism, innumerable cartoons, art and literature reviews, and—during its final publications—erotic material. The periodical was aimed at constructing itself as a gay-focused production as well as serving as a spokesperson for other minority movements, such as the Black Movement (the Unified Black Movement, among others, featured heavily in various editions of the paper), feminism and transgender rights, indigenous populations, ecology, prisons, and even marijuana legalization.

The 1970s witnessed a change in the periodical’s relationship with political activity. The disenchantment with tradi-

tional left and right political parties, as well as the rise of social movements with post-material and identity-based demands allowed the defense of sociability and lifestyle practices as agglutinations of demands and social pressure.

For some authors, the emergence of the Brazilian Homosexual Movement (MHB) in the 1970s was identified by the defense of practices and lifestyles, as well as a strong aversion to classist identity discourses, mercantiled relationships, and profound discourses of macro-structural transformations of Brazilian society. Instead, the *Lampião* defined itself by anecdotes of individual transformations, the relationship with pleasure, and the struggles of sex-workers (among others); from these stories and transformations, they were able to influence practices and social norms. As the slogan of the paper made very clear, the *Lampião*’s concern was pleasure, but it devoted most of its pages to documenting crimes against the LGBT community, which the state and mass media refused to talk about.

MOVEMENTS AND THE LAMPIÃO: FORMATION OF A POLITICAL AGENDA

In addition to its symbolic role, the *Lampião* was logistically important for its time because it made the emergence and maintenance of contact between several homosexual identity groups viable in Brazil. During its existence, the newspaper routinely published open letters to the homosexual community in which various groups (EROS, Somos, Grupos Libertos, Grupo de Atuação e Afirmação Gay, and others) presented their positions and analyses of Brazilian society, as well as publicizing their contacts and

meeting. Such spaces, discussed extensively in the *Lampião*, allowed the exchange of information and experiences among groups and its members.

.....
As the slogan of the paper made very clear, the *Lampião*’s concern was pleasure, but it devoted most of its pages to documenting crimes against the LGBT community, which the state and mass media refused to talk about.
.....

As noted by author Edward MacRae, these groups viewed themselves as members of their community first, as opposed to members of general society. This identity-based egalitarian community (based on the ideal that all people are equal in their everyday struggles and conditions of existence) employed horizontal organization, in which groups and subgroups of identity and support provided spaces for discussions on social experiences, the expansion of relationships, and the organization of political behavior. The multifaceted term of homosexual classification, despite having been aggressively appropriated by groups and even by the *Lampião* newspaper, could not encompass the experiences and behaviors of subjects completely; this category was considered essential and innate for others, and this social construction of sexuality shined.

George Chauncey, author and professor of lesbian and gay history, demon-

strates through extensive research how state criminal law in some US states was openly used to discriminate against homosexual practices and sociabilities during the twentieth century. Through the 1960s, the LGBT movement was guided by the idea that social integration was only possible by adapting to the established social norm—including declarations of nationalism—according to American social conventions, and the suspension of public behaviors that might threaten chances at full integration. Thereafter, the 1970s resulted in a total breakaway from this vision. However, we can see the cultural exchanges, politics, and identities that occurred in the North American minority social movements during this period:

In the gay movement, to affirm, celebrate and even publicly cultivate the homosexual difference, broke with the assimilation discourse present in the 1950s. This therefore greatly influenced the growth of black cultural nationalism which rejected assimilationist theories and encouraged black cultural pride. This influence can be seen in the North American Gay Movement. When a group of gay activists officially adopted the slogan ‘*Gay is Good*’ at a meeting in 1968, after intense debate, they were directly inspired by the affirmation that *Black is Beautiful*. In the ‘70s, the decision to call a commemorative march of resistance to a police raid at the Stonewall Inn, what emerged was the Gay Pride March, in which self-acceptance and pride among gays that felt ashamed of their condition, was directly based on Black Pride. The long standing effort

to create a gay-affirmative culture—including theater, cinema, music, and gay publications—was also influenced by the *Black Arts Movement*, the Chicano muralist movement and other ethno-cultural organizations which sought to strengthen community solidarity and pride in cultural difference.

Similarly, Michael George Hanchard describes the belief in racial democracy in his book *Orfeu e o Poder: O Movimento Negro no Rio de Janeiro e São Paulo*, which was the idea that racism and racial discrimination among Brazilians was present even though it was not established in social relationships in Brazilian society. This stood in contrast to the American case, which was present and widely diffused from the 1930s primarily through writings of intellectuals such as Gilberto Freyre. This was negated and defended by various political regimes, principally, by the Estado Novo (The Second Republic, 1937-1945) and by the military regime (1964-1985) in Brazil. For Hanchard, this ideological policy permeated both the state and civil spheres of Brazilian society, as demands and pressures on the state presented obstacles to the development of common identity politics that boosted social-political transformations.

During the Estado Novo (1937-1945), political groups were banned or co-opted by the state, therefore, debates between the intellectual resources of the country about the condition of Afro-descendants served as fuel for the eventual emergence of Afro-Brazilian organizations and associations among lower classes. Common agglutinations such as music, sports, and religious groups ended up operating as political forces even if in a veiled and fragmented manner, using fetishization of culture as an instrument

of action. During the military dictatorship, movements like the Black Soul Movement—located initially in the most popular areas of Rio de Janeiro—were considered alleged supporters of racial prejudice. The movement initiated racial conflicts by stating, among other things, that “black is beautiful,” which wouldn’t have existed in aforementioned Brazilian racial democracy, but was nevertheless regarded as Marxist theory because it caused divisions amongst the poor and oppressed social classes. The 1980s thereafter was deemed a period of political openness which presented ample space for the emergence of classical political movements (political parties). It provided space for the emergence of identity movements and new social movements, with some leaders even occupying public positions. According to Hanchard, the cultural bias created myths due to the lack of actions and more traditional sociopolitical events—such as boycotts—which demonstrated the limited range that this route could take. As a result, the integrated social processes, including ideological, cultural visions, and materials, should be favored in the formation and expansion of consciousness with political activity.

Antonio Sérgio Guimarães undertakes a genesis of the political-theoretical framework that he denoted as “racism,” i.e. a theory of races. According to Guimarães, racialism provides instruments to analyze the different meanings of the term “race” (understood as multi-faceted) as it continues to be applied to Brazilian society. In the beginning, “race” was understood as qualities and moral characteristics, behavioral aspects, and genetic features specific to a given group. In a later time, race would be paired with cultural aspects

and socially constructed. Thus, Guimarães inherently defines “race” as a naturalized concept born of the differences between individuals and groups, and used a racialism analysis to show how these mechanisms are naturalized in discourse as scientific or “cultural racism.” This solidified and naturalized the existence of racism in Brazilian society, as it reaffirmed that Brazilians were naturally a mixed population, associating the population with the structural and systematic origins of a colonial and slave-owning past.

For the authors cited above, the apparent racial democracy—joined with the construction of the “Brazilian” national and cultural narrative—was used to allow the erasure of socially undesirable origins. This characteristic of the Brazilian model favored the idea of whitening or “blood purification,” which allowed the possibility (reduced to the individual level) of social mobility. The *whiter* a family manages to become, the more chances it will have to move higher up in Brazilian society. Taken as an ideology common to all citizens, this would maintain the social hierarchy.

It is interesting to note that these new social movements were able to make their demands within a broader political agenda, and with their professionalism, ended up becoming political and historical references of actions and pressures on the state and society.

From the 1980s to the present day, this agenda has been influenced by the virulent attacks and demonstrations of physical, moral, and public intolerance that LGBT identified individuals suffer. Therefore, we believe that *Lampião da Esquina* guided, at least in part, the construction of a homosexual identity, based in three parts: consumption and life-

style; political activism; and discourses against violence (institutional as well as social) targeting both homosexuals and *travestis*, as well as women, blacks, and indigenous people. In this sense, despite the lack of antihomosexuality laws in Brazil since the 1824 Constitution, the tensions created by the medical and legal practices affected the daily lives and social image of LGBT individuals. It is possible that the toxic narrative combination of supposed moral and/or biological degeneration, character flaws, and/or the possibility of innate criminality was propagated in these discourses that permeated the identity formation of the aforementioned racial and sexual minorities. Gender theorist Judith Butler describes how gender, sex, and the body are immersed in social and discursive patterns that try to force them into certain normative patterns. However, we are also gifted with corporal flexibilities, malleability, and gender performance traits that have opened us to various actions, non-conformity, and even protection in specific contexts.

If we look at how *Lampião da Esquina* denounced and appropriated judicial processes and notices, making a critique of the state, we see how it facilitated an identity mechanism that proposed and normalized demands, experiences, and existences not previously acknowledged. We undertake a theoretical analysis, proposed by Butler in her work *Precarious Life*, wherein she problematizes the question about “which lives are worth living,” looking at the issues of existence of the “*other*,” in terms of what/who is considered human or not. The form of recognition most exemplary of the recognition of life is the right to mourn (both public and personal). To deny the right to grieve is to deny one’s existence

or end of existence. Butler demonstrates that violence and its victims, in the absence of mourning, diminish in importance and become unreal. What is silent does not matter, while what is not silent is not lost.

The denial of the existence of certain subjects (and even identities) means the ineligibility for rights in other social categories. The process of dehumanization that certain identities face is reproduced by the social and state powers that society possesses, therefore, the mourned surpass the personal and become political: they have less of a relationship to the individual and more of a relationship to each other—what is recognized as life ends in the group. Therefore, all individuals have an uneven distribution of vulnerabilities and when specific vulnerabilities of an individual or group are negated, a resurgence of violence occurs: the inexhaustibility of the object of violence is given by the negation of the existence of the subject itself.

A hierarchy of grief can provide a typology of lives framed in broad intelligibility, where these lives are on the border between the living and dead. For Butler, a leading example is the obituaries in newspapers that reproduce norms such as monogamous heterosexual marriage, children, and a steady job. Those aspects of existence outside of this image are in a gray area “outside of humanity.” One possible way out of this abstraction is the transformation of deaths and assaults into reality. The mobilization of sexual acts and racial minorities became public performative acts by Act Up (LGBT) in the 1980s. The Women’s March and anti-racist marches organized by North American black organizations were strategies of humanization and visibility. Additionally, this mobilization led to the

expansion of discourses (with a greater degree of intelligibility), rights (individual), and collective demands of protection of groups previously seen as diffuse or non-existent. Individual narratives of violence were transforming into collective narratives as a way to carry victims and create a macro social explanation of phenomena seen as local or circumstantial. The vulnerabilities of subjects and groups need to be recognized in order to play part of the political and ethical game in the social sphere, and that is precisely *Lampião*’s unintended result.

TRAVESTIS, PROSTITUTION, TOXIC SUBSTANCES, AND HOMOSEXUALISM IN THE SAME BAG

The 1978 edition of *Lampião* brings one of the most important markers: the denunciation of institutional homophobia. According to the paper, 2,500 students at a federal technical school in Rio Grande do Norte, Brazil, were prohibited from enrolling based on their sexual orientation. The school board, in conjunction with a large network of investigators from the Federal Police, identified the students as having been rejected at the beginning of the school year. When questioned about why the students were prohibited from attending the school, the director of the institution affirmed that the sexual orientation of the students was not a large factor that would affect their enrollment, even if it had drawn certain attention. The alleged homosexuality, in conjunction with other negative innate behavioral aspects and politics, contributed to the students’ rejection from the institution.

The same edition announced the unjust imprisonment of dozens of gays by the military police in the city of Olinda.

This event was considered even more unjust because the authorities, aside from failing to present legal justification, invaded the Atlântico restaurant and unjustly apprehended its clientele. In its analysis, the *Lampião* stated:

One of the ways to avoid situations such as this is to obtain specific laws against discrimination (Blacks already have the Afonso Arinos Bill), following the example of the United States. But until this moment, we have a long way to go. And for example, homosexuals are still learning to walk.

A year later, a campaign was launched against imprisonment based on sexual orientation; it was ultimately denied by the Ministry of Justice. In its pages, the *Lampião* opened up space for demonstrations against the aforementioned (il)legal action. Among the voices highlighted, we find two letters: one from the Unified Black Movement and the other from the Institute for Research on Black Cultures (IPCN). In the precautionary imprisonment conclusion discussions, *Lampião* writer João Carlos Rodrigues asks his readers how such a measure would be related to homosexuals and warns:

Jail, for being a ‘suspect’ directly reaches homosexuals and other minorities such as blacks for example. By subjective evaluation, one can be arrested for the mere fact of being gay, black, poor, or unable to work. But this is no longer the case? It happens, but it’s illegal. And if it is legalized, we lose any possibility of struggle.

In line with promises of slow and gradual openings, secured in the early 1980s, the *Lampião* highlighted other

institutional mechanisms of repression that had increased actions and coercion, not only against homosexuals but also against other parts of society. As observed by Butler, if there are complications in establishing one's own identity, political norms (and police actions) should seek to normalize the abnormal, or rather those that were for some reason out of line. Dissent is seen as enough of a reason for moral/physical punishments to be applied. As discussed previously, the condition of vulnerability is a political condition and historically localized in its time; whether or not this vulnerability is maximized depends on the exposure of a given population or group to violence. The state often worked to suppress violent actions (that it, often, perpetuates) that act in affirmative and negative manners: positive in the sense of actively repressive actions and negative in the failure to recognize or grant rights and protection.

In 1980, *Lampião* presented a denunciation of violence and the auspicious absence of police forces in cases of public aggression against *travestis* and *bichas* (fags) in Cinêlandia, Rio de Janeiro, during Carnival that year. According to the publication, aside from diverse aggressions suffered by partygoers at this event, the case was even more shocking for its aggression against an elegant travesti that “was held captive in Amarelinho Bar, where she was beaten and stripped of her clothes.” The condemnation proceeds in a severe and ironic tone:

Our police, what did they do? Nothing. Ten PM officers were impassive at this scene . . . A fact that has angered me to the point of making me cry. Where are our rights? We wanted to have our syndicate, so we took a course

of action, because this is the last straw.

We draw upon Harvard social sciences professor Michael Herzfeld to analyze the denunciation above. Herzfeld discusses the social production of indifference in a critique of state bureaucracy that seeks to standardize the members of nation-states, even though global and local don't always harmonize, and to seek accountability of the states and the agents that operate and represent it. As declared by Herzfeld, “It's not the State that decides the limits of what is acceptable.” Therefore, the silence of political agents amounts to their compliance with acts of symbolic violence, and physically perpetuates the social stigma attributed to these individuals.

.....

Assaults and murders of homosexuals and travestis are thus treated as exemplary models of unification for minorities fighting for their right to the recognition of their identities.

.....

In another editorial, a war was declared against the Mesquita family, owners of the São Paulo State newspaper. In a piece titled “One plea of the Traditional Mesquita Family: catch, kill and fuck *travestis*,” the *Lampião* presents a public denouncement against the editorials of the Mesquita family newspaper, which demanded that society and police detain and even kill—in the style of a vendetta—travestis and homosexuals who roam the streets of big cities instill-

ing immorality, crime, and danger. Herzfeld associates the model of the family to the construction of the nation, which indicates that this parallel is not only rhetorical, but also an example of how the traditional family would prove to be exemplary in loyalty and collective responsibility, identical to a national state where its citizens embody this responsibility for their country.

Assaults and murders of homosexuals and travestis are thus treated as exemplary models of unification for minorities fighting for their right to the recognition of their identities. The deaths and crimes, described in every edition of the *Lampião*, shocked readers, as common characteristics form an identity. We understand that the use of images, narrative time, and intense descriptions of persecutions, assaults, and murders, narrated by the *Lampião*, ended up defining an imaginary identity of the homosexual. If everyone possesses the same patterns, cultural and social capitals, bodies, and erotic practices, they would be subject to the same types of aggression and humiliation. A joint action would therefore be necessary.

The headline of the twenty-fifth edition of the *Lampião* was “The Return of the *Bicha*-Death Squad: Three Crimes That Shook the Guei Community.” In this edition, two cases of homosexual murders are presented in an example of a clear violation of rights by the military police in different parts of the country. One such famous case handled by the *Lampião*, is the murder of Luis Eduardo Correa (or as they were better known Luísa Felpuda) and his brother in Rio Grande do Sul. The convicted killer, Jairo Teixeira Rodrigues, was a sex worker who provided services for Luísa Felpuda, claiming to have committed the crime in

a moment of irrationality, having been embarrassed at not being able to sustain an erection. Luísa Felpuda was the homosexual owner of a hotel for gentleman encounters, and the nephew of a Brazilian ambassador who, upon hearing the news of his nephew's death, rushed to say that he did not approve of his nephews' lifestyles. Most interestingly, the *Lampião* had already determined Rodrigues's innocence, while the victim—who managed a house frequented by male visitors—was presumed to be the cause of his own and his brother's death. At the end of the report, the journalist launched a manifest-declaration, which stated:

The mainstream press, the radio and the TV, aside from giving heroes honors to Michê Jairo, had sensational, libelous and deeply regrettable behavior. Homosexuals, all homosexuals, were singled out as potential criminals of extreme dangerousness, deserving jail and/or psychiatric treatment. *Travestis*, prostitution, toxic substances, and *homosexuality* were all in the same pot of abnormality, requiring ferocious medical-police repression. The *bichas* of Porto Alegre will be furious. Are they already reacting, arranging some sort of defense when they have used, use or will use the homosexual option? What are they waiting for?

In the same edition, the *Lampião* highlighted Marli Pereira Soares, a favela resident of Nova Iguaçu (Rio de Janeiro). The case of Pereira Soares, determined by the paper, is intriguing because the police were the perpetrators of a mass killing in the carioca (Rio de Janeiro)

suburbs. Over the course of several days, the military police stormed the houses of residents in the city, beat them, and kidnapped members of the families, apparently murdering many of them in the following days. Marli's brother, Adilson da Silva, was considered missing in the days following, but was later determined to be one of the victims, whose crime was his supposed involvement in the sale of toxic substances. As a result, Pereira Soares drove to the police station to try to find the whereabouts of her brother and press charges, even though she was discouraged to do so by the attending officers. After a lot of back and forth in her attempt to find her brother's killer, Pereira Soares, supported by lawyers, received a ruling in her favor: a line up of the entire battalion of the military police to identify the killers. After this ruling, Nova Iguaçu (a poor city located on the outskirts of Rio de Janeiro) was in an uproar. Commerce shut down in support of the officers' arrest, gunfire was exchanged between the military and civil police, and the army even invaded local police stations on two occasions. The outcome of the case, which the paper did not cover in other editions, was that more than 20 officers from the police forces were accused of the crime. The *Lampião* uses this story as an example, to suggest it was necessary for minorities to unite and confront repressive forces in order to enact change.

The use of police force to suppress spaces of socialization was justified as a necessary strategy to ensure the circulation of "good people" and maintain public morality. In several editions of the *Lampião*, this argument is at various times, by different actors (sheriffs, police officers, judges, politicians, and religious leaders), a means of maintenance and

control. In May 1981 the penultimate edition of the *Lampião da Esquina* presents an extensive dossier describing the end of Tiradentes Square (Rio de Janeiro) as a gay space. Several prefecture projects, actions by the military, and police acts in the name of private enterprise aimed to transform the decaying town square of Rio de Janeiro into a new and revitalized shopping area. For this to occur, oppressive actions by the police and prefecture started taking place. Cinemas that facilitated casual sexual encounters were closed for health violations or lack of security structure; upon the arrival of a new sheriff, characterized as ignorant and uninformed by the paper's writers, arrests of cinema patrons intensified. In an interview with the paper, deputy Andrade claimed that the dangers of these cinemas was not in the number of recorded crimes (in the data presented in the dossier, Tiradentes Square was less dangerous than other parts of the city center), but rather in the high number of travestis, homosexuals, and suspicious individuals who frequented the locale daily. In his interview, Andrade stated that increasing numbers of police actions have a prophylactic reasoning: keep the "homosexuals and other marginalized individuals" out of the city center to increase the number of "fisheries" in his region.

From the beginning of its publication, the *Lampião* saw recording acts of physical violence as one of its main agendas. The murder of homosexuals (or those suspected of being so) became a registration of these subjects in public space. In November 1978 the *Lampião's* sixth edition discussed the murder of Father Antônio Carneiro Van der Linden, beaten to death while he slept, and the ensuing trial of his murderer Nilton Sírio Mar-

tins, in the Grand Jury of Rio de Janeiro. During the trial, the *Lampião* recounts that the killer called his witnesses to the stand, where they each confirmed the homosexuality of the priest. After several hearings, the judges decided to acquit the defendant on the basis that the defendant was acting in legitimate *honor defense* despite testimony that substantiated that the priest's skull was crushed in his sleep by the defendant. The paper ends the narrative by including specifics from the case—the fact that the crime was committed against a homosexual, the fact that the relationship between the two individuals was not questioned, and the premeditation of the murder that proved that the judging of a homosexual only needs anecdotal evidence to prove his guilt in the eyes of the law, whereas specificities of the case are not required.

The rationale of the *honor defense* in cases of homicide was extensively discussed in the subjects published by the *Lampião*. In their first edition, the newspaper documented crimes committed against alleged latent homosexuals, and questioned the legal, social, and police intricacies by which these same confessed murderers were able to escape punishment. In such cases, it was not only an assessment of facts, but also a discourse about *macho society*.

In the November 1980 edition, a *Lampião* headline read, "Felpuda's killer almost rapes a girl." Jaíro Teixeira Rodrigues, ex-soldier and confessed murderer of Luísa Felpuda and his brother, was accused of attempted rape of a nine-year-old girl. Rodrigues lured the child into his apartment with the promise that her older sister would arrive at the house at the same time. Inside the apartment, Rodrigues removed the girl's underwear and when he was about to perpetrate the

act, someone rang the doorbell, allowing the child to escape and run home. The mother, a public employee, was a resident of the same building where Rodrigues lived, and noticed her daughter's behavior change. Without going into the details of Rodrigues's newest crime, the *Lampião* asserted that if Felpuda's murderer was considered a *hero* by the media, justice system, and police for having eliminated two undesirable members of society, potentially this newest act of violence would be taken more seriously by the *justice of man* than the murder of an openly homosexual man.

CONCLUSION

Undertaken here is one of the possible narratives about the emergence of a discourse that attempted to construct a homosexual identity during the period of political openness. Through the analysis of various editions of *Lampião da Esquina*, this paper tried to show how identity construction was intertwined with political action of recognition and even the paper's very distribution. *Lampião da Esquina* functioned as a space of public mourning, disclosing murders and repression of not only homosexuals but also travestis, lesbian, gues, blacks, prostitutes, felons, Indians, and others. Without them, people were at the mercy of a mass media that deemed such lives unworthy of mourning or fighting for in the public sphere. The reporting of such cries, and often their unsatisfactory outcomes, allowed readers, writers, and future generations of the Brazilian Homosexual Movement to form an agenda that is still consistent in contemporary LGBT activism, i.e. LGBTphobia. The narratives of *Lampião*, during its time, present an alternative point of view to

the forms of disclosure of crimes against homosexuals in mass print in the 1980s and 1990s. As authors Silvia Ramos & Sérgio Carrara state:

. . . the predominantly sensation-
alist approach of the press, particu-
larly during the 1980s and part
of the 1990s favoured a partial
view of the victimization of ho-
mosexuals who often tended to
'confirm'—even to the movement
itself—current representations of
homosexuality, in which tragedy
was somehow caused by the moral
weakness and choices of its vic-
tims.

If, since the first moment, the armed
forces of the state were its most visi-
ble representatives, they were also the
mechanism of collective identification,
which was mobilized and facilitated by
the *Lampião*, its journalists, critics, and
readers. It is the attack of this same en-
tity by the police apparatus that helped
craft a more general definition of what it
means to be homosexual, travesti, black,
poor, or indigenous. Whether by institu-
tional mechanisms (laws, decrees, and
prohibitions) lack of accountability, or
purely through illegal actions includ-
ing precautionary arrests, police raids,
or specifically the 1980 Richetti Opera-
tion that the *Lampião* openly criticized;
the '70s and '80s were witness to the
emergence of diverse identities that pre-
viously lacked public forums for their
voices to be heard.

The emergence of the AIDS virus in
Brazil, in the mid-1980s, threw the ma-
jority of MHB groups into chaos. How-
ever, just a few years later, several other
groups—this time more professional and
with greater access to the state and its
resources—managed to organize a po-

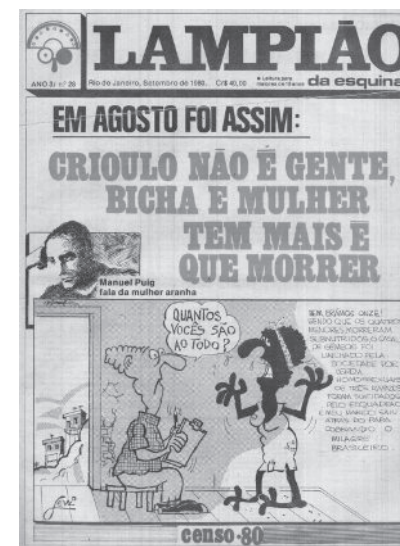
litical agenda of recognition and redis-
tribution in terms of health and bodily
care. Nevertheless, they were still not
entirely legitimized by the legislative
systems in the protection against hate
crimes, including homophobia and re-
productive rights. *Lampião's* analysis and
perception of the state is left ambiguous
as to whether its movement is affirma-
tive or negative: affirmative in terms of
repression movements of diverse groups
and individuals, and negative in the con-
cession of rights and protection. The
complete silence and indifference of the
state and its structures to the numerous
aggressions and violent deaths against
homosexuals and other minorities rever-
berates until today in Brazilian society
and politics. A greater political open-
ness in these present democratic times,
demands of the LGBT community may
finally enter into the national political
agenda owing much debt to the work of
Lampião da Esquina and its brave report-
ers who had the courage to fight an au-
thoritative and military regime.

End notes are to be found online at:
www.hkslgbtq.com.

APPENDIX



"The Death of 'Luísa Felpuda'"



"Creoles are not people, fags and women must die." This issue approaches crimes committed in August 1980 against the LGBT, African-Brazilian communities and the genocide of women.



"The Fag-Killing Squad Returns." *Lampião* became known for divulging crimes against the LGBT communities in Brazil and named perpetrators of crimes such as fag-killing, it would also include murders, criminals, police forces, and court decisions against minorities.



"Disagreement Between Minorities." *The newspaper approaches the theme of dissent amongst minority groups (LGBT, African-Brazilian, Indigenous populations, etc.).*

HARVARD Kennedy School
SHORENSTEIN CENTER
 on Media, Politics and Public Policy

THE SHORENSTEIN CENTER analyzes the power of media, in all its forms, and its impact on public policy and politics. Through research, teaching, high-profile events and engagement, the Center plays a leading role in the discussion about media and politics in the 21st century in Cambridge and beyond.



TEACHING. Faculty members teach and conduct research on political communication, public opinion, new media and the intersection of press, politics and policy.



STUDENTS. The Center offers Kennedy School students access to internships, positions as research assistants and scholarships.



FELLOWSHIPS. Outstanding journalists and scholars spend a semester at the Center researching and writing a paper, and participating in Harvard activities.



PUBLIC PROGRAMS. Weekly events with distinguished scholars and practitioners attract students, faculty and members of the community.



GOLDSMITH AWARDS IN POLITICAL JOURNALISM. The Goldsmith Awards include a prize for investigative reporting, two book prizes and a career award.



RESEARCH. Studies include research on the role of the media in the 2016 election, consumption of news on mobile devices and reporting on ISIS.

shorensteincenter.org | @ShorensteinCtr