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Where the American Dream Becomes a Nightmare: LGBT Detainees in Immigration Detention Facilities

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WHERE THE AMERICAN DREAM BECOMES A NIGHTMARE:
LGBT¹ DETAINEES IN IMMIGRATION
DETENTION FACILITIES

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INTRODUCTION

In recent years, immigration detention has become known as “the fastest-growing, least scrutinized form of incarceration in the

1. While I will refer specifically to the LGBT community throughout this Note, it is implied that the issues discussed apply to other groups of the sexual orientation minority community not included in this acronym including, but not limited to, those who identify as questioning, genderqueer, asexual, intersex, and other non-binary or gender nonconforming people.

United States.”² Each day, a Congressional mandate requires the U.S. Immigration and Customs Enforcement (ICE)—the interior enforcement agency of the Department of Homeland Security (DHS)—to maintain no less than 34,000 beds in more than 250 detention facilities nationwide.³ While DHS claims that this mandate does not necessarily require those beds to be *filled* on any given day, ICE and numerous members of Congress argue the opposite.⁴ This bed quota applies to broad categories of non-citizens, including lawful permanent residents, non-violent offenders,⁵ asylum seekers, and other vulnerable groups, including victims of human trafficking and unaccompanied minors,⁶ all of whom are subject to removal for potential violations of administrative immigration law.⁷ The crackdown on non-citizens began with the passing of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996,⁸ and continued as a result of subsequent immigration reforms made under the George W. Bush and Barack Obama Administrations.⁹ Before the passing of

2. *Unlocking Liberty: A Way Forward for U.S. Immigration Detention Policy*, LUTHERAN IMMIGRATION & REFUGEE SERV. 5 (May 2012), <http://lirs.org/wp-content/uploads/2012/05/RPTUNLOCKINGLIBERTY.pdf> [<http://perma.cc/6NC3-N263>].

3. *Immigration Bed Mandate 101*, NAT'L IMMIGRANT JUST. CTR., <http://immigrantjustice.org/sites/immigrantjustice.org/files/Bed%20Mandate%20101%20Backgrounder%20FINAL.pdf> [<http://perma.cc/7VCZ-SLEL>]; see also H.R. 4903, 113th Cong. (2014), <https://www.govtrack.us/congress/bills/113/hr4903/text> [<http://perma.cc/7HFH-YBTT>] (requiring “[t]hat funding made available under this heading shall maintain a level of not less than 34,000 detention beds . . .”).

4. Esther Yu-Hsi Lee, *Homeland Security Head Insists ‘Bed Mandate’ Is Not a Quota to Fill Detention Centers*, THINK PROGRESS (Mar. 12, 2014, 4:42 PM), <http://thinkprogress.org/immigration/2014/03/12/3391911/jeh-johnson-bed-mandate-quota> [<http://perma.cc/ZKD7-Q9AP>] (in which Rep. John Culberson (R-TX) explains that, “[t]he law is mandatory’ . . . ‘[A]nd this isn’t optional, it’s not discretionary. There’s no prosecutorial discretion on the part of a police officer or detention folks as to whether or not you’re going to fill 34,000 beds. You shall fill 34,000 beds.”).

5. *Costly and Unfair: Flaws in US Immigration Detention Policy*, HUM. RTS. WATCH 3 (May 2010), <http://www.hrw.org/sites/default/files/reports/usimmigration0510webwcover.pdf> [<http://perma.cc/3DFB-KN87>] (“72 percent of all non-citizens deported for crimes between 1997 and 2007 were deported for non violent offenses.”).

6. *Id.* at 1; see also *About the U.S. Detention and Deportation System*, DET. WATCH NETWORK, <http://www.detentionwatchnetwork.org/resources> [<http://perma.cc/C6EM-NX4Z>].

7. John F. Simanski, *Immigration Enforcement Actions: 2013*, DHS Office of Immigration Statistics 8 (Sept. 2014), https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf [<http://perma.cc/7RPH-JEJA>].

8. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 303, 110 Stat. 3009-585 (1996), <http://www.uscis.gov/iframe/ilink/docView/PUBLAW/HTML/PUBLAW/0-0-0-10948.html>.

9. Examples include the cessation of “Catch and Release” (the practice of picking up undocumented immigrants and releasing them on their own recognizance until their deportation) and the initiation of “Secure Communities” (an information-sharing program between the

the IIRIRA, the Immigration and Naturalization Service (INS) held approximately 85,000 immigrants in detention facilities annually.¹⁰ As of fiscal year 2013, that number had increased fivefold to over 440,000.¹¹

Among those caught up in immigration detention are asylum seekers, some of whom come from one of the seventy-five countries where it is a crime to be lesbian, gay, bisexual or transgender.¹² Numerous other asylum seekers come from nations where it is fundamentally unsafe to identify as LGBT, even if it is technically legal to do so.¹³ The year of 2013 saw a rise in new and renewed laws in other countries criminalizing same-sex acts, indicating that the discriminatory trend against LGBT individuals may be worsening.¹⁴

FBI and ICE, allowing ICE to find and pick immigrants that it will eventually deport). Gretchen Gavett, *Map: The U.S. Immigration Detention Boom*, FRONTLINE (Oct. 18, 2011, 7:54 PM), <http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/map-the-u-s-immigration-detention-boom> [<http://perma.cc/8HQ8-L7VM>].

10. *Analysis of Immigration Detention Policies*, AM. CIVIL LIBERTIES UNION (Aug. 18, 1999), <https://www.aclu.org/immigrants-rights/analysis-immigration-detention-policies> [<http://perma.cc/JW3W-LX2K>].

11. *Unlocking Human Dignity: A Plan to Transform the U.S. Immigrant Detention System*, MIGRATION AND REFUGEE SERV. U.S. CONFERENCE OF CATHOLIC BISHOPS 7 (May 2015), <http://www.usccb.org/about/migration-and-refugee-services/upload/unlocking-human-dignity.pdf> [<http://perma.cc/Y3BT-YS6H>].

12. Aengus Carroll & Lucas Paoli Itaborahy, *State-Sponsored Homophobia 2015: A World Survey of Laws: Criminalisation, Protection and Recognition of Same-Sex Love*, INT'L LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASS'N 9–10 (May 2015), http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2015.pdf [<http://perma.cc/LU99-QM7Z>] (indicating that eight countries—Iran, Mauritania, Saudi Arabia, Sudan, Yemen, Pakistan, Afghanistan, and Qatar—have a statutory death penalty for same-sex sexual acts, although only the former five actually implement it. Judges in Iraq, as well as non-state actors such as ISIS, also issue the death penalty for same-sex sexual acts.).

13. *See, e.g., id.* at 76.

14. *See, e.g.,* Hayes Brown, *Uganda Passes New Version of 'Kill the Gays' Bill*, THINKPROGRESS (Dec. 20, 2013, 1:55 PM), <http://www.thinkprogress.org/security/2013/12/20/3093931/uganda-passes-kill-gays-anti-homosexuality> [<http://perma.cc/A5G7-WHVG>] (noting that in Uganda, the Anti-Homosexuality Act was passed in 2013); Lucas Paoli Itaborahy & Jingshu Zhu, *State-Sponsored Homophobia, A World Survey of Laws: Criminalisation, Protection and Recognition of Same-Sex Love*, INT'L LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASS'N 9 (May 2014), http://old.ilga.org/Statehomophobia/ILGA_SSHR_2014_Eng.pdf [<http://perma.cc/E924-K9S7>]; *Nigeria 2013 Human Rights Report*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS. AND LABOR 45–46 (2013), <http://www.state.gov/documents/organization/220358.pdf> [<http://perma.cc/59SK-BPMU>] (Nigeria further criminalized consensual same-sex relations and instituted restrictions on the rights to free association, expression, and assembly for LGBT people.); Dhananjay Mahapatra, *Supreme Court Makes Homosexuality a Crime Again*, THE TIMES OF INDIA (Dec. 12, 2013), <http://timesofindia.indiatimes.com/india/Supreme-Court-makes-homosexuality-a-crime-again/articleshow/27230690.cms> [<http://perma.cc/HB2U-RUZ5>] (discussing the Supreme Court of India's decision to reinstate a colonial-era law that criminalizes consensual same-sex relations).

Even where there are no explicitly discriminatory laws, LGBT people are still forced to seek protection from societal resistance in countries where the government is unwilling or unable to protect them.¹⁵ For example, although some parts of Mexico have progressed to the point of legalizing same-sex marriage, the U.N. Special Rapporteur found 555 recorded homicides of LGBT people in Mexico from 2005 to 2013.¹⁶ In some instances, these murders were committed with the complicity of authorities.¹⁷ Homosexual acts were also decriminalized in Honduras in 1899,¹⁸ but between June 2009 and January 2011, thirty-one LGBT persons were attacked or murdered.¹⁹

To protect themselves from the violence resulting from governmental discrimination or inaction, some LGBT people attempt to seek refuge within the borders of a more accepting country, and many of them look to the United States.²⁰ The reality, however, is that the severity of mistreatment that LGBT immigrants will face in U.S. immigration detention centers will rival that of their home country.²¹ As a Human Rights Watch report stated in 2010, with regard to U.S. immigration detention facilities, “the problem cannot be dismissed as a series of isolated incidents”; rather, “there are systemic failures at issue.”²² Indeed, even with the implementation of new immigration detention standards, the housing policies, training of the staff, and the appeals and complaints processes remain highly inadequate, resulting in gross violations of human dignity.²³

15. See, e.g., Sharita Gruberg & Rachel West, *Humanitarian Diplomacy: The U.S. Asylum System's Role in Protecting Global LGBT Rights*, CTR. FOR AM. PROGRESS 8 (June 2015), <https://cdn.americanprogress.org/wp-content/uploads/2015/06/LGBTAsylum-final.pdf> [<http://perma.cc/3FYT-PVXK>].

16. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, *Mission to Mexico*, Human Rights Council, U.N. Doc. A/HRC/26/36/Add.1 18 (Apr. 28, 2014), <http://www.ohchr.org/EN/Issues/Executions/Pages/AnnualReports.aspx> [<http://perma.cc/P3WS-4YB4>].

17. *Id.*

18. Itaborahy & Zhu, *supra* note 14, at 17.

19. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, *Summary of Information, Including Individual Cases, Transmitted to Governments and Replies Received*, Human Rights Council, U.N. Doc. A/HRC/17/28/Add.1 9 (May 27, 2011), <http://www.ohchr.org/Documents/Issues/Executions/A-HRC-17-28-Add1.pdf> [<http://perma.cc/CPB6-KKZ8>].

20. See, e.g., Gruberg & West, *supra* note 15, at 1–2.

21. See *Detained and at Risk: Sexual Abuse and Harassment in United States Immigration Detention*, HUM. RTS. WATCH 3 (Aug. 25, 2010) [hereinafter *Detained and at Risk*], <http://www.hrw.org/reports/2010/08/25/detained-and-risk-0> [<http://perma.cc/AG4W-ZKD3>].

22. *Id.*

23. See *id.* at 16.

I. UNIQUE ISSUES FACED BY LGBT IMMIGRANT DETAINEES

A. *LGBT Immigrant Detainees Suffer Punitive Conditions in Violation of the Due Process Clause*

Individuals detained for immigration violations are technically in civil detention,²⁴ the primary purpose of which is to ensure their presence at immigration hearings and compliance with immigration orders.²⁵ Civil detainees are unlike prisoners in that they are not detained for the purpose of punishment or incapacitation for any criminal offense.²⁶ Despite their status as civil detainees,²⁷ persons in immigration detention facilities are mistreated to an equal—and sometimes greater—extent than criminal detainees.²⁸ Under the Due Process Clauses of the Fifth and Fourteenth Amendments, conditions and restrictions of a detention facility must be nonpunitive in both purpose and effect.²⁹ In other words, ICE detention may not amount to punishment. Rather, punishment is reserved only for those who have been tried and convicted.³⁰

The U.S. Court of Appeals for the Ninth Circuit went one step further by holding that conditions of confinement for civil detainees must be superior to conditions endured by convicted prisoners, and at least equal to those afforded to pretrial criminal detainees.³¹ Thus, if a civil detainee is confined in conditions that are “identical to, similar to, or more restrictive than” conditions in which pretrial detainees are held, then those conditions are presumptively punitive and unconstitutional.³² It follows, then, that civil detainees have the right to be free from unsafe conditions and unreasonable bodily restraint,

24. Cesar Cuauhtemoc Garcia Hernandez, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1352 (2014).

25. *Id.* at 1393.

26. *Id.* at 1348.

27. *Id.*

28. See *Jailed Without Justice: Immigration Detention in the USA*, AMNESTY INT’L 29 (Mar. 25, 2009), <http://www.amnestyusa.org/research/reports/usa-jailed-without-justice?page=show> [http://perma.cc/Q2LY-VPMJ].

29. U.S. CONST. amend. V; U.S. CONST. amend. XIV; *Bell v. Wolfish*, 441 U.S. 520, 521 (1979); see also *Wong Wing v. United States*, 163 U.S. 228, 241 (1896).

30. *Wong Wing*, 163 U.S. at 238; see also *Edwards v. Johnson*, 209 F.3d 772, 778 (5th Cir. 2000) (holding that immigration detainees should receive the same level of protection as pretrial criminal detainees).

31. *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004) (“[A]n individual detained awaiting civil commitment proceedings is entitled to protections at least as great as those afforded to a civilly committed individual and at least as great as those afforded to an individual accused but not convicted of a crime.”).

32. *Id.* at 934.

which would include environments in which the risk of sexual assault is high.³³

B. LGBT Detainees Face an Increased Risk of Sexual Assault and Have Little Protection

U.S. immigration detention facilities are notorious for sexual assault and harassment,³⁴ much like the U.S. prison system.³⁵ According to a study conducted at several California prisons, LGBT detainees are fifteen times more likely to be assaulted than any other detainee.³⁶ Human Rights Watch found that detainees who are young, small in stature, physically weak, feminine, or gay are more likely to be the targets of sexual assault.³⁷ Once raped, a detainee is likely to be “marked” as prey, and abused repeatedly.³⁸ The Government Accountability Office (GAO) reported that twenty percent of substantiated allegations of sexual abuse reported to ICE involved transgender³⁹

33. The Supreme Court has stated that “[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” *Greenholtz v. Inmates of the Nebraska Penal & Corr. Complex*, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part); and according to *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982), liberty from bodily harm survives criminal conviction and incarceration, pretrial detention, or involuntary civil commitment.

34. See *Detained and at Risk*, *supra* note 21 (assessing reports of more than 50 alleged detainee victims since 2003); *Invisible Victims: Migrants on the Move in Mexico*, AMNESTY INT’L 15 (Apr. 2010), <http://www.amnestyusa.org/sites/default/files/amr410142010eng.pdf> [<http://perma.cc/VEG3-GQTY>] (“It is a widely held view—shared by local and international NGOs and health professionals working with migrant women—that as many as six in 10 migrant women and girls are raped.”); *Sexual Abuse in Immigration Detention*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/sexual-abuse-immigration-detention> [<http://perma.cc/XW6E-K7WH>] (explaining that a Freedom of Information Act request from the American Civil Liberties Union uncovered documents containing roughly 200 allegations of sexual abuse since 2007 alone).

35. See Allen J. Beck & Paige M. Harrison, *Sexual Victimization in State and Federal Prisons Reported by Inmates, 2007*, BUREAU OF JUST. STAT. 1, <http://www.bjs.gov/content/pub/pdf/svsfpri07.pdf> [<http://perma.cc/KBC3-X4GL>] (4.5 percent of inmates reported sexual abuse during a 12-month span); see also Brett Garland & Gabrielle Wilson, *Prison Inmates’ Views of Whether Reporting Rape Is the Same as Snitching: An Exploratory Study and Research Agenda*, 28 J. OF INTERPERSONAL VIOLENCE 1201, 1201–22 (2013) (noting that rape is reported even less in prisons due to “cultural norms” that discourage “forwarding inmate information to correctional authorities”).

36. *A Call for Change: Protecting the Rights of LGBTQ Detainees*, JUST. DETENTION INT’L 1 (Feb. 2009) [hereinafter *A Call for Change*], <http://www.justdetention.org/pdf/CFCLGBTQJan09.pdf> [<http://perma.cc/7W7U-GHTD>].

37. *No Escape: Male Rape in U.S. Prisons*, HUM. RTS. WATCH (Apr. 1, 2001) [hereinafter *No Escape*], http://www.hrw.org/reports/2001/prison/report4.html/#_1_23 [<http://perma.cc/7HZN-4H98>].

38. *A Call for Change*, *supra* note 36, at 1.

39. Transgender is an umbrella term used to describe people whose gender identity, one’s inner sense of being male or female, differs from their assumed sex at birth. A transgender woman is generally identified as male-to-female (MTF), while a transgender man is female-to-male (FTM).

victims⁴⁰—a percentage far exceeding their representation in the detained population.⁴¹ Furthermore, the National Prison Rape Elimination Commission (NPREC) found that immigration detainees are especially vulnerable to sexual abuse because they are often separated from friends and family, and they may not speak the same language as the detention staff or other detainees.⁴²

In *Farmer v. Brennan*, a case that went before the United States Supreme Court, Dee Farmer, a transgender woman, was repeatedly beaten and raped in a men’s prison facility.⁴³ Prison officials were found to be responsible for the attacks on Farmer because they knew about the substantial risk of serious harm⁴⁴ and took no steps to prevent future incidents of violence against her.⁴⁵ The holding in this case made it clear that “[b]eing violently assaulted in prison is simply not ‘part of the penalty that criminal offenders pay for their offenses against society.’”⁴⁶ What logically follows from this holding is that “deliberate indifference” to sexual assault and harassment is in no way acceptable in the context of immigration detention facilities and civil detainees.⁴⁷

Unfortunately, sexual assault and harassment are chronically under-reported and under-investigated,⁴⁸ which is often due to the victim’s fear of retaliation if a complaint is submitted.⁴⁹ A GAO report found that forty percent of all sexual assaults in immigration detention are not reported by ICE field office officials to ICE headquarters.⁵⁰ Several national advocacy groups, including Heartland

40. U.S. GOV’T ACCOUNTABILITY OFF., GAO-14-38, IMMIGRATION DETENTION: ADDITIONAL ACTIONS COULD STRENGTHEN DHS EFFORTS TO ADDRESS SEXUAL ABUSE 60–61 (2013) [hereinafter U.S. GOV’T ACCOUNTABILITY OFF.].

41. Cristina Costantini et al., *Why Did the U.S. Lock Up These Women with Men?*, FUSION MEDIA NETWORK (Nov. 19, 2014, 2:00 PM), <http://interactive.fusion.net/trans> [<http://perma.cc/6S3L-G7UA>] (stating that Immigration and Customs Enforcement houses roughly 75 transgender detainees on any given night).

42. NAT’L PRISON RAPE ELIMINATION COMM’N REP. 22 (June 2009).

43. *Farmer v. Brennan*, 511 U.S. 825, 825 (1994).

44. *Id.* at 841.

45. *Id.* at 842.

46. *Id.* at 857 (Blackmun, J., concurring) (quoting *Wilson v. Seiter*, 501 U.S. 294 (1991)).

47. *See id.* at 835.

48. *See Detained and at Risk*, *supra* note 21; *see also* U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 40, at 1 (“GAO was unable to locate an additional 28 allegations detainees reported to the 10 facilities GAO visited . . . because ICE field office officials did not report them to ICE headquarters.”).

49. ICE’s Performance Based Detention Standards dictate that detainees cannot be harassed or punished for filing a grievance and cannot be deported or threatened with deportation for reporting sexual abuse. However, these standards lack the force of law. *See 2011 Performance-Based National Detention Standards*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT 399 (2011) [hereinafter *2011 Operations Manual*], <http://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf> [<http://perma.cc/E893-V52Q>].

50. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 40, at 1.

Alliance's National Immigrant Justice Center (NIJC), have attempted to document abuse of LGBT immigrant detainees.⁵¹ NIJC alone has filed seventeen complaints with DHS's Office of Civil Rights and Civil Liberties and the Office of Inspector General involving incidents of sexual assault, discrimination, and abuse.⁵² A Freedom of Information Act request revealed nearly 200 reports of abuse against LGBT immigrant detainees from 2008 to 2013.⁵³ However, because ICE does not keep records of the gender identity of detainees, the request only produced "incidents in which the summary of the allegation mentions the immigrant's sexual orientation . . ."⁵⁴ Efforts made by these aforementioned organizations, among many others, illustrate that "only a fraction of the actual instances of [sexual] abuse" are made public.⁵⁵

Despite the extraordinary number of complaints, evidence indicates that the U.S. government is doing very little to address them.⁵⁶ According to government documents obtained by FRONTLINE and the American Civil Liberties Union (ACLU), immigrant detainees filed more than 170 allegations of sexual abuse between 2007 and 2011, yet DHS's Office of Inspector General (IG) only initiated fifteen investigations.⁵⁷ A GAO report also revealed that some calls to the DHS IG hotline that is used to report incidents of sexual assault were not answered or the voicemail was full.⁵⁸

C. LGBT Immigrant Detainees Do Not Receive Adequate Healthcare in Violation of the Eighth Amendment

LGBT immigrants detained in the U.S. are also the victims of a dangerously inadequate medical system.⁵⁹ In general, detainees

51. *Stop Abuse of Detained LGBT Immigrants*, NAT'L IMMIGRANT JUSTICE CTR. (2011), <http://www.immigrantjustice.org/stop-abuse-detained-lgbt-immigrants> [<http://perma.cc/JQ8Y-JDRM>].

52. *Id.*

53. Sharita Gruberg, *Dignity Denied: LGBT Immigrants in U.S. Immigration Detention*, CTR. FOR AM. PROGRESS 5 (Nov. 2013), <http://cdn.americanprogress.org/wp-content/uploads/2013/11/ImmigrationEnforcement.pdf> [<http://perma.cc/X7GQ-SE8U>].

54. *Id.*

55. *Id.*; see also Catherine Rentz, *How Much Sexual Abuse Gets "Lost in Detention"?*, FRONTLINE (Oct. 19, 2011, 2:03 PM), <http://www.pbs.org/wgbh/pages/frontline/race-multi-cultural/lost-in-detention/how-much-sexual-abuse-gets-lost-in-detention> [<http://perma.cc/TR7T-YJJJ>]; *Lost in Detention: Documents*, AM. UNIV. SCH. OF COMM'N INVESTIGATIVE REPORTING WORKSHOP (2014) [hereinafter *Lost in Detention*], <http://www.investigative-reporting-workshop.org/documents/sex-abuse-immigration-detainees> [<http://perma.cc/6NH5-6TP5>].

56. See *Lost in Detention*, *supra* note 55.

57. Rentz, *supra* note 55.

58. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 40, at 23.

59. See Jesus Barrios, *Queerness and U.S. Immigration Detention Centers*, CTR. FOR HIV L. & POLY, <http://www.hivlawandpolicy.org/fine-print-blog/queerness-and-us-immigration-detention-centers> [<http://perma.cc/4XBA-69NE>]; *Detained and Dismissed: Women's*

do not have accurate information about available health services, and the care and treatment given to them is often delayed and sometimes it is denied to them outright.⁶⁰ “LGBT and HIV-positive detainees are at particular risk” of being denied medical treatment.⁶¹

One major issue is that transgender detainees in ICE custody are regularly denied hormone treatment.⁶² Chase Strangio, an attorney at the ACLU, explained that people who abruptly stop hormone therapy experience “hot flashes, dizziness, anxiety, suicidality, desire to engage in a self-castration and other things that can have very dire physical consequences.”⁶³ According to a number of courts, deliberate failure to provide medical treatment, such as hormone therapy, is a direct violation of the Eighth Amendment’s prohibition of cruel and unusual punishment.⁶⁴

A particularly notable case that considered transgender detainees’ denial of hormone treatment is *Fields v. Smith*.⁶⁵ *Fields* involved a Wisconsin law called the Inmate Sex Change Prevention Act, which prevented prison doctors from prescribing transition-related medical treatment, including Sex Reassignment Surgery⁶⁶ and hormone therapy.⁶⁷ The court held that preventing transgender prisoners from accessing transition-related care violates the Eighth Amendment,

Struggles to Obtain Health Care in United States Immigration Detention, HUM. RTS. WATCH 1–3 (Mar. 17, 2009) [hereinafter *Detained and Dismissed*], http://www.hrw.org/sites/default/files/reports/wrd0309web_0.pdf [<http://perma.cc/8JKV-Q5NZ>]; *Dying for Decent Care: Bad Medicine in Immigration Custody*, FLA. IMMIGRANT ADVOCACY CTR. 9 (Feb. 2009), <http://www.d3n8a8pro7vhmx.cloudfront.net/aijustice/pages/273/attachments/original/1390427524/DyingForDecentCare.pdf?1390427524> [<http://perma.cc/56QL-RDNV>].

60. *Detained and Dismissed*, *supra* note 59, at 19.

61. Gruberg, *supra* note 53, at 7. One high-profile case involved Victoria Arellano, an undocumented transgender woman living with HIV, who was placed in immigration detention after she was arrested for a minor traffic violation in California. In 2007, Ms. Arellano died in an immigration detention facility after being denied medical treatment for two months. See Sandra Hernandez, *A Lethal Limbo: Lack of Healthcare Turns Federal Detention into a Death Sentence for Some Immigrants*, L.A. TIMES (June 1, 2008), <http://articles.latimes.com/2008/jun/01/opinion/op-hernandez1> [<http://perma.cc/7UVG-KQBS>].

62. Gruberg, *supra* note 53, at 7.

63. Lila Shapiro & Saki Knafo, *Georgia Accused of Sentencing Transgender Woman to ‘Torture,’* HUFFINGTON POST (May 13, 2014, 7:00 PM) http://www.huffingtonpost.com/2014/05/13/transgender-inmate-_n_5317413.html [<http://perma.cc/KU9R-CJUL>] (internal citations omitted).

64. *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987); see also *De'Lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003); *Allard v. Gomez*, 9 Fed. Appx. 793, 794 (9th Cir. 2001); *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000); *Brown v. Zavaras*, 63 F.3d 967, 970 (10th Cir. 1995); *Phillips v. Mich. Dept. of Corr.*, 731 F. Supp. 792, 800 (W.D. Mich. 1990), *aff'd*, 932 F.2d 969 (6th Cir. 1991); *White v. Farrier*, 849 F.2d 322, 325–27 (8th Cir. 1988).

65. 653 F.3d 550, 552 (7th Cir. 2011).

66. Sex Reassignment Surgery (SRS) is also known as Gender Reassignment Surgery (GRS).

67. *Fields*, 653 F.3d at 552–53.

making the law unconstitutional.⁶⁸ Another recent case, *Adams v. Federal Bureau of Prisons*, reversed the federal “freeze frame” policy, which prevented transgender prisoners from beginning transition-related care unless they could prove that they began their transition prior to incarceration.⁶⁹ Additionally, in *Kosilek v. Spencer*, the District Court of Massachusetts cited the Eighth Amendment in recognizing that Massachusetts’ prisoners have the right to receive sex reassignment surgery.⁷⁰

The American Medical Association and the World Professional Association for Transgender Health have also deemed hormone therapy a “medically necessary treatment” for transgender individuals.⁷¹ Without treatment, gender dysphoria, a nationally recognized medical condition,⁷² could manifest itself through symptoms such as “distress, dysfunction, debilitating depression and, for some people without access to appropriate medical care and treatment, suicidality and death.”⁷³

ICE revised its detention standards in 2011, which are now known as “Performance-Based National Detention Standards” (PBNDS), to provide for continued access to hormone therapy for transgender detainees who were already receiving hormone therapy prior to being taken into federal custody.⁷⁴ These standards, however, are not mandatory.⁷⁵

Even in the Santa Ana City Jail, which remains the only immigration detention facility in the country with a dedicated protective custody unit for LGBT individuals, health care is lacking.⁷⁶ This facility is located “[a]pproximately 100 miles north of the U.S.-Mexican border . . . where ICE detains up to 64 gay and transgender

68. *Id.* at 557.

69. 716 F. Supp. 2d 107, 112–13 (D. Mass. 2010).

70. *Kosilek v. Spencer*, 889 F. Supp. 2d 190, 240 (D. Mass. 2012), *rev'd*, 777 F.3d 63 (1st Cir. 2014).

71. Parker Marie Molloy, *Denied Hormone Treatment, Ohio Trans Prisoner Files Lawsuit*, ADVOCATE (May 1, 2014, 10:34 AM), <http://www.advocate.com/politics/transgender/2014/05/01/denied-hormone-treatment-ohio-trans-prisoner-files-lawsuit> [<http://perma.cc/D3DN-22N8>].

72. See *Gender Dysphoria*, AM. PSYCHIATRIC ASS’N 1 (2013), <http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf> [<http://perma.cc/5H78-3J3L>] (noting that gender dysphoria is the distress that accompanies the incongruence between one’s experienced or expressed gender and one’s assigned gender).

73. *FAQ on Access to Transition-Related Care*, LAMBDA LEGAL, <http://www.lambdalegal.org/know-your-rights/transgender/transition-related-care-faq> [<http://perma.cc/NX9A-DXZV>] (internal citations omitted).

74. See *2011 Operations Manual*, *supra* note 49, at 296.

75. Gruberg, *supra* note 53, at 11.

76. Christina Fialho, *A Model Immigration Detention Facility for LGBTI?*, FORCED MIGRATION REV. 50–51 (Apr. 2013), <http://www.fmreview.org/sogifialho> [<http://perma.cc/9Y97-UC8E>].

immigrants”⁷⁷ In the Santa Ana City Jail, there have been asylum seekers whose medical records have taken thirty-five to forty-five days to arrive.⁷⁸ This extended wait time has delayed these detainees’ access to hormone therapy by up to four months,⁷⁹ which could result in renewed gender dysphoria.

D. LGBT Immigrant Detainees Suffer Abuse Through Prison Policies of Segregation and Solitary Confinement

Another way in which LGBT immigrant detainees are subjected to abuse is through the use of segregation and solitary confinement. Officials often segregate detainees they consider “at-risk,” notably those who are LGBT, from the general population of detainees.⁸⁰ One notable case involved Bamby Salcedo, a transgender woman, who was “regularly beaten, sexually abused, and even incarcerated” in her home country of Mexico because of her gender identity.⁸¹ At the age of seventeen, Salcedo came to the U.S. seeking asylum and, twenty years later, she was placed in a men’s immigration detention facility until her claim could be adjudicated.⁸² Salcedo’s fellow detainees verbally harassed her in the showers, assaulted her, and fractured her nose.⁸³ Following the attack, Salcedo was moved into solitary confinement—also referred to as administrative segregation or protective custody—to protect her from further physical and sexual victimization.⁸⁴ Salcedo noted, “as transgender people, we are placed in that unit because of who we are.”⁸⁵ Unfortunately, Salcedo is one

77. Christina Fialho, *Who Is Overseeing Immigration Detention?*, HUFFINGTON POST (Sept. 21, 2013, 5:12 AM), http://www.huffingtonpost.com/christina-fialho/who-is-overseeing-immigration-detention_b_3632009.html [<http://perma.cc/LBT5-MV9R>].

78. Gruberg, *supra* note 53, at 7.

79. *Id.*

80. See Laurel Anderson, *Punishing the Innocent: How the Classification of Male-to-Female Transgender Individuals in Immigration Detention Constitutes Illegal Punishment Under the Fifth Amendment*, 25 BERKELEY J. GENDER L. & JUST. 1, 8 (2010); *Rights of Transgender Prisoners*, NAT’L CTR. FOR LESBIAN RTS. (July 2013), <http://www.nclrights.org/wp-content/uploads/2013/07/RightsofTransgenderPrisoners.pdf> [<http://perma.cc/5HCA-APRR>].

81. Crosby Burns et al., *Living in Dual Shadows: LGBT Undocumented Immigrants*, CTR. FOR AM. PROGRESS 20 (Mar. 8, 2013), <https://cdn.americanprogress.org/wpocontent/uploads/2013/03/LGBTUndocumentedReport-6.pdf> [<http://perma.cc/47S2-UVYZ>]; J. Jeanty & H.J. Tobin, *Our Moment for Reform: Immigration and Transgender People*, NAT’L CTR. FOR TRANSGENDER EQUAL. 14 (2013), <http://transequality.org/Resources/CIRen.pdf> [<http://perma.cc/B9KK-46UN>].

82. Burns et al., *supra* note 81, at 20; Jeanty & Tobin, *supra* note 81, at 14.

83. Burns et al., *supra* note 81, at 20; Jeanty & Tobin, *supra* note 81, at 14.

84. Burns et al., *supra* note 81, at 20; Jeanty & Tobin, *supra* note 81, at 14.

85. Burns et al., *supra* note 81, at 20.

of well over 300 individuals per day who are subjected to solitary confinement in detention facilities.⁸⁶

In a 2010 report, the Inter-American Commission on Human Rights (IACHR) stated that it was “deeply troubled by the use of [solitary] confinement . . . in the case of vulnerable immigration detainees, including members of the LGBT community”⁸⁷ The IACHR visited a number of immigration detention facilities to investigate alleged violations of human rights during the detention of a variety of vulnerable immigrant groups, and, in doing so, met with a number of detainees who were placed in solitary confinement for safety reasons.⁸⁸ At one facility, IACHR observed that four detainees had been in solitary confinement for 150 days.⁸⁹ These detainees were granted one hour of exercise a day, and were denied any “meaningful contact with other human beings.”⁹⁰

Studies regarding solitary confinement show that isolated detainees suffer lasting harm to their medical and mental health.⁹¹ Specifically, they can become hypersensitive to external stimuli and susceptible to hallucinations, panic attacks, obsessive thoughts, and paranoia.⁹² Depression and suicidal behavior, which are common conditions among LGBT detainees,⁹³ can also be exacerbated by forced segregation and isolation.⁹⁴ Setting the physical and mental impacts aside, segregation serves more as a de facto punitive measure as opposed to a protective measure.⁹⁵ It inevitably results in depriving the detainee of certain privileges and resources including phone calls,

86. Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES (Mar. 23, 2013), http://www.nytimes.com/2013/03/24/us/immigrants-held-in-solitary-cells-often-for-weeks.html?pagewanted=all&_r=0 [<http://perma.cc/8TVY-ANSK>].

87. *Report on Immigration in the United States: Detention and Due Process*, INTER-AM. COMM'N ON HUM. RTS. 118 (2010), <https://www.oas.org/en/iachr/migrants/docs/pdf/Migrants2011.pdf> [<http://perma.cc/2FBJ-PSFN>].

88. *Id.*

89. *Id.*

90. *Id.*

91. Mike Corradini et al., *Buried Alive: Solitary Confinement in the US Detention System*, PHYSICIANS FOR HUM. RTS. 3 (Apr. 2013), https://s3.amazonaws.com/PHR_Reports/Solitary-Confinement-April-2013-full.pdf [<http://perma.cc/6DXC-PDGB>].

92. *Id.* at 1.

93. See NCTE Leads Effort to End LGBTI Sexual Abuse in Immigration Detention, NAT'L CTR. FOR TRANSGENDER EQUAL. (Mar. 4, 2013), <http://www.transequality.org/blog/ncte-leads-effort-to-end-lgbti-sexual-abuse-in-immigration-detention> [<http://perma.cc/63WR-J9GX>] (discussing “the growing rates of depression, anxiety and suicide ideation among immigration [sic] detainees . . .”).

94. *Id.* at 2.

95. See, e.g., *Briefing Paper: The Dangerous Overuse of Solitary Confinement in the United States*, AM. CIVIL LIBERTIES UNION 8–9 (Aug. 2014), https://www.aclu.org/sites/default/files/assets/stop_solitary_briefing_paper_updated_august_2014.pdf [<http://perma.cc/HT4W-3EFL>] (describing the use of solitary confinement to punish juvenile offenders).

showers, group religious worship, and visitations.⁹⁶ Because of the detrimental and debilitating emotional effects of isolation, a number of commentators have suggested that long-term segregation amounts to torture.⁹⁷

Another major consequence of solitary confinement is the increased likelihood of violence by staff members.⁹⁸ A GAO report revealed that at least eighty-six of the 215 allegations reported to DHS between 2009 and 2013 were against ICE staff members,⁹⁹ reaffirming that guards and staff are significant violators of LGBT detainee rights.¹⁰⁰ Staff members can reach detainees out of view of any surveillance cameras or potential witnesses, which puts detainees at immeasurable risk.¹⁰¹ Detainees are particularly vulnerable to sexual assault and harassment because they can be forced to endure the attack under threat of deportation.¹⁰²

II. THE PRISON RAPE ELIMINATION ACT & THE DEPARTMENT OF HOMELAND SECURITY'S FINAL RULE

In 2001, after three years of research, Human Rights Watch released a 378-page report in an effort to expose the issue of male rape in U.S. prisons.¹⁰³ The report, which was based on the testimonies

96. See *Tates v. Blanas*, 2003 WL 23864868, at *3–5 (E.D. Cal. 2003) (in which a detainee was “prohibited from attending religious services,” rarely permitted to exercise, and was only allowed to use the phones and showers during the middle of the night); Darren Rosenblum, “Trapped” in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 530 (2000) (discussing a detainee who was denied “adequate ‘recreation, living space, educational and occupational rehabilitation opportunities . . .”).

97. See, e.g., Atul Gawande, *Hellhole: The United States Holds Tens of Thousands of Inmates in Long-Term Solitary Confinement. Is This Torture?*, NEW YORKER (Mar. 30, 2009), <http://www.newyorker.com/magazine/2009/03/30/hellhole> [<http://perma.cc/6VY7-TA35>]; see also *Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988) (noting that “isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total.”); Louise Arbour, *Is Segregation Torture?*, TELEGRAPH-J. (Apr. 4, 2009).

98. Sydney Tarzwell, Note, *The Gender Lines Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 178 (2006).

99. U. S. GOV'T ACCOUNTABILITY OFF., *supra* note 40, at 14–15.

100. *Transgender Rights Toolkit: A Legal Guide for Trans People and Their Advocates: Transgender Incarcerated People in Crisis*, LAMBDA LEGAL (2013) [hereinafter *Transgender Rights Toolkit*] http://www.lambdalegal.org/sites/default/files/2015_transgender-incarcerated-people-in-crisis-fs-v5-singlepages.pdf [<http://perma.cc/25JU-VL4D>].

101. *Cross-Gender Supervision*, NAT'L PREA RES. CTR. (2013), <http://www.prearesourcecenter.org/faq/crossgendersupervision> [<http://perma.cc/LQ4H-RTYF>].

102. See, e.g., Carrie Johnson, *Immigration Detainees Seek Prison-Rape Protection*, NPR (Dec. 13, 2011, 3:15 PM), <http://www.npr.org/2011/12/13/143638236/immigration-detainees-see-prison-rape-protection> [<http://perma.cc/Z4NR-HS7Z>].

103. *No Escape*, *supra* note 37.

and surveys of over 200 prisoners in thirty-seven states,¹⁰⁴ spurred the drafting of the Prison Rape Elimination Act (PREA).¹⁰⁵ PREA was passed with strong bipartisan support in September 2003.¹⁰⁶ The primary purpose of the Act was to:

[E]stablish a zero-tolerance standard for the incidence of prison rape in prisons in the United States; make the prevention of prison rape a top priority in each prison system; develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape . . . [and] increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape¹⁰⁷

PREA has detailed provisions for an annual comprehensive statistical review by the Bureau of Justice Statistics (BJS).¹⁰⁸ The purpose of the review is to identify the common characteristics of the victims and the perpetrators of prison rape as well as the prisons and prison systems with a high incidence of prison rape.¹⁰⁹ “The [A]ct also created the National Prison Rape Elimination Commission” (NPREC), which is charged with “developing draft standards for the elimination of prison rape.”¹¹⁰ The PREA draft was “turned over to the Department of Justice [DOJ] for review,” and the final rule ultimately became effective on August 20, 2012.¹¹¹

In the meantime, the abominable treatment of civil detainees in immigration detention centers began to come to light.¹¹² The

104. *Id.*

105. Brenda V. Smith, *The Prison Rape Elimination Act: Implementation and Unresolved Issues* (2008), AM. UNIV. CRIM. L. BRIEF 10 (2008).

106. Alex Friedmann, *Prison Rape Elimination Act Standards Finally in Effect, but Will They be Effective?*, PRISON LEGAL NEWS (Sept. 15, 2013), <https://www.prisonlegalnews.org/news/2013/sep/15/prison-rape-elimination-act-standards-finally-in-effect-but-will-they-be-effective> [http://perma.cc/UF6Y-TQLL] (“The lead sponsors of the bipartisan bill, entitled the Prison Rape Elimination Act (PREA), included Senator Jeff Sessions and Rep. Frank Wolf, both Republicans, and Democrats Senator Edward Kennedy and Rep. Bobby Scott.”).

107. Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, § 3, 117 Stat. 972 (2003).

108. *Prison Rape Elimination Act (Sexual Violence In Correctional Facilities)*, BUREAU OF JUSTICE STATISTICS (Feb. 10, 2015), <http://www.bjs.gov/index.cfm?ty=tp&tid=20> [http://perma.cc/X8BN-XN3A].

109. *Prison Rape Elimination Act*, NAT'L PREA RES. CTR. (2015), <http://www.prearesourcecenter.org/about/prison-rape-elimination-act-prea> [http://perma.cc/QX8X-HM86].

110. *Id.*

111. *Id.*

112. See, e.g., Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Mendez, *Observations on Communications Transmitted to Governments and Replies Received*, Human Rights Council, U.N. Doc. A/HRC/22/53/Add.4 102 (Mar. 12, 2013), http://www.ohchr.org/documents/hrbodies/hrcouncil/regular_session/session22/a-hrc-22-53-add4_efs.pdf [http://perma.cc/6BVG-BAMG] (indicating that

Special Rapporteur on Torture, for one, found that the treatment of LGBT immigrants in U.S. detention facilities violated the Convention Against Torture.¹¹³ With international pressures in mind, the Obama Administration issued a presidential memorandum on May 17, 2012, expanding the application of PREA to all agencies with federal confinement facilities.¹¹⁴ The memorandum specifically mandated that these facilities work with the Attorney General to create rules “to prevent, detect, and respond” to sexual assault.¹¹⁵ On December 19, 2012, DHS published its proposed PREA standards for public comment.¹¹⁶ Fifteen months later, in March 2014, DHS published its final PREA standards.¹¹⁷ These standards were intended to apply to detainees in facilities owned by DHS and ICE headquarters within sixty days of publication.¹¹⁸

III. CRITICISMS OF THE DEPARTMENT OF HOMELAND SECURITY’S PRISON RAPE ELIMINATION ACT

After the finalization of the PREA standards for immigrant detainees, it became clear to many that DHS substantially weakened the protections provided by the DOJ’s original PREA rule.¹¹⁹ DHS also failed “to include protections already routinely provided by many corrections and law enforcement agencies around the country.”¹²⁰

Another major issue that is not mentioned in the criticisms below relates to inadequate enforcement mechanisms. Several states

gay and transgender individuals were “subjected to solitary confinement, torture and ill-treatment, including sexual assault, while in detention in U.S. immigration facilities.”)

113. *Id.*

114. Office of the Press Secretary, *Presidential Memorandum—Implementing the Prison Rape Elimination Act*, WHITE HOUSE (May 17, 2012), <http://www.whitehouse.gov/the-press-office/2012/05/17/presidential-memorandum-implementing-prison-rape-elimination-act> [<http://perma.cc/VC3B-R4PY>].

115. *Id.*

116. *Department of Homeland Security PREA Standards*, NAT’L.PREA.RES. CTR. (2015), <http://www.prearesourcecenter.org/news-events/news/1150/department-of-homeland-security-prea-standards> [<http://perma.cc/44R2-6ZJK>].

117. *See* Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities, 6 C.F.R. § 115 (2014), <http://www.gpo.gov/fdsys/pkg/FR-2014-03-07/pdf/2014-04675.pdf> [<http://perma.cc/DZS7-9U3R>].

118. *See id.*

119. Diana Quick, *The Women’s Refugee Commission Welcomes Announcement of DHS Finalization of Prison Rape Elimination Act (PREA) Standards*, WOMEN’S REFUGEE COMM’N (Mar. 11, 2014), <http://www.womensrefugeecommission.org/news/press-releases-and-statements/2015-the-women-s-refugee-commission-welcomes-announcement-of-dhs-finalization-of-prison-rape-elimination-act-prea-standards> [<http://perma.cc/M6BC-S4XF>].

120. *Weak DHS Rules Underscore Need to End Detention of Transgender Immigrants*, NAT’L CTR. FOR TRANSGENDER EQUAL. [hereinafter *Weak DHS Rules*], <https://transgenderequality.wordpress.com/2014/03/07/weak-dhs-rules-underscore-need-to-end-detention-of-transgender-immigrants> [<http://perma.cc/J2MS-9K3T>].

and territories, including Arizona, Florida, Idaho, Indiana, Nebraska, Texas, Utah, and the Northern Marianas Islands, declined to provide an affirmation or certification of compliance with DHS PREA standards.¹²¹ The penalty of a five percent reduction in funding is regrettably not incentive enough to induce states to impose protective measures for immigrant detainees.¹²²

A. The Prison Rape Elimination Act Does Not Apply to Most Contract Facilities

DHS claims that it will “endeavor to ensure”¹²³ compliance with PREA standards in immigration detention facilities,¹²⁴ overseen by ICE and holding facilities,¹²⁵ “which are used by ICE and U.S. Customs and Border Protection (CBP).”¹²⁶ However, private companies that provide detention services under a government contract or Intergovernmental Service Agreement (IGSA), such as the Corrections Corporation of America (CCA) and GEO Group, Inc., as well as local or county facilities that rent out bed space, may be effectually exempt from PREA standards.¹²⁷

Private, for-profit prison corporations bring in hundreds of millions of dollars each year detaining immigrants in federal custody.¹²⁸

121. *States’ and Territories’ Responses to the May 15, 2014 Prison Rape Elimination Act Deadline*, BUREAU OF JUST. ASSISTANCE (May 15, 2014), <https://www.wcl.american.edu/endsilence/documents/PREASStateList.pdf> [<http://perma.cc/6H48-KB5B>].

122. *See id.*

123. Mary Meg McCarthy, *U.S. Department of Homeland Security’s Sexual Assault Regulations Take Effect Today*, HEARTLAND ALLIANCE’S NAT’L IMMIGRANT JUST. CTR. (May 6, 2014) http://www.immigrantjustice.org/press_releases/us-department-homeland-security%E2%80%99s-sexual-assault-regulations-take-effect-today#.VcIs4be5dpk [<http://perma.cc/FN72-GX6V>].

124. 6 C.F.R. § 115 at 13101 (2014), <http://www.gpo.gov/fdsys/pkg/FR-2014-03-07/pdf/2014-04675.pdf> [<http://perma.cc/DZS7-9U3R>] (“Immigration detention facilities [are] . . . used for longer-term detention of aliens in immigration proceedings or awaiting removal from the United States . . .”).

125. *Id.* (“[H]olding facilities . . . are used by ICE and U.S. Customs and Border Protection (CBP) for temporary administrative detention of individuals pending release from custody or transfer to a court, jail, prison, other agency or other unit of the facility or agency.”).

126. *Id.*; *DHS Announces Finalization of Prison Rape Elimination Act Standards*, DEP’T OF HOMELAND SEC. PRESS OFF. (Feb. 28, 2014), <http://www.aila.org/content/default.aspx?docid=47595> [<http://perma.cc/8UYC-QN53>].

127. Sharita Gruberg, *How the Prison Rape Elimination Act Helps LGBT Immigrants in Detention*, CTR. FOR AM. PROGRESS (Apr. 2, 2014), <https://www.americanprogress.org/issues/lgbt/report/2014/04/02/86976/how-the-prison-rape-elimination-act-helps-lgbt-immigrants-in-detention> [<http://perma.cc/9NTV-R7ZA>].

128. Jesse Lava & Sarah Solon, *As Immigration Reform Comes Up Again, Watch This Private Prison Company*, HUFFINGTON POST (Jan. 23, 2014, 6:58 PM), http://www.huffingtonpost.com/jesse-lava/as-immigration-reform-com_b_4143734.html [<http://perma.cc/8HCM-3W82>].

These corporations are notorious for perpetuating human rights abuses against immigrant detainees, as well as U.S. prison populations.¹²⁹ Contract Detention Facilities (CDFs), detention facilities owned and operated by private companies, and privately operated Intergovernmental Service Agreements (IGSAs) house the majority of immigrants in DHS custody.¹³⁰ Of the 158 immigration detention facilities covered by the PREA regulations, 152 are CDFs or IGSAs.¹³¹ While it is required that any “new contracts, contract renewals, and substantive contract modifications” comply with PREA standards,¹³² most of DHS’s contracts automatically renew in perpetuity or they “will not be up for renewal for decades.”¹³³ Moreover, the DHS contract renegotiation process is largely non-transparent.¹³⁴ “Thus, the proposed contracting provision will [essentially] exempt 95% of the covered immigration detention facilities from the regulations” for an indeterminate period of time.¹³⁵

B. The Prison Rape Elimination Act Fails to Adequately Protect the Bodily Integrity of LGBT Immigrant Detainees

Even if a detention facility is subject to PREA standards, the rule still fails to adequately protect detainees. One major example is that of abusive searches. DHS regulations attempt to limit cross-gender supervision of detainees’ private bodily areas and functions by requiring the implementation of “policies and procedures that enable detainees to shower, perform bodily functions, and change clothing without being viewed by staff of the opposite gender, except in

129. See, e.g., Julia Dahl, *Private Prison Co. Again Accused of Human Rights Abuses*, ABC NEWS (Aug. 5, 2008), <http://abcnews.go.com/Blotter/story?id=5466166> [<http://perma.cc/EZR8-AT6X>]; Azadeh Shahshahani, *Detained Immigrants Exploited for Profit*, HUFFINGTON POST (Mar. 10, 2013, 5:12 AM), http://www.huffingtonpost.com/azadeh-shahshahani/detained-immigrants-exploited-profit_b_2422599.html [<http://perma.cc/9HGV-MQRW>].

130. Bethany Carson & Eleana Diaz, *Payoff: How Congress Ensures Private Prison Profit with an Immigrant Detention Quota*, GRASSROOTS LEADERSHIP (Apr. 2015), <http://www.grassrootsleadership.org/reports/payoff-how-congress-ensures-private-prison-profit-immigrant-detention-quota> [<http://perma.cc/2UEG-TBTZ>] (“Sixty-two percent of all ICE immigration detention beds in the United States are now operated by for-profit prison corporations, up from 49 percent in 2009.”).

131. 77 Fed. Reg. 75,300, 75,307 (Dec. 19, 2012).

132. 6 C.F.R. § 115.112(a) (2014), <http://www.gpo.gov/fdsys/pkg/FR-2014-03-07/pdf/2014-04675.pdf> [<http://perma.cc/DZS7-9U3R>].

133. Gruberg, *supra* note 127.

134. See *id.*

135. Laura W. Murphy et al., *RE: Comments on Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities*, 77 FR 75299 2 (Dec. 19, 2012), AM. CIVIL LIBERTIES UNION (Feb. 26, 2013), https://www.aclu.org/files/assets/prea_dhs_nprm_aclu_comments_final.pdf [<http://perma.cc/KT52-AHQY>].

exigent circumstances”¹³⁶ The exception, however, permits cross-gender supervision “when such viewing is incidental to routine cell checks”¹³⁷ This exception has the potential to completely undercut the efficacy of the provision.

Furthermore, while the rule prohibits cross-gender pat-down searches of female detainees, absent exigent circumstances,¹³⁸ it completely fails to prevent cross-gender searches and viewing of male detainees or transgender detainees.¹³⁹ “Cross-gender pat-down searches routinely involve intimate contact through clothing, including with genital areas,”¹⁴⁰ granting staff access to the detainees’ bodily privacy “in a way that can foster abuse.”¹⁴¹ The failure to provide even basic protection of bodily integrity is evidenced by repeated findings by BJS that sexual abuse by staff members is prevalent among detainees.¹⁴²

C. The Prison Rape Elimination Act Fails to Ensure that LGBT Immigrant Detainees Receive Sufficient Medical Care

Before enacting its final PREA rule, DHS addressed a number of comments and concerns that it received in response to its notice of proposed rule-making.¹⁴³ Many commentators urged DHS to expand on and provide more specificity regarding the medical care that must be available to LGBT immigrant detainees.¹⁴⁴ For instance, one commentator suggested that medical practitioners receive cultural sensitivity training, in which they would learn how to address past traumas with immigrant detainees, and “appropriate terms and concepts to use when discussing sex and sexual abuse,” among other

136. 6 C.F.R. § 115.15(g) (2014), <http://www.gpo.gov/fdsys/pkg/FR-2014-03-07/pdf/2014-04675.pdf>.

137. *Id.*

138. *Id.* § 115.15(c).

139. 6 C.F.R. § 115.15(b) (2014), <http://www.gpo.gov/fdsys/pkg/FR-2014-03-07/pdf/2014-04675.pdf> (“Cross-gender pat-down searches of male detainees shall not be conducted unless, after reasonable diligence, staff of the same gender is not available”).

140. Murphy et al., *supra* note 135, at 8.

141. *Id.* at 8.; *see also, e.g.*, Jordan v. Gardner, 986 F.2d 1521, 1523 (9th Cir. 1993).

142. *See, e.g.*, Allen J. Beck et al., *Sexual Victimization in Prisons and Jails Reported by Inmates, 2008–09*, BUREAU OF JUST. STAT. 24 (Aug. 2010), <http://www.bjs.ojp.usdoj.gov/content/pub/pdf/svpjri0809.pdf> [<http://perma.cc/2LDQ-3EDT>]; Allen J. Beck et al., *Sexual Victimization in Juvenile Facilities Reported by Youth, 2008–09*, BUREAU OF JUST. STAT. 13 (Jan. 2010), <http://www.bjs.ojp.usdoj.gov/content/pub/pdf/svjfry09.pdf> [<http://perma.cc/NE2X-5GHH>].

143. Fed. Reg. 13,129 (Mar. 7, 2014) (codified at 6 C.F.R. § 115 (2014), <http://www.gpo.gov/fdsys/pkg/FR-2014-03-07/pdf/2014-04675.pdf>).

144. *Id.*

things.¹⁴⁵ DHS responded by stating that such training would be “superfluous.”¹⁴⁶ DHS also refused to explicitly prohibit “restrictions on access to medical or mental health care” in immigration detention facilities.¹⁴⁷

Other provisions in the final PREA rule lack the specificity necessary to ensure that adequate health services are administered. For instance, the rule states that “[d]etainee victims of sexual abuse shall have timely, unimpeded access to emergency medical treatment . . . including emergency contraception”; however, it fails to indicate the timeframe in which victims must receive the contraception.¹⁴⁸ This deficiency is problematic because, as commentators noted, “emergency contraception can prevent pregnancy within five days of intercourse but it is more effective if it is taken within three days.”¹⁴⁹

Moreover, as noted above, DHS does not view the vast majority of reports of sexual abuse and harassment as legitimate enough to warrant an investigation.¹⁵⁰ Therefore, it seems unlikely that its staff members will provide medical services to “unsubstantiated” claims of sexual abuse.

D. The Department of Homeland Security Fails to Arrange for Appropriate Places of Detention for LGBT Immigrant Detainees

The final DHS PREA rule codified pre-existing language requiring that housing decisions for transgender detainees never be made solely on the basis of identity documents or physical anatomy.¹⁵¹ Rather, PREA mandates that decisions be made on a case-by-case basis taking into consideration a detainee’s self-identification and self-assessment of safety.¹⁵² Although this provision has existed for years, DHS has yet to abide by it.¹⁵³ Additionally, the Immigration and

145. *Id.*

146. *Id.*

147. *Id.* at 13,131.

148. 6 C.F.R. § 115.82(a) (2014), <http://www.gpo.gov/fdsys/pkg/FR-2014-03-07/pdf/2014-04675.pdf>.

149. Fed. Reg. 13,144 (Mar. 7, 2014) (codified at 6 C.F.R. § 115 (2014), <http://www.gpo.gov/fdsys/pkg/FR-2014-03-07/pdf/2014-04675.pdf>).

150. Catherine Rentz, *Lost in Detention: New Documents Detail Sex Abuse of Detained Immigrants*, AM. UNIV. SCH. OF COMM’N INVESTIGATIVE REPORTING WORKSHOP (Oct. 19, 2011), <http://www.investigativereportingworkshop.org/investigations/immigration-detention/story/new-documents-detail-sex-abuse-detained-immigrants> [<http://perma.cc/JC66-8QKN>].

151. 28 C.F.R. § 115.42(b); 6 C.F.R. § 115.42(b) (2014), <http://www.gpo.gov/fdsys/pkg/FR-2014-03-07/pdf/2014-04675.pdf>.

152. 28 C.F.R. § 115.42(c) (2012); 28 C.F.R. § 115.42(e) (2012); 6 C.F.R. § 115.42(b) (2014), <http://www.gpo.gov/fdsys/pkg/FR-2014-03-07/pdf/2014-04675.pdf>.

153. *Weak DHS Rules*, *supra* note 120.

Nationality Act (INA), a statute governing immigration detention,¹⁵⁴ requires that DHS “arrange for appropriate places of detention” for immigrant detainees “pending . . . a decision” of removal or release.¹⁵⁵ However, despite these existing standards, transgender detainees continue to be housed with people of a gender with which they do not identify.¹⁵⁶ Instead, most immigration detention centers house detainees based on sex assigned at birth or according to whether the detainee has undergone a sex reassignment surgery.¹⁵⁷ Not only is this treatment in direct contradiction to the laws in place, but it heightens the risk of sexual abuse or harassment.¹⁵⁸

The new DHS PREA rule uses almost identical phrasing, stating in part that detention facilities will endeavor to “provide appropriate housing”¹⁵⁹ “Appropriate” housing assignments are presumably those that provide a degree of safety to the detainees in residence; yet, DHS has continuously failed in this regard.¹⁶⁰ A study by University of California Irvine shows that transgender detainees are 13.4 times more likely to be sexually assaulted, and housing procedures in immigration detention only serve to heighten the risk of abuse.¹⁶¹ “An increasing number of localities—including Cook County, IL, Cumberland, ME, Denver, CO, and Washington, D.C.—have had success with policies that classify [prisoners] by gender identity”¹⁶² There is no reason that the same sort of success could not be had with detainees in immigration detention facilities.¹⁶³ At any rate, given that

154. See The Immigration and Nationality Act of 1952, Pub. L. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

155. 8 U.S.C. § 1231(g)(1).

156. See, e.g., *In Their Own Words: Enduring Abuse in Arizona Immigration Detention Centers*, AM. CIVIL LIBERTIES UNION OF ARIZ. 22, <http://www.acluaz.org/sites/default/files/documents/detention%20report%202011.pdf> [<http://perma.cc/Q8HT-YXBK>].

157. See Gruberg, *supra* note 53, at 17.

158. See, e.g., Drake Hagner, Note, *Fighting for Our Lives: The D.C. Trans Coalition’s Campaign for Humane Treatment of Transgender Inmates in District of Columbia Correctional Facilities*, 11 GEO. J. GENDER & L. 837, 860 (2010) (“Ample research and case law indicate that transgender individuals are at greater risk of abuse when classified and housed based on birth sex or genitalia.”).

159. 6 C.F.R. § 115.43(b) (2014), <http://www.gpo.gov/fdsys/pkg/FR-2014-03-07/pdf/2014-04675.pdf>.

160. *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States*, HUM. RTS. WATCH 6–7, 35–38 (Dec. 2009), <http://www.hrw.org/sites/default/files/reports/us1209webwcover.pdf> [<http://perma.cc/FC4R-L4R9>] (discussing ICE’s tendency to transfer detainees to locations according to convenience, rather than appropriateness).

161. See Valerie Jenness et al., *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault*, U.C. IRVINE CTR. FOR EVIDENCE-BASED CORR. 42, 72, 74, 76, 78 (2007), http://www.ucicorrections.seweb.uci.edu/files/2013/06/PREA_Presentation_PREA_Report_UCI_Jenness_et_al.pdf [<http://perma.cc/4ELY-LT24>].

162. *Transgender Rights Toolkit*, *supra* note 100, at 3.

163. See *id.*

immigration detention facilities have been operating under the same housing policies that are written in DHS's final PREA rule since 2011,¹⁶⁴ it is unlikely that housing conditions will change.

Despite the well-documented effects associated with solitary confinement, it is permissible under DHS's PREA standards if "reasonable efforts have been made to provide appropriate housing."¹⁶⁵ DHS maintains its presumptive limit of administrative segregation to thirty days, two weeks past the point at which detainees suffer lasting harm to their medical and mental health,¹⁶⁶ and the time frame may even exceed that limit under extraordinary circumstances.¹⁶⁷

E. The Department of Homeland Security Fails to Enforce Consistent and Specific Training Related to LGBT Immigrant Detainees

"[O]nly seven [states] have written policies that specifically address how to manage transgender inmates."¹⁶⁸ Prior to the implementation of PREA, "ICE [did] not offer a standardized training program for immigration detention facility staff. Therefore, staff training varie[d] dramatically from one facility to the next, with many facility officers receiving no specialized training on immigration policies and how to work with [those] needing special attention."¹⁶⁹ While the existence of a universal training requirement is undoubtedly an improvement, DHS failed to provide any significant details regarding the contours of the training that will be provided.¹⁷⁰ Rather, in response

164. See *2011 Operations Manual*, *supra* note 49, at 73.

165. 6 C.F.R. § 115.43(b) (2014), <http://www.gpo.gov/fdsys/pkg/FR-2014-03-07/pdf/2014-04675.pdf>.

166. *Torture and Other Cruel Inhuman or Degrading Treatment or Punishment: Note by the Secretary-General*, U.N. Doc. A/66/150 (Aug. 5, 2011), <http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf> [<http://perma.cc/7393-WMTN>] (stating that solitary confinement becomes "prolonged" at 15 days, after which the psychological effects may become irreversible).

167. 6 C.F.R. § 115.43(b) (2014), <http://www.gpo.gov/fdsys/pkg/FR-2014-03-07/pdf/2014-04675.pdf>; *Statement for the Record of ICE Office of Detention Policy and Planning Assistant Director Kevin Landy for a Senate Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights and Human Rights Hearing Titled "Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences,"* DEP'T OF HOMELAND SEC. (Feb. 25, 2014), <http://www.dhs.gov/news/2014/02/25/statement-record-ice-senate-judiciary-subcommittee-constitution-civil-rights-and> [<http://perma.cc/2MVX-MEN6>].

168. Karri Iyama, Note, "We Have Told the Bell for Him": An Analysis of the Prison Rape Elimination Act and California's Compliance as it Applies to Transgender Inmates, 21 TUL. J.L. & SEXUALITY 23, 29 (2012) (suggesting policy deficiencies for the larger LGBT prison community).

169. Fialho, *supra* note 77 (including LGBT detainees).

170. 6 C.F.R. § 115.131(a) (2014), <http://www.gpo.gov/fdsys/pkg/FR-2014-03-07/pdf/2014-04675.pdf>.

to a comment on the under-inclusiveness of this particular portion of the statute, DHS reasoned that the provision was sufficiently “detailed and comprehensive” and that agency flexibility in implementation is necessary.¹⁷¹ It is therefore inevitable that the inconsistency existing prior to PREA will persist.

In addition, some commentators have suggested that the staff in charge of screening the detainees should be conducted by employees who are both culturally and linguistically competent.¹⁷² However, the DHS PREA standards do not require such training, presumably because many of the state and local jails housing ICE detainees lack the resources to do so.¹⁷³

F. LGBT Immigrant Detainees Do Not Have Access to Effective Complaints and Appeals Processes

While procedures for hearing grievances are available in immigration detention centers, they can be difficult for detainees to navigate.¹⁷⁴ The ICE manual illustrates broad procedures for filing grievances, but there is no uniform system in existence across the different facilities; each type of facility has different protocols, and they lack any sort of standardization.¹⁷⁵ Appeals are heard by high-level administrators in each institution, which can lead to different interpretations of the policies.¹⁷⁶ Because each detention facility designs the specifics of its grievance policies, an individual detainee who transfers through several facilities potentially has to learn a different procedure in each facility.¹⁷⁷ Without a uniform standard to rely on, detainees cannot easily ascertain their rights or bring claims based on a facility’s violation of a policy.

Another major failing of the DHS PREA rule regarding reporting processes is that it does not, by its terms, prohibit the retaliatory deportation of those who report abuse.¹⁷⁸ Immigrant detainees often “hesitate to report sexual assault by [detention center] staff because they are being held by the same agency that has the power to deport

171. See 79 Fed. Reg. 13,100, 13,125 (Mar. 7, 2014), <http://www.gpo.gov/fdsys/pkg/FR-2014-03-07/pdf/2014-04675.pdf> [<http://perma.cc/JR7C-YLV8>].

172. *Id.* at 13,126.

173. See *id.* at 13,125 (pointing out the importance of “agency . . . flexibility”).

174. See *ICE/DRO Detention Standard: Grievance System*, U.S. DEP’T OF HOMELAND SEC. 1–9 (Dec. 5, 2008), http://www.ice.gov/doclib/dro/detention-standards/doc/grievance_system.doc [<http://perma.cc/5V3Q-DH87>].

175. See *id.* at 3–6.

176. See *id.* at 6–7.

177. See *id.* at 2.

178. 6 C.F.R. § 115.151 (2014), <http://www.gpo.gov/fdsys/pkg/FR-2014-03-07/pdf/2014-04675.pdf> [<http://perma.cc/DZS7-9U3R>].

them”¹⁷⁹ Detainees may report abuse orally and in writing;¹⁸⁰ however, both of these methods may be intimidating to vulnerable victims of abuse. DHS Office of Inspector General (OIG) provides an alternative reporting avenue via a telephone hotline; however, as mentioned earlier, the hotline is difficult to reach for many detainees, and it is often ignored.¹⁸¹

Finally, unlike the DOJ PREA standards,¹⁸² the DHS rule does not have a provision that allows staff to privately report sexual abuse or harassment of detainees.¹⁸³

CONCLUSION

As the ACLU aptly stated, the U.S. “immigration detention system locks up hundreds of thousands of immigrants unnecessarily every year, exposing detainees to brutal and inhumane conditions of confinement at massive costs to American taxpayers.”¹⁸⁴ These conditions are considerably more dangerous to LGBT detainees. Although the recently implemented DHS PREA standard was intended to improve the situation, PREA fails to address many of the issues facing LGBT immigrant detainees, and significant changes are unlikely to occur.

Numerous improvements must be made in order to create a more humane system in accordance with the Constitution and international human rights norms. To secure full implementation of its standards, DHS must require its components to proactively modify contracts with non-DHS entities to comply with DHS PREA regulations on a uniform schedule. DHS also needs to bulk up its protective provisions.

To remedy the issue of cross-gender pat-downs and supervision, DHS should adopt standards that resemble those of the ABA Standards on the Treatment of Prisoners.¹⁸⁵ All staff, including guards

179. Renee Lewis, *Report: ICE Offices Fail to Report Some Sex Abuse Allegations*, AL JAZEERA AMERICA (Nov. 21, 2013, 8:04 PM), <http://www.america.aljazeera.com/articles/2013/11/21/ice-fails-to-reportsexualassaultinimmigrantdetentionfacilities.html> [<http://perma.cc/4MYT-8VB8>].

180. *Id.*

181. U. S. GOV'T ACCOUNTABILITY OFF., *supra* note 40, at 2.

182. 28 C.F.R. § 115.251(d) (2012).

183. *See* 6 C.F.R. § 115.151 (2014), <http://www.gpo.gov/fdsys/pkg/FR-2014-03-07/pdf/2014-04675.pdf>.

184. *Immigrants' Rights and Detention*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention> [<http://perma.cc/U4UZ-MLE5>].

185. The ABA standard requires that “[c]orrectional authorities should employ strategies and devices to allow correctional staff of the opposite gender to a prisoner to supervise the prisoner without observing the prisoner’s private bodily areas.” *Standards on Treatment*

and healthcare professionals, employed in immigration detention facilities should receive thorough and uniform gender-identity, cultural and linguistic training to their guards and healthcare professionals, which will help to dispel discriminatory practices. Medical care needs to be given at the discretion of the detainees, rather than by staff referral. It must also include access to services specific to the LGBT community, including hormone therapy and sex reassignment surgery. Detainees should be housed according to gender identity and they should never be placed in solitary confinement or administrative segregation for any length of time. Finally, complaints and appeals processes need to be more uniform and accessible and investigated to the fullest extent possible.

Even with these necessary changes, the system could never be fully mended. Given the severity and the likelihood of the risks involved in placing LGBT immigrants—or any immigrant for that matter—in immigration detention, an alternative means of dealing with undocumented or otherwise removable immigrants must be established.¹⁸⁶ After all, as descendants of Europeans who came to the New World in search of a better life, how can we justify such reprehensible treatment of those who harbor the same dream?

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of Prisoners: Standard 23-7.10 Cross-Gender Supervision, AM. BAR ASS'N, https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners.html#23-7.10 [<http://perma.cc/3GS8-K38Z>].

186. Gruberg, *supra* note 53, at 16 (“There are a number of alternatives to detention, including monitoring through the use of electronic ankle bracelets or through supervised-release programs . . . [T]he Vera Institute of Justice implemented a pilot project [called] the Appearance Assistance Program to study appearance rates in removal hearings for individuals released into a form of supervised release. Ninety-one percent of participants in the pilot project appeared for all of their required hearings.” These rates illustrate that mandatory detention is not necessary to ensure that immigrants appear at their hearings.)

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