

# Walking While Trans: Profiling of Transgender Women by Law Enforcement, and the Problem of Proof

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WALKING WHILE TRANS: PROFILING OF  
TRANSGENDER WOMEN BY LAW ENFORCEMENT,  
AND THE PROBLEM OF PROOF

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INTRODUCTION

- I. WHY IS POLICE PROFILING OF TRANSGENDER WOMEN A  
SERIOUS PROBLEM?
    - A. *Transgender Women and Violence*
    - B. *Police Profiling of Transgender Women—The Anecdotal  
Evidence*
  - II. PROVING THAT “WALKING WHILE TRANS” IS A PERVASIVE  
PHENOMENON
  - III. WHY IS LACK OF DATA A PROBLEM?
  - IV. POTENTIAL SOLUTIONS TO THE NO-DATA PROBLEM
- CONCLUSION

INTRODUCTION

It is painful and frustrating to recognize that a marginalized population is being systematically subjected to unfair treatment. It is all the more painful and frustrating to realize that one lacks the means to prove to those with the power to make change that the unfair treatment is occurring with any regularity at all. Law enforcement’s pervasive profiling of transgender women,<sup>1</sup> particularly those

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1. The authors use the term “transgender women” to refer to individuals who are and identify themselves as women, but were assigned otherwise (often male) at birth. We address this population specifically because we know them to be at the most significant vulnerability, even within the extremely vulnerable trans population. While we appreciate the great diversity of both gender identity and linguistic specification, we use the phrase “transgender women” in an inclusive way here, intending to address the experiences faced by the individuals most frequently profiled by police. It is acknowledged and appreciated that there are many other ways in which individuals identify themselves (women of transgender experience, women, transwomen), but the authors have chosen what they believe to be the most efficient and inclusive language.

of color, as sex workers, presents precisely such a situation, and is the subject of this Article.

To put it mildly, the transgender community has not enjoyed a comfortable relationship with law enforcement. Among other indignities, transgender women in particular report that law enforcement officers frequently presume that they are likely engaged in sex work, regardless of the activities that they are actually observed engaging in.<sup>2</sup> Law enforcement officers regularly stop, harass, and demand identification from transgender women, regularly subject them to commands to disperse, and regularly arrest them for low-level offenses tied to suspicions of prostitution.<sup>3</sup> This phenomenon is sufficiently widespread that the transgender community has given it the colloquial label “walking while trans.”<sup>4</sup>

The authors *know* that this happens because we both have had numerous clients to whom this has happened.<sup>5</sup> We are also connected to networks of activists and service providers who also possess this knowledge, and we are familiar with numerous studies, discussed at greater length *infra*, which provide bodies of compelling anecdotal evidence that demonstrates the pervasiveness and severity of this problem. However, the authors are aware of virtually no police-generated data that could be used to prove more convincingly that transgender women are being subjected to police profiling. The lack of statistical evidence of this phenomenon has, the authors contend, thwarted some strategies for large-scale reforms that might otherwise have the effect of curtailing police profiling of transgender women. The authors contend that the lack of available data stems from the simple fact that law enforcement agencies rely upon a binary system of recording gender, and do not keep statistics on the number of transgender people with whom they interact.

However, the authors contend that this fairly simple problem does not present a remotely simple solution, since it is unclear whether adding categories to existing male/female designations would accurately capture either officers’ perceptions of gender *or* the gender identities of individuals stopped by police. In addition, advocates for

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2. See JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 61 (2011).

3. *Id.*

4. *Id.* (“Transgender women, particularly transgender women of color, are so frequently perceived to be sex workers by police that the term *walking while trans*, derivative of the more commonly known term *driving while Black*, was coined to reflect the reality that transgender women often cannot walk down the street without being stopped, harassed, verbally, sexually and physically abused, and arrested, regardless of what they are doing at the time.”).

5. The authors were both Philadelphia-based providers of direct legal services to low-income LGBT populations.

LGBT communities are highly anxious about the prospect of law enforcement demanding that kind of information from the public. The authors suggest that in order to accurately capture gender identity for the purpose of tracking police profiling of transgender women, police departments should instead require that officers record *their perception* of an individual's gender. Although this suggestion cuts against some current thinking regarding the utility of tracking gender by government institutions, it would have the effect of creating data points that would accurately record an officer's belief about an individual—critical information when police profiling is at issue.

Part I of this Article seeks to answer the question of why the profiling of transgender women as sex workers is something that lawyers and legal scholars should care about. Section I.A observes that transgender women are at exceptionally high risk of experiencing violence and harassment, which is meted out by both private and state actors, and both in private and institutional spaces. Violence and harassment against transgender women, the authors note, is especially pervasive in the endemically violent and highly gender-segregated institutions that make up the American criminal justice system. Transgender women, therefore, would benefit tremendously from good relationships with law enforcement, and suffer unusually brutal hardships when inserted into the criminal justice system.

Section I.B demonstrates that significant anecdotal evidence exists to suggest that “walking while trans” is a real and pervasive issue. This section then delineates some of the harms that transgender women suffer as a result of police profiling practices.

Part II of this Article considers the proof problem in demonstrating that “walking while trans” is a real and widespread practice. This part suggests that in order to more definitively demonstrate that profiling of a particular community exists, we should first look to proof strategies that have proven effective in the past. This part examines the methods by which racial profiling was proven in the late 1990s and early 2000s. This part notes that racial profiling advocates focused on obtaining police-generated data on the race of motorists stopped by police. With access to that data, advocates could compare the percentage of people of color who were stopped against some other figure, such as motorists driving on a particular highway generally, or against the racial demographics of communities surrounding a highway. This part notes, however, that producing similar data on transgender people is far more difficult, if not impossible, because police do not (and usually cannot) routinely capture transgender status in police reports.

Part III discusses ways in which the lack of data that might otherwise prove the existence of “walking while trans” is hampering efforts to advocate effectively for better policing practices with respect to this vulnerable population.

Part IV asks the reader to consider various potential solutions to this problem. The first solution would be to require law enforcement officers to check a third box for “transgender” on police reports. This solution, the authors suggest, would carry with it several serious problems, and is not recommended. A second solution would be to eliminate gender entirely from police reports, as some modern thinking suggests that gender does little real work for most purposes in government. However, this solution actually makes it *more* difficult to document gender-based police profiling, not less. The authors suggest a third solution, which would be to add a new section to police reports that would capture the officer’s *perception* of the individual’s gender. This solution would acknowledge that in cases of discrimination, it is the perception of the victim that drives the prohibited, discriminatory behavior, and not the individual’s actual identity.

This Article concludes with suggestions for future discussion and research, as the authors acknowledge that this Article raises more questions than it answers.

## I. WHY IS POLICE PROFILING OF TRANSGENDER WOMEN A SERIOUS PROBLEM?

This Part seeks to explain why “walking while trans” is a pressing law enforcement issue that deserves the focused attention of experts. Section I.A describes how violence from both private and official actors affects transgender women, both in private spaces and institutional spaces. Section I.B describes the “walking while trans” phenomenon, and explains how it exposes an already vulnerable population to increased levels of life-threatening danger.

### A. *Transgender Women and Violence*

Transgender women, and transgender women of color particularly, experience extraordinary vulnerability to violence by both private and state actors, in both public areas and controlled institutional spaces.<sup>6</sup>

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6. HUMAN RIGHTS CAMPAIGN & TRANS PEOPLE OF COLOR COALITION, ADDRESSING ANTI-TRANSGENDER VIOLENCE: EXPLORING REALITIES, CHALLENGES AND SOLUTIONS FOR

Transgender women are at high risk of violence from private actors, particularly through homicide and domestic violence.<sup>7</sup> Every year in recent history has seen the murder of scores of transgender women of color, most notably Black transgender women.<sup>8</sup> We have every reason to believe that this trend is not new, and that even with a more concerted effort to track murders of transgender women, we are not identifying every murder of this kind.<sup>9</sup> In addition to the steady stream of brutal murders of transgender women each year, available evidence suggests that trans women experience other kinds of violence.<sup>10</sup> For example, they experience domestic violence at extraordinary rates.<sup>11</sup>

However, when transgender women experience violence at the hands of private actors, they often cannot count on law enforcement to protect them. For example, researchers have unearthed an alarming pattern in the behavior and responses of police officers to domestic violence calls in which the victim is trans-identified.<sup>12</sup> Transgender victims of domestic violence report that calling the police frequently results in the transgender victim being arrested, violence from the police, or a total failure to respond to the situation.<sup>13</sup> These experiences make transgender violence victims believe that the police offer very little safety and, in fact, support a belief that they may be more dangerous than perpetrators of violence such as domestic abusers.<sup>14</sup> The ultimate effect is that transgender women frequently do not seek law enforcement assistance when they experience violence.<sup>15</sup> They may instead remain in relationships and situations in which they are endangered physically and emotionally.

Beyond the violence inflicted by actors in noninstitutional settings, transgender women (particularly those of color) face violence, sexual assault, and nearly impossible conditions inside correctional

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POLICYMAKERS AND COMMUNITY ADVOCATES 28 (2015), [https://assets.hrc.org/files/assets/resources/HRC-AntiTransgenderViolence-0519.pdf?\\_ga=2.141382002.1176995285.1508349791-1695609455.1508349791](https://assets.hrc.org/files/assets/resources/HRC-AntiTransgenderViolence-0519.pdf?_ga=2.141382002.1176995285.1508349791-1695609455.1508349791) [<https://perma.cc/S6BE-GXLQ>].

7. *Id.*

8. *Id.*

9. See *infra* note 119, discussing the obstacles to identifying transgender murder victims due to a pervasive binary approach to gender.

10. JODY L. HERMAN & TAYLOR N.T. BROWN, THE WILLIAMS INSTITUTE, INTIMATE PARTNER VIOLENCE AND SEXUAL ABUSE AMONG LGBT PEOPLE 14 (2015) <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Intimate-Partner-Violence-and-Sexual-Abuse-among-LGBT-People.pdf> [<https://perma.cc/3XUN-EGNY>].

11. *Id.*

12. See, e.g., AMNESTY INTERNATIONAL, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S. 128 (2005).

13. *Id.*

14. See generally Kae Greenberg, *Still Hidden in the Closet: Trans Women and Domestic Violence*, 27 BERKELEY J. GENDER L. & JUST. 198, 230 (2012).

15. *Id.*

facilities.<sup>16</sup> The experience of transgender women in prisons is not only rife with abuse from other incarcerated people, but also violence, sexual assault, and often life-threatening medical neglect at the hands of correctional officers and the policies of the system itself.<sup>17</sup>

Transgender women are uniquely vulnerable in the correctional system because of the degree to which that system relies upon a binary system of gender as a means of identifying and housing incarcerated people.<sup>18</sup> Because prisons are sex segregated, a strict gender binary is enforced as a primary means of keeping order and classifying prisoners.<sup>19</sup> Transgression of that binary may end in harassment, violence, or possibly homicide at the hands of corrections officers or other inmates.<sup>20</sup>

In the vast majority of correctional facilities, individuals are assigned a gender category based upon the current state of their genitalia, regardless of other factors such as hormone treatment, self-identification, or outward appearance.<sup>21</sup> This determination is

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16. The experience of prison is inherently violent for all incarcerated people, and incredibly dangerous for all trans people, but for our purposes we will focus on the violence specific to transgender women.

17. See Greenberg, *supra* note 14, at 234.

18. See Sydney Tarzwell, *The Gender Lines Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the October 24, 2017 Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 169 n.5 (2006) (defining “gender binary” as “the cultural scheme that acknowledges only two genders—male and female—and that labels each individual as one or the other at birth. The gender binary is generally based on the belief that chromosomes, gonads, primary and secondary sex characteristics, identity, and social roles are or should be more or less consistently male or female within any individual.”).

19. See Jennifer Sumner & Lori Sexton, *Same Difference: The “Dilemma of Difference” and the Incarceration of Transgender Prisoners*, 41 L. & SOC. INQUIRY 616, 619 (2016) (“Today, sex segregation remains a taken-for-granted part of the carceral landscape—so much so that policies simply indicate where male and female prisoners will be housed without specifying how to determine who is included in these categories. The hegemony of this dichotomous system of sex segregation is further evidenced by the policies and procedures that are designed with these taken-for-granted categorizations in mind. . . . Challenges to gendered distinctions have survived judicial review on the grounds that they serve the legitimate penological interests of safety and security.”) (internal citations omitted).

20. *Id.* at 630–31 (describing transgender inmates’ experiences of ostracism and abuse from both fellow prisoners and prison staff).

21. *Chapter Three: Classification and Housing of Transgender Inmates in American Prisons*, 127 HARV. L. REV. 1746, 1748 (2014) [hereinafter *Chapter Three*] (“[T]ransgender inmates in American prisons who have not undergone sex reassignment surgery ‘are generally classified according to their birth sex for purposes of prison housing, regardless of how long they may have lived as a member of the other gender, and regardless of how much other medical treatment they may have undergone.’ For example, such was the federal government’s practice until recently: ‘federal prison authorities . . . incarcerate[d] preoperative transsexuals with prisoners of like biological sex.’ A number of justifications have been given for such policies, including administrative ease, ‘respecting the privacy interests of female inmates in women’s facilities, protecting women from

then used to place the person in a sex segregated facility. In many cases, this means transgender women are housed in men's prisons, making them extraordinarily vulnerable to attacks by cisgender<sup>22</sup> men incarcerated in the same facility with them.<sup>23</sup> In a recent report on the transgender community in the United States, a survey participant reported the following anecdote, which is both shocking and horrifyingly typical: "I was arrested one day regarding something minor. Due to my gender being marked as male, I was put in with the men. Within 15 minutes, I was raped by 3 different men."<sup>24</sup>

When transgender women enter a correctional facility, the only solution available to the prison to protect them from sexual assault and other forms of violence is to place them in administrative segregation or another version of solitary confinement.<sup>25</sup> While this strategy may protect individuals from the dangers of living in the general population of the prison (and protect the prison from the resulting lawsuit), it is also well-documented that there are serious mental health consequences<sup>26</sup> and potentially increased rates of attack by correctional officers when transgender women are placed in protective custody.<sup>27</sup>

In addition to the extraordinary danger of violence and sexual assault that transgender women face in correctional settings, there

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potential coercive sex by [male-to-female] inmates, and preventing pregnancy.") (internal citations omitted).

22. "Cisgender" is defined as follows: "of, relating to, or being a person whose gender identity corresponds with the sex the person had or was identified as having at birth." MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/cisgender> [<http://perma.cc/J9Q9-B4EZ>].

23. *Chapter Three, supra* note 21, at 1749 ("[H]igher rates of sexual assault owe themselves at least in part to the practice of genitalia-based classification. For example, transgender women who are placed in male housing because they have yet to undergo sexual reassignment surgery but who nevertheless have significant feminine features become obvious targets for abuse in prison.") (internal citations omitted).

24. JAIME M. GRANT, LISA A. MOTTET, JUSTIN TANIS, JACK HARRISON, JODY L. HERMAN & MARA KEISLING, NAT'L CTR. FOR TRANSGENDER EQUALITY & NAT'L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 168 (2011).

25. See Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 537 (2009).

26. *Id.* at 538–39 ("The documented psychological effects of isolation, even for short periods of time, include intense anxiety, confusion, lethargy, panic, impaired memory, psychotic behavior, hallucinations and perceptual distortions, difficulty eating, inability to communicate, hypersensitivity to external stimuli, violent fantasies, and reduced impulse control. This type of segregation itself is a form of psychological violence and can lead to prisoners violently harming or killing themselves.") (internal citations omitted).

27. *Id.* at 540 ("Some trans people have reported that they are more likely to be attacked in protective custody or other forms of segregation because it is easier for abusive correctional staff to access them alone and out of the sight of other prisoners or video surveillance.").



exists rampant medical neglect in most large prison systems<sup>28</sup> that disproportionately affects transgender women due to their frequent reliance on gender-confirming medical regimes.<sup>29</sup> All prisoners are ostensibly entitled to necessary medical care.<sup>30</sup> Regardless, transgender women are regularly denied access to hormone therapy or other transition-related care, even if they were prescribed such regimens before being incarcerated.<sup>31</sup> The denial of transition-related care can significantly exacerbate symptoms of gender dysphoria, lead to illness as a result of sudden hormone withdrawal, and cause other serious health consequences.<sup>32</sup>

The fact that transgender women find themselves so vulnerable to violence would lead most reasonable people to draw a couple of basic conclusions. First, one would reasonably conclude that law enforcement ought to be doing everything in their power to protect transgender women from violence at the hands of private actors. However, as has been noted already with regard to domestic abuse, the converse appears to be true. And second, one would reasonably conclude that police officials ought to take considerable care when engaging in any action that might expose a transgender woman to incarceration, given the extreme levels of danger such women face in correctional settings. However, as the next Section demonstrates, considerable anecdotal evidence exists to demonstrate that here, as well, the opposite is true.

### *B. Police Profiling of Transgender Women—The Anecdotal Evidence*

There exists a growing body of survey-based evidence that demonstrates that transgender women generally, and particularly transgender women of color, are not given the protection and consideration

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28. See generally Evelyn Malavé, *Prison Health Care After the Affordable Care Act: Envisioning an End to the Policy of Neglect*, 89 N.Y.U. L. REV. 700, 705 (2014) (“Despite the urgent need for medical and mental health services in prison, prison health care is at best inadequate and, at worst, an atrocity.”).

29. *Id.* at 727.

30. See *Estelle v. Gamble*, 429 U.S. 97 (1976) (holding that deliberate indifference to serious medical need violates Eighth Amendment prohibition against cruel and unusual punishment).

31. Sandy de Sauvage & Kelly Head, *Correctional Facilities*, 17 GEO. J. GENDER & L. 175, 199 (2016) (“According to the *Diagnostic and Statistical Manual of Mental Disorders* published by the American Psychiatric Association, Gender Identity Disorder (GID) is a formal diagnosis used to describe those who experience persistent gender dysphoria and discontent with the traditional gender roles assigned to their biological sex. However, the circuit courts are varied in their decisions as to whether gender dysphoria constitutes a serious medical need. Unfortunately, the failure to provide transgender prisoners with needed medical treatment has led to autocastration in at least six facilities in four states.”).

32. *Id.*

by police that is commensurate with their vulnerability to violence.<sup>33</sup> In fact, the opposite appears to be true. The available data on interactions of trans and gender nonconforming people with the police demonstrates not just a serious disconnect between this incredibly vulnerable population and law enforcement, but an enhanced vulnerability in the presence of those charged with maintaining order and safety.<sup>34</sup>

Generally, transgender people report a high frequency of negative interactions with law enforcement.<sup>35</sup> Of the respondents to a recent study conducted by the National Center for Transgender Equality and the National LGBTQ Task Force, approximately one-third of transgender people (thirty percent) reported being treated in a generally disrespectful way by police.<sup>36</sup> This trend worsens among individuals at vulnerable intersections. Notably, respondents who were both Black and transgender reported being disrespected by police (forty-seven percent) with greater frequency than being respected (forty-three percent).<sup>37</sup> Further, there was a similar pattern among transgender individuals who had not obtained a high school diploma—again, a greater number (forty-seven percent) report disrespect than respect (forty-three percent).<sup>38</sup> Alarming, these issues do not appear to end with simple disrespect. Police harassment was reported by thirty-eight percent of Black transgender respondents where the overall rate of police harassment of transgender people was reported at twenty-two percent.<sup>39</sup>

More specifically, transgender women overwhelmingly report a very specific problem—they are pervasively profiled as sex workers by the police based on their gender expression, and then subjected

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33. See AMNESTY INTERNATIONAL, *supra* note 12, at 2.

34. The experiences of transgender women—the subject of this Article—are generally aligned with the experiences of the LGBT community as a whole, particularly those members who are gender nonconforming. LGBT individuals, and in particular transgender and gender nonconforming people, and LGBT people of color, report that quality of life crimes (loitering, obstructing the highway, etc.), moral regulations, and other statutes governing public behavior are applied excessively to these groups. This application of low level, often citation-based violations, does not appear to be about addressing the particular transgressions committed, but rather an attempt to remove trans and gender nonconforming people of color from public spaces and neighborhoods in large cities that are currently in the process of gentrifying. *See, e.g., id.*

35. ERIN FITZGERALD, SARAH ELSPETH PATTERSON, DARBY HICKEY, WITH CHERNOBIKO & HARPER JEAN TOBIN, MEANINGFUL WORK: TRANSGENDER EXPERIENCES IN THE SEX TRADE 5 (2015), [http://www.transequality.org/sites/default/files/Meaningful%20Work-Full%20Report\\_FINAL\\_3.pdf](http://www.transequality.org/sites/default/files/Meaningful%20Work-Full%20Report_FINAL_3.pdf) [<http://perma.cc/NCK4-BGTG>].

36. See GRANT ET AL., *supra* note 24, at 159.

37. *Id.*

38. *Id.*

39. *See id.* at 160.

to aggressive, often abusive, policing practices based upon law enforcement's perception that they are universally and perpetually engaged in sex work.<sup>40</sup>

This phenomenon is so well understood in trans and allied communities that it has earned its own informal term—"walking while trans" (a play on the more commonly known racial profiling term "driving while Black").<sup>41</sup> And it is very well-documented in numerous studies of police/LGBT interactions that rely upon survey data.

One of the most well-known studies of this type was commissioned in 2005 by Amnesty International.<sup>42</sup> The report resulting from the study, called *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S.*, paints a damning portrait of police/LGBT relations.<sup>43</sup> It contains an entire section devoted specifically to police profiling of transgender women as sex workers.<sup>44</sup> The Amnesty International report notes:

AI has found a strong pattern of police unfairly profiling transgender women as sex workers. AI received reports of such practices in Chicago, Los Angeles, New York and San Antonio, as well as in Washington, DC, Philadelphia, Pennsylvania, San Francisco, California and Houston, Texas. Transgender individuals are often the subject of intense police scrutiny and AI heard many reports of transgender women being stopped by police and questioned about their reason for being on the street and where they were going, often under the pretext of policing sex work, even when those stopped were engaging in routine daily activities such as walking a dog or going to a local shop. AI attended a meeting . . . where a number of the predominantly Latina participants recounted instances of profiling as sex workers by officers while they were engaged in activities such as hailing a cab or walking down the street.<sup>45</sup>

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40. Many transgender women are left with little choice but to participate in street economies, since they tend to experience extremely high rates of homelessness, family rejection, and discrimination in employment. This seems to be exacerbated in transfeminine communities of color. *See, e.g.,* FITZGERALD ET AL., *supra* note 35, at 4 (demonstrating that transgender women of color are more likely to engage or have engaged in sex work than other trans-identified people). It is quite possibly true that transgender women are over-represented in sex worker populations. However, that possibility, on its own, is not a sufficient reason for law enforcement officers to stop, search, cite, or arrest transgender women who are merely attempting to engage in ordinary life activities.

41. *See* MOGUL ET AL., *supra* note 2, at 61.

42. *See generally* AMNESTY INTERNATIONAL, *supra* note 12, at 128.

43. *Id.*

44. *Id.* at 20.

45. *Id.* at 21 (internal citations omitted).

Amnesty's report also recounted that some law enforcement personnel themselves had self-reported to Amnesty that they believed that high percentages of transgender women are sex workers.<sup>46</sup>

A 2008 report on police/sex worker relations in Washington, D.C. corroborated the Amnesty study.<sup>47</sup> The report noted,

In line with findings of other research in D.C. and other jurisdictions, we found that negative police interactions were much more common for transgender people. . . . "Walking while transgender" is a phrase coined by community members to describe the almost constant profiling of transgender women (particularly African-American and Latina) as prostitutes.<sup>48</sup>

More recent studies demonstrate that little has changed with respect to police profiling of transgender women. For example, in a recent study of interactions between law enforcement officers in Los Angeles and Latina transgender women, almost sixty percent of survey participants reported being stopped by law enforcement in the previous year though they were not violating the law.<sup>49</sup> That study specifically referenced descriptions of interactions in which police "assumed" that participants were prostitutes.<sup>50</sup> Similarly, a 2015 report on transgender people involved in sex work found that almost fifty percent of transgender people of color surveyed believed that they had been "arrested for being trans."<sup>51</sup>

Beyond formal reporting, both authors have personally represented clients who reported similar treatment by police.<sup>52</sup> Numerous clients of the authors reported being stopped by police, harassed,

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46. *Id.* at 22.

47. ALLIANCE FOR A SAFE & DIVERSE DC, MOVE ALONG: POLICING SEX WORK IN WASHINGTON D.C. (2008), <https://detranscoalition.files.wordpress.com/2010/05/movealongreport.pdf> [<http://perma.cc/N56F-CUXQ>].

48. *Id.* at 54 (internal citations omitted). *See also* CATHERINE HANSENS, AISHA C. MOODIE-MILLS, ANDREA J. RITCHIE, DEAN SPADE & URVASHI VAID, A ROADMAP FOR CHANGE: FEDERAL POLICY RECOMMENDATIONS FOR ADDRESSING THE CRIMINALIZATION OF LGBT PEOPLE AND PEOPLE LIVING WITH HIV 3 (2014), <http://www.law.columbia.edu/gender-sexuality/roadmap-change> [<http://perma.cc/6DQD-QMGU>] (in which transgender woman of color CeCe McDonald relates that "[p]olice officers use many stereotypes of black trans people to dehumanize me, such as assuming that I am a sex worker.").

49. FRANK GALVAN & MOHSEN BAZARGAN, INTERACTIONS OF LATINA TRANSGENDER WOMEN WITH LAW ENFORCEMENT 7 (2012), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Galvan-Bazargan-Interactions-April-2012.pdf> [<http://perma.cc/FU8C-5P8T>].

50. *Id.*

51. *See* FITZGERALD ET AL., *supra* note 35, at 5. This report used data gathered by the National Transgender Discrimination Survey, which also formed the basis for the report *Injustice at Every Turn*, also referenced in this Article.

52. As noted *supra*, both authors are former direct legal service providers to LGBT communities in Philadelphia.

searched, and verbally and physically abused. In many cases, the stops reported to the authors by clients appeared to be predicated only on the visible transgender identity of the individual and their presence in an area of Philadelphia with a known reputation for sex work.

The effects of police profiling on transgender women are overwhelmingly negative. First, by using “quality of life” and prostitution-related charges to discourage transgender women from being present in particular public spaces, police make transgender women less safe by making it more difficult for them to move about freely in areas that might otherwise be relatively safe for them, such as LGBT-focused neighborhoods in large cities.<sup>53</sup> Additionally, profiling of transgender women as prostitutes significantly erodes the level of trust and comfort transgender women feel with respect to law enforcement.<sup>54</sup>

Most disturbingly, continual and often unwarranted police contact greatly increases the rate with which transgender women must engage with the criminal courts and the rate at which they are incarcerated.<sup>55</sup> Because of longstanding mistrust of the system, transgender women frequently do not appear for scheduled hearings or other events associated with the citations issued for “walking while trans” violations.<sup>56</sup> In the absence of a defendant, bench warrants or other actions are taken to issue a penalty for the unresolved citation.<sup>57</sup> Should the person in question be stopped by the police again, she will now have a bench warrant out for her arrest and be taken to jail. Thus, what may appear to be a minor criminal infraction can begin a potentially life-destroying cycle in the prison system, where transgender women are misgendered, denied medical care, raped, abused, or placed in solitary confinement “for their own protection.”<sup>58</sup>

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53. This is an effect of anti-prostitution policing upon transgender women specifically, but also on all people perceived to be sex workers. See ALLIANCE FOR A SAFE & DIVERSE DC, *supra* note 47, at 2 (“Our research reveals that being told to move along by police is a common experience for people presumed to be engaging in commercial sex, and that it is not limited to areas covered by prostitution free zones. Most people reported moving into areas or neighborhoods where they feel less safe, potentially making themselves vulnerable to violence, robbery and even more police abuse.”).

54. See GRANT ET AL., *supra* note 24, at 162 (“Police harassment and assault had an apparent deterrent effect on respondents’ willingness to seek out help from law enforcement; 46% of the sample reported that they were uncomfortable seeking help from police while only 35% reported that they were comfortable doing so.”).

55. See *id.* at 170.

56. *Id.*

57. The authors’ own transgender clients frequently had outstanding bench warrants that they explained had not been cleared because of their fears of interacting with the criminal justice system. Sometimes, clients had difficulty completing other necessary legal tasks, such as legal name changes, as a result of these warrants.

58. See HANSSENS ET AL., *supra* note 48.

## II. PROVING THAT “WALKING WHILE TRANS” IS A PERVERSIVE PHENOMENON

The authors are convinced, based upon the quantity and quality of available survey data, coupled with the authors’ own client experiences, that “walking while trans” is a real and pressing problem for transgender women, particularly those of color. If, in fact, the problem is as pervasive as we suspect, this represents nothing short of a crisis for the trans community. As previously noted, transgender women are multiply marginalized and extraordinarily vulnerable to violence. An epidemic of police profiling will only exacerbate this problem by exposing this population to exactly the wrong end of the law enforcement spear, treating transgender women as criminals and outlaws instead of vulnerable populations for whom relationships of trust with law enforcement are critical to their survival.<sup>59</sup>

But as it currently stands, the authors believe that anecdotal evidence alone may not be sufficient to provoke the kind of sweeping national policy shifts that would end the policing practices that lead to “walking while trans.” The rhetorical impact of anecdotal evidence is considerable, but scholars, courts, and policymakers tend to view such evidence with skepticism, often demanding empirical proof before committing to a course correction that might be difficult, expensive, and controversial.<sup>60</sup>

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59. The authors understand that there are many who take the position that law enforcement’s sole purpose is to protect the powerful, maintain that power, and contribute to the forcible oppression of targeted underclasses. See, e.g., Mychal Denzel Smith, *Abolish the Police. Instead, Let’s Have Full Social, Economic, and Political Equality*, THE NATION (Apr. 9, 2015), <https://www.thenation.com/article/abolish-police-instead-lets-have-full-social-economic-and-political-equality> [http://perma.cc/L2P7-4KNT]. Those who take this position might argue that the only way to make trans women of color and other marginalized communities truly safe is to abolish the police entirely. The authors do not intend to necessarily take an opposing position to that viewpoint, but instead offer their analysis as a means to make the current system *less* unjust and unsafe for trans women.

60. For example, when *Queer (In)justice* was released, a law journal book review had this to say:

*Queer (In)Justice* attempts an ambitious survey. The work’s scope is itself useful, given that scholars have yet to examine many aspects of how the criminal legal system treats LGBT people. However, the book’s effectiveness is at times undercut by its largely anecdotal approach, which strings together a series of high-profile incidents and cases. The book often reads like a collection of stories that made the news, many of them (such as the Leopold and Loeb case) well-known and often told. The book also largely fails to provide comprehensive data or evidence of discrimination.

Giovanna Shay & J. Kelly Strader, *Queer (In)Justice: Mapping New Gay (Scholarly) Agendas*, 102 J. CRIM. L. & CRIMINOLOGY 171, 177 (2012) (reviewing JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* 61 (2011)).

If we wanted to see how profiling has been successfully identified and acknowledged in the past, we would not need to reach back very far. During the 1990s, lawmakers, law enforcement officials, and civil rights advocates grappled with the emergence of national awareness of the phenomenon known as “driving while Black,” in which Black motorists perceived that they were stopped at a far higher rate than White motorists, even when there was no articulable reason for the police to suspect that they had engaged in any wrongdoing.<sup>61</sup> Advocates for these populations understood, based upon individual anecdotes and aggregated survey data, that there was a pervasive belief among minority communities that police stopped motorists of color far more frequently, and under flimsier pretexts, than White motorists.<sup>62</sup>

Advocates also understood that minorities would not automatically be believed based entirely on their own perceptions.<sup>63</sup> However, civil rights advocates reported that there existed at that time a startling lack of law enforcement-generated data that might have either proved or disproved the reality of “driving while Black.”<sup>64</sup> As leading racial profiling scholar David A. Harris recounts, law enforcement in the 1990s used the lack of data as a shield against the argument that racial profiling was a legitimate phenomenon:

But the most intriguing reply that I would get . . . was . . . not *it doesn't happen*, but *you can't prove it*. Show me, I was asked by any number of police officials, any statistics that prove your case, any data or analysis anywhere that anyone has done to support

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61. David A. Harris, *The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection*, 66 L. & CONTEMP. PROBS. 71, 74 (2003) (“African Americans, Latinos and other members of minority groups frequently complained that police singled them out by stopping their cars for the slightest (or even for nonexistent) traffic violations and would then ask for permission to search their cars. Sometimes, however, permission was not sought at all, and searches were conducted as a matter of course, regardless of what the Fourth Amendment may have required.”). Scholars and advocates also identified a kind of corollary problem involving pedestrian stops undertaken for racially tinged reasons. See generally David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 298 (2001).

62. See, e.g., David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 302 (1999).

63. See *id.* at 275–76 (“Talking with African-Americans leaves little doubt that pretextual traffic stops have a profound impact on each individual stopped, and on all blacks collectively. There is also no doubt that blacks view this as not a series of isolated incidents and anecdotes, but as a long-standing pattern of law enforcement. . . . But is there proof that would substantiate those strongly-held beliefs? What statistics exist that would allow one to conclude, to an acceptable degree of certainty, that ‘driving while black’ is, indeed, more than just the sum of many individual stories?”).

64. See *id.* at 275.

the assertion that police target blacks, Hispanics or other minorities on the basis of race or ethnic appearance. Since, in the middle 1990s, neither I nor anyone else could prove anything statistically, that was often the end of the discussion. Simply put, there were no statistics collected in any jurisdiction that would allow people to move forward in the discussion in even the most modest way—to know, for example, the racial or ethnic breakdown of those who police stopped. It was a stalemate, an argument that could never be resolved, not even to the extent of determining whether the use of racial and ethnic targeting was real or not.<sup>65</sup>

Thus, much of the early legal advocacy regarding racial profiling revolved around the search for meaningful data that could be used to demonstrate that motorists of color were not imagining that they were the targets of profiling.<sup>66</sup>

In January 1997, Congressman John Conyers helped spur the push for data by introducing the Traffic Stops Statistics Study Act, which would have mandated that at the federal level the Attorney General must collect and study available data on traffic stops, including the racial demographics of those stopped.<sup>67</sup> Although the federal bill stalled, many states began to pass their own legislation mandating that law enforcement agencies carefully collect data on the race of those stopped, so that patterns of biased police practices could be identified and departments held appropriately accountable.<sup>68</sup>

Concurrently, advocates began filing lawsuits challenging racial profiling practices and using statistical evidence to demonstrate that their claims of discriminatory treatment were true.<sup>69</sup> For example, in 1996 a New Jersey trial court decided *State v. Soto*, a seminal

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65. See Harris, *supra* note 61, at 75. David Rudovsky made a similar observation with respect to racially motivated pedestrian stops. Rudovsky, *supra* note 61, at 304 (“Law enforcement is well aware that it is far easier to discount anecdotal evidence of constitutional violations than it is to rebut statistical data that reflect entrenched patterns of unlawful practices. Without hard data to prove that racial profiling and random stops are integral parts of street level policing, the police have every reason to be confident that if an improper stop is made there will likely not be any negative consequences.”).

66. See Harris, *supra* note 61, at 76 (“[I]t seemed quite natural to propose that police departments be required to take the first step toward answering these questions by collecting data on all traffic stops, including the race of the driver.”).

67. H.R. 118, 105th Cong. (1997). This bill was never passed despite being reintroduced each legislative session for many years.

68. According to a 2014 NAACP report, 30 states have some form of racial profiling prohibition on the books and 18 require data collection for all stops and searches. NAACP, BORN SUSPECT: STOP-AND-FRISK ABUSES & THE CONTINUED FIGHT TO END RACIAL PROFILING IN AMERICA 1 (2014), [http://action.naacp.org/page/-/Criminal%20Justice/Born\\_Suspect\\_Report\\_final\\_web.pdf](http://action.naacp.org/page/-/Criminal%20Justice/Born_Suspect_Report_final_web.pdf) [<https://perma.cc/2P7C-RM5A>].

69. See Harris, *supra* note 61, at 74–77.



racial profiling case.<sup>70</sup> In *Soto*, a group of seventeen African-American criminal defendants filed motions to suppress, claiming that their arrests along the New Jersey Turnpike were the result of a pattern of discriminatory and unconstitutional stops conducted by the New Jersey State Police.<sup>71</sup> *Soto* was remarkable in that the litigation strategy heavily foregrounded the use of statistics. The judge in the case allowed each side during the discovery process access to a huge amount of data: “all stops and arrests by State Police members patrolling the Turnpike between exits 1 and 7A out of the Moorestown Station for thirty-five randomly selected days between April 1988 and May 1991 from arrest reports, patrol charts, radio logs and traffic tickets.”<sup>72</sup> The defense was also permitted to conduct both a “traffic survey” of that same area that provided a baseline of the demographics of drivers and a “violator survey” of the area that demonstrated the demographics of those who exceeded the speed limit.<sup>73</sup> Based upon these and other statistics, the trial court determined that the defendants had made out a prima facie case of selective enforcement that the State had failed to rebut.<sup>74</sup>

At this point, two decades since advocates first began bumping up against the no-data problem, there exists a robust body of research related to the collection and analysis of data on police profiling, and statisticians have developed some standard models for best analytical practices.<sup>75</sup> Commentators seem to agree that statistical evidence is not necessarily a magic bullet, particularly in an Equal Protection litigation setting where the plaintiff must demonstrate discriminatory intent as well as effect.<sup>76</sup> However, in the context of racial profiling generally, it appears that attitudes have shifted substantially, from questions about whether data ought to be collected at all, to questions about how much data, what kind of data, and more nuanced methodological issues such as appropriate benchmarks and sample sizes.<sup>77</sup>

In a relatively short time, the collection and analysis of data has become an integral part of advocacy meant to eradicate racial

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70. *State v. Soto*, 342 N.J. Super. 66 (Law Div. 1996).

71. *Id.* at 69.

72. *Id.*

73. *Id.* at 69–70.

74. *Id.* at 84–85.

75. See generally Melissa Whitney, *The Statistical Evidence of Racial Profiling in Traffic Stops and Searches: Rethinking the Use of Statistics to Prove Discriminatory Intent*, 49 B.C. L. REV. 263 (2008).

76. *Id.* at 283 (discussing courts' reluctance to accept statistical evidence as probative of discriminatory intent in Equal Protection cases).

77. See *id.* at 289–94.

profiling. And advocates have used that data in a variety of contexts to push for police practice reforms.

The authors believe that advocates for transgender women now find themselves in a similar position to the one in which racial justice advocates found themselves in the late 1990s. An impressive body of anecdotal evidence, discussed *supra*, demonstrates that transgender women continually experience unjust, sometimes brutal treatment by law enforcement officers. But advocates have yet to make the jump from community-generated survey data to statistical information derived from police-collected data that would more forcefully prove that transgender women are unfairly targeted.

As LGBT rights advocates in Philadelphia, the authors have long considered how we might use existing criminal justice statistics in a manner similar to that of racial profiling cases to quantify the prevalence of police profiling of transgender women. The authors considered, for example, whether one might collect data on the number of transgender women arrested or cited for prostitution-related crimes<sup>78</sup> in a given police district, track those arrests through prosecution, and engage in a two-step analysis.

The first analytical step would involve using arrest and citation data to assess whether there is a higher rate of arrest or citation for transgender women in Philadelphia than one would expect, given their estimated prevalence in the population generally. This use of data roughly tracks the way that racial profiling cases tend to use arrest data of motorists.<sup>79</sup>

In the second analytical step, one could account for the fact that transgender women are likely over-represented in the sex work industry<sup>80</sup> by attempting to capture whether arrests of transgender

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78. In Philadelphia, these crimes would include both prostitution-related crimes and quality-of-life offenses that are often used to displace individuals or groups that police identify as likely to be engaging in criminal behavior. Those crimes include offenses such as “obstructing the highway,” 18 Pa. C.S. § 5507, a confoundingly vague and broad offense that essentially consists of blocking a sidewalk or road, or being part of a group that refuses to obey a “reasonable official request or order to move.” Obstructing is either a summary offense (meaning that it is a low-level offense that usually results in ticketing, but can in some instances result in arrest), or a third-degree misdemeanor. *See also* § 6:6. Warrantless arrest for summary offense, 16 West’s Pa. Prac., Criminal Practice § 6:6 (“By statute, a police officer may make a warrantless arrest, upon view and probable cause, when there is ongoing conduct that imperils the personal security of any person or endangers public or private property, for any of the following offenses constituting a summary offense: (1) disorderly conduct; (2) public drunkenness; (3) obstructing highways and other public passages; or (4) the underage purchase, consumption, possession, or transportation of liquor or malt or brewed beverages, and for a violation of an ordinance of a city of the second class.”).

79. *See* Whitney, *supra* note 75 for a discussion of racial profiling cases.

80. *See* FITZGERALD ET AL., *supra* note 35, at 17–18.

women on prostitution-related charges were based on evidence or simply profiling. One might accomplish this by tracking, for example, arrests of transgender women for certain selected prostitution-related crimes, to determine whether those arrests resulted in convictions, not guilty verdicts, or decisions by prosecutors to decline prosecution. If, for example, prostitution-related charges against transgender women of color were *nol prossed* at a much higher rate than the same charges against, say, cisgender women, one might be able to point to that anomaly as evidence that the arrest was meant merely to harass and was based on flimsy or non-existent evidence.<sup>81</sup>

If advocates were able to create a statistical picture that bore out anecdotal evidence of transgender profiling, certainly individual litigants in selective enforcement cases might benefit. But entire communities with significant trans populations could benefit as well. Police departments, faced with irrefutable evidence of the problem, might well begin to attempt to identify and hold accountable individual officers whose behavior adversely affect police-community relations. And, LGBT communities themselves might finally face and contend with their own internal anti-trans and race-based biases that may be resulting in pressure on police departments to sweep away “undesirable” queers from LGBT neighborhoods.<sup>82</sup>

But of course, you can’t do any of that. And the reason why you can’t is both shockingly simple and extraordinarily complex: you can’t track police profiling of transgender women using police-generated statistics because police themselves do not capture the fact of an arrestee’s transgender status at all.

Although police practices and forms vary considerably from one jurisdiction to another, they do not generally provide an opportunity for an arresting or citing officer to denote transgender status in the gender designation section of forms. Thus, advocates for trans profiling victims are almost completely unable to track individual instances

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81. This is a similar concept to the concept of “hit rates” in traffic and pedestrian stops. In that context, a “hit rate” refers to the rate at which contraband is actually found during traffic or pedestrian searches. The theory is that if racial profiling exists, the “hit rate” will be lower for minorities, reflecting a higher level of arbitrariness in those stops than in stops of nonminorities. See Whitney, *supra* note 75, at 279. The authors offer this example as only a rough example of the type of statistical analysis one might engage in, were one to attempt to prove “walking while trans” through data-driven means.

82. In the authors’ experience, some of the behavior of law enforcement personnel toward transgender women of color appears to be fueled by White, cisgender owners and operators of LGBT-focused businesses. The authors have observed that sometimes, owners of LGBT-focused clubs and restaurants, who are seen as “respectable queers,” enjoy fairly close relationships with law enforcement and encourage police to “crack down” on street drug dealing and sex work in the neighborhoods where their businesses operate. Thus, the LGBT community itself feeds the criminalization of poverty and the cycle of mass incarceration even as those systems destroy the community’s most vulnerable members.

of police misconduct against transgender people through law enforcement systems unless they happen to already know the name and transgender identity of the individual who was profiled.

Advocates for transgender victims of police harassment find themselves in a position that is in some ways similar to that faced by advocates for victims of racial profiling in the mid 1990s. But advocates for transgender communities face an even deeper chasm where data should be. Racial categories have historically been collected in a broad array of law enforcement contexts (although, as racial profiling advocate David Harris found out, less reliably than one might expect). And those categories have generally allowed for at least a rough and admittedly imperfect explanation of an individual's racial identity.<sup>83</sup> Furthermore, those categories invariably include "African-American" or "Black" as a selection, which allows for the identification of the most historically stigmatized category.

Gender categories, however, operate differently on police forms (and practically everywhere else as well). The insistence on a binary choice of "male" or "female" (or occasionally "other" or "unknown") gives law enforcement officers significantly fewer options than the race category.<sup>84</sup> And most critically, the boxes representing some of the most historically stigmatized groups (transgender people generally and transgender women specifically) simply do not exist. It is as though, for example, the NYPD's Stop and Frisk form contained only two categories of race, and neither of them were "Hispanic." Imagine how difficult it would be to track systemic misuse of Stop and Frisk against Hispanic New Yorkers in the face of such a form. Such is the situation in which transgender advocates find themselves. Not only are the available forms misused, there have historically been *no boxes to check* that might alert researchers and advocates to the fact that a transgender person had had an interaction with police at all.

### III. WHY IS LACK OF DATA A PROBLEM?

"Not everything that can be counted counts, and not everything that counts can be counted."<sup>85</sup> It is true that statistics are not the

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83. Certainly, there are racial identities that are not appropriately accounted for in the current scheme of racial categorization. For example, there exists a good deal of controversy regarding the best method by which to categorize multiracial people on government forms. See, e.g., Carrie Lynn H. Okizaki, "What Are You?": *Hapa-Girl and Multiracial Identity*, 71 U. COLO. L. REV. 463, at 483–94 (2000).

84. The NYPD UF-250 form, for example, has six categories for race, and two for gender.

85. This quote has been, like so many other things probably not said by Albert Einstein, attributed to Albert Einstein. However, he's probably not the one who said it.

be-all, end-all of proof, and it is conversely true that even where statistics exist, they are frequently less than useful and often prone to misinterpretation. The authors are also not sufficiently naïve to believe that the existence of better data on police interactions with transgender individuals will act alone to convince policymakers of the critical nature of the trans profiling problem. The authors do, however, believe that gaps in record-keeping on transgender-police relations specifically and LGBT-police relations more generally thwart most reasonable attempts to even prove the existence of systemic profiling patterns and practices.

In *LGBT Identity and Crime*, Jordan Blair Woods discusses the macro-level effects of failure to collect incident-by-incident data on either sexual orientation or transgender status.<sup>86</sup> Woods observes that this dearth of data prohibits researchers and advocates from engaging in the kind of statistical analyses that are routinely undertaken by criminologists and advocates for marginalized populations.<sup>87</sup> In particular, Woods points to the lack of any information on LGBT status (outside of the hate crime victimization context) in the FBI's Uniform Crime Report (UCR), a data collection commonly used to study crime in the United States.<sup>88</sup>

As Woods puts it,

[T]he lack of data on the number of LGBT people who are arrested and for what crimes makes it difficult to quantify how many LGBT people are affected by police profiling. This lack of data also makes it difficult to determine whether particular segments of the LGBT population (for instance, LGBT people of color, transgender people, or homeless LGBT people) are especially vulnerable to police profiling.<sup>89</sup>

Woods's observation about the effect of the lack of data in this area is supported by results of actual attempts to quantify transgender profiling.<sup>90</sup> For example, in 2008–2009 three psychology

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For an interesting read on who might have originated this quote, see *Not Everything That Counts Can Be Counted*, QUOTE INVESTIGATOR, <http://quoteinvestigator.com/2010/05/26/everything-counts-einstein> [<https://perma.cc/LF8L-G4NG>].

86. Jordan Blair Woods, *LGBT Identity and Crime*, 105 CAL. L. REV. 667, 675–76 (2017).

87. See *id.* at 724.

88. The UCR annually aggregates data provided by local law enforcement on criminal activity nationwide. The UCR breaks down criminal offenses by demographic data of offender that does not include LGBT status. See *Crime in the United States, 2012*, U.S. DEPT. JUST., FED. BUREAU OF INVESTIGATION (2013), <https://ucr.fbi.gov/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/persons-arrested/persons-arrested> [<https://perma.cc/S28A-UBMN>].

89. See Woods, *supra* note 86, at 710.

90. Brett G. Stoudt, Michelle Fine & Madeline Fox, *Growing Up Policed in the Age of Aggressive Policing Policies*, 56 N.Y. L. SCH. L. REV. 1331, 1335 (2011–12).

researchers engaged in a study of the effects of so-called “quality of life” policing on New York City’s youth, seeking to determine whether those aggressive police practices have had a negative effect on youth populations.<sup>91</sup> Their findings were published in 2012 in a New York Law School Law Review article entitled *Growing Up Policed in the Age of Aggressive Policing Policies* [hereinafter *Growing Up Policed*].<sup>92</sup> The authors of *Growing Up Policed* used a creative study design to approach the issue, comparing two different datasets, one from a poll of New York City youth and the other derived from the NYPD’s own Stop, Question and Frisk statistics.<sup>93</sup>

The NYPD dataset that the authors relied on revealed a number of disturbing ways in which the department’s “stop and frisk” policy affected youth.<sup>94</sup> It revealed, for example, that NYPD was concentrating its stops of youth more heavily in poor communities of color, but that those stops were not very successful in terms of unearthing weapons or contraband.<sup>95</sup> The NYPD dataset also revealed that police practices inside public housing resulted in racially disproportionate levels of police stops inside of housing as opposed to in public.<sup>96</sup>

The youth polling data tended to corroborate the NYPD dataset, demonstrating that youth of color tended to have a more fraught relationship with police compared to white youth.<sup>97</sup> Of great concern in the youth polling data was the discovery that LGBTQ-identified youth demonstrated very high levels of distrust of police.<sup>98</sup>

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91. *Id.*

92. *See* Stoudt et al., *supra* note 90.

93. As the authors explained,

One set of data was from our Polling for Justice (PFJ) study . . . which examines the experiences of NYC youth (ages fourteen to twenty-one, from 2008 to 2009) in the areas of education, criminal justice, and health. These quantitative and qualitative data address encounters with police from the perspective of NYC youth. The other dataset comprised the NYPD Stop, Question and Frisk statistics, partitioned to specifically examine NYC youth between the ages of fourteen and twenty-one during the years 2008 and 2009. These data address police stops on youth from the perspective of the NYPD. In this essay we triangulate the dual-sourced evidence to understand the landscape, dynamics, and implications of stop and frisk for a generation of urban youth growing up policed. Thus, for the remainder of this essay, we draw upon these two distinct sets of data to ask what aggressive policing has been like for young people in NYC.

*Id.* at 1335.

94. *Id.* at 1340.

95. *Id.*

96. *Id.* at 1348.

97. *Id.* at 1353.

98. The authors noted

Of particular noteworthiness, and a valuable contribution to this literature,

However, with regard to the negative experiences of LGBQ youth, as well as trans-identified youth, the authors hit a familiar roadblock. The police-generated dataset they used was aggregated from the NYPD stop and frisk form, known as the “UF-250.”<sup>99</sup> NYPD officers fill out a UF-250 form when they engage in a stop and frisk encounter.<sup>100</sup> The form, however, does not capture sexual orientation at all.<sup>101</sup> And predictably, the only possible selections for gender are “male” and “female.”<sup>102</sup>

Thus, although the authors of the study could use both the NYPD dataset *and* the youth polling data to demonstrate both the subjective perception *and objective reality* of differential racial treatment, they could not do so with respect to sexual orientation or transgender status. They were, as usual, left only with LGBT youth’s subjective perceptions of differential treatment, and no way to corroborate that perception with the kind of statistical evidence that has been so effective in demonstrating racial profiling.<sup>103</sup>

The negative effects of this lack of data are also evident in reports on police misconduct generated by the Department of Justice.<sup>104</sup> For many years, racial justice advocates have leveraged the DOJ’s

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are the attitudes in our sample expressed by those youth who identified as LGBQ. More than half of the sample of LGBQ youth reported feeling stressed or worried to some extent by police, as compared to straight youth. Not surprisingly, straight youth were nearly twice as likely to express feeling comfortable to some degree turning to police (21%), as well as feeling the police “protect young people like me” (53%), compared to youth who identified as LGBQ (12% and 26%, respectively). These findings, in combination with the results reported earlier by LGBQ youth, reveal a seldom researched but highly concerning trend for this marginalized community of NYC young people. Our data suggest that greater attention is needed on this issue.

See Stoudt et al., *supra* note 90, at 1354.

99. *Id.* at 1336.

100. *Id.*

101. *Id.* at 1350.

102. NYPD UF-250 form, available at <https://www.prisonlegalnews.org/media/publications/Blank%20UF-250%20Form%20-%20Stop%2C%20Question%20and%20Frisk%20Report%20Worksheet%2C%20NYPD%2C%202016.pdf> [<https://perma.cc/NK8J-7MLD>].

103. In a corollary situation, advocates for LGBT youth in the juvenile justice system have encountered a similar dearth of data on the number of LGB and gender nonconforming youth within the system. See Angela Irvine, “*We’ve Had Three of Them*”: *Addressing the Invisibility of Lesbian, Gay, Bisexual and Gender Nonconforming Youths In the Juvenile Justice System*, 19 COLUM. J. GENDER & L. 675, 678 (2010) (discussing the lack of collection of data on sexual orientation and gender identity of youth involved with juvenile justice, and presenting the findings from a large survey of involved youth that attempted to provide an estimate).

104. U.S. DEP’T JUST., NEWARK POLICE DEP’T, FINDINGS REPORT (2014), [https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark\\_findings\\_7-22-14.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf) [<https://perma.cc/J9YZ-3E9F>].

“pattern and practice” authority under 42 U.S.C.A. § 14141<sup>105</sup> to obtain the assistance of the DOJ in investigating police departments for unlawful profiling practices and requiring accountable reform.<sup>106</sup> Pattern and practice investigations, which can result in the DOJ suing a police department for injunctive relief,<sup>107</sup> have led to consent decrees requiring a variety of reforms within departments, many of which are designed to create greater accountability and transparency.<sup>108</sup>

A 2014 DOJ investigation into the policing practices of the Newark, New Jersey, Police Department reveals the potential of the DOJ’s pattern and practice authority—but also provides a lesson on the ways in which LGB and transgender communities are currently under tremendous disadvantage due to a lack of available data.<sup>109</sup>

In that report, the DOJ found that the Newark Police Department had engaged in a number of potentially unconstitutional activities, including unreasonable stops, so-called “contempt of cop” arrests,<sup>110</sup> and narcotics searches and seizures that likely violated the Fourth Amendment.<sup>111</sup> The DOJ also found that the Newark Police Department arrested and stopped Black individuals at a far higher rate than its members arrested and stopped White or Hispanic individuals.<sup>112</sup>

105. The text of 42 U.S.C.A. § 14141 (current through P.L. 115-40) is as follows:

(a) Unlawful conduct.

It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(b) Civil action by Attorney General.

Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) . . . has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.

106. Kami Chavis Simmons, *Beginning to End Racial Profiling: Definitive Solutions to an Elusive Problem*, 18 WASH. & LEE J. CIV. RTS. & SOC. JUST. 25, 47 (2011) (“An institutional culture that encourages or tolerates racial profiling necessitates an institutional remedy. One of the most promising models to remedy systemic police misconduct is the DOJ’s ‘pattern or practice’ authority, which the federal government has used to implement systemic reforms within several local police departments nationwide.”).

107. 42 U.S.C.A. § 14141(b).

108. See Simmons, *supra* note 106, at 48.

109. See U.S. DEPT JUST., *supra* note 104.

110. A “contempt-of-cop” arrest occurs when an officer arrests an individual for no reason beyond the individual’s challenging or disrespectful behavior toward an officer. *Id.* at 13.

111. See *id.* at 2.

112. *Id.*



The DOJ's ability to collect and analyze data<sup>113</sup> was critical in its ability to make a forceful determination that the Newark Police Department's policing practices were leading directly to a culture of fear and mistrust among the Black community of Newark. The Newark Police Department DOJ findings report runs forty-nine pages in length, and contains a myriad of meticulously documented and highly damning findings regarding the Department's ineffective and discriminatory policing practices. As with the *Growing Up Policed* study, the *combination* of data and anecdotal evidence enabled the DOJ to make several profound and muscular assertions in its report, such as the following statement regarding racial disparities in stops:

Nonetheless, regardless of *why* the disparity occurs, the *impact* is clear: because the NPD engages in a pattern of making stops in violation of the Fourth Amendment, Newark's black residents bear the brunt of the NPD's pattern of unconstitutional policing. This undeniable experience of being disproportionately affected by the NPD's unconstitutional policing helps explain the community distrust and cynicism that undermines effective policing in Newark. In individual interviews and group meetings, many community and criminal justice stakeholders consistently described Newark as a city where black residents, and particularly black men, fear law enforcement action, regardless of whether such action is warranted by individualized suspicion. They indicated that unjustified stops by NPD officers have become so routine that many members of the black community have ceased feeling a sense of outrage and simply feel a sense of resignation.<sup>114</sup>

When the report turns to LGBT-police relations, however, the report's assertiveness is strikingly dampened. The DOJ noted in its report that "[a]t the beginning of the investigation, the DOJ notified the City that its review would include allegations of gender-biased policing with respect to criminal investigations of sexual assault, bias related to sexual orientation and gender identity, and risk of harm to detainees confined in the NPD's holding cells."<sup>115</sup> The

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113. Apparently, the DOJ had to rely on the Newark Police Department's data management vendor for these statistics, since the Department did such a poor job of tracking demographic statistics of stopped and arrested individuals on its own. The DOJ excoriated the Newark Police Department for this failure in its report, which further underscores the importance of data in tracking whether unlawful profiling is prevalent. *Id.* at 18 ("Without carefully tracking, analyzing, and addressing the racially disparate effects of its law enforcement activities in Newark, the NPD will be unable to fully understand and respond to this divisive disparity, and will face greater difficulty gaining the community trust and legitimacy required for effective and constitutional policing.")

114. *Id.* at 17.

115. U.S. DEPT JUST., *supra* note 104, at 46.

authors of the report did, in fact, include a section on anti-LGBT bias.<sup>116</sup> However, unlike the in-depth treatment given racial profiling, the section is a single paragraph in length, and states only this:

During the investigation there was anecdotal evidence that the NPD has engaged in discriminatory policing practices based on sexual orientation or gender identity. The investigation did not produce evidence sufficient to demonstrate a pattern or practice in this area. The LGBT community expressed concerns about the NPD's lack of responsiveness to complaints about violent assaults against LGBT individuals, as well as harassment of female transgender persons by NPD officers—including the mistaken assumption that all female transgender persons are prostitutes. They also described a lack of cultural competence and insensitivity by NPD officers when engaging the LGBT community, and the transgender community, in particular. The NPD does not appear to have any policy or training that would provide officers guidance on how to interact respectfully and effectively with LGBT individuals. Community advocates report that NPD command staff are amenable to training on LGBT issues, although none had yet occurred. The NPD should engage with the LGBT community around the concerns noted, and develop training on policing related to sexual orientation and gender identity.<sup>117</sup>

The disparity in the depth and certainty which the authors of this DOJ report wrote on racial bias as opposed to anti-LGBT bias—and the striking disparity in the amount of space given to recounting discrimination in each community—is telling. Without data to demonstrate more conclusively that the community's impressions that they are singled out are objectively accurate, there is simply nothing beyond what was written to say.<sup>118</sup>

The authors believe that it is incumbent upon those of us who care about the well-being of transgender populations to acknowledge that lack of law enforcement-generated data on transgender women's interactions with police is a problem.<sup>119</sup> The authors also believe that

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116. *Id.* at 48.

117. *Id.* (internal citations omitted).

118. Other similar DOJ reports treat LGBT issues similarly. *See, e.g.*, U.S. DEPT JUST., BALT. POLICE DEP'T, FINDINGS REPORT 123 (2016), <https://www.justice.gov/crt/file/883296/download> [<http://perma.cc/49YF-EAGX>].

119. The profiling problem is only one in a constellation of similar problems. Critically, erasure of transgender identity or presentation in official documents also affects society's ability to track the experiences of trans individuals as crime victims. For example, authorities often fail to identify murder victims as transgender, due to the strictly anatomical approach taken to gender identification and inability to interrogate the victim regarding their gender identity. Thus, the gender of murder victims is identified on the

significant thought should be given to strategizing new solutions to this problem. Those solutions must be effective (in that they require that useful data be collected and contain mechanisms for accountability when data is not collected), but must also do no harm (in that solutions should not invite invasive questioning, inflict dignitary harm upon transgender communities, or exacerbate existing tensions). We consider some solutions in the section that follows.

#### IV. POTENTIAL SOLUTIONS TO THE NO-DATA PROBLEM

The good news is that LGBT advocates and many law enforcement officials seem to agree on two basic principles. First, they agree (at least formally) that profiling of individuals based upon gender identity is poor policing practice. And second, they agree that better data collection is a crucial step in making forward progress on this issue.

In 2014, the DOJ issued a document entitled *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, Or Gender Identity*.<sup>120</sup> That document was intended to build and expand upon earlier guidance issued by the DOJ with respect to race-specific biased policing practices.<sup>121</sup> It uses strong terms to condemn the use of biased policing practices generally, and specifically rejects the idea that such practices are acceptable because some groups are more prone to certain criminal activity—a feature of the report that is highly salient in the context of the profiling of transgender women.<sup>122</sup>

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basis of genitals in most cases, and in nearly all cases where victims' identities in the community are not known to authorities. Due to the use of genital status in murder victim identification, combined with a lack of access to gender-affirming medical care, we can reasonably predict that the available statistics on the murders of transgender women every year are likely to be highly under-representative. See Meredith Talusan, *Documenting trans homicides*, MIC (Dec. 8, 2016), <https://mic.com/unerased> [<https://perma.cc/FV8Q-KWVJ>] (quoting trans-identified epidemiologist Alexis Dinno as stating that, with respect to trans murder victims, “[o]ur institutions of recording death—coroners, death certificates, police reports, hospital records, obituaries—are unprepared to represent transgender. . . . The boxes labeled ‘was transgender’ do not exist to be checked off or not.”).

120. U.S. DEP'T JUST., GUIDANCE FOR FEDERAL LAW ENFORCEMENT AGENCIES REGARDING THE USE OF RACE, ETHNICITY, GENDER, NATIONAL ORIGIN, RELIGION, SEXUAL ORIENTATION, OR GENDER IDENTITY (2014), <https://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf> [<https://perma.cc/XER8-CCAY>].

121. *Id.* at 1.

122. *See id.* at 3 (“Some have argued that overall discrepancies in certain crime rates among certain groups could justify using a listed characteristic as a factor in general traffic enforcement activities and would produce a greater number of arrests for non-traffic offenses (e.g., narcotics trafficking). We emphatically reject this view. Profiling by law enforcement based on a listed characteristic is morally wrong and inconsistent

As part of the specific recommendations listed in this report, the DOJ specifically forbids profiling based upon the list of characteristics in the title of the report, which includes gender identity.<sup>123</sup> The guidance stresses that any use of those listed characteristics must be based upon actual information about criminal activity, such as a description of an assailant, rather than general beliefs about the criminality of certain groups.<sup>124</sup>

The DOJ guidance document also notes that:

Data collection can be a tremendously powerful tool to help managers assess the relative success or failure of policies and practices. At the same time, data collection is only useful to the extent that the collected data can be analyzed effectively and that conclusions can be drawn with confidence. Each law enforcement agency therefore (i) will begin tracking complaints made based on the Guidance, and (ii) will study the implementation of this Guidance through targeted, datadriven research projects.<sup>125</sup>

The guidance, however, does not contain any further instructions to federal law enforcement regarding whether or how to accurately track the transgender status of complainants.

In January 2017, the U.S. Department of Justice's Office of Community Oriented Policing Services (COPS) released a report called *Gender, Sexuality, and 21st Century Policing: Protecting the Rights of the LGBTQ+ Community*.<sup>126</sup> That publication summarizes the results of a forum that was held in July 2016 on police/LGBT relations, which brought together law enforcement personnel and representatives of LGBT advocacy groups.<sup>127</sup> The report delineates a number of very serious issues regarding LGBT/law enforcement

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with our core values and principles of fairness and justice. Even if there were overall statistical evidence of differential rates of commission of certain offenses among individuals possessing particular characteristics, the affirmative use of such generalized notions by law enforcement officers in routine, spontaneous law enforcement activities is tantamount to stereotyping. It casts a pall of suspicion over every member of certain groups without regard to the specific circumstances of a particular law enforcement activity, and it offends the dignity of the individual improperly targeted. Whatever the motivation, it is patently unacceptable and thus prohibited under this Guidance for law enforcement officers to act on the belief that possession of a listed characteristic signals a higher risk of criminality. This is the core of invidious profiling, and it must not occur.”)

123. *See id.* at 4.

124. *Id.*

125. *See id.* at 11.

126. JAMES. E. COPPLE & PATRICIA M. DUNN, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, GENDER, SEXUALITY, AND 21ST CENTURY POLICING: PROTECTING THE RIGHTS OF THE LGBTQ+ COMMUNITY 2 (2017), <https://ric-zai-inc.com/Publications/cops-w0837-pub.pdf> [<http://perma.cc/Q9PB-ZP47>].

127. *Id.* at 2.

relations, and offers some specific recommendations for reform.<sup>128</sup> An entire section, called “Understanding Data and the Need for Data Collection,” is devoted to discussing the need for improved data collection, noting that “[q]uantifying all these problems is a necessary first step to solving them. Forum participants stressed that data collection and analysis are critical to hiring, policy development, creating an open environment, and reducing bias.”<sup>129</sup>

However, the report immediately notes—but does not really resolve—a tension between the need to improve data collection and LGBT activists’ very reasonable fears about collecting data in ways that make individuals less safe.<sup>130</sup> According to the report:

Departments are beginning to create the infrastructure that will allow them to collect relevant data, but advocacy groups at the forum emphasized that data concerning an individual’s sexual orientation or gender identity should never be collected by law enforcement officers as a matter of course during stops, arrests, or in use of force reports to avoid the unintentional consequences of causing harm or reinforcing existing bias.<sup>131</sup>

The report does contain an Appendix, which gives suggestions for recommended best practices for law enforcement interactions with transgender individuals.<sup>132</sup> The best practices delineated in the Appendix recommend that:

[Law enforcement officers] shall note the name and gender pronoun currently used by individuals as “name and pronoun used” in memo books and on departmental forms, such as arrest forms. All officers shall use the listed “name and pronoun used” when referring to a person in police custody. Members shall not consider or document the name an individual currently uses as

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128. *Id.*

129. *Id.* at 6.

130. *Id.* at 8.

131. *Id.* at 6. Forum participant Andrea Ritchie is also quoted as stating:

We think it’s critical the CDC [Centers for Disease Control] and the [DOJ’s] Bureau of Justice Statistics gather data on LGBTQ+ experiences of policing, and on broader areas in which that LGBTQ+ people experience disproportionate police violence. These things are not captured and need to be captured by federal agencies. What I want to emphasize, though, is that we do not think that law enforcement officers should be collecting data on people’s sexual orientation and gender identity in day-to-day contact. That will increase the exact forms of violence we are talking about. When people mention that their experience was based on LGBTQ+ discrimination, you gather that data separately and in the aggregate and don’t identify people’s names.

See COPPLE & DUNN, *supra* note 126, at 8.

132. *See id.* at 37.

an “alias” or “nickname.” All departmental forms shall allow a space for “Name used” and “Legal Name” (if different from above), in addition to any spaces currently designated for “alias.”<sup>133</sup>

The approach suggested by the COPS report aligns with more recent local law enforcement policies intended to improve police-trans relations. The Philadelphia Police Department (PPD) provides an excellent example of this strategy. In early 2014, the PPD introduced a new directive, called Directive 152, that was meant to provide guidance to officers interacting with members of the transgender community.<sup>134</sup> The directive is progressive in its intention and wide-ranging in its scope, covering issues including the searching of trans individuals, the correct way to address a trans individual, and transportation and housing of arrestees.<sup>135</sup>

Directive 152 also contains a fairly complex rubric for recording the gender classification of an arrestee.<sup>136</sup> In essence, the Directive provides a kind of flowchart for determining what gender to mark down on an arrest report.<sup>137</sup> The decision is contingent on multiple factors, including 1) the gender marker on the arrestee’s government-issued identification, starting with that which appears on arrestee’s driver’s license, and 2) the surgical status of the arrestee.<sup>138</sup>

Certainly, Directive 152 makes an impressive attempt to treat transgender Philadelphians with greater respect than they have historically enjoyed. But as complex and thoughtful as the decision tree for documenting gender seems, there are still only two choices—male and female.<sup>139</sup> Thus, when an individual’s information is taken, the fact that they were perceived as transgender by an officer is still lost, and along with that fact, any possibility of generating meaningful statistics on police profiling. In this way, both federal and local law enforcement best practices afford more dignity to trans individuals by crediting their identities—but at the same time, those best practices render transgender individuals almost entirely invisible.

Philadelphia is one of several major cities, including Los Angeles, Boston, and Washington, D.C., that have similarly reformed

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133. *Id.* at 40.

134. *Commish Talks New Trans Directive*, PHILA. GAY NEWS (Jan. 16, 2014), <http://www.epgn.com/news/local/6836-24400581-commish-talks-new-trans-directive> [<http://perma.cc/6ZC9-98AQ>].

135. *Directive 152*, PHILA. POLICE DEP’T (Dec. 20, 2013), [https://matchbin-assets.s3.amazonaws.com/public/sites/357/assets/55XE\\_Directive152.pdf](https://matchbin-assets.s3.amazonaws.com/public/sites/357/assets/55XE_Directive152.pdf) [<http://perma.cc/XG56-VUYP>].

136. *Id.* at 4–5.

137. *Id.*

138. *Id.*

139. *Id.* at 5.

their practices with respect to dealing with transgender individuals.<sup>140</sup> Curiously, though, activists in some of these communities have reported disappointment with the level of improvement in the trans population's comfort with police.<sup>141</sup> There are several reasons why this could be the case. It is possible, for example, that trans populations have experienced such significant trauma at the hands of law enforcement for so long that they are simply not prepared to begin to trust police at this time, no matter how many policy reforms or gestures of goodwill police engage in. However, it is also possible that there has been little positive change because law enforcement officers understand that, without the ability to generate statistics on the quantity of arrests, citations, or stops of transgender women, there can be no real accountability. In this way, policy reforms that stress self-identification of gender in police record-keeping may be continuing to miss the mark.

So what would be better? An obvious choice would be to add a third box—"transgender"—to the existing "male" and "female" categories. Certainly, this solution would provide the simplest means by which to aggregate data, since one could simply search a database for stops, arrests, or citations of "transgender"-marked individuals. This choice, however, is not the easy fix that it may appear to be at first glance, for three primary reasons.

First, it is unclear how the officer would *know* to mark "transgender" without interrogating the individual with whom the officer

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140. See COPPLE & DUNN, *supra* note 126, at 16.

141. *Id.* at 11 ("Advocacy groups who have engaged in policy development and implementation conclude, 'Though data on this subject is quite limited, the studies that do exist reinforce the point that policy change does not necessarily lead to change on the ground.' Numerous examples of policy implementation support this, including one cited from the District of Columbia: 'For example, in the District of Columbia a 2012 survey of transgender residents, conducted over five years after the Metropolitan Police Department adopted a groundbreaking general order on interactions with transgender people, found that 55 percent of respondents remained uncomfortable speaking to the police. Of those who had interacted with police, a third reported being treated with disrespect.'") (internal citations omitted). *Queer Injustice* and *Stonewalled* author Andrea Ritchie has also noted lack of significant movement on the issue of police/LGBT relations generally, asserting that, "In the decade since Amnesty International conducted the first national study of LGBTQ experiences of policing in the U.S., the patterns of discriminatory policing we identified have continued unabated." HANSENS ET AL., *supra* note 48, at 11. Activists in New York also report little real change despite significant policy reforms. See, e.g., Noah Remnick, *Activists Say Police Abuse of Transgender People Persists Despite Reforms*, N.Y. TIMES (Sept. 6, 2015), <https://www.nytimes.com/2015/09/07/nyregion/activists-say-police-abuse-of-transgender-people-persists-despite-reforms.html> [<http://perma.cc/HB8P-QA78>] ("We're hearing the same sorts of things today that we heard five years ago," said Sharon Stapel, the executive director of the New York City Anti-Violence Project, an advocacy group for lesbian, gay, bisexual and transgender people. "Trans people are still targeted and harassed by the police for being trans.").

interacts. This butts directly against the concerns voiced by advocates that intrusive questioning of trans or LGB individuals could heighten tensions in police-community interactions.<sup>142</sup>

Second, advocates are highly suspicious of collecting and storing data that unequivocally identifies an individual as trans.<sup>143</sup> For example, the *21st Century Policing* report recommends that police

DO NOT collect data on the gender identity, sexual orientation, or gender expression of individuals stopped, searched, subject to use of force or arrested by police officers as part of departmental data “demographic category” data collection (and ensure that definitions of demographic category don’t create loopholes whereby officers could collect this data).<sup>144</sup>

Clearly, there exists a great deal of well-founded trepidation on the part of advocates about what police might do with information about individuals that might be used to harass, intimidate, blackmail, or in any way further marginalize them.

There is a third problem—not all gender variant people identify with the term “transgender.” Although the term “transgender” is generally considered a kind of umbrella term that folds in a variety of identities,<sup>145</sup> not all gender-variant people are comfortable identifying with that term. Some prefer non-binary terms, such as “gender fluid” or “nonbinary,”<sup>146</sup> while others prefer terms like “woman of transgender experience” that foreground their identity as genuine women or men and do not stress their trans status. Thus, while the addition of a single category might begin to address the data collection problem, it will not really provide a reliable fix, and may in fact sow additional friction and confusion in the interaction.

Some observers may be tempted to throw up their hands and suggest that gender categories be eliminated entirely, in order to avoid the mis-gendering of trans and gender variant people, and in order to foster a sense among law enforcement that reliance on strict gender categories is contrary to the reality of gender fluidity. Certainly that suggestion is not out of step with current rethinking of the utility of gender categories generally.<sup>147</sup> However, the authors

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142. See COPPLE & DUNN, *supra* note 126.

143. *Id.* at 59.

144. *Id.*

145. *Transgender*, GLAAD MEDIA REFERENCE GUIDE, <https://www.glaad.org/reference/transgender> [<http://perma.cc/8DKN-766S>].

146. Alice Jones, *Redefining Gender*, NAT’L GEOGRAPHIC MAG. (Jan. 2017), <http://www.nationalgeographic.com/magazine/2017/01/explore-gender-glossary-terminology> [<https://perma.cc/D5FM-SSAQ>].

147. See, e.g., HEATH FOGG DAVIS, *BEYOND TRANS: DOES GENDER MATTER?* (2017).



caution against the wholesale eradication of gender categories, particularly in areas where those categories can be used to track very real discrimination. As Dean Spade observed in his seminal article *Documenting Gender*,<sup>148</sup>

Tools like Census data that are used to evaluate policies aimed at remedying discrimination and exclusion and redistributing government services and support, therefore, need to measure race in ways that do not obscure the existence of communities and issues constituted around those categories. Similarly, we might suggest that in programs collecting data for purposes of evaluating efforts to remedy the impact of long-term discrimination and exclusion of women and transgender people collecting data about gender might be useful. Such data collection could be undertaken with an understanding that what is being measured is the impact of social processes of gender production that result in discrimination and exclusion in contexts where systemic sexism and transphobia exist. Again, as in the health context, the gender categories used in such collection might not simply be “male” and “female” depending on the kind of problems being assessed.<sup>149</sup>

We suggest that data measuring police-community interactions can serve exactly the sort of discrimination-remedying function Spade describes above. Losing the ability to collect any data on gender in this context would be unlikely to have a liberating effect on anyone, and would instead further obfuscate unfair treatment of transgender women.

So what to do, then? There is another choice that the authors ask our readers to consider. We ask that readers consider the possibility of requiring that officers record an individual’s gender based upon the criteria listed in current police directives, but *also* record the officer’s *perception* of the gender of the individual with whom the officer interacts. This could be accomplished in several ways. For example, forms could be redrafted so that they would contain two sections. The first would record the gender of the individual in line with the rules outlined in the most current police policies (like Philadelphia’s Directive 152).<sup>150</sup> The new section would be marked “Gender As Perceived By Officer.” That section would contain boxes marked “male,” “female,” “gender variant,” and possibly an “unknown” or “other” category. The officer would fill out the second section based upon their own subjective perception of the individual’s gender, and would be filled out *without interrogating the individual*.

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148. Dean Spade, *Documenting Gender*, 59 HASTINGS L. J. 731 (2008).

149. Spade, *supra* note 148, at 816.

150. See PHILA. POLICE DEP’T, *supra* note 135.

This solution may feel retrogressive, and dehumanizing to advocates accustomed to pressing institutions to adopt gender markers that correspond to people's *identities* as transgender or gender-nonconforming. It is not intended to be. Instead, it is designed to acknowledge and capture what matters in the law enforcement profiling setting. As unsettling as it is to admit, in cases of profiling or selective enforcement, it simply doesn't matter how its victims identify themselves. All that really matters in that context is *how one is perceived by police*.

Interestingly, this method of identification by perception is an accepted best practice in the context of racial profiling.<sup>151</sup> In 2000, the DOJ put out a handbook for law enforcement called *A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned*.<sup>152</sup> The handbook was intended to assist law enforcement seeking to set up data collections systems that would flag discriminatory policing.<sup>153</sup> The handbook discusses best practices for collecting data, and has specific recommendations for the best way to collect racial data.<sup>154</sup> Notes the handbook:

[D]iscerning race or ethnicity requires either a verbal inquiry of the individual or an officer's subjective determination. Since a verbal inquiry risks exacerbating tensions during a potentially tense encounter, to minimize inconvenience and maximize officer safety, we recommend using the officer's perception of race or ethnicity. Since an officer's perception of race or ethnicity gives rise to the problem of racial profiling, the officer's perception is an appropriate means of ascertaining race or ethnicity. Whether the officer correctly ascertains the race or ethnicity of the driver is less important than being able to analyze whether, having perceived the driver is a person of color, the officer treats the person fairly.<sup>155</sup>

But despite being in line with racial profiling data collection best practices, this suggestion is in tension with current best practices suggestions in the trans and LGB context, as noted *supra*. The authors encourage advocates to consider whether collection only of *perceived* gender identity with a strong prohibition on interrogation might strike a balance between preserving the dignity, safety, and

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151. DEBORAH RAMIREZ, JACK MCDEVITT & AMY FARRELL, *A RESOURCE GUIDE ON RACIAL PROFILING DATA COLLECTION SYSTEMS: PROMISING PRACTICES AND LESSONS LEARNED* (2000).

152. *Id.*

153. *See id.* at iii–iv.

154. *See id.* at 47.

155. *Id.*

privacy of individuals while still encouraging the collection of data that might be useful in reform efforts.

#### CONCLUSION

As demonstrated *supra*, transgender women face enormous challenges in obtaining basic safety and security. Law enforcement should act as partners to members of marginalized communities seeking lives free of violence and victimization. Instead, all available accounts strongly suggest that law enforcement often plays a largely negative role in the lives of transgender women, by exposing them—often unnecessarily—to encounters with the criminal justice system that may well prove destructive or even fatal. In addition, anecdotal evidence suggests that by profiling and harassing transgender women, law enforcement officers frequently force transgender women from some of the only neighborhoods in which they feel safe and welcome.

The authors believe that this problem, while serious, is far from insoluble, so long as it is first made visible through the careful and thorough collection of data. We hope that scholars, advocates, and members of law enforcement consider solutions including, but certainly not limited to, the one that we have suggested.