

A ROADMAP FOR CHANGE:

Federal Policy Recommendations for Addressing the Criminalization of LGBT People and People Living with HIV

RECOMMENDATIONS FOR FEDERAL AGENCIES

by

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Trans Day of Action, organized annually by the Audre Lorde Project, New York City, June 2012.

Courtesy of S. Narasimhan

Stop the Frisk Rally, New Orleans, May 2013. *Courtesy of BreakOUT!*

Trans Day of Action, organized annually by the Audre Lorde Project, New York City, June 2012.

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Community United Against Violence (CUAV) members, staff and board at May Day march. *Courtesy of CUAV*

Community United Against Violence (CUAV) organized Women Against S-Comm rally to show that deportation is a women’s issue and an LGBTQ issue, San Francisco, 2013. *Courtesy of CUAV*

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INTRODUCTION & SUMMARY

Each year in the United States thousands of lesbian, gay, bisexual, transgender, Two Spirit, queer, questioning and gender nonconforming (LGBT)* people and people living with HIV (PLWH)** come into contact with the criminal justice system. According to a recent national study, a startling 73 percent of all LGBT people and PLWH have had face-to-face contact with police during the past five years and 5 percent have spent time in jail or prison—that is markedly higher than the less than 3 percent of the U.S. adult population who are under some form of correctional supervision at any point in time.¹

In fact, LGBT people and PLWH, especially Native and LGBT people and PLWH of color, are significantly overrepresented in all aspects of the penal system, from policing, to adjudication, to incarceration. Yet their experiences are often overlooked, and little headway has been made in dismantling the cycles of criminalization that perpetuate poor life outcomes and push already vulnerable populations to the margins of society. Justice continues to be elusive and conditional for these populations due to a range of unequal laws and policies that dehumanize, victimize, and criminalize them because of their sexual orientation, gender identity, or HIV status.

In short, criminal justice policies perpetuate poor life outcomes for LGBT people and PLWH, even as attitudes toward and acceptance of LGBT people have reached an all-time high. The time is ripe, now more than ever, for the federal government to leverage this momentum and intervene to address the criminalization of LGBT people and PLWH and the harms they face once within the system.

The following is a policy roadmap of actions that the federal government can take to address discriminatory and abusive policing practices, improve conditions for LGBT prisoners and immigrants in detention, de-criminalize HIV, and prevent LGBT youth and adults from coming in contact with the system in the first place.

These recommendations were adapted from *A Roadmap for Change: Federal Recommendations for Addressing the Criminalization of LGBT People and People Living with HIV*, which is one of the first comprehensive publications to offer federal policy recommendations to address the myriad criminal justice issues that impact LGBT people and PLWH. This roadmap was generated in collaboration with over 50 activists, policy advocates, lawyers, and grassroots organizations working on LGBT, criminalization, and racial justice issues at the local, state, and federal levels, and represents their collective wisdom and expertise.²

Specifically, the roadmap is intended to 1) guide federal engagement with federal, state, and local law enforcement agencies, jails, and prisons, 2) inform the implementation of the Prison Rape Elimination Act (PREA), 3) advocate for additional reforms beyond PREA, 4) generate momentum around the LGBT policy priorities that members of this working group have presented to the current Administration over the last four years, 5) highlight and address drivers of criminalization of LGBT people and people with HIV and 6) provide analysis that will serve as a resource for policy makers and advocates alike.

* In this document, we use the term “LGBT” in a manner that is explicitly inclusive of queer identified, questioning, gender non-conforming and Two Spirit people. Two Spirit is a term that refers to a multiplicity of historic and present-day Indigenous gender identities and expressions and sexualities.

** In this document, we use the term “PLWH” to denote individuals living with HIV and AIDS.

Six key topic areas organize the discussion:

Policing and Law Enforcement.

In this section we outline policy reforms that could be implemented by the Department of Justice and other federal government agencies to reduce discriminatory profiling and policing practices, unlawful searches, false arrests and discriminatory targeting of LGBT people and PLWH, and to put an end to the use of condom possession as evidence of intent to engage in prostitution-related offenses or lewd conduct. We also offer recommendations to facilitate the implementation of the new Prison Rape Elimination Act regulations in police lock-ups, and increase safety for LGBT individuals in police custody.

Prisons and Detention Centers.

Here we propose reforms for the Department of Justice and Bureau of Prisons to address issues associated with incarceration including, and beyond, the implementation of the Prison Rape Elimination Act regulations, access to LGBT-inclusive sexual health care (including STI/HIV prevention) and sexual health literacy programs for prisoners, and classification and housing policies.

Immigration-related Issues.

Here we provide recommendations for the Immigration and Customs Enforcement and the Department of Homeland Security to reduce exclusion, profiling, detention, and deportation of LGBT and PLWH immigrants, address conditions of confinement and access to essential general and sexual health care services in immigrant detention centers, ensure adoption of policies within ICE and DHS on LGBT people and PLWH and other serious, chronic health needs in systems; and addressing administrative discretion regarding applicability of prior criminal convictions in immigration hearings.

Criminalization of Youth.

A top predictor of adult involvement with the criminal justice system is youth involvement. Here we outline policy solutions that the Department of Education and Department of Justice can employ to dismantle the school-to-prison pipeline for LGBT youth, eliminate discrimination in family courts, reduce incarceration of LGBT youth, and ensure that youth have access to LGBT-inclusive sexual health services in juvenile detention facilities.

HIV Criminalization.

There are a patchwork of laws around the country that still criminalize consensual sex among PLWH as well as some behaviors such as spitting and biting which pose no measurable risk of HIV transmission. Here we outline updates that are needed to current laws, practices and policies that criminalize HIV exposure, nondisclosure, and transmission.

Drivers of Incarceration.

We know that LGBT people and PLWH experience higher rates of homelessness and poverty, lower levels of education, and high rates of family and community rejection. Here we identify key policy reforms that could be taken up by various federal agencies to address the disparities of LGBT people and people with HIV in the criminal justice system, and the consequences of the criminalization these populations currently face.

We urge policy makers, legislators, and federal agency staff to adopt and advance the components of this roadmap, which represent essential steps towards reducing the criminalization of LGBT people and PLWH.

DEPARTMENT OF DEFENSE (DOD)

ADDRESSING GOVERNMENT-SUPPORTED STIGMA AND DISCRIMINATION IN THE CRIMINAL JUSTICE SYSTEM

- Discontinue use of a service member's HIV diagnosis as the basis for prosecution, enhanced penalties or discharge from military service.

LACK OF ACCESS TO ID AND SOCIAL SERVICES FOR TRANSGENDER PEOPLE

- Adopt clear policies to permit transgender veterans to obtain proof of service that does not show their enlisted name but rather shows their current legal name, in order to protect personal privacy and prevent discrimination and victimization.

DEPARTMENT OF EDUCATION (DOE)

SCHOOL CLIMATE

- Require all districts to adopt enumerated anti-bullying policies that specifically include sexual orientation and gender identity as protected classes, and promote greater understanding and safety for all students without relying on punitive disciplinary measures that exclude students who engage in harassment.
- The Office of Civil Rights (OCR) should expand its data collection efforts to better understand the experience of LGBT youth in schools. This includes adding a question to the Civil Rights Data Collection (CRDC) measure to quantify incidences of bullying, and should also include efforts to collect data on the impact of school discipline policies on LGBT youth.³
- OCR should also further its research on the impact of implicit bias and the discriminatory application of school policies such as dress codes and codes of conduct on LGBT youth and issue guidelines for teachers and administrators on fostering supportive environments that provide resources, and reduce disparities, for LGBT youth as a follow up to the guidance on racial disparities in school discipline policies issued in January 2014.
- Create and disseminate materials to facilitate increased school programming on LGBT issues and HIV-related issues, featuring representations of LGBT and HIV positive people, including LGBT and HIV positive people of color and Indigenous peoples.

SCHOOL DISCIPLINE REFORM

- Eliminate funding of law enforcement officers in schools and promote alternatives including counseling, peer-to-peer accountability mechanisms, and family supports through federal funding.
- Require the adoption of positive behavioral interventions as alternatives to punitive school discipline policies, including in the context of efforts to address bullying in schools, as a condition of federal funding to Local Education Agencies (LEA).
- Promote restorative justice practices, and issue guidance on reentry to reconnect youth with schools rather than pipelining them into alternative programs. The administration should also promote and support passage of the Positive Behavior for Safe and Effective Schools Act⁴ (PBSESA), the Ending Corporal Punishment in Schools Act,⁵ and the Restorative Justice in Schools Act.⁶
- Issue guidance to LEA, law enforcement agencies, and state legislators urging elimination of vague and subjective status offenses such as “willful defiance” and “ungovernability” which are susceptible to biased application by school resource officers.
- Include LGBT youth and Two Spirit youth in all research and recommendations on dismantling the school-to-prison pipeline, including any future work of the Supportive School Discipline Initiative.

DETENTION CENTERS & REENTRY

- Cooperate with the Department of Justice to promote better reentry programs to reconnect youth with schools rather than transitioning them to alternative education centers or continuation schools.
- Alternative education and continuation schools should be regulated by the Department of Education, rather than local juvenile justice systems. These schools should be required to adhere to DoE’s minimum curriculum standards and meet basic graduation and/or GED requirements.

DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS)

HOMELESSNESS AND FOSTER CARE

- As a follow up to the 2011 guidance issued by HHS for foster care agencies on eliminating discrimination on the basis of sexual orientation and gender identity, HHS should extend protections against discrimination based on HIV/AIDS status and marital status in foster care facilities and placements, and provide support to staff and foster families to create safe and welcoming environments for LGBT youth.⁷ HHS should continue to develop programs that foster family acceptance and increase permanency for youth.
- Mandate elimination of exclusions of potential adoptive and foster parents solely because of their sexual orientation, gender identity, or marital status as a condition of receipt of federal funding (no matter which type of organizations states contract with to carry out services with the funding), and expand access to loving, permanent homes.
- Dismantle policies that enable the promotion of gender conformity and/or suppress LGBT youth's ability to express their sexual orientation and gender identity while in state custody, specifically through clothing and grooming.
- Mandate, as a condition of federal funding, that states ensure that LGBT youth are not required or forced to participate in counseling, reparative therapy, programming or religious activities that condemn LGBT people or enforce heterosexuality or normative gender expressions while in foster care.
- Require child welfare agencies to adopt strict confidentiality policies, specifically with respect to a young person's sexual orientation, gender identity, and HIV status, including with respect to parents and guardians, as a condition of receipt of federal funding.
- Strengthen home-based interventions to build strong supportive families to reduce LGBT youth homelessness, and support the Reconnecting Youth to Prevent Homelessness Act, which would improve permanency for older foster care youth and all homeless young people, LGBT or otherwise. Where home-based interventions are not possible, HHS should expand independent living programs focused on building skills for independence rather than mandatory group home-based programs that are frequent sites of violence and harm for LGBT youth. Ensure LGBT youth have decision-making power regarding family reunification or independent living so that they are not relentlessly subjected to abusive homophobic or transphobic family environments.

DETENTION CENTERS & REENTRY

- Mandate, as a condition of federal funding, that states ensure that LGBT youth are not required to, forced to, or incentivized to participate in counseling, therapy, programming or religious activities that condemn LGBT people or enforce heterosexuality or normative gender expressions while in state custody.

ADDRESSING WIDESPREAD IGNORANCE ABOUT THE ROUTES, RISKS, AND CONSEQUENCES OF HIV

- Cooperate with the CDC in mandating development and support of accurate, age-appropriate and LGBT-inclusive HIV and STI literacy programs for students and staff of all federally-supported school systems as a condition of federal funding.
- Health Resources and Services Administration (HRSA) and other responsible federal agencies should require proof of written policies and standards for the provision of sexual health care and HIV inclusive sexual health literacy programs for police lock-ups, juvenile, corrections and detention facilities receiving federal funds. Staff education should include training on avoiding discriminatory enforcement of regulations against PLWH and on maintaining confidentiality about prisoners' HIV statuses.

DRUG POLICY

- Expand funding for evidence-based health approaches to drug use, including harm reduction and drug treatment, and reduce reliance on punishment-centered approaches which consistently increase costs and harms of drug use.⁸
- Support the development of Supervised Injection Facilities to improve the health and safety of people using injection drugs and the communities in which they live and reduce criminal activity.⁹
- Develop anti-LGBT discrimination guidelines for substance use treatment programs and ensure that no one is denied access to treatment because of their sexual orientation or gender identity and that residential substance use programs receiving federal funds are respecting the gender identities of their participants.¹⁰

CRIMINALIZATION OF POVERTY AND HOMELESSNESS

- Provide guidance to states to encourage states to stop taking driver's licenses away from people who are behind on child support.
- Make it optional, rather than mandatory, for applicants for aid to identify co-parents who can be pursued for child support.
- Fund preventative and educational programs about HIV/AIDS at shelters, soup kitchens, and other locations that are easily accessible to homeless people.

- Provide federal funding to implement public hygiene centers, public bathrooms¹¹ and syringe access and overdose prevention programs that significantly improve health outcomes for low-income and homeless people.

LACK OF ACCESS TO ID AND SOCIAL SERVICES FOR TRANSGENDER PEOPLE

- Direct states to eliminate bars to gender confirming health care for transgender people in Medicaid programs, which violate the federal Medicaid statute’s prohibition on diagnosis discrimination.¹²
- Issue clear guidance mandating provision of gender confirming health care for transgender people in private insurance programs in compliance with the Affordable Care Act’s nondiscrimination clause.¹³
- Provide guidance to state welfare agencies about establishing clear and accessible procedures for changing name and gender on public benefits records and preventing discrimination in welfare offices and mandatory job training programs.
- The Substance Abuse and Mental Health Services Administration should follow the example HUD has set by using their general authority over grant program administration to adopt regulations expressly prohibiting discrimination based on sexual orientation and gender identity in federally-funded programs.¹⁴

CRIMINALIZATION OF SEX WORK AND RESPONSES TO TRAFFICKING IN PERSONS

- Eliminate discriminatory Medicare and Medicaid exclusions that limit transgender people’s access to medically appropriate health coverage.

CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC)

ADDRESSING WIDESPREAD IGNORANCE ABOUT THE ROUTES, RISKS, AND CONSEQUENCES OF HIV

- Cooperate with HHS in mandating development and support of accurate, age-appropriate and LGBT-inclusive HIV and STI literacy programs for students and staff of all federally-supported school systems as a condition of federal funding.

- Develop and distribute more direct and explicit public service announcements on the routes, risks and consequences of all sexually transmitted diseases, including HIV, dispelling myths that fuel HIV criminalization, via mainstream and new media.
- Prominently include information on the actual routes, likely relative risks, and consequences of HIV and other STI transmission that reflect real-life risk reduction choices (e.g., oral sex as a very low-to-no-risk alternative; the impact of drug therapies on the already low transmission risk of HIV).

USE OF POSSESSION OF CONDOMS AS EVIDENCE OF INTENT TO ENGAGE IN PROSTITUTION-RELATED OFFENSES

- Issue and publicize guidance condemning reliance on mere possession or presence of condoms as evidence of intent to engage in criminal activity as harmful to sound public health policy and undermining the implementation of public health initiatives, and encouraging local law enforcement agencies to adopt policies prohibiting this practice.
- Publicize and implement the Presidential Advisory Council on HIV/AIDS (PACHA) recommendation against this practice.

ADDRESSING GOVERNMENT-SUPPORTED STIGMA AND DISCRIMINATION IN THE CRIMINAL JUSTICE SYSTEM

- Cooperate with the Department of Justice (DOJ) to fund and support trainings and information sharing about HIV transmission risks and myths to criminal justice personnel, state health departments, and the general public.
- The CDC and the DOJ should release the long-promised joint publication on the current state of HIV criminal law in the United States, including recommendations for how states should evaluate and modernize current laws and prosecution policies relating to HIV.
- Create incentive mechanisms, such as research and prevention project grants, that will encourage states to modernize existing laws criminalizing HIV.¹⁵

SURGEON GENERAL

ADDRESSING WIDESPREAD IGNORANCE ABOUT THE ROUTES, RISKS AND CONSEQUENCES OF HIV

- Create a public awareness campaign including detailed information that both explains the specific routes, relative risks, and modern-day consequence of HIV and STI infection, and dispels myths and ignorance contributing to criminalization of people with HIV.¹⁶ The campaign should reflect the substantial input of medical and research experts on current HIV risk/transmission data in the context of everyday risks and events, and consultation with people affected by HIV and their advocates.

DEPARTMENT OF HOMELAND SECURITY (DHS)

IMMIGRATION

- End Secure Communities (S-Comm) and Criminal Alien Program (CAP), along with other ICE ACCESS programs that require information sharing between local law enforcement agencies and federal immigration authorities and shift immigration enforcement duties to local law enforcement agencies.
- Prioritize the development and implementation of alternatives to detention, and the release of individuals in removal proceedings on their own recognizance. Release for all LGBT individuals should be prioritized to the maximum extent possible. ICE should specifically provide alternatives where existing community-sponsored alternative-to-detention programs are run by the U.S. Conference of Catholic Bishops (USCCB), and generally seek to include LGBT-friendly agencies so that LGBT immigrants who cannot be housed safely in detention may be released.
- Require specialized and culturally appropriate training conducted by community-based advocates and experts, of at least 8 hours annually, on LGBT and HIV issues arising in detention, for all staff in any facility in which ICE holds LGBT immigrants.

VIOLENCE AND ABUSE AGAINST LGBT AND PEOPLE WITH HIV/AIDS IN FEDERALLY FUNDED IMMIGRANT DETENTION FACILITIES

- Immediately begin to implement its Final PREA Rule in all facilities that hold immigration detainees, including contract facilities, and should certify full implementation by May 2015.
- Adopt the NPREC recommendation that ICE make case-by-case determinations about whether to release victims and witnesses to sexual assaults in immigration detention by balancing the danger the detainee may face in custody, the ability of the facility to protect that detainee without transferring or isolating him or her, the potential threat the detainee poses to the community, and the burden of monitoring the individual in the community as an alternative. In many cases, it may be safer for the detainee and less burdensome to the facility to release the detainee who has been a victim of or witnessed sexual abuse in custody. The merits of the detainee's immigration case should not be taken into consideration when making such a determination.¹⁷
- Implement the recommendations of the GAO Report on Immigration Detention, GAO-14-38.
- Provide comprehensive training for officers and contract facility staff on how to identify and protect vulnerable populations, including LGBT individuals and ensure that such training is provided by LGBT community based organizations.

- Issue guidelines ensuring that all family structures are treated equally and LGBT parents or parents of LGBT children are not discriminated against in terms of access to visits, correspondence, video visiting and other necessary steps to both ensure the strength of their family and meet and demands placed on them by local Departments of Social Services.

SEGREGATION AND HOUSING

- Given the tremendous harms demonstrated by the use of solitary confinement, DHS and ICE should end the use of solitary confinement for immigrant detainees.
- Put an end to routine placement of LGBT-identified people in restrictive segregation and/or solitary confinement. Consistent with the September 2013 ICE Segregation Directive, detention facilities should not use a detainee's sexual orientation or gender identity as the sole basis for a decision to place the detainee in involuntary segregation.
- Require ICE to issue periodic reports about placements in segregation and continued use of segregation.¹⁸

MEDICAL CARE

- Ensure all detainees receive access to necessary medical care to the same extent that is available to persons outside of immigration detention.
- Immediately extend the 2011 PBNDS to all facilities which it manages or with which it contracts, and must enforce compliance with these and other applicable medical standards.
- Complete an assessment of medical services available to detainees of all federally-operated immigration detention centers to determine whether people detained in these facilities are afforded the same level of care afforded to people in the custody of other BOP facilities, including but not limited to voluntary and confidential screening, evaluation, counseling and treatment for all sexually-transmitted and infectious diseases, and uninterrupted, confidential access to all appropriate medications and therapy, including HIV-related care and hormone therapy consistent with current federal treatment standards and guidelines. DHS should issue a report for plans to remedy any deficiencies in care by January 2015.
- Ensure that all HIV-positive detainees receive medication immediately upon detention and transfer in a confidential and timely manner consistent with prescribed timing and dosage.
- Ensure all detainees receive hormone and gender affirming medical treatment in a confidential and timely manner, in accordance with prescribed timing and dosage, and consistent with, but not contingent on, pre-detention treatment.
- Ensure regular and comprehensive training of ICE detention officials in appropriate medical treatment for HIV positive and LGBT people in detention.

- Create an independent oversight organization to monitor provision of health care in all facilities that house immigration detainees, including tracking of health care metrics such as morbidity and mortality rates, immunization and preventive health utilization, and other standard measures of quality performance in health care settings.
- Require that health care professionals working in detention facilities report to health organizations, such as the Department of Health and Human Services (HHS), rather than to DHS or for-profit private contractors so that they may maintain clinical independence.
- Address chronic staffing shortages so that health professionals have adequate time to spend with each patient.
- Ensure that lines of accountability for provision of quality health care to individuals in immigration detention are clear to health professionals, patients and security personnel.¹⁹
- Because of the strong evidence that confirms the beneficial impact of drug treatment in detention centers, DHS should ensure that all detainees receive screening, diagnosis and evidence-based treatment for substance use-related conditions, including access to approved opiate replacement therapies.²⁰

IMMIGRATION HEARINGS AND ACCESS TO COUNSEL

- ICE and DHS should partner with state and local government agencies to fund and provide pro bono attorneys for indigent, detained immigrants.

LACK OF ACCESS TO ID AND SOCIAL SERVICES FOR TRANSGENDER PEOPLE

- US Citizenship and Immigration Services should update policies for gender change in federal records and documents to accept certifications from licensed non-physician health care providers.

DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE)

VIOLENCE AND ABUSE AGAINST LGBT AND PEOPLE WITH HIV/AIDS IN FEDERALLY FUNDED IMMIGRANT DETENTION FACILITIES

- Implement the recommendations of the GAO Report on Immigration Detention, GAO-14-38.
- Ensure that immigration detainees have the ability to report sexual assault easily to staff inside and outside the facility; that they receive immediate medical assistance; and that assault evidence-collection kits are available for medical staff at all facilities.
- In consultation with LGBT advocates, ICE should implement its Risk Assessment & Classification Tool, (RACT) nationally to improve its ability to determine self-identified LGBT and HIV positive detainees in the system.

SEGREGATION AND HOUSING

- Given the tremendous harms demonstrated by the use of solitary confinement, DHS and ICE should end the use of solitary confinement for all detainees.
- Release LGBT detainees based on “special vulnerability” status, as contemplated by ICE’s Segregation Directive issued on September 4, 2013.
- All ICE detention facilities should comply with reporting and notice requirements as detailed in the September 2013 ICE segregation directive for detainees held in involuntary administrative segregation. For any segregation of more than 48 hours, require that detainee receives notice, and opportunity to contest segregation.
- Issue periodic reports about placements in segregation and continued use of segregation.²¹

MEDICAL CARE

- Immediately extend the 2011 PBNS Standards to all facilities which it manages or with which it contracts, and enforce compliance with these and other applicable medical standards.

IMMIGRATION HEARINGS AND ACCESS TO COUNSEL

- ICE and DHS should partner with state and local government agencies to fund and provide *pro bono* attorneys for indigent, detained immigrants.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD)

COLLATERAL CONSEQUENCES OF CRIMINALIZATION AND INCARCERATION

- Eliminate public housing guidelines that terminate leases of people convicted of crimes and/or ban people from accessing housing who have criminal convictions.

CRIMINALIZATION OF POVERTY AND HOMELESSNESS

- Provide extra points on the annual homeless assistance funding application to communities that avoid criminalization by instead adopting positive alternatives like housing and supportive services.²²
- Create enforcement mechanism for the Home Affordable Modification Program (HAMP) loan modification to hold banks accountable and require them to actually modify mortgages to amounts that people can afford to pay.

LACK OF ACCESS TO ID AND SOCIAL SERVICES FOR TRANSGENDER PEOPLE

- Clarify that homeless shelter programs receiving federal funding must provide placement based on a resident's current gender identity, rather than birth assigned gender, unless the individual requests a different placement because of safety concerns, consistent with the Fair Housing Act and the HUD Equal Access Rule.²³

POLICING HOMELESSNESS

- Leverage federal funding to discourage criminalization of homelessness and poverty through enforcement of anti-panhandling laws, laws prohibiting sitting or lying on sidewalks, loitering and vagrancy laws.²⁴ This could include providing bonus points in applications for funding for communities that do not engage criminalization of homelessness and pursue alternate solutions to housing instability along the lines of Utah's Housing First Program.²⁵

DEPARTMENT OF JUSTICE (DOJ)

PROFILING

- Expand guidance on profiling by federal law enforcement agents to prohibit profiling based on actual or perceived sexual orientation, gender, gender identity and expression, disability, immigration, housing, marital and HIV status and promptly issue and enforce an updated directive to federal law enforcement agents to that effect.
- All federal law enforcement agencies, including Immigration and Customs Enforcement (ICE), should adopt anti-discrimination and anti-profiling provisions of recent consent decrees entered into by the (DOJ) with the New Orleans Police Department (NOPD) and the Commonwealth of Puerto Rico (PRPD) prohibiting the use of race, color, ethnicity, national origin, immigration status, religion, gender, disability, sexual orientation or gender identity as a factor, to any extent or degree, in establishing reasonable suspicion or probable cause, exercising discretion to conduct a warrantless search or seek a search warrant, or effecting arrest except as part of an actual and apparently credible description of specific suspect or suspects in a criminal investigation.²⁶
- Make promulgation and compliance with policies consistent with the above referenced anti-discrimination and anti-profiling provisions of recent consent decrees entered into by the Department of Justice with the NOPD and the PRPD a condition of federal funding to local law enforcement agencies.²⁷
- Make collection of data concerning stops, frisks, and searches of pedestrians and motorists a condition of federal funding to local law enforcement agencies, promulgate guidelines for data collection, and collect and publish this data on an annual basis.

POLICING HOMELESSNESS

- Issue guidance to state and local governments on the constitutionality and cost-effectiveness of anti-homeless ordinances, intervene in litigation challenging such ordinances, incorporate investigation of civil rights abuses of homeless people as a standard practice in federal pattern and practice investigations, and include provisions addressing discriminatory policing of homeless people in federal consent decrees.²⁸
- Promote and support enactment of federal, state and local legislation prohibiting profiling discrimination by law enforcement based on housing status.²⁹

POLICE DETENTION

- Aggressively pursue enforcement of existing PREA standards for police lock-ups.
- Issue a clarification that the definition of “lock-ups” contained in the PREA regulations includes police cars and other temporary locations of police detention.

- Initiate new rulemaking pursuant to PREA that would more closely harmonize the PREA provisions pertaining to police lockups with those pertaining to adult jails and prisons, including augmenting provisions related to access to victim advocates, response planning, training and education, and screening for risk of sexual victimization and abusiveness, to police lock-ups.
- Amend PREA regulations to include an explicit prohibition on search for the sole purpose of determining genital characteristics in police lock-ups, regardless of whether conducted as part of a broader medical examination, and regardless of whether genital characteristics are known.³⁰
- Provide necessary guidance regarding searches and placement of transgender and gender non-conforming individuals in police custody, and issue a clarification through the Frequently Asked Questions section on the PREA Resource Center’s website³¹ indicating that that transgender people must be allowed to specify the gender of the officer they would prefer to be searched by in the event a search is legally justified and necessary.³²
- The Bureau of Justice Statistics (BJS) should develop a survey analogous to the National Inmate Survey (NIS) that would enable annual data collection concerning reports of sexual harassment and assault in police custody by mandating that selected agencies participate in the survey as a condition of receiving federal funding.
- Federal law enforcement agencies should adopt policies aimed at documenting, preventing, and addressing sexual harassment, abuse, and assault by local law enforcement agents which are consistent with the recommendations of the International Association of Chiefs of Police (IACP).³³
- Condition federal funding to local law enforcement agencies on adoption of policies aimed at documenting, preventing, and addressing sexual harassment, abuse, and assault by local law enforcement agents which are consistent with the IACP recommendations.³⁴
- Condition federal funding to local law enforcement agencies on adoption of provisions of NOPD and PRPD consent decrees with respect to regulation of consent searches.³⁵
- Consult with groups who have successfully advocated for local policies to promulgate guidance for local law enforcement agencies relating to placement, searches, and interactions with transgender and gender non-conforming individuals consistent with those contained in NOPD and PRPD consent decrees,³⁶ and make adoption of policies consistent with the guidance a condition of receipt of federal funding.

USE OF POSSESSION OF CONDOMS AS EVIDENCE OF INTENT TO ENGAGE IN PROSTITUTION-RELATED OFFENSES

- Issue and publicize guidance condemning reliance on mere possession or presence of condoms as evidence of intent to engage in criminal activity as harmful to sound public health policy and undermining the implementation of public health initiatives, and encouraging local law enforcement agencies to adopt policies prohibiting this practice.
- Publicize and implement the Presidential Advisory Council on HIV/AIDS (PACHA) recommendation against this practice.

DISCRIMINATION AND VIOLENCE INSIDE PRISONS AND RELATED FACILITIES

- Amend the PREA regulations to require prisons to eliminate bans on consensual sex among incarcerated people. Current BOP policy authorizes prison administrators to ban consensual sex among people in custody, which undermines PREA's goals by discouraging prisoners from reporting sexual violence. In some cases, people who have claimed that they were raped have been punished for purportedly engaging in consensual sex after staff determined that their claim was unsubstantiated.³⁷ DOJ should convene a working group of relevant agency personnel and outside experts, including people who have been incarcerated and survivors of sexual assault, to recommend modifications to BOP's existing policy with the purpose of creating a policy that allows for appropriate, consensual sexual contact among prisoners but does not undermine the purposes of PREA or authorize relationships between a prisoner and a prison staff member. The group should also investigate and address instances of prison staff using PREA as a pretext for punishing non-sexual displays of affection, which tend to be based on homophobia and transphobia.³⁸
- Issue a clarification through the Frequently Asked Questions section on the PREA Resource Center's website³⁹ indicating that transgender people must be allowed to specify the gender of the officer they would prefer to be searched by in the event a search is legally justified and necessary.⁴⁰
- Amend PREA regulations to include an explicit prohibition on search for the sole purpose of determining genital characteristics, regardless of whether genital characteristics are known or whether as part of a broader medical examination.⁴¹

IMMIGRATION

- Work with the Administration and Congress to remove the one-year application deadline for asylum application.
- Ensure that asylum applicants are not detained while their applications are pending.
- Prioritize the development and implementation of alternatives to detention, and the release of individuals in removal proceedings on their own recognizance. Release for all LGBT individuals should be prioritized to the maximum extent possible. ICE should specifically provide alternatives where existing community-sponsored alternative-to-detention programs are run by the U.S. Conference of Catholic Bishops (USCCB), and generally seek to include LGBT-friendly agencies so that LGBT immigrants who cannot be housed safely in detention may be released.

IMMIGRATION HEARINGS AND ACCESS TO COUNSEL

- In the absence of broad-based access to counsel, the Executive Office for Immigration Review (EOIR) at the Department of Justice should expand the Legal Orientation Program (LOP), to make it nationally available.

HOMELESSNESS AND FOSTER CARE

- Office of Juvenile Delinquency and Prevention (OJJDP) should issue guidance discouraging the arrest and detainment of truant and homeless youth simply because they are truant and/or homeless.

SCHOOL DISCIPLINE REFORM

- Provide guidance to state and local legislators and law enforcement on truancy policies to stop penalizing youth for being out of school, loosen day-time curfew restrictions, and eliminate police enforcement of truancy laws through police sweeps and arrests of youth for minor offenses.
- Include LGBT youth and Two Spirit youth in all research and recommendations on dismantling the school-to-prison pipeline, including any future work of the Supportive School Discipline Initiative.

JUVENILE JUSTICE

- Issue guidance to states with respect to age of consent laws. These laws expose adolescents to sanctions for engaging in consensual sexual behavior with other adolescents.
- Support and promote amendment of the Sex Offender Registration and Notification Act (SORNA) to exclude youth who are convicted of sex-based offenses from mandatory sex offender registration.
- Issue guidance on parole regulations that discourages the use discriminatory “special parole regulations” which restrict gender identity or sexual expression such as restrictions on clothing.
- Provide guidance to states and localities regarding training and resources for juvenile professionals (including judges, defense attorneys, prosecutors, probation officers, and detention staff) regarding the unique societal, familial, and developmental challenges confronting LGBT youth and the relevance of these issues to court proceedings.
- Issue guidance to states on improvement of juvenile court procedures to streamline case processing, reduce length of stay in custody, expand the availability of non-secure program slots, and ensure that interventions with youth are timely and appropriate.
- Mandate automatic and free expungement of juvenile criminal records once youth turn 21.
- Provide federal guidance to states and localities regarding the development of alternatives to youth incarceration including prevention and diversion,⁴² and elimination of excessive sentencing which effectively replicates sentences of juvenile life without parole struck down by the U.S. Supreme Court.
- Issue guidance with respect to the impacts of criminal gang injunctions, including the impacts of youth profiling and racial profiling, and constitutional challenges to curfew laws.⁴³

- Issue guidance to states encouraging judicial discretion to consider a young person’s unique circumstances, such as age, maturity, role in the charged offense, and dependency on any adult involved in the offense.
- Issue guidance to states with respect to addressing “placement delay” where youth remain incarcerated despite a court order directing alternate placement. This is particularly important to LGBT youth in light of family rejection and the dearth of programs that are appropriate or welcoming to LGBT and gender non-conforming youth.
- Issue federal guidance to states encouraging them to change Medicaid procedures that pose a barrier to health care access for youth coming out of custody.⁴⁴
- Federal resources for Tribal juvenile justice should be consolidated in a single Federal agency within the DOJ, allocated to Tribes in block funding rather than unpredictable and burdensome grant programs, and provided at a level of parity with non-Indian systems. Tribes should be able to redirect funds currently devoted to detaining juveniles to more demonstrably beneficial programs, such as trauma-informed treatment and greater coordination between Tribal child welfare and juvenile justice agencies. Additionally, regardless of whether they are in Federal, State, or Tribal juvenile justice systems, Native youth brought before juvenile authorities for behavior that took place in Tribal communities should be provided with trauma-informed screening and care within a reasonable distance from the juvenile’s home which may entail close collaboration among juvenile justice agencies, Tribal child welfare, and behavioral health agencies. A legal preference should be established in State and Federal juvenile justice systems for community-based treatment of Indian country juveniles rather than detention in distant locations.

DETENTION CENTERS & REENTRY

- Cooperate with the Department of Education to promote better reentry programs to reconnect youth with schools rather than transitioning them to alternative education centers or continuation schools.
- Alternative education and continuation schools should be regulated by the Department of Education, rather than local juvenile justice systems. These schools should be required to adhere to DoE’s minimum curriculum standards and meet basic graduation and/or GED requirements.
- Issue guidance on how to ensure that all youth in custody have access to quality education that is inclusive of information and resources on sexual orientation and gender identity and LGBT histories, including histories of LGBT people of color and Native LGBT people.
- Mandate adoption of anti-discrimination policies prohibiting harassment based on actual or perceived sexual orientation or gender identity by staff and juveniles at all juvenile detention centers and prisons with effective grievance procedures, as a condition of receipt of federal funding.
- Issue guidance on incorporation of LGBT-inclusive sexual health care, including condom access and education and access to gender affirming treatment, including hormone treatment, into basic medical services provided to all young people in state detention/juvenile facilities.⁴⁵

- Juvenile justice facilities and law enforcement officers should not hold LGBT youth in isolation, even if it is intended as a means of protection. This type of isolation is a form of segregation and has the potential to cause extensive psychological damage.

ADDRESSING GOVERNMENT-SUPPORTED STIGMA AND DISCRIMINATION IN THE CRIMINAL JUSTICE SYSTEM

- Cooperate with the Centers for Disease Control (CDC) to fund and support trainings and information sharing about HIV transmission risks and myths to criminal justice personnel, state health departments, and the general public.
- The CDC and the DOJ should release the long-promised joint publication on the current state of HIV criminal law in the United States, including recommendations for how states should evaluate and modernize current laws and prosecution policies relating to HIV.

COLLATERAL CONSEQUENCES OF CRIMINALIZATION AND INCARCERATION

- The Administration should lead efforts to eliminate sex offender registries. The Department of Justice should provide guidance to states about the efficacy of shifting resources from registration programs toward prevention programs.⁴⁶

CRIMINALIZATION OF POVERTY AND HOMELESSNESS

- Issue guidance encouraging the use of crisis response teams that can direct people to services and away from law enforcement and the criminal justice system.⁴⁷
- The federal government should review its grant programs, particularly community policing grants at DOJ, to ensure that federal funds support positive efforts to end homelessness, and are not being used to support criminalization. The DOJ Civil Rights Division should actively support legal challenges to ordinances that unconstitutionally criminalize homeless people.⁴⁸

LACK OF ACCESS TO ID AND SOCIAL SERVICES FOR TRANSGENDER PEOPLE

- Provide guidance to state criminal courts regarding ensuring that mandatory programs, such as drug treatment programs, are non-discriminatory and place transgender patients according to current gender identity.

CRIMINALIZATION OF SEX WORK AND RESPONSES TO TRAFFICKING IN PERSONS

- Offer guidance to local law enforcement agencies with respect to policies and practices that place survivors of trafficking at greater risk, such as the widespread confiscation and use of condoms as evidence of intent to engage in prostitution-related offenses.⁴⁹
- Provide guidance for local law enforcement agencies with respect to enforcement of prostitution and anti-trafficking laws encouraging deprioritization of arrest-based responses.

DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS (BOP)

DISCRIMINATION AND VIOLENCE INSIDE PRISONS AND RELATED FACILITIES

- Provide guidance clarifying that federal regulations that prohibit discrimination based on “sex” include gender identity and expression-based discrimination.⁵⁰ This guidance should explicitly discuss examples of discrimination experienced by transgender and gender non-conforming prisoners and describe how it is to be avoided. This guidance should also recognize the right to identify in culturally specific ways such as Two-Spirit and tribal specific forms of gender identity and expression, and the forms of discrimination targeting individuals who express these identities.
- Amend regulations to explicitly add sexual orientation, gender identity, marital status and HIV status to the forms of discrimination that federal law prohibits.⁵¹
- Ensure that prison visitation policies, including conjugal visitation policies, do not permit discrimination or harassment on the basis of sexual orientation, gender identity or marital status.

HEALTH AND NUTRITION

- Ensure that LGBT-inclusive sexual health care is available as part of essential medical care in its facilities, and make condoms and other barriers freely available to federal prisoners as part of basic sexual health care and sexual health care literacy programs. BOP should also provide guidance⁵² to states and local recipients of federal law enforcement funding on the elements of basic sexual health care and literacy programming that includes condom availability in all facilities of confinement.⁵³

- Ensure all prisoners and detainees receive access to quality necessary medical care, including continuity of care during transfers between facilities and after release, access to treatment based on contemporary medical standards, and full informed consent for all treatment.⁵⁴ This should include screening, diagnosis, and evidence-based treatment for substance use-related conditions, including access to approved opiate replacement therapies such as methadone and buprenorphine. Prisoners who were previously receiving treatment with methadone or buprenorphine before incarceration should be continuously maintained on it throughout intake to any correctional facilities.⁵⁵
- Complete an assessment of current practices to ensure that all prisoners with HIV receive regular evaluation and therapy consistent with current Department of Health and Human Services (HHS) treatment standards and guidelines and receive prescribed HIV medications immediately upon detention and transfer in a confidential and timely manner consistent with prescribed timing and dosage.
- Ensure regular and comprehensive training of prison officials in the appropriate medical treatment for HIV-positive and LGBT prisoners and detainees.
- Create rules and guidance ensuring that prisoners have access to gender appropriate clothing and grooming items, which are often particularly denied to transgender prisoners. The BOP should use the New York Office of Children and Family Services (OCFS) policy as a model.⁵⁶
- Ensure that all confinement facilities follow standards set by the Department of Agriculture (USDA) and the CDC on nutritional adequacy for all people in custody, with an emphasis on creating menus that reflect the needs of people living with long-term illness, pregnant people, people with HIV, young people, and people over the age of 50.⁵⁷ Specific attention should be paid to resolving current problems of inadequate nutrition and lack of physical activity for prisoners in solitary confinement.⁵⁸

ACCESS TO PROGRAMMING

- Ensure meaningful access to libraries and educational programs for prisoners in Federal prisons and provide guidance for such access in state and local facilities, including youth facilities. Access to the internet, to LGBT educational materials and publications, materials relevant to a racially and religiously diverse set of populations, cultural supports and Native-specific programming, mental health resources, and programs designed to prepare prisoners for release should be provided.⁵⁹ People in solitary confinement, protective custody, or other types of segregation should also have access to such materials and programs.

PLACEMENT WITHIN PRISON FACILITIES

- PREA regulations extend important new protections to transgender people, including limitations on segregated housing.⁶⁰ Consistent with these regulations, BOP should eliminate involuntary placement in protective custody in federal prisons and DOJ should provide guidance to state and local jurisdictions to do the same. Such placement is regularly used to effectively place LGBT prisoners in solitary confinement.⁶¹

- Eliminate all forms of solitary confinement in federal prisons and the DOJ should provide guidance to state and local facilities to eliminate such placements, sometimes called “Intensive Management Units,” “Communication Management Units,” “Special Housing Units,” “Security Housing Units.” LGBT prisoners, including youth, and prisoners with HIV and/or other serious health conditions are regularly placed in such units at the discretion of prison staff for long periods without justification, due process or outside oversight. Such placement causes significant psychological harm and adverse health outcomes including suicidality.⁶²
- Make transparent and enable engagement of transgender advocates in determinations of whether to place transgender prisoners in women’s or men’s facilities.⁶³ PREA regulations require officials to make case-by-case decisions that are not solely based on anatomy, and to give serious consideration to the individual’s own views as to his or her safety.⁶⁴ However, significant challenges remain regarding the pace of implementation of these requirements as well as the process for making the determination. BOP should ensure that this process is meaningful by making it transparent, disclosing statistics on the assignment of transgender people and the preferences that they expressed, and inviting advocates from the transgender community to play a role in the review process.

DEPARTMENT OF LABOR (DOL)

CRIMINALIZATION OF POVERTY AND HOMELESSNESS

- Establish sexual orientation and gender identity and expression non-discrimination guidelines for Job Corps sites and One-Stop Career Centers.

DEPARTMENT OF STATE (DOS)

LACK OF ACCESS TO ID AND SOCIAL SERVICES FOR TRANSGENDER PEOPLE

- Update policies for gender change in federal records and documents to accept certifications from licensed non-physician health care providers.

DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION (VA)

LACK OF ACCESS TO ID AND SOCIAL SERVICES FOR TRANSGENDER PEOPLE

- Update policies for gender change in federal records and documents to accept certifications from licensed non-physician health care providers.
- Eliminate bars to gender confirming health care for transgender people receiving their healthcare through VA benefits.⁶⁵
- The Veterans' Administration and other federal agencies should follow the example HUD has set by using their general authority over grant program administration to adopt regulations expressly prohibiting discrimination based on sexual orientation and gender identity in federally-funded programs.⁶⁶

OFFICE OF PERSONNEL MANAGEMENT (OPM)

LACK OF ACCESS TO ID AND SOCIAL SERVICES FOR TRANSGENDER PEOPLE

- Update policies for gender change in federal records and documents to accept certifications from licensed non-physician health care providers.

SOCIAL SECURITY ADMINISTRATION (SSA)

LACK OF ACCESS TO ID AND SOCIAL SERVICES FOR TRANSGENDER PEOPLE

- Update policies for gender change in federal records and documents to accept certifications from licensed non-physician health care providers.

WHITE HOUSE DOMESTIC POLICY COUNCIL (DPC)

PROFILING

- Support and promote passage of the End Racial Profiling Act, with provisions inclusive of prohibitions on profiling based on gender, gender identity and expression, and sexual orientation.

DISCRIMINATION AND VIOLENCE INSIDE PRISONS AND RELATED FACILITIES

- Initiate, support and promote legislation that would create a private right of action to enforce the PREA regulations.
- Work with Congress to reform the Prison Litigation Reform Act (PLRA). The PLRA creates significant obstacles for prisoners seeking redress for harm and violence, including sexual violence. Reforms should include repeal of the physical injury requirement, repeal or amendment of the exhaustion requirement, and repeal of the provisions extending the law to children.⁶⁷

IMMIGRATION

- Work with the Department of Justice and Congress to remove the one-year application deadline for asylum application.
- Support and promote the elimination of annual deportation and detention quotas, and should clarify that ICE's 34,000 "bed quota" does not mandate ICE to fill the Congressionally authorized detention beds.
- Enact a moratorium on deportations.
- Support and promote legislative changes that would increase discretion to immigration judges to make individualized custody determinations based on flight and safety risks, to set bonds or to order a less restrictive form of custody.⁶⁸
- Develop, support and promote legislation that would eliminate the ban on entry and immigration based on prior involvement in prostitution or drug related offenses.
- Seek to amend the Deferred Action for Childhood Arrivals (DACA) program requirements to eliminate the "serious misdemeanor" disqualification ground for youth who would otherwise be eligible.
- Seek to amend the DACA program requirements to eliminate the age requirement for eligibility.

IMMIGRATION HEARINGS AND ACCESS TO COUNSEL

- Develop, support and promote statutory change to ensure access to counsel at the government's expense for all indigent immigrants, particularly where facing detention and deportation.⁶⁹

SCHOOL DISCIPLINE REFORM

- Promote and support passage of the Positive Behavior for Safe and Effective Schools Act⁷⁰ (PBSESA), the Ending Corporal Punishment in Schools Act,⁷¹ and the Restorative Justice in Schools Act.⁷²

JUVENILE JUSTICE

- Support and promote reauthorization of the Juvenile Justice and Delinquency Prevention Act (JJDP A) to include key items essential to LGBT youth:
 - Deinstitutionalize status offenses, including removal of the valid court order (VCO) and Interstate Compact exceptions.
 - Update Disproportionate Minority Contact mandate to require states to take concrete steps to reduce racial and ethnic disparities in the juvenile justice system which will also benefit LGBT youth in the system who are predominately youth of color and Native youth.
 - Expand training, technical assistance, and research and evaluation to include LGBT and Two Spirit youth.
 - Mandate that juvenile justice facilities ensure that all policies, practices, and programs recognize the unique needs of LGBT and Two Spirit youth.
- Support and promote passage of the Youth PROMISE Act.⁷³
- Initiate, support and promote amendment of the Indian Child Welfare Act (ICWA) to provide that when a state court initiates any delinquency proceeding involving an Indian child for acts that took place on the reservation, all of the notice, intervention, and transfer provisions of ICWA will apply. For all other Indian children involved in state delinquency proceedings, ICWA should be amended to require notice to the Tribe and a right to intervene.⁷⁴

DRUG POLICY

- Initiate, support and promote legislation to reduce and eliminate mandatory minimum sentences for drug offenses at the federal and state levels, and specifically support passage of the Smarter Sentencing Act.⁷⁵
- President Obama should use his pardon power to release individuals convicted of drug offenses.⁷⁶

- Work with Congress to restore federal funding to syringe exchange programs. The CDC and other agencies should promote syringe exchange as a useful tool for reducing HIV infection and drug use.⁷⁷
- Oppose drug testing for food stamps and other benefits. Drug testing is costly and ineffective.⁷⁸

COLLATERAL CONSEQUENCES OF CRIMINALIZATION AND INCARCERATION

- Work with Congress to repeal the Souder Amendment and restore access to federal financial aid to students with drug convictions.
- Work with Congress to eliminate the exclusion of people with a felony drug conviction from receiving food stamps and public assistance.⁷⁹
- Ban questions about criminal history in applications and interviews for federal jobs, and initiate, support and promote federal “ban the box” legislation to prohibit such practices nationally.⁸⁰
- Develop, support and promote legislation that would eliminate federal bans on access to public housing, Temporary Assistance for Needy Families (TANF) benefits and Medicaid for people with criminal convictions.⁸¹
- Lead efforts to eliminate sex offender registries. DOJ should provide guidance to states about the efficacy of shifting resources from registration programs toward prevention programs.⁸²

CRIMINALIZATION OF POVERTY AND HOMELESSNESS

- Reduce obstacles to public benefits for people in need by taking the following actions, or encouraging state and local agencies to take these actions, to the greatest extent possible under current law:
 - Provide guidance to states to remove barriers to LGBT individuals and families applying for public assistance and expanding eligibility criteria for public assistance to recognize LGBT families.⁸³
 - Increase and expand eligibility for cash assistance, remove time limitations and family caps on receiving cash assistance, and remove restrictions on immigrants receiving assistance.
 - Remove the requirement for states to implement measures to control welfare fraud established by the Personal Responsibility and Work Opportunity Reconciliation Act.
 - Increase SNAP benefits.⁸⁴
 - Shift the Department of Agriculture’s (USDA) -Food and Nutrition Service (FNS) priorities away from food stamp fraud. The current focus on food stamp fraud is producing sweeping prosecutions in some states resulting in lost benefits to many beneficiaries. FNS should also direct states that two people who use the same address should not be presumed to share the same household for the purpose of investigating food stamp fraud.⁸⁵

- Enhancing enforcement of language access requirements in the food stamp program to prevent programs from turning people away who do not speak English.
- Provide guidance to states encouraging them to reduce or eliminate sanctions regimes that suspend TANF and Supplemental Nutrition Assistance Plan SNAP to people in need, and encouraging them to entirely eliminate sanctions tied to housing subsidies which contribute to homelessness.⁸⁶
- Eliminate work requirements in TANF, retaining job training and other skills building services. While work requirements remain, students should be exempted.
- Develop new HUD guidelines that eliminate barriers to public housing for people based on a history of criminalization.⁸⁷
- Increasing funding for homeless shelters, supportive housing programs, voluntary drug rehabilitation and mental health services, earmarking some funding for training programs to reduce discrimination against LGBT people and PLWH in such programs.⁸⁸
- Lead efforts to reassess the federal poverty measure to better capture the realities of individuals and families in need.⁸⁹
- Expand the Earned Income Tax Credit to reach more workers, including childless workers.⁹⁰

LACK OF ACCESS TO ID AND SOCIAL SERVICES FOR TRANSGENDER PEOPLE

- Finalize the updated Model State Vital Statistics Act and include an administrative process for gender change on birth certificates based on certification by a licensed health care provider (similar to recent District of Columbia legislation).

CRIMINALIZATION OF SEX WORK AND RESPONSES TO TRAFFICKING IN PERSONS

- Develop, promote and support legislation that would increase federal funding for affordable housing and improve access to public housing Section 8 vouchers for LGBT youth and adults.
- Support and promote passage of immigration reform legislation that does not place LGBT immigrants at greater risk of enforcement action or deportation by condoning or legitimizing profiling, or through implementation of the Secure Communities (S-Comm) Program and Criminal Alien Program (CAP).
- Federal funding to combat human trafficking allocated through the Federal Strategic Action Plan to Combat Trafficking in Persons (SAP) should be prioritized to meeting critical needs identified by survivors of trafficking themselves over law enforcement based responses.⁹¹ Grants awarded pursuant to the SAP should prioritize resourcing non-judgmental, harm reduction based services which recognize the uniqueness and complexity of each individual's experiences, as

well as the multiple gender, racial, and cultural identities of survivors of all forms of trafficking. Access to services should not be premised on recognition or identification as a “victim,” a status that continues to be denied LGBT survivors of trafficking and other forms of violence due to predominant narratives.

- Develop, promote and support an amendment to the Trafficking Victims Protection Reauthorization Act (TVPRA) to eliminate mandatory collaboration with law enforcement in order to obtain immigration relief or services. Such collaboration often presents a significant barrier to access to services for all survivors of trafficking, and particularly for LGBT youth and adults who are routinely denied help by law enforcement agencies or profiled as perpetrators of violence or subjected to dual arrest even as they are targets of violence.⁹²
- Involve survivors of all forms of trafficking, including LGBT youth and adults, in every aspect of implementation of SAP from awareness raising to assessment and evaluation of outreach materials and identification practices, to identification of barriers to housing, immigration benefits, legal services, and medical care, to identification of research priorities. Mechanisms to ensure involvement of LGBT survivors of labor trafficking and coerced involvement in the sex trades as well as of LGBT youth who have experienced homelessness, involvement in the sex trades, or both should take place through transparent public processes rather than closed “invitation only” events should be prioritized.
- Seek additional input for SAP from organizations working with Two Spirit and Indigenous youth and adults.
- Partnerships with faith-based organizations promoted through SAP must be premised on an established track record of LGBT affirming services and approaches, excluding faith-based organizations which promote “reparative therapy” or otherwise offer anti-LGBT services.
- Establish a task force to investigate the impact of criminalization of involvement in the sex trades on public health, safety, budgets, and the economy, and examine alternative approaches to addressing harms to individuals in the sex trades by reducing poverty, homelessness and basic needs in populations most represented in the sex trades.
- Ensure full implementation of Recommendation 86 of the UN Human Rights Commission pursuant to the 2011 Universal Periodic Review of the U.S. government’s compliance with international human rights instruments and take concrete steps to eliminate violence against sex workers.

ENDNOTES

- 1 Lambda Legal, “Protected and Served? Survey of LGBT/HIV Contact with Police, Prisons, Courts and Schools” (2014) (fact sheet with preliminary findings on file with authors).
- 2 For the list of collaborators, see the full brief, *A Roadmap for Change: Federal Recommendations for Addressing the Criminalization of LGBT People and People Living with HIV*, at [INSERT WEBSITE ADDRESS].
- 3 Several of the authors expressed concern with data collection by school administrators regarding students’ sexual orientation and gender identity and potential risks and privacy concerns such practices may present for youth. Any data collection protocols must include strict safeguards to ensure that student privacy and safety is protected, and that individual student records are destroyed up on graduation or departure from schools.
- 4 Positive Behavior for Safe and Effective Schools Act, HR. 2597, 111th Cong. (2009).
- 5 Ending Corporal Punishment in Schools Act, HR 2027, 112th Cong. (2011).
- 6 Restorative Justice in Schools Act of 2011, H.R. 415, 112th Cong. (2011).
- 7 See Shannan Wilber, Caitlin Ryan, and Jody Marksamer, “Best Practice Guidelines for Serving LGBT Youth in Out-of-Home Care” (Washington: Child Welfare League of America, 2006), available at <http://www.ncrights.org/wp-content/uploads/2013/07/bestpracticeslgbtyouth.pdf>; “Model Policy & Practice Guideline for Providing Non-Discriminatory Services to Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Justice Facilities” (San Francisco: National Center for Lesbian Rights, 2008), available at http://www.ncrights.org/wp-content/uploads/2013/07/LGBT_POLICY_final_9_18_8.pdf.
- 8 “Drug Courts Are Not the Answer: Toward a Health-Centered Approach to Drug Use” (Drug Policy Alliance, 2011), available at http://www.drugpolicy.org/sites/default/files/Drug%20Courts%20Are%20Not%20the%20Answer_Final2.pdf.
- 9 Drug Policy Alliance, “Supervised Injection Facilities” (2012), available at http://www.drugpolicy.org/sites/default/files/DPA_Fact%20Sheet_Supervised%20Injection%20Facilities.pdf.
- 10 John Caher, “Judge Says Transgender Woman May Sue Drug Treatment Program or Bias,” *New York Law Journal*, December 12, 2013, <http://www.newyorklawjournal.com/id=1202632099779/Judge-Says-Transgender-Woman-May-Sue-Drug-Program-for-Bias?slreturn=20140212165439>.
- 11 For example, “Urban Rest Stop,” available at <http://www.urbanreststop.org/>; “The Portland Loo,” available at <http://www.portlandoregon.gov/bes/59293>.
- 12 42 C.F.R. § 440.230; Pooja S. Gehi and Gabriel Arkles, “Unraveling Injustice: Race and Class Impact of Medicaid Exclusions of Transition-Related Health Care for Transgender People,” *Sexuality Research & Social Policy* 4 (4) (2007); Dean Spade, Gabriel Arkles, Phil Duran, Pooja Gehi, & Huy Nguyen, *Medicaid Policy & Gender-Confirming Healthcare for Trans People: An Interview with Advocates*, 8 *Seattle J. Soc. Just.* 497 (2010); Nicole M. True, *Removing the Constraints to Coverage of Gender-Confirming Healthcare by State Medicaid Programs*, 97 *Iowa L. Rev.* 1329 (2011); Daphna Stroumsa, MD, MPH, “The State of Transgender Health Care: Policy, Law and Medical Frameworks,” *American Journal of Public Health*, March 2014, Vol 104, No. 3, p. e31-e38.. “When Health Care Isn’t Caring: Transgender and Gender Non-Conforming People, Results from Lambda Legal’s Health Care Fairness Survey,” Lambda Legal Defense and Education Fund, http://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-insert_transgender-and-gender-nonconforming-people.pdf (viewed 3/11/14).
- 13 The Patient Protection and Affordable Care Act, 42 U.S.C. § 18116 (2010); Khan, Liza (2011) “Transgender Health at the Crossroads: Legal Norms, Insurance Markets, and the Threat of Healthcare Reform,” *Yale Journal of Health Policy, Law, and Ethics*: Vol. 11: Iss. 2, Article 4. Available at: <http://digitalcommons.law.yale.edu/yjhple/vol11/iss2/4>; Daphna Stroumsa, MD, MPH, “The State of Transgender Health Care: Policy, Law and Medical Frameworks,” *American Journal of Public Health*, March 2014, Vol 104, No. 3, p. e31-e38.
- 14 Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 24 C.F.R. §§ 5, 200, 203, 236, 400, 570, 574, 882, 891, 982 (2012).
- 15 Incentives could include research grants that would monitor changes in testing and risk behavior following repeal of HIV criminal laws; assess the impact of HIV criminal laws on the doctor/patient relationship and the ethical considerations of health care providers; prevention project grants in correctional facilities in states that eliminate barriers to testing, such as the threat of prosecution for having consensual sex after diagnosis; or other incentives related to the removal of legal and other barriers to HIV testing.

Such incentives might be modeled on those that were employed in promoting amendment of states laws to allow names-based HIV reporting and adoption of its 2006 HIV testing recommendations for health care settings. Centers for Disease Control, *CDC HIV/AIDS Science Facts: CDC Releases Revised HIV Testing Recommendations in Healthcare Settings* (Department of Health and Human Services, 2006).

- 16 See Surgeon General and the Centers for Disease Control, *Understanding AIDS: A Message from the Surgeon General* (Department of Health and Human Services, 1988), available at http://profiles.nlm.nih.gov/BB/D/R/L/_/_/qqbdrl.pdf.
- 17 National Prison Rape Elimination Commission, "Standards for the Prevention, Detection, Response and Monitoring of Sexual Abuse in Adult Prisons and Jails" (2009): 67-68.
- 18 Recommendations 4 and 5 on segregation were also made by the ACLU of Arizona in its report documenting the experience and incidents of sexual abuse of vulnerable immigrants in the Arizona ICE facilities (including women, transgender persons and LGBT persons). See, ACLU of Arizona, *In Their Own Words: Enduring Abuse in Arizona Immigrant Detention Centers* (June 2011), p. 23, available at <http://www.acluzaz.org/detention-report-2011>.
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- 21 Recommendations 4 and 5 on segregation were also made by the ACLU of Arizona in its report documenting the experience and incidents of sexual abuse of vulnerable immigrants in the Arizona ICE facilities (including women, transgender persons and LGBT persons). See, ACLU of Arizona, *In Their Own Words: Enduring Abuse in Arizona Immigrant Detention Centers* (June 2011), p. 23, available at <http://www.acluzaz.org/detention-report-2011>.
- 22 National Coalition for the Homeless, "National Coalition for the Homeless: Public Policy Priorities – 2013" (2013), available at http://www.nationalhomeless.org/advocacy/PolicyPriorities_2013.html#C.
- 23 Lisa Mottet and John M. Ohle, "Transitioning Our Shelters" (Washington: National Gay and Lesbian Task Force Policy Institute and National Coalition for the Homeless, 2003), available at <http://www.thetaskforce.org/downloads/reports/reports/TransitioningOurShelters.pdf>.
- 24 Courts have struck down such laws. See *Speet v. Schuette*, 726 F.3d 867 (6th Cir. 2013); *Wilkinson v. Utah*, 860 F. Supp. 2d 1284 (D. Utah 2012); *State v. Boehler*, 262 P.3d 637 (Ariz. Ct. App. 2011); "Criminalizing Crisis: The Criminalization of Homelessness in U.S. Cities" (Washington: National Law Center on Homelessness & Poverty, 2011), available at http://www.nlchp.org/Criminalizing_Crisis.
- 25 See, Comprehensive Report on Homelessness, State of Utah 2013, Utah Housing and Community Development Division, available at: <http://jobs.utah.gov/housing/documents/homelessness2013.pdf>.
- 26 Consent Decree Regarding the New Orleans Police Department, *United States v. City of New Orleans*, 12cv1924 (E.D. La. July 24, 2012) ("NOPD Consent Decree") ¶¶ 125, 127, 142, 183, 184-186.
- 27 *Ibid*, ¶ 184.
- 28 For instance, the Department of Justice could intervene in litigation such *Pottinger v. Miami* which is now being challenged by the City of Miami, in which a settlement reduced the ability of police to arrest homeless people for "life sustaining activities" (such as loitering, littering, and blocking sidewalks) that homeless people without recourse to shelter need to carry out in public, without fear of arrest, to survive. The result was a drastic increase in services to homeless people and decrease in the downtown Miami homeless population. Similar policies could be included in federal consent decrees and promoted through federal guidance to law enforcement agencies. Charles Rabin and Andres Viglucci, "Miami to go to federal court to undo homeless-protection act," *Miami Herald*, April 11, 2013, available at <http://www.miamiherald.com/2013/04/11/3339297/miami-to-go-to-federal-court-to.html>.
- 29 Legislation offering protection from discriminatory treatment by police based on housing status or homelessness has been enacted in the State of Rhode Island, the District of Columbia, and the Municipality of Cook County, IL. D.C. Code §2-1402.31 (2012); Cook Cnty., Ill. Code of Ordinances § 42-31, 42-37 (2012); R.I. Gen. Laws § 34-37.1-3 (2012). Additionally, a number of police departments across the country have adopted policies prohibiting discriminatory law enforcement action based on housing status or actual or perceived homelessness.). See e.g., Metro. Police Dep't Gen. Ord. 308-14 (2011); S.F. Police Dep't DGO 5.03, Investigative Detentions (2003).
- 30 Invasive and degrading genital searches conducted by law enforcement as "gender checks" are unfortunately commonplace. Stonewalled, Amnesty International Report. The current language in PREA, which prohibits such searches "unless part of a broader medical examination" leaves too much discretion as to what constitutes a "broader medical examination," given the ongoing problem of harassing and assaultive genital searching of LGBT detainees.

- 31 See, Frequently Asked Questions, PREA Resource Center, <http://www.prearesourcecenter.org/faq>.
- 32 See, e.g., Harris County Texas Sheriff, Policy No. 413: Lesbian, Gay, Bisexual, Transgender and Intersex (2013).
- 33 “Addressing Sexual Offenses and Misconduct by Law Enforcement Officers: An Executive Guide” (Virginia: International Association of Chiefs of Police, 2011), available at <http://www.theiacp.org/Portals/0/pdfs/AddressingSexualOffensesandMisconductbyLawEnforcementExecutiveGuide.pdf>.
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- 35 NOPD Consent Decree, ¶129,149,187.
- 36 Ibid, ¶ 184,185, 187.
- 37 *Umber v. Murphy*, 304 A.D.2d 931, 931-32 (N.Y. App. Div. 2003).
- 38 The agency should commit to a multi-year pilot project implementing the recommended policies in a substantial number of BOP facilities. This policy could then serve as a model for other federal, state, and local detention agencies.
- 39 See Frequently Asked Questions, PREA Resource Center, <http://www.prearesourcecenter.org/faq>.
- 40 See e.g., Harris County Texas Sheriff, Policy No. 413: Lesbian, Gay, Bisexual, Transgender and Intersex (2013).
- 41 Invasive and degrading genital searches are a source of trauma for many people in prison. In recent years, increasing attention has been paid to the issue, in part because of advocacy efforts in Michigan to stop a routine invasive search at the Michigan Women’s Huron County Correctional Facility. See, “Invasive Searches,” ACLU, <https://www.aclu.org/invasive-search>. Invasive genital searches are, unfortunately, a common experience for LGBT prisoners, especially trans prisoners who are often searched in this way when corrections staff do “gender checks” of them. The current language in PREA, which prohibits such searches “unless part of a broader medical examination” leaves too much discretion as to what constitutes a “broader medical examination,” given the ongoing problem of harassing and assaultive genital searching of LGBT prisoners and detainees.
- 42 Jeffrey Fagan and Aaron Kupchik, *Juvenile Incarceration and the Pains of Imprisonment*, 3 Duke F. for L. & Soc. Change 29 (2011), available at: <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1017&context=dfisc>.
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- 47 For example, the Downtown Emergency Service Center’s mobile crisis team in Seattle. Rosette Royale, “Mobile Crisis Team to ease conflicts between police, mentally ill,” *Real Change*, October 12, 2011, available at <http://www.realchangenews.org/index.php/site/archives/5957/>.
- 48 Ibid.
- 49 President’s Advisory Council on AIDS, *Resolution on Ending Federal and State Specific Criminal Laws*, (Department of Health and Human Services, 2012), available at <http://aids.gov/federal-resources/pacha/meetings/2013/feb-2013-criminalization-resolution.pdf>; Human Rights Watch, “Sex Workers At Risk”; Open Society Foundations, “Criminalizing Condoms”; PROS Network, “Public Health Crisis”.
- 50 “Bureau staff shall not discriminate against inmates on the basis of race, religion, national origin, sex, disability, or political belief. This includes the making of administrative decisions and providing access to work, housing and programs.” 28 C.F.R. § 551.90 (2013).

- 51 Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act, Feb. 23, 2011 (“Recent evolutions in legislation (including the pending repeal of Don’t Ask, Don’t Tell), in community practices and attitudes, in case law (including the Supreme Court’s holdings in Lawrence and Romer), and in social science regarding sexual orientation all make clear that sexual orientation is not a characteristic that generally bears on legitimate policy objectives.”).
- 52 See e.g., The Center for HIV Law and Policy, Teen SENSE Model Policies and Standards for Sexual Health Care for Youth in State Custody, Sexual Health Literacy for Youth in State Custody, and Staff Training to Address the Needs of LGBT Youth in State Custody, available at <http://www.hivlawandpolicy.org/initiatives/teen-sense>.
- 53 Properly used condoms reduce the risk of HIV transmission by as much as 90% and access to condoms has been found not to increase sexual activity or security risks. Alexander McKay, “Sex Research Update,” *Canadian Journal of Human Sexuality* 15 (1) (2006): 47, 49; John P. May & Earnest L. Williams, Jr., “Acceptability of Condom Availability in a U.S. Jail,” *AIDS Education and Prevention* 14 (5) (2002): 90 (“The experience in the Washington, DC jail has found condom access to be unobtrusive to the jail routine, no threat to security or operations, no increase in sexual activity, and accepted by most inmates and correctional officers.”); Mary Sylla, Nina Harawa, and Olga Grinstead Reznick, “The First Condom Machine in a US Jail: The Challenge of Harm Reduction in a Law and Order Environment,” *American Journal of Public Health* 100 (6) (2010). Meeting sexual health and prevention needs supports the health of prisoners and the partners and communities they return to after release.
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