

**“BULLSEYE ON THEIR BACK”: POLICE PROFILING AND ABUSE OF TRANS  
AND NON-BINARY INDIVIDUALS AND SOLUTIONS BEYOND THE  
DEPARTMENT OF JUSTICE GUIDELINES**

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I. INTRODUCTION

*“Usually what we see is homicides of low income trans women of color are the ones where police don’t respond as fast as they should with the forcefulness that they should.”<sup>1</sup> - Osman Ahmed, National Coalition of Anti-Violence Programs (NCAVP)*

In 2016, more trans and non-binary people have been murdered in the U.S. than in any other year since this statistic has been tracked.<sup>2</sup> The

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1. Mary Emily O’Hara, *Trans Women of Color Face an Epidemic of Violence and Murder*, VICE (Nov. 20, 2014), <http://www.vice.com/read/trans-women-of-color-face-an-epidemic-of-violence-and-murder-673>.

2. Alex Schmider, *GLAAD calls for increased and accurate media coverage of transgender murders*, GLAAD (Nov. 8, 2016), <http://www.glaad.org/blog/glaad-calls-increased-and-accurate-media-coverage-transgender-murders> (noting that as of November 2016 the number amounts to two murders a month, and that “this number does not include transgender people whose deaths were not reported due to misgendering in police reports, news stories, and sometimes by the victim’s family”). See also HUM. RTS. CAMPAIGN & TRANS PEOPLE OF COLOR COAL., ADDRESSING ANTI-TRANSGENDER VIOLENCE: EXPLORING REALITIES, CHALLENGES AND SOLUTIONS FOR POLICYMAKERS AND COMMUNITY

number, at least 26,<sup>3</sup> may seem low compared to the thousands of people murdered every year in the U.S.<sup>4</sup> and given that in 2014 a murder occurred in the general population every thirty-seven minutes.<sup>5</sup> But compared to the total population of trans people in the U.S., this number represents what many call an epidemic that has likely been happening for years.<sup>6</sup> The fact that police are slow to respond to calls in poor areas<sup>7</sup> where trans people tend to live<sup>8</sup> amplifies this number as well. Additionally, bias leads police to treat trans and non-binary people, especially people of color, poorly when they do respond to a call.<sup>9</sup> At least some of these deaths could have been prevented were the police contacted or quick to arrive on the scene of the violent encounter that led to death.<sup>10</sup> But the question remains: how can

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ADVOCATES 5 (2015), <http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/HRC-AntiTransgenderViolence-0519.pdf> [hereinafter HRC Report] (showing that 2015 was the deadliest year until that point)

3. Schmider, *supra* note 2.

4. See Sherry L. Murphy et al., CDC, DEATHS: FINAL DATA FOR 2012, No. 9, 63 NAT'L VITAL STAT. REP. 40 (Aug. 31, 2015), [http://www.cdc.gov/nchs/data/nvsr/nvsr63/nvsr63\\_09.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr63/nvsr63_09.pdf).

5. 2014 Crime Clock Statistics: National Data, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/offenses-known-to-law-enforcement/browse-by/national-data> (last visited Nov. 11, 2016) (reporting crime statistics by breaking down the number of murders per second in 2014).

6. See German Lopez, *How Bad is the Epidemic of Violence Against Transgender Women? It's Hard to Know*, VOX (Nov. 20, 2015), <http://www.vox.com/2015/10/20/9574239/transgender-murders-epidemic>.

7. See Cord Jefferson, *Cleveland Home Reminds Us Some Police Don't Rush to Poor Neighborhoods*, GAWKER (May 09, 2013), <http://gawker.com/cleveland-home-reminds-us-some-police-dont-rush-to-poo-496838235>.

8. See Jaime M. Grant et al., NAT'L CTR. FOR TRANSGENDER EQUAL. & NAT'L GAY AND LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2 (2011), [http://www.thetaskforce.org/static\\_html/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf) (showing that trans people were “nearly four times more likely” to live in poverty) [hereinafter NCTE Report].

9. *Id.* at 6. See also JOEY L. MOGUL ET AL., QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 120 (2011) (“With appalling frequency, LGBT victims of violence are subjected to further homophobic or transphobic verbal or physical abuse at the hands of law enforcement authorities that are charged with protecting them.”).

10. *Id.* at 129-32 (noting that “nonresponse or inadequate response” by the police towards violence against trans people continues to prevail in law enforcement).

trans people trust law enforcement when the people who are sworn to protect and serve them fail to in many instances?

This article will explore the rate of violence, intimidation, profiling, and harassment experienced by trans and nonbinary people at the hands of law enforcement officials. While it is clear that most police officers enforce the law in a just, un-biased way and do not participate in these activities, the problems must be addressed. This article will include a discussion of the general discrimination trans and non-binary people face, the history of policing of “deviant” gender practices, and how this translates into a system that tolerates violence against trans and non-binary people. Finally, this article will analyze the Department of Justice’s (DOJ) current guidelines on gender profiling and propose additional solutions to the problem.

## II. STATISTICS AND “AXES OF OPPRESSION”

*“These are all characteristics of people in the United States who are more susceptible to violence, of people who are more marginalized economically and educationally, people who end up having a bullseye on their back.”<sup>11</sup> -Mara Kiesling, Executive Director, National Center for Transgender Equality (NCTE)*

Trans and non-binary people experience discrimination in all areas of life—housing, employment, public services, and from their own families<sup>12</sup>—leading many to suicide<sup>13</sup> or to lives of homelessness and/or poverty,<sup>14</sup> and forcing them to disproportionately participate in survival

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11. Katy Steinmetz, *Why Transgender People Are Being Murdered at a Historic Rate*, TIME (Aug. 17, 2015), <http://time.com/3999348/transgender-murders-2015/>.

12. See generally NCTE Report, *supra* note 8 (providing statistics for percentage of trans people suffering discrimination in housing, employment, public accommodations, and family life).

13. See ANN P. HAAS ET AL., *Suicide Attempts among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey 2* (Jan. 2014), AM. FOUND. FOR SUICIDE PREVENTION & THE WILLIAMS INST., <http://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf> (showing that 42 percent of trans women and 46 percent of trans men have attempted suicide).

14. See NCTE Report, *supra* note 8, at 22 (finding that transgender and non-binary people “are nearly four times” as likely to live below the poverty line than the general population).

crimes such as sex work or selling drugs.<sup>15</sup> Due to lack of adequate healthcare and discriminatory healthcare policies, many trans people use the black market to obtain gender affirming hormones and surgeries.<sup>16</sup> These factors naturally lead to more interactions with police.<sup>17</sup>

Because trans women of color are caught up in what some call “axes of oppression”<sup>18</sup>—meaning their bodies and lives are treated differently because of the intersection of race, class, and gender<sup>19</sup>—their lives are fraught even more so with bigotry and violence from others, including from the police.<sup>20</sup> For example, NCAVP gathered individual data from anti-violence centers around the country where LGBTQ and HIV-Affected people reported hate violence.<sup>21</sup> Among this limited data of those who actually felt comfortable reporting hate violence to the organizations, “[t]ransgender people as a whole were 3.7 times more likely to experience police violence than [cisgender] people [who reported experiencing hate violence], and 7 times more likely to experience physical violence from the police.”<sup>22</sup> And trans people of color were “6 times more likely to experience violence from the police compared to [w]hite cisgender survivors and victims.”<sup>23</sup> To the outsider these statistics are unsettling, but for those at the crux of multiple axes of oppression they are not only unsettling but a fact of life.

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15. *Id.* at 22 (noting that “11% of all respondents report[ed] having done sex work for income” compared to only “1% of women in the U.S.”).

16. Kylar W. Broadus, *The Criminal Justice System and Trans People*, 18 TEMP. POL. & C.R. L. REV. 561, 564 (2009).

17. Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 757 (March 2008).

18. Hannah Alsgaard, *Introduction*, 26 BERKELEY J. GENDER L. & JUST. 198, 199 (2011). *See also* Jennifer Lisa Vest, *What Doesn’t Kill You: Existential Luck, Postracial Racism, and the Subtle and Not so Subtle Ways the Academy Keeps Women of Color Out*, 12 SEATTLE J. FOR SOC. JUST. 471, 505 (2013) (“[A]xes of oppression [include] gender, sexuality, class, race, etc.”).

19. Alsgaard, *supra* note 18, at 199.

20. *See generally* Osman Ahmed & Chai Jindasurat, *A Report from the National Coalition of Anti-Violence Programs: Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2013* (2014), NAT’L COAL. OF ANTI-VIOLENCE PROGRAMS, [http://www.avp.org/storage/documents/2013\\_ncavp\\_hv\\_report\\_final.pdf](http://www.avp.org/storage/documents/2013_ncavp_hv_report_final.pdf) [hereinafter NCAVP Report].

21. *Id.* at 18-19.

22. *Id.* at 59. “Cisgender is a term used to identify individuals whose gender identity and gender expression matches the sex they were assigned at birth.” *Id.* at 8 n. 2.

23. *Id.* at 9.

*A. History/Level of Discrimination*

*“Neither my clothing, my mannerisms, nor my body language conformed to the strict gender binaries of Central Florida society and fashion. Although I was not wearing my usual suit and tie the night the cops stopped me, I was wearing a men’s dress linen shirt, non-gendered linen pants.”<sup>24</sup> -Jennifer Lisa Vest, PhD*

Police intimidation of trans and non-binary people is not a new phenomenon. If someone looks like they do not conform to a stereotypical version of a certain gender, they are automatically considered suspicious by the observer.<sup>25</sup> One part of this suspicion is deeply rooted in American culture as shown through “sumptuary” laws which prohibited cross dressing,<sup>26</sup> or laws prohibiting people from dressing in a “disguise” or prohibiting “impersonation” that were used primarily to arrest those who were cross-dressing or simply not conforming to gender norms.<sup>27</sup> These laws “signaled to everyone what dress, and what behavior, was appropriate”<sup>28</sup> and reinforced a gender binary through police action.<sup>29</sup> By reinforcing what a “man” should act and look like and what a “woman” should act and look like, anyone acting differently becomes a target.<sup>30</sup> Combined with these laws were the many sodomy laws prohibiting private

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24. Vest, *supra* note 18, at 483 (describing her assault by campus police officers outside of the building where she worked on her tenure binder because she seemed suspicious to them based on her disability, skin color, and gender presentation).

25. *Law Enforcement Violence Against Women of Color & Trans People of Color: A Critical Intersection of Gender Violence & State Violence* 5, INCITE! WOMEN OF COLOR AGAINST VIOLENCE, [http://www.incite-national.org/sites/default/files/incite\\_files/resource\\_docs/3696\\_toolkit-final.pdf](http://www.incite-national.org/sites/default/files/incite_files/resource_docs/3696_toolkit-final.pdf) [hereinafter Incite!].

26. See I. Bennett Capers, *Cross Dressing and the Criminal*, 20 YALE J.L. & HUMAN. 1, 8 (2008).

27. *Id.* at 9. See also Incite!, *supra* note 25, at 5. This is not to say that trans people are simply cross-dressing, but to point out that when some officials find out that someone is trans, they see them as “simply cross-dressing,” as “other,” and will treat them as such.

28. Capers, *supra* note 26.

29. *Id.* at 9.

30. See generally *id.*

sexual acts common to many LGBTQ relationships.<sup>31</sup> Police were therefore given power to raid popular LGBTQ hangouts in the guise of enforcing these laws, while violently abusing their power.<sup>32</sup> Though many of these laws no longer exist,<sup>33</sup> the remnants of intimidation and violence are alive and well.<sup>34</sup>

Many police encounters may not become physically violent but are nevertheless discriminatory or emotionally violent.<sup>35</sup> Because police have broad discretion whether to enforce many laws, individual biases come into play meaning “they often consciously and unconsciously exercise that broad discretion in ways that are anything but neutral.”<sup>36</sup> As Amnesty International reports, police disproportionately enforce “quality of life” crimes, such as “public drunkenness, loitering, vandalism, littering, or public urination” against trans people of color.<sup>37</sup> For example, one youth described their experience in New York:

If there is a group of queer youth of color hanging out in front of the subway station on Christopher Street [an historically queer neighborhood] the police will tell them they are loitering, but if it’s a group of white tourists blocking the subway entrance they don’t say anything.<sup>38</sup>

These ordinances also affect homeless and poor populations disproportionately.<sup>39</sup> One fifth of trans people have “experienced homelessness at some time in their lives because of discrimination and family rejection,”<sup>40</sup> and they experience further discrimination from shelters

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31. *Lawrence v. Texas*, 539 U.S. 558, 570-71 (2003).

32. *See* MOGUL ET AL., *supra* note 9, at 45.

33. *Lawrence*, 539 U.S. at 570-71.

34. *See generally*, *USA: Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S.* (Sept. 21, 2005), AMNESTY INTERNATIONAL, <https://www.amnesty.org/en/documents/AMR51/122/2005/en/> [hereinafter *Stonewalled*].

35. *See, e.g., id.*

36. MOGUL ET AL., *supra* note 9, at 48.

37. *Stonewalled*, *supra* note 34, at 49.

38. MOGUL ET AL., *supra* note 9, at 52.

39. *Stonewalled*, *supra* note 34, at 49.

40. Movement Advancement Project et al., *Understanding Issues Facing Transgender Americans* 4 (2015), <http://www.lgbtmap.org/file/understanding-issues-facing-transgender-americans.pdf> [hereinafter *MAP Report*].

because of their identity.<sup>41</sup> This places trans and non-binary people in the way of law enforcement officers who feel free to toss epithets at their arrestees or strip search them at the local precinct in order to mock their bodies.<sup>42</sup> Thus, trans and non-binary people are constant police targets because of the axes of oppression they face.<sup>43</sup>

*B. Profiling, DOJ Guidance, and Constitutional Doctrines at Play*

*“If you’re a student carrying condoms, you’re practicing good public health; if you’re a transgendered [sic] person of color, you’re a prostitute.”<sup>44</sup> -Andrea Ritchie, Lawyer with Streetwise and Safe*

April Walker defines profiling as “the target of specific . . . groups as suspects in criminal activities based on the assumption that certain . . . groups are predisposed to commit certain crimes.”<sup>45</sup> Applying this definition, gender profiling is the specific targeting of people who do not fit

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41. *Id.* at 4. *See also* Stonewalled, *supra* note 34, at 53-54. *But see* George I. Gonzalez, *HUD Proposes Rule Ensuring Equal Access to Housing and Services in Accordance with Gender Identity*, DEPT. OF HOUSING & URB. DEV. (Nov. 20, 2015),

[http://portal.hud.gov/hudportal/HUD?src=/press/press\\_releases\\_media\\_advisories/2015/HUDNo\\_15-150](http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2015/HUDNo_15-150) (announcing proposed rule to require equal access to trans people in homeless shelters by requiring they be housed according to their gender identity rather than their assigned sex).

42. *See e.g.*, Stonewalled, *supra* note 34, at 93 (“‘It has tits and ass, so let’s put it in the queer tank.’ - Unknown L.A. officer . . . ‘Shut up bitch.’ ‘You want to act like a man, I’ll treat you like a man!’ – Unknown Boston officer.”); *id.* at 75 (“‘I know what you are. I know your kind. I just want you to know you’re never going to have a family like me, kids like me, a dog like me. And know that whatever you strap on between your legs will never be as real or as big as mine. You’re going to end up like the rest of your kind: without a job, homeless and shooting up drugs.’ - Unknown N.Y. officer.”).

43. *See* MOGUL ET AL, *supra* note 9, at 48-49; Stonewalled, *supra* note 34, at 54.

44. Ginia Bellafante, *Arrests by the Fashion Police*, N.Y. TIMES (April 5, 2013), [http://www.nytimes.com/2013/04/07/nyregion/arrests-by-the-fashion-police.html?\\_r=0](http://www.nytimes.com/2013/04/07/nyregion/arrests-by-the-fashion-police.html?_r=0).

45. April Walker, *Racial Profiling-Separate and Unequal Keeping the Minorities in Line-The Role of Law Enforcement in America*, 23 ST. THOMAS L. REV. 576, 591 (2011).

stereotypical gender norms because they are perceived to be “predisposed” to be involved in sex work or to carrying drugs.

Merging with both disproportionate enforcement of “quality of life” crimes and skewed views of gender identity is “[t]he cultural stereotype that transgender women are prostitutes [which] may contribute to [police] profiling and to the arrest of transgender women who are not engaged in prostitution.”<sup>46</sup> For instance, one trans woman in New York reported being arrested on “suspicion of prostitution” three times simply because she had condoms in her possession.<sup>47</sup> And many trans women in New York “claim they are singled out by police for ‘walking while trans’” despite reforms to department policy regarding such profiling.<sup>48</sup> Police in New Orleans were also subject to a DOJ investigation for similar activities of profiling LGBTQ individuals.<sup>49</sup> And evidence abounds that the practice of gender profiling of trans, non-binary individuals, and other queer people exists all over the country.<sup>50</sup>

While the DOJ released guidelines prohibiting Federal law enforcement officers from using gender, sexual orientation, or gender identity “in making routine or spontaneous law enforcement decisions” unless used as part of a “specific suspect description,” this does not apply to local law enforcement agencies unless they are working with Federal agents on a Federal matter.<sup>51</sup> Further, this guidance does not create any material rights for individuals from being profiled by Federal agents, as the

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46. Spade, *supra* note 17, at 757 (citing CHRIS DALEY ET AL., *WALKING WHILE TRANSGENDER: LAW ENFORCEMENT HARASSMENT OF SAN FRANCISCO’S TRANSGENDER/TRANSSEXUAL COMMUNITY* (2000)).

47. Jordan Flaherty, *Are Police Profiling Transgender Americans?*, AL JAZEERA (Oct 16, 2015), <http://america.aljazeera.com/watch/shows/america-tonight/america-tonight-blog/2013/10/16/rise-in-transgenderharassmentviolencebypolicelinkedtoprofilng.html>.

48. Noah Remnick, *Activists Say Police Abuse of Transgender People Persists Despite Reforms*, N.Y. TIMES (Sept. 6, 2015), [http://www.nytimes.com/2015/09/07/nyregion/activists-say-police-abuse-of-transgender-people-persists-despite-reforms.html?\\_r=2](http://www.nytimes.com/2015/09/07/nyregion/activists-say-police-abuse-of-transgender-people-persists-despite-reforms.html?_r=2).

49. U.S. Dep’t of Just. C.R. Div., *Investigation of the New Orleans Police Department* (March 16, 2011), [http://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd\\_report.pdf](http://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf).

50. Stonewalled, *supra* note 34, at 18.

51. U.S. Dep’t of Just., *Guidance for Federal Law Enforcement Agencies Regarding the use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity* 1 (Dec. 2014), <http://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf> [hereinafter DOJ Guidelines].



guidelines are merely persuasive authority for the executive branch.<sup>52</sup> However, the Supreme Court in *Whren v. U.S.* explicitly stated “that the Constitution prohibits selective enforcement of the law based on considerations such as race.”<sup>53</sup> And the DOJ rightfully interprets this statement to mean that police may not selectively enforce the law based on “irrelevant individual characteristics,” which include gender, sexual orientation, and gender identity.<sup>54</sup> For instance, if a trans woman walks down a street carrying condoms in her purse, unless the police have some other reason to believe she is a prostitute, the fact that she is trans should not be a factor in whether they arrest her for prostitution. One may note the difference when comparing that image to what police perceive to be a white heterosexual cisgender male walking down the street carrying condoms.<sup>55</sup> Police will not likely stop, let alone arrest, that person on suspicion of prostitution because of not only his skin color but his gender identity, and further because no pervasive stereotype exists that white heterosexual cisgender males are prostitutes.<sup>56</sup> But statistics show that local law enforcement nonetheless profiles trans women and others perceived to not conform to gender stereotypes because of the stereotypical belief that they participate in sex work.<sup>57</sup>

The enforcement of profiling guidelines, policies, and rules, however, proves not so easy. The constitutional test for a Fourth Amendment search and seizure is an objective test of probable cause—whether the officer has “probable cause to believe” a person has violated the law is tested against whether a “reasonable officer would have been motivated to stop [that person] to enforce the [law].”<sup>58</sup> Police need the discretion granted to them

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52. *See id.*, at 2 n.2.

53. 517 U.S. 806, 813 (1996). *See also* *Oyler v. Boles*, 368 U.S. 448, 456 (1962) (finding that prosecutorial discretion cannot be based on “an unjustifiable standard such as race, religion, or other arbitrary classification”).

54. DOJ Guidelines, *supra* note 51, at 2.

55. *See generally*, Remnick, *supra* note 48.

56. *See e.g.*, Stonewalled, *supra* note 34, at 29 (“When officers are working in areas where people have sex in their cars, if it’s a man and a woman or even two women, the officers usually check to make sure there is not a serious crime occurring (such as rape) and then send them on their way. The parties are told to take it to a hotel or take it home. However, if there are two men consensually involved in the car, officers arrest them more often than not. This is discriminatory enforcement.”).

57. *See* Spade, *supra* note 17, at 757.

58. *Whren*, 517 U.S. at 808.

because of the nature of their job—dealing with dangerous situations that can occur at any moment,<sup>59</sup> and working in the community to prevent crime.<sup>60</sup> But “stop and frisk” procedures (where police may stop a suspicious person and ask questions, and if believed to be involved in criminal activity, frisk that person for weapons or contraband<sup>61</sup>), though subject to the Fourth Amendment test,<sup>62</sup> have proven an easy way for police to disproportionately target minorities, intentionally or not.<sup>63</sup> This is not only the product of historically discriminatory laws and power structures, but also the “unconscious bias” police take into their work.<sup>64</sup> And the tests to prove profiling in stops, searches and seizures, and arrests are such that “[s]o long as police claim targeting is not based on [a certain immutable characteristic] alone, courts tend to treat the action as beyond the purview of the Equal Protection Clause.”<sup>65</sup> To prove that police are enforcing laws in a way that has a discriminatory effect, even if there is no discriminatory purpose, would require resources and statistical tracking data that the queer community simply does not have and that the government has not implemented effectively.<sup>66</sup>

Many police officers are upstanding people who treat those with whom they come into contact with respectfully, following correct procedures and guidelines and embodying the ideal that police officers are indeed peace officers. But the statistics clearly show there is a systemic problem with police using their positions of authority to abuse and denigrate trans and non-binary people.<sup>67</sup> As April Walker noted, police come into the job with pre-conceived notions of certain groups of people based on their life experiences.<sup>68</sup> If the failure of the passage of the Houston Equal Rights

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59. Terry v. Ohio, 392 U.S. 1, 10 (1968).

60. *Id.* at 22.

61. *Id.* at 10.

62. *Id.* at 21.

63. See Floyd v. City of New York, 959 F. Supp. 2d 540, 661-62 (S.D.N.Y. 2013) (finding discriminatory intent and effect where the NYPD targeted blacks and Hispanics to stop and frisk disproportionately to whites).

64. Pooja Gehi, *Gendered (In)Security: Migration and Criminalization in the Security State*, 35 HARV. J. OF L. & GENDER 357, 365 (2012).

65. I. Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L. J. 835, 852 (2008).

66. See *Born Suspect: Stop-and-Frisk Abuses & the Continued Fight to End Racial Profiling in America*, NAACP 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) [hereinafter NAACP Report].

67. See Flaherty, *supra* note 47.

68. Walker, *supra* note 45, at 586.

Ordinance<sup>69</sup> or the numerous “bathroom bills” introduced across the country<sup>70</sup> (and passed in one instance<sup>71</sup>), are any indicator of the public views of trans people as deceptive, participating in “deviant behavior,” allowing “perverted men to harm women in the bathroom,” or that “transgender people are dangerous and sexually scheming,”<sup>72</sup> then it is no wonder that this kind of thinking and suspicion has invaded our local police precincts. The fear of those who do not conform translates into homophobia and transphobia that invades the police system, and allows police to abuse their position of power.<sup>73</sup> Because some laws such as “quality of life” ordinances are “open to discriminatory application” in the way of profiling, “police officers make decisions about who to stop, question or detain” so “discrimination may come into play and may determine both the initiation and outcome of interactions.”<sup>74</sup> This has led to “sexual, physical and verbal abuse” of trans, non-binary, and other queer individuals by police on the streets and in custody.<sup>75</sup> Something must be done to stop these acts of torture<sup>76</sup> against one of the most vulnerable populations in our country.

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69. Justin William Moyer, *Why Houston’s Gay Rights Ordinance Failed: Fear of Men in Women’s Bathroom*, WASH. POST (Nov. 4, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/11/03/why-houstons-gay-rights-ordinance-failed-bathrooms/>.

70. Jennifer Bendery & Michelangelo Signorile, *Everything You Need to Know About the Wave of 100+ Anti-LGBT Bills Pending in States*, HUFFINGTON POST (Apr. 16, 2016), [http://www.huffingtonpost.com/entry/lgbt-state-bills-discrimination\\_us\\_570ff4f2e4b0060ccda2a7a9](http://www.huffingtonpost.com/entry/lgbt-state-bills-discrimination_us_570ff4f2e4b0060ccda2a7a9).

71. Garrett Epps, *North Carolina’s Bathroom Bill is a Constitutional Monstrosity*, THE ATLANTIC (May 10, 2016), <http://www.theatlantic.com/politics/archive/2016/05/hb2-is-a-constitutional-monstrosity/482106/>.

72. Dominic Holden, *Why are Black Transgender Women Getting Killed in Detroit?*, BUZZFEED (Nov. 19, 2015), <http://www.buzzfeed.com/dominicholden/why-are-black-transgender-women-getting-killed-in-detroit#.dcA5vP3ED>.

73. Stonewalled, *supra* note 34, at 56.

74. *Id.* at 16.

75. *Id.* at 55-56; *id.* at 58-62 (reporting numerous instances of police all over the country forcing trans women and other LGB individuals to perform sexual acts if they do not want to get arrested or detained, whether or not these people were sex workers).

76. *Id.* at 62, 70 (recognizing rape of a prisoner by a state official as torture under international law).

## III. SOLUTIONS

*“I should have tried to file a report, but it’s hard to feel empowered in this kind of situation.”<sup>77</sup> -Mitchyll Mora, youth leader at Streetwise and Safe*

When twenty states still do not have laws explicitly prohibiting racial profiling and only thirty “have one or more anti-racial profiling law on the books,”<sup>78</sup> the likelihood of states going a step further to ban gender profiling seems slim. Ranjana Natarajan, director of the Civil Rights Clinic at the University of Texas School of Law, proposes national policies that cover state and local police against racial profiling.<sup>79</sup> This should extend to gender profiling. While discussing the DOJ’s 2014 updates to guidelines against racial profiling, Natarajan notes that “state and local law enforcement agencies should have also been covered . . . because Americans encounter local police in far greater numbers than any federal law enforcement officers.”<sup>80</sup> Thus while the DOJ’s guidelines set a good example, and provide one remedy for those empowered enough to file complaints against the local police,<sup>81</sup> the many different factors at work mean that to eradicate abuse of trans and non-binary people, multiple strategies must be used.

*A. Sociological Measures*

One obvious way to address the problem is through police education and community partnerships with local precincts. On a positive note, the Journal of Law Enforcement published a best practices guide for police interaction with transgender people.<sup>82</sup> While it includes practical

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77. Bellafante, *supra* note 44 (describing how a police officer stopped, frisked, and groped him while “invok[ing] a gay slur” when he was on the way to a poetry reading wearing “makeup, boots, [and] long earrings”).

78. NAACP Report, *supra* note 66, at 19 (noting, though, that many local precincts pass their own anti-racial profiling policies).

79. Ranjana Natarajan, *Comprehensive National Policy That Outlaws Racial Profiling Should Cover State, Local Police*, HUFFINGTON POST (Dec. 9, 2014), [http://www.huffingtonpost.com/ranjana-natarajan/comprehensive-national-po\\_b\\_6297186.html](http://www.huffingtonpost.com/ranjana-natarajan/comprehensive-national-po_b_6297186.html).

80. *Id.*

81. U.S. Dep’t of Just., *How to File a Complaint*, <http://www.justice.gov/crt/how-file-complaint>.

82. Jan S. Redfern, *Best Practices to Improve Police Relations with Transgender Individuals*, 3 J. OF L. ENFORCEMENT, ISSN: 2161-0231 (Online), <http://www.jghcs.info/index.php/l/article/viewFile/265/239>.

suggestions for officers, such as appropriate language to use,<sup>83</sup> it idealistically includes police speaking at trans organizations to bolster understanding between the two (not mutually exclusive) groups and for sensitivity training.<sup>84</sup> It is true that understanding needs to exist between police officers and trans people, but many rural areas lack the resources and community presence to develop concrete LGBTQ organizations.<sup>85</sup> So this tactic would only serve major cultural centers where there is enough support for groups of trans and non-binary people to find each other and work toward greater visibility.

A similar but more realistic measure, and a growing trend, is to establish a police department LGBTQ liaison officer or unit.<sup>86</sup> The purpose of this officer or unit is to establish community ties and foster dialogue between the department and LGBTQ individuals in order “to improve the relationship between” them.<sup>87</sup> In the case of rural communities, this person or unit would be able to travel to larger urban areas at a lower expense to undergo training in order to bring cultural competency back to the local community and to train fellow officers.<sup>88</sup> Thus, this measure spans both urban and rural communities and may therefore prove a better solution to establishing cultural understanding between local police precincts and their trans and non-binary citizens. The hope here is that cultural understanding

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83. *Id.* at 7.

84. *Id.* at 6.

85. See, Neal A. Palmer et al., *Gay, Lesbian, & Straight Educ. Network, Strengths and Silences: The Experience of Lesbian, Gay, Bisexual and Transgender Students in Rural and Small Town Schools* 1 (2012), <http://www.glsen.org/sites/default/files/Strengths%20%26%20Silences.pdf>.

86. See, e.g., Martin Well, *D.C. Police Add ‘Bisexual and Transgender’ to Name of Liaison Unit*, WASH. POST (Jan. 11, 2015), [https://www.washingtonpost.com/local/public-safety/dc-police-add-bisexual-and-transgender-to-name-of-liason-unit/2016/01/11/0fdc36d4-b8e1-11e5-b682-4bb4dd403c7d\\_story.html](https://www.washingtonpost.com/local/public-safety/dc-police-add-bisexual-and-transgender-to-name-of-liason-unit/2016/01/11/0fdc36d4-b8e1-11e5-b682-4bb4dd403c7d_story.html); *Gay Lesbian, Bisexual, Transgender Liaison Officer*, FARGO POLICE DEP’T, <https://www.cityoffargo.com/CityInfo/Departments/Police/AboutFPD/FieldServicesDivision/LGBTLiaisonOfficer/>; *LGBT Liaison*, ATLANTA POLICE DEP’T, <http://www.atlantapd.org/lgbtliaison.aspx>; .

87. *LGBT Liaison*, *supra* note 86.

88. See generally, Angela Dwyer, *Policing Gay, Bisexual and Transgender Young People: a Gap in the Research Literature*, 22 CURRENT ISSUES CRIM. JUST. 415 (2011).

might erase some of the inherent bias law enforcement officers carry, thus lowering rates of profiling and leading to better treatment in custody.<sup>89</sup>

### *B. Concrete Measures*

On top of these sociological measures, more concrete and drastic measures need to be taken. Body cameras, while new to the concept of police enforcement, may be a good solution.<sup>90</sup> Little data exists on what effect body cameras have on police activity, but what data does exist is hopeful.<sup>91</sup> If law enforcement officers know that they will have to submit a tape of their activities, it seems logical that they will not engage in abusive practices with those they take into custody, including trans and non-binary people. While it is a more pragmatic than moral reason, Jan S. Redfern points out that body cameras would incentivize police officers to avoid abusive practices in order to avoid litigation for civil rights violations.<sup>92</sup> When police act badly, the whole city pays for the investigation and the civil suit.<sup>93</sup> With the implementation of body cameras, the goal is that officers will behave better because they will not be able to hide from a civil suit; and if there is one, it will not drag out for as long because the evidence will be clearer.<sup>94</sup> []

Additionally, independent review boards should be established to investigate police misconduct so that prosecutors who work closely with local law enforcement are not the ones deciding whether to bring charges.<sup>95</sup> While it may not be feasible for all prosecutors' offices to have a review board available, they could "attach" to prosecutors' offices<sup>96</sup> in large urban centers, but be available to rural communities in the state as well. These boards would "promptly investigate complaints filed by citizens and

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89. U.S. Dep't of Just. Cmty. Rel. Serv., *Understanding Bias: A Resource Guide*, 3 ("Research suggests that improving cultural competency levels of public servants can potentially increase civic engagement and social trust among young members of minority populations.").

90. *See generally*, Howard M. Wasserman, *Moral Panics and Body Cameras*, 92 WASH. U. L. REV. 831 (2015).

91. *Id.* at 837-38 (citing one study that found "when wearing cameras, officers were less likely to use weapons and less likely to initiate physical contact with suspects").

92. Redfern, *supra* note 82, at 7.

93. *Id.*

94. Wasserman, *supra* note 90, at 838.

95. Walker, *supra* note 45, at 613.

96. Scott J. Krischke, Note, *Absent Accountability: How Prosecutorial Impunity Hinders the Fair Administration of Justice in America*, 19 J.L. & POL'Y 395, 433 (2010).

defense attorneys” against police and law enforcement officials.<sup>97</sup> They would be comprised of neutral parties from the community who are well versed in the law, practical law enforcement tactics, and the unique needs of trans and non-binary individuals. One supplemental benefit of having these boards is the statistical tracking of police offenses.<sup>98</sup> With better data tracking of police abuses, the misbehavior of law enforcement would come to light, hopefully urging the people paying their salaries to demand better police work. Tracking data would also highlight the failure of hate crime laws, (which generally impose stronger punishments on already criminal acts if committed because of bias or hatred toward someone based on their race, religion, sexuality, gender, disability, etc.), to protect vulnerable populations from violence.<sup>99</sup> Finally, with review boards in place officers would know that their unreasonable actions are subject to review by not only federal and local prosecutors, but those outside of the law enforcement community, hopefully incentivizing them to act accordingly.<sup>100</sup>

Given that police officers have been under increased investigation for abuses of people of color, and not just trans people of color, it might be wise for states to apply stricter standards to police cadets.<sup>101</sup> Psychological testing of police officers may be expensive, but it would be worth the cost to protect the lives of many people who would otherwise face abuse at the hands of police.<sup>102</sup> “Preemployment psychological screening” involves testing for and “identifying concerns about the candidate’s emotional stability and highlight[s] suitability factors such as personality traits or a personal history” that may affect one’s ability to practice respectful

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97. *See id.*

98. *Fighting Police Abuse: A Community Action Manual*, AM. CIV. LIB. UNION, <https://www.aclu.org/other/fighting-police-abuse-community-action-manual> (last visited Nov. 11, 2016).

99. MOGUL ET AL., *supra* note 9, at 123-29 (showing that while the goal of such statutes is to “educate the public and provide communities with an effective mechanism for holding offenders accountable by ensuring police attention to such violence,” they fail to “dismantl[e] the systemic forces that promote, condone, and facilitate homophobic and transphobic violence”).

100. *Fighting Police Abuse: A Community Action Manual*, *supra* note 98.

101. Tony Cantu, *Austin Police Launch Training Guidelines Dealing With LGBT Community*, PATCH (Apr. 14, 2016), <http://patch.com/texas/downtownaustin/austin-police-launch-training-guidelines-dealing-lgbt-community>.

102. Walker, *supra* note 45, at 614.

policing.<sup>103</sup> This would weed out those that take advantage of their position of power to abuse and coerce arrestees under threat of incarceration or those that would profile trans and non-binary people based on overt bias.

Though some point to the legalization of sex work as a solution to police profiling and abuse,<sup>104</sup> a better goal is to help get trans people out of that trade and off the streets. States can help in one way that has nothing to do with incentivizing or educating police. If states lessen barriers to identity documents and healthcare for gender affirming surgeries,<sup>105</sup> trans people will no longer look “suspicious” for having a driver’s license that does not match the gender as which they present.<sup>106</sup> And with gender affirming documents (and, if needed, surgeries), trans people can better find and keep jobs, not only because people who would otherwise discriminate against them will likely be unaware of their status as trans, but because their mental health will improve, allowing them to participate more fully in society.<sup>107</sup> With more trans, non-binary, and LGBTQ citizens participating in lawful work, the economy grows and the community becomes better integrated, in turn fostering understanding between cultures.<sup>108</sup>

In the larger scheme, organizations that work for LGBTQ rights and visibility would greatly benefit from partnering with organizations that work toward equality for people of color and other marginalized populations.<sup>109</sup> By pooling funding resources or sharing data and educational training methodologies, they could work toward bringing

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103. Yossef S. Ben-Porath et al., *Assessing the Psychological Suitability of Candidates for Law Enforcement Positions*, 78 THE POLICE CHIEF 64-70 (August 2011), *available at* [http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article\\_id=2448&issue\\_id=82011](http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article_id=2448&issue_id=82011).

104. Alsgaard, *supra* note 18, at 200-201 (“Although [Miss Major, a leading figure in the trans community] believes that decriminalization is a step forward, she argues that merely changing the law will not be enough; instead more than the laws need to be changed—namely, the attitudes and perceptions of law enforcement officers”).

105. *See* Broadus, *supra* note 16, at 563-64; HRC Report, *supra* note 2, at 38; *see generally* Spade, *supra* note 17.

106. *See* Nico Lang, *For Trans Americans, Changing Your Name Can Still Be a Matter of Life or Death*, QUARTZ (Mar. 31, 2016), <http://www.qz.com/651310/for-trans-americans-changing-your-name-can-still-be-a-matter-of-life-or-death/>.

107. *See* Spade, *supra* note 17, at 785 (“[L]ack of access to this care results in serious physical and mental health consequences.”).

108. *See generally*, Patrick S. Shin, *Diversity v. Colorblindness*, 2009 B.Y.U. L. REV. 1175 (2009).

109. MOGUL ET AL., *supra* note 9, at 155-58.



equality to people at the intersection of multiple axes of oppression.<sup>110</sup> This, too, is an idealistic goal, especially in the South where there is a severe lack of funding for LGBTQ organizations that is only just now starting to be addressed.<sup>111</sup> But, for example, there are organizations that focus on organizing, education, and policy work, like Southerners on New Ground<sup>112</sup> that are partnering with impact litigation organizations, like Transgender Law Center<sup>113</sup> to do just this.<sup>114</sup> This gives concrete hope to the idea that greater visibility might enhance understanding of trans and non-binary people so they are seen and treated as equals.

#### IV. CONCLUSION

*“These are important initiatives – but we still have a great deal more to do.”<sup>115</sup> – Attorney General Loretta Lynch*

These varied measures are by no means all-inclusive. And of course the federal government should continue to investigate police practices as they have done in New York and New Orleans. The Violence Against Women Act (VAWA) was amended in 2013 to include trans women, and should

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110. *Id.*

111. See Patrick Saunders, *Left Out in the South: National Funding Foundations Leaving Southern LGBT Nonprofits High and Dry*, GEORGIA VOICE (March 14, 2014), <http://thegavoice.com/left-south-national-funding-foundations-leaving-southern-lgbt-nonprofits-high-dry/>.

112. *Southerners on New Ground*, <http://southernersonnewground.org/>, (“[A] regional Queer Liberation organization made up of people of color, immigrants, undocumented people, people with disabilities, working class and rural and small town, LGBTQ people in the South.”).

113. *Transgender Law Center*, <http://transgenderlawcenter.org/>, (“Transgender Law Center changes law, policy, and attitudes so that all people can live safely, authentically, and free from discrimination regardless of their gender identity or expression.”).

114. Southerners on New Ground, *Announcing a New Form of National Collaboration: TLC@SONG* (Feb. 6, 2015), <http://southernersonnewground.org/2015/02/tlcatsong/>.

115. U.S. Dep’t of Just., *Attorney General Loretta E. Lynch Delivers Announcement of Gender Bias Policing Guidance*, (Dec. 15, 2015), <http://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-announcement-gender-bias-policing-guidance> (introducing new guidance for police responses to domestic violence based on reports of gender bias toward women and LGBTQ individuals as domestic violence victims).

also be enforced against police officers who abuse them.<sup>116</sup> The specter of federal investigation should serve to curb police abuses, but as noted, comprehensive education and reform is needed for this country generally, and for police culture specifically. When the segment of police forces that are secondary perpetrators of violence and oppression instead spend their time preventing and investigating violent crimes against trans women and those that do not fall into cultural gender norms, all of society will benefit.

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116. NCAVP, *supra* note 20, at 4.