GIVE ME YOUR TIRED, YOUR POOR, AND YOUR QUEER: THE NEED AND POTENTIAL FOR ADVOCACY FOR LGBTQ IMMIGRANT DETAINEES

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As immigration detention has increased in the United States over the past two decades, legislative changes have placed LGBTQ immigrants at a higher risk of being detained because of deportation policies that focus on poverty-related crime and increasingly stringent asylum requirements. Once detained, these immigrants are subjected to significantly higher rates of violence and are often denied access to essential medical care. Exacerbating the problems of detention for all detainees, there are no substantive legislative or regulatory standards governing detention conditions, and the Department of Homeland Security's internal standards are poorly enforced and often not even binding. While there are constitutional limits to what detainees can be subjected to, most circuit courts have held that detainees are not entitled to any protections beyond those given criminal prisoners. Litigation by LGBTQ people in criminal incarceration has yielded some successes that may be imported into the detention context to improve conditions, but litigation is an uncertain and difficult route for advocates to take, particularly given uncertainties about detainees' access to the court system. Ultimately, the most meaningful advocacy may be outside of the litigation arena, advocating for legislative and regulatory changes. One obvious goal of advocacy may be to increase standards and oversight for detention conditions, but this may be difficult to achieve meaningfully and may result in an unintended entrenchment of policies favoring increased detention. A more promising route is for LGBTQ-focused organizations to work with other stakeholder communities in advocating for significant decreases in the number of people detained.

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INTRODUCTION

Immigration detention has been a booming business in the United States for the past twenty years, increasing at astronomical rates as the U.S. has become more concerned with controlling its borders.[1] In the fifteen years from 1994 to 2009, the federal government's immigration detention capacities have increased by almost 500 percent, from having space to hold 6785

1. *See The History of Immigration Detention in the U.S.*, DET. WATCH NETWORK, http://www.detentionwatchnetwork.org/node/2381 (last visited Jan. 28, 2011).

detainees per day in 1994,[2] to having space for 33,400 detainees per day in 2009.[3] In 2009, the Office of Detention and Removal Operations (DRO)—the arm of U.S. Immigration and Customs Enforcement (ICE) charged with overseeing the detention of immigrants—held an estimated 400,000 people in immigration detention centers.[4] The most drastic increases have been in the past four years, a span during which the number of detainees has more than doubled,[5] and during which daily capacity increased by more than 150 percent.[6]

Although immigrant detention is civil in nature and is not considered punishment for a criminal act,[7] conditions in immigrant detention facilities are generally comparable to those in jails and prisons.[8] As numerous recent incidents have exposed,[9] immigrant detainees routinely suffer from inadequate medical care, severe overcrowding, violence, and harassment.[10] While the current situation of detention is problematic for all detainees, particular groups of detainees are at increased risk for violence, harassment, and medical health

2. ALISON SISKIN, CONG. RESEARCH SERV., RL 32369, IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES 12 (2004), *available at* http://www.fas.org/irp/crs/RL32369.pdf.

3. *Department of Homeland Security Appropriations for 2010: Hearings Before the Subcomm. on Homeland Sec. of the H. Comm. on Appropriations*, 111th Cong. 475 (2009) [hereinafter *DHS 2010 Appropriations Hearing*] (statement of James T. Hayes, Jr., Director, Office of Detention and Removal Operations).

4. *Id.*

5. The total number of detainees increased from 225,905 in 2006 to the aforementioned 442,941 in 2009. *Detention and Removal: Immigration Detainee Medical Care: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec. & Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. 273 (2007) [hereinafter *Detention and Removal Judiciary Hearing*] (answer to written question #14); *DHS 2010 Appropriations Hearing*, *supra* note 3, at 16.

6. Capacity increased from 20,594 in 1996, DONALD KERWIN & SERENA YI-YING LIN, MIGRATION POLICY INST., IMMIGRANT DETENTION: CAN ICE MEET ITS LEGAL IMPERATIVES AND CASE MANAGEMENT RESPONSIBILITIES? 7 (2009), to the aforementioned 33,400 in 2009, *DHS Appropriations for 2010*, *supra* note 3, at 475.

7. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("The proceedings at issue here are civil, not criminal . . . .").

8. In most cases, not only are conditions comparable, but they are also the exact same facilities. Two-thirds of detainees are held in local jail facilities under intergovernmental lease agreements between the federal government and local law enforcement agencies. *Fact Sheet: Detention Management*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Nov. 20, 2008), http://www.ice.gov/news/library/factsheets/detention-mgmt.htm.

9. Among the most widely reported incidents in recent years have been the deaths of Victoria Arellano and Francisco Castaneda in 2007, *see infra* note 115, and litigation surrounding conditions at a detention facility in downtown Los Angeles, *see* Associated Press, *Settlement Aids Detainees in Los Angeles*, N.Y. TIMES, Sept. 17, 2009, at A19 (discussing conditions at the now-closed "B-18" facility in Los Angeles).

10. *Conditions in Immigration Detention*, DET. WATCH NETWORK, http://www.detentionwatchnetwork.org/node/2383 (last visited Jan. 28, 2011).

issues while in detention. One such group is lesbian, gay, bisexual, transgender, and queer (LGBTQ)[11] detainees.[12]

This Comment explores the need for—and possible means of—advocating for improved conditions for LGBTQ detainees in immigration detention centers, particularly for transgender detainees. This Comment argues that, while litigation is an important tool for attempting to protect the rights of detainees and provide a remedy for those whose rights have been violated, the instability and uncertainty of judicial standards in the immigration and civil detention contexts makes litigation a poor tool for effecting meaningful systemic change. Ultimately, in order to have significant impact on the lives and rights of LGBTQ immigrant detainees, change will need to occur at the legislative, regulatory, and oversight levels.

Part I of this Comment analyzes the need for advocacy around the issues facing LGBTQ immigrant detainees. This need stems both from their increased rates of detention and the unique vulnerabilities that LGBTQ people face once detained. All groups of immigrants have been affected by the sweep of anti-immigrant legislation and changes in ICE procedures that have radically increased rates of immigrant detention.[13] However, due to the LGBTQ community's increased rates of poverty, unemployment, need to resort to survival crimes, subjection to profiling and selective law enforcement by police, and persecution leading to individuals seeking asylum, LGBTQ immigrants are particularly vulnerable to these statutory and regulatory changes.[14] Once detained, LGBTQ detainees face increased vulnerability to abuse and particular obstacles to accessing needed specialized medical care.[15]

Part II surveys the existing standards designed to protect immigrants held in detention. Because of a complete lack of substantive statutory or regulatory requirements for detention conditions, these protections come from two extremes—constitutional protections and ICE operational standards. On the constitutional side, the question of available protections is complex and unclear,

11. Based on the topic at hand and the preference of the writer, many writers use various acronyms to "name" the communities of people who fall outside of traditional heteronormative and/or cisgender normative frameworks. I have chosen "LGBTQ" here, as it strikes a balance between comprehensiveness and readability. I do so noting the realm of difficulties surrounding the imposition of labels on people who may or may not self-identify with these terms. I would also like to note that, since my sources did not discuss problems faced by intersex people, I chose not to include them in the scope of this Comment. This is a serious shortcoming of current research and awareness.

12. Pooja Gehi, *Struggles From the Margins: Anti-Immigrant Legislation and the Impact on Low-Income Transgender People of Color*, 30 WOMEN'S RTS. L. REP. 315, 318 (2009).

13. *See infra* Part I.A.

14. *See infra* Part I.A.

15. *See infra* Part I.B.

with uncertainties surrounding the extent to which detainees can claim *any* constitutional rights at all, and if so, what standards should guide courts when presented with constitutional decisions regarding nonpunitive detention. There is currently a circuit split on whether civil detainees' claims should be evaluated based on standards roughly equivalent to those used for Eighth Amendment criminal protections, or whether these claims should have a more protective standard.[16] On the regulatory side, internal ICE standards are largely ineffective for providing protection for LGBTQ detainees—no standards exist that specifically address LGBTQ detainees in any way, and the generally applicable standards are poorly enforced by ICE and often not followed at all by facilities.[17]

Parts III and IV examine potential avenues for advocacy for LGBTQ detainees, highlighting the possibilities and roadblocks for each. Part III considers possibilities for litigation. There have been successes in the context of prison litigation that may help advance claims of constitutionally deficient conditions by establishing that certain problems fail even the stricter Eighth Amendment standards. While these precedents are far from universal, they are nonetheless substantial.[18] These cases are of little benefit, however, when detainees face difficult evidentiary obstacles, and when courts find that detainees have almost no claim to constitutional protection. Additionally, standard government tactics—such as settling claims, or providing treatment and releasing prisoners in order to render their claims moot—significantly reduce the likelihood of establishing strong precedent in the immigration context.[19]

Rather than focusing on litigation, Part IV presents possibilities for change at the statutory and regulatory levels and in internal ICE standards. One important route of advocacy is to push back on the trends that have resulted in massive increases in immigrant detention. Advocates for LGBTQ detainees cannot afford to take a tunnel-vision approach, focusing *only* on LGBTQ detainees; it is essential that LGBTQ activists work with immigrants' rights advocates to reduce levels of detention for *all* immigrants. For those immigrants who remain in detention, improved standards for and oversight of detention facilities is critical, but so is avoiding the unintended result of entrenchment of policies favoring increased detention. The varied nature of detention facilities—ranging from large ICE–owned and operated centers to local jails used to house small numbers of detainees—limits the practicability of

16. *See infra* Part II.A.
17. *See infra* Part II.B.
18. *See infra* Part III.A.
19. *See infra* Part III.B.

legislation and regulation to provide specific guidelines and procedures to ensure the protection of detainees. However, legislation and regulation can impose stricter requirements on ICE for developing and overseeing standards. As with litigation, looking to the prison context can be informative, as numerous prison systems have begun to create and implement various standards for the protection and care of LGBTQ prisoners, weakening arguments that such standards are impracticable in detention settings.[20]

I. THE NEED FOR ADVOCACY ON BEHALF OF LGBTQ DETAINEES

Given the dramatic increase in immigration detention in the United States, LGBTQ immigrants are far from the only immigrants in need of advocacy surrounding detention issues. As reflected in ongoing publicity surrounding avoidable deaths of detainees while in ICE custody[21] and detainees being kept in deplorable conditions,[22] people throughout the system routinely face troubling—and often tragic—situations. However, as this Part details, LGBTQ immigrants are subject to a series of issues, which places them at particularly high risk for suffering egregious harms in detention.

This Part focuses on two concerns. The first is a number of changes in immigration law and policy within the past twenty years that have contributed to the overall increase in immigrant detention, and to which LGBTQ immigrants are particularly and disproportionately vulnerable. These changes include increased criminalization of poverty,[23] mandatory detention and deportation of immigrants,[24] and drastically increased standards for asylum applicants.[25]

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20. *See infra* Part IV.

21. *See, e.g.*, Nina Bernstein, *Lawsuits Renew Questions on Immigrant Detention*, N.Y. TIMES, Mar. 4, 2010, at A21, *available at* http://www.nytimes.com/2010/03/04/us/politics/04detain.html ("When the Obama administration vowed to overhaul immigration detention last year, its promise of more humane treatment and accountability was spurred in part by the harrowing treatment of two detainees who died in the Bush years." (referring to Hiu Lui Ng and Francisco Castaneda)).

22. *See, e.g.*, *Intolerable Conditions at Downtown Immigration Facility Will End Under Terms of Lawsuit Settlement*, ACLU (Sept. 16, 2009), http://www.aclu.org/immigrants-rights/intolerable-conditions-downtown-immigration-facility-will-end-under-terms-lawsuit- (discussing conditions at the now-closed "B-18" facility in Los Angeles); *Settlement Aids Detainees in Los Angeles*, *supra* note 9.

23. "Criminalization of poverty" is a term used to refer to trends that increase prosecution for crimes that are closely linked with poverty, treat low-income people as presumptive criminals, and focus on prosecution rather than social support. *See* Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 644 (2009); Barbara Ehrenreich, *Is It Now a Crime to Be Poor?*, N.Y. TIMES, Aug. 9, 2009, at WK9, *available at* http://www.nytimes.com/2009/08/09/opinion/09ehrenreich.html.

24. *See infra* Part II.A.1.

25. *See infra* Part II.A.2.

The second is the increased likelihood that LGBTQ people will face troubling and abusive conditions once they have been detained. In all incarceration and detention settings, LGBTQ prisoners have been shown to be at heightened risk for physical and sexual violence, and there is no evidence to suggest otherwise in the immigration detention system, especially given that many detainees are often housed in local jail facilities with little or no separation from criminally incarcerated prisoners.[26] Additionally, transgender detainees often have critical and particular health needs—both physical and mental—related to their gender identity and transition, which are generally unmet in contexts of imprisonment.[27] For these two reasons we must pay increased attention to the harm afflicting LGBTQ immigrant detainees. Not only are they disproportionately affected by recent legislation that has dramatically increased detention for all groups, but once they are detained, they face particularly acute risks that must be addressed.

A. Recent Law and Policy Changes Result in Increased Rates of Detention for LGBTQ People

Over the past two decades, Congress has passed several pieces of legislation that have severely affected immigrants by increasing the rates at which they are detained, as well as the lengths of time they remain in detention. Although this legislation was not implemented with the intention of targeting LGBTQ immigrants, it nonetheless negatively affects LGBTQ immigrants for a variety of reasons, as described in this Subpart.

The first set of legislative changes drastically increased the number of immigrants facing mandatory deportation, mandatory detention, or both. Two 1996 laws, the Antiterrorism and Effective Death Penalty Act (AEDPA)[28] and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[29] made significant additions to the categories of convictions that lead to mandatory deportation and/or detention. These changes place LGBTQ immigrants

26. *See infra* Part II.B.1. *See also* JUST DET. INT'L, LGBTQ DETAINEES CHIEF TARGETS FOR SEXUAL ABUSE IN DETENTION 1 (2009); Mila P., *Meeting to Highlight Issues Faced by LGBT People in California Prisons*, TRANSGENDER L. CTR. (Dec. 12, 2008), http://transgenderlawcenter.org/new/index.php/updates/press-releases/meeting-to-highlight-issues-faced-by-lgbt-people-in-california-prisons/108.

27. *See infra* Part II.B.2.

28. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered titles and sections of the U.S. Code).

29. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (codified as amended primarily in scattered sections of 8 U.S.C. and 18 U.S.C.).

at a disproportionate risk of facing deportation and detention because of the link between these crimes and poverty.

The other legislation this Part examines is 2005's REAL ID Act.[30] While the effects of the REAL ID Act's identification requirements on the transgender community are more widely known, the impacts that the Act has on asylum claims are less so. These changes increase the asylum application requirements for corroborating evidence and establishing credibility—requirements that pose particular difficulties for LGBTQ applicants.[31]

1. Increased Risks of Detention Related to Deportation After the AEDPA and IIRIRA

In 1996, Congress passed two pieces of legislation, the AEDPA and the IIRIRA, which significantly increased the rates of detention of immigrants facing deportation as a result of criminal convictions. Prior to enactment of these statutes, when an individual faced deportation as a result of criminal convictions, mandatory deportation was only imposed for convictions that resulted in five or more years imprisonment.[32] The AEDPA and IIRIRA, however, significantly expanded the range of convictions for which immigrants must be deported, with no allowance for discretion on the part of immigration courts or officials.

Deportable offenses now include crimes of moral turpitude with a sentence of incarceration of one year or longer; two or more crimes of moral turpitude, regardless of the sentence; aggravated felonies; almost any drug-related offense; and crimes related to domestic violence.[33] Immigrants are also deportable without conviction if they are shown to be "drug abuser[s] or addict[s]" at any time after admission, regardless of whether they are still viewed as such.[34] In addition to expanding the enumerated reasons why an immigrant may face deportation, the AEDPA and IIRIRA further expand what crimes fall into these enumerated categories.[35] "Aggravated felonies" under the AEDPA and IIRIRA include, among other things, crimes of theft and *any* felonies or *misdemeanors* (such as receipt of stolen property) with a

30. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302 (codified as amended primarily in scattered sections of 8 U.S.C. and 49 U.S.C.).

31. *See infra* Part I.A.2.

32. LARRY M. EIG, CONG. RESEARCH SERV., RS 20681, MANDATORY DEPORTATION OF CRIMINAL ALIENS: PROPOSED RELIEF FOR LONG-TERM RESIDENTS 3–4 (2000).

33. 8 U.S.C. § 1227(a)(2) (2006).

34. *Id.* § 1227(a)(2)(B)(ii) ("Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.").

35. *See* EIG, *supra* note 32, at 3.

prison or jail sentence imposed of at least one year.[36] "Crimes of moral turpitude" is not specifically defined, although it is very broad. Generally, this category includes a wide range of offenses, including crimes with an intent to steal or defraud; crimes in which bodily harm or serious bodily harm is caused or risked by intentional, willful, or negligent acts; and most sex offenses.[37] Initiation of deportation proceedings based on this laundry list of reasons almost inevitably leads to the person being placed in detention.[38]

For most of the crimes that now render immigrants deportable, the IIRIRA requires that they be detained immediately upon release from custody of the criminal court, with little discretion given to immigration judges to release the immigrant from detention while the removal proceedings are taking place.[39] Once an order of removal has been made, judges now have no discretion to release the person from detention during the ninety days immediately following the order (known as the removal period); the immigrant must be detained.[40] If the immigrant has not been deported during the removal period, the immigrant may still be denied parole from detention, instead being subjected to extended—and in some cases indefinite—detention.[41]

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36. 8 U.S.C. § 1101(a)(43). There are many other crimes that qualify; I have highlighted these because they are the most pertinent to the topic at hand. Further, despite the term "aggravated felony," the statutes do not require that the crime involved actually be charged as a felony. This means that immigrants can face mandatory deportation for misdemeanor convictions if they fit into an applicable category in the definition. *See* United States v. Graham, 169 F.3d 787, 792–93 (3d Cir. 1999) (holding that a crime of theft qualified as an "aggravated felony" for the purposes of § 1101, which is based on the length of the sentence imposed, not on the formal misdemeanor/felony designation given to the crime).

37. *See* MANUEL D. VARGAS, IMMIGRATION CONSEQUENCES OF NEW YORK CRIMINAL CONVICTIONS 2–3 (2006), *available at* http://www.kccba.org/Immigration%20Consequences%20of%20NY%20Criminal%20Convictions%20article%202006.pdf.

38. While it is easy to feel that immigrants who have committed crimes should be subject to detention, it is important to note that the detention described here takes place after the person has already served his or her sentence for the crime committed. 8 U.S.C. § 1231 affirmatively prohibits the removal of a convicted immigrant sentenced to jail or prison before he or she is released from custody of the involved correctional system. 8 U.S.C. § 1231(a)(4)(A) ("[T]he Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment."). Thus, at this stage, the person is subjected to imprisonment above and beyond what was imposed by criminal law.

39. *Id.* § 1226(c)(2) (allowing for release only if it "is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of [such a person], and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding").

40. *Id.* § 1231(a)(2) ("Under no circumstance during the removal period shall the Attorney General release an alien who has been found . . . deportable under section 1227(a)(2) . . . of this title.").

41. *Id.* § 1231(a)(3); 8 C.F.R. § 241.4 (2009). The U.S. Supreme Court in *Zadvydas v. Davis* did interpret § 1231 as being subject to constitutional limitations curtailing indefinite detention. 533 U.S. 678, 701 (2001). However, both Congress and the George W. Bush administration subsequently implemented a number of policies outlining cases in which detainees can be held beyond the six-month

These legislative changes place LGBTQ immigrants at a significantly greater risk of deportation and accompanying detention because of the link between poverty and the many, often relatively minor, crimes included in these expanded definitions. Despite the myth of gay affluence,[42] LGBTQ people face higher rates of poverty than heterosexual and gender conforming people, especially in family contexts.[43] This disparity is particularly acute for transgender people, who also suffer from significant barriers to education—a key factor in income potential.[44] Higher rates of poverty often compel people to engage in "survival crimes" in order to meet their basic needs or those of their family—activity that is criminalized, but which individuals are essentially forced to engage in due to extreme poverty and unemployment.[45]

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period, often not subject to judicial review. *See* T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365, 379–81 (2002).

42. Due largely to marketing studies done in the late 1980s and early 1990s, there is a persistent stereotype that lesbians and gay men have considerably more financial resources than most people. Ronald Alsop, *Are Gay People More Affluent Than Others?*, WALL ST. J., Dec. 30, 1999, at B1; M.V. Lee Badgett, *The Myth of Gay & Lesbian Affluence*, GAY & LESBIAN REV. WORLDWIDE, Apr. 30, 2000, at 22; *see also* Michael Wilke, *Data Show Affluence of Gay Market: Simmons, Mulryan/Nash Link Up for Study of Media, Buying Habits*, ADVERTISING AGE, Feb. 3, 1997, http://adage.com/article/news/data-show-affluence-gay-market-simmons-mulryan-nash-link-study-media-buying-habits/69302. Despite growing evidence to the contrary, this stereotype has continued into the twenty-first century. *See* Liz Hoggard, *The L Word: Lesbian. Loaded. Loving It*, INDEPENDENT, Nov. 20, 2005, at 24, *available at* http://www.independent.co.uk/news/uk/this-britain/the-l-word-lesbian-loaded-loving-it-516111.html; Liane Katz, *Burgeoning Gay Travel Market Worth Up to £600M*, GUARDIAN.CO.UK, Nov. 6, 2006, http://www.guardian.co.uk/travel/2006/nov/06/travelnews.uknews.gayandlesbiantravel.

43. *See* RANDY ALBELDA ET AL., POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY ii–iii (2009) (finding that lesbian, gay, and bisexual (LGB) people are more likely to live in families with very low incomes and that LGB families are more likely to receive government assistance); M.V. LEE BADGETT ET AL., BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION 7, 12–16 (2007) (finding substantial evidence of wage discrimination against men based on sexual orientation, and noting that while concrete studies have been difficult to conduct, large percentages of transgender people report being discriminated against and earning less than $25,000 per year).

44. *See* Jessica M. Xavier et al., *A Needs Assessment of Transgendered People of Color Living in Washington, DC*, 8 INT'L J. TRANSGENDERISM 31, 35 (2005) (finding that in a sample pool of adults predominated by transgender respondents, 30 percent had not finished high school, 64 percent had no higher education, 35 percent were unemployed, and 64 percent made less than $15,000 per year).

45. *See* POVERTY REDUCTION COAL., CRIMES OF DESPERATION: THE TRUTH ABOUT POVERTY-RELATED CRIME 3 (2008); POVERTY REDUCTION COAL. & ELIZABETH FRY SOC'Y OF CALGARY, SURVIVAL-RELATED CRIMES INITIATIVE 1 (2008); NAT'L COAL. FOR THE HOMELESS, SUBSTANCE ABUSE AND HOMELESSNESS 1 (2009), http://www.nationalhomeless.org/factsheets/addiction.pdf; *see also* NAT'L LAW CENT. ON HOMELESSNESS & POVERTY & NAT'L COAL. FOR THE HOMELESS, HOMES NOT HANDCUFFS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES (2009) [hereinafter NCH, HOMES NOT HANDCUFFS].

LGBTQ people are no different,[46] nor are LGBTQ immigrants.[47]

Activities most often associated with survival crimes include prostitution, theft, and drug offenses.[48] These are crimes that—under the heightened standards of the AEDPA and IIRIRA—will now most likely result in mandatory deportation and detention.[49] One author has noted that immigrants have been targeted for deportation for such minor crimes as turnstile jumping, which is characterized as a crime committed with intent to steal or defraud, and is therefore a crime of moral turpitude.[50]

In addition to increased levels of poverty that lead LGBTQ individuals to turn to survival crimes, LGBTQ people are also often profiled for criminal accusations and prosecutions.[51] Advocates report that LGBTQ people are often disproportionately targeted by quality-of-life law enforcement programs.[52] LGBTQ people are also disproportionately accused of crimes involving sex. Law enforcement personnel routinely profile LGBTQ people—particularly transgender women of color—as sex workers,[53] and stories of "bathroom stings" entrapping gay men in public restrooms are certainly not new.[54] However, sometimes such targeting comes in very unexpected ways. In at least two cases in the United States, transgender people have been convicted of fraud and rape when purported victims engaged in consensual relationships with them, but, upon the community discovering the person's transgender status,

46. *See* KATAYOON MAJD ET AL., HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN JUVENILE COURTS 71–74 (2009); NICHOLAS RAY, NAT'L GAY AND LESBIAN TASK FORCE, LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS 72–73 (2006).

47. *See* Gehi, *supra* note 12, at 324.

48. NCH, HOMES NOT HANDCUFFS, *supra* note 45, at 2.

49. *See* Gehi, *supra* note 12, at 324–26 (citing Dean Spade, *Compliance Is Gendered: Struggling for Gender Self-Determination in a Hostile Economy*, *in* TRANSGENDER RIGHTS 217, 229, 232 (Paisely Currah et al. eds., 2006)) (outlining the various means by which transgender immigrants are often targeted for crimes that lead to deportation).

50. *Id.* at 325 n.45.

51. Amnesty Int'l, *United States of America: Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S.*, AI Index AMR 51/122/2005, at 17 (Sept. 2005).

52. *Id.* at 53. Quality of life enforcement policies call for aggressively enforcing laws against minor offenses, such as loitering, public drunkenness, and littering, on the theory that a permissive approach towards minor social disorder leads to serious crime. *Id.* at 51.

53. *Id.* at 21–22.

54. *See* Max Follmer, *Craig Bust Leads to Debate Over Bathroom Stings*, HUFFINGTON POST, http://www.huffingtonpost.com/2007/09/07/craig-bust-leads-to-debat_n_63481.html (last updated Mar. 28, 2008, 2:45 AM) (discussing the debate over the efficacy and fairness of bathroom stings such as the one that led to the arrest of Senator Larry Craig); Amnesty Int'l, *supra* note 51, at 32–33.

later claimed to have been misled.[55] For immigrants, such targeted convictions, like those related to survival crime, would almost certainly lead to deportation and detention.

2. Increased Detention Related to Protracted Asylum Application Proceedings After the REAL ID Act

The REAL ID Act[56] significantly affects both immigrant and LGBTQ communities. Much has been written about the REAL ID Act and LGBTQ individuals—specifically its impact on transgender and gender nonconforming people.[57] However, such commentary is generally focused on the REAL ID Act's primary purpose of heightening requirements for identification for federal purposes and the problems this poses for transgender and gender nonconforming people who have difficulty obtaining identification documentation that matches their appearance.[58] Beyond these concerns, the REAL ID Act also contains several lesser-known provisions, some of which relate to claims for asylum.[59]

a. Changes to Asylum Claims Implemented by the REAL ID Act

Noncitizens who apply for asylum when attempting to enter the United States or prevent deportation have the burden of showing that they qualify for protection.[60] Applicants must show that they are "unable or unwilling to return to" their home country "because of persecution or a well-founded fear of persecution on account of . . . membership in a particular social group . . . ."[61] In meeting this burden, applicants must meet requirements of both

55. *See, e.g.*, Aeyal Gross, *Gender Outlaws Before the Law: The Courts of the Borderland*, 32 HARV. J.L. & GENDER 165 (2009) (describing cases in which transgender people were convicted of crimes ranging from fraud to rape after they were discovered to be transgender); Jennifer L. Nye, *The Gender Box*, 13 BERKELEY WOMEN'S L.J. 226 (1998) (same). In one case, a supposed victim later recanted and wrote a letter to the presiding judge admitting that she had known the defendant had been assigned as female at birth and was transgender. Nevertheless, the charges were not dropped. Gross, *supra*, at 170–71. These cases did not involve immigrants, but there is little reason to presume that immigrants are immune from such accusations.

56. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302 (codified as amended primarily in scattered sections of 8 U.S.C. and 49 U.S.C.).

57. *See, e.g.*, Félix E. Gardón, *The REAL ID Act's Implications for Transgender Rights*, 30 WOMEN'S RTS. L. REP. 352 (2009); James McGrath, *Are You a Boy or a Girl? Show Me Your REAL ID*, 9 NEV. L.J. 368 (2009).

58. Gardón, *supra* note 57; McGrath, *supra* note 57.

59. *See* REAL ID Act of 2005 tit. I.

60. 8 U.S.C. § 1158(b)(1)(B)(i) (2006); 8 C.F.R. §§ 208.13(a), 208.16(b), 1208.16(b), 1208.13(a) (2009).

61. 8 U.S.C. § 1101(a)(42)(A).

corroboration and credibility. Corroboration entails presenting evidence to back up their claims if such evidence is requested by the government. Credibility entails a finding that applicants are believable. Both of these requirements were made considerably more difficult by the REAL ID Act, particularly for LGBTQ people.[62] Although requirements for corroboration had grown steadily more restrictive over time, prior to the REAL ID Act, corroboration was based on notions of reasonableness and discretion on the part of immigration judges.[63] In the most recent decision to clarify corroboration requirements, *In re S-M-J-*,[64] the Board of Immigration Appeals (Board) stated that when it is reasonable to expect corroborating evidence, applicants should supply it or provide a reason why they are unable to do so.[65] At the same time, the Board continued to recognize that applicants' statements alone could suffice to establish their claims,[66] required that judges follow a standard of reasonableness when requesting corroborating evidence,[67] and—even when an expectation of corroboration was reasonable—left it to the judge's discretion whether to actually request it.[68]

The REAL ID Act, however, states that when "the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence *must* be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence."[69] While this language still allows for the possibility that applicants can succeed in their claims despite not having the required evidence, it also increases the burden on applicants to explain why they do not have it. Additionally, the language leaves out the requirement that any request for corroborating evidence be reasonable.[70] Together, these seemingly subtle changes in language have a

62. For a comprehensive discussion of the history of these requirements, how the changes imposed by the REAL ID Act continue a trend of increasing restrictions on establishing corroboration and credibility, and the effects of these restrictions on LGBTQ people, see Melanie A. Conroy, *Real Bias: How REAL ID's Credibility and Corroboration Requirements Impair Sexual Minority Asylum Applicants*, 24 BERKELEY J. GENDER, L. & JUST. 1, 2–3 (2009).

63. *See* Conroy, *supra* note 62, at 5–7 (discussing the development of corroboration standards by the Board of Immigration Appeals).

64. 21 I. & N. Dec. 722, Interim Decision 3303 (B.I.A. 1997).

65. *Id.* at 725.

66. *Id.* at 724.

67. *Id.* at 725.

68. *See* Conroy, *supra* note 62, at 6 (citing Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the REAL ID Act Is a False Promise*, 43 HARV. J. ON LEGIS. 101, 123 (2006)) (noting the Board's use of the permissive terms "should" and "can," rather than the mandates "shall" and "must").

69. 8 U.S.C. § 1158(b)(1)(B)(ii) (2006) (emphasis added).

70. *Id.*; Cianciarulo, *supra* note 68, at 127.

drastic effect on when an applicant may face a demand for corroborating evidence, and on what must be done to meet it.[71]

Like requirements for corroboration, credibility standards have also grown more restrictive over time. In *In re Mogharrabi*,[72] the Board found that the applicants were credible when their statements were "plausible, detailed, and coherent" and when nothing in the record suggested that the applicant was not credible.[73] While subsequent cases allowed that a credibility assessment could be impacted by omissions and inconsistencies in applicants' testimony,[74] and also by subjective factors such as the demeanor of the applicant during the hearing,[75] case law and commentators recognized the limits of these factors and found it important that they be considered in context.[76]

The REAL ID Act significantly increased the importance to credibility of the applicant's demeanor and of discrepancies in an applicant's statement, even minor discrepancies that have little impact on the applicant's central claim.[77] The Act places demeanor and minor discrepancies on an even playing field with other, more substantial factors and makes no mention of the weight judges ought to accord to each. Even more drastically, the Act explicitly states that minor discrepancies can be a basis for a finding of non-credibility even if they do not go to the heart of an applicant's claim.[78]

These standards make it much more likely that an applicant will be found not credible based on factors which have no real impact on an applicant's true credibility.[79] They also greatly increase the pressure on applicants to present a series of completely consistent statements and maintain a calm demeanor at all times, creating a nearly impossible standard given the conditions under

71. *See* Cianciarulo, *supra* note 68, at 127.

72. 19 I. & N. Dec. 439, Interim Decision 3028 (B.I.A. 1987).

73. *Id.* at 448.

74. *In re* A-S-, 21 I. & N. Dec. 1106, 1110, Interim Decision 3336, (B.I.A. 1998); *In re* S-M-J-, 21 I. & N. Dec. 722, 729, Interim Decision 3303, (B.I.A. 1997).

75. *In re A-S-*, 21 I. & N. Dec. at 1110.

76. *See, e.g.*, Cianciarulo, *supra* note 68, at 132–35 (noting that while previous Board and circuit court decisions held that minor discrepancies are natural and are not an appropriate basis to find an applicant non-credible, the REAL ID Act specifically states that they should be considered without regard to whether they speak to the central claim); Conroy, *supra* note 62, at 27 (highlighting the increased role of demeanor in the REAL ID statutory text, and noting that demeanor has been found to be a highly subjective and inappropriate means of judging credibility due to differences in culture, language, and personality).

77. 8 U.S.C. § 1158(b)(1)(B)(iii) (2006) (allowing determination of credibility based on demeanor, candor, consistency among statements, consistency between statements and evidence, and "any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim").

78. *See id.*

79. *See* Cianciarulo, *supra* note 68, at 135–36.

which many asylum applicants arrive in the United States and the stressful nature of the application process that stems from the potential consequences.[80]

b. Impact of the REAL ID Act on LGBTQ Applicants for Asylum

While these changes were put in place to prevent terrorist actors from taking advantage of asylum laws,[81] they have had an adverse impact on many legitimate asylum applicants,[82] including LGBTQ applicants.[83] This is particularly the case when applicants are forced to establish their membership in the LGBTQ "social group."[84]

Corroboration is often an extraordinarily difficult requirement for LGBTQ applicants proving either their membership in the "LGBTQ social group" or their persecution. If applicants feared persecution in their country of origin because of their sexual orientation or gender identity, their survival may have depended on secrecy, resulting in a lack of evidence to corroborate longstanding "membership" in the LGBTQ community.[85] Evidence of persecution may also be difficult to show, as official action taken against them in their home country, even if it is documented, may have been done under pretext and not explicitly because they are LGBTQ.[86] Under previous standards, requesting such corroborating evidence may well have been deemed unreasonable; if it were requested, applicants could overcome this request with an explanation as to why they did not have it. However, under the REAL ID Act, even unreasonable requests for evidence shift the burden to the applicants to show that it is reasonable that they do not have the evidence.

The focus on consistency and demeanor in making credibility determinations can likewise place LGBTQ asylum applicants at a distinct disadvantage. Applicants will likely find themselves faced with questions they cannot

80. *See id*. at 130–31. Depending on applicants' precise circumstances, they may have to give a written statement as part of the application, as well as oral statements at a point of entry into the United States, in a "non-adversarial" interview with a Customs and Immigration Services Asylum Officer, and in testimony subject to cross examination before an Administrative Law Judge. *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS., Aug. 12, 2010, http://www.uscis.gov/asylum (follow "Obtaining Asylum in the United States" hyperlink).

81. 151 CONG. REC. H460 (daily ed. Feb. 9, 2005) (statement of Rep. Sensenbrenner, Chairman, H. Comm. on the Judiciary).

82. Cianciarulo, *supra* note 68, at 136.

83. *See* Conroy, *supra* note 62, at 46–47.

84. Recall that federal law requires that the feared persecution be based on "membership in a particular social group." 8 U.S.C. § 1101(a)(42)(A) (2006); *see also supra* note 61 and accompanying text.

85. Conroy, *supra* note 62, at 29.

86. *See* Gehi, *supra* note 12, at 332 (discussing pretextual actions taken against transgender asylum claimants by governments, such as giving false reasons for arrest, persecution, or dismissal from government employment).

answer as customs officials ask them details about their history.[87] Questions may be inapplicable, such as questions about "coming out"—a notion that does not exist in some cultures but is a common theme in American ideas of LGBTQ people.[88] Indeed, the very notion of membership in an LGBTQ "social group," or identifying as LGBTQ, may be something that does not exist in an applicant's country or culture of origin, making questions about such things practically unanswerable for the applicant, giving the appearance of dishonesty.[89] Questions may also be irrelevant to an applicant's sexual orientation or gender identity, or have answers that are interpreted as inconsistent with an applicant's claim to being LGBTQ. Such questions include inquiries into past sexual activity or marital status, which may or may not have any bearing on an applicant's sexual orientation, and have nothing to do with gender identity.[90]

Based on credibility standards focusing on demeanor and inconsistencies, these types of unanswerable, stress-inducing questions increase the likelihood that LGBTQ applicants may be found to be not credible. Upon witnessing an applicant's inability to answer these questions to their satisfaction, immigration officials are likely to then request information from applicants to corroborate their LGBTQ status, or persecution based on LGBTQ status, leading to the complications with corroboration discussed above.

c. Subsequent Increases in Detention Rates for LGBTQ Asylum Applicants

The severe hurdles in the asylum process effected by the REAL ID Act increase the likelihood that LGBTQ applicants for asylum will have their claims rejected, or that it will take a significant amount of time for their applications to be processed even if they are ultimately successful. Because of the interplay between the REAL ID Act and the IIRIRA, both of these eventualities increase the length of time that LGBTQ applicants will spend in detention.

Under the IIRIRA, individuals attempting to enter without valid entry documents are subject to mandatory detention.[91] This includes applicants for

87. *The Real ID Act: Bad Law for Our Community*, NAT'L CTR. FOR TRANSGENDER EQUAL. & TRANSGENDER LAW CTR., http://www.realnightmare.org/images/File/NCTE%20realid.pdf (last visited May 10, 2011).

88. *Id.*

89. Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 122–23 (2002); Deborah A. Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases*, 15 L. & SEX. 135, 152–53 (2006).

90. *The Real ID Act*, *supra* note 87.

91. 8 U.S.C. § 1225(b)(2)(A) (2006).

asylum who are waiting for their application to be processed.[92] Given that these issues increase the time it takes for a determination to be made on an application, the applicant spends more time in detention. If applications are denied and the applicants choose to appeal the decision, they remain in detention while their appeal is heard. As a result, it is common for asylum applicants—even if ultimately successful—to spend years in detention.[93]

Similarly, applicants for asylum whose applications have been denied—an increased likelihood for LGBTQ applicants, as noted above—and who have had a final order of removal issued are subject to mandatory detention until they are deported.[94] However, deportation of denied applicants can be a lengthy and difficult process, as it is often dangerous or unfeasible to return the applicant to their country of origin. As denied applicants wait for the United States to locate a suitable alternative place to send them, they languish in detention, as the IIRIRA requires.

B. Particular Concerns of LGBTQ People Once in Detention

Aside from being affected by changing policies regarding who must be detained, once LGBTQ people are in detention they face specific issues beyond the typical loss of liberty associated with imprisonment. These include increased risk of violence for all LGBTQ prisoners and particular health needs for transgender prisoners. In the criminal detention context, the fact that LGBTQ prisoners face specific hardships is well established.[95] While there is little completed scholarly work or research in the immigration detention context, what has been done supports the notion that LGBTQ detainees face many of the same issues.[96] This is further bolstered by the fact that nearly two-thirds of all detainees are held in local jail facilities, and therefore under the same conditions as those in a criminal detention context.[97]

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92. *Id.* § 1225(b)(1)(B)(iii)(IV).

93. *See* PHYSICIANS FOR HUMAN RIGHTS & THE BELLEVUE/NYU PROGRAM FOR SURVIVORS OF TORTURE, FROM PERSECUTION TO PRISON: THE HEALTH CONSEQUENCES OF DETENTION FOR ASYLUM SEEKERS 50 (2003) (reporting findings that the length of detention for applicants granted asylum in the study ranged from seven months to three-and-one-half years with an average length of time of ten months and that at least one applicant whose application had not been determined at the time of the study had been detained for four-and-one-half years).

94. 8 U.S.C. § 1231(a)(2); 8 CFR 241.4 (2009).

95. JUST DET. INT'L, *supra* note 26; Mila P., *supra* note 26.

96. *See* Gehi, *supra* note 12, at 337–38; JUST DET. INT'L, SEXUAL ABUSE IN U.S. IMMIGRATION DETENTION 1 (2009); STOP PRISONER RAPE, NO REFUGE HERE: A FIRST LOOK AT SEXUAL ABUSE IN IMMIGRATION DETENTION 4–9 (2004).

97. *See Fact Sheet: Detention Management*, *supra* note 8.

1. Increased Risks of Violence for LGBTQ Detainees

In the contexts of incarceration and detention, LGBTQ individuals face higher levels of violence and sexual violence than most non-LGBTQ prisoners. Two of the highest-risk groups are male-bodied gender nonconforming prisoners and male-to-female (M-T-F) transgender prisoners.[98] M-T-F transgender detainees are at especially high risk for abuse due to prison housing policies. Most prison and detention facilities house detainees according to their assigned sex at birth and external genitalia,[99] a practice which often literally results in women being detained in men's facilities.[100]

A study of sexual violence in California prisons released by the California Department of Corrections and Rehabilitation found that 67 percent of LGBTQ inmates reported being sexually assaulted, a rate fifteen times higher than the overall population.[101] A 2007 study from the University of California, Irvine, found that 59 percent of transgender inmates reported being sexually assaulted, a rate thirteen times higher than the overall population.[102]

There is some evidence that the numbers in California prisons may be higher than those nationwide, as California prisons have been shown to have much higher overall rates of sexual assault than other states.[103] While this indicates that national rates of violence in overall prison populations are lower

98. When discussing issues of violence against LGBTQ prisoners, one important factor to keep in mind is that LGBTQ encompasses not only prisoners who self-identify as LGBTQ, but also prisoners who may be perceived as LGBTQ, or even those who fail to completely conform to heteronormative gender stereotypes. MAJD ET AL., *supra* note 46, at 101–02. This is particularly true for people housed in men's facilities, where any deviation from traditional stereotypes of masculinity is targeted as a sign of weakness, exposing the prisoner to an increased risk of harm. *Id.* at 104.

99. IMMIGRATION EQUAL. & TRANSGENDER LAW CENT., IMMIGRATION LAW AND THE TRANSGENDER CLIENT 90 (Victoria Neilson ed., 2008) [hereinafter IMMIGRATION LAW AND THE TRANSGENDER CLIENT].

100. Many transgender people do not have the financial, medical, or social ability to undergo surgery to alter their external genitalia. *See infra* notes 125–127 and accompanying text. Despite this lack of access to surgery, it is not unusual for individuals to have been receiving hormone therapy, either formally or informally, for years prior to incarceration. *See infra* note 128 and accompanying text. The result in the case of transwomen in this situation is that despite a prisoner having the same secondary sex characteristics of cisgender women, including breasts, she will be placed in men's facilities because she still has male genitalia.

101. LARRY YEE, ASSEMB. COMM. ON PUB. SAFETY, BILL ANALYSIS: AB 382, at 3, 2009–10 Leg., Reg. Sess. (Cal. 2009), *available at* http://info.sen.ca.gov/pub/09-10/bill/asm/ab_0351-0400/ab_382_cfa_20090327_110439_asm_comm.html.

102. Valerie Jenness et al., *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault*, THE BULL., June 2007, at 2.

103. Jennifer Macy Sumner & Kristy N. Matsuda, *Shining Light in Dark Corners: An Overview of Prison Rape Elimination Legislation and Introduction to Current Research*, BULL.: THE UC IRVINE CTR. FOR EVIDENCE-BASED CORR., Mar. 2006, at 3–4, *available at* http://ucicorrections.seweb.uci.edu/pdf/PREABulletinSoftCopy3.pdf.

than those found in the California studies, it does not necessarily indicate that LGBTQ prisoners' proportional risk of violence is lower nationwide. Indeed, Just Detention International (JDI), a human rights organization that works to end sexual abuse in all forms of imprisonment, reports that roughly one in five survivors who contact JDI each year self-identify as LGBTQ.[104]

As noted above, there is less research about violence towards LGBTQ detainees in the immigration context. The bureaucratic and insular nature of immigration detention facilities makes it difficult for researchers to conduct empirical research to determine the precise incidence of violence in detention centers, or the degree to which LGBTQ people experience violence.[105] However, based on lawsuits and anecdotes, researchers know that problems of violence and sexual violence do exist in immigration detention.[106]

In addition to facing similar risks of violence that prisoners in criminal detention contexts face, immigrant detainees often struggle with significant obstacles to reporting acts of violence and to obtaining protection from their attackers beyond the difficulties typical to detention and prison environments. These obstacles include language barriers,[107] a pervasive lack of access to legal representation,[108] the unresponsive nature of detention bureaucracy,[109] and the substantial power imbalance between detainees—desperate to stay in the United States—and the Department of Homeland Security (DHS)—which not only operates the detention through ICE, but also holds detainees' fates in its hands through ICE and the Citizenship and Immigration Services (CIS), the department that makes admission and deportation decisions.[110]

2. Particular Health Treatment Needs of Transgender Detainees

Transgender detainees in detention environments face specific medical issues stemming from both physical transition and mental health needs. Regarding physical transition, there are two broad categories of physical

104. JUST DET. INT'L, *supra* note 26, at 1.

105. *See, e.g.*, STOP PRISONER RAPE, *supra* note 96, at 10 (discussing Stop Prisoner Rape's frustrated efforts to gain access to detention facilities in order to conduct research).

106. JUST DET. INT'L, *supra* note 96; STOP PRISONER RAPE, *supra* note 96, at 4–9.

107. STOP PRISONER RAPE, *supra* note 96, at 1.

108. U.S. law does not guarantee immigrant detainees representation by legal counsel, and one study found that 78 percent of detainees do not have representation. Cormac T. Connor, Note, *Human Rights Violations in the Information Age*, 16 GEO. IMMIGR. L.J. 207, 218 (2001).

109. *See* Christy Oglesby, *What's Wrong With the INS? Critics, Defenders Agree: Agency Needs Overhauling*, CNN.COM, Mar. 21, 2002, http://archives.cnn.com/2002/US/03/21/ins.woes.

110. JUST DET. INT'L, *supra* note 96, at 1; Clay McCaslin, "*My Jailor Is My Judge*"*: Kestutis Zadvydas and the Indefinite Imprisonment of Permanent Resident Aliens by the INS*, 75 TUL. L. REV. 193, 224 (2000).

treatment that are generally available to transgender people desiring to transition: hormone therapy and surgery.[111] In hormone therapy, the person takes hormones of the desired sex, with the goal of developing secondary sex characteristics of the desired sex (for example, facial hair and a deeper voice for those desiring to live as male, or breasts and softer skin for those desiring to live as female).[112] Surgery can entail any number of procedures, but most often refers to surgery to construct either a male or female chest (breast surgery), or to construct male or female genitals (genital surgery).[113] In imprisonment contexts, the physical care transgender detainees seek most often is hormone therapy; surgery—while important to many transgender people—is simply not a realistic goal during incarceration and detention.[114]

The provision of adequate medical care for all immigrant detainees is a consistent problem in ICE facilities.[115] ICE has established few standards for providing medical care to detainees. The ICE Performance Based National Detention Standards (Standards) states that detention facilities are expected to provide an initial medical screening (including mental health and dental screening); primary medical, dental, and mental health care; emergency care; and specialty health care.[116] These terms are not further defined, nor are standards set for what is considered an adequate level of care to give to detainees.[117] The result of these vague standards is a pervasive failure to provide

111. WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, THE HARRY BENJAMIN INTERNATIONAL GENDER DYSPHORIA ASSOCIATION'S STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS 3 (6th ed. 2001) [hereinafter WPATH, BENJAMIN STANDARDS OF CARE] ("After the diagnosis of [gender identity disorder] is made the therapeutic approach usually includes three elements or phases (sometimes labeled triadic therapy): a real-life experience in the desired role, hormones of the desired gender, and surgery to change the genitalia and other sex characteristics.").

112. *Id.* at 14.

113. *Id.* at 19–20.

114. IMMIGRATION LAW AND THE TRANSGENDER CLIENT, *supra* note 99, at 92.

115. *See, e.g.*, *Detention and Removal Judiciary Hearing*, *supra* note 5, at 13–15 (testimony of Francisco Castaneda, former detainee) (describing Castaneda's denial of medical care for a lesion on his penis for eleven months despite multiple requests and recommendations by medical personnel that the lesion be biopsied); Sandra Hernandez, *Denied Medication, AIDS Patient Dies in Custody*, L.A. DAILY J., Aug. 9, 2007, at 1, 6, *available at* http://www.detentionwatchnetwork.org/node/334 (discussing the case of Victoria Arellano, a detainee who was denied routine antibiotics to prevent AIDS-related infections, contracted pneumonia, and died in ICE custody after being left untreated for two weeks despite high fevers, back pain, cramping, and vomiting blood). Castaneda never received treatment from ICE; he was released several days before a biopsy was performed. Receiving treatment privately, he was diagnosed with—and ultimately died from—invasive squamous cell carcinoma, an aggressive form of cancer. Castaneda v. United States, 538 F. Supp. 2d 1279, 1285 (C.D. Cal. 2008).

116. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, PERFORMANCE BASED NATIONAL DETENTION STANDARDS, pt. 4, § 22: MEDICAL CARE, at 4 (2008) [hereinafter ICE, MEDICAL CARE], *available at* http://www.ice.gov/doclib/dro/detention-standards/pdf/medical_care.pdf.

117. *See generally id.*

minimally adequate health care to detainees throughout the immigrant detention system, a problem that has slowly gained media attention and consequent public awareness.[118]

Given these threadbare standards for and resulting obstacles to obtaining medical care, it would be unsurprising if a transgender detainee faced difficultly obtaining hormone therapy or other transitional care.[119] ICE has established no standards related to the provision of transitional treatment to transgender detainees,[120] although an ICE official has asserted that ICE will provide hormone therapy to detainees who have undergone "sex reassignment surgery."[121] Despite this apparent policy, it is likely that a detainee will have to lobby extensively for such care with the assistance of a legal representative.[122] Given the uncertainty surrounding such basic medical care as antibiotics,[123] provision of hormones to post-operative transgender detainees is bound to be uncertain.

Even if one assumes that this guideline is followed, the standard leaves many transgender detainees without appropriate hormone therapy due to its reliance on "sex reassignment surgery" as the predicate for the provision of hormone therapy. For several reasons, a large number of transgender individuals, both citizens and immigrants, receive hormone therapy without having undergone any surgical treatment. First and foremost, the overwhelmingly dominant treatment model in the United States generally calls for hormone therapy well before surgery.[124]

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118. *See, e.g.*, Nina Bernstein, *Immigrant Detainee Dies, and a Life Is Buried, Too*, N.Y. TIMES, Apr. 3, 2009, at A1, A26; Bernstein, *supra* note 21; Hernandez, *supra* note 115.

119. Due to the relatively recent nature of these drastic increases in detention, as well as the difficulties in studying both detainee and transgender populations generally, there is little statistical or anecdotal evidence of how transgender detainees are or are not receiving medical care. However, many advocacy groups express skepticism that detainees are being treated appropriately. *See, e.g.*, IMMIGRATION LAW AND THE TRANSGENDER CLIENT, *supra* note 99, at 92.

120. *See generally* ICE, MEDICAL CARE, *supra* note 116.

121. *Detention and Removal Judiciary Hearing*, *supra* note 5, at 277 (answer to written question #18).

122. *See* IMMIGRATION LAW AND THE TRANSGENDER CLIENT, *supra* note 99, at 92 (predicting that a transgender detainee may need aggressive representation even for treatment of transition-related conditions that pose serious health risks). If such aggressive advocacy is needed even for urgent situations, the outlook is dim for a detainee trying to access less obviously urgent treatment such as hormone therapy.

123. *See supra* note 115 (discussing the case of Victoria Arellano).

124. *See* WPATH, BENJAMIN STANDARDS OF CARE, *supra* note 111, at 3 ("Typically, triadic therapy takes place in the following order: hormones → real-life experience → surgery, or sometimes: real-life experience → hormones → surgery."). Although not legally binding, the Benjamin Standards are considered the leading guidelines and dominant model for the treatment of individuals diagnosed with gender identity disorder. *See* Am. Med. Ass'n House of Delegates, *Removing Financial Barrier to Care for Transgender Patients*, Res. 122, at 1–2 (2008) (recognizing WPATH and the Benjamin Standards as critical elements in the American Medical Association's resolution to oppose the exclusion of coverage of transitional treatment in health insurance policies).

For others, even though they may desire and be eligible for surgical transitional treatment, it is simply not a realistic option. Many transgender people lack health insurance, and for those who have it, most insurance does not cover surgical transitional treatment. As a result, many transgender people cannot afford hormone treatment through standard medical routes, let alone surgery.[125] In the immigration context, surgical treatment may be particularly unattainable for many individuals seeking entry, depending on the availability of medical services and the risks involved in obtaining treatment in their country of origin (and thereby exposing their identity).[126] For still others, surgery may not be needed, is not physically possible, or is not desired.[127]

Nevertheless, people in any of these situations may be taking hormones, either formally through a prescription, or informally buying hormones on the street.[128] However, under the standard described above—that of having undergone "sex reassignment surgery"—none of the people in these situations would be eligible to receive hormone therapy while in detention. Detainees who are already on hormone therapy at the time of detention, whether prescribed or not, can suffer from severe withdrawal if hormone therapy is abruptly stopped, including "emotional lability, undesired regression of hormonally-induced physical effects . . . [a] sense of desperation that may lead to depression, anxiety and suicidality . . . psychiatric symptoms and self-injurious behaviors."[129] While the Standards have requirements that detainees be evaluated for chemical dependencies and potential withdrawal issues, no mention is made of potential withdrawal from hormones.[130]

The other aspect of care that poses particular problems for transgender detainees relates to their mental health. Therapy, counseling, or other mental health care is often a critical need for many transgender individuals, particularly in lieu of physical transition when such transition is neither possible nor desired, as is often the case in detention.[131] As noted above, mental health care is needed for detainees who have been forced to abruptly stop hormone

125. Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 755, 757 (2008).
126. *Cf.* Conroy, *supra* note 62, at 30–31.
127. Spade, *supra* note 125, at 754–55.
128. *Id.* at 757.
129. WPATH, BENJAMIN STANDARDS OF CARE, *supra* note 111, at 14.
130. ICE, MEDICAL CARE, *supra* note 116, at 12–13.
131. WPATH, BENJAMIN STANDARDS OF CARE, *supra* note 111, at 11 ("Many adults with gender identity disorder find comfortable, effective ways of living that do not involve all the components of the triadic treatment sequence. While some individuals manage to do this on their own, psychotherapy can be very helpful in bringing about the discovery and maturational processes that enable self-comfort.").

therapy. Yet, access to mental health care is another area in which ICE detention facilities have been found lacking.[132] Prior to 2008, ICE had no specific standards for the provision of mental health care to detainees.[133] Despite now having standards that require facilities to have an available in-house or contracted mental health provider, provide initial screenings determining whether referral to a mental health provider is necessary, and to ensure receipt of services within fourteen days of any referral,[134] detainees continue to be denied access to adequate mental health care.[135]

At the same time that they are likely being deprived of adequate mental health care, transgender people often face increased mental stress from the detention environment. In many prison and detention contexts, government officials respond to a transgender person's requests for evaluation and treatment by insisting that the person does not require any treatment, insisting that the person's gender identity issues are not "real."[136] Further, government officials often require the person to adhere to dress codes and codes of conduct required for the person's birth sex, and continue to refer to the person by their birth name and pronouns corresponding to their birth sex.[137]

The denial of identity that results from such deprivation of hormone therapy, medical treatment, and respect for the detainee's identity can have devastating impacts on detainees. In the prison context, undergoing years of such denial has led prisoners to suicide attempts, self-mutilation, and self-castration.[138] While this may not be as significant of an issue for detainees who spend only a short time in detention, some detainees—especially applicants for asylum—spend years in detention.[139]

132. Nina Bernstein, *Plight of Mentally Ill Detainees Is Outlined in Study*, N.Y. TIMES, Mar. 30, 2010, at A18, *available at* http://www.nytimes.com/2010/03/30/us/30immig.html.

133. ANN BADDOUR ET AL., JUSTICE FOR IMMIGRATION'S HIDDEN POPULATION: PROTECTING THE RIGHTS OF PERSONS WITH MENTAL DISABILITIES IN THE IMMIGRATION COURT AND DETENTION SYSTEM 27 (2010).

134. ICE, MEDICAL CARE, *supra* note 116, at 13–14.

135. *See* BADDOUR ET AL., *supra* note 133, at 27–30 (discussing failures in detention centers to meet Department Operations Manual standards for mental health care, due largely to understaffing).

136. MAJD ET AL., *supra* note 46, at 50.

137. *Id.*

138. *Id.* at 66–67.

139. *See* PHYSICIANS FOR HUMAN RIGHTS AND THE BELLEVUE/NYU PROGRAM FOR SURVIVORS OF TORTURE, *supra* note 93, at 50 (reporting findings that the length of detention for applicants granted asylum in one study ranged from two months to three-and-one-half years, with an average length of time of ten months and a median length of time of seven months).

II. STANDARDS FOR DETENTION CONDITIONS AND PROTECTION OF DETAINEES' RIGHTS

Before analyzing the feasibility of different routes of advocacy for LGBTQ detainees, it is necessary to look at the current protections and standards that govern conditions under which immigrants are detained. This will clarify the parameters within which advocacy must take place as well as what rights detainees may assert, and identify areas advocacy must target to be most effective.

Detention conditions are governed primarily by detainees' constitutional rights under the Fifth Amendment Due Process Clause and by ICE's internal detention guidelines. There is no statutory language that substantively addresses standards for conditions,[140] beyond stating that the applicable agency (currently ICE under the DHS) must provide "appropriate places of detention."[141] Similarly, there are no regulations governing detention center conditions.[142]

The result, as outlined below, is that detention conditions are checked only by the limits of detainees' ambiguous constitutional rights and ICE's internal standards. The framework of each of these is discussed in the following Subparts.

A. Constitutional Protections of Due Process for Immigrant Detainees

Despite their being effectively imprisoned, immigrant detainees are not explicitly covered by Eighth Amendment protections against cruel and

140. Each year since 2008, legislation has been introduced to set minimum standards for detention conditions and health care. However, none of these has been brought to a vote in either chamber or in any committee. Secure and Safe Detention and Asylum Act, S. 3114, 110th Cong. (2008); Secure and Safe Detention and Asylum Act, S. 1594, 111th Cong. (2009); Detainee Basic Medical Care Act of 2008, S. 3005, 110th Cong. (2008); Detainee Basic Medical Care Act of 2008, H.R. 5950, 110th Cong. (2008). Legislation has also been introduced each year since 2007 to impose stricter reporting requirements regarding detainee deaths. The most recent version passed the House of Representatives but did not come to a vote in the Senate before the end of the 111th Congress. Death in Custody Reporting Act of 2009, H.R. 738, 111th Cong. (2009); Death in Custody Reporting Act of 2008, H.R. 3971, 110th Cong. (2008); Death in Custody Reporting Act of 2008, H.R. 7227, 110th Cong. (2007). At the time of writing this Comment, similar bills had not yet been introduced in the 112th Congress.

141. 8 U.S.C. § 1231(g) (2006).

142. *See* Kelsey E. Papst, *Protecting the Voiceless: Ensuring ICE's Compliance With Standards That Protect Immigration Detainees*, 40 MCGEORGE L. REV. 261, 268 (2009) (looking at the only regulations that touch on facilities, which prohibit detention centers from releasing information or records on detainees to the public).

unusual punishment[143] because immigrant detention is considered a civil detention, not a criminal one.[144] Thus, the governing constitutional provision is the Due Process Clause of the Fifth Amendment, which prohibits the deprivation of liberty without due process of law.[145] As outlined below, there is currently a circuit split regarding what standards properly apply to immigrant detainees under the Fifth Amendment. A first hurdle that must be overcome, however, is the question of whether and when Fifth Amendment protections even apply to immigrant detainees, given Congress's traditional plenary power over immigration.

1. Potential Plenary Power Limitations to Due Process Protection

The plenary power doctrine holds that Congress has absolute power over matters concerning the admission of noncitizens to the United States and over the naturalization of noncitizens.[146] This doctrine was originally established—and is still maintained—in regards to those statutes and regulations governing who is admissible to the United States, and who is excludable or deportable.[147] Thus, when immigrants are faced with legal action against them stemming from traditional immigration law, plenary power effectively cuts off many—if not all—constitutional due process protections. In contrast, when immigrants are faced with legal action stemming from laws other than traditional immigration law, such as criminal prosecutions, the U.S. Supreme

143. U.S. CONST. amend. VIII.

144. Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("The proceedings at issue here are civil, not criminal . . . ."). In order for Eighth Amendment protections to apply, there must have been an adjudication of guilt in a criminal trial. Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977).

145. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

146. Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution . . . cannot be granted away or restrained on behalf of any one."). For a comprehensive discussion of the development and balance of Congress's plenary powers in the immigration context, see generally Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087 (1995).

147. The foundational cases of the plenary power doctrine dealt with Congress's power to exclude and deport immigrants in the context of the Chinese Exclusion Act. *The Chinese Exclusion Case* established that Congress had the right to refuse admission at its discretion, even to a legal resident attempting to return to the country. *Chae Chan Ping*, 130 U.S. at 609. Four years later, the Supreme Court held that Congress had the power to deport immigrants who had previously been here lawfully, also at its discretion. Fong Yue Ting v. U.S., 149 U.S. 698, 732 (1893).

Court has held that they have the same Fifth Amendment Due Process protections as United States citizens.[148]

Immigrant detention and detention conditions fall into a gray area between these two doctrines.[149] While the tradition of deference to Congress's plenary power was originally applied only to questions of who is eligible to enter or to remain in the country, in the post–World War II era, the Court has extended it to certain issues of detention and detention conditions.[150] In *Knauff v. Shaughnessy* and *Shaughnessy v. Mezei*, the Court denied the habeas corpus petitions of immigrant spouses of U.S. citizens who had been denied reentry to the United States and detained for years at Ellis Island.[151] Through these decisions, the Court seemed to establish that at least one condition of detention—length of detainment—was beyond Fifth Amendment powers. Although this holding has not been overruled, it has been called into serious doubt by more recent decisions in *Zadvydas v. Davis*[152] and *Clark v. Martinez*.[153] Still, the government has attempted to use these cases to stand for the establishment of plenary power over all areas of detention.[154]

Despite these extensions of plenary power to some aspects of detention, other cases have placed immigrants' constitutional protections regarding their

148. *See* Taylor, *supra* note 146, at 1133–35 (describing the foundational cases establishing constitutional protections for noncitizens). In *Yick Wo v. Hopkins*, the Court found that Chinese immigrants—although not citizens of the United States—were entitled to protection from discriminatory enforcement of local laws under the Due Process Clause of the Fourteenth Amendment. 118 U.S. 356, 368–69 (1886). In *Wong Wing v. United States*, the Court extended due process protections to deportable immigrants, finding that even though deportable immigrants no longer had a right to remain in the United States, and even though Congress had the power to order their deportation at its discretion, Congress did not have the power to sentence them to a period of imprisonment with hard labor prior to their deportation. 163 U.S. 228, 238 (1896). The Court held that "all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] amendments, and . . . even aliens shall not be . . . deprived of life, liberty or property without due process of law." *Id.* The presumption that "all persons" includes immigrants of all legal statuses was reaffirmed by the Court in *Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.").

149. *See* Taylor, *supra* note 146, at 1092 ("Only a handful of reported cases have decided the due process challenges to conditions of confinement suffered by alien detainees. These cases reflect confusion over which of the two competing lines of cases—the plenary power doctrine or the aliens' rights tradition—should govern conditions claims." (citations omitted)).

150. *See, e.g.*, Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950).

151. *Mezei*, 345 U.S. at 212; *Knauff*, 338 U.S. at 543.

152. 533 U.S. 678 (2001).

153. 543 U.S. 371 (2005).

154. *See, e.g.*, Haitian Ctrs. Council v. McNary, 969 F.2d 1326, 1341 (2d Cir. 1992) (describing a situation in which the government attempted to argue that plenary power doctrines precluded all detainee claims to constitutional protection); Lynch v. Cannatella, 810 F.2d 1363, 1372 (5th Cir. 1987) (same).

conditions of confinement on considerably firmer ground.[155] The foundational case for this premise is *Lynch v. Cannatella*. In *Lynch*, the Fifth Circuit distinguished the purpose of the plenary power doctrine in the immigration context from the government's assertion of it over detention conditions.[156] In doing so, the circuit court found that the government's sovereign interests would not be threatened by placing constitutional standards on the conditions under which immigrants are detained.[157] Consequently, the court found that immigrant detainees were entitled to Fifth Amendment Due Process protections in detention, insofar as the physical conditions of confinement were concerned.[158]

Although the Supreme Court has not taken up the issue, the holding in *Lynch* is generally representative of the notion that immigrant detainees are to be accorded due process protections in regards to their treatment by government officials. However, immigrants often face challenges to their claims based on the plenary power doctrine.[159]

2. Applicable Standards of Confinement Under Due Process Protections

Having established that immigrant detainees are generally afforded due process protections regarding their conditions of confinement, the next step in the constitutional analysis is to determine what those protections require. Most circuits have held that it is proper to analyze due process claims of detainees using the same standards that one would use to analyze cases involving pretrial detainees, as both types of detainees are under noncriminal detention.[160] This trend was solidified in *Zadvydas v. Davis*,[161] in which the Supreme Court held that immigration detention is not a criminal punishment, but a civilian detention.[162] As such, standards applicable to pretrial detention serve

155. While the government attempted to use *Knauff* and *Mezei* to stand for absolute plenary power over detention conditions, the circuit courts rejected this premise. *See Haitian Ctrs. Council*, 969 F.2d at 1340–41; *Lynch*, 810 F.2d at 1373.

156. *Lynch*, 810 F.2d at 1373.

157. *Id.* at 1374.

158. *Id.*

159. *See, e.g.*, Xiao v. Reno, 837 F. Supp. 1506, 1549 (N.D. Cal. 1993) (dismissing the government defendants' plenary power-based argument that the immigrant plaintiff had no substantive due process rights under the Fifth Amendment).

160. *See* Preval v. Reno, 203 F.3d 821 (4th Cir. 2000); United States v. Lazo-Herrera, 45 F.3d 440 (10th Cir. 1995); *Lynch*, 810 F.2d 1363; Amanullah v. Nelson, 811 F.2d 1 (1st Cir. 1987); Ortega v. Rowe, 796 F.2d 765 (5th Cir. 1986).

161. 533 U.S. 678 (2001).

162. *Id.* at 690.

as the strongest starting point for determining what protections immigrant detainees receive.

The basic standard for pretrial detainees was first established in *Bell v. Wolfish*,[163] in which the Court held that because pretrial detainees could not be punished prior to a conviction, the proper standard was to determine whether the treatment of the detainees amounted to punishment.[164] However, in both *Bell* and *Zadvydas*, the Court also recognized that the physical civil detention of detainees for the purpose of assuring their appearance at trial (or removal) does not by itself constitute punishment, despite the obvious significant loss of liberty.[165] Still further, in *Zadvydas*, the Court established a presumption that detention is nonpunitive.[166] This presumption effectively stacks the deck against a detainee attempting to establish that certain conditions rise to the level of punishment.

Since *Bell*, a firm circuit split has developed regarding the standard to use in determining what constitutes "punishment" for the purposes of pretrial detention analysis. The Third[167] and Ninth[168] Circuits have relied on a close reading of *Bell* to determine whether a pretrial detainee's due process rights have been violated. *Bell* instructed courts to determine whether the contested restriction is "imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose."[169] In determining whether punishment was intended by the contested condition, the courts could look to expressed intent to punish, the existence of another rational purpose for the restriction, and whether the restriction seems excessive in light of the alternative purpose.[170]

The Third Circuit further clarified its approach to determining whether conditions amount to punishment in *Union County Jail Inmates v. Di Buono*.[171] The circuit court held that the proper inquiry was "first, whether any legitimate

163. 441 U.S. 520 (1979).

164. *Id.* at 535.

165. *Zadvydas*, 533 U.S. at 699 ("[The habeas court] should measure reasonableness primarily in terms of the statute's basic purpose, namely, assuring the alien's presence at the moment of removal."); *Bell*, 441 U.S. at 536–37 ("[T]he Government concededly may detain him to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution.").

166. *Zadvydas*, 533 U.S. at 690 ("The proceedings at issue here are civil, not criminal, and we assume that they are nonpunitive in purpose and effect.").

167. Hubbard v. Taylor, 399 F.3d 150, 166–67 (3d Cir. 2005).

168. Pierce v. Orange County, 526 F.3d 1190, 1205–06 (9th Cir. 2008).

169. *Bell*, 441 U.S. at 538.

170. *Id.*

171. 713 F.2d 984 (3d Cir. 1983).

purposes are served by these conditions, and second, whether these conditions are rationally related to these purposes."[172] In determining whether conditions are reasonably related to a legitimate purpose, the court held that it must "inquire as to whether these conditions 'cause [inmates] to endure [such] genuine privations and hardship over an extended period of time,' that the adverse conditions become excessive in relation to the purposes assigned for them."[173]

In contrast, the majority of circuits have applied standards that create a higher hurdle to prove that detainment conditions constitute punishment. Presently, the First,[174] Sixth,[175] Eighth,[176] Tenth,[177] and Eleventh[178] Circuits have all explicitly applied the Eighth Amendment standard of deliberate indifference to detainees' conditions-of-confinement claims, despite the fact that the pretrial detention is theoretically nonpunitive and of a different nature than imprisonment. These holdings are rooted in the reasoning that the Due Process Clause provides *at least* the protections given by the Eight Amendment,[179] but over time the standards came to be seen as identical, without substantial additional reasoning.[180] The Eleventh Circuit provided more substantial reasoning in *Hamm v. DeKalb County*,[181] finding that government purposes of efficiency and cost saving justified most deprivations, with the absolute minimum requirements being established by the Eighth Amendment standard.[182] The court rejected using a different minimum standard, reasoning that it would be burdensome on courts and law enforcement to distinguish between people who are often held in the same facilities.[183]

Under the Eighth Amendment standards used by the majority of circuits, prisoners must first establish that the conditions they were subjected to caused them sufficiently serious harm, "denying 'the minimal civilized

172. *Id.* at 992.
173. *Id.* (quoting *Bell*, 441 U.S. at 542).
174. Suprenant v. Rivas, 424 F.3d 5, 18–19 (1st Cir. 2005).
175. Spencer v. Bouchard, 449 F.3d 721, 727–30 (6th Cir. 2006).
176. Butler v. Fletcher, 465 F.3d 340, 343–45 (8th Cir. 2006).
177. McClendon v. Albuquerque, 79 F.3d 1014, 1022 (10th Cir. 1996).
178. Marsh v. Butler County, 268 F.3d 1014, 1024 (11th Cir. 2001).
179. Burrell v. Hampshire County, 307 F.3d 1, 7 (1st Cir. 2002); Boswell v. Sherburne County, 849 F.2d 1117, 1121 (8th Cir. 1988); Roberts v. City of Troy, 773 F.2d 720, 723 (6th Cir. 1985); Garcia v. Salt Lake County, 768 F.2d 303, 307 (10th Cir. 1985).
180. *See supra* notes 174–178.
181. 774 F.2d 1567 (11th Cir. 1985).
182 *Id.* at 1573–74.
183. *Id.*

measure of life's necessities.'"[184] Prisoners must then establish that the prison official acted with a culpable state of mind: that of deliberate indifference.[185] The standard of deliberate indifference is subjective and based on the prison official's actual knowledge. It requires that "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."[186]

Under current case law in the majority of circuits, this two-step analysis is used to determine when conditions rise to the level of punishment under *Bell*. Additionally, while the holding in *Lynch v. Cannatella* helped solidify immigrant detainees' access to due process protections for conditions claims, it has had unfortunate results for the standards used in assessing them. In some cases, courts have seized upon the most stringent language in *Lynch*, using it as a standard threshold for a constitutional claim in this context. The court in *Lynch* stated that the plaintiffs had a right to be free from the "malicious infliction of cruel treatment" and "gross physical abuse at the hands of state or federal officials."[187] This severe language, if taken as a standard, is even more stringent than the standard for Eighth Amendment claims, which the Supreme Court has explicitly stated does not require malice.[188]

While there is little indication that the court in *Lynch* intended this language to create such a stringent governing standard for pretrial detention claims,[189] subsequent cases in at least two circuits have treated it as doing precisely that.[190] Case law in this area has not developed sufficiently to establish this standard as binding precedent, but at least in the Fifth and Eleventh Circuits it has established an even higher threshold for conditions claims

184. Wilson v. Seiter, 501 U.S. 294, 298 (1991) (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)); *see also* Farmer v. Brennan, 511 U.S. 825, 834 (1994) (quoting *Rhodes*, 452 U.S. at 347).

185. *Farmer*, 511 U.S. at 834; *Wilson*, 501 U.S. at 303.

186. *Farmer*, 511 U.S. at 837.

187. Lynch v. Cannatella, 810 F.2d 1363, 1374 (5th Cir. 1987).

188. *See Wilson*, 501 U.S. at 303 (rejecting defendant prison administrators' contention that malice should be required for conditions claims, and instead using the deliberate indifference standard established in the medical care context in *Estelle v. Gamble*, 429 U.S. 97 (1976)).

189. *See* Taylor, *supra* note 146, at 1149–50.

190. *See, e.g.*, Gisbert v. U.S. Att'y Gen., 988 F.2d 1437, 1442 (5th Cir. 1993) (affirming denial of a habeas corpus petition because plaintiffs could not show gross physical abuse); Adras v. Nelson, 917 F.2d 1552, 1559 (11th Cir. 1990) (affirming dismissal because plaintiffs did not allege malicious infliction of harm or gross physical abuse); Medina v. O'Neill, 838 F.2d 800, 803 (5th Cir. 1988) (holding that plaintiffs did not state a claim because they did not allege malicious infliction of cruel treatment or gross physical abuse).

in the context of immigration detention than those used in either pretrial detention or criminal punishment.

Thus, while in some circuits detainees have a right to detention conditions that are less restrictive and onerous than criminal incarceration, in the majority of circuits, the standards are constructively identical, or even more severe. The obstacles and implications of these standards for LGBTQ detainees attempting to vindicate their rights through litigation are discussed in Part III.

B. Standards for Detention Imposed by ICE Regulations

Aside from these constitutional due process standards, the primary guide for detention facility conditions are ICE's Performance Based National Detention Standards (Standards), which in 2008 replaced the original Detention Operation Standards (DOS), first released in 2000. The Standards took full effect in January 2010.[191]

The Standards cover almost all facets of immigration detention, including inmate care, activities, and access to legal information; facility safety and security; and administration.[192] As such, they are a promising start to regulation of detention conditions for civilly detained immigrants. However, they contain serious flaws that limit their usefulness. These stem both from their actual content and from their implementation and enforcement.

1. Shortcomings in Requirements Under the Standards

Despite standing as a comprehensive guide for detention facilities, the Standards have significant shortcomings when it comes to the detention of LGBTQ immigrants. The current Standards contain no reference to or guidelines regarding LGBTQ detainees, despite the facts that—as discussed in Part I—LGBTQ detainees are at greater risk for abuse and that transgender detainees likely have particular health, housing, and hygiene needs.[193] Nor do

191. *Fact Sheet: Detention Management*, *supra* note 8.

192. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, 2008 OPERATIONS MANUAL ICE PERFORMANCE BASED NATIONAL DETENTION STANDARDS (PBNDS) (2008), *available at* http://www.ice.gov/detention-standards/2008.

193. *See* ICE, MEDICAL CARE, *supra* note 116; U.S. IMMIGR. & CUSTOMS ENFORCEMENT, 2008 OPERATIONS MANUAL ICE PERFORMANCE BASED NATIONAL DETENTION STANDARDS (PBNDS): SEXUAL ABUSE AND ASSAULT PREVENTION AND INTERVENTION (2008), *available at* http://www.ice.gov/detention-standards/2008 (follow "Part 2—Security" hyperlink, then follow "Sexual Abuse and Assault Prevention and Intervention" hyperlink); U.S. IMMIGR. & CUSTOMS ENFORCEMENT, 2008 OPERATIONS MANUAL ICE PERFORMANCE BASED NATIONAL DETENTION

the current Standards require any training of detention center staff regarding LGBTQ detainees,[194] including procedures for searching LGBTQ detainees.[195]

Both of these failings stand in stark contrast to a number of penal settings that have implemented housing standards for LGBTQ prisoners, clear medical care guidelines for transgender prisoners (although such guidelines are rarely favorable), and training for prison personnel around LGBTQ sensitivity and awareness.[196] For example, the National Prison Rape Elimination Commission considers the needs of LGBTQ prisoners in its recommended standards for adult[197] and juvenile facilities,[198] lockup facilities,[199] and community correctional facilities.[200]

2. Shortcomings in ICE Enforcement of the Standards

Even if regulations relating to LGBTQ detainees were added to the Standards, they would likely provide little real protection given the considerable evidence that the Standards are poorly enforced within ICE.[201] In

STANDARDS (PBNDS): PERSONAL HYGIENE (2008), *available at* http://www.ice.gov/detention-standards/2008 (follow "Part 4—Care" hyperlink, then follow "Personal Hygiene" hyperlink).

194. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, 2008 OPERATIONS MANUAL ICE PERFORMANCE BASED NATIONAL DETENTION STANDARDS (PBNDS): STAFF TRAINING (2008), *available at* http://www.ice.gov/detention-standards/2008 (follow "Part 7—Administration and Management" hyperlink, then follow "Staff Training" hyperlink).

195. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, 2008 OPERATIONS MANUAL ICE PERFORMANCE BASED NATIONAL DETENTION STANDARDS (PBNDS): SEARCHES OF DETAINEES (2008), *available at* http://www.ice.gov/detention-standards/2008 (follow "Part 2—Security" hyperlink, then follow "Searches of Detainees" hyperlink).

196. The Los Angeles Men's Central Jail has had a program in place since 1985 under which gay men and transgender prisoners are housed separately. Due to the critical mass of gay and transgender inmates, this program is generally considered to be fairly successful. *See* Press Release, L.A. Cnty. Sheriff's Dep't, Deputies to Be Honored for Innovative Jail Program for Gay Inmates (May 16, 2005), *available at* http://www.lasd.org/releases/52a-SMART-CSW-pr.htm. California's state prison regulations contain relatively comprehensive guidelines for transgender prisoners' health care. Div. of Corr. Health Care Servs., California Correctional Health Care Services Manual, Chapter 26: Hormone Therapy for Transgender Inmate Patients (2007). Although the policy of the Federal Bureau of Prisons leaves much to be desired, it at least provides some guidelines for treatment of transgender prisoners. FED. BUREAU OF PRISONS, PROGRAM STATEMENT: PATIENT CARE 48 (2005).

197. NAT'L PRISON RAPE ELIMINATION COMM'N, STANDARDS FOR THE PREVENTION, DETECTION, RESPONSE, AND MONITORING OF SEXUAL ABUSE IN ADULT PRISONS AND JAILS (2009).

198. NAT'L PRISON RAPE ELIMINATION COMM'N, STANDARDS FOR THE PREVENTION, DETECTION, RESPONSE, AND MONITORING OF SEXUAL ABUSE IN JUVENILE FACILITIES (2009).

199. NAT'L PRISON RAPE ELIMINATION COMM'N, STANDARDS FOR THE PREVENTION, DETECTION, RESPONSE, AND MONITORING OF SEXUAL ABUSE IN LOCKUPS (2009).

200. NAT'L PRISON RAPE ELIMINATION COMM'N, STANDARDS FOR THE PREVENTION, DETECTION, RESPONSE, AND MONITORING OF SEXUAL ABUSE IN COMMUNITY CORRECTIONS (2009).

201. The ACLU has been especially critical of ICE's enforcement of its standards, maintaining that ICE does not adequately oversee local facilities housing detainees, conducts ineffective inspections of which facility employees have advance warning, conducts inspections that focus on

2006, DHS's Office of the Inspector General (OIG), which is responsible for auditing and investigating DHS programs,[202] conducted an audit of five detention centers: an ICE–owned and operated facility, a privately owned facility operated through a contract with ICE, and three local jail facilities used for housing detainees. The audit focused on compliance with detention standards regarding health care, environmental health and safety, conditions of confinement, and reporting of abuse.[203]

In the course of its audit, the OIG found noncompliance with the DOS, which were in force at the time, regarding health care at four of the five facilities.[204] Two of the facilities failed to respond to nonemergency health care requests in a timely manner a full 50 percent of the time.[205] The OIG also found noncompliance with the DOS regarding environmental health and safety in three of the five facilities,[206] and noncompliance with the DOS regarding conditions of confinement at all five facilities.[207] This included a failure to classify detainees based on security needs,[208] housing detainees of different classification levels together,[209] and a failure to have adequate detainee grievance procedures.[210]

The OIG report also detailed serious shortcomings in the education of detainees regarding their rights. Upon arrival at a facility, detainees are to be issued a handbook that instructs them as to their rights and responsibilities, and the rules and procedures of that facility.[211] The OIG found that none of the five facilities' handbooks informed detainees of the procedure for reporting abuse

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policy rather than practice, and fails to require facilities to correct violations it finds. ACLU OF MASS., DETENTION AND DEPORTATION IN THE AGE OF ICE: IMMIGRANTS AND HUMAN RIGHTS IN MASSACHUSETTS 57–63 (2008).

202. U.S. DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., http://www.dhs.gov/xoig (last visited May 10, 2010) ("The Inspector General is responsible for conducting and supervising audits, investigations, and inspections relating to the programs and operations of the Department.").

203. DEP'T OF HOMELAND SEC., OFFICE OF THE INSPECTOR GEN., TREATMENT OF IMMIGRATION DETAINEES HOUSED AT IMMIGRATION AND CUSTOMS ENFORCEMENT FACILITIES 1 (2006), *available at* http://trac.syr.edu/immigration/library/P1598.pdf [hereinafter OIG 2006 REPORT].

204. *Id.* at 3–6.

205. *Id.* at 4.

206. *Id.* at 8–10.

207. *Id.* at 12–25.

208. *Id.* at 17.

209. *Id.* at 18.

210. *Id.* at 20–21. One facility had practically no grievance procedures at all. The Passaic County Jail did not keep a log of detainee grievances, did not file grievances in detainees' records, had no grievance committee (instead relying on one employee to answer and resolve all grievances), did not respond to any audited grievances in a timely manner, and provided no means for detainees to file a grievance without knowledge of the jail's staff in order to avoid retaliation. *Id.*

211. *Id.* at 31.

or other civil rights violations.[212] At two of the facilities, roughly 50 percent of the detainees did not receive a handbook at all; at one, the handbook given to detainees was the facility's inmate handbook, given to convicted prisoners.[213]

Despite the widespread nature of some of these violations, the OIG also found that ICE's most recent annual review of each facility failed to identify the problems: Each of the facilities had been given a rating of "acceptable" at their most recent annual reviews.[214]

The Government Accountability Office (GAO) also performed an audit of twenty-three ICE facilities in 2007 to examine ICE compliance with the DOS.[215] This audit also found inconsistent compliance with detention standards. Although the primary widespread issue identified was telephone access to pro bono services,[216] the GAO identified issues in a variety of areas, including medical care,[217] food service,[218] the potential for use of excessive force (including stun guns and dogs),[219] inappropriate use of short-term hold rooms,[220] and overcrowding.[221]

In summary, while the Standards represent a potential source of guidance for detention conditions, they provide little meaningful assurance that detainees will be held in acceptable conditions in practice. Given ICE's inability to enforce basic protections for all detainees, even if protections for LGBTQ detainees were added to the Standards, there is little hope that they would be implemented in a consistent, meaningful manner.

212. *Id.* at 32.
213. *Id.* at 31–32.
214. *Id.* at 36.
215. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-875, REPORT TO CONGRESSIONAL REQUESTERS, ALIEN DETENTION STANDARDS: TELEPHONE ACCESS PROBLEMS WERE PERVASIVE AT DETENTION FACILITIES; OTHER DEFICIENCIES DID NOT SHOW A PATTERN OF NONCOMPLIANCE 5 (2007), *available at* http://www.gao.gov/cgi-bin/getrpt?GAO-07-875 [hereinafter GAO 2007 PRIMARY REPORT].
216. *Id.* at 10–17.
217. *Id.* at 17–20. *See generally* RICHARD M. STANA, U.S. GOV'T ACCOUNTABILITY OFFICE, TESTIMONY BEFORE THE SUBCOMM. ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SEC. & INT'L LAW, COMM. ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ALIEN DET. STANDARDS: OBSERVATIONS ON THE ADHERENCE TO ICE'S MED. STANDARDS IN DET. FACILITIES (2008), *available at* http://www.gao.gov/cgi-bin/getrpt?GAO-08-869.
218. GAO 2007 PRIMARY REPORT, *supra* note 215, at 21–22.
219. *Id.* at 21.
220. *Id.* at 20–21.
221. *Id.* at 28–30.

III. POSSIBILITIES AND SHORTCOMINGS OF LITIGATION-BASED ADVOCACY

When one talks about advocacy, especially in the context of LGBTQ legal rights, the first thing that may come to mind is litigation. Much of the history of LGBTQ legal rights advocacy has been based on litigation—aiming to secure rights through the courts—in the pattern of the civil rights movement.[222]

A. Litigation Precedents in the Prison Conditions Context

Litigation does hold some possibilities for relief of poor detainment conditions or treatment, primarily for compensation once a detainee has been harmed. As noted in Part II, there are significant obstacles both for stating a cognizable claim under the Due Process Clause,[223] and—in the majority of circuits—for establishing that the conditions violated due process protections once they are triggered.[224] These high standards can make it difficult for LGBTQ detainees to state a claim that a court will recognize, let alone consider on the merits.[225]

Fortunately, there is positive precedent from litigation involving criminal incarceration of LGBTQ prisoners that can be leveraged in the detention context. Over the past several years, LGBTQ prisoners bringing claims based on prison conditions have met with more consistent success. This growing body of case law helps to establish that not only is the failure to protect LGBTQ prisoners from assault a potential violation of Eighth Amendment protections, but so may be the failure to provide transgender inmates with transitional health care, especially hormone therapy.[226]

The notion that prison officials have a duty to protect prisoners from assault is well established.[227] The primary obstacle to claims of this type is the requirement of subjective awareness of risk on the part of prison officials. It is not enough that an official has a generalized awareness of dangers in prison, or

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222. *See generally* Libby Adler, *The Gay Agenda*, 16 MICH. J. GENDER & L. 147 (2009) (discussing and critiquing the LGBTQ movement's use of rights-based litigation).

223. *See supra* Part II.A.

224. *See supra* Part II.B.2.

225. *See supra* Part II.B.

226. *See, e.g.*, Gammett v. Idaho State Bd. of Corr., No. CV05-257-S-MHW, 2007 WL 2186896 (D. Idaho July 27, 2007) (granting a preliminary injunction against the Board of Corrections, and requiring the provision of proper medical care related to the plaintiff's gender identity disorder).

227. *See* Farmer v. Brennan, 511 U.S. 825, 833–34 (1994).

even of a particular prisoner's general vulnerability or threat.[228] However, as the Supreme Court allowed in *Farmer v. Brennan*, awareness of risk can be inferred from circumstances, such as the length of time the danger has existed or the obviousness of the danger.[229] As the risks posed to LGBTQ prisoners become more exposed and recognized, it has become considerably more difficult for prison administrators to claim a lack of awareness of such risks and avoid liability, a fact that has led some facilities to take costly and significant measures to avoid such risks.[230]

Precedents related to the provision of health care to transgender prisoners show even more concrete improvement. The first cases to consider transgender prisoners' claims for health care did not take seriously transgender prisoners' need for transition-related care.[231] While courts did require some care for inmates diagnosed with Gender Identity Disorder (GID),[232] there was no consideration that anything was necessary beyond psychotherapy to make prisoners more comfortable with their birth sex. Starting in the 1990s, however, as medical professionals began to become more familiar with transgender people's health care needs, courts began to recognize that in some cases, mere psychotherapy was insufficient treatment, particularly when prisoners had taken hormones prior to incarceration.[233] This trend has culminated in some cases where courts have held that hormone therapy and other accommodations for transgender prisoners—such as the issuance of female-appropriate clothing and use of the prisoner's chosen name and pronoun—may be constitutionally required.[234]

228. *See, e.g.*, Carter v. Galloway, 352 F.3d 1346 (11th Cir. 2003); Rich v. Bruce, 129 F.3d 336 (4th Cir. 1997).

229. *Farmer*, 511 U.S. at 842–43.

230. *See* L.A. Cnty. Sheriff's Dep't, *supra* note 196.

231. Meriwether v. Faulkner, 821 F.2d 408 (7th Cir. 1987); Supre v. Ricketts, 792 F.2d 958 (10th Cir. 1986); Lamb v. Maschner, 633 F. Supp. 351 (D. Kan. 1986).

232. Note that "Gender Identity Disorder" is a more recent term. Labels used to diagnose transgender prisoners have varied considerably over the years; for simplicity's sake, I will use it throughout this discussion, regardless of the term in use at the time.

233. *See* Maggert v. Hanks, 131 F.3d 670, 671 (7th Cir. 1997) (recognizing that the appropriate treatment for transgender patients is physical transition, although not requiring it in the case at hand); Phillips v. Mich. Dep't of Corr., 731 F. Supp. 792 (W.D. Mich. 1990) (recognizing the need for more treatment where the prisoner had lived as female for seventeen years).

234. *See* De'Lonta v. Angelone, 330 F.3d 630 (4th Cir. 2003) (reversing the district court's dismissal of an Eighth Amendment claim where hormone therapy was stopped after being administered for several years); Konitzer v. Frank, 711 F. Supp. 2d 874 (E.D. Wis. 2010) (denying summary judgment for the defendants where the prisoner challenged the denial of permission to wear a bra and use a female name and pronouns); Kosilek v. Maloney, 221 F. Supp. 2d 156, 162 (D. Mass. 2002) (finding that even though the prisoner had not previously been diagnosed with GID, denial of diagnosis and hormone treatment was inadequate provision of health care, and that even if the

Because these cases arise in the prison context, they can likely be useful precedent for immigrant detainees regardless of the circuit. In the majority of circuits applying Eighth Amendment standards to the due process claims of civil detainees, as discussed in Part II.A.2, these precedents have already been shown to meet that burden, as they arose directly under the Eighth Amendment judicial framework and have explicitly been found to violate those minimum standards.

In the minority of circuits applying a lower threshold, these precedents show that such situations should be violations of due process rights, as they have already been held to violate much narrower Eighth Amendment rights. As discussed earlier, these circuits focus on whether the conditions amount to punishment, based on expressed intent, the existence of another rational purpose for the deprivation, and whether the deprivation seems excessive in light of any possible alternative purpose.[235] Although no court has found an express intent to punish by withholding transitional health care to transgender detainees, courts have discredited other purposes for such deprivations in the prison context, such as cost,[236] administrative burdens, and security.[237] In the absence of another legitimate purpose for denial of treatment, a court could easily find that this denial amounts to punishment, and therefore violates the detainee's due process rights.

B. Weaknesses in Litigation as an Advocacy Strategy

1. Weaknesses in Prison Condition Precedents

Although the precedent discussed above does provide a solid starting point for advocates wishing to litigate conditions claims, there remain significant obstacles to relief through litigation. Primarily, while this precedent is helpful, it is hardly rock solid. As noted above, in terms of inmate safety, it is often

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defendant could establish good-faith security justifications for refusing hormone therapy, the denial of such therapy may be unconstitutional).

235. Bell v. Wolfish, 441 U.S. 520, 538 (1979) (identifying factors to be used in determining whether "particular restrictions and conditions accompanying pretrial detention amount to punishment").

236. *Kosilek*, 221 F. Supp. 2d at 161 ("It is not . . . permissible to deny an inmate adequate medical care because it is costly.").

237. *Id.* at 162 (noting that policies in other systems allowing prisoners already on hormone therapy to continue their therapy had not presented a security problem, and stating that if new hormone therapy is denied based on safety concerns, "a court will have to decide whether the Eighth Amendment has been violated"); *see also Konitzer*, 711 F. Supp. 2d at 910–12 (denying summary judgment for the defendants based on administrative and security rationales for denying the prisoner the right to feminize her appearance and use female name and pronouns).

difficult to establish the requisite awareness of individual prison officials to establish their culpability.[238]

The roadblocks to transgender prisoners receiving transitional health care are even more burdensome. The violations LGBTQ detainees suffer are rarely seen as being egregious enough to meet the higher standards imposed by the plenary power doctrine or by the majority standards for civil detention conditions. For example, the provision of transitional medical care for transgender prisoners and detainees is often seen as superfluous and elective; as such, the denial of such care is not considered a harm at all, let alone an egregious one.[239] Such views of transition care reflect a persistent misunderstanding of GID and transition in the public at large and in the popular media; these misunderstandings can even encompass health care that is routine for cisgender people, such as mammograms.[240] Also militating against the usefulness of the litigation strategy is the fact that even recent victories in securing transitional care have been limited to particular cases. Most successful cases involve prisoners who have been diagnosed with GID prior to imprisonment.[241] Courts have generally declined to hold unconstitutional so-called "freeze frame" policies, which deny transitional treatment to prisoners who were not diagnosed with GID and taking hormones prior to imprisonment.[242] Such policies, however, ignore many transgender prisoners' realities, as they cannot afford to access formal medical diagnoses and hormone prescriptions, instead relying on self-diagnosis and obtaining hormones on the street.[243] The restraint shown by courts in deferring to such policies makes litigation a futile route for many transgender prisoners.

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238. *See supra* note 228 and accompanying text.

239. *See, e.g.*, Maggert v. Hanks, 131 F.3d 670, 672 (7th Cir. 1997) (stating that transitional therapy is "esoteric" treatment that should not be provided to prisoners for fear that transgender people will commit crimes in order to access state sponsored transition).

240. *See, e.g.*, Caroline Black, *Transgender Killer Tells Massachusetts Taxpayers to Put Mammogram on Her Tab*, CRIMESIDER.COM, Apr. 21, 2010, http://www.cbsnews.com/8301-504083_162-20002851-504083.html; Denise Lavoie, *Sex-Change Inmate Says Treatment Stopped*, USATODAY.COM, Feb. 27, 2008, http://www.usatoday.com/news/nation/2008-02-26-404369684_x.htm. This failure to take treatment seriously can even extend to nontransitional treatment. Unfortunately, such attitudes are prevalent even within the LGBTQ community, as evidenced by the treatment given in an article on Advocate.com, the website of a prevalent LGBTQ news magazine, and in the comments posted by readers. Christopher Mangum, *Transgender Murderer Wants Her Electrolysis*, ADVOCATE.COM, Nov. 23, 2009, http://www.advocate.com/News/Daily_News/2009/11/23/Transgender_Murder_Wants_Her_Electrolysis.

241. *See, e.g.*, *Konitzer*, 711 F. Supp. 2d at 874; Brooks v. Berg, 270 F. Supp. 2d 302 (N.D.N.Y. 2003); Phillips v. Mich. Dep't of Corr., 731 F. Supp. 792, 792 (W.D. Mich. 1990).

242. *See, e.g.*, *Kosilek*, 221 F. Supp. 2d at 193 (refusing to find Massachusetts's freeze frame policy unconstitutional despite finding that its application to the defendant was a denial of adequate care).

243. *See* MAJD ET AL., *supra* note 46, at 112.

There are also ways in which precedent established in the prison context may not translate to the immigration detention context. One particular issue is that detainees typically spend much less time in immigration detention than an individual spends in prison. While this may not make much difference in cases in which detainees have been exposed to violence, it can be a critical distinction for issues of care given to transgender detainees. In prison cases, one of the primary arguments for requiring that hormone therapy and other care be provided is that while there may not be an acute need for such treatment, being denied care for an extended length of time is often detrimental to a prisoner's psychological and physical health.[244] Immigration detention is generally much shorter in length than criminal imprisonment, often measured in a matter of weeks. This can greatly reduce the compelling need for the detainee to receive treatment from the government.

However, with increasing rates of detention, the length of detention is also increasing. This is especially true for applicants for asylum, who sometimes spend years in immigrant detention.[245] Additionally, if a situation has become egregious enough to lead to meaningful litigation, then chances are high that the detainee was held and denied treatment for a considerable amount of time, thus triggering the same concerns that exist in the prison context.

2. Weaknesses in Litigation as an Advocacy Tool

Litigation is perhaps the most common route through which the LGBTQ community seeks to vindicate its rights.[246] For systemic reasons, however, litigation may not be as useful as the primary route of advocacy in the immigration context as it is in other areas of the LGBTQ movement. Litigation may make more sense in the context of same-sex marriage, where political gains are incredibly uncertain and slow to come,[247] or in the context of parental rights, where most overall law—not just as it relates to LGBTQ people—is established by court precedent.[248] In the context of immigration detention, however, the benefits of litigation are more limited, both in the potential positive outcomes for individual litigants and in the promise for effecting change.

244. *See* Spade, *supra* note 125, at 755.
245. *See supra* note 93.
246. *See* Adler, *supra* note 222.
247. MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE 143 (1999).
248. *See* Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 207–14 (2009) (outlining a brief history of the development of custody laws, largely through common law).

At the individual level, litigation only arises after the detainee has suffered significant harm while in government detention. While a monetary award after the fact is often considered a victory by advocates—and may be at least a minimum level of compensation for plaintiffs—it cannot erase the loss of health or life already inflicted. For the individual plaintiff, litigation is too late. This is in stark contrast to typical litigation situations in the LGBTQ context, in which winning access to marriage or securing parental rights is truly a complete victory—the plaintiff's rights are made whole.

Litigation in this context is also unlikely to effect meaningful change for future LGBTQ immigrants in detention. In both the prison and detention contexts, there is a well-established practice of defendants avoiding court-ordered changes and the setting of other precedent by settling cases or rendering them moot.[249] Sometimes, such settlement can result in positive change, as in *Gammett v. Idaho State Board of Corrections*.[250] In that instance, after a judge granted a preliminary injunction requiring the Idaho Board of Corrections to provide the plaintiff with transitional care, the Board settled, agreeing to implement policy changes as part of the settlement.[251] More often, however, defendants successfully avoid such policy changes by settling for purely monetary damages, or by rendering cases moot by providing treatment to the particular plaintiff involved only after the plaintiff has filed suit.[252] This may provide relief for that plaintiff, but it does not effect systemic change that will benefit future prisoners or detainees.

This is again in stark contrast to litigation involving rights such as marriage equality or the establishment of parent-child relationships. Monetary damages are irrelevant in such cases, and without the leverage of financial settlement, there is no consequent potential for settlements that avoid the setting of precedent.

Ultimately, litigation may be the only recourse that immigrants currently in detention have to attempt to remedy violations of their individual rights, subjection to abuse, and denial of adequate health care. However, at best, litigation will provide minimal, after-the-fact relief for plaintiffs who have already been injured, and it should not be relied upon to drive widespread change or to protect future detainees.

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249. *See, e.g.*, Gammett v. Idaho State Bd. of Corr., No. CV05-257-S-MHW, 2007 WL 2186896 (D. Idaho July 27, 2007); ACLU, *supra* note 22.

250. 2007 WL 2186896.

251. NAT'L CTR. FOR LESBIAN RIGHTS, CASE DOCKET: GAMMETT V. IDAHO STATE BOARD OF CORRECTIONS, *available at* http://www.nclrights.org/site/PageServer?pagename=issue_caseDocket_idaho_tg_prisoners (last visited May 18, 2011).

252. *See, e.g.*, *id.*

IV. POSSIBILITIES FOR CHANGE FROM POLICY-BASED ADVOCACY

Given the shortcomings of the litigation-based approach outlined above, advocates wishing to alleviate the plight of LGBTQ immigrant detainees may do well to include significant policy-based advocacy in any legal campaign. In the following Subparts, I look at the possibilities for policy changes at the legislative and regulatory levels, and at the level of ICE's internal standards. These Subparts are admittedly brief, as my goal here is not to detail a comprehensive plan of detention reform, but rather to indicate directions that LGBTQ organizations and other advocates may consider beyond litigative advocacy.

Part IV.A discusses one obvious means of addressing problematic detention conditions—increasing regulation and oversight of detention facilities. Currently, there is significant room for this in legislation, regulation, and internal ICE standards. However, each of these routes poses significant problems, which are discussed in turn below. For that reason, Part IV.A.2 focuses on advocacy to reduce the number of people held in detention.

A. Expanding Mechanisms for Controlling Detention Conditions

1. Legislative or Regulatory Oversight of Conditions

In addition to striving to reduce detention rates, advocacy can focus on implementing meaningful oversight of detention conditions. There is currently little or no congressional oversight of detention conditions.[253] The Immigration and Naturalization Act (INA) makes only indirect, minimal reference to detention conditions, stating that DHS "shall arrange for appropriate places of detention,"[254] and expressly stating that detainees do not have a private right of action under the INA to challenge their conditions of detention.[255] Similarly, the Code of Federal Regulations provides no real guidelines over the management and operation of detention centers.[256] There is significant room at both the statutory and regulatory levels to establish more meaningful oversight of detention. However, the decision to pursue such increased oversight may be a dubious use of limited resources due to the potential impracticality and impotence of such oversight, and the risk that increased bureaucracy will further entrench the current system of detention.

253. *See* Papst, *supra* note 142, at 267–68.
254. 8 U.S.C. § 1231(g) (2006).
255. *Id.* § 1231(h).
256. *See* Papst, *supra* note 142, at 268.

To a certain degree, it is entirely impractical to expect comprehensive regulation to be implemented at the statutory or regulatory level. Detention facilities vary widely in their size, number of detainees, available resources, and sophistication, including large, ICE–owned and operated facilities, facilities operated by private contractors, and local jail facilities that contract with ICE to house detainees.[257] The wide variety of accommodations, exceptions, and other variations different facilities would require based on their capabilities makes management at a statutory and regulatory level inefficient, unlikely, and probably unwise.

Despite these difficulties, Congress could pass legislation, or DHS could implement regulations, requiring ICE to put into place stronger standards governing the management and operation of detention centers. Such legislation or regulation could require minimum levels of oversight from ICE, such as mandating more frequent inspections; imposing consequential punishments on facilities that fail to meet minimum standards; or mandating the creation of standards covering specific areas of concern in detention, such as the safety of LGBTQ detainees. Congress could also impose a greater degree of its own external oversight of ICE.

Such oversight, however, carries the substantial risk of further entrenching the current system of detention. Superficially, oversight necessarily results in an increase in resources directed towards the detention system. On a deeper level, however, such oversight may serve to further normalize the detention system as it stands, and counteract efforts to reduce our reliance on it. Increasingly, legal theorists note that by ameliorating only the most urgent consequences of problematic institutions, such accountability measures can reduce calls for more meaningful change while leaving the problematic institutions largely intact.[258]

Given the problems inherent in detention, discussed in Part I, organizations that choose to advocate for such oversight should do so cautiously, particularly in light of the resources that such advocacy would draw from other efforts. However, considering the urgent nature of conditions in detention, combined with ICE's proven inability to enforce what few standards exist, it is arguably an important route for advocates to take.

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257. *Fact Sheet: Detention Management*, *supra* note 8.

258. Gabriel Arkles, Pooja Gehi & Elana Redfield, *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. FOR SOC. JUST. 579, 601 (2010) (citing Paul Kivel, *Social Services or Social Change?*, *in* THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX 129, 139–40 (INCITE! Women of Color Against Violence ed. 2007) and Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest Convergence Dilemma*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 20, 20 (Kimberlé Crenshaw et al. eds., 1995)).

2. ICE Monitoring and Standards

ICE standards and monitoring represent another avenue with the potential for implementing procedures that can protect LGBTQ detainees. As an initial matter, implementation of LGBTQ standards carries many of the same risks discussed above in regards to greater oversight by Congress and DHS increasing the apparent legitimacy of current detention practices and reducing the urgency for systemic reform. However, the lack of even minimal safeguards for LGBTQ detainees is an urgent problem that warrants more consideration. Creating concrete standards can spur rapid policy and procedural changes at individual institutions that can provide some relief. Additionally, the existence of standards can be an important tool in litigation by providing a measuring stick against which to measure a defendant facility's actions, or by providing evidence of deficient policies and practices.

ICE's standards and operations manual must include LGBTQ-related standards, both for the safety of LGBTQ detainees and for the provision of appropriate health care. The prison context shows us that LGBTQ-related standards are not anathema to the efficient operation of a detention facility.[259] In 2009, the National Prison Rape Elimination Commission (NPREC) released standards for decreasing the amount of sexual abuse that takes place in prisons. These specific standards are aimed to protect LGBTQ prisoners, with no evidence that the NPREC views such protections as decreasing the ability of facilities to operate safely and efficiently.[260] Numerous state and local prison systems, such as the California Department of Corrections and Rehabilitation,[261] the Los Angeles County Jail[262] and the Idaho Department of Corrections (*Gannett*),[263] have implemented their own policies for protecting LGBTQ inmates. Even the Federal Department of Corrections has guidelines for the treatment of transgender prisoners.[264]

Additionally, ICE must implement procedures for monitoring compliance with its standards and for enforcing compliance more stringently. As noted above, current ICE oversight is poor, with many violations of standards going

259. *See supra* Part III.

260. *See supra* notes 197–200 and accompanying text.

261. CAL. DEP'T OF CORR. & REHAB., ADULT INSTITUTIONS, PROGRAMS, AND PAROLE OPERATIONS MANUAL § 91020.26, at 774 (2010), *available at* http://www.cdcr.ca.gov/Regulations/Adult_Operations/DOM_TOC.html; *see* Div. of Corr. Health Care Servs., *supra* note 196.

262. L.A. Cnty. Sheriff's Dep't, *supra* note 196.

263. *See* Press Release, Nat'l Ctr. for Lesbian Rights, Federal Judge in Idaho Orders Treatment for Transgender Inmate (July 30, 2007), *available at* http://www.nclrights.org/site/PageServer?pagename=press_idaho_prison073007.

264. FED. BUREAU OF PRISONS, *supra* note 196.

undetected by ICE audits.[265] Where violations are detected, there is little evidence that ICE imposes any penalties or other consequences on facilities for these failures, or that it takes meaningful steps to ensure that these deficiencies are corrected.[266] With such meaningless enforcement, even comprehensive standards protecting LGBTQ detainees would be reduced to toothless recommendations. If ICE is unable to consistently monitor and enforce its own provisions, greater oversight by DHS or Congress may be required.[267]

B. Turning Back the Increases in Detention

Rather than advocating for the expansion of detention systems and further entrenchment of detention practices, a more effective way to protect LGBTQ immigrants from abuse in detention is to reduce the number of immigrants being detained. No matter what standards are implemented, or constitutional rights secured, imprisonment in the United States is an inherently violent situation,[268] and without significant change, LGBTQ detainees (indeed, all detainees) will be exposed to inordinate amounts of violence.[269] To this end, LGBTQ advocates should join with immigrants' rights advocates to push for legislative changes that will decrease the current staggering rates of detention.

Numerous advocacy organizations are campaigning for alternatives to the mass detention of immigrants. A common call is for the elimination of mandatory detention, to be replaced by a system of detention based on individual assessment of an immigrant's threat to public safety and community-based supervision programs to ensure that immigrants appear at immigration proceedings.[270] Such an approach can drastically reduce costs to both the government and to detainees, while still allowing for the detention of individuals who truly pose a threat if not detained.[271]

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265. *See* OIG 2006 REPORT, *supra* note 203, at 36.

266. *See id.* (noting that facilities in violation of standards were still rated "Acceptable"); GAO 2007 PRIMARY REPORT, *supra* note 215, at 38–39 (noting that ICE audits had detected violations in many of the same areas that GAO had, but these violations had not been corrected by the facilities).

267. *See* Papst, *supra* note 142, at 286–87.

268. Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 518 (2009).

269. *See id.* at 517.

270. Press Release, Am. Friends Serv. Comm., Human Rights Advocates Say No to Massive Immigration Detention Center in Northeast (Dec. 21, 2010), *available at* http://afsc.org/story/human-rights-advocates-say-no-massive-immigration-detention-center-northeast; *DWN Core Values and Principles*, DET. WATCH NETWORK, http://www.detentionwatchnetwork.org/corevaluesprinciples (last visited Mar. 1, 2011); *Dignity Not Detention: About the Campaign*, DET. WATCH NETWORK, http://detentionwatchnetwork.org/DND_about (last visited Mar. 7, 2011).

271. *See* STANFORD LAW SCHOOL IMMIGRANTS RIGHTS CLINIC, POLICY BRIEF: COMMUNITY-BASED ALTERNATIVES TO IMMIGRATION DETENTION 1–2 (2010), *available at*

Such proposals are not only the conjecture of activists; from 1997 to 2000, the Immigration and Naturalization Services (the forerunner to ICE) teamed with the Vera Institute of Justice to implement a pilot community monitoring program in New York City called the Appearance Assistance Program.[272] Immigrants in the program had a 91 percent appearance rate at hearings, compared to a 71 percent rate for nonparticipants.[273] In terms of cost, for asylum seekers and immigrants facing deportation due to criminal convictions, supervision was more cost effective than detention.[274] ICE has implemented its own community supervision programs, the Intensive Supervision Appearance Program and the Enhanced Supervision/Reporting Program, which impose electronic and in-person monitoring on immigrants.[275] However, these programs are not used as alternatives to mandatory detention—in order to qualify for the program, an immigrant must not be subject to mandatory detention.[276] On a smaller scale, one narrow step is to eliminate the mandatory detention of arriving asylum seekers, an approach that has been taken in Australia,[277] and which is more closely in line with international human rights law than current detention practices.[278]

Despite the impact these immigration policies have on LGBTQ people, and the potential for such advocacy to help relieve their burdens, the reduction of immigration detention is not an issue mainstream LGBTQ advocacy organizations address. Presently, none of the most commonly referenced LGBTQ legal advocacy organizations noted the increase and overuse of immigration detention as an issue or area of concern.[279] Based on this narrow

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http://www.law.stanford.edu/program/clinics/immigrantsrights/#advocacy_projects (follow "report on behalf of Detention Watch Network" hyperlink); Press Release, *supra* note 270.

272. 1 EILEEN SULLIVAN ET AL., TESTING COMMUNITY SUPERVISION FOR THE INS: AN EVALUATION OF THE APPEARANCE ASSISTANCE PROGRAM i (2000), *available at* http://www.vera.org/content/testing-community-supervision-ins-evaluation-appearance-assistance-program (follow "final report.pdf" hyperlink).

273. *Id.* at 3.

274. *Id.* at 7–8.

275. DEP'T OF HOMELAND SEC. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, SALARIES AND EXPENSES FISCAL YEAR 2011 OVERVIEW CONGRESSIONAL JUSTIFICATION 60–61 (2010).

276. DEP'T OF HOMELAND SEC. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, ALTERNATIVES TO DETENTION FOR ICE DETAINEES (Oct. 23, 2009), *available at* http://www.aila.org/content/default.aspx?bc=1016%7C6715%7C12053%7C26286%7C31038%7C30487.

277. Tim Johnson, *Australia Announces Changes on Asylum Seekers*, N.Y. TIMES, July 30, 2008, http://www.nytimes.com/2008/07/30/world/asia/30australia.html.

278. U.N. High Commissioner for Refugees, Detention of Refugees and Asylum-Seekers, No. 44 (XXXVII) (Oct. 13, 1986), *available at* http://www.unhcr.org/refworld/docid/3ae68c43c0.html; Bill Frelick, *US Detention of Asylum Seekers and Human Rights*, MIGRATION POL'Y INST. (Mar. 2005), http://www.migrationinformation.org/usfocus/display.cfm?ID=296.

279. *Immigration*, NAT'L CTR. FOR TRANSGENDER EQUAL., http://transequality.org/Issues/immigration.html (last visited Mar. 13, 2011); *Immigration Project Overview*, NAT'L CTR. FOR LESBIAN

definition of what constitutes an "LGBTQ issue," it seems evident that these organizations are neglecting a dire problem for many LGBTQ immigrants. This failure is disappointing, particularly because this is an issue in which LGBTQ organizations can both actively support and be supported by other communities.

CONCLUSION

As illustrated throughout this Comment, advocates for LGBTQ immigrant detainees face a large number of obstacles to effective advocacy, ranging from an unfriendly legislative environment, evidenced by the passage of laws such as the AEDPA, IIRIRA and REAL ID Act, to uncertain constitutional protections and guidelines, to deficient and ineffective standards. Certainly, the challenge presented is a daunting one.

However, the situation is not entirely bleak. As a result of increased media coverage of detention conditions, there is growing political pressure to implement meaningful change in our system of detention.[280] There have been ongoing efforts in Congress to enact legislation such as that discussed above, implementing stronger oversight and accountability in detention.[281] While these efforts have not yet gained a significant foothold, they have been persistent. This confluence of dire circumstances and fledgling political efforts provides an opportunity for LGBTQ communities to engage in meaningful coalition building with other social movements, particularly, in this case, the immigrants' rights movement. For the sake of LGBTQ people who do not benefit from United States citizenship, LGBTQ advocacy organizations must act on this opportunity and increase efforts both beyond litigation and beyond the narrow view of LGBTQ issues that they have traditionally held.

RTS., http://www.nclrights.org/site/PageServer?pagename=issue_immigration_overview (last visited Mar. 13, 2011); *International Rights & Immigration*, HUM. RTS. CAMPAIGN, http://www.hrc.org/issues/int_rights_immigration.asp (last visited Mar. 13, 2011); *Issues*, LAMBDA LEGAL, http://www.lambdalegal.org/our-work/issues (last visited Mar. 13, 2011); *The Issues*, NAT'L GAY & LESBIAN TASK FORCE, http://www.thetaskforce.org/issues (last visited Mar. 13, 2011); *LGBT Rights*, ACLU, http://www.aclu.org/lgbt-rights (last visited Mar. 13, 2011); *Our Work*, GAY & LESBIAN ADVOCATES & DEFENDERS, http://www.glad.org/work (last visited Mar. 13, 2011).

280. *See, e.g.*, Nina Bernstein, *Report Critical of Scope of Immigration Detention*, N.Y. TIMES, Oct. 7, 2009, at A17 (covering a report released by the Obama administration that was highly critical of current detention trends and conditions).

281. *See supra* note 140.