

HOW THE CRIMINAL JUSTICE SYSTEM IS ANTI-QUEER¹

Queer people face heightened surveillance and repression based on their actions and appearances. From criminalizing the sexual behavior or relationships of queer people to harassing and willfully ignoring the rape or assault of transgender prisoners, the criminal justice system has a long history of anti-queer practices and policies. Although the Supreme Court struck down anti-sodomy laws in 2003,² the criminal justice system continues to treat queer individuals unfairly. Queer, transgender, and transsexual prisoners are more likely to be assaulted or raped by correctional officers and prisoners, and they are the least likely to receive medical or psychiatric care for grave illnesses. With their identities frequently unacknowledged, queer people are segregated from other prisoners and denied access to rehabilitative programs. Queer people of color face additional harassment and imprisonment.

QUEER YOUTH ARE TARGETED BECAUSE OF THEIR SEXUALITY AND BECAUSE THEY ARE YOUNG.

- ***Many queer youth are forced onto the streets and become targets of the criminal justice system as a result.*** Social stigma and rejection, feeling they have no choice but to leave, or being kicked out have all caused queer youth to leave home. Now, about 40% of homeless youth are believed to be queer. Interviews with queer youth suggest that many are often driven to commit crimes such as robbery or prostitution in order to survive. These are the crimes for which queer youth are most often arrested, and estimates indicate that queer youth compose anywhere from 4% to 10% of the juvenile justice population.³
- ***Foster homes aren't safe spaces either.*** Many foster homes are hostile places where queer youth may experience violence and harassment. According to one study, while in group foster homes, 100% of queer youth have experienced homophobic verbal abuse and 70% have experienced physical violence.⁴
- ***Transgender youth are particularly targeted by foster care and forced to wear clothing "appropriate" to their birth sex.*** Many youth in the juvenile justice and foster care system are often denied hormones or have them taken away if already medically prescribed, even with previous parental consent.⁵

TRANSGENDER PEOPLE WHO HAVE NOT HAD SEX REASSIGNMENT SURGERY ARE CLASSIFIED ACCORDING TO THE SEX THEY WERE BORN WITH FOR PURPOSES OF PRISON HOUSING.⁶

- ***Classifying transgender people by their birth sex can put them in danger.*** This is done regardless of how long prisoners may have lived as their identified gender, and in spite of other steps taken in medical transition.⁷ Sometimes a transgender defendant is held in a separate or "secure" cell at the courthouse when they are waiting to appear before a judge. Often, that cell is located next to or across from the cells of other defendants. If this occurs, the transgender defendant frequently becomes the target of verbal abuse. Sometimes a transgender defendant is housed in the same cell or room as other defendants awaiting trial. When this happens, verbal abuse can escalate to physical and sexual violence.⁸ Not housing transsexual prisoners in a way that is consistent with their gender identities puts male-to-female individuals, in particular, at a greater risk for sexual violence.⁹
- ***Transgender people are sometimes housed separately from other prisoners. This is called "administrative segregation."*** This segregation results in exclusion from recreation, educational and occupational opportunities, and associational rights.¹⁰
- ***Many queer and trans prisoners are also labeled sex offenders and have to wear special uniforms to identify them as such even when their charges don't include any sexual misconduct.***¹¹

- ***Transgender prisoners undergoing hormone replacement therapy prior to their incarceration may face problems in prison.*** The 8th Amendment prohibits cruel and unusual punishment, and the subject of whether a transgender person should receive hormone therapy while in prison has been argued on the grounds that denying hormone therapy exhibits “deliberate indifference” to a prisoner’s “serious medical needs.”¹² While it is the official policy of the United States Bureau of Prisons to provide hormones to transgender individuals at the same level they were receiving prior to incarceration, most prisoners are unable to document their prior prescriptions for hormones, or face prison officials who ignore the Bureau of Prisons policy. Even if prisons do provide hormones, there is no assurance that they will be provided at sufficient levels, with essential physical and psychological support services,¹³ or that transgender inmates will receive hormones regularly.¹⁴ When transgender people stop hormone therapy, many of the changes they had experienced may reverse themselves.¹⁵ This could cost transgender people in prison the progress they had made through hormone treatments, as well as the lost investment of the hormones they had taken prior to incarceration.

QUEER VICTIMS OF VIOLENT CRIME OFTEN FACE HOMOPHOBIC AND ACCUSATORY ASSAULTS FROM ATTACKERS’ DEFENSE ATTORNEYS.

- ***There are no laws or rulings barring the so-called “Gay Panic Defense.”*** This is a defense in which a person claims to have committed a violent crime against a person of the same sex because they allege that the person made unwanted romantic or sexual advances towards them.¹⁶ The defense is usually unsuccessful in winning acquittals, but it is often able to reduce the defendant’s culpability and mitigate the punishment he receives.¹⁷ Although it occasionally has been barred in specific trials, no state or federal laws prohibit its use. The defense has also been used in recent years by those accused of murdering queer people, such as in the much-publicized Matthew Shepard case in Wyoming.

SODOMY LAWS, WHILE RECENTLY RULED TO BE UNCONSTITUTIONAL, HAVE LEFT A LEGACY OF DISCRIMINATION AGAINST QUEER PEOPLE.

- ***Sodomy laws ban any contact or consensual sexual behavior between a person’s sexual organs and the mouth or anus of another.***¹⁸ In trying to justify having such laws, states have claimed that acts which would fall under the definition of sodomy endanger the “moral welfare” of society, and that the best way to protect society is to punish those who engage in this behavior.¹⁹ Although both heterosexual and homosexual people engage in the behaviors outlawed by these statutes, they were usually applied to people engaged in same-sex sexual behavior.
- ***Although sodomy laws were ruled unconstitutional by the U.S. Supreme Court in June of 2003, many such laws still existed on state books up until they were invalidated by the Court’s decision.*** These sodomy laws, even if not always enforced, have a history of labeling gay, lesbian, bisexual, and transgender people as “criminals,” and have in the past given courts and police a mechanism by which to discriminate against queer individuals though few convictions ever resulted under sodomy laws themselves.²⁰ In fact, up until the court’s decision, 15 states still had technically enforceable sodomy laws on the books. In four states, such laws applied only to sexual contact between two people of the same sex.²¹
- ***In the past, so-called sodomy laws have stigmatized lesbians and gay men in many ways.*** In addition to branding lesbians and gay men as criminals, these laws have been used to deny employment to gay job applicants, to deny child custody and visitation rights, and as a rationale against enacting civil rights laws that bar discrimination based on sexual orientation.²² It is too soon after the Supreme Court Ruling against sodomy laws to know if the ruling against them will help to end the legacy they have created.

- ***Sodomy laws were used to justify targeting queer people.*** These laws hurt people through "sting" operations in which police departments set up special squads whose purpose was to entrap gay men, as well as to justify anti-gay interpretations of the law.²³ Although many of these laws technically applied to both same-sex couples and heterosexual couples, they were historically used only against gay men and lesbians.

GAY MEN MAY BE FORCED TO REGISTER AS SEX OFFENDERS.

- Sex offender laws which create statewide public registries of sex offenders have raised fears that gay men who have been convicted of consensual gay sex under now-obsolete criminal statutes will appear alongside men and women convicted of violent sexual crimes on lists available to anyone in their community.²⁴ Although gay men convicted of consensual sex were removed from registries in California in 1997,²⁵ similar laws still exist in other states.

QUEER PARENTS ARE DISCRIMINATED AGAINST IN CHILD CUSTODY ISSUES.

- Former spouses, psychiatrists, or the courts themselves can damage child custody claims of queer parents by stating that the person is mentally unstable or is an unfit parent because of their sexual orientation.²⁶

1 For the purposes of this document, the word 'Queer' is being used as an inclusive term referring to all those who identify as Lesbian, Gay, Bisexual, Transgender, Transsexual, and Two-spirited.

2 CNN. November 18, 2003. "Supreme Court Strikes Down Texas Sodomy Law". See <<http://www.cnn.com/2003/LAW/06/26/scotus.sodomy/>>. (May 18, 2005).

3 Feinstein, Randi et al. 2001. "Justice for all? A report on lesbian, gay, bisexual and transgendered youth in the New York juvenile justice system." See <<http://www.urbanjustice.org/publications/index.html>> (June 15, 2004).

4 Ibid.

5 Rickke Mananzala, personal correspondence with editor, June 6, 2005.

6 Joslin, Courtney. 2002. "Transsexual Prisoners." National Center for Lesbian Rights. See <<http://www.nclrights.org/publications/tsprison.htm>> (July 16, 2003).

7 Ibid.

8 Transgender Law Center. No Date. "Some Courtroom Concerns of the Transgender Community," See <<http://www.transgenderlaw.org/resources/courtroomconcerns.pdf>> (June 17, 2004).

9 Joslin, op. cit.

10 See Darren Rosenblum, "Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism, 6 MICH. J. GENDER & L. 499, 530 (2000). Cited in the National Center for Lesbian Rights. "Fact Sheet: Rights of Transgender Prisoners." See <<http://www.nclrights.org/publications/tgprisoners0804.htm#2>>. (May 18, 2005).

11 Rickke Mananzala, personal correspondence with editor, June 6, 2005.

12 Ibid.

13 Ibid.

14 California Prison Focus. No date. Trans/Gender in Prison Committee Homepage. See <<http://www.prisons.org/TIP.htm>> (June 22, 2004).

15 King County, WA Public Health Web Page. Last Updated October 13, 2003. "Gay, Lesbian, Bisexual and Transgender Health: Transgender health medical issues." See <<http://www.metrokc.gov/health/glbh/transmedical.htm>> (June 22, 2004).

16 Wikipedia: The Free Encyclopedia. June, 2003. "Gay Panic Defense," See <<http://www.wikipedia.org/wiki/Gay+Panic+Defense>> (July 16, 2003).

17 Ibid.

18 Alliance of Sodomy Supporters. January 28, 2001. "U.S. Sodomy Laws" See <<http://www.sodomy.org/laws/>> (June 17, 2004).

19 Ibid.

20 National Gay and Lesbian Task Force. January 22, 2003. "GLBT Parents and their Children." See <<http://www.ngltf.org/downloads/familypolicy/familypolicy-chap04.pdf>> (June 17, 2004)

21 Ibid.

22 Ibid.

23 Example in American Civil Liberties Union. July 23, 2002. "Detroit Settles ACLU Lawsuit Challenging Police Sting Operation Against Gay Men." See <<http://www.aclu.org/LesbianGayRights/LesbianGayRights.cfm?ID=10557&c=41>> (June 23, 2004).

24 Sodomy Laws – Press Release. November 12, 1997. "ACLU Scores Win for Gay Men Swept Up in CA Sex Offender Law." See <<http://www.sodomylaws.org/usa/california/canews01.htm>> (June 16, 2003).

25 Ibid.

26 Israel, Gianna E. 1999. "Child custody issues for the transgender parent." See <<http://www.firelily.com/gender/gianna/custody.html>> (July 16 2003). Also see: Kendell, Kate. 2003. "Lesbian and Gay Parents in Child Custody and Visitation Disputes, Human Rights, Summer 2003. Found at <http://www.abanet.org/irr/hr/summer03/custody.html> (May 24, 2005).