

QUEER (IN)JUSTICE

The Criminalization of LGBT People in the United States

Joey L. Mogul, Andrea J. Ritchie, and Kay Whitlock

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FALSE PROMISES

Criminal Legal Responses to Violence against LGBT People

In March 2002 April Mora, a lesbian teen of African American and Native American descent, was walking to a store in Denver, Colorado, to get a soft drink. A car pulled up behind her and the driver called out, referring disparagingly to Mora as a “dyke.” Two other men jumped from the car, attacked her, and pinned her to the ground. When Mora screamed, one man with a knife cut her tongue, causing blood to gather in her throat. He held a knife to her neck while the other used a razor blade to carve the word “dyke” on her left forearm and “R.I.P.” into the flesh of her stomach. Choking, she fought to get free. The man with the razor cut her face. Before leaving her on the street, both men kicked her in the ribs, telling her she was lucky they hadn’t raped her, and that next time, they would.

Dazed, injured, and bloodied, Mora walked back home and called her girlfriend, Dominicque Quintana, at school. When Quintana arrived, they called an ambulance and the police. The scene that unfolded when the police arrived both compounded and complicated the homophobic ferocity of the original attack. According to Quintana’s mother, who lived with the two young women, the police immediately wanted to know if Mora and her girlfriend had been fighting, and if they were on drugs. They did not search for the men who attacked Mora, instead insisting that she take a polygraph to prove she was telling the truth.

After the young women were finally allowed to leave for the hospital, officers remaining on the scene focused their investigation on a “self-infliction of injury” theory. Quintana’s mother later recounted that “the police went into my house and looked for a razor and the

tee shirt April had been wearing. The police trashed April and Dominique's bedroom in the basement and went through the freezer, too." Though the health care providers who treated Mora offered to confirm in writing that the injuries she suffered could not have been self-inflicted, the police nevertheless insisted on focusing on Mora rather than on investigating her account of events, thereby foreclosing any opportunity to locate her attackers.¹

Violence against LGBT people at the hands of strangers on the streets and family members in our homes continues to be reported at alarming rates across the country. According to the National Coalition of Anti-Violence Programs (NCAVP), a national network of thirty-five local organizations providing services to and advocating on behalf of LGBT people, in 2008 there were over two thousand instances of homophobic and transphobic violence reported to just thirteen local organizations across the country, representing a 26 percent increase over 2006 figures.² Homophobic and transphobic violence spans a spectrum from brutal physical attacks such as that experienced by Mora, to pervasive verbal abuse and harassment. While commonplace, physical assaults make up the minority of reported incidents. Nevertheless, the viciousness and impunity of the violence in many instances shocks the conscience, prompts outrage, and spurs demands for action.

The 1993 rape and murder of Brandon Teena, a transgender man living in Lincoln, Nebraska, memorialized in the Hollywood film *Boys Don't Cry*; the highly publicized 2002 beating and strangling of Gwen Araujo, a California transgender woman; the brutal dismemberment of Rashawn Brazell, a young African American gay man from Brooklyn, New York, in 2005; the vicious videotaped beating of Jack Price in Queens, New York, in 2009; and the shooting death of Lateisha Green, an African American transgender woman in Syracuse, New York, the same year, are but a few of the many horrific instances of homophobic and transphobic violence that have galvanized public attention.³ With increasing frequency, transgender and gender-nonconforming people are reporting particularly brutal violence, prompting commemoration of an annual Transgender Day of Remembrance⁴ and increasingly vocal calls that violence motivated by transphobia and gender nonconformity be addressed. Sadly, despite increased awareness, local, state, and federal legislative efforts,

and heightened law enforcement response in some localities, the numbers and intensity of homophobic and transphobic violent incidents have proven intractable.

Unfortunately, but perhaps not surprisingly given the central role played by the criminal legal system in policing sexual and gender nonconformity, April Mora's experience with seeking protection and accountability from the police is also not unique. LGBT people across the country consistently report that police often focus on them, rather than their assailants, when they are victims of violence, by questioning their account or blaming them for bringing violence upon themselves. With appalling frequency, LGBT victims of violence are subjected to further homophobic or transphobic verbal or physical abuse at the hands of law enforcement authorities that are charged with protecting them. Often, police refuse to take reports, neglect to classify violence as motivated by anti-LGBT sentiment or as domestic violence, or fail to respond altogether.⁵ For many LGBT people, and particularly LGBT people of color, immigrants, youth, and criminalized queers, reliance on the police and criminal legal system for safety is simply not an option because of the risk of adverse consequences.

The same criminalizing archetypes that permeate treatment of queers in other contexts also profoundly inform police approaches to LGBT victims of crime.⁶ The officers' response to the attack on Mora indicated that they were more invested in confirming the presumptive criminality of a young woman of color whose gender expression and perceived sexual orientation were at odds with societal norms than investigating a brutal act of violence committed against her. "The detectives were very rude and made me feel uncomfortable, as if we were wasting their time," Mora said. "I think they're saying that because I choose to look like this, I deserve it or something. It's as if—if I want to look like a guy, I should get beat up like a guy." Mora also noted, "I'm black and Indian, but I look Chicano. I think if we were white, the cops and people would treat us differently."⁷

VIOLENCE AGAINST LGBT PEOPLE

The virulently homophobic and transphobic assault April Mora experienced constitutes what is generally understood to be a *hate crime*, a term used to describe violence motivated, in whole or in part, by

actual or perceived race, color, religion, ethnicity, national origin, sexual orientation, gender, gender identity or expression, or disability. According to the FBI, the majority of identity-related violence is motivated by race, followed by violence based on religion, homophobia, and national origin.⁸ Indeed, the grisly 1998 murder of James Byrd, Jr., who was beaten and then dragged behind a truck to his death by three white supremacists in Jasper, Texas, remains foremost among iconic representations of present-day manifestations of hate crimes in the United States.

Recognizing that many forms of violence are motivated by a range of intentions and hostilities, the terms *racist*, *sexist*, *anti-Semitic*, *anti-Muslim*, and *homophobic and transphobic violence* are used here in an effort to more accurately describe the phenomena under discussion: the terms *bias* or *hate crime* suggest that such violence is motivated entirely by prejudice (presumably irrational) and not informed by historical patterns of dominance and subordination that produce tangible political, social, and economic benefits for majority groups. Regardless of the terminology used or its targets, there is no question that such violence is abhorrent, structural, and pervasive.

Where violence against LGBT people is concerned, the problem is difficult to quantify for a variety of reasons. Like many forms of gender and sexuality-based violence, it is underreported across the board, and particularly to law enforcement officials.⁹ Numerous factors may contribute to LGBT individuals' reluctance to report violence they experience, including fear of retribution by their attackers, and of disclosure of sexual orientation, gender identity, or immigration status, perceptions that police will not take the report seriously, or will blame them for the violence, and participation in informal or criminalized economic activity, including sex work.¹⁰ According to the NCAVP, "Because anti-LGBT violence has historically been poorly addressed by law enforcement (and because law enforcement officials remain one of the prime categories of offenders documented by NCAVP each year), it is very often underreported to police even in jurisdictions where relationships between law enforcement and the LGBT population have improved." As a result, LGBT antiviolence activists and service providers generally agree that much—perhaps even most—harassment and violence against queers is never reported.¹¹

Moreover, official figures do not even accurately depict the number of incidents that *do* come to the attention of law enforcement, due to police officers' failure to adequately and appropriately respond to, classify, document, and report such instances.¹² While the FBI issues an annual report that includes data on incidents reported to law enforcement where a motive based on sexual orientation and, more recently, gender identity or expression has been ascribed, it relies on inconsistent, voluntary reporting by a small and unrepresentative number of local law enforcement agencies. In 2007, for example, only 2,025 out of nearly 17,000 law enforcement agencies reported hate crime data to the federal Uniform Crime Reporting Program.¹³ The most reliable source of national data on anti-LGBT violence is compiled annually by the NCAVP. Although limited by resources and the fluctuating capacity of its member organizations to consistently collect and report data, the NCAVP's reports document incidents of homophobic and transphobic violence reported directly to its member organizations, including incidents in which victims have declined to report to the police, or where law enforcement refused classification as a hate crime.

The NCAVP's 2008 report paints a sobering picture. In addition to an increase of 26 percent over 2006 figures in incidents of vandalism, verbal abuse, and physical abuse, the incidence of sexual assaults reported to be motivated by homophobia and transphobia rose sharply for the third consecutive year. While murders represent only a small fraction of violence experienced by LGBT people, their numbers increased by 28 percent from 2007 to 2008, and, according to the NCAVP, constituted "the highest number of deaths since 1999."¹⁴

Since racially motivated violence makes up the majority of reported hate crimes, it is not surprising that LGBT people of color are overrepresented among those targeted for homophobic and transphobic violence.¹⁵ Transgender people also experience high levels of violence: 12 percent of the total number of reported incidents of violence targeted transgender people, and transgender and gender-nonconforming people report some of the most pervasive and egregious forms of harassment and abuse.¹⁶ Even among LGB people who do not identify as transgender, gender nonconformity has been found to be a predictor of both "every day discrimination" and violence.¹⁷ Finally, despite the prevailing perception that gay men are "the natu-

ral and most frequent targets of homophobic hate crime," some estimate that one in five lesbians have been assaulted in an antilesbian incident in their lifetimes.¹⁸

No matter which numbers or populations we look at, homophobic and transphobic violence against LGBT people in the United States clearly demands a response. The question is whether responses rooted in a criminal legal system invested in policing and punishing sexual and gender deviance, rather than in community-based accountability and systemic change, are effective in actually preventing and protecting queers from violence.

THE "HATE CRIME" FRAMEWORK

The predominant response to violence against LGBT people over the past decade has focused on enactment of legislation against hate crimes. In almost all cases, the underlying violation—criminal mischief, harassment, malicious intimidation or threat, vandalism, arson, assault, battery, rape, or murder—is already subject to criminal penalties.¹⁹ The addition of provisions specific to motivations for already-criminalized activity is intended to ensure harsher punishment of such offenses and promote law enforcement measures intended—at least in theory—to deter and prevent such violence.

The precursor to the new generation of hate crime legislation that has evolved over the past decade was a provision of the Civil Rights Act of 1968, intended to provide a remedy for violence directed against people of African descent seeking to exercise constitutional rights such as voting, attending public school, utilizing public accommodations, and serving on juries. A specific response to widespread and systemic forms of racism, this law prohibited the use or threat of force to injure, intimidate, or interfere with a person engaged in constitutionally protected activities based on race, color, religion, or national origin. Where local law enforcement colluded in, condoned, or failed to respond to such acts, the law authorized federal intervention.²⁰

Eleven years later, in the midst of bitter strife surrounding court-mandated busing to address persistent patterns of racial segregation in public schools, Massachusetts enacted the first post-civil rights era hate crime law. While the law did not name particular protected status categories, "authorities made it clear through aggressive enforce-

ment that it covered racial and religious-based" acts of violence and intimidation.²¹

In 1981, the Anti-Defamation League (ADL)²² developed a "model" template for hate crime laws, promoted as an effective response to the problem of harassment, intimidation, and violence based on a victims' actual or perceived race, religion, or national origin. Sexual orientation and gender were later added to the ADL model. The core feature of the ADL approach is "a 'penalty-enhancement' concept: criminal activity motivated by hate is subject to a stiffer sentence" on the grounds that the harm extends beyond the individual, affecting the entire community.²³

The model is based on the theoretical swift and harsh "retribution" for violence directed at any member of a particular group, without reference to historical context, the complexities of intersecting power relations, or consequences to members of other oppressed groups. The powerful appeal of such an approach rests in its implied promise that, by framing communities historically targeted for ongoing harassment and violence as "crime victims," law enforcement will "be on our side."

Major established organizational players in the U.S. civil rights community quickly coalesced around the hate crime framework, including the National Association for the Advancement of Colored People (NAACP), the Leadership Conference on Civil Rights, the Mexican American Legal Defense and Education Fund, the National Urban League, the American-Arab Anti-Discrimination Committee, and other notable organizations. In their view, the new statutes would at once help to educate the public and provide communities with an effective mechanism for holding offenders accountable by ensuring police attention to such violence.

Among the major liberal mainstream organizations, only the ACLU, generally supportive of hate crime laws, including penalty enhancement provisions, consistently voiced any concern that these laws might prove problematic when implemented. Specifically, ACLU argues that unless carefully crafted, hate crime legislation could have a chilling effect on constitutionally protected speech and freedom of association.²⁴

In 1982, the National Gay Task Force initiated the first national antiviolence organizing project to document and increase public

awareness of violence against lesbian and gay people, and mobilize “community indignation about hate crimes [in order to] finally end the long-ignored epidemic of anti-LGBT violence.” The primary policy tool for bringing about an end to this violence would be “the passage of state and federal laws that recognize LGBT vulnerability to crimes motivated by anti-LGBT hate and prejudice.”²⁵ Other national, state, and local groups representing LGBT communities also quickly embraced the hate crime framework. State hate crime legislation rapidly proliferated, particularly as advocates worked to expand the original list of protected categories to include actual or perceived ethnicity, sexual orientation, mental or physical disability, gender, and gender identity or expression. By late 2009, forty-five states had legislation addressing bias-motivated harassment and violence. Laws vary with regard to protected categories, though most include race, religion, ethnicity, and national origin. Twelve states and the District of Columbia include both gender identity and sexual orientation, while eighteen states only include sexual orientation.²⁶

Enforcement mechanisms vary within the hate crime template. Most laws authorize enhanced penalties; state statutes may also, or alternatively, require the collection and reporting of hate crimes statistics, mandate training for law enforcement personnel, create a civil cause of action permitting victims to sue for damages, or some combination of these.²⁷

New federal hate crime laws passed as well, beginning with the 1990 Hate Crimes Statistics Act. Sentencing enhancements were tucked into the much broader 1994 Violent Crime Control and Law Enforcement Act.²⁸ In 2009, the Local Law Enforcement Enhancement Act (LLEEA), also known as the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, authorized the Department of Justice to assist or, where local authorities are unwilling or unable, take the lead in state and local investigations and prosecutions.

A push for the creation of specialized law enforcement units to investigate and prosecute hate crimes accompanied the rapid spread and expansion of these laws, a call taken up by many LGBT organizations. Such units now exist in a growing number of locales. In many more community liaisons are charged with educating law enforcement officers about affected communities and facilitating appropriate responses to hate crimes.²⁹

The passage and enforcement of inclusive hate crime legislation continues to top the agendas of many mainstream LGBT organizations.³⁰ Hate crime laws, advocates tell us, send crucial messages: "That crimes motivated by prejudice are unacceptable," and "that certain crimes that strike at this country's core values, such as the freedom to live free of persecution, will be punished and deterred by both enhanced penalties and federal involvement in the investigation and the prosecution of the crime."³¹ But if those messages are actually being sent by the many hate crime laws now in place, all too many people, including those in law enforcement, do not appear to be listening.

Closer examination of the hate crime framework reveals substantive flaws in this approach. A central shortcoming is its exclusive focus on individual acts of violence rather than on dismantling the systemic forces that promote, condone, and facilitate homophobic and transphobic violence. Hate or bias-related violence is portrayed as individualized, ignorant, and aberrant—a criminal departure by individuals and extremist groups from the norms of society, necessitating intensified policing to produce safety. The fact is many of the individuals who engage in such violence are encouraged to do so by mainstream society through promotion of laws, practices, generally accepted prejudices, and religious views. In other words, behavior that is racist, homophobic, transphobic, anti-Semitic, anti-Muslim, and anti-immigrant, and violence against disabled people, does not occur in a political vacuum. And it is not always possible to police the factors that encourage and facilitate it.

For instance, violence against LGBT people generally increases in the midst of highly visible, homophobic, right-wing political attacks. Michigan saw the largest increase (207 percent) in anti-LGBT incidents reported to NCAVP in 2007, as the state's attorney general was concluding a three-year campaign against domestic partnership benefits.³² In 2008, during the volatile backlash that accompanied the statewide Yes on Proposition 8 campaign to reverse a California Supreme Court decision permitting same-sex couples to marry, Community United Against Violence (CUAV) reported a large increase in reported anti-LGBT violence.³³ Other tensions also produce notable increases in violence against LGBT people who are immigrants or people of color. For example, attacks against South Asian and Middle

Eastern LGBT people surged in the aftermath of the anti-Arab and anti-Muslim rhetoric following 9/11.³⁴

Because they fail to address larger social forces influencing individual acts of violence, and instead focus on harsher punishment of individuals rather than prevention, there is no proactive "protection" in hate crime laws, despite the claims of supporters.³⁵ While the presumed deterrent value of enhanced penalties is advanced as a central argument for the laws, the hate crime statutes currently in place in thirty states and the District of Columbia do not appear to deter much, if any, harassment and violence. More than two decades after the first LGBT embrace of hate crime laws, as NCAVP figures illustrate, violence directed against queers remains a serious problem.

Even more disturbing is evidence suggesting hate crime laws can contribute to systemic violence against those they are intended to protect. As several progressive queer organizations in New York City point out, "Hate crime laws do not distinguish between oppressed groups and groups with social and institutional power."³⁶ The American Friends Service Committee (AFSC), a Quaker organization with a long history of active support for LGBT rights, agrees that the neutral wording of hate crime laws "implies a false equivalence [in power] between white people and people of color, between women and men, between queer people and heterosexuals. The situation of these groups is not equivalent, however, and the erasure of this reality in the language of the law should be of profound concern to those who historically have faced violence, subordination, and exclusion in their relationship with the state, particularly with law enforcement authorities."³⁷ As a result, even well-intentioned hate crime laws can morph in the hands of law enforcement officials into tools used to reinforce old patterns of injustice.

One example of how this "neutral" language can backfire against the very communities it was intended to protect is an antilynching law passed in South Carolina in 1951 to address the lethal violence of white mobs against people of African descent. A mob is defined as two or more persons, without reference to race. Fifty years later, though Blacks comprise only about 30 percent of the South Carolina population, they represented 63 percent of those charged with "lynching," defined as "mob" violence that may be minor or lethal.

Black youth were disproportionately charged under the statute, even in cases less serious or comparable to those involving whites.³⁸

While data such as this suggests that it is the case, it is impossible to make categorical statements about whether or not people of color are disproportionately charged under hate crime laws because the necessary research simply doesn't exist.³⁹ There is no comprehensive data collection and analysis on how many incidents of "hate" violence actually take place, much less reliable data concerning the demographics of the parties involved, the investigation and prosecution of such acts, and their ultimate outcomes. Nevertheless, as legal analyst Terry Maroney writes, "Given both overt and unconscious racism or racial insensitivity on the part of police and prosecutors, it is reasonable to speculate that such persons are quicker to think of anti-white crimes as bias-motivated than so to judge anti-black crimes."⁴⁰

Another incident illustrates the complicated intersections of race, class, sexuality, and immigration status. In the course of representing Terry Phalen, a white gay man who had been subjected to homophobic epithets and beaten by guards in the intake area of Cook County Jail in Illinois in 1999, attorneys for Phalen sought to interview other inmates in the intake area who had witnessed the incident. One man who had seen Phalen's beating was a poor, Asian immigrant. He was in jail, he said, because he tried to defend himself against two men who had physically assaulted him while uttering an anti-Asian epithet. But according to police reports, the Asian man allegedly approached two gay men, one white and one Black, walking on the street in the middle of the day, holding hands, called them "fags," and punched the white man in the face. There were no reported witnesses to the events, and none of the parties suffered physical injury. Yet police credited the word of the two gay men over that of the impoverished Asian immigrant, and only arrested him on a battery charge, which they later upgraded to a felony hate crime. However, if the Asian man's account is true, the actions of the two gay men—who were never charged with any offense—could just as easily fit into the definition of felony hate crime.⁴¹

LGBT people of color do not escape the problematic effects of the hate crime framework. Police profile LGBT people of color, particularly youth, as potential perpetrators of hate crimes in predominantly white, gay urban enclaves. Given prevailing perceptions of

LGBT people as predominantly, if not exclusively, white, people of color are perceived by police and residents to be criminally “out of place” in these neighborhoods. Archetypes framing people of color as inherently dangerous and more violently homophobic than whites further contribute to law enforcement targeting, aggressively harassing, stopping, and questioning LGBT people of color about the “legitimacy” of their presence in LGBT-identified areas. For instance, one police official in the Hollywood-Wilcox Division of the LAPD reported that, after a series of hate crimes against transgender women in the area, officers questioned, stopped, and arrested Latina/o and African American youth in the gay-identified West Hollywood area as a “preventive” measure.⁴²

Ultimately, despite the relatively small number of hate crime convictions, the enforcement of hate crime legislation operates within a larger context, and as such can be twisted into yet another weapon to systematically criminalize people of color, including LGBT people of color.

LAW ENFORCEMENT RESPONSES TO ANTI-LGBT VIOLENCE

The hate crime framework is further compromised by placing primary responsibility for preventing violence in the hands of a criminal legal system that is itself responsible for much of the LGBT violence. As journalist Richard Kim has noted, “It seems improbable that the passage of hate crimes laws would suddenly transform the state into a guardian of gay and lesbian people.”⁴³ Recent NCAVP data underscores the point: the 2008 report concludes that “law enforcement officers remain one of the prime categories of offenders documented by NCAVP each year.”⁴⁴ Over the past three decades LGBT people have increasingly turned to police and prosecutors for protection, only to be met with responses that further devalue queer lives, sometimes placing victims in greater jeopardy. Nevertheless, resources allocated by hate crime legislation for responding to and reducing violence continue to be directed almost exclusively to the expansion of policing, prosecution, and punishment.

But instances in which law enforcement-based approaches have failed to address or further contributed to the problem abound. For example, the Anti-Violence Project (AVP) of the Los Angeles Gay and Lesbian Center reported a case in which several youth in a car saw a

Latina transgender woman, stopped, and proceeded to beat and stab her. Los Angeles Police Department officers responding to the scene demanded the victim's driver's license, which identified her as female, refused to accept it, and insisted that paramedics on the scene examine her genitals. The paramedics did not comply with the demand. Witnesses to the attack alleged the officers inquired in an intimidating fashion about their immigration status.⁴⁵ As in April Mora's case, criminalizing archetypes framing transgender and gender-nonconforming people as inherently deceptive and unworthy of protection drove police response, which in turn led the victim and witnesses to refuse to speak further to the police, even though they had information that could have helped identify the assailants.

Unfortunately, such responses do not appear to be the product of an aberrant few insensitive, untrained officers. Researchers studying police response to violence against LGBT people in Minnesota over a ten-year period described numerous instances of 911 operators failing to send assistance, police mocking and laughing at victims, and officers blaming victims for the violence they experienced. Overall, police engaged in verbal harassment of victims of homophobic and transphobic violence in 32 percent of all incidents in which police responded, although this percentage decreased over time.⁴⁶

Such responses are commonplace across the country. Typical is an incident in which an Asian Pacific transgender woman reported a hate crime to police who refused to photograph her injuries. The Internal Affairs Bureau officers to whom she complained told her, "You're not a victim of violence. If you didn't tell people you're a transsexual, people would leave you alone." Similarly, police responding to a physical attack on two Detroit lesbians at a 2003 party asked them if they were "making out" in front of people and thereby brought the attack on themselves.⁴⁷

Nonresponse or inadequate response to homophobic and transphobic violence is also prevalent, reflecting sentiments that queers are unworthy of protection. In one incident Los Angeles police called during a violent assault on an undocumented Latina transgender street vendor reportedly responded by nonchalantly saying, "If they kill her, call us."⁴⁸ In another a Latina lesbian and her Black partner experienced vandalism and escalating racist, homophobic, and

transphobic harassment by their North Carolina neighbors, including use of slurs such as “nigger,” “spic,” and “dyke,” threats to their six-year-old daughter, the murder of their dog, and damage to their property to the point where it had to be condemned. Yet they were told by police officers responding to repeated requests for assistance that the situation was merely a “neighborly dispute,” and that there wasn’t sufficient “proof” to do anything about the violence they were experiencing.⁴⁹

The Minnesota researchers found that “there continues to be a significant percentage of incidents where officers refuse to file a report indicating that a crime has occurred. Over the course of the nine years, on average, officers refused in 31 percent of the cases to file a general incident report.”⁵⁰ More recent figures compiled by the NCAVP indicate a 27 percent rate of refusal to classify violence against LGBT people as motivated by sexual orientation or gender identity.⁵¹

The Minnesota study also found that, despite deliberate efforts on the part of local LGBT antiviolence activists to build strong relationships with local police departments through education, outreach, sharing information about specific incidents, and advocating on behalf of victims of crime, negative interactions with police continued. More than half of the incidences of violence reported by LGBT people over this period were met with “negative” responses by law enforcement, compared to 20 percent positive responses. Although negative responses decreased by 50 percent over a nine-year period, they still made up the bulk of police-related incidents reported. The authors concluded, “While Minnesota has a reputation as one of the best states in the nation that offers protection against bias-motivated violence and intimidation, we still found low levels of reporting, refusal by police to indicate bias when requested by the victim, and police misconduct against those in the GLBT community.”⁵²

For almost thirty years, hate crime laws have existed as a kind of untouchable “third rail” of mainstream LGBT politics. In some respects debates around hate crime laws seem to powerfully distill all of the insult, harm, and fear born by queers for centuries. Many LGBT people—especially those who have little ongoing contact or engagement with policing and prison systems and their broader social and economic impacts—respond as if any challenge to these laws is an

active betrayal of wounded gay people, an almost intentional reinfliction of murderous violence.

But it is also becoming apparent to at least some supporters of such legislation that, while data collection, civil remedies, and other provisions might be useful and important in particular contexts, penalty enhancements are largely ineffective. Three prominent transgender advocates hinted as much when they wrote, in 2006, "Including transgender people in hate crime laws does not create a change by enhancing penalties but by educating legislators, the media, the police, and the courts about the violence faced by trans people and by asking the public at large to side with the victims rather the perpetrators of hate."⁵³ The NCAVP has distanced itself from penalty enhancements over a period of several years, and in 2008, NCAVP affirmed its opposition to enhanced penalties for those convicted of hate crimes.⁵⁴ In 2009, the Sylvia Rivera Law Project (SRLP), joined by FIERCE, INCITE! Women of Color Against Violence, Queers for Economic Justice (QEJ), Right Rides, the Transgender Intersex Justice Project (TGIJP), and the Transformative Justice Law Project (TJLP), declared their opposition to the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act. Placing their stand within a larger context of opposition to mass incarceration, militarization, and colonialism, they said, "The evidence . . . shows that hate crimes laws and other 'get tough on crime' measures do not deter or prevent violence. Increased incarceration does not deter others from committing violent acts motivated by hate, does not rehabilitate those who have committed past acts of hate, and does not make anyone safer."⁵⁵

DOMESTIC VIOLENCE IN QUEER RELATIONSHIPS

Over the past two decades, in addition to demanding protection from homophobic and transphobic violence at the hands of strangers, LGBT individuals and communities have increasingly sought protection for violence in intimate relationships. Although historically even more invisible than its heterosexual counterpart, the existence of violence in the context of queer relationships is being brought to light by antiviolence advocates working to counter reluctance both within and outside queer communities to recognize it. In so doing they have come up against resistance on the part of LGBT people concerned about feeding negative perceptions of queers as well as resistance on the

part of policymakers loathe to appear to be condoning homosexuality by providing protections to victims of violence in homosexual relationships.⁵⁶ Despite these challenges, by 2008, thirty-seven states provided for civil orders of protection against an intimate partner of the same sex under varying circumstances, although the availability of this remedy in reality varies from judge to judge and jurisdiction to jurisdiction.⁵⁷

Fifteen organizations in fourteen jurisdictions across the country provide services to LGBT survivors of domestic violence (DV) and jointly report on the populations they serve in an annual report published by the NCAVP. They define domestic violence as “a pattern of behavior where one partner coerces, dominates, and isolates the other to maintain power and control over their partner.”⁵⁸ While this is a welcome expansion beyond a domestic violence frame that encompasses only physical abuse in heterosexual relationships, it does not include violence queers experience in other intimate relationships, including at the hands of family members such as parents, siblings, and extended family members, as well as caregivers. A significant proportion of homophobic and transphobic violence takes place within or near our homes, and often represents some of the most brutal violence experienced by LGBT people.⁵⁹ The widely used term *same sex domestic violence*, which appears to reflect an effort to shoehorn queer lives into mainstream domestic violence discourse, similarly excludes these experiences of violence, as well as those of transgender people involved in heterosexual relationships. Recognizing that LGBT people, and particularly queer youth and elders, are vulnerable to violence in a multitude of intimate contexts beyond monogamous relationships that mirror heterosexual marriage, many LGBT anti-violence activists use the broader term *LGBT domestic violence* to reflect this reality and distinguish these experiences from violence experienced at the hands of strangers or public authorities.

A recent study found, based on a review of the literature, that police are less likely to intervene in domestic violence cases that involve gay or lesbian couples. The study’s authors suggest that failure to do so may be based on homophobia, and on notions that “women cannot be abusers and men cannot be abused.” They also note that such beliefs are likely held not only by law enforcement officers, but also by others who will determine survivors’ success in obtaining safety

through in the criminal legal system, including witnesses, health care workers, attorneys, judges, and jurors. As a result, the researchers conclude, lesbian and gay people who experience domestic violence "may not receive equal protection under the law."⁶⁰

This conclusion is unfortunately borne out by the experience of antiviolence programs working with individuals who have experienced LGBT DV. In many cases, despite laws and policies on the books, police and courts fail to appropriately respond. Where they do respond, they often arrest and criminalize both parties, under the theory that LGBT DV is the equivalent of "mutual combat." According to Amnesty, officers more often than not perceive violence among two women as a "catfight" and urge them to "work it out." Violence among men is generally treated by law enforcement as a "fair fight," or somehow an inherent aspect of sexual deviance in gay relationships.⁶¹

In far too many cases, police heap harassment and abuse on top of that already experienced at the hands of an intimate. NCAVP data indicates that, of the 18 percent of cases of LGBT DV reported to affiliates across the country in which the police intervened, police misconduct, including verbal abuse, use of slurs, and physical abuse, was reported in 6 percent. Arrest of survivors in addition to or instead of abusers took place in an additional 6 percent. And, overall reports of police misconduct in DV cases increased by 93 percent in 2008. In Los Angeles, which consistently reports the largest number of LGBT DV cases per year, a misarrest was reported in over 97 percent of cases in 2007: "Frequently both parties are arrested or law enforcement officers threaten to arrest both."⁶² Indeed, since 2002 the Los Angeles AVP's STOP DV program has reported that, notwithstanding ongoing advocacy and law enforcement training, many of their clients continue to be erroneously assessed by the criminal legal system as abusers and mandated to attend batterers' intervention programs. In fact, this trend is so pronounced that the program consistently runs court-mandated "batterers" groups uniquely for people who are actually survivors of domestic violence, for whom being forced to participate in a group intended for abusers is profoundly retraumatizing. In 2008, reports of misarrests rose by 120 percent outside of Los Angeles.⁶³

Amnesty also received reports from across the country concerning

homophobic and transphobic attitudes in the context of police responses to domestic violence. For instance, one officer responding to LGBT domestic violence in San Antonio was reported to have said, "I know we are supposed to be tolerant, but that's a bunch of bull, they should all be killed."⁶⁴ According to NCAVP, in New York City 16 percent of reported incidents in which police were called to respond to LGBT DV in 2007 "involved some form of police misconduct, ranging from refusal to take a police report to the use of homophobic or transphobic slurs." In 2008, that figure increased by 800 percent.⁶⁵

Suzanna Rose, former director of the St. Louis AVP, describes a call to the organization's hotline about an incident in which police responded to a 911 call placed by a lesbian being abused by her partner by arresting both women. They proceeded to taunt the victim about her sexuality while she was in jail, and continued to harass her after her release.⁶⁶ A gay man from Richmond, Virginia, reported to the Equality Virginia AVP:

During a beating I had to call 911 and have the police come and save my life. When the cops arrived they laughed at me. I was bloody, bruised, crying, and my clothes had been cut and ripped . . . It was by far the worst and most humiliating experience of my life. I will never trust the police again.⁶⁷

In some cases, police failure to respond, combined with an absence of alternative community-based responses, can prove deadly. On March 28, 1998, Marc Kajs was shot by his former partner at the restaurant where he worked in Houston, Texas. A lawsuit brought by Kajs' mother alleged that, although he contacted police to report abuse by the former partner on at least six separate occasions, each time officers failed to file written reports or offer him assistance. On the last occasion Kajs sought help from the police, he ran into a police station at two thirty in the morning while being chased by his former partner, who threatened him in front of a police officer. Kajs told the officer he was frightened, that the man had threatened his life and that of his friends and family members, and asked for protection. The officer gave him an incident number and sent him back out on the street with his abuser, telling him to return the following Monday. Kajs was dead before Monday came around.⁶⁸

In many more cases, as with hate crimes, queers feel unable to seek protection from the criminal legal system, fearing ineffective or homophobic responses, disclosure of their sexual orientation or gender identity, or arrest, deportation, loss of custody of children, or other adverse outcomes.⁶⁹ NCAVP suggests that this is particularly true for LGBT people of color and LGBT immigrants. It is also the case for a substantial number of transgender people. According to NCAVP, "Since police officers were perpetrators in almost half (48 percent) of the incidents of antitransgender violence [in 2000], transgender people are not likely to seek police protection from an abusive partner." The number of incidents reported to NCAVP member organizations in which police were called decreased by 41 percent in 2008.⁷⁰

Abusers use these realities as further weapons of control. CUAV reports one case in which a lesbian abuser, who was a documented U.S. citizen, would tell her partner, an immigrant, that the partner was "a nobody without papers, who owned nothing, and whom nobody would ever believe over an American citizen." Predictably, when the partner tried to leave, the abuser called the police, claimed that her partner was high and threatening to kill her, and disclosed her partner's immigration status. Although there was no evidence that the abuser's partner was intoxicated or violent, the specter of the homicidal lesbian rose up, and melded with the perception of queers as threats to national security. Police arrested the abused partner and took her to jail where she would be picked up by immigration authorities.⁷¹

Not surprisingly, the situation doesn't much improve once queer survivors of domestic violence reach the courts. As the National Resource Center on Domestic Violence notes, "In the overtly hierarchical structure of the legal system . . . survivors of violence in same-gender/gender variant relationships are not routinely afforded the same protections as those employed to protect privileged heterosexual victims of domestic violence."⁷² Not only do queer survivors face generic and pervasive homophobic treatment, but in some jurisdictions courts continue to refuse to enforce existing protections for people who experience LGBT domestic violence on the grounds that they believe doing so would put gay relationships on equal legal footing with heterosexual marriage.⁷³ Further aggravating the situation, the STOP DV program of the Los Angeles AVP reports a lack of

awareness among legal professionals regarding domestic partnership law and custody and visitation issues in LGBT relationships, which may lead to hesitation to offer assistance because the issues appear too complicated.⁷⁴

Responses to LGBT domestic violence often present additional sites for policing and punishment of gender and sexual deviance. Many LGBT survivors are told by police that the abuse they are experiencing is a natural outcome of their depraved sexual orientation, or are denied protection on officers' assumption that what is really going on is "kinky sex." Antiviolence advocates across the country also consistently report that law enforcement officers routinely profile transgender, gender-nonconforming, or more "masculine" people, people of color, immigrants, people with no or limited English proficiency, young people, or working-class people as the perpetrator of violence or abuser in any given situation.⁷⁵

In one incident, police called to a fight between a white butch lesbian and her partner in Boston arrested the "very masculine," larger partner, who sought assistance at a domestic violence shelter on her release.⁷⁶ In another, a Filipino man beaten on several occasions by his partner, a white U.S. citizen, was arrested by police officers who told him, "You're not a citizen. We should deport you, you shouldn't be hitting Americans; you're not an American." He was convicted and sentenced by the court to a year of batterers' counseling.⁷⁷ In Chicago a Latina lesbian who did not speak English, and had been beaten by her partner over a period of time—during which neighbors repeatedly called the police, to no avail—was ultimately arrested and sentenced to mandatory counseling for abusers because she was unable to communicate with police when they eventually did respond.⁷⁸

For transgender women, the problem is endemic. Archetypes of transgender people as deceptive, mentally unstable, and sexually degraded permeate responses to domestic violence committed against them as much as they do other law enforcement activities. A San Antonio woman, who called the police for help when her boyfriend broke a window and some of her personal possessions, was arrested on the mere word of her abuser that she was "bipolar." A young African American transgender woman living in Los Angeles who repeatedly called police for assistance when her boyfriend was abusive was told each time that there was nothing the officers could do, despite the

presence of visible bruises on her body. However, one morning two undercover officers knocked on her door and told her she was under arrest pursuant to an old warrant on a solicitation charge. In 2002, in Washington, DC, a transgender woman choked by her male partner managed to call police only to be arrested, handcuffed, pushed down the stairs, and referred to by male pronouns throughout her subsequent detention. Although charges against her were eventually dismissed, the message was clear: gender “deception” can be met with violence, with no recourse to the law.⁷⁹

These experiences are not unusual. Many transgender survivors of domestic violence report that when police do respond to interpersonal violence committed against them, once officers determine that they are transgender, they either simply leave, saying something along the lines of, “Oh guys, it’s a man, forget it,” shift the focus of their investigation to the transgender person, or engage in further abuse. In one case involving parental violence, Candace Walker, a young transgender woman, was shot twice by her father after she disclosed her gender identity to her family. Following the incident, a law enforcement official framed Candace as the threat to the community, stating, “Candy provoked a violent *and most likely justified* reaction from her father, whose gun shots caused extreme risk of injury or death to people in the community” (emphasis added). Although she fortunately recovered from her injuries, Candace, who, at the time of the incident was attempting to retrieve her belongings after having been kicked out of her home by her family, was subsequently charged with first-degree burglary, taken into custody, and held in solitary confinement for forty days until she was released on \$20,000 bail—a reduction from the initial bail assignment of \$250,000. Members of a local transgender advocacy organization expressed outrage, stating, “We are appalled that she was ever charged in the first place. Virtually her only ‘crime’ was being a transsexual woman. Charges would *never* have been brought in a domestic dispute of this nature, especially against the *victim* in a shooting incident, had she been privileged, straight, white and not transgendered.”⁸⁰

As these examples illustrate, society’s almost exclusive reliance on the criminal legal system to address DV exposes LGBT victims to greater violence and leaves many queers without any options at all. Advocates report that transgender and gender-nonconforming

queers, LGBT people of color and immigrants, and LGBT youth rarely feel safe seeking law enforcement protection from interpersonal violence. As one survivor put it, "As a woman of color and a lesbian, I really don't want to take this to the police if I can handle it myself."⁸¹ Another, a fifty-five-year-old white lesbian living in rural Ohio, describes a harrowing incident in which she felt powerless to seek assistance because of the gender policing she believed would be inherent in any law enforcement response:

During our last fight, Tammy was drunk, she got out her gun, loaded it in front of me, and started calling for the dog. After an hour of begging her to stay away from the dog, she pointed the gun at me. I didn't call the police because I don't think they'd know how to handle it. I'm a butch lesbian, I worked at a factory most of my life. Tammy is a tiny little Avon saleswoman.⁸²

The Network/La Red, a NCAVP affiliate in Boston, reports that a Latina, HIV-positive, undocumented immigrant transgender woman who was repeatedly physically and sexually abused by her partner never called the police because her abuser would tell her that as soon as the police heard she was "illegal" they would arrest her instead.⁸³ Under current legislation, immigrants convicted of domestic violence face deportation, thereby raising the stakes for immigrant queers who experience domestic violence, but fear arrest by responding police.

As is the case in the context of community violence, some antiviolence advocates claim victory in increasing police responsiveness to violence against LGBT people by working closely with police departments and LGBT liaisons. Increasingly, though, there is a recognition that, in the words of the NCAVP, "all barriers present in both prevention and intervention [for LGBT DV] are rooted in multiple forms of oppression. These attitudes, though often unspoken, are still pervasive in our police departments, court systems, medical centers, shelters, and organizations . . . Policy and legislative change alone will not eliminate these barriers for our communities."⁸⁴

The realities of LGBT survivors point us away from reliance on the criminal legal system. The National Resource Center on Domestic Violence reports that "within some LGBT communities, attention is turning to harm reduction models and finding safer spaces within the

community.”⁸⁵ Ultimately, as in the case of homophobic and transphobic violence, the flaws and false promises of reliance on criminal legal approaches to LGBT domestic violence are becoming increasingly apparent, challenging us to envision new approaches that more effectively ensure our safety in our homes and neighborhoods.

* * *

The challenge is to develop bolder justice visions and new frameworks for naming, analyzing, and confronting the myriad forms of individual and systemic violence that not only hurt individuals, but also destabilize entire communities—to shift our focus to our communities, to help them grow stronger, more just, more stable, and more compassionate. LGBT people need to deeply question whether institutions rooted in the control and punishment of people of color, poor people, immigrants, *and* queers can ever be deployed in the service of LGBT interests without abandoning entire segments of queer communities to continuing state violence. But how do we start to break out of the old frames, confront the inhumanity of criminal archetypes, and begin to open up what Angela Y. Davis calls “new terrains of justice”?⁸⁶