

Policy Brief

**The Disproportionate Harm of
Immigration Detention for
Transgender and Nonbinary People
Requires an End to the Use of
Confinement**

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Transgender and nonbinary individuals are subject to inhumane conditions and abuse in U.S. immigration detention facilities

The Disproportionate Harm of Immigration Detention on Transgender and Nonbinary People Requires an End to the Use of Confinement

Executive summary

Transgender and nonbinary (TNB) people outside of the United States are subject to discrimination, violence and death because of their gender identity, causing them to flee their home countries to seek legal protection such as asylum elsewhere. TNB individuals – many of whom voluntarily surrender themselves to U.S. Customs and Border Protection for legal protection – are subject to inhumane conditions and abuse in U.S. immigration detention facilities, including those with dedicated units for TNB people, and are held for significantly longer than the average person detained. Recent research involving direct interviews with TNB people who are detained reveals current ICE policies for treatment of TNB people in immigration detention fail to prevent harm and abuse, and detention facilities are unable to ensure their safety and well-being, including access to basic needs and medical care. Moreover, immigration detention negatively impacts mental health of TNB individuals and triggers prior trauma.

Due to the failure of current policies and guidelines to protect TNB people in immigration detention who seek legal protection, we strongly advocate the following policy recommendations:

1. The U.S. should immediately end civil immigration detention for TNB people.
2. When case management is necessary for TNB individuals for whom there is a flight risk or safety concern, community-based and not-for-profit alternatives-to-detention should be adopted, with a focus on ensuring TNB people in the U.S. understand their rights to guarantee their safety and basic needs are met.
3. State and federal enforcement and accountability mechanisms should be created to ensure implementation of and adherence to policies to protect vulnerable populations like TNB people, especially at for-profit detention centers. Violators should lose their federal contracts.

Figure 1

Terminology

Transgender: Having a gender identity that differs from sex designated at birth.

Cisgender: Having a gender identity that is the same as sex designated at birth.

Nonbinary: Having a gender identity differs from sex designated at birth and is not aligned with the male or female binary.

Transphobia: Fear of, hatred toward or discrimination against transgender and nonbinary people.

Stigma attached to gender identity leaves transgender and nonbinary people without social support and in well-founded fear for their lives

Context and importance of the problem

Transgender and nonbinary people outside of the United States are subject to discrimination, violence and death because of their gender identity, causing them to flee their home countries.

Transgender and nonbinary (TNB) people born in countries other than the United States frequently experience significant trauma due to stigma attached to their gender identity. This trauma often includes verbal, physical, and sexual abuse and violence, death threats and attempted murder.¹⁻² Numerous TNB people – mostly transgender women of color – are murdered every year because of their gender identity.³ The trauma experienced often results in depression, post-traumatic stress disorder (PTSD) and suicidal thoughts.⁴⁻⁵ The people who abuse TNB children are often family members, caregivers, school personnel and peers. As adults TNB people frequently face persecution from employers, police, security forces and organized crime groups.^{2,4} This leaves TNB individuals without social support and often in well-founded fear for their lives. Compounding this is a lack of legislation protecting TNB people from discrimination and violence in their countries of origin which allows it to continue with impunity and perpetuates a culture of transphobia, including in much of Latin America and the Caribbean.⁶ Even in countries that do have protective anti-discrimination legislation, enforcement mechanisms are often lacking and violence still occurs. Nearly 90% of TNB asylum seekers and refugees from Central America report surviving sexual and gender-based violence.⁶ For many, the only recourse is to escape their home country to save their own lives.⁶⁻⁷

TNB migrants are uniquely vulnerable to violence and persecution while fleeing their country of origin due to low visual gender role conformity (i.e., not being perceived as having physical features or appearance socially expected of their gender identity), often related to a paucity of gender affirming medical care or barriers in accessing it. Additionally, TNB frequently face legal barriers in their home countries to obtaining updated identity documents with chosen name and gender identity due to burdensome costly requirements to undergo mandatory gender affirming medical and surgical treatments, psychological evaluations and/or obtain judicial permission. Having identity documents with discordant name and gender marker places TNB migrants at risk of further discrimination and violence, including gender-based violence.⁶⁻⁸

TNB migrants who enter or are brought to the U.S. may be detained by the Department of Homeland Security (DHS) through the ongoing practice of immigration detention. DHS often encounters and detains TNB migrants at or near the border and through the “criminalization of trans[gender] immigrants.”⁹ Pursuant to federal law, DHS has wide discretion to detain noncitizens – including TNB migrants – who are seeking entry to the U.S., pending a decision on whether they will be granted permission to stay in the U.S., or waiting for removal after a final order has been issued. INA §§ 236(a),(c), 235(b), 241(a). In practice, TNB people are detained across the U.S., in facilities with and without units designated for TNB people. The immigration detention system is legally described as civil, not criminal, and therefore nonpunitive.

Transgender people are subject to inhumane conditions and abuse in U.S. immigration detention facilities, including those with dedicated units for transgender people, and are held for significantly longer than the average person detained.

Although immigration detention is legally categorized as nonpunitive, the experience of detention is described as worse than prison. Reports from human rights organizations found high rates of sexual assault, unsafe housing conditions, lack of access to and denial of medically necessary care including for mental health, HIV and hormone therapy among TNB migrants in U.S. immigration detention facilities.⁹⁻¹¹ This is corroborated by recent research involving direct interviews with TNB people seeking legal protection who have been detained. They recounted the following inhumane treatment and abuse while in U.S. immigration detention, including at an Immigration and Customs Enforcement [ICE] (a component of DHS) facility managed by a private company with a dedicated unit for TNB people who are detained¹²⁻¹³:

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- **Torture, abuse and discrimination in detention facilities:**
 - **By Detention Officers:** Experiences of torture, abuse and discrimination related to gender identity were common in detention, including sexual harassment, sexual assault/abuse, and verbal harassment (including related to gender identity) by detention officers. Many TNB individuals described officers intentionally not using their chosen name and pronouns and referring to them by their birth sex. One transgender woman recounted her breasts and genitals being groped by guards at two separate detention facilities. This treatment commonly occurred at initial detention facilities where TNB people were held for shorter periods prior to being transferred to a facility with a dedicated unit for TNB people, but also occurred at the latter. Another transgender woman who had survived a pre-migration sexual assault was forced to undergo a strip search by a male officer. When she requested a female officer perform the search, she was told she had to accept it or would be sent back to her country.
 - **By Medical and Mental Health Professionals:** At a private detention facility designated for TNB people, one transgender woman reported mistreatment by the psychologist she was assigned, who asked her “why we were pretending to be trans, that it couldn’t be, that the law wasn’t going to help us, that they weren’t going to take care of us, that this country wasn’t for us.” The same individual shared the physician at the facility sexually abused her and other women, frequently touching and examining their genital areas when they had completely unrelated complaints such as a headache. This was reported and an investigation was performed, after which that physician was replaced, per the individual’s account.
 - **By Other People Who are Detained:** Multiple TNB individuals described verbal harassment and threats of physical violence related to their gender identity from other people who were detained with them.

Transgender people described being forced to undergo unnecessary psychological evaluations not in accordance with international professional standards of care to qualify for gender affirming hormone therapy

- **Solitary confinement and unsafe housing:** Transport between multiple detention facilities was common and while TNB individuals were sometimes ultimately housed with other TNB people in their final destination, at interim locations they were forced into housing including bathing with people of the same birth sex, making them uniquely vulnerable to harassment and verbal, physical, and sexual assault. When there were no other TNB people to house with, then TNB people were also placed in solitary confinement often for long periods of time, which is a human rights abuse and negatively impacts mental health, including risk of suicidality.¹⁴
- **Forced unpaid labor:** TNB individuals reported being forced to clean the detention facility, including bathrooms, and told by guards that their food would be withheld if they did not complete the work.
- **Withholding basic needs:** Food provided was insufficient to meet caloric needs and of poor nutritional quality. TNB individuals detained described difficulty in obtaining soap or shampoo for bathing.
- **Denial of adequate medical and behavioral health care:** TNB individuals reported denials and barriers to accessing medical care including for chronic conditions, medically necessary gender affirming care and behavioral health care, as well as abuse from health care professionals in detention facilities.
 - *Medical care for acute and chronic conditions:* Organizations providing support for detained TNB people reported those living with HIV not being treated with antiretroviral therapy within the detention center and not transported externally to a specialty clinic where they could have received this care. Lack of antiretroviral therapy for HIV can result in disease progression to AIDS, heightened risk of HIV transmission to others and increased risk of disability and death from AIDS-related complications. TNB people described variability in access to, as well as delays in treatment and medications for chronic conditions. One transgender person described being denied any medical treatment for her asthma, as well as for a more serious acute illness she suspected to be dengue fever during which she suffered bleeding from her nose, eyes, ears, mouth and genital area. Another was able to get an inhaler for asthma, but it took two weeks after arriving to the detention facility.
 - *Gender affirming care:* Transgender people described being forced to undergo unnecessary psychological evaluations not in accordance with international professional standards of care¹⁵ to qualify for gender affirming hormone therapy, often delaying initiation of treatment for months and negatively impacting mental health. One transgender individual described having to wait for a year for hormone therapy initiation. Some people had previously been treated with hormone therapy at other detention facilities but were told after transfer to a new facility that they could not continue the hormone therapy until records were sent which would often take weeks to months. Others had taken nonprescribed hormone therapy before fleeing

Transgender and nonbinary people spent on average 2-7 times longer in immigration detention than cisgender people despite the majority having no criminal record or credible flight risk

their home countries, often for years, but because of lack of formal medical records were forced to undergo extensive psychological evaluations to re-initiate therapy, which significantly delayed treatment. Hormone therapy for treatment of gender dysphoria is medically necessary and is protective against negative mental health outcomes, including suicidality.¹⁵ A transgender man described being started on testosterone by a health care provider without training in gender affirming care, after which he began to experience negative side effects. He subsequently had a telehealth consultation with an outside transgender health specialist and was told the dose he had been administered was very high, significantly above recommended guidelines, and felt improved with a reduced dosage. This illustrates that health care providers working in detention facilities do not have the training to initiate and manage gender affirming hormone therapy and can subsequently cause harm when prescribing it.

- *Behavioral health care:* TNB individuals reported receiving mental health evaluations in detention but described these as cursory and unsupportive. No individual interviewed reported receiving ongoing psychotherapy during detention, despite experiencing worsening mental health with prolonged detention and suffering from gender identity discrimination. One individual reported verbal harassment from a psychologist as described above.
- **Longer than average detention times:** TNB people spent on average 2-7 times longer in immigration detention than cisgender people despite the majority having no criminal record or credible flight risk.^{12,16}
- **Unsafe conditions during the Covid-19 pandemic:** For those detained during the Covid-19 pandemic, TNB individuals reported being forced to clean bathrooms without personal protective equipment, difficulty obtaining masks for personal protection, and guards routinely not wearing masks when in contact with people detained. People detained were unable to gain access to Covid-19 testing, faced barriers and delays in receiving vaccines and inadequate or absent medical care after testing positive. Large Covid-19 outbreaks occurred within multiple ICE facilities, which had rising Covid-19 rates despite reductions in the detained population and higher positive test rates than the general population.¹⁷
- **Retaliation for reporting abuse, discrimination or facility conditions:** TNB people detained report retaliatory treatment from detention officers for attempts to report abuse, discrimination, lack of services and facility conditions.

Detained transgender and nonbinary migrants are uniquely vulnerable due to potential exacerbation of preexisting mental health issues resulting from prior trauma as well as worsening mental health due to lack of access to gender affirming care

Immigration detention negatively impacts mental health of TNB migrants and triggers previous trauma.

Detained TNB migrants are uniquely vulnerable due to potential exacerbation of preexisting mental health issues resulting from prior trauma as well as worsening mental health due to untreated gender dysphoria when they lack access or are denied appropriate gender affirming care.¹⁸ These conditions for TNB individuals with an extensive history of trauma can worsen underlying chronic and mental health conditions and increase the risk of suicidality and self-harm.¹⁸

Figure 2
Participant stories¹

Sam

Sam is a transgender man in his 30s from the Caribbean. He suffered discrimination and abuse due to transphobia and homophobia in his country. Sam's partner was murdered in front of him, and Sam survived an attempt on his life. There was no safe place to be in his country, so in fear for his life, he fled and presented himself at the U.S. border to seek asylum. He was transferred between 3 separate detention facilities and detained for a total of 7 months before being released. For 4 ½ months of that time he was housed alone in segregation and did not have contact with anyone except at mealtimes. He suffered verbal discrimination and physical abuse from guards and other people in detention. This worsened his mental health and triggered past trauma. He was granted asylum on appeal two years after arriving in the U.S. He continues to struggle with past trauma, including related to his negative experiences in immigration detention.

Ana Sofia

Ana Sofia is a transgender woman from Central America who fled to the U.S. in her 20s because of discrimination and violence because of her gender identity, including sexual assault. She was held in 3 separate detention facilities and describes verbal and sexual harassment and abuse from guards in all of them: "What I want to say is when I was first detained by ICE, they treated me very badly because I had [breasts] due to the hormones. From that moment on, I was considered a male and a man had to check me, not a woman. They come and they touch you again and again, and it's something you have to put up with because you want something better for yourself."

¹ Identifying details have been changed to protect the individual's confidentiality and safety.

Despite protective standards and guidelines being in place since 2015, ICE is still currently unable to ensure the safety and well-being of transgender and nonbinary individuals who are detained

Critique of current policy

Current ICE policies and guidelines for treatment of transgender and nonbinary people in immigration detention fail to prevent harm and abuse of TNB individuals and detention facilities are unable to ensure their safety and well-being, including access to basic needs and medical care.

ICE released guidance on treatment of TNB people in 2015 to supplement existing ICE detention standards, the later versions of which include limited protections for TNB individuals.¹⁹⁻²⁰ These provide guidelines on issues such as gender identity screening, use of name/pronouns, gender expression in concordance with gender identity, housing units and bathroom facilities, reducing unnecessary strip searches and choice of gender of the person performing them, minimizing use of administrative segregation (i.e. solitary confinement), and provision of gender affirming health care including hormone therapy, but only for those TNB individuals who have documentation of receiving hormone therapy when taken into ICE custody or where therapy is deemed “medically necessary.”

These guidelines are not being consistently adhered to or enforced according to recent research and reports from human rights organizations, and are differentially interpreted and applied between facilities owned by ICE and those run by private companies.^{10-13,21} In fact, ICE detention standards and the 2015 guidance are not mandatory without a contractual agreement between ICE and the contract facility.^{9,16} In March of 2020, Reuters reported that no facility had modified its contract to adopt the 2015 guidance and that some facilities had adopted the guidance “informally.”^{9,16}

Recent research with direct interviews of TNB people detained, including in facilities with dedicated units for housing TNB people, finds that they are routinely violated with impunity, to the detriment of the physical and mental health of these individuals. Even brief periods of time in immigration detention risks discrimination, abuse and irreparable harm for TNB people who are actively fleeing violence and seeking safety. ¹²⁻¹³ These findings demonstrate that despite protective standards and guidelines being in place since 2015, ICE is still currently unable to ensure the safety and well-being of TNB individuals who are detained.

Policy alternative

ICE has the legal authority to adopt a general policy of release and an end to routine civil immigration detention for TNB people, especially those seeking asylum or other legal protection. When additional measures are necessary for individuals who pose a flight risk or for whom there are safety concerns, community-based alternatives-to-detention (ATD) programming for immigrants and asylum-seekers in the United States and other countries have demonstrated high levels of success with average compliance rates $\geq 90\%$ and costs 80% lower than immigration detention.²⁴ The Biden Administration is working to actively expand ATD to over half a million

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immigrants and asylum seekers by the end of 2023. ATDs run through not-for-profit community organizations use a case management model that seeks to ensure people receive holistic support and understand their rights and obligations.²⁵

In contrast, the ATD models currently in use by the federal government and private contractors typically involve ankle monitors, telephone calls, and smartphone applications.²⁵ These models have been found to negatively impact the physical and mental health of participants because of fear of failure to comply with conditions of release due to design flaws, the stress of constant surveillance, and the stigma associated with participation in criminal-justice-like programming.²⁵ The possible effects on TNB participants is particularly concerning as the technologies used for phone reporting have higher failure rates for TNB people as opposed to cisgender people²⁵ and because further experiences of stigma and surveillance may be retraumatizing.

Recommendations

1. **The U.S. should immediately end civil immigration detention for transgender and nonbinary people.**
2. **When case management is necessary for transgender and nonbinary individuals for whom there is a flight risk or safety concern, community-based and not-for-profit alternatives-to-detention programming should be adopted,** with a focus on ensuring transgender and nonbinary people in the U.S. understand their rights to guarantee their safety and basic needs are met.
3. **State and federal enforcement and accountability mechanisms should be created to ensure implementation of and adherence to policies** to protect vulnerable populations like transgender and nonbinary people, especially at for-profit detention centers. Violators should lose their federal contracts.

Conclusion

ICE has not demonstrated the ability to protect TNB people in detention from discrimination, neglect, abuse and torture. Given TNB individuals' heightened risk for abuse – often the very reason they seek legal protection in the U.S. – and given ICE's inability to effectively enact its 2015 guidelines over the last 5 years, we recommend ICE adopt a policy of release or, if necessary in some cases, community-based alternatives-to-detention for TNB people. To do otherwise threatens the lives and well-being of TNB people seeking legal protection in the United States.

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