



# WHY DIVERSITY STILL MATTERS

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BY MICHAEL KIEHNE

**O**n June 26, 2017, the Michigan Department of Corrections (MDOC) implemented a new policy regarding the care of transgender prisoners.<sup>1</sup> The policy establishes the right of transgender prisoners to receive hormone therapy, requires consideration of special housing needs and the availability of appropriate undergarments and grooming aids, and it emphasizes the right of transgender prisoners to be treated with respect and in a professional manner by prison staff.<sup>2</sup> MDOC initiated this policy change when it was contacted by the American Civil Liberties Union (ACLU) and the Southern Poverty Law Center on behalf of a transgender inmate, Jami Naturalite.<sup>3</sup>

The MDOC action was an important step forward for Michigan's transgender community. However, this and other measures to recognize civil rights and promote equality may lead some to believe that the work of fostering diversity is complete and no longer a relevant goal for legal advocates. According to some, we now live in a nation where equality reigns, and actively working to protect marginalized groups is therefore

unnecessary. We elected our first African-American president, adults are allowed to marry whom they love, and even transgender prisoners are able to begin hormone therapy while incarcerated.<sup>4</sup> These milestones might suggest that all civil rights work is complete and the framework to ensure equality now exists.

Others argue that focusing on diversity issues promotes divisiveness and conflicts with equality.<sup>5</sup> They believe that the goal of equality is to eventually erase categorization based on race, ethnicity, sexuality, and gender identity.<sup>6</sup> According to these critics, identifying and tracking categorized groups only reinforces the barriers decried by proponents of equality. A common argument is that "[minority groups] end up competing for resources on the basis that they are more excluded and vulnerable than others.... There is a perverse incentive to assert one's victimization by others, rather than build alliances."<sup>7</sup>

Inequality is prevalent in the United States and Michigan. This article seeks to emphasize the continued importance of

identifying marginalized groups and tracking violations of their civil and constitutional rights to promote equality. It highlights challenges facing transgender Michiganders as well as overrepresentation of racial and ethnic minorities in Michigan prisons and the underrepresentation of those same groups in the legal profession. It also discusses the importance of offering culturally competent services to clients who may be members of marginalized groups. This focus is not meant to be exhaustive or representative of all groups experiencing inequality. Women, religious minorities, other members of the LGBTQ community, and other groups face both similar and distinct challenges that are not discussed in this article.

### Challenges facing Michigan's transgender population

The MDOC policy change mentioned previously is a clear sign of progress, but significant work remains to be done to ensure equality and defend the civil rights of Michigan's transgender community. The 2015 U.S. Transgender Survey is the largest undertaking to gather information about transgender people living in this country.<sup>8</sup> It illuminates the struggles and barriers most transgender people face regarding employment, housing, education, and interaction with law enforcement.

The survey compiled information from 27,715 respondents nationwide and 894 respondents in Michigan.<sup>9</sup> According to the survey, the unemployment rate for transgender people was 19 percent in Michigan—almost four times the national unemployment rate at that time.<sup>10</sup> Critics often point to high unemployment rates in a marginalized population as evidence of apathy or indolence. However, nearly one-third of survey respondents who said they applied for or held a job

during that time reported being fired, denied a promotion, or not being hired because of their gender identity or expression.<sup>11</sup> Furthermore, 17 percent of respondents who have been employed reported losing a job because of their gender identity sometime in their lifetime.<sup>12</sup> An additional 16 percent of respondents who were employed during that time reported verbal harassment at work because of their gender identity.<sup>13</sup>

A common response to lack of employment opportunities or underemployment is to suggest obtaining higher education to be more competitive. However, school proves to be a traumatic place for many in the transgender community. In Michigan, 79 percent of transgender people who were openly or perceived to be transgender between kindergarten and grade 12 experienced some form of mistreatment, such as verbal harassment, being disciplined more harshly than cisgender peers, and physical and sexual assault.<sup>14</sup> The experience for a significant number of transgender people remained the same in post-high school educational settings: nearly one-third of transgender people in Michigan experience verbal, physical, or sexual harassment in college or vocational school.<sup>15</sup>

Considering discriminatory employment practices and the harassment many transgender people experience in school, it is no surprise that 30 percent of Michigan's transgender population lived in poverty at the time of the survey.<sup>16</sup> More than one-third of transgender people in Michigan experienced homelessness at some point in their lives and 20 percent were homeless within a year of when the survey was conducted, and of those experiencing homelessness 35 percent avoided staying in a shelter because they feared mistreatment as a transgender person.<sup>17</sup> More than one-quarter of transgender Michiganders experienced housing discrimination, including landlords who refused to rent to transgender people or evicting them because they are transgender.<sup>18</sup>

Transgender people also experience high levels of mistreatment and harassment by police. Of those who have interacted with law enforcement officers in Michigan, 60 percent experienced mistreatment ranging from verbal harassment and being repeatedly referred to as the wrong gender to physical and sexual assault such as being forced to engage in sexual activity to avoid arrest.<sup>19</sup> These negative interactions have led to significant mistrust of law enforcement; at the time of the survey, more than half of Michigan's transgender population felt uncomfortable asking law enforcement for help.<sup>20</sup>

By continuing to track instances of harassment, discrimination, and inequality, we can advocate for changes that prohibit them. Failure to track marginalized groups such as Michigan's transgender community adds to their vulnerability by allowing patterns of inequality and discrimination to go undetected. Without that information, there is no way of knowing what progress still needs to be made.

### Racial and ethnic minorities

Similar issues of mistrust and maltreatment exist with ethnic and racial minorities and law enforcement. The racial

### FAST FACTS

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disparities present in incarceration rates are glaring. In 2014, African Americans constituted 2.3 million (34 percent) of the total 6.8 million prison population in the U.S.<sup>21</sup> African Americans were incarcerated at more than five times the rate of whites nationally, and although African Americans and Hispanics made up approximately 32 percent of the U.S. population, they comprised 56 percent of all incarcerated people in the U.S. in 2015.<sup>22</sup>

In Michigan, white non-Hispanics were estimated to make up 75.4 percent of the population for 2016.<sup>23</sup> However, according to the MDOC 2015 Statistical Report,<sup>24</sup> the white prison population only constituted approximately 44.5 percent of the total prison population, with 18,973 white inmates.<sup>25</sup> Non-white inmates constituted well over half of the prison population, with 23,633 inmates.<sup>26</sup>

To explain these disparities, the National Association for the Advancement of Colored People (NAACP) points to the failed war on drugs and similar policies like three-strikes laws that established mandatory minimum sentencing.<sup>27</sup> Nationally, African Americans use drugs at rates similar to those of whites, but African Americans are imprisoned for drug crimes at rates nearly six times that of whites.<sup>28</sup> In Michigan, African Americans are over three times more likely than whites to be arrested for marijuana possession, despite equal usage rates.<sup>29</sup> According to an ACLU report, Monroe, St. Clair, and Jackson counties have the most staggering rates of racial disparity in this regard, with African Americans being up to 15 times more likely than whites to be arrested for marijuana possession.<sup>30</sup>

The impact of disparate arrest and incarceration is felt in minority communities long after an individual's last interaction with the criminal justice system. A criminal record can negatively affect custodial rights, access to public benefits, financial aid for school, and housing eligibility. A criminal record also creates employment barriers. According to the NAACP, having a criminal record could cut the likelihood of a call back for a job interview nearly in half.<sup>31</sup> Michigan expungement laws<sup>32</sup> offer some relief. However, as in many cases, those with the greatest need for legal assistance often cannot afford it.

When we track and increase awareness of these disparities, we can educate law enforcement and the judiciary to reduce implicit biases. We can also draft and amend legislation to remove systemic biases and discrimination.

### Diversity in the legal profession

The overrepresentation of racial and ethnic minorities in prison contrasts starkly with their underrepresentation in the legal profession. According to the American Bar Association National Lawyer Population Survey, the diversity statistics have remained the same for the past decade, with only slight fluctuations in the demographics for Hispanics and African Americans. The percentage of Hispanic attorneys ranged from 3 percent to 5 percent of the total number of attorneys nationwide.<sup>33</sup> The percentage of African-American attorneys ranged

from 4 percent to 5 percent.<sup>34</sup> The low representation of both minority groups in the legal profession is disheartening. By contrast, the percentage of white attorneys peaked at 90 percent in 2007, and has steadily decreased to 85 percent in 2017.<sup>35</sup>

According to the U.S. Department of Labor, African Americans made up 11 percent of judges and magistrates in 2016.<sup>36</sup> The number of Hispanic judges is drastically lower, with only 3.5 percent.<sup>37</sup> While the number of African-American judges is encouraging, it is still not representative of the African-American population in this country, which according to U.S. Census estimates for 2016 was 13.3 percent of the overall population.<sup>38</sup> The percentage of Hispanic judges is dismal and far from representative considering the U.S. Census estimated the Hispanic population comprised 17.8 percent of our overall population in 2016.<sup>39</sup>

Although Michigan law schools seem to be fairly representative in terms of minority student enrollment,<sup>40</sup> the demographics of minority faculty members are less promising. Between 2011 and 2014, the percentage of minority faculty members dropped from 11.4 percent to 9.5 percent.<sup>41</sup> Both figures are well below half of the minority population in Michigan. While minority student enrollment is strong, the number of law degrees awarded to minorities is lower than the number of enrolled minority students. Arguably and worthy of more research, this dichotomy could be linked to the lack of faculty diversity.<sup>42</sup>

### Advocating for equality

As the statistics indicate, inequality is still pervasive throughout the country and in Michigan. Failing to acknowledge these persistent inequalities will likely perpetuate socioeconomic and other divides in access to justice. Acknowledging and working to dismantle significant systemic barriers can help preserve and expand access to justice. It is important to track instances of discrimination and inequality in different groups to be able to address them. State Bar of Michigan members are crucial in this process. By litigating, legislating, and advocating, attorneys have the ability to effect change and ensure the advancement of justice and equality.

Progress toward this goal continues. Organizations like the ACLU of Michigan, Affirmations, local NAACP offices, and legal services programs throughout Michigan work to defend civil and constitutional rights and promote equality. Some private attorneys specialize in servicing marginalized groups, partner with organizations like the Transgender Legal Defense Fund, or volunteer their services to help combat inequality. Free legal resources are available on MichiganLegalHelp.org for residents who need to represent themselves.

### Cultural competence

Cultural competence<sup>43</sup> is essential when working with marginalized groups. To be effective advocates, attorneys must not only be able to recognize cultural differences, but be sensitive

and responsive to them. When working with different populations, it is important to use correct and preferred terminology and pronouns. Attorneys must be conscious of gender, sexual orientation, education levels, and trauma to generate trust with clients. Too often, members of these groups have suffered at the hands of law enforcement, employers, strangers, and even family members. Their advocates should avoid adding to their trauma at all costs.

Becoming culturally competent attorneys is the first step in effecting change. That awareness and sensitivity coupled with recognition of the important work that remains to be done to equalize access to justice will ensure effective advocacy for marginalized clients like Jami Naturalite. ■



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## ENDNOTES

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5. Mirza, *Diversity is Divisive*, The Guardian <<https://www.theguardian.com/commentisfree/2006/nov/21/diversityhasbecomedivisive>> (posted November 21, 2016).
6. *Id.*
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9. NCTE, *2015 US Transgender Survey: Michigan State Report*, p. 1 <<http://www.transequality.org/sites/default/files/docs/usts/USTSMISStateReport%281017%29.pdf>>.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 2.
16. *Id.* at 1.
17. *Id.* at 2.
18. *Id.*
19. *Id.*
20. *Id.*
21. National Association for the Advancement of Colored People (NAACP), *Criminal Justice Fact Sheet* <<http://www.naacp.org/criminal-justice-fact-sheet/>>.
22. *Id.*
23. United States Census Bureau, *Quick Facts: Michigan* <<https://www.census.gov/quickfacts/MI>> (the U.S. Census Bureau noted that for tracking purposes, "Hispanics may be of any race, so [they] also are included in applicable race categories.").
24. MDOC, *2015 Statistical Report* (May 12, 2017) <[http://www.michigan.gov/documents/corrections/MDOC\\_2015\\_Statistical\\_Report\\_-\\_2016.08.23\\_532907\\_7.pdf](http://www.michigan.gov/documents/corrections/MDOC_2015_Statistical_Report_-_2016.08.23_532907_7.pdf)>. See in particular Tables C3 through C3b.
25. *Id.* at C-80.
26. *Id.* at C-82. Michigan's total prison population for 2015 was 42,628, but this total included 22 cases with insufficient information that were not accounted for in these totals.
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28. *Id.*
29. ACLU, *Report: The War on Marijuana in Black and White* (June 2013) <<https://www.aclu.org/report/report-war-marijuana-black-and-white?redirect=criminal-law-reform/war-marijuana-black-and-white>>.
30. *Id.* at 58 (for 2010, African Americans were 15.4 times more likely to be arrested than whites in Monroe County, 10.1 times more likely to be arrested in St. Clair County, and 8.6 times for likely to be arrested in Jackson County).
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32. Setting Aside Adult Convictions, MCL 780.621; Probate Code, MCL 712A.18e.
33. ABA, *ABA National Lawyer Population Survey* (2017 Revised) <[https://www.americanbar.org/content/dam/aba/administrative/market\\_research/national-lawyer-population-10-year-demographics-revised.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-10-year-demographics-revised.authcheckdam.pdf)> (Hispanic attorneys accounted for 3 percent of the profession in 2008 and 2012. Since 2015, Hispanic attorneys have accounted for 5 percent of attorneys nationwide.)
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36. United States Department of Labor, Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey* (2016) <<https://www.bls.gov/cps/cpsaat11.htm>>.
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41. *Id.* at 5-6.
42. *Id.* at 3-4 (comparing Tables "Total Enrollment of Minorities" to "JDs Awarded to Minorities").
43. Bassett and Martell, "Advising Same-Sex Clients After Obergefell," On-Demand Seminar (ICLE, posted 3/7/16) ("Cultural competency is the integration and transformation of knowledge about individuals and groups of people into specific standards, policies, practices, and attitudes that can be used in appropriate cultural settings to both increase the quality of services and representation and to produce better outcomes for clients."). See also Banuelos, Hernandez, Moore et al., *Embracing Diversity and Being Culturally Competent is No Longer Optional* (March 22-24, 2012) <[https://www.americanbar.org/content/dam/aba/events/labor\\_law/2012/03/ethics\\_professional\\_responsibility\\_committee\\_midwinter\\_meeting/mw2012\\_cultural\\_compentancy.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/events/labor_law/2012/03/ethics_professional_responsibility_committee_midwinter_meeting/mw2012_cultural_compentancy.authcheckdam.pdf)>.