

Know Your Rights Manual for the Transgender Community: Criminal Law



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This manual is a project of the National Lawyers Guild San Francisco Bay Area Chapter; many additional individuals and organizations made valuable contributions.

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The National Lawyers Guild is an association dedicated to the need for basic change in the structure of our political and economic system. We seek to unite the lawyers, law students, legal workers, and jailhouse lawyers of America in an organization which shall function as an effective political and social force in the service of the people, to the end that human rights shall be regarded as more sacred than property interests. The Transgender Know Your Rights Manuals are legal materials designed for transgender community members and their advocates to provide a set of basic, current, and locally-specific legal information about how certain areas of substantive law uniquely affect transgender individuals.

This effort was inspired by Thomas Steel, tireless advocate for the San Francisco Bay Area LGBT community and longtime friend and supporter of the National Lawyers Guild San Francisco Bay Area Chapter. His leadership and vision enabled the work which the Transgender Know Your Rights Manuals seek to further.

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This information was compiled by law students of the National Lawyers Guild, using statutory law, case law, and the work of numerous legal and non-legal organizations across the country, notably, the National Lawyers Guild San Francisco Bay Area chapter. While the information here is up-to-date through June 2014, it is possible that substantive changes have been made to the laws since it was last updated. Please keep this in mind while using this resource. Source and reference information will be provided for most of the content in this manual to help you verify that the information is still good before relying on it.

This manual was created for use by transgender community members and allies, by service providers who work with the transgender community, and by attorneys and legal workers who provide advocacy and legal services to members of the transgender community. For purposes of this manual, the word “transgender” is used as an umbrella term that includes transgender, gender variant, and intersex people who are at any point of self-identification or physical transition. Occasionally, the text will refer to individuals as “he or she” or “his or her.” This reference does not indicate that a statement applies exclusively to persons who identify as male or female, but instead is used for legibility and accessibility.

The information in this manual does not constitute legal advice; instead, it is meant to serve as a resource to help understand the landscape of transgender law in a particular area, and to help connect readers with the current information needed to verify law or navigate a particular situation. Although we hope that this manual assists service providers and community members in locating information and resources, it is important to note that only licensed attorneys are authorized to give legal advice. If you have a question of law that is outside of the scope of information provided in this manual, you may wish to consult or refer your client to an attorney or, if you are a client, to contact one of the legal support agencies listed in the resource guide in the back. Many of the organizations listed in the resource guide provide referrals to attorneys who are familiar with transgender law and working with the transgender community.

For questions, comments, corrections, and suggestions, please contact carlos@nlgsf.org.

USING THIS MANUAL

This manual was created to be a first-stop reference for lawyers, service providers, and community members who need legal information about a transgender-specific issue or question of law. For ease of use, the content has been divided by common problems or

needs. Case law, statutes, print and web resources, and other service organizations can be found embedded throughout the manual, referenced in the footnotes, and listed in the directory at the back of this manual.

This resource was created by and for people in the San Francisco Bay Area, and therefore much of the information is specific to California and San Francisco Bay Area resources and law. We hope that this manual will be a helpful resource to readers outside of California as well because it includes information that is nationally relevant. However, it is important that non-California readers pay close attention to what information appears to be specific to California or the Bay Area, and not presume that the local information contained in this manual will transfer to other cities and states. Non-California readers are encouraged to use the national resources listed in the directory at the back to locate up-to-date information about the laws and precedent in their state or city.

It is important to note that, although the researchers who assembled this information did their best to be accurate on points of both black letter law and how the law tends to play out in the real world, there may be inaccuracies and nothing in this manual should be relied on as legal advice. Legal advice can only come from a lawyer. This manual is, however, a good starting place to understand the law and how it affects transgender people and communities in California and the Bay Area specifically.

FINDING THE LAW FOR FREE

Legal documents, such as cases and statutes, are actually public documents. This means that everyone (members of the public) has the right to research and read these documents. The problem is that sometimes these documents can be hard to find or access.

If a case is cited in this document and a person wants to find and read the actual case, it can be found by following a series of steps. The first step is to avoid getting flustered by the complicated series of numbers, letters, and punctuation that follows the name of the case. The next step is to simply go to <http://scholar.google.com/>, click the “Legal opinions and journals” button and type in the volume number, the journal name, and the page number from the case citation. For example, to find the case of *State v. Jordan*, 742 N.W.2d 149 (Minn. 2007). We would ignore the name of the case (*State v. Jordan*), and copy the volume number (742), then journal name (N.W.2d), followed by the page number (149). Those three things are all that’s needed to find the case on Google scholar. Sometimes the journal name will be different, but as long as the right information is copied into the search bar, Google Scholar should be able to pull it up.

Again, the information in this manual is not legal advice. We hope that transgender individuals and their allies will use this manual as a first step for beginning to understand applicable law, and identify when legal help is needed.

Many transgender people report barriers to accessing legal services for a number of reasons. The cost of hiring a lawyer is a major issue for many, along with fears that lawyers will not be respectful of transgender clients, will not know enough about how laws specifically affect transgender people, or that the court system is prejudiced against

transgender people. While all of these fears are justified, attorneys, activists, and advocates across the country are making huge strides in increasing legal services and resources for transgender people. Many states have lesbian, gay, bisexual, and transgender (LGBT) bar associations that can be helpful in locating legal information or finding lawyers who are knowledgeable about transgender law and sensitive to the specific concerns of transgender clients. Many of the organizations listed in the resource section at the end of this manual are happy to assist individuals in finding legal services. Although legal services often seem too expensive, there are a lot of organizations and individual attorneys committed to making justice more accessible. You may be eligible for pro bono (free of charge) representation or fee structures that work for you (such as contingency fees, where you only pay if you win your case). Additionally, many attorneys are happy to meet with potential clients for free to assess a case. This can be a good way to learn more about your options and whether it's worth it to you to pursue legal action.

A NOTE TO PROFESSIONALS

This manual was designed to be a resource to clients, but it is our hope that service providers and legal professionals will also find it useful. Attorneys may find this manual to be a helpful starting point for legal research and a useful tool for locating additional resources. All manuals in this series contain footnotes to case law, law review articles, and statutes that we hope will assist you. As with any compilation of research, attorneys are urged to check all cited law before relying on it to make sure there haven't been substantive changes and that it will apply to your client's particular case. Many of the organizations listed in the resource section of this document provide assistance to attorneys representing clients, and can be excellent sources for information and insight. When advocating for transgender clients, attorneys can advocate for the use of appropriate name and pronoun for their client in court and other proceedings.

BASIC RIGHTS

Both citizens and non-citizens alike have rights under the United States Constitution. The Fifth Amendment gives every person the right to remain silent – that is, to not answer questions asked by a police officer or government agent. The Fourth Amendment restricts the government's power to enter and search a person's home or workplace, although there are many exceptions and new laws have expanded the government's power to conduct surveillance, as well as the authority for the police to search a person or belongings. The First Amendment protects a person's right to speak freely and to advocate for social change. These Constitutional rights are absolute, and cannot be suspended – even during wartime.¹

OVERVIEW

There are numerous reasons that transgender persons are more susceptible to ending up in the criminal justice system. Due to widespread and pervasive systemic discrimination, transgender persons frequently experience relatively higher levels of unemployment, homelessness, lack of identification, lack of healthcare, gender policing, and exposure to

¹ Know Your Rights!: What to Do if Questioned by Police, FBI, Customs Agents or Immigration Officers, August 2004
California: National Lawyers Guild San Francisco Bay Area Chapter, American Civil Liberties Union of Northern California, and the American Arab Anti-Discrimination Committee, <http://www.nlgsf.org/resources/>, Last visited May 22, 2014.

violence or harassment. The intersection between race and class can add additional layers that make transgender persons a constant target of law enforcement professionals. According to a demographic study of men's prisons in California, 35% of transgender inmates are Black, 28% are Latino, 1% are Asian/Pacific Islander, and 28% are White. They are slightly older than the general prison population, are disproportionately incarcerated for crimes against property, and tend to have higher levels of educational attainment than other inmates. Transgender persons are also more likely to be unemployed one month before their arrest, are more likely to suffer from depression, other mental health issues, or be HIV-positive (60-80%), and 20% report being homeless before their most recent incarceration.²

INTERACTIONS WITH POLICE OFFICERS

A 2003 study conducted in San Francisco by the National Center for Lesbian Rights and the Transgender Law Center indicates that one in four respondents said that they had suffered discrimination when interacting with law enforcement officials.³ Additionally, in a 2011 nationwide survey of transgender discrimination, 30 percent of respondents who had interacted with law enforcement reported harassment or assault by police, with much higher rates reported by people of color.⁴ Almost half of the respondents (46%) reported being uncomfortable seeking police assistance.⁵

When dealing with the police, there are basic things one can do to stay safe, or at least make a stressful situation safer. People are less threatening to an officer if they keep their hands in view, don't make sudden movements, never touch the officers or their equipment, and remain respectful at all times. Anything that detainees might do to give an officer reason to argue that they are dangerous will work against them. Such behavior could even lead to an aggressive reaction on the part of the police, and a charge of assault against the detainee.

Stops and Searches on the Street

Much of what could potentially transpire between a police officer and someone on the street is governed by the Fourth Amendment of the United States Constitution, including when an officer may stop someone and what that officer has the authority to do after stopping someone. Even if it appears that a person has been stopped by an officer for no reason, this is often hard to prove, as the officer only needs to meet a relatively low standard of proof in order to stop an individual.

² Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men's Prisons, University of California, Irvine's Center for Evidence-Based Correction, <http://ucicorrections.seweb.uci.edu/files/2013/06/A-Demographic-Assessment-of-Transgender-Inmates-in-Mens-Prisons.pdf>, Last visited May 22, 2014; see also Transgender Inmates in California's Prisons: An Empirical Study of a Vulnerable Population, Presented by Valerie Jenness, Ph.D., Center for Evidence-Based Corrections, to California Department of Corrections and Rehabilitation Wardens' Meeting, April 2009, <http://ucicorrections.seweb.uci.edu/files/2013/06/Transgender-Inmates-in-CAs-Prisons-An-Empirical-Study-of-a-Vulnerable-Population.pdf>, Last visited May 22, 2014.

³ Trans Realities: A Legal Needs Assessment of San Francisco's Transgender Communities, National Center for Lesbian Rights and Transgender Law Center, 2003, <http://www.nclrights.org/wp-content/uploads/2013/07/transrealities0803.pdf>, Last visited May 22, 2014.

⁴ Injustice at Every Turn: A Report of the National Transgender Survey, National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011, http://endtransdiscrimination.org/PDFs/NTDS_Report.pdf, Last visited May 22, 2014.

⁵ *Id.*

An officer is prohibited from stopping someone solely based on gender presentation. An investigative stop of any individual must be justified by some objective manifestation of fact that the person stopped is, or is about to be, engaged in criminal activity.⁶ This “reasonable suspicion” test, however, is easy to satisfy. A court will examine the circumstances surrounding the stop, and officers can cite to things such as being in a “high crime area,” the time of day, and their own expertise to support their findings of “reasonable suspicion.”⁷ The San Francisco Police Commission has adopted resolutions explicitly prohibiting officers from using gender presentation as a factor to meet this “reasonable suspicion” requirement.⁸

Just after someone has been stopped by an officer, it is a good idea to ask the officer if he or she is free to go. If the answer is yes, that person may walk away. If the police say an individual is not under arrest, but is not free to go, that person is being detained. Though being detained is not the same as being arrested, an arrest could follow.

An officer is required to have an explanation for such detention. You can ask the officer for an explanation of why you are being detained, though they may not answer your question. If the detention is later challenged, the officer will be required to provide the court with an explanation for the detainment. The person being detained does not have to answer any questions (though outside of California you may be required to identify yourself). Even though people who are being detained often feel that they are not being treated with respect, and may be stressed out or upset, maintaining a respectful and polite tone with the officer can go a long way toward staying safe. Especially if you are refusing to answer questions or identify yourself, use your own best judgment about how to speak to police officers.

Under the U.S. Constitution’s Fourth Amendment and California law, the police need a reasonable suspicion that a person is armed and dangerous in order to search their person.⁹ This type of search is referred to as a “frisk,” or a “pat down.” The purpose of a frisk is for the officer’s safety and therefore can only be done in search of weapons, and not in search of drugs. An officer may pat down a person’s clothing, which may include patting the area over or near the chest, buttocks, or genitals. Grabbing at or near genitalia, however, simply to establish a person’s “true sex” is inappropriate and potentially unlawful, depending on the jurisdiction. Even if the police have no other grounds for suspicion, hostility or aggressive behavior may be enough for them to justify a search. However, consenting to a search is not required; consent may enable the police to conduct a much broader search than would otherwise be allowed by law.¹⁰ It is important that the person being stopped calmly assert that they do not consent to the search; this helps ensure that any evidence found will be inadmissible in court if the officer’s search is later ruled to have been illegal.

Note that if you are stopped while in a vehicle, the constitutional reasonableness of traffic stops does not depend on the actual motivations of the individual officers involved.¹¹

⁶ United States v. Cortez, 449 U.S. 411, 417 (1981).

⁷ People v. Souza, 9 Cal. 4th 224, 229, 237 (1994).

⁸ San Francisco Police Department, General Order 5.17(II)(A)(2)(a)

⁹ Cal. Pen. Code, § 833.

¹⁰ People v. Jenkins, 22 Cal. 4th 900, 974 (2000).

¹¹ Whren v. United States, 517 U.S. 806, 813 (1996).

Furthermore, police officers making traffic stops may order passengers to get out of the vehicle pending the completion of a search.¹²

Stops of Suspected Sex Workers

In a study conducted by Human Rights Watch, transgender persons reported being frequently stopped and searched by police officers due to profiling based on their gender presentation.¹³ In San Francisco, detaining an individual solely based on gender presentation violates police policy.¹⁴ However, a law banning “loitering with intent to commit prostitution” is frequently used to stop or arrest suspected sex workers, with at least 168 arrests occurring in San Francisco between May and August of 2011.¹⁵ Disturbingly, prior to October 2012, the possession of condoms was commonly used as evidence in the prosecution of suspected sex workers. In April 2013, the San Francisco District Attorney announced that a ban on this practice would be permanent.¹⁶

The California law banning intent to commit prostitution defines “intent” in an exceptionally broad manner, and conduct which may be used as evidence of intent includes having conversations with passersby or hailing the drivers of cars.¹⁷ It has been unsuccessfully challenged for being overly broad and vague.¹⁸ An excellent guide for handling encounters with law enforcement in this context can be found on page 130 of St. James Infirmary’s Occupational Health and Safety Manual, available online at: http://stjamesinfirmary.org/wordpress/wp-content/uploads/2010/10/sji_rg_v3-2010.pdf.

Treatment and Pronouns

Disrespectful and unsafe treatment by police officers is particularly prevalent with transgender community members. Acknowledging this reality, it can be difficult for detainees to know how to increase their chances of being treated safely and respectfully, especially in regards to pronoun use for transgender detainees. In San Francisco¹⁹ and in other municipalities, police officers are required to avoid harsh, profane or uncivil language as well as address a person with respect to their self-identified gender.

In San Francisco for instance, officers are instructed to respectfully ask individuals for clarification if uncertain of what pronoun to use; “e.g. ‘do you prefer to be referred to as ‘she’ or ‘he’?’” This means that a person arrested in San Francisco is entitled to be treated in accordance with a self-identified gender, regardless of anatomy, legal name, or gender marker. Other jurisdictions may or may not have such police protocols in place, but it is always a good idea to check just in case. If interacting with a police officer who is using the wrong pronoun, the detained person can correct this by saying to the officer, “I prefer to be referred to by female/male pronouns.” In other municipalities, it should be argued that such

¹² Maryland v. Wilson, 519 U.S. 408 (1997).

¹³ Sex Workers at Risk: Condoms as Evidence of Prostitution in Four US Cities, Human Rights Watch, July 19, 2012. <http://www.hrw.org/reports/2012/07/19/sex-workers-risk>, Last visited May 22, 2014.

¹⁴ Investigative Detentions, San Francisco Police Department, General Order 5.03. <http://www.sf-police.org/modules/ShowDocument.aspx?documentid=14788>, Last visited May 22, 2014.

¹⁵ Sex Workers at Risk at <http://www.hrw.org/node/108771/section/5>, Last visited May 22, 2014.

¹⁶ Seth Hemmelgarn, Breaking: DA Agrees to new Condoms Policy, Bay Area Reporter, Apr. 11, 2013. <http://ebar.com/news/article.php?sec=news&article=68698>, Last visited May 22, 2014.

¹⁷ Cal. Pen. Code, § 653.22

¹⁸ People v. Pulliam, 62 Cal. App. 4th 1430 (1998).

¹⁹ General Rules of Conduct, SFPD San Francisco Police Department, General Order 2.01, #14; SFPD San Francisco Police Department, Department Bulletin, 03-243.

treatment is necessary to maintain the rights and dignity of the detainee. The law does not necessarily protect people against improper pronoun usage when the mistake is inadvertent. A persistent refusal to address a detainee in accordance with his or her gender identity, however, could be an actionable offense in a municipality such as San Francisco with a policy regarding pronoun use in place.

Identification

After making a stop, an officer might ask the person for identification. In California, the refusal or failure of a person to submit identification upon request cannot be the sole cause for arrest or detention, except where the driver of a motor vehicle refuses to produce a driver's license upon request.²⁰ In other words, unless an individual is pulled over while driving, it is legal to refuse to produce identification in California; and, in San Francisco at least, an officer may not threaten arrest in order to make a person comply.²¹ Individuals can also refuse to provide other personal information, such as address or immigration status. If arrested, an individual is not obligated to provide identification, but may be released more quickly if a name is provided, unless the individual is driving a vehicle, in which case refusing to provide identification can result in charges.

In some states, including New Mexico and Nevada, refusing to give a name can be cause for being detained or arrested under state law.²² Regardless of the laws in a particular state, police do not always follow the law, and refusing to provide a name may make an officer suspicious and lead to a person being arrested anyway. If an individual fears that providing a legal name would lead to arrest or harassment, such as having a legal name that is obviously not congruent with gender presentation for instance, that person can claim the right to remain silent and, if arrested, this fact can be helpful later. Individuals should not give any name that is not a legal name, as providing a false name can be considered a crime. Even if the name given is the only name that person uses, it could still potentially be considered a false name for purposes of charging the individual with a misdemeanor.²³

Questioning

Everyone has the right to talk to a lawyer before deciding whether to answer questions.²⁴ If a person does agree to be interviewed, that individual has the right to have an attorney present. The lawyer's job is to protect a person's rights. Once a detainee requests a lawyer, the officer must stop questioning the detainee, and the individual should make any further contact only through the lawyer.²⁵ If the person does not have a lawyer, the individual can still request to speak with one before answering questions. A detainee or arrestee should remember to get the name, agency, and telephone number of any investigator who visits, and give that information to the lawyer. The government must provide a free lawyer²⁶ if the person is charged with a crime. The National Lawyers Guild or another organization may be able to help find a lawyer for free (pro bono) or at a reduced rate.

²⁰ Cal. Veh. Code, § 40302.

²¹ Investigative Detentions, San Francisco Police Department, General Order 5.03.

²² *Hiibel v. Sixth Jud. Dist. Ct.*, 542 U.S. 177 (2004).

²³ Cal. Pen. Code §148.9.

²⁴ *Miranda v. Arizona*, 384 U.S. 436, 470 (1966).

²⁵ *Id.* at 474.

²⁶ *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963).

Some people might worry that insisting on remaining silent, requesting a lawyer, or refusing a search will make an officer more suspicious. This is not necessarily the case. Silence can demonstrate to officers an awareness of rights, thus providing additional incentive for the officers to follow procedural rules to avoid accusations of misconduct. As the *Miranda* warning states, “anything you say can be used against you in a court of law.”²⁷ Generally speaking, law enforcement officials are supposed to read people their *Miranda* rights before questioning them.²⁸ However, the National Lawyers Guild strongly cautions individuals that come into contact with officers to remain silent and assume that anything they say will be used against them in court.²⁹ In June 2013, the Supreme Court ruled that a defendant must invoke his or her Fifth Amendment right to remain silent in order to restrict the use of that silence as evidence at trial.³⁰ If you are questioned by police officers, it is a good idea to explicitly invoke your Fifth Amendment right to remain silent with the officer by stating “I am going to remain silent. I want to see a lawyer.”

Arrestees often believe that offering explanations will help resolve the problem, but it is impossible to know how statements made in front of an officer will be interpreted later. Often statements will result in causing more harm than good. The safest approach is for detainees or arrestees to calmly repeat that they wish to remain silent and do not consent to a search of their person or of their vehicle.³¹

Transporting Arrestees³²

In San Francisco, after being arrested the arrestee is often transported to a different destination than where the arrest took place. Transport is a stage of the process where transgender people are particularly vulnerable to police misconduct. The San Francisco Police Department has enacted a policy to mitigate harm to transgender people during transport. This policy, General Order 2.01, Rule 36, “Transporting of Females and/or Transgender Individuals,” applies to women and “any transgender person or individual whose gender identity is indeterminate to the [officer] and not clearly articulated by the individual.” San Francisco police orders state that when officers transport a female or transgender person, they must notify the Communications Division of the Department of the vehicle's starting mileage, the location from which they are leaving, and the destination. When the officer reaches the destination, that officer must immediately notify the Communications Division with the vehicle's ending mileage.

If a female or transgender detainee is being transported and this rule is not being followed, the detainee can self-identify to the officer, thereby making the officer aware that Rule 36 applies. An officer who does not follow this procedure could attempt to escape liability by stating that he or she was unaware that the detainee was female or transgender at the time of transportation because the detainee did not self-identify. Ultimately, it is the arrestee's decision to disclose or not; arrestees may feel that disclosing prior to or during

²⁷ *Miranda*, 384 U.S. at 479.

²⁸ U.S.C.A. Const. Amend. 5.

²⁹ You Have the Right to Remain Silent: A Know Your Rights Guide for Law Enforcement Encounters, National Lawyers Guild, <http://www.nlgsf.org/sites/default/files/resources/KYRpamphletSF.pdf>, Last visited May 22, 2014.

³⁰ *Salinas v. Texas*, No. 12-246, 2013 BL 158572, *8 (May 22, 2014).

³¹ Know Your Rights: Dealing with Police, Midnight Special Law Collective, <http://www.midnightspecial.net/materials/dealingwithpolice.html>, Last visited May 22, 2014.

³² San Francisco Police Department, General Order 2.01, #36.

transportation may create more risk than it will prevent, but others may feel that disclosing prior to transportation will increase the chances that rules will be followed and documented, making any possible misconduct easier to prove.

It is important to remember that even when there are rules in place, these rules are not always followed. Ultimately, individuals should rely on their best judgment in a particular situation. Some arrestees would prefer to cooperate even when not required to in order to de-escalate a situation if they fear retaliation by an officer, particularly if there is no one around to witness or if the officer seems particularly aggravated. Document any suspected violation of rules and consult your attorney or consider filing a misconduct report if you believe your rights, as provided by these rules, have been violated. Again, individuals outside of San Francisco should check for the rules and policies in their jurisdiction to see what, if any, protections are offered.

Booking³³

Booking, which is the process of being admitted into detention after being arrested, can be complicated and stressful for transgender people. If a transgender arrestee has not already disclosed his or her transgender status or identity, the booking process is where disclosure might occur regardless of the arrestee's wishes. The booking process involves paperwork where the sex on a person's driver license or state ID is recorded, and where a person's legal name is demanded.

When a transgender arrestee is brought to the detention center, an officer will review the individual's legal documents to see if that person meets the admission requirements of the facility. The general booking process has several steps where transgender or intersex status might be disclosed whether or not the individual wants this information known. One general step is recording of information, or the booking form. The booking form will ask for either male or female gender as well as driver license information. Similar to a job application, the form will request your address, work or school information, and emergency contact. The name on the driver license is the name that an individual will be booked under. However, if the name on your driver license is not the name that you prefer to be called, you can let the officer know when the form is being filled out, as policy requires the police to use your preferred name. It is possible that the officer will disregard your request, but if you feel safe and are comfortable with voicing your preferred name, do so.

After the intake form, arrestees will usually have their mug shot taken and property collected. The next step is often fingerprinting, which will likely connect your fingerprint to the gender/sex indicated on the booking form. A nurse may screen the arrestee for potential vulnerability to sexual assault and if that person has tendencies to act out with sexually aggressive behavior. If either of these are present, the nurse will notify the Associate Warden of Operations. Being a transgender individual is often considered within the scope of vulnerability to sexual assault.

³³ San Francisco Police Department, Department Bulletin 03-246, 2003. https://archive.org/stream/minutes2003sanf_7/minutes2003sanf_7_djvu.txt, Last visited June 5, 2014 and Booking and Detention Manual, July 2004

However, as always, be mindful of who is making the assessment and your safety during that process. Individuals may feel that disclosing to the examining nurse is a safer choice than disclosing to the booking officer. Although it often feels like there is no safe time to disclose transgender status or identity while detained, individuals may choose to disclose during the booking process before an unclothed body search if he or she believes that this search will be uncomfortable or unsafe. Prisoners may wish to request strip search staff that make them feel more comfortable during the process (for example, female staff strip searching a male-to-female inmate), but a refusal to accommodate such requests does not necessarily mean a prisoner's rights have been violated by prison officials.³⁴ However, searches are required to be reasonable, and may violate the Fourth Amendment if they are conducted in an excessive, vindictive, or harassing manner.³⁵

The San Francisco Police Department has specific regulations related to booking transgender people. The SFPD's Department Bulletin 03-246, "Standards for Interaction with Transgender Communities: Arrest and Booking" states that:

"If, in the booking process, an arrestee does not offer self-identification of gender, and does not respond to the officer's inquiry as to the individual's gender identity, Jail Health Services staff shall make the gender determination. For booking and citation purposes, an officer shall always write an individual's name as it appears on a driver's license or state identification card. If the arrestee identifies a preference for a different name, the officer shall list that name in the appropriate section of the citation or booking form. Whether or not the name on an individual's driver's license or identification card coincides with the arrestee's gender identity, the officer shall refer to the arrestee by the name that the arrestee has used to identify him or herself. The [officer] shall use the pronouns consistent with that name in addressing the arrestee or referring to the arrestee. For purposes of listing sex on citations, police reports and other official documentation, officers shall use the sex designation listed in the most recent records in the official criminal justice databases, starting with the DMV record."³⁶

Vehicle Exception

The law allows greater authority to officers stopping people in cars. In this context, there are certain actions a person can take to increase the chances of a safe and less confrontational encounter with an officer. People being stopped should keep their hands where the police can see them. If stopped while driving a vehicle, the driver is required to show license and registration.³⁷ A stop of a motor vehicle is considered by law to create limited exceptions to the warrant requirement. This means that officers can conduct a search without a warrant if they have probable cause to believe there is contraband in the vehicle, or if they believe someone in the vehicle is armed or poses a threat to officer safety.³⁸ If officers begin to

³⁴ *Konitzer v. Frank*, 711 F. Supp. 2d 874 (E.D. Wis. 2010) (not "deliberately indifferent" to medical needs of male-to-female transgender person by denying her request to be strip searched by female prison staff, no evidence male staff would harm prisoner); see also *Meriwether v. Faulkner*, 821 F.2d 408, 410-11 (7th Cir. 1987) (transgender inmate claimed she was harassed by officers and forced to strip in front of officers and other inmates).

³⁵ *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988).

³⁶ San Francisco Police Department, Department Bulletin 03-246, 2003.

https://archive.org/stream/minutes2003sanf_7/minutes2003sanf_7_djvu.txt, Last visited June 5, 2014.

³⁷ Cal. Veh. Code §4462.

³⁸ *Knowles v. Iowa*, 525 U.S. 113, 116. (1998).

search the vehicle, it is best for a person to state clearly and calmly that he or she does not consent to a search.

Often, police will request consent to a search because they do not have probable cause to search without asking. After all, if they had probable cause, there would be no need for consent, other than to broaden the scope of the legal search. An officer may not conduct a full search of a vehicle without probable cause merely because he or she is issuing a citation.³⁹ If an officer wishes to search a vehicle to find vehicle registration or identification documents, the officer may only conduct a limited search of locations where he or she reasonably believes they may be found.⁴⁰ Officers may separate passengers and drivers from each other to question them, but both drivers and passengers retain the right to remain silent. It is best to always state clearly that you do not consent to a search. The police may search anyway, but an illegal search may lead to suppression of the evidence in court.

TAKING ACTION: POLICE MISCONDUCT

If a person feels his or her rights have been violated by a police officer, it is important to document as many of the following as possible:

- Date, time, and location of the incident;
- The officer's name, badge number, and squad car number;
- A physical description of the officer;
- The officer's precinct number or division (possibly found on the brass insignia on the officer's shirt collar); and
- Any witnesses present at the time (get names and phone numbers if possible).

Use of excessive force or violation of constitutional rights by a police officer can also give rise to a lawsuit against the police officer, the police department and the city under the state and federal constitutions.⁴¹

Document any injuries right away. If a person is injured, they should get medical care as soon as possible. Be sure to tell the caregiver that the injuries were caused by police and be certain it is noted in the medical record. Get a copy of the medical record when leaving the clinic or hospital. Have injuries photographed immediately, using good quality color film or a high resolution digital camera with a time and date stamp. If a healthcare facility offers to take photographs, have them use your camera or take copies of the photographs when you leave. Sit down right away and write down every detail about the incident. Ask any witnesses to do the same.

Below are several ways to report police misconduct. **Please note that the National Lawyers Guild does not encourage individuals to report police misconduct directly to police departments or city offices because of a historically high incidence of retaliation and non-response.**

³⁹ Id. at 116-17.

⁴⁰ In re Arturo D., 27 Cal. 4th 60, 86. (2002).

⁴¹ Bivens v. Six Unknown Narcotics Agents, 403 U.S. 388 (1971).

Making complaints to city agencies can be highly ineffective and discipline is historically and statistically unlikely. Frequently, there is very little action taken on reports of police misconduct. Of 164 allegations of police misconduct made to the Oakland Citizens' Police Review Board between January and June of 2011, only 6 (4%) were sustained.⁴² However, benefits of reporting to the city agencies include that there is a possibility (though unlikely) of officer discipline, a report that is substantiated may bolster any civil lawsuit that might be brought against the officer(s), reports can be used in class action lawsuits brought by non-profits on behalf of a group, and each individual report affects statistics and other information that is used to influence attempts to bring about changes in police policies and tactics.

For issues with the San Francisco Police Department, the most effective way to file a complaint of misconduct is to go to the **Office of Citizen Complaints (OCC)**, located at 25 Van Ness Avenue, Suite 700, San Francisco, CA 94102. This will allow investigators to personally interview the person and to do a thorough job of completing the initial, and one of the most important, phases of the investigation of a complaint.⁴³ For more information, visit <http://sfgov.org/occ/> or call (415) 241-7711.

For issues with the Oakland Police Department, a person can either call the 24-hour complaint hotline at (866) 214-8834 or the **Citizens' Police Review Board Office** at (510) 238-3159. Both of these offices have challenges that cause barriers to access and effectiveness. The OCC has inadequate funding, a small staff, and long delays in charging offending officers. Between 1996 and 2004, the OCC received more than 10,000 complaints and sustained only ten percent.⁴⁴ The Oakland office no longer has public hearings, which indicates less accountability to the public. Individuals who experience police harassment or misconduct in Oakland can contact **People United for a Better Life in Oakland (PUEBLO)** for assistance making a report at (510) 535-2525 or visit their website at www.peopleunited.org.

People who experience police harassment or misconduct in San Francisco or greater Bay Area can contact **Community United Against Violence (CUAV)** for support resources, assistance filing police misconduct reports, and courtroom advocacy. CUAV can be reached online at www.cuav.org, or via their multi-lingual hotline at (415) 333-4357.

Individuals anywhere in the country can visit the National Lawyers Guild's **National Police Accountability Project (NPAP)** website at www.nlg-npap.org to locate attorneys and organizations that work with police misconduct issues across the country.

⁴² City of Oakland Citizens' Police Review Board 2011 Semi-Annual Report, Office of the City Administrator, Oct. 13, 2011. <http://www2.oaklandnet.com/oakca1/groups/cityadministrator/documents/report/oak032709.pdf>, Last Visited May 22, 2014.

⁴³ Complaints, City & County of San Francisco's Office of Citizen Complaints, <http://www.sfgov3.org/index.aspx?page=434>, Last visited May 22, 2014.

⁴⁴ Fernandez, Sward, and Wallace, The Use of Force / Disciplines obstacles / Few complaints against police upheld – even fewer bring serious discipline, San Francisco Chronicle (Feb. 8, 2006) p. A1, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/02/08/MNUFDISCIPLINE.DTL>, Last visited May 22, 2014.

DISCRIMINATION IN PRISON⁴⁵

Transgender people in prison often face a variety of types of discrimination. For this reason, in 2002 the National Lawyers Guild partnered with the City and County of San Francisco's Human Rights Commission to develop model protocols for the treatment of transgender people in San Francisco County Jail.⁴⁶ Unfortunately, most prisons do not implement such policies concerning the treatment of transgender people in their custody. Prison is typically a highly gendered environment that requires the classification of prisoners into male and female bodies. One common problem is discrimination in gender identity or expression. This may involve policies that require prison staff to refer to people in prison by titles or pronouns associated with their birth sex (for example, calling a transwoman "Mr." and "he" against her wishes) or instituting mandated dress and grooming codes that have a disparate impact on transgender people (for example, requiring all people in men's prisons to wear masculine clothing, refusing to permit inmates in men's prisons to use makeup, and denying transgender women in men's prisons access to bras or prescription hormones).^{47, 48} In addition, prison staff often discriminate against transgender people by asking them to strip unnecessarily for "gender checks," asking improper questions about private details of their anatomy, or placing them in isolation as the alternative to an unsafe group placement.

Discrimination and violence against transgender individuals in jails and prisons is a serious issue. Physical and sexual assault behind bars remains a serious problem: 16% of respondents in the National Transgender Discrimination Survey who had been to jail or prison reported being physically assaulted and 15% reported being sexually assaulted.⁴⁹ In recent years, the reality of anti-transgender discrimination behind bars has raised the attention of groups advocating for the rights of transgender people. The Transgender, Gender Variant, and Intersex (TGI) Justice Project has a helpful guide that covers a range of issues applicable to transgender inmates titled *Surviving Prison in California: Advice By and For Transgender Women*. Though written primarily for a male-to-female audience, the guide has tips that can be useful to any incarcerated transgender individual or their advocates. This resource is available online at <http://www.tgjp.org/prison-survival-guide.html>.

⁴⁵ Most of the information is taken from *Rights of Transgender Prisoners*, National Center for Lesbian Rights, June 2006, <http://www.nclrights.org/wp-content/uploads/2013/07/RightsofTransgenderPrisoners.pdf>. Last visited May 22, 2014, and supplemented with phone calls.

⁴⁶ Model Protocols on the Treatment of Transgender Persons by San Francisco County Jail, City and County of San Francisco Human Rights Commission and the National Lawyers Guild, July 2002, available from: <http://www.ftmi.org/images/OJail.pdf>, Last visited May 22, 2014.

⁴⁷ *Long v. Nix*, 86 F.3d 761, 765 (8th Cir. 1996) (no Eighth Amendment claim against prison officials for denying transgender inmate's request for women's clothing and make-up, hormone therapy, and sex-reassignment surgery); *but see Phillips v. Michigan Dep't of Correction*, 731 F. Supp. 792, 794 (W.D. Mich. 1990) (male-to-female inmate granted injunction requiring prison to give estrogen because of ill side effects of withholding after 17 years of hormone therapy).

⁴⁸ However, it is now the U.S. Bureau of Prisons' policy to provide treatment for those with "gender identity disorder", which may include an evaluation for GID, as well a treatment plan which allows inmates to begin hormone therapy in prison. See Memorandum from the Federal Bureau of Prisons on Gender Identity Disorder Evaluation and Treatment (May 31, 2011) Available at <http://www.glad.org/uploads/docs/cases/adams-v-bureau-of-prisons/2011-gid-memo-final-bop-policy.pdf>, Last visited May 22, 2014.

⁴⁹ *Injustice at Every Turn: A Report of the National Transgender Survey*, National Center for Transgender Equality and the National Gay and Lesbian Task Force, 2011, http://endtransdiscrimination.org/PDFs/NTDS_Exec_Summary.pdf, Last visited May 22, 2014.

Transgender people in prison frequently face verbal humiliation from both prisoners and staff. Transgender people often have difficulty accessing hormone replacement therapy (HRT) while incarcerated. In some cases, hormones that have been prescribed, approved, and ordered by a doctor and/or court are not accessible to an inmate because of uncooperative staff or medical providers in the jail or prison.⁵⁰ Transgender people often face additional types of medical neglect, both in receiving transgender-specific care and in general medical attention. Transgender people in prison are often subjected to very serious discrimination including sexual harassment, physical assault, and even sexual assault and rape both by fellow inmates and staff.

Current case law views two primary issues for transgender prisoners—placement and access to hormonal therapy—through the lens of the Eighth Amendment “deliberate indifference” standard adopted in *Farmer v. Brennan*, which will be discussed later. Individuals that feel like their rights have been violated while behind bars can use *The Jailhouse Lawyer’s Handbook*, a helpful guide developed by National Lawyers Guild’s Prison Law Project and the Center for Constitutional Rights, to learn how to file a lawsuit in federal court to challenge their treatment: http://ccrjustice.org/files/Report_JailHouseLawyersHandbook.pdf

Placement

Common practice in the California prison system is that transgender people who have not had genital surgery are housed according to birth sex, regardless of how long an individual may have lived in his or her present gender identity, and regardless of how many other types of medical transition treatments used, such as hormones, facial surgeries, or top surgeries, and regardless of the inmate's appearance. For example, a transgender woman who has been on hormones, has had a tracheal shave and facial reconstruction surgery, has breasts, long hair, and lives full time as a woman, but has not had genital surgery would be classified as male and incarcerated in a male facility.⁵¹ It is easy to see how this policy creates potentially dangerous situations for transgender inmates, particularly in circumstances where transgender women are housed in men’s prisons, renowned for sexual violence. In contrast, a new policy adopted by the Illinois Department of Corrections requires a psychiatrist to evaluate transgender inmates individually, and a case-by-case determination on prison placement is made. The assessment considers a variety of factors, including inmate safety, and genital status is not determinative.⁵² In 2010, a California bill which would have required prison officials to consider the sexual orientation and gender identity of prisoners when making placement determinations was vetoed by then-governor, Arnold Schwarzenegger.⁵³

⁵⁰ *But see* *Brooks v. Berg*, 270 F. Supp. 2d 302 (N.D.N.Y. 2003) (actionable claim when prison fails to provide diagnostic services to transgender inmate who requested them).

⁵¹ *Farmer v. Haas*, 990 F.2d 319, 320 (7th Cir. 1993) (transgender inmate displaying “feminine” characteristics in dress and actions claimed officials placed her in general population despite knowledge of facility’s history of violent assaults; see also *Lucrecia v. Samples*, 1995 WL 630016 (N.D. Cal. Oct. 16, 1995) (no Eighth Amendment violation when prison transferred male-to-female transsexual from female to male facility where she was subjected to harassment and assault), *but see* *Greene v. Bowles*, 361 F.3d 290 (6th Cir. 2004), *Powell v. Schriver*, 175 F.3d 107 (2d Cir. 1999).

⁵² Medill Northwestern University: Justice Project, *A Decade in the Making: Revamped Policy Evaluates Transgender Prisoners in Illinois*, May 29, 2013.

<https://www2.illinois.gov/idoc/news/IDOCintheNews/Documents/2013/Transgender.pdf>, Last visited May 22, 2014.

⁵³ Equality California, *Governor Vetoes Crucial LGBT Prisoner Safety Bill*, Sept. 27, 2012.

<http://www.eqca.org/site/apps/nlnet/content2.aspx?c=kuLRJ9MRKrH&b=4869041&ct=8716201>, Last visited May 22, 2014.

In California, once a person is booked, inmates have no choice in who their cellmate is or what location they will be placed. “Inmates are not entitled to single cell assignment, housing location of choice, or to a cellmate of their choice”⁵⁴ unless there is a safety concern with the assigned cellmate. If individuals are incarcerated and feel unsafe, they still have the option to alert staff and request a move for personal safety reasons. For instance, transgender inmates may feel more safe in a “special needs yard,” than “general population.” Individuals who are concerned with safety in the prison system can, upon entry, also request “administrative segregation” (isolation), though this will not always be granted. Moreover, administrative segregation does not ensure that transgender inmates are protected from violence by prison guards, and may actually lead to increased exposure to violence.⁵⁵ Administrative segregation comes with several other disadvantages as well because it denies prisoners recreational, educational, occupational, and other opportunities,⁵⁶ which may in turn violate a prisoner’s constitutional rights.⁵⁷ One final note, administrative confinement is subject to Due Process, and prison officials must give the reasons for why an inmate is placed in administrative segregation.⁵⁸

Violence

In California, prison officials are required to protect prisoners from “foreseeable harm by third parties,” including violence at the hands of other prisoners.⁵⁹ However, anecdotal evidence indicates that most abuse suffered by transgender prisoners in women’s facilities is usually at the hands of white male correctional officers.⁶⁰ Prison officials who display a “deliberate indifference” to this duty violate the Eighth Amendment prohibition of cruel and unusual punishment. The U.S. Supreme Court defined “deliberate indifference” in *Farmer v. Brennan*, 511 U.S. 825 (1994). *Farmer* involved a transgender woman who was severely beaten and raped by her male cellmate in a maximum-security prison.⁶¹ The Court declined to adopt a definition of deliberate indifference that would hold a prison official liable for violence inflicted on a prisoner when the official “should have known” the prisoner was in danger. Instead, the Court ruled that an officer is in violation of the Eighth Amendment where the officer is found to have actual knowledge that the prisoner is at risk of violence and deliberately fails to act on that knowledge, a more difficult standard to meet.

⁵⁴ 15 C.C.R., § 3269.

⁵⁵ See, e.g., Emily Alpert, Gender Outlaws: Transgender Prisoners Face Discrimination, Harassment, and Abuse Above and Beyond That of the Traditional Male and Female Prison Population, In the Fray Magazine, Nov. 21, 2005, http://inthefray.org/joomla/index2.php?option=com_content&do_pdf=1&id=1381, Last visited May 22, 2014.

⁵⁶ See Darren Rosenblum, Trapped in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism, 6 Mich. J. Gender & L. 499, 530 (2000), <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1206&context=lawfaculty>, Last visited May 22, 2014.

⁵⁷ *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1154 (D. Haw. 2006), *DiMarco v. Wyoming Dep’t of Corrections*, 300 F. Supp. 2d 1183 (D. Wyo. 2004), *Tates v. Blanas*, 2003 U.S. Dist. LEXIS 26029 (E.D. Cal. Mar. 6, 2003); *but see Davenport v. DeRobertis*, 844 F.2d 1310 (7th Cir. 1988), *Farmer v. Carlson*, 685 F. Supp. 1335 (M.D. Pa. 1988) (no cruel and unusual punishment for extended placement in administrative segregation citing *Lamb v. Maschner*, 633 F. Supp. 351, 353 (D. Kan. 1986)), *Meriwether v. Faulkner*, 821 F.2d 408 (7th Cir. 1987).

⁵⁸ *Enomoto v. Wright*, 434 U.S. 1052 (1978).

⁵⁹ *Giraldo v. California Dep’t of Corrections and Rehabilitation*, 168 Cal. App. 4th 231 (1st Dist. 2008).

⁶⁰ Alexander Lee, Gendered Crime & Punishment: Strategies to Protect Transgender, Gender Variant & Intersex People In America’s Prisons, 4 GIC TIP J. 1, 7 (2004).

⁶¹ For more information, see Still in Danger: The Ongoing Threat of Sexual Violence Against Transgender Prisoners, American Civil Liberties Union National Prison Project and Just Detention International (formerly Stop Prisoner Rape), 2005, <http://www.ncdsv.org/images/stillindanger.pdf>, Last visited May 22, 2014.

According to Amnesty International, an inmate's "perceived or actual sexual orientation is one of four categories that make a female prisoner a more likely target for sexual abuse, as well as retaliation when she reports that abuse."⁶² [Fifty-nine] percent of transgender inmates reported experiencing sexual assault while in a California correctional facility, and [forty-eight] percent reported engaging in sexual acts that, from their point of view, were not against their will, but nonetheless they would rather not have done.⁶³ Moreover, prisons do not provide inmates with condoms, on the belief that prisoners are not or should not be having sex, which means sexual assaults in prison can lead to HIV-infection or the transmission of other diseases that, in turn, increase a prisoner's stigmatization.⁶⁴

On September 22, 2005, Governor Arnold Schwarzenegger signed the Sexual Abuse in Detention Elimination Act.⁶⁵ This act is not specifically for transgender inmates, but it does include some provisions which would appear to be helpful to transgender inmates, such as:

The Department of Corrections and Rehabilitation *inmate classification and housing assignment procedures shall take into account risk factors* that can lead to inmates and wards becoming the target of sexual victimization. §2636(a) [emphasis added] Inmates and wards who file complaints of sexual abuse shall not be punished, either directly or indirectly, for doing so. If a person is segregated for his or her own protection, *segregation must be nondisciplinary*. §2637(b) [emphasis added] Staff shall not discriminate in their response to inmates and wards who are gay, bisexual, or *transgender* who experience sexual aggression, or report that they have experienced sexual abuse. §2637(e) [emphasis added]⁶⁶

According to the 2008 National Former Prisoner Survey, one in ten former inmates, including prisoners who said they were transgender, reported being sexually victimized at least once during their incarceration.⁶⁷ In May 2012, the United States Department of Justice set binding national standards aimed at protecting inmates from prison rape in all federal, state, and local adult prisons and jails, lockups, community confinement facilities, and juvenile facilities.⁶⁸ The standards require "incorporating the unique vulnerabilities" of LGBTI inmates into training and screening protocols, among other things.⁶⁹ State and local facilities had one year to come into compliance with the new standards.

⁶² Women in Prison: A Fact Sheet, Amnesty International, http://www.prisonpolicy.org/scans/women_prison.pdf, Last visited May 22, 2014.

⁶³ Joan Petersilia, California's Correctional Paradox of Excess and Deprivation, 37 Crime & Just. 207, 207 (2008).

⁶⁴ Christine Peek, Breaking Out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment, 44 Santa Clara L. Rev. 1211, 1229-30 (2004).

⁶⁵ Just Detention International, Stop Prisoner Rape Hails Passage of Historic Law in California, Sept. 8, 2005. http://www.justdetention.org/en/pressreleases/2005/09_08_05.aspx, Last visited May 22, 2014.

⁶⁶ Ally Windsor Howell, A Comparison of the Treatment of Transgender Persons in the Criminal Justice Systems of Ontario, Canada, New York, and California, 28 Buff. Pub. Int. L.J. 133, 150-51 (2010).

⁶⁷ National Former Prisoner Survey: Sexual Victimization Reported by Former State Prisoners, United States Department of Justice's Bureau of Justice Statistics, 2008, <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrfsp08.pdf>, Last visited May 22, 2014.

⁶⁸ Justice Department Releases Final Rule to Prevent, Detect, and Respond to Prison Rape, United States Department of Justice's Office of Public Affairs, May 17, 2012, <http://www.justice.gov/opa/pr/2012/May/12-ag-635.html>, Last visited May 22, 2014.

⁶⁹ *Id.*

Often, transgender prisoners may face violence at the hands of prison guards. In California, even if the inmate is a consenting adult, it is against the law for employees or officers of detention facilities to engage in sexual activity with people behind bars.⁷⁰ Other states may have similar protections.⁷¹ In response to lawsuits filed by transgender persons who were sexually abused by prison guards, several courts have held that prison guards do not have qualified immunity from civil suits under 42 USC § 1983.⁷²

Hormone Treatment

In federal prisons, the U.S. Bureau of Prisons adopted a new policy in May 2011 to provide treatment for those with “gender identity disorder,” which may include a medical evaluation and a treatment plan which allows inmates to begin hormone therapy in prison. The policy specifies that treatment will not be denied based on the status of the inmate prior to incarceration.⁷³

In state prisons, there is not a uniform practice across California, nor nationally, governing hormone therapy for transgender inmates. Most circuits have ruled that denial of hormone therapy for transgender inmates does not meet the “deliberate indifference” standard of the Eighth Amendment. However, the law is changing in several jurisdictions. Notably, in April, 2010, Wisconsin struck down a state law that prevented transgender prisoners from receiving transgender-related medical care while incarcerated, finding that GID or transsexualism was a “serious medical need” for purposes of the Eighth Amendment.⁷⁴ Most recently, the First Circuit found that state officials were deliberately indifferent to medical needs of an anatomically male civil detainee by denying the detainee female hormones.⁷⁵

Anecdotally, hormone replacement therapy (HRT) is often available to transgender prisoners who had a prescription and were receiving treatments before incarceration, and the treatment will be administered at the same level as before incarceration. At least one court has ruled that a person undergoing hormone therapy prior to incarceration had a right to the same treatment while incarcerated.⁷⁶

It is much more difficult to begin taking hormones while incarcerated, as a prison medical professional must determine that hormone treatment is necessary, and this ruling is especially uncommon. Inmates who wish to begin hormone therapy will first be referred to a mental health counselor. This information is based on the anecdotal findings of the Transgender, Gender Variant, and Intersex Justice Project, who provide advocacy to transgender prisoners in California, and is supported by an unpublished 9th circuit case, *South v. Gomez*, 211 F.2d 1275 (9th Cir. 2000). Outside of California, practices vary.

⁷⁰ Cal. Pen. Code, § 289.6.

⁷¹ Brenda V. Smith, *An End to Silence: Prisoners’ Handbook on Identifying and Addressing Sexual Misconduct*, American University’s Washington College of Law, Jan. 2002, <http://www.justdetention.org/pdf/smithhandbook.pdf>, Last visited May 22, 2014.

⁷² *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

⁷³ See Memorandum the Federal Bureau of Prisons on Gender Identity Disorder Evaluation and Treatment (May 31, 2011) Available at <http://www.glad.org/uploads/docs/cases/adams-v-bureau-of-prisons/2011-gid-memo-final-bop-policy.pdf>, Last visited May 22, 2014.

⁷⁴ *Fields v. Smith*, 712 F. Supp. 2d 830 (E.D. Wis. 2010), supplemented (July 9, 2010).

⁷⁵ *Battista v. Clarke*, 645 F.3d 449 (1st Cir. 2011).

⁷⁶ *Phillips v. Michigan Dep’t of Corrections*, 731 F. Supp. 792, 794 (W.D. Mich. 1990).

Although there is significant negative precedent for prisoner's access to transgender-related health care, new case law is emerging all the time that is helping to pave the way toward better access.⁷⁷ Much of the negative case law involves prisoners who were representing themselves (pro se). Many organizations across the country, including the American Civil Liberties Union, the National Center for Lesbian Rights, the Sylvia Rivera Law Project, and the TGI Justice Project are working to support individuals fighting for transgender health care while incarcerated.⁷⁸ Researching case law or asking local advocacy organizations can help show local practices or trends.

FINAL WORD OF CAUTION

Medicalizing transgender people based on a gender or sex binary creates ambiguous benefits for transgender persons that sets up the prison system as a regulator of gender non-conformity.⁷⁹ While homosexuality has not been seen as a mental disorder in the United States since its removal from the DSM-III in 1973⁸⁰, “gender identity disorder” remained in the DSM-IV until 2012. Having GID in the DSM-IV allowed many transgender individuals to seek medical help, but the same classification also labels transgender persons as sick or ill. In 2012, the American Psychiatric Association announced that GID would be replaced with “Gender Dysphoria” in the DSM-V, defining it as “a marked incongruence between one’s experienced/expressed gender and assigned gender.”⁸¹ Health and disability laws are often the only routes available for transgender persons to gain access to basic rights, but no one’s gender identity should be stigmatized as a disabling condition or disorder.

RESOURCES

Below is a brief list of resources that may be especially helpful. This collection is only a small representation of transgender-welcoming services in California and the United States. Searching online for additional resources may yield more specific information or assistance. Resources are divided by California-specific organizations, national organizations, and general resources. For ease of use, we have specified whether organizations provide direct

⁷⁷ *Brown v. Zavaras*, 63 F.3d 967, 969-70 (10th Cir. 1995) (gender dysphoria is a serious medical need requiring treatment under Eighth Amendment), *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988) (transsexualism is serious medical need); *but see Maggert v. Hanks*, 131 F.3d 670, 671 (7th Cir. 1997) (not cruel and unusual to withhold sex-reassignment surgery as treatment for gender dysphoria), *Supre v. Ricketts*, 792 F.2d 958, 963 (10th Cir. 1986); *see also Farmer v. Moritsugu*, 163 F.3d 610, 615-16 (D.C. Cir. 1998) (immunity for Medical Director of Bureau of Prisons, holding he was not obligated to provide hormone treatment to inmate whose request was “completely unsupported by treatment records or recommendations from local medical personnel”).

⁷⁸ *See generally Kosilek v. Maloney*, 221 F. Supp. 2d 156 (D.Mass. 2002) (Federal district court held that Gender Identity Disorder diagnosis constituted serious medical need and prison officials were required to provide adequate treatment), *South v. Gomez*, 211 F.2d 1275 (9th Cir. 2000) (9th Circuit held that terminating transgender prisoner’s hormone replacement therapy when she was transferred to a new facility violated her Eighth Amendment rights), *Wolfe v. Horn*, 130 F. Supp. 2d 648 (E.D. Pa. 2001) (Court held that terminating prescribed hormone replacement therapy without understanding plaintiff’s condition and failing to treat withdrawal symptoms and effects of termination could constitute “deliberate indifference”).

⁷⁹ Sydney Tarzwell, *The Gender Lines Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 Colum. Hum. Rts. L. Rev. 167, 188-89 (2006).

⁸⁰ Gregory M. Herek, *Facts About Homosexuality and Mental Health*, Psychology at UC-Davis, http://psychology.ucdavis.edu/rainbow/html/facts_mental_health.html, Last visited May 22, 2014.

⁸¹ Camille Beredjick, *DSM-V to Rename Gender Identity Disorder ‘Gender Dysphoria’*, *The Advocate*, July 23, 2012, <http://www.advocate.com/politics/transgender/2012/07/23/dsm-replaces-gender-identity-disorder-gender-dysphoria>, Last visited May 22, 2014.

or support services, and to what extent they serve the LGBT communities, and specifically, to what extent they serve transgender communities. National Lawyers Guild Interns spoke with representatives of almost all of these organizations to ensure that our description of their services is correct and up-to-date, and that they are explicitly welcoming of transgender community members.

California Resources

California Coalition for Women Prisoners, www.womenprisoners.org

1540 Market St., Suite 490

San Francisco, CA 94102

Phone: (415) 255-7036, ext. 4

Fax: (415) 552-3150

Email: info@womenprisoners.org

The California Coalition for Women Prisoners (CCWP) is a grassroots social justice organization, with members inside and outside prison, that challenges the institutional violence imposed on women, transgender people, and communities of color by the prison industrial complex (PIC). They see the struggle for racial and gender justice as central to dismantling the PIC and they prioritize the leadership of the people, families, and communities most impacted in building this movement.

California Prison Focus, www.prisons.org

1904 Franklin Street, Suite 507

Oakland, CA 94612

Phone: (510) 836-7222

Email: contact@prisons.org

California Prison Focus (CPF) works to abolish the California prison system in its present condition. CPF investigates and exposes human rights abuses with the goal of ending long term isolation, medical neglect, and all forms of discrimination. CPF is a group of community activists, prisoners, and their families educating and inspiring the public to demand change. It also publishes the “Prison Focus” newsletter, written by prisoners, for prisoners.

Community United Against Violence, www.cuav.org

427 South Van Ness Avenue

San Francisco, CA 94103

Phone: (415) 777-5500 ext. 301

Safety Line: (415) 333-HELP (4357)

Email: info@cuav.org

Founded in 1979, Community United Against Violence (CUAV) works to build the power of LGBTQQ (lesbian, gay, bisexual, transgender, queer, and questioning) communities to transform violence and oppression. We support the healing and leadership of those impacted by abuse and mobilize our broader communities to replace cycles of trauma with cycles of safety and liberation. As part of the larger social justice movement, CUAV works to create truly safe communities where everyone can thrive.

Transgender, Gender Variant, and Intersex Justice Project, www.tgijp.org

1230 Market Street #705

San Francisco, CA 94102

Email: info@tgjip.org

The Transgender, Gender Variant, and Intersex (TGI) Justice Project is a group of transgender people—inside and outside of prison—creating a united family in the struggle for survival and freedom. They work in collaboration with others to forge a culture of resistance and resilience to strengthen them for the fight against imprisonment, police violence, racism, poverty, and societal pressures. They seek to create a world rooted in self-determination, freedom of expression, and gender justice.

Transgender Law Center, www.transgenderlawcenter.org

1629 Telegraph Avenue, Suite 400

Oakland, CA 94612

Phone: (415) 865-0176

Email: info@transgenderlawcenter.org

The Transgender Law Center (TLC) is a civil rights organization advocating for transgender communities. TLC provides direct legal services, engages in public policy advocacy and education and works to change laws and systems that fail to incorporate the needs and experiences of transgender people.

Nationwide Resources

American Civil Liberties Union National Prison Project, www.aclu.org/prisoners-rights

125 Broad Street, 18th Floor

New York, NY 10004

Phone: (212) 549-2500

In Northern California: 39 Drumm St, San Francisco, CA, 94111; Phone: 415-621-2493

The American Civil Liberties Union (ACLU) National Prison Project is dedicated to ensuring that our nation's prisons, jails, and other places of detention comply with the Constitution, domestic law, and international human rights principles, and to ending the policies that have given the United States the highest incarceration rate in the world. They promote a fair and effective criminal justice system in which incarceration is used only as a last resort, and its purpose is to prepare prisoners for release and a productive, law-abiding life at the earliest possible time.

Black and Pink, <http://www.blackandpink.org>

614 Columbia Road

Boston, Massachusetts 02125

Email: members@blackandpink.org

Black & Pink is an open family of LGBTQ prisoners and “free world” allies who support each other. Their work toward the abolition of the prison industrial complex is rooted in the experience of currently and formerly incarcerated people. They are outraged by the specific violence of the prison industrial complex against LGBTQ people, and respond through advocacy, education, direct service, and organizing.

Center for Constitutional Rights, www.ccrjustice.org

666 Broadway, 7th Floor

New York, NY 10012

Phone: (212) 614-6464

The Center for Constitutional Rights (CCR) is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements in the South, CCR is a non-profit legal and educational organization committed to the creative use of law as a positive force for social change.

Human Rights Coalition Fedup! Pittsburgh Chapter,

<http://prisonerstories.blogspot.com/>

Thomas Merton Center

5129 Penn Avenue

Pittsburgh, PA 15224

Phone: (412) 361-3022, ext. 4

Email: hrcfedup@gmail.com

We are a prisoner advocacy group working with prisoners in Philadelphia. We have an extensive abuse log in which we collect evidence and testimony of those incarcerated for public viewing. We have biweekly letter writing nights to send resources to those incarcerated, we educate the public on prison issues through art exhibits and film screenings, and we also conduct research on prison related issues. We are looking to broaden the base of prisoners they communicate with.

Just Detention International, www.justdetention.org

3325 Wilshire Blvd., Suite 340

Los Angeles, CA 90010

Phone: (213) 384-1400

Email: info@justdetention.org

Note: If you are incarcerated, please feel free to communicate with JDI using legal mail, addressing your correspondence to:

Cynthia Totten, Esq.

CA Attorney Reg. #199266

3325 Wilshire Blvd., Suite 340

Los Angeles, CA 90010

All of Just Detention International's (JDI) work takes place within the framework of international human rights laws. The sexual assault of detainees, whether committed by corrections staff or by inmates, is a crime and is recognized internationally as a form of torture. JDI is concerned about the safety and well-being of all detainees, including those held in adult prisons and jails, juvenile facilities, immigration detention centers, and police lock-ups, whether run by government agencies or by private corporations on behalf of the government. JDI has three core goals for its work: to ensure government accountability for prisoner rape; to transform ill-informed public attitudes about sexual violence in detention; and to promote access to resources for those who have survived this form of abuse.

National Center for Lesbian Rights, www.nclrights.org

870 Market Street, Suite 370

San Francisco, CA 94102

Legal Helpline: (415) 392-6257 (9 am to 5 pm PST)

Toll Free Helpline: (800) 528-6257 (9 am to 5 pm PST)

Legal Helpline request forms: <http://www.nclrights.org/legal-help-resources/>

The National Center for Lesbian Rights (NCLR) helps LGBT individuals and families nationwide through litigation, public policy advocacy, and public education. NCLR offers a legal helpline during regular business hours, and the best way to request assistance is by filling out an online help form on NCLR's website. NCLR provides referrals, assistance locating LGBT-aware attorneys, and offers limited direct services.

National Center for Transgender Equality, www.transequality.org

1325 Massachusetts Avenue NW, Suite 700

Washington, DC 20005

Phone: (202) 903-0112

Fax: (202) 393-2241

The National Center for Transgender Equality is a national social justice organization devoted to ending discrimination and violence against transgender people through education and advocacy on national issues of importance to transgender people.

National Lawyers Guild National Police Accountability Project, www.nlg-npap.org

499 7th Avenue, Suite 12N

New York, NY 10018

Phone: (212) 630-9939

Fax: (212) 659-0695

Email: npap@nlg.org

The National Police Accountability Project (NPAP), a project of the National Lawyers Guild, is a non-profit organization of plaintiff's lawyers, law students and legal workers. NPAP is dedicated to ending police abuse of authority through coordinated legal action, public education, and support for grassroots and victims' organizations combating police misconduct.

Sylvia Rivera Law Project, www.srlp.org

147 West 24th Street, 5th Floor

New York, NY 10011

Phone/Legal Helpline: (212) 337-8550

SRLP provides free legal services to transgender, intersex and gender nonconforming low-income people and people of color in the New York area. SRLP provides advice and referral for a wide variety of legal issues. Sometimes, they can also provide more help, such as advocacy, help with a case you are bringing on your own, or, more rarely, representation in a legal action.

TIG Prisoner Pen Pal Project

P.O. Box 1122

Portland, OR, 97211

TIG Prisoner Pen Pal Project is a list for transgender, intersexed, genderqueer, and gender-variant prisoners to find pen pals for support and friendship. Please send a brief posting about yourself, your contact information, and any regulations in your institution (no mail from other prisoners, etc). It can take a long time to match interested people with pen pals, so please be patient.

Transformative Justice Law Project of Illinois, www.tjlp.org

4707 N. Broadway, Suite 307

Chicago, IL 60640

Phone: (773) 272-1822

Email: info@tjlp.org

Transformative Justice Law Project of Illinois provides free, zealous, life-affirming, and gender-affirming holistic criminal legal services to low-income and street based transgender and gender non-conforming people targeted by the criminal legal system in Illinois.

Tranzmission Prison Project, <http://tranzmissionprisonproject.yolasite.com/>

P.O. Box 1874

Asheville, NC 28802

Email: tranzmissionprisonproject@gmail.com

Tranzmission Prison Project is a volunteer run organization that works to support LGBTQQIA (lesbian, gay, bi-sexual, transgender, queer, questioning, intersex and asexual) prisoners nationwide. They offer books, zines, information, resources and pen pals. They fully believe that every member of our fabulous community deserves access to support. As allies, they strive to let incarcerated LGBTQQIA folks know that just because they are out of sight does not mean they are out of mind.