

Know Your Rights Manual for the Transgender Community: Criminal Law

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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, Bay Area chapter. While the information here is up to date through June 2011, 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 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 our 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 document and a person wants to find and read the actual case, we can find it 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. 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 trans 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 GLBT 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 your case. This can be a good way to learn more about your options and whether it’s worth it to you to pursue specific legal actions.

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 an 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. However, the Department of Homeland Security (DHS) can legally target someone based on political activities if that person is a non-citizen and can be deported. 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 experience relatively higher levels of unemployment, homelessness, lack of identification, lack of healthcare, gender policing, and exposure to violence or harassment. The intersectionality of race and class add additional layers of oppression that make transgender persons a constant target of law enforcement professionals.

INTERACTIONS WITH POLICE OFFICERS²

A study conducted by the City of San Francisco indicates that most violence against transgender people is perpetrated by law enforcement officials.³ Additionally, in a recent National Transgender Discrimination Survey, 22 percent of the respondents who have interacted with police, reported harassment by police, with much higher rates reported by people of color. Almost half of the respondents (46%) reported being uncomfortable seeking police assistance.⁴

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, 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 easy requirement in order to stop an individual.

¹ *Know Your Rights*, (2004) New York: National Lawyers Guild.

² *Know Your Rights*, (August 2004) New York: National Lawyers Guild; *Know Your Rights*, (2006) Midnight Special Law Collective

³ Testimony of Christopher Daly, Director, Transgender Law Ctr., to Nat'l Prison Rape Elimination Comm'n (Aug. 15, 2005) at 3, available at http://www.nclrights.org/site/DocServer/prison_daley081905.pdf?docID=941 (noting that many trans people become "involved in the street econom[y] of prostitution ... for survival").

⁴ Grant, Jaime M., Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling, *Injustice at Every Turn: A Report of the National Transgender Survey*, Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011, available online at: http://endtransdiscrimination.org/PDFs/NTDS_Exec_Summary.pdf

Although an officer is prohibited from stopping someone solely based on gender presentation, an officer must be able to state a “reasonable cause” (reasonable belief that someone is engaged in or about to be engaged in criminal activity) in order to stop an individual. The “reasonable cause” test, however, is easy to satisfy. 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 cause.” The San Francisco Police Commission has adopted resolutions explicitly prohibiting officers from using gender presentation as a factor to meet this “reasonable suspicion” requirement.⁵ Regardless, even if a person is doing nothing illegal, it is fairly easy for an officer to claim that he or she felt suspicious.

Under the Fourth Amendment and California law, the police need a reasonable suspicion that a person is armed and dangerous in order to search their person.⁶ 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. It is important that the person being stopped continues to 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.

Regardless, even if a person is doing nothing illegal, it is fairly easy for an officer to claim that he or she felt suspicious. Furthermore, police officers making traffic stops may order passengers to get out of the vehicle pending the completion of a search.⁷

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 Francisco 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.⁸

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'?'”⁸. 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. 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 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.

⁵ *Standards for Interaction with Transgender Communities*, (December 2003) SFPD Department Bulletin 03-246.

⁶ Cal. Pen. Code § 833

⁷ *Maryland. v. Wilson*, 519 U.S. 408 (U.S. 1997).

⁸ *General Rules of Conduct*, SFPD General Order 2.01, #14; SFPD Department Bulletin, 03-243, 12/22/2003.

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.⁹ In other words, unless an individual is pulled over while driving, it is legal to refuse to produce identification, and an officer may not threaten arrest in order to make a person comply.¹⁰ 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. Regardless of the laws in a particular state, Police do not always follow the law, and refusing to provide your 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, 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, and 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.

Questioning

Everyone has the right to talk to a lawyer before deciding whether to answer questions. If a person does agree to be interviewed, that individual has the right to have a lawyer present. The lawyer's job is to protect a person's rights. Once a detainee requests a lawyer, the officer must stop trying to question the detainee, and the individual should make any further contact through the lawyer. 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 has to provide a free lawyer if the person is charged with a crime, and the National Lawyers Guild or another organization may be able to help find a lawyer for free (pro bono) or at a reduced rate.

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."

Arrestees often believe that explaining the situation will help resolve the problem, but it is impossible to know how statements made in front of an officer will be interpreted later, often in ways that will harm the arrestee rather than helping. 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.¹¹

⁹ Cal. Veh. Code § 40302

¹⁰ *Investigative Detentions*, SFPD General Order 5.03

¹¹ *Know Your Rights: Dealing with Police*, (2006) Midnight Special Law Collective. Available online at: <http://www.midnightspecial.net/materials/dealingwithpolice.html> (Last visited June 23, 2008).

Transporting Arrestees¹²

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." The orders for police in San Francisco 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 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.

Booking¹³

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's 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, the booking form. The booking form will ask for either Male or Female gender as well as driver's 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's license is the name that you will be booked under. However, if the name on your driver's license is not the name that you prefer to be called, you can let the officer know when the form

¹² SFPD General Order 2.01, #36.

¹³ SFPD Department Bulletin 03-246, 2003.

is being filled out. 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 their 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.

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.

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."

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, registration, and proof of insurance. A stop of a motor vehicle is considered by law to create an exception to the warrant requirement. This means that if officers have probable cause to believe there is contraband in the vehicle, they can search without a warrant. If officers want to 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. Officers may separate passengers and drivers from each other to question them, but no one has to answer any questions.

In short, if someone is in a car, the police can search the driver and the passenger compartment of the vehicle, if they can show it was in the interest of their own safety. 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

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. 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, one might consider just walking 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. 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.

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 (found on the brass insignia on the officer's shirt collar)
- 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 council under the state and federal constitution.¹⁴

Document any injuries right away. If a person is injured, they should get medical care right away. 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. 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.**

¹⁴ See *Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388 (1971).

Making complaints to the 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. 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, 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, 7th Floor. 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.¹⁵ For more information, visit www.sfgov.org.

For issues with the Oakland police, 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.¹⁶ 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 510-452-2010 or visit their website at www.peopleunited.org. Individuals anywhere in the country can visit the **National Police Accountability Project (NPAP)**'s website at www.nlg-npap.org to locate attorneys and organizations that work with police misconduct issues across the country. People who experience police harassment or misconduct in San Francisco or greater Bay Area can contact Community United Against Police Brutality (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. CUAV also offers walk-in appointments on Wednesdays and Fridays from 11am-1pm at 170 A Capp Street, San Francisco, CA 94110.

DISCRIMINATION IN PRISON¹⁷

Transgender people in prison often face a variety of types of discrimination. Prison is a highly gendered environment that requires the classification of prisoners into male and female bodies. One common problem is discrimination in gender identity 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 trans woman "Mr." and "he" against her wishes) or instituting mandated dress and grooming codes that negatively affect 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). In addition, prison staff often discriminate against transgender people

¹⁵ *How to Make a Police Misconduct Complaint*, SFGov: Office of Citizen Complaints <http://www.sfgov.org/site/occ_page.asp?id=1444> (Last accessed: of June 23, 2008).

¹⁶ Fernandez, Sward & Wallace, *The Use of Force Disciplines Obstacles*, SFGate (Feb. 8, 2006) p. A1 <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/02/08/MNUFDISCIPLINE.DTL> (as of June 23, 2008).

¹⁷ Most of the information is taken from *Rights of Transgender Prisoners*, National Center for Lesbian Rights, June 2006, <http://www.nclrights.org/site/DocServer/tgprisoners.pdf?docID=1285> and supplemented with phone calls.

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.

Physical and sexual assault in jail/prison 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.¹⁸

Transgender people in prison frequently face verbal humiliation from both other 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. 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.

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. 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. Individuals who are concerned with safety in the prison system can, upon entry, request “administrative segregation” (isolation), though this will not always be granted.

On the positive side, placing a transgender woman in administrative segregation may provide her with greater protection than being housed in the general population. On the negative side, however, administrative segregation deprives the transgender person of social interaction and unduly limits the person’s ability to use prison facilities such as the library, educational classes, and recreational and physical fitness facilities.¹⁹ In effect, segregation inflicts a destructive and disproportionate level of punishment on a transgender inmate. Such exclusion may violate the constitutional rights of prisoners if the conditions of segregation are excessively harsh. Furthermore, administrative segregation does not protect transgender prisoners from abuse at the hands of guards and may even lead to increased vulnerability to violence.

¹⁸ Grant, Jaime M., Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling, *Injustice at Every Turn: A Report of the National Transgender Survey*, Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011, available online at: http://endtransdiscrimination.org/PDFs/NTDS_Exec_Summary.pdf

¹⁹ 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 (2010)

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. 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 Transgender Rights Project of LAMBDA Legal, the National Center for Lesbian Rights, the Sylvia Rivera Law Project, and the Transgender, Gender Variant, and Intersex Justice Project are working to support individuals fighting for transgender health care while incarcerated.²⁰

Violence

Prison officials are required to protect prisoners from violence at the hands of other prisoners. 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. 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.

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."²¹ [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.²² On September 22, 2005, Governor Arnold Schwarzenegger signed the Sexual Abuse in Detention Elimination Act.⁵⁶ 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]

²⁰ 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").

²¹ Amnesty International, *Women in Prison: A Fact Sheet*, available at

<http://www.amnestyusa.org/women/womeninprison.html> (last visited July 10, 2011).

²² Joan Petersilia, California's Correctional Paradox of Excess and Deprivation, 37 Crime & Just. 207, 207 (2008).

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]²³

Often, transgender prisoners may face violence at the hands of prison guards. 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 § 1983.²⁴ Transgender persons can also sue prison guards under the federal Gender Motivated Violence Act (GMVA). In *Schwenk v. Hartford*, the Ninth Circuit held that the GMVA extends to transgender persons when a particular act of violence is gender-motivated.

Hormone Treatment

There is not a uniform practice across California, nor nationally, that governs hormone therapy for transgender inmates. Most circuits have ruled that hormone therapy for transgender inmates does not meet the “deliberate indifference” standard of the Eight 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.²⁵ 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.²⁶

Anecdotally, hormone replacement therapy (HRT) is 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 in incarceration.²⁷

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. Researching case law or asking local advocacy organizations can help show local practices or trends.

Final Word of Caution

Medicalizing transgender bodies 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.²⁸ While homosexuality is no longer seen as a mental disorder in the United States,

²³ 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)

²⁴ *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000)

²⁵ *Fields v. Smith*, 712 F. Supp. 2d 830 (E.D. Wis. 2010), supplemented (July 9, 2010).

²⁶ *Battista v. Clarke*, 10-1965, 2011 WL 1902165 (1st Cir. May 20, 2011)

²⁷ See *Phillips v. Michigan Dep't of Corr.*, 731 F. Supp. 792, 794 (W.D. Mich. 1990).

²⁸ 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)

gender identity disorder, or gender dysphoria, still remains in the DSM-IV. Having GID in the DSM-IV allows many transgender individuals to seek medical help but the same classification also labels transgender persons as sick or ill. Not encouraging transgender persons to seek help through existing health and disability laws in the books also feeds into ableism.