

CHAPTER II

Transgender Incarcerated People in Crisis

Nearly one in six transgender Americans—and one in two black transgender people—has been to prison.¹ Once behind bars, discriminatory policies and the constant threat of sexual assault can make prison a living hell for this already mistreated group. Lambda Legal documented the unique dangers faced by transgender incarcerated people through a 2012 survey called *Protected and Served?*, now available at www.lambdalegal.org/protected-and-served-jails-and-prisons.

The transgender prison crisis is part of a larger pattern of violence and discrimination in U.S. society that disproportionately affects people of color, poor people and transgender and gender-nonconforming (TGNC) people. “Over-policing and profiling of low-income people and of trans and gender-nonconforming people intersect,” as the Sylvia Rivera Law Project (SRLP) describes it, “producing a far higher risk than average of imprisonment, police harassment and violence for low-income trans people.”

Violence against TGNC people tends to be worse in places that are separated by sex such as county jails, immigration facilities and prisons. In the United States, transgender incarcerated people are still usually housed according to the sex assigned at birth, instead of by gender identity—one’s inner sense of being male, female or something else. This policy makes transgender people more vulnerable to harassment or attack by staff or fellow incarcerated people: A California study found that transgender people were 13 times more likely to be sexually assaulted than non-transgender people in prison.²

U.S. prison officials also commonly block the access of incarcerated people to transition-related health care such as hormone therapy or gender-affirming surgery, even when it’s prescribed as medically necessary by a doctor.

The TGNC prison crisis has been attracting public concern thanks to the continued efforts of organizations such as SRLP and Transgender Gender Variant Intersex Justice (TGIJP). The result has been a series of major policy shifts and important legal precedents.

Among these is the federal Prison Rape Elimination Act (PREA), passed unanimously in 2003, which in 2012 established long-demanded national standards for preventing, detecting and reporting prison rape. A new federal policy on transgender health care (see “Health Care” sidebar) is now in effect as well. In the courts, incarcerated people have repeatedly found recourse since the 1994 Supreme Court decision *Farmer v. Brennan*,³ which provides precedent for transgender people to argue that the failure to protect them from sexual abuse and other violence, and the failure to provide transition-related health care is cruel and unusual punishment in violation of the Eighth Amendment of the U.S. Constitution.

These promising legal developments don’t change the fact that conditions for TGNC people behind bars remain discriminatory and dangerous. While PREA carries potential financial penalties for prison systems that do not comply, it does allow incarcerated people to file a lawsuit in court for violations of its provisions. Enforcement and education are an uphill climb.

1. See National Gay and Lesbian Task Force and National Center for Transgender Equality’s “National Transgender Discrimination Survey” (2011): <http://www.endtransdiscrimination.org/Force>. 2. “Transgender Inmates in California’s Prisons: An Empirical Study of a Vulnerable Population,” Valerie Jenness, et al (2009): <http://nicic.gov/Library/023832> 3. *Farmer v. Brennan*, 511 U.S. 825 (1994).

MY STORY HARASSED AT MY HALFWAY HOUSE

DONISHA MCSHAN

“When I was paroled to The H Group, a halfway house in Marion, Illinois, to receive substance abuse treatment, I was excited about the opportunity to focus on my rehabilitation.

“But I was told by the staff members that I was a man, and that if I didn’t stop acting like a woman, I would be sent back to jail. They addressed me with male pronouns and titles, forced me to sleep in a room with four men, even though I didn’t feel safe, and periodically raided my belongings and confiscated anything they viewed as remotely feminine. They took my makeup, clothing, pedicure kit, magazines and curlers. They even took my pink shower cap.

“I filed a formal grievance with The H Group about the way I was being treated, and then Lambda Legal sent a letter. Four days later, I received a formal apology from the director of the facility. I felt proud and grateful. My personal items were returned and staff started treating me as a woman. I found for the first time that I was able to concentrate on treating my substance abuse and preparing for my release.”



FAQ

Answers to Common Questions about Mistreatment of TGNC Incarcerated People

Q: How can I protest prison mistreatment?

A: Get a copy of your facility's grievance system procedures and file a grievance **right away**. It is important that you "exhaust your administrative remedies" as soon as possible by filing grievances that put your facility on notice that you believe your rights have been violated. The grievance procedures are specific to each facility and sometimes deadlines are very short.

Under the Prison Litigation Reform Act (PLRA), a federal law passed in 1996, people in custody who wish to file a lawsuit in federal court must *first* exhaust all of the administrative remedies available to them. Failing to do so gives a correctional facility a reason to ask a court to throw out such a case. If you do not file a grievance within the time period provided and pursue it through every level of appeal, it is likely that any lawsuit you bring will be dismissed.

To exhaust your administrative remedies at the federal level, the Bureau of Prisons (BOP) requires that you:

1. file a "request for an administrative remedy" with your institution within 20 days of the violation of your rights;
2. appeal any decision that you do not like to a regional office within 20 days;
3. appeal the decision with 30 days.

There are very few exceptions to the exhaustion requirement, but the Prison Rape Elimination Act (see below for more about the PREA) provides for one: If you have been sexually assaulted, you may still file a grievance related to the sexual abuse even if the deadline to do so has otherwise passed.

For more details about the PLRA and how to file a lawsuit in federal court, see the *Jailhouse Lawyer's Manual* at <http://blogs2.law.columbia.edu/jlm/>.

Q: What protects transgender people from violence and sexual assault in prison?

A: The federal Prison Rape Elimination Act (PREA) requires prisons, jails, community confinement facilities and immigration detention facilities to comply with standards to protect vulnerable people from sexual abuse. For example, these facilities must have a written policy mandating "zero tolerance" toward all forms of sexual abuse and sexual harassment; screen incarcerated people for vulnerability and separate them from likely abusers; proactively investigate all complaints; and train guards and other staff about issues specific to transgender people (see "Prison Guards" sidebar, opposite page). While PREA carries financial penalties for noncompliance, it does not allow individuals to file a lawsuit in court if it is violated.

Individuals may, however, file a lawsuit in court based

on a violation of the Eighth Amendment, after exhausting administrative remedies (see above). The Supreme Court set the standard for this in *Farmer v. Brennan*, which involved a transgender woman named Dee Farmer who was repeatedly beaten and raped by other people in a men's prison. The Court found that prison officials were responsible because they knew about the attacks on Farmer and did nothing. Courts have repeatedly cited the Eighth Amendment's prohibition of "cruel and unusual punishment" in holding prison officials responsible for such violence. Incarcerated individuals may also be able to file a lawsuit based on violation of state law.

Q: Are transgender incarcerated people guaranteed access to health care?

A: Transgender people have struggled to access medically necessary care for years and have suffered a great deal because of bias and misunderstanding. U.S. courts have begun to recognize the health needs of transgender people, with several recent prison-related victories putting the issue in the spotlight. All seven Circuit Courts that have addressed gender dysphoria have recognized it as a serious medical condition. In *Fields v. Smith*, the 7th Circuit upheld the lower court ruling that denying medically necessary transition-related health care violated the Eighth Amendment's prohibition against cruel and unusual punishment. In *Adams v. Bureau of Prisons*,⁴ the Bureau of Prisons agreed to reverse their "freeze frame" policy that prevented transgender incarcerated people from accessing transition-related care unless they could prove that they had already started it prior to incarceration (see "Health Care" for more about the new policy). In *Norsworthy v. Beard*, a California District Court found that refusal of transition-related surgery to a transgender incarcerated person could constitute sex discrimination. Even in *Kosilek v. Spencer*, where a transgender woman was denied the right to receive transition-related surgery, the Massachusetts court recognized that gender dysphoria is a serious medical condition.

Q: How do prisons decide whether to house a transgender person in a male or female facility?

A: Most prisons in the U.S. currently house transgender people by the sex assigned at birth or according to genital characteristics. These practices may be changing, however, in light of conflicts with the PREA, which requires that prisons make such decisions on a case-by-case basis. Using surgery to measure whether or not someone has transitioned is counter to established medical thinking. According to the World Professional Association for Transgender Health (WPATH), "Treatment is individualized: What helps one person alleviate gender

4. *Adams v. Fed. Bureau of Prisons*, 716 F. Supp. 2d 107 (D. Mass. 2010).

“They addressed me with male pronouns and titles, forced me to sleep in a room with four men, even though I didn’t feel safe, and periodically raided my belongings and confiscated anything they viewed as remotely feminine.”

—DONISHA MCSHAN

dysphoria might be very different from what helps another person. This process may or may not involve a change in gender expression or body modifications.” For more about this, please see “Transition-Related Health Care,” another fact sheet in this Lambda Legal Transgender Rights Toolkit, which can be found at lambdalegal.org/publications/toolkits.

An increasing number of localities—including Cook County, IL, Cumberland, ME, Denver, CO and Washington, DC—have had success with policies that classify people by gender identity rather than sex assigned at birth. In the 2014 DC case *Shaw v. Kates*, a transgender woman who had been detained with the male prison population filed a lawsuit against the Washington, DC Metropolitan Police Department, resulting in a settlement that required, among other things, for the department to change its classification policy so that transgender detainees will be classified based on the gender listed on their ID (if they so wish). In addition, this has been the official policy in the United Kingdom since 2011.

Q: If a person seems likely to be victimized by other people in prison, should this person be placed in isolation away from the general population?

A: Prison officials often deem certain people “at-risk” and segregate them from the general population in “protective custody” or “solitary confinement.” Long-term isolation is a violation of human rights because it amounts to punishment and can cause serious psychological damage.

Lambda Legal joined five other LGBT advocacy organizations in 2012 in urging a Senate panel to stop the discriminatory placement of transgender inmates and immigrant detainees in solitary confinement. Lambda Legal testified that, “Solitary confinement affects many people incarcerated in U.S. jails, prisons and detention facilities, but none so significantly as transgender inmates and immigrant detainees involuntarily confined not because of their actions, but because of their identities.”

The American Civil Liberties Union (ACLU) also testified, stating that “...for prisoners and detainees who are lesbian, gay, bisexual, transgender, have intersex conditions (LGBTI), or are gender-nonconforming, solitary confinement is too often the correctional management tool used to separate them from the general population.”

Under the PREA, facilities may use segregation in isolation, solitary confinement or protective custody only as a last resort. This means taking other steps to prevent abuse such as permitting transgender people to shower separately and

HEALTH CARE

NEW FEDERAL TRANSGENDER PRISON POLICY

In 2011, a settlement in the case *Adams v. Bureau of Prisons (BOP)* prompted a major policy reversal for federal prisons. Adams forced the government to begin guaranteeing access to hormone therapy and other care deemed medically necessary by doctors.

- Transgender people incarcerated by the BOP now must have access to “individualized assessment and evaluation.”
- Also, “current, accepted standards of care will be used as a reference for developing the treatment plan,” as outlined in the Standards of Care published by the World Professional Association for Transgender Health (WPATH).
- Finally, “treatment options will not be precluded solely due to level of services received, or lack of services, prior to incarceration.” This tosses out the BOP’s former “freeze frame” policy, whereby officials could refuse transition-related care for people who couldn’t prove they had started such treatment before being incarcerated. Such arbitrary, blanket bans of health care have repeatedly been found to be unconstitutional.

HOUSING PROBLEMS AFTER PRISON

Many TGNC people face discrimination even after they are released from prison and staying in transitional housing. If you are in such a facility and are denied access to the housing and restrooms that you are most comfortable using and that matches who you are, file a complaint.

Donisha McShan (see “My Story,” at the beginning of this section) was assigned to a male-only unit even though the housing facility also had female and co-ed units. Staff members threatened to send McShan back to prison if she did not comply and live as male. McShan filed an administrative grievance with the facility, because that’s the procedure required to preserve her right to file a case in court, and then Lambda Legal submitted a letter informing the facility that state and federal law prohibit discrimination against transgender people who are incarcerated in government-funded facilities. An apology followed, and McShan was given back her possessions and allowed a room of her own.

exploring alternatives such as moving an aggressor to another cell or facility. Facilities must justify any use of isolated segregation for more than 30 days.

Q: Doesn't it solve all these problems when prisons have a separate "pod" for LGBT people?

A: Setting aside special areas in a prison that are only for LGBT people may offer some protection. However, segregating transgender people as an entire group—especially without their consent—can stigmatize them, cut them off from work opportunities, privileges and resources, and actually encourage violence by staff. The PREA bans involuntary segregation of LGBT or intersex people unless it is “in connection with a consent decree, legal settlement or legal judgment for the purpose of protecting such inmates.”

Ideally, separation of transgender people from the general prison population should be voluntary and assessed on a case-by-case basis. People who are separated should have access to the same programs, privileges, education and work opportunities as everybody else.

FOR MORE INFORMATION:

Contact Lambda Legal at 212-809-8585, 120 Wall Street, 19th Floor, New York, NY 10005-3919. If you feel you have experienced discrimination, call our Legal Help Desk toll-free at 866-542-8336 or go to www.lambdalegal.org/help.

Resources

HELP FOR TGNC INCARCERATED PEOPLE AND THEIR ALLIES

If you are in prison, please use this list to find support or ask questions about your rights behind bars. If you are not in prison yourself but want to get involved in advocating for TGNC incarcerated people, consider reaching out to one of these groups or being a pen pal. Or contact the Transgender Rights Project, Lambda Legal's initiative to win equality for TGNC people in all areas of life, through impact litigation, policy development and public education (lambdalegal.org or 866-542-8336).

American Civil Liberties Union (ACLU)

The ACLU's National Prison Project works to ensure that prisons, jails and other places of detention comply with the Constitution, domestic law and international human rights principles. (aclu.org/prisoners-rights or 212-549-2500)

Black and Pink

Black and Pink is a network of LGBTQ pen pals that also produces a newsletter of stories, advice and essays about being LGBT in prison. (blackandpink.org or members@blackandpink.org)

Jailhouse Lawyer's Manual

The Columbia Human Rights Law Review compiles A Jailhouse Lawyer's Manual, which contains information about “challenging your conviction or your sentence, your rights while you are in prison and different ways to obtain an early release from prison.” (<http://blogs2.law.columbia.edu/jlm/>)

Just Detention International

This health and human rights organization battles sexual abuse and supports survivors, including TGNC individuals, in all forms of detention. (justdetention.org or 202-506-3333 or info@justdetention.org)

National Center for Transgender Equality (NCTE)

NCTE fights discrimination and violence against transgender people in prison and beyond, and has published “LGBT People and the Prison Rape Elimination Act” (bit.ly/MK1meQ). (transequality.org or 202-903-0112 or NCTE@transequality.org)

National PREA Resource Center (PRC)

The PRC provides information about implementation of the Prison Rape Elimination Act (PREA) in the U.S. corrections system, including current research and updates about local staff training programs. (PREAResourceCenter.org)

Sylvia Rivera Law Project (SRLP)

SRLP's Prisoner Justice Project provides legal services to improve the conditions of confinement and reduce the number of people held in prison and jail, and also helps develop guidelines on classification and care of transgender individuals. SRLP's Prisoner's Advisory Committee (PAC) asks incarcerated people for policy input and circulates a newsletter. (srlp.org or 212-337-8550 or info@srlp.org)

Transformative Justice Project of Illinois

This is a collective of lawyers, social workers, activists and community organizers working for prison abolition, transformative justice and gender self-determination. (tjlp.org or 773-272-1822 or info@tjlp.org)

Transgender Gender Variant Intersex Justice (TGIJP)

The TGIJP mission is to challenge human rights abuses committed against transgender, gender variant/genderqueer and intersex (TGI) people in California prisons and beyond. TGIJP helps out low-income transgender people both inside and outside of prison; volunteers respond to letters from incarcerated people. (tgijp.org or 510-533-3809 or info@tgijp.org)