

Advocating for transgender people detained or incarcerated

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Types of Detention

- State, federal and military prisons
- Local and county jails
- Immigration detention
- Juvenile justice facilities
- Mental hospitals
- Community confinement (i.e. probation, GPS monitoring, parole)



EXPERIENCE OF DISCRIMINATION

Over 150 survey respondents were asked to self-report on whether they had experienced discrimination in the following areas:

Area	Percentage	Area	Percentage
Employment	49%	Prison or Jail	14%
Public Accommodation	38%	Other	12%
Housing	32%	Ability to Marry	09%
Health Care	31%	Immigration	07%
Interactions with police officers	26%	Child custody	06%
Access to Social Services	20%	Not sure	01%

Sexual Assault Differences between the Random Sample and the Transgender Sample

	Random Sample	Transgender Sample
Prevalence of Sexual Assault	4.4%	59%
Prevalence of undesirable sexual acts	1.3%	48.3%
Weapon actually used if involved	20%	75%
Officer Aware of the Incident	60.6%	29.3%
Provision of Medical Attention (if needed)	70%	35.7%
Racial composition (% of incidents interracial)	17.2%	63.9%
Relational Distance	Evenly distributed	Skewed toward familiarity

Gender and Detention Policies

- People in all forms of detention are typically housed based on their genitalia (written and unwritten) .
- New federal guidelines aim to change these policies (Prison Rape Elimination Act - 2012)
- Those attempting to access gender related care in detention still often face a myriad of obstacles.

Gender Expression in Detention

- Social and legal transition are often huge barriers in all detention facilities.
 - Individuals are not allowed to express their gender due to policies preventing cross-gender items in gendered institutions
 - Often, detainees are punished for using items to express their gender (i.e. make-up, undergarments)
 - Huge obstacles to obtaining legal name and gender changes when in detention (e.g. TX and CA)

Reliance on Administrative Segregation to “Protect” Transgender

Prisoners



- The stated purpose of administrative segregation is that people being confined within it are a proven danger to themselves, staff, or other inmates.
 - Minimal interaction with other people
 - No access to jobs or treatment programs
 - Restricted privileges (including phone and commissary)
- Message being sent:
 - A person’s gender identity itself is threatening to the institution
 - person must be locked away in a prison within the prison.

Access to Programs, Jobs, and Recreational Opportunities



- Because the following opportunities are not offered in AdSeg, most institutions deny transgender prisoners opportunities to attend:
 - Drug Treatment
 - Educational Programs
 - Job Assignments
 - Recreational Activities

Access to Programs, Jobs, and Recreational Opportunities



- Stated reason for the denials:
 - Transgender inmate's safety
 - Policy change necessitated because a different transgender prisoner used the opportunity to participate in a prohibited activity (often sexual in nature).
- Alternatives:
 - Educational and recreational alternatives rarely compare to lost opportunity
 - Rarely alternative drug and alcohol programs
 - Offered credit for time they would have been offered off their sentence.

Prison Rape Elimination Act (PREA)

- According to federal Guidelines (2012), all facilities, including local jails and detention centers, must follow new PREA guidelines
- No current way to enforce these standards on states and local governments without state legislation – no private right of action
 - CA passed legislation to impose standards at state facilities (SADEA).
 - Still no legislation to enforce at local level
 - SB716
 - Enforces at local level,
 - Passed State Senate, but not State Assembly in 2013.

Prison Rape Elimination Act (PREA)

- Important PREA Guidelines for transgender inmates:
 - Case-by-case assessment includes inmates sense of safety in housing assignment
 - (allows for inmates and detainees to be housed based in genderidentity, not genitals)
 - Search procedures
 - Solo and/or private showering

Prison Rape Elimination Act (PREA)

- Important PREA Guidelines for transgender inmates don't:
 - Access to physical and mental health treatment following sexual assault
 - No involuntary LGBT specific units, unless by court order (Los Angeles)
 - Use of solitary confinement as means solely to keep LGBT inmates safe is forbidden

Prison Rape Elimination Act (PREA)

Guidelines

- Violations of PREA determined during audits of facilities
- Over the course of three years beginning August 20, 2013, state and local agencies must audit every facility operated by the agency
- All agencies subject to PREA must identify a PREA coordinator to monitor and implement compliant policies.
- If violation - federal funding can be reduced or withheld

Prison Rape Elimination Act (PREA)

Guidelines

- Options for inmates who have had rights violated:
 - Ask your state or local corrections agency for the schedule of PREA audits and contact information for the auditors so inmate can report violations to auditor.
 - Facilities are required to post notice of upcoming audits and contact information for auditors six weeks prior to the audit

Prison Rape Elimination Act (PREA)

- Facilities that are particularly noncompliant or have systemic issues of noncompliance can be reported to:

Civil Rights Division—Special Litigation Section

950 Pennsylvania Avenue NW

Washington, D.C. 20530

(202) 514-6255 or (877) 218-5228

Farmer v. Brennan (1994)

- Current legal standard for Eighth Amendment (Cruel and Unusual Punishment) complaints based on conditions of confinement
 - Deliberate Indifference”standard
- US Supreme Court Case
- Based on case of Dee Farmer, a pre-op transsexual inmate, who was raped in GP.

Farmer v. Brennan (1994)

- “Deliberate Indifference” Standard
 - [A] prison official can not be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless:
 - The official knows of and disregards an excessive risk to inmate health and safety
 - The official is aware of facts from which the inference could be drawn that a substantial harm exists AND he must also draw that inference.

Access to Transition Related Care in Detention

- There is not a uniform policy across nationally that governs denial of hormone therapy for transgender inmates
- Many facilities/institutions still do not prescribe hormones to individuals who meet criteria for GD despite legal obligations to do so.
- No facilities provide surgery...yet

Access to Transition Related Care in Detention

- On August 5, 2011, a Wisconsin law called the Inmate Sex Change Prevention Act was found to be unconstitutional in *Fields v. Smith*, on the grounds that preventing transgender prisoners from accessing transition-related care violated the Eighth Amendment.
 - 7th Circuit affirmed
 - Denied Cert. by US Supreme Court

Access to Transition related care in Detention

- On September 30, 2011, a settlement was announced *in Adams v. Bureau of Prisons* reversed the federal “freeze frame” policy that had prevented transgender prisoners from beginning transition-related care unless they can prove that they already started it prior to incarceration (see “Health Care” for more about the new policy).
 - Federal Bureau of prisons released two memos outlining access to transition related care (HRT only).

Access to Hormone Therapy (CA)

- 2011 GID Care Guide Released
- 2012 CDCR updates the California Correctional Health Services Policy Manual
 - Policy 4.26.1: Treatment of Transgender Persons
 - Policy 4.26.2: Treatment of Transgender Persons Procedure
 - Also lists specific institutions for housing “Male - to - Female inmate/patients” and “Female- to-Male Inmate Patients (this is also in CDCR DOM - section 62080.14)
 - Includes clothing (Trans women - bras, Trans men - boxers)

Michele Kosilek(MA)

- In 2000, she sued the MA Dept. of Corr. claiming a “violation of rights” under the Eighth Amendment. She won in 2002 and received hormones and therapy for GID.
- She briefly received electrolysis treatment in 2008, but ultimately lost that lawsuit in 2009.



Michele Kosilek (MA)

- *Kosilek v. Spencer* - In 2014, a three judge panel of the First Circuit Court of Appeal held Kosilek's 8th Amend. rights included "receiving medically necessary treatment ... even if that treatment strikes some as odd or unorthodox."
 - MA was granted a rehearing *en banc* (2/2014)

Norsworthy v. Beard et. al.

- Case in Northern District Court of CA challenging CDCR's practice to deny surgery to transgender inmates
 - Norsworthy has recommendation from CDCR psychologist for surgery.
 - Plaintiff has Hep C and HRT has been ceased due to complications with HEP C.
 - Fourteenth and Eighth Amendment rights violated
 - Fourteenth amendment claim: Prison has policy allowing female inmates to access genital surgery (vaginoplasty) when Cystocele or Rectocele

Norsworthyv. Beardet.al

- CDCR Title 15 Section 3350.1
 - (b) Surgery not medically necessary shall not be provided.Examples include, but are not limited to:
 - (1) Castration.
 - (2)Vaginoplasty(except for Cystocele or Rectocele).
 - (3) Vasectomy.
 - (4) Tubal ligation.
 - (5)-(7) (omitted)

Military and Federal Prisons



- Those held in military prisons (i.e. army garrisons) still denied access to all medical treatment for genderdysphoria(e.g. Chelsea Manning)
- Those housed as incarcerated women soldiers are placed in federal prison
- Inmates housed in federal prison have access to HRT as a result of lawsuit against Federal Bureau of Prisons.

Lack of Competent Medical Care

Issues transgender patients face include:

- Proper issuance of hormones
- Provider's ability to monitor drug interactions and typical hormone side effects
- Reluctance to start a prisoner on hormone therapy
- Improper questions or genital inspections to satisfy a provider's curiosity
- Complete denial of care

1996 Prison Legal Reform Act (PLRA)

- Makes it harder for prisoners to file a lawsuit in federal court
 - Most important parts:
 - EXHAUSTION OF ADMINISTRATIVE REMEDIES (42 U.S.C. §1997e(a))
 - safest course is always:withrespect to each claim you want to raise, and each defendant youwantto name, in your eventual lawsuit, you should file agrievance andappeal that grievance through all available levels of appeal.

1996 Prison Legal Reform Act (PLRA)

- II. FILING FEES (28 U.S.C. § 1915(b)).
 - all prisoners must pay court filing fees in full.
 - If indigent, can pay in monthly installments from prison commissary, but filing fee will not be waived.
- III. THREE STRIKES PROVISION (28 U.S.C. § 1915(g))
 - Each lawsuit or appeal filed that is dismissed because a judge decides it is frivolous, malicious, or does not state a proper claim counts as a “strike.”
 - After three strikes, cannot file another lawsuit in forma pauperis- that is, cannot file unless you pay the entire court filing fee up-front.
 - The only exception to this rule is if you are at risk of suffering serious physical injury in the immediate future.

1996 Prison Legal Reform Act (PLRA)

- IV. PHYSICAL INJURY REQUIREMENT (42 U.S.C. § 1997e(e))
 - The requirement of physical injury only applies to money damages, it does not apply to claims for injunctive and declaratory relief.
- V. EXHAUSTION OF STATUTES OF LIMITATIONS
 - Most courts have held that the statute of limitations is tolled (suspended) while you are exhausting administrative remedies, meaning the time does not start to run until a final administrative decision.
 - However, not every court may accept this idea

Retaliation for Complaints



• Common occurrence which takes on many forms

- Use of the incorrect pronoun after previously using the correct one.
- Cut-off from medical treatment
- Increased searches for contraband associated with gender identity expression.

Professional Responsibility

CA Business and Professions Code §6068 (h).

It is the duty of an attorney to do all of the following:

- (h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed.

Is there an ethical duty to provide pro bono legal assistance?

County of Tulare v. Ybarra (1983) 143 Cal App 3d 587

The Court of Appeal held that the trial court erred by not appointing counsel to represent defendant, even though appointed counsel would be required to serve gratuitously, pro bono publico, absent legislative authorization of payment of fees from public funds.

CA State Bar – Pro Bono Resolution

Urges all attorneys to devote at least 50 hours per year to provide or enable direct delivery of legal services without expectation of compensation other than reimbursement expenses

- To indigent individuals
- Non-profit organizations with a primary focus of providing services to the poor or on behalf of the poor or disadvantaged,
- not-for-profit orgs with a purpose of improving the law and the legal system, or increasing access to justice

CA State Bar – Pro Bono Resolution

- Urges all law firms and governmental and corporate employers to promote and support involvement of associates and partners in pro bono and other public service activities by counting all or a reasonable portion of their time spent on these activities, at least 50 hours over year, toward their billable hour requirements, or by otherwise giving actual work credit.

CA State Bar – Pro Bono Resolution

- Urges all law schools to promote and encourage participation of law students in pro bono activities, including requiring any law firm wishing to recruit on campus to provide written statement of its policy, if any concerning the involvement of its attorneys in public service and pro bono activities

CA State Bar – Pro Bono Resolution

- Urges all attorneys and law firms to contribute financial support to not-for-profit orgs that provide free legal services to the poor, especially those attorneys who precluded from directly rendering pro bono services.

ABA Model Rule 6.1

- Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono public legal services per year. In fulfilling this responsibility, the lawyer should:
 - (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:
 - (1) persons of limited means or
 - (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and

ABA Model Rule 6.1

- (b) provide any additional services through:
 - (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
 - (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
 - (3) participation in activities for improving the law, the legal system or the legal profession.
- In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Does an attorney owe a lesser ethical duty to a pro bono client?

- In CA the answer is **No**.
- An “...argument [that] presupposes that pro bono clients deserve less diligent services than paying client, [is] a proposition that undermines the integrity of the legal profession.” *Segal v. State Bar of California (1988) 44 Cal 3d 1077, 1084*

Rule 2-400 (B)(1)(2) Prohibited Discriminatory Conduct in a Law Practice

- CA State Bar Rules of Professional Conduct: Rule 2-400 (B) (1) (2)
 - (B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race , national origin, sex, sexual orientation, religion, age or disability in:
 - (1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or
 - (2) accepting or terminating representation of any client.

Rule 2-400 (B)(1)(2) Prohibited Discriminatory Conduct in a Law Practice

In order for discriminatory conduct to be actionable under this rule it must:

- First be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law.

A disciplinary investigation or proceeding for conduct may be initiated and maintained, if such conduct warrants discipline under California Business and Professions Code section 6068



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