



Cecelia Longo

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## Transgender Rights in Public Prisons

*Transgender people make up around 27% of the prison population in the United States (Lydon 2015). The fair and adequate medical treatment for transgender prisoners, notably hormone treatments and sexual reassignment surgery, are basic rights. Protections for inmates are provided by the Eighth Amendment and the Prison Rape Elimination Act, however poor enforcement and differing interpretations of how broad these statutes reach has resulted in unsafe living conditions and inadequate medical care. True change and protection of transgender inmates can be achieved with an overhaul of the intake, medical, and housing system in prisons.*

### Scope of the Problem

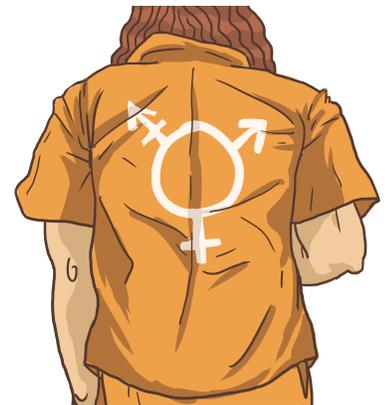
New York State has 57 prisons and one rehabilitation facility for convicted individuals (NYS-DOCCS). These facilities are segregated by sex, rather than gender identity. Transgender women are at the highest risk for sexualized violence, prejudice, or unsafe conditions when housed in male prisons. The Department of Justice (DOJ) Bureau of Justice Statistics reported from the years 2011-2012, sexualized violence against transgender prisoners was on the rise (Beck, 2014). From 2007 to 2012, state and federal prisons saw a 3% to 10% rise in sexualized violence against transgender inmates, however these numbers are projected from a small respondent pool because inmates fear being outed as transgender or a sexual assault survivor, even when anonymity is guaranteed (Beck, 2014).

In New York State, prisoners are placed in facilities based on initial intake procedures such as a physical exam and referencing formal medical documents. This leaves transgender inmate's placement up to guards who determine placement based on physical appearance and genitalia, rather than gender identity. Sentencing and placement in confinement facilities is heavily influenced by political directives such as the War on Drugs, which

transformed to a War on Terror. Both initiatives can unfairly target marginalized communities as potential criminals, leading to increased arrest rates of people of color, low-income, homeless, and undocumented people (Bassichis, 2007). These sub populations contain a large number of transgender people, resulting in high arrest rates of transgender citizens.

Transgender people are more likely to be low-income per *The National Transgender Discrimination Survey*, which found 14% of gender

nonconforming people being unemployed, and 19% being denied housing because of their gender identity (Grant, 2011). In New York, Governors Rockefeller (1959-1973) and Mario Cuomo (1983-1994) contributed to the prison industrial complex, by building numerous prisons, using the Urban Development Corporation, which was created to build housing for the poor in New York (Schlosser, 1998). Trans individuals of color are disproportionately placed in prisons because of



cyclical low-income levels, tripling their likelihood of arrest (Schlosser, 1998). Furthermore, with ill-equipped state mental health facilities, transgendered and gender nonconforming people are placed in prisons to deal with perceived or real mental health problems in prisons (Bassichis, 2007). Adequate mental health care is necessary, especially for transgender individuals who have been mostly isolated because of their identity. Without comprehensive prison reform, transgender individuals will continue to be denied their Constitutional right for just imprisonment free from cruel and unusual punishment.

## Past Policy

Founded as part of the Eighth Amendment of the Constitution, inmate rights are guaranteed to all individuals housed in U.S. prisons. Recently, political and public policy advocates pushed for a broader understanding of the Eighth Amendment, encompassing transgender healthcare and freedom from sexualized violence (Schneider, 2016). People in prisons are protected against cruel and unusual punishment, along with protection of their personal



safety while incarcerated. The Supreme Court implied through numerous historical decisions that the Eighth Amendment is malleable; therefore, it changes with popular opinion concerning what is right and just.

Adequate medical care is an ideal supported by popular rhetoric, and therefore transgender people are entitled, under the Eighth Amendment, to receive gender affirming treatment, which is in line with receiving adequate medical care.

In 2015, the DOJ, for the first time, declared that blanket refusal of hormone treatment and sexual reassignment surgery was discriminatory (Schneider, 2016). This shift in policy was not inclusive and called for a case-by-case assessment of transgender inmates by prison medical staff. National and state legislation for prisoner rights is needed to ensure meaningful change due to the myriad of inconsistent rules and regulations implemented at state and federal prisons, as well as private prisons.



In 2011, the 7th Circuit Court of Appeals decided, *Fields v. Smith*, 653 F.3d 550 (7<sup>th</sup> Cir., 2011), ruling in favor of two transgender prisoners who had been receiving hormone treatment for years before imprisonment, and the suspension of the hormone therapy by a doctor in a Wisconsin prison was deemed unconstitutional. The Court ruled in favor of the prisoners, stating medical officials in prisons cannot stop hormone treatments as a legitimate course of medical action for transgender inmates. Federal and state prisons now have precedent to no longer deny transgender inmate's medical treatment when required. However, this protection is only extended to people who were taking medically prescribed hormones prior to their incarceration.

In a 2015 prison survey from Black and Pink, a non-profit focused on LGBTQ prisoner rights, only 6% of transgender inmates were taking prescribed medication (Lydon, 2015). With so many inmates not legally receiving hormone replacement treatments (HRT) or having never started, the prison is under no obligation to continue previous, non-prescribed self-treatment. In prisons, doctors provide recommendations for medical treatment, which are

then decided on by prison administration, who are only legally obligated to provide treatment and medical care that is “compatible with ‘contemporary standards of decency’” (Schneider, 2016). Lacking strict standards for prison medical care, the administration can deny gender affirming treatment so long as they can justify the lack of medical treatment complies with the arbitrary standard of decency.

## Current Policy

Currently, the most important piece of legislation for transgender individuals is the Prison Rape Elimination Act (PREA), which is the main legal protection for transgender inmates. PREA states transgender individuals can only be segregated if a real threat is perceived; however, this is not a holistic policy because it does not protect the physical and mental well-being of a prisoner. Placed in protective custody when they enter prison or if a threat to their well-being is perceived, transgender inmates are isolated from their peers. Protective custody is another term for solitary confinement, meaning inmates are isolated and alone for twenty-three hours a day (Bassichis, 2007). While prisons are trying to protect their population by placing transgender and intersex prisoners in protective custody, they continue a cycle of ostracization, furthering the social rhetoric of transgendered people as “others.” Anecdotal evidence indicates the need for protective custody, especially for transgender women in male prisons, to escape the violence of general population housing. However, entering protective custody can place transgender prisoners at increased risk for sexualized violence from corrections officers, let alone the mental strain placed on being isolated for a significant period of time (Bassichis, 2007). Nearly half of sexual assaults in prisons are committed by guards, and solitary confinement gives employees unfettered access to inmates (Beck 2014).

Hormone replacement treatment (HRT) and sexual reassignment surgery (SRS) are the two most prominent methods for physically affirming gender. In

2014, President Obama passed legislation which ensured Medicare covered SRS and extended that coverage to the incarcerated. Unfortunately, the new American Health Care Act under President Trump could undo this effort (Schneider, 2016). Currently, to receive HRT in prison, a person must gain doctor and psychiatric approval by being diagnosed with either gender dysphoria (GD) and/or gender identity disorder (GID) (Lydon, 2015). In Black and Pink’s prisoner survey, only 43% of transgender respondents were granted this diagnosis. Yet, these diagnoses are not encompassing of all transgender individuals. Additionally, the survey authors indicated the likelihood of an unreported population who hope to have gender affirming treatment but chose not to respond because fears of being outed by participating in the survey. As the survey results, do not reflect actual numbers, projections are the most often used (Lydon, 2015). The reality of gender affirming treatment is inadequate for transgender prisoners, either through lack of access, lack of safety to come-out, and/or lack of quality care.

## Policy Options

### Compliance with the Nelson Mandela Rules

Stated by the United Nations as a minimum humane treatment level for prisoners, solitary confinement can be used for up to fifteen days, with twenty-two hours of isolation per day, before the confinement is considered a human rights violation (United Nations 2015). If protection for transgender inmates is required, and solitary confinement is the only option, prisoners may be placed there for their protection. The state or federal department of corrections will have a safer environment in place to transfer the inmate within fifteen days.

## Housing Based on Gender Identity

In accordance with PREA, prisons will begin placing inmates based on their gender identity, rather than based solely on their genitals. Gender Queer individuals will be placed in the facility of their preference. A social worker or therapist will be on-hand during the intake process to conduct brief interviews to ensure people are placed by their gender identity, rather than a desire to be placed with the opposite sex.

## Optional Transgender and Intersex Only Housing

Rather than placing transgender inmates in protective custody/solitary confinement upon arrival for their protection, or later if a threat is perceived, transgender and intersex only housing would ensure a like-minded community. Further, this housing section could have either their own canteen or a separate eating time to ensure safety. People who identify as transgender or intersex will have the option of joining this housing unit.

## Mandatory Inmate Sensitivity Training

These trainings will include topics such as healthy relationships, protected sex, prisoner rights, gender identity, and sexuality. Classes will have a mandated curriculum enunciated by the Department of Justice. After an initial round of classes taught by social workers, inmates will be able to obtain a paying job as a teaching assistant for the class. Classes will be taught in Spanish and English, along with training videos for other languages. Tests will be given in written and verbal formats to ensure inmates were attentive and learned the material. This class must be passed to obtain a job within the prison and prior to review for release by the parole board.

## Key Organizations

The protection of transgender inmates extends beyond prisons to human rights. There are 1,821 federal and state adult prisons in the United States, housing over 2 million prisoners (Wagner 2017). Investigating the treatment of gender non-conforming prisoners and ensuring their rights are not being violated is monitored by numerous organizations.

- **The National Center for Transgender Equality (NCTE):** Founded in 2003, to respond to the need for public policy advocacy by and for gender nonconforming people. Advocacy trainings and reports are published by the NCTE, which push for more accountability in prisons. Most notably, NCTE wants to address the historical trauma transgender people face when working in the criminal justice and prison system.
- **The American Civil Liberties Union:** Founded in 1920, the ACLU is focused on preserving the rights on American people. Working to ensure the rights for the LGBTQ+ community, the ACLU continues their focus on transgender rights in prisons during the past decade.
- **The Sylvia Rivera Law Project:** Founded in 2002, the organization focuses on the high rates of poverty and incarceration the transgender community faces. SRLP provides free legal help for name changes and works for prisoner justice. Based and focused in New York, SRLP advocates primarily on prisoner justice within New York State.

# Glossary of Terms

**Gender dysphoria:** Clinically significant distress caused when a person's assigned birth gender is not the same as the one with which they identify. According to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM), the term - which replaces Gender Identity Disorder - "is intended to better characterize the experiences of affected children, adolescents, and adults."

**Gender non-conforming:** A broad term referring to people who do not behave in a way that conforms to the traditional expectations of their gender, or whose gender expression does not fit neatly into a category.

**Hormone Replacement Treatment:** Hormone replacement therapy (HRT) is the use of synthetic or natural female hormones to make up for the decline or lack of natural hormones produced in a woman's body.

**Intersex:** The intersex definition is a person is born with a combination of male and female biological characteristics, such as chromosomes or genitals, that can make it difficult for doctors to assign their sex as distinctly male or female.

**Prison Industrial Complex:** The Prison Industrial Complex (PIC) is a term used to describe the overlapping interests of government and industry that use surveillance, policing and imprisonment as solutions to economic, social and political problems.

**Transgender:** An umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth. Being transgender does not imply any specific sexual orientation. Therefore, transgender people may identify as straight, gay, lesbian, bisexual, etc.

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## Community Policy Institute

The Community Policy Institute builds capacity surrounding policy within the Capital Region. We provide researched-based policy information to our community partners who use the information to modify best practices and advocate for policies that will further the development and effectiveness of direct community engagement.

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Cecelia Longo

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