Nearly one in six transgender Americans has been to prison—and nearly half of all black transgender people.1 Once behind bars, discriminatory policies and the constant threat of sexual assault can make prison a living hell for this already mistreated group.

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 U.S., transgender prisoners are still usually housed according to the sex assigned at birth, instead of by gender identity—one’s inner sense of being male or female. This policy makes transgender prisoners more vulnerable to harassment or attack by staff or fellow prisoners:

A California study found that transgender prisoners were 13 times more likely to be sexually assaulted than non-transgender prisoners.2 U.S. prison officials also commonly block prisoners’ access to transition-related health care such as hormone therapy or sex reassignment surgery (SRS), even when it’s prescribed as medically necessary by a doctor. (In “My Story,” below, a former Wisconsin prisoner describes the devastating effects these prison bans can have.)

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), 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, transgender victims of prison assault have repeatedly found recourse since the 1994 Supreme Court decision Farmer v. Brennan,3 and prisoners fighting for the right to transition-related health care have won cases in several states.

These promising legal developments don’t change the fact, however, that conditions for TGNC people behind bars remain discriminatory and dangerous. While PREA carries potential financial penalties for prison systems, it does not allow individuals to challenge violations in court. Enforcement and education are an uphill climb.

This fact sheet is a guide for transgender prisoners and their allies. If you or someone you know has experienced assault, discrimination, forced isolation or denial of health care while in detention of any kind, contact Lambda Legal’s Help Desk at 866-542-8336 or www.lambdalegal.org/help-form.

4. Fields v. Smith, 653 F.3d 550 (7th Cir. 2011)
FAQ

Answers to Common Questions about Mistreatment of TGNC Prisoners

Q: What protects transgender people from violence and sexual assault in prison?
A: The federal Prison Rape Elimination Act (PREA) requires prisons to make sexual abuse complaint procedures accessible to transgender prisoners and to train guards and other staff about issues specific to transgender prisoners (see “Prison Guards” sidebar, opposite).

While PREA carries financial penalties for noncompliance, the Constitution’s Eighth Amendment sets the standard for individual inmates seeking recourse for abuse. Courts have repeatedly cited the Eighth Amendment’s prohibition of “cruel and unusual punishment” in holding prison officials responsible for such violence.

The Supreme Court set the standard for the Eighth Amendment in Farmer v. Brennan, which involved a transgender woman named Dee Farmer who was repeatedly beaten and raped by other prisoners in a men’s prison. The Court found that prison officials were responsible for the attacks on Farmer because they knew about them and did nothing.

Q. Are transgender prisoners 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, however, with several recent prison-related victories putting the issue in the spotlight:

- 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’s prohibition against cruel and unusual punishment.
- On September 30, 2011, a settlement was announced in Adams v. Bureau of Prisons that 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).
- A September 4, 2012 decision in the case Kosilek v. Spencer cited the Eighth Amendment in recognizing Massachusetts prisoner Michelle Kosilek’s right to receive SRS.

Q: How do prisons decide whether to house a transgender prisoner in a male or female facility?
A: Most prisons in the U.S. currently house transgender prisoners by sex assigned at birth or according to whether or not someone has had SRS. 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. And 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), “Clinical experience indicates that many transgender people find comfort with their gender identity and expression (or alleviate or resolve their gender dysphoria) without having surgery. Transition-related surgery is medically necessary for some, but not for all transgender people…” (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 www.lambdalegal.org/publications/trans-toolkit.)

An increasing number of localities—including Cook County, IL, Cumberland, ME, Denver, CO and Washington, DC—have had success with policies that classify prisoners by gender identity rather than sex assigned at birth. (In addition, this has been official policy in the United Kingdom since 2011.)

DEFINITIONS

“Transgender” and “TGNC”
Transgender is an umbrella term used to describe people whose gender identity, one’s inner sense of being male or female, differs from their assigned or presumed sex at birth; Gender Non Conforming people don’t meet society’s expectations of gender roles.

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Q: If a transgender prisoner seems likely to be victimized by other prisoners, should he or she be given a separate cell away from the general population?
A: Prison officials often deem certain prisoners “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.

The American Civil Liberties Union (ACLU) testified before Congress in 2012 about an alarming increase of solitary confinement in U.S. prisons—and expressed particular concern about TGNC prisoners. The ACLU found 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.”

The ACLU also testified that the depression and suicidal behavior that are common among transgender prisoners can be “made significantly worse by forced segregation and isolation.”

Under the PREA, facilities must use this kind of segregation only as a last resort. This means taking other steps to prevent abuse such as permitting transgender prisoners to shower separately from others and exploring alternatives such as moving a hostile cellmate to another cell before resorting to protective custody. Facilities must justify any such use of segregation for more than 30 days.

Q: Doesn’t it solve all these problems when prisons have a separate “pod” for LGBT prisoners?
A: Setting aside special areas in a prison that are only for LGBT prisoners may offer some protection. However, segregating transgender prisoners as an entire group can stigmatize them; cut them off from work opportunities and other privileges and resources; and actually encourage violence by staff. The PREA bans segregation of LGBT or intersex prisoners 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 prisoners from the general population should be voluntary and assessed on a case-by-case basis, and they should have access to the same programs, privileges, education and work opportunities as other prisoners.

PRISON GUARDS
WHAT WE NEED NEXT: STAFF TRAINING
In 2012, the PREA began requiring that prisons and other detention facilities train their own employees about transgender issues, citing strong evidence that ignorance or prejudice on the part of guards or other detention staff commonly fosters the sort of hostile environment that encourages anti-TGNC violence.

At the top of the list: How to identify transgender prisoners and ensure their safety and health needs are considered; how to recognize behavior that amounts to anti-transgender harassment; how to defuse that sort of behavior; and how to address transgender prisoners in respectful ways. Also, medical personnel need to be made aware that there is now a medical protocol for gender transition behind bars and that they may be violating the constitution if they refuse treatments such as hormone therapy or transition-related surgery when doctors have deemed it necessary.

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 BOP prisoners 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 prisoners who couldn’t prove they had started such treatment before being incarcerated. Such arbitrary, blanket bans of health care have repeatedly found to be unconstitutional.
IMMIGRATION ABUSES
BE QUIET OR WE’LL DEPORT YOU

Federal immigration detention facilities are among the worst violators of transgender detainees’ rights, with sexual assault and harassment rampant—and chronically under-reported and under-investigated.

In February 2013, Lambda Legal joined a range of LGBT rights and immigration groups in calling on the Department of Homeland Security’s Immigration and Customs Enforcement (ICE) to update its policies in line with the PREA so that such incidents can be documented and prosecuted, or prevented in the first place. Several former prisoners shared stories in the letter about being sexually assaulted by guards, other staff or fellow detainees. One transgender prisoner was confined to her 5-by-9-foot cell for 22 hours a day, forced periodically to strip naked by guards and openly harassed about her body. Two were immigrants who endured assaults under the threat of deportation.

The PREA is already law in these immigration facilities; enforcing it among TGNC detainees would protect a population that is especially vulnerable to threats.

RESOURCES
HELP FOR TGNC PRISONERS 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 prisoners, 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.

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)

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 prisoners 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. (tjfp.org or 773-272-1822 or info@tjfp.org)

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

FOR MORE INFORMATION:
Contact Lambda Legal at 212-809-8585, 120 Wall Street, Suite 1900, New York, NY 10005-3919.
If you feel you have experienced discrimination, call our Help Desk toll-free at 866-542-8336 or go to www.lambdalegal.org/help.