

**MODEL PROTOCOLS ON THE TREATMENT OF  
TRANSGENDER PERSONS  
BY SAN FRANCISCO COUNTY JAIL**

**National Lawyers Guild  
&  
City & County of San Francisco Human Rights Commission**

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**By Murray D. Scheel and Claire Eustace**

# MODEL PROTOCOLS ON THE TREATMENT OF TRANSGENDER PERSONS<sup>1</sup> BY SAN FRANCISCO COUNTY JAIL

## INTRODUCTION

Following are model protocols for the treatment of transgender people by San Francisco County jail personnel.<sup>2</sup> These protocols will help jail staff prevent discrimination against transgender inmates by articulating rules that are both respectful of transgender inmates' needs and administrable. The protocols will also bring San Francisco County Jail into compliance with local anti-discrimination laws.<sup>3</sup> These protocols are to be used by jail staff as a supplement to the existing jail protocols in order to protect the rights of transgender inmates.

These protocols are based on research by the National Lawyers Guild and the San Francisco Human Rights Commission. The Guild and the Commission began the research in response to allegations from the San Francisco transgender community of discrimination by the San Francisco police department and San Francisco County jails. The research incorporated interviews with service providers, members of the transgender community, and staff from the San Francisco Police Department and County Jail. It also included a review of law journals, legal cases, statutes, and regulations regarding both the transgender community and criminal law. Finally, the policies and practice of San Francisco were compared with other jurisdictions in the Bay Area and beyond (Alameda, San Mateo, Marin, and Los Angeles Counties, as well as Multnomah County, OR ).

This research uncovered three broad problem areas: disrespectful forms of address in the jail; jail housing that is either unsafe or overly isolating; and failure to provide appropriate access to hormone therapy. As a result, four goals must be met: (1) law enforcement personnel must find ways to recognize and prevent behavior that harasses transgender people; (2) law enforcement personnel must address inmates in a manner appropriate to their gender identity; (3) the County must formally adopt a written housing policy that safely houses transgender people according to their gender identity, not their genitalia; and (4) hormone therapy must be available through county jails' medical services.

For the most part, the San Francisco County Jail makes a strong effort to address the needs of transgender inmates. Its system for housing inmates is similar to other well-developed jail systems (Compare Los Angeles County, CA; Multnomah County, OR) and forms the basic structure for some of the housing recommendations in these protocols. However, like elsewhere, current and former inmates in San Francisco complain of unnecessary strip searches, overly isolating housing, and staff who refuses to use respectful forms of address with transgender inmates.

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<sup>1</sup> The term "transgender" includes any transsexual or intersex prisoner. Transsexual people are individuals who perceive themselves as members of gender or sex that is different from the one they were assigned at birth. (Survivor Project: Intersex & Trans Basics, at <http://www.survivorproject.org/basic.html> (last visited 7/12/02)).

"Intersexuality is a set of medical conditions that features 'congenital anomaly of the reproductive and sexual system.' That is, a person with an intersex condition is born with sex chromosomes, external genitalia, or an internal reproductive system that is not considered "standard" for either male or female." (Intersex Society of North America, at <http://isna.org/faq/faq-medical.html#what> (last visited 7/24/02)).

<sup>2</sup> Portions of these protocols are designed to help institutions follow state regulations; for example, CAL. CODE REGS. tit. 15, § 1050 ( 2002) sets minimum standards for local detention facilities or jails and requires jail administrators to develop and implement a *written classification plan* designed to properly assign inmates to housing units.

<sup>3</sup> SAN FRANCISCO, CAL., ADMIN. CODE chs. 12A, 12B, 12C, and POLICE CODE art. 33, prohibit discrimination based on gender identity by the Police Department and Sheriff's Office and their contractors; the San Francisco Human Rights Commission has the authority to enforce these provisions.

The National Lawyers Guild and the San Francisco Human Rights Commission intend that these protocols be used by the San Francisco County Sheriff's Department to comply more fully with the City's gender identity non-discrimination ordinances, and by other jurisdictions as a model to guide their own actions. The document begins with the recommended protocols (pp. 4-7), followed by commentary explaining the basis for the recommendations (pp. 8-15). A list of sources (pp. 16-21), contacts for further information (p. 22), and an appendix with suggested protocols for use by police departments are also provided.

## PROTOCOLS

- I. Name Usage, Forms of Address, Searches:** the jail will process a transgender arrestee according to normal booking procedures, with the following exceptions.
- a. *Booking Name:* When booking a transgender arrestee, the San Francisco Sheriff's Department will use the Field Arrest Card from the arresting agency. If the Sheriff's Department is the arresting agency, it will include the arrestee's adopted name (i.e., non-birth name that the inmate uses in self-reference) in the booking, either as the primary name or as the "also known as" ("a.k.a."). The transgender inmate will be booked under the name appearing on the inmate's official identification (e.g., driver's license), as well as under an "a.k.a." name if applicable. If no I.D. is available, then the Sheriff's Department will use the adopted name for booking purposes, either as the primary or the "a.k.a." name. The arrestee's birth name will be used only if it is the arrestee's legal name or if there is a specific law enforcement reason for doing so, such as a prior arrest record. However, if the Sheriff's Department is not the arresting agency and the arresting agency failed to include the arrestee's adopted name on the Field Arrest Card, the Sheriff's Department will add the adopted name to the Field Arrest Card and to the record as an a.k.a.
  - b. *Forms of Address:* Jail staff will always address transgender inmates by the inmate's adopted name. This is true even if the inmate has not gotten legal recognition of the adopted name. In addressing or discussing an inmate who is transgender, staff will use pronouns appropriate for that person's gender identity. (e.g., "she, her, hers" for inmate who is male-to-female; "he, him, his" for an inmate who is female-to-male). If the staff is uncertain which pronouns are appropriate, then staff will respectfully ask the inmate for clarification.
  - c. *Strip Searches:* With respect to persons arrested for infraction or misdemeanor offenses that do not involve weapons, controlled substances, or violence, strip searches will only be conducted if "a peace officer has determined there is reasonable suspicion based on specific and articulable facts to believe such person is concealing a weapon or contraband, and a strip search will result in the discovery of the weapon or contraband."<sup>4</sup> All searches of the transgender inmate's person will be done by two officers of the gender requested by the transgender inmate. If the inmate does not specify a preference, then the search will be done by officers of the same gender as the transgender inmate's gender presentation (e.g., a female-to-male (FTM) inmate expressing no preference should be searched by a male officer). If gender presentation or identity is not clear to the inmate, the inmate will be searched by one female and one male officer.<sup>5</sup>

### *Conditions during Incarceration*

- II. Housing:** According to California law, a jail must implement a classification plan that includes segregating inmates on the basis of sex.<sup>6,7</sup> The regulation requiring the classification plan does not define "sex". At the time of the creation of these protocols, if jail staff determined that an inmate had

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<sup>4</sup> CAL. PENAL CODE § 4030 (f) (Deering 2001).

<sup>5</sup> When San Francisco County Jail strip searches a new inmate, the inmate strips in a private booth closed by a curtain. One deputy observes the inmate, while other deputies are present in the portion of the room not enclosed by the curtain. This arrangement provides adequate privacy and safety for the inmate.

<sup>6</sup> CAL. CODE REGS. tit. 15, § 1050 (a) (2002).

<sup>7</sup> Transsexual and intersexed inmates often do not fit into conventional categories of "male" and "female." Many do not think of their bodies as specifically "male" or "female."

“male” genitalia, that inmate was assigned to the men’s housing. If the jail staff determined that the inmate did not have “male” genitalia, then the inmate was assigned to the women’s housing.

- a. *Assigning Transgender Inmates to Housing:* All transgender inmates in San Francisco County jails will be assigned housing based on their gender identity, not their genitalia. Housing status will be determined first by referring to the inmate’s official identification (e.g., driver’s license), and the inmate will be housed according to the gender marker if the official identification is consistent with the inmate’s gender presentation.

If there is no updated or consistent I.D., then jail staff will ask the inmate whether she or he is female or male, and house accordingly. If the transgender inmate identifies as male and has had genital surgery, he will be housed in the male unit. For those transgender men who have not had genital surgery, the county will house them in a vulnerable male unit. If the transgender inmate identifies as female, she will be housed in the female section. For those transgender women who have not had genital surgery, the county is allowed to house them in a vulnerable female unit.<sup>8</sup>

If the inmate expresses uncertainty about her or his gender, then that inmate will be evaluated by a social worker or psychologist to determine appropriate housing.

When assigning the inmate to housing during the intake process, the jail will NOT use a strip search simply to determine genitalia.

The County jail is not allowed to house any transgender inmate in a unit based solely on the inmate’s birth-identified gender. Likewise, it is against good practice to force a transgender inmate into solitary housing.

- b. *Housing and Vulnerability:* An individualized assessment for appropriate housing will be made for each inmate, and reviewed periodically thereafter. Intake staff should assess the transgender inmate for potential vulnerability in the general prison population.

As part of the housing assessment for vulnerability, jail staff will ask the inmate his or her own opinion of his or her vulnerability in the general jail population. To solicit this information, the assessing staff member may ask questions such as:

- Have you been attacked before?
- Have you been in jail before? If so, how were you treated by other inmates?
- Do people call you names, intimidate, or harass you?
- Do you think other people might harm you because of the way you look?
- Among whom would you prefer to be housed (males, females, vulnerable unit)?

- c. *Inmates not suited to placement with a vulnerable population:* As with all other inmates, a transgender inmate will be assessed for factors that indicate the inmate would be an unusual security risk. If so, he or she should not be placed with other vulnerable inmates. However, this assessment must be made based on objective criteria, such as:

- (1) Inmate has been charged or convicted of a violent crime

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<sup>8</sup> As of July of 2002, San Francisco County jail had no “vulnerable female unit.”

- (2) A record of disruption or non-cooperation
  - (3) A history of escape attempts
  - (4) A history of victimizing others
  - (5) Marked or severe symptoms of mental illness that may require special housing
- d. *Protective Custody*: A transgender inmate will be housed in Protective Custody or Administrative Confinement ONLY when there is reason to believe the inmate presents a heightened risk to himself or herself or to others, and only for that limited period of time during which the heightened risk exists.

Grounds for Protective Custody may also exist if a transgender inmate has been, or fears they will be, vulnerable to victimization in any other housing setting, including shared vulnerable inmate housing. To guard against arbitrary confinement, all inmates in Protective Custody have a right to:

- a written statement explaining the reason for the confinement;
  - a brief plan for returning the inmate to less restrictive housing;
  - approximate time period for returning the inmate to shared housing units.
- e. *Access to Services*: Inmates in the unit for vulnerable prisoners will have access to all of the same services as inmates in the general population (e.g., education, jail jobs, drug treatment). The unit for vulnerable prisoners will not be so isolated from other facilities or prisoners that it effectively becomes a form of administrative confinement, nor will it be administered in a way that puts its inmates on unnecessary display.<sup>9</sup>
- f. *Clothing and Cosmetics*: Transgender inmates will be permitted to wear, and provided with, the same clothing and cosmetics as any other inmates of their gender (a male-to-female inmate is permitted to wear female clothing).
- g. *Genital Sex and Gender*: These model protocols favor housing based on gender identity rather than genitalia in order to treat transsexual persons appropriately with respect to their gender and to enhance safety. For example:

An MTF pre-operative or non-operative transsexual with male genitalia who is on hormones is more safely housed with females than even with vulnerable males.

An FTM pre-operative or non-operative transsexual with female genitalia is more safely housed with vulnerable males than with the general population of women. Housing FTMs who have not had genital surgery with vulnerable males rather than with the women also ensures the safety of the women since FTMs may be physically stronger than most women.

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<sup>9</sup> Inmates housed in the B pod of County Jail 8 have complained about a sense of being on display because after official “lights out” at night, the lights in their cells remained on longer than those in other parts of the unit.

### **III. Medical Treatment**

- a. The jail medical staff will be trained on the evaluation and counseling process used to determine whether hormones are appropriate therapy, so that the jail medical staff may either:
  - continue the transgender inmate on his or her evaluation process; or
  - begin hormone therapy for an inmate who has been identified as a candidate for hormone therapy, but did not begin therapy prior to incarceration; or,
  - determine that a previously undiagnosed inmate is a good candidate for hormone therapy and prescribe that therapy.
- b. Transgender inmates shall have access to all other necessary medical and mental health care, including psychotherapy if needed.
- c. Jail medical staff will be trained on the interactions between hormones and HIV, other STD's, and other common ailments.

### **IV. Alternative Dispute Resolution**

There are existing means of redress available to all inmates; however, agencies outside the San Francisco County Sheriff's Department continue to receive complaints about the treatment of transgender inmates. These complaints suggest that the available methods of redress are ineffective. We recommend that the San Francisco Human Rights Commission, as designated by the San Francisco Sheriff's Department, be given the ability to mediate disputes between transgender prisoners and jail personnel, such disputes limited to issues covered by these protocols.

## COMMENTARY

### INTRODUCTION

San Francisco is distinct from other Bay Area jurisdictions in several ways. Its status as a sanctuary city means that city employees are prohibited from cooperating with the Immigration and Naturalization Service in ways that employees in other counties are not, which has significance for how an undocumented inmate will be treated. Also, attorneys have access to their clients at any time without prior notice to the jail, and are provided private space for consulting with their clients. With regard to the housing and treatment of transgender inmates, San Francisco addresses the needs of transgender inmates more specifically than most Bay Area jurisdictions. Implementation of these protocols is a logical step forward in providing progressive, appropriate jail conditions for transgender inmates.

### COMMENTARY ON SECTION I: NAME USAGE, FORMS OF ADDRESS, SEARCHES

#### *Name Usage*

Many current and former transgender inmates of San Francisco County Jail complain that their gender identity and adopted name are routinely ignored by many deputies in the jail. Many transgender people find this use of their old name humiliating and discriminatory.

Some jail personnel believe that an inmate's birth name is the inmate's true name. They view an inmate's adopted name as somehow false or fraudulent. This is not true. Most transgender people adopt new names as a reflection of the finding of their true selves. Their adopted name is, therefore, more "true" than their birth name. And while it may sometimes be necessary to note an inmate's birth name in their paperwork, using this name in addressing or discussing a transgender inmate serves no legitimate administrative or security purpose.

Sometimes an inmate's Field Arrest Card will contain only the inmate's birth-identified name. Traditionally, Jail personnel have felt restricted by this card and subsequently only used the inmate's birth-name to identify them. This former policy served no administrative purpose. Simply noting the inmate's adopted name in their file and record as an "also-known-as" will allow jail personnel to feel more comfortable using that name when addressing or discussing the inmate.

This procedure does not compromise existing Jail policy with regard to street or gang names. The Jail does have an understandable policy in place to not use an inmate's street or gang name in order to avoid fraternization and to discourage gang activity. The security purpose for such a policy is clear. However, the same security rationale fails to justify use of a transgender inmate's birth name.

Use of the inmate's adopted name by the police and jail staff is critical to the dignity of the inmate. By diligently following this practice, respect for and willingness to cooperate with jail personnel will increase on the part of the transgender inmate.

#### *Use of pronouns*

One of the most consistent complaints from transgender inmates is that they are referred to by pronouns associated with their birth-identified gender instead of those pronouns which respect their gender identity. This practice serves no legitimate administrative or security purpose. In fact, doing so often creates a

culture of disrespect among transgender inmates. Like use of proper name, use of those pronouns which recognize an inmate's gender identity will increase respect for and cooperation with jail personnel.

### *Strip Searches*

San Francisco County Jail routinely strip searches all new inmates for weapons and contraband. With regard to transgender inmates, some jail systems already require that officers of the transgender person's adopted gender perform the search (e.g., a male-to-female transgender inmate is searched by a female deputy).<sup>10</sup> However, the Trans and Gender Variant in Prison Project has expressed a recurring concern that transgender inmates have options over their treatment (i.e., not presuming the needs of transgender inmates when no such presumption is necessary).

Consequently, these protocols grant a transgender inmate the right to choose the gender of the deputies involved in their strip search. In rare cases, an inmate will be unable to make such a choice. When this happens, the inmate will be searched by one male and one female deputy.

Because of the intimate nature of a strip search, special attention should be made to provide inmates with as much privacy as possible. A search conducted by one officer in a private booth within a larger public room would provide privacy for the inmate as well as limit chances of abuse by an officer. However, no inmate should be strip searched by a lone deputy.

## COMMENTARY ON SECTION II: HOUSING

### *Assigning the Inmate to Housing*

Transgender inmates often transcend conventional or stereotypical male-female expression. As a result, it is often difficult to apply the genitalia rule at first glance: a male-to-female transgender inmate may appear very female and have male genitalia, while a female-to-male transgender inmate may appear very male and have female genitalia. Police departments and jails often resort to strip searches in order to resolve this ambiguity. However, such searches to determine the sex (gender) category for the purpose of safe housing are humiliating and traumatic for the transgender inmate.

Therefore a strip search usually provides little or no additional dispositive information. If the jail were simply to house in the women's section any inmates who live and identify as female, the jail would be in line with San Francisco's Compliance Guidelines to Prohibit Gender Identify Discrimination.<sup>11</sup> Because most FTMs do not have genital surgery, by following the "male genitalia rule," jail staff, at the time of this writing, either housed FTMs with the women or housed them in their own cells in the women's section. However, it is humiliating for transgender men to be considered women, and the alternative of being housed in one's own cell might be considered to be solitary confinement, which is usually reserved to punish an inmate. Jails can avoid these problems by housing pre-operative or non-operative FTMs in the vulnerable male section. Since strip searches to determine sex (gender) classification are humiliating

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<sup>10</sup> See MULTNOMAH COUNTY, OREGON SHERIFF'S DEP'T, CORRECTIONS FACILITIES DIVISION SPECIAL ORDER 00-18, TRANSGENER INMATE BOOKING AND CLASSIFICATION, § 3.1 (2000).

<sup>11</sup> CITY AND COUNTY OF SAN FRANCISCO HUMAN RIGHTS COMMISSION, COMPLIANCE GUIDELINES TO PROHIBIT GENDER IDENTITY DISCRIMINATION (1998), available at [www.sf.ca.us/sfhumanrights/lgbth](http://www.sf.ca.us/sfhumanrights/lgbth).

for the inmate and yield little to no additional practical information, the jail should not conduct strip searches to determine sex category.

By following these protocols, the jail can accomplish the same goal of safe housing while refraining from infringing on the dignity of the inmate as much as possible. First, jail staff can consult the official I.D., if available. Second, if no consistent I.D. is available, the jail staff may simply ask the inmate whether she or he is female or male. If the inmate cannot give a consistent answer (e.g., is intoxicated), then the inmate should be evaluated by a social worker or psychologist.

### *Housing and Vulnerability*

Several counties, including San Francisco, provide segregated housing, or pods, for vulnerable inmates.<sup>12</sup> These protocols follow in large part the system in those counties, particularly in San Francisco. Jail staff individually assesses each prisoner to decide where to house that prisoner. At the time of the writing of these protocols, prisoners with male genitalia were housed in male sections of the jail.

The San Francisco system then evaluates *all* prisoners (including transgender prisoners) for heightened vulnerability in the general prison population, and will segregate prisoners found to be vulnerable. Housing assignments are reevaluated regularly, and may vary according to the prisoner's behavior, appearance, and the supply of housing available.

“Vulnerable” means presenting a higher than average risk of being victimized in the general prison population. Consequently, the segregation is not based on membership in any one group, but rather on the risk any one inmate may run by being placed in the general prison population. Vulnerability is based on physical appearance (e.g., small build, effeminate behavior, MTF transsexual presentation), youth, or membership in a group targeted often by others (gay men, transgender people). This screening system allows jails to accommodate the needs of transgender inmates who may not fit in with the general population, while at the same time protecting vulnerable inmates from others who, though ostensibly members of a minority group, have a history of victimizing others in that group.<sup>13</sup>

County jails that are too small to accommodate separate units for vulnerable inmates could borrow from or share space with other county jails. However, shared housing among jails faces significant obstacles in the Bay Area. First, few, if any, county jails in the Bay Area have extra space. Second, housing an inmate in another county subjects that inmate to that county jail's rules, which may be more restrictive. For instance, in the San Francisco County Jail, an attorney may visit a client in the jail at any hour of the day, and be given a private room for use during the consultation. However, if that client were housed in Alameda County Jail, the attorney would be required to make an appointment ahead of time and to talk with the client through a glass partition. Third, housing an inmate in another county can make contact with family members more difficult. For these and other reasons, shared or borrowed facilities present administrative obstacles. All jurisdictions involved would have to agree on a common set of guidelines.

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<sup>12</sup> Alameda County, Cal.; Los Angeles County, Cal.; Multnomah County, Or.

<sup>13</sup> This is based on objective criteria, such as whether the inmate has: been charged or convicted of a violent crime; a record of disruption or non-cooperation; a history of escape attempts; a history of victimizing others; and marked or severe symptoms of mental illness that may require special housing.

### *Protective Custody/Administrative Confinement/Solitary Confinement*

Transgender inmates should not be housed in “protective” or solitary confinement indefinitely simply because it may be more convenient for the jail than securing less restrictive safe housing. A jail risks liability under the 8<sup>th</sup> and 14<sup>th</sup> Amendments if it houses transgender inmates in “protective custody” (i.e., administrative or solitary confinement) for an indefinite period of time simply on the basis of the inmate’s transgender status. This is true even if the justification is ostensibly the inmate’s safety. Administrative or protective confinement is subject to 8<sup>th</sup> Amendment scrutiny,<sup>14</sup> and is also subject to due process.<sup>15</sup>

Administrative and solitary confinement are punitive forms of housing. Conditions beyond one’s control are not punishable.<sup>16</sup> Therefore, insofar as “protective custody” starts to be punitive the county may risk violating the 8<sup>th</sup> Amendment.

### *Access to Services*

Several inmates in the San Francisco County Jail protective unit in B pod County Jail 8 complained that they had less access to jobs than other inmates in the jail. While they acknowledged that the B pod facility marked a significant improvement for transgender inmates, they nevertheless remarked that within the pod they are highly isolated from other inmates, forbidden to talk to other inmates outside their limited portion of the unit, and unable to utilize other facilities in the unit (e.g., game boards, exercise equipment). They also described a sense of being on display (e.g., after official “lights out” at night, the lights in their cells remain on longer than those in other parts of the unit, putting them on display).

Some of the potential dangers in having a separate unit for vulnerable inmates are limited access to programs and services, increased isolation, and being put on display. In the administration of such a separate unit, the jail will need to ensure that the unit’s inmates have equal access to jail jobs and other services, and that the unit is not administered in a punitive manner that makes it excessively isolating or turns it into spectacle for other inmates.

### *Clothing and Cosmetics*

Wearing clothing and cosmetics appropriate for their gender identity is essential to the well-being of many transgender inmates.<sup>17</sup> In the June 2001 meeting of the Trans and Gender-Variant in Prison Project, one of the members of the group reported that in California state prison, the transgender inmates are not permitted to wear clothing appropriate for their gender. For example, male-to-female transgender prisoners housed with the male inmates were not allowed to wear bras. This is true even for those inmates who had developed breasts.<sup>18</sup> Transgender inmates would often resort to making their own undergarments out of the clothing provided by the prison, but were then punished for destroying state property.

For over twenty years, San Francisco County Jail has permitted transgender inmates to wear gender appropriate clothing. This policy must be consistently and diligently enforced.

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<sup>14</sup> *McCray v. Burrell*, 516 F.2d 357 (4<sup>th</sup> Cir. 1975).

<sup>15</sup> *Hewitt v. Helms*, 459 U.S. 460, 466 (1983).

<sup>16</sup> *Robinson v. California*, 370 U.S. 660, 666-67 (1962).

<sup>17</sup> *Id.*

<sup>18</sup> Meetings with Trans and Gender-Variant in Prison Project, *supra* note 16.

### *Genital Sex and Gender*

At the time of this writing, in the San Francisco jail system, the unit, or pod, for vulnerable inmates was “male” only, meaning only inmates with male genitals are placed there. There was no analogous unit in the women’s jails for vulnerable female inmates because physical violence is reportedly so rare among women inmates that no such special unit is needed. Consequently, a pre-operative female-to-male transsexual would be placed in the women’s jail, regardless of whether he had a beard, lacked breasts, or otherwise presented as male.

Title 15 of the California Board of Corrections’ Regulations (CCR) requires that inmates be segregated by sex. However, it does not define sex or require that jails use genitalia to determine sex. While these protocols recognize this statutory restraint, they also note that transgender inmates will in most circumstances be housed more safely with inmates of the same gender. Following the example above, a non- or pre-operative FTM inmate is safer among the males of a vulnerable unit of prisoners than among women; likewise, a non-operative MTF transsexual who is on hormones is more safely housed among women under most circumstances.

### *Housing by gender identity, not genitalia*

Many jail systems follow an Objective Classification System for housing inmates. In the past, San Francisco’s Objective Classification System segregated inmates based on genitalia, regardless of gender presentation.<sup>19</sup> The primary purpose of this segregation is to protect females from assault by males, not to maintain privacy.

However, the “genitalia rule” complicates, rather than simplifies, jail administration. A male-to-female pre-operative inmate is at greater risk in a segregated unit for vulnerable males than in the general female population. A transgender female housed in a male facility often becomes a ready target for verbal and physical abuse and harassment.<sup>20</sup> However, it is permissible to house transgender women in a “vulnerable women” pod within the women’s facility.

Correspondingly, female-to-male inmates should not be housed in the general female population. Under the old policy, this was often the case because few female-to-male inmates have undergone genital surgery. Because FTM inmates are often physically stronger than most women, housing them with females potentially endangers the safety of the women. FTMs who have had genital surgery should be housed in the general male population. FTMs who have not had genital surgery should be housed in the vulnerable male population.

A genitalia-based classification policy arguably creates administrative problems and potentially opens jails to civil liability.<sup>21</sup> By following these protocols, the jail can accomplish the same goal of safe housing while refraining from infringing on the dignity of the inmate as much as possible.

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<sup>19</sup> See Darren Rosenblum, *‘Trapped’ in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism* 6 MICH. J. GENDER & L. 499, 500-05 (2000). The law presumes that genitalia can be categorized as strictly either male or female. However, this categorization is highly arbitrary in the case of transsexual and intersexed people. Consequently, any attempt to reform the legal system faces a tension between working within the system’s definitions of terms such as “male” and “female” in order to effect change, and on the other hand challenging the objectivity of those definitions.

<sup>20</sup> See *Farmer v. Brennan*, 511 U.S. 825 (1994); *Crosby v. Reynolds*, 763 F. Supp. 666, 667 (D. Me. 1991).

<sup>21</sup> See *Farmer v. Brennan*, 511 U.S. 825 (1994).

### *Other Counties in the Bay Area*

Following is a brief survey of policy in other Bay Area jurisdictions as it affects transgender inmates. With regard to hormone therapy, most jurisdictions provide hormones only if the inmate is already on hormone therapy at the time of incarceration. Medical personnel at the San Francisco jail evaluate new inmates for hormone therapy on a case-by-case basis if the inmates have not started hormone therapy, but have been evaluated by the Tom Waddell Transgender Clinic of the Public Health Department.

Alameda County operates two jails, a North County Jail and a Santa Rita Jail. Both jails segregate by genitalia. In the Santa Rita Jail, transgender inmates with male genitalia are segregated into a separate pod along with gay males and other vulnerable males, analogous to the San Francisco system. Unlike San Francisco, however, Alameda segregates inmates by "lifestyle," as opposed to vulnerability, and refers to these separate units as "alternative lifestyle" units. "Lifestyle" in this case means being gay or transgender.

Marin County has no specific written policy on the treatment of transgender inmates. As of July 2001, it was reported that the County Jail housed only one transgender inmate in the previous 18 months. Marin County Jail segregates inmates by genitalia, operates a vulnerable male unit analogous to San Francisco, and provides inmates housed therein with all of the same medical care and jail services that other inmates receive.

San Mateo County has very limited housing for vulnerable inmates, including transgender inmates, and has housed transgender inmates in the San Francisco County Jail in the past.

### COMMENTARY ON SECTION III: MEDICAL TREATMENT

Being able to commence and continue hormone therapy is a crucial interest for many transgender people.<sup>22</sup> While county jails are required to *maintain* transgender inmates on hormone therapy that commenced before incarceration, they are not required to *start* an inmate on hormone therapy.<sup>23</sup> Jails are only required to provide "some" treatment for gender dysphoria. Psychotherapy without hormones is considered sufficient treatment under the 8<sup>th</sup> Amendment.<sup>24</sup>

However, the medical community recognizes that hormones are "medically necessary" treatment for some transgender people.<sup>25</sup> According to Joseph Goldenson, M.D., head of medical services in the San Francisco County Jail, there has never been a formal policy prohibiting the commencement of hormone therapy in the county jail. In the past, a pattern of practice was established to defer the start of hormone therapy until release. This deferment occurred for three reasons:

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<sup>22</sup> Meetings with Trans and Gender-Variant in Prison Project, *supra* note 16; Debra Sherman Tedeschi, *The Predicament of the Transsexual Prisoner*, 5 TEMP. POL. & CIV. RTS. L. REV. 27 (1995).

<sup>23</sup> *South v. Gomez*, 2000 U.S. App. LEXIS 3200 (9th Cir. Feb. 25, 2000) (cessation of hormone treatment while incarcerated caused prisoner to suffer physical and emotional damage and therefore amounted to cruel and unusual punishment).

<sup>24</sup> *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7<sup>th</sup> Cir. 1987); *Lamb v. Maschner*, 633 F. Supp. 351 (D. Kan. 1986).

<sup>25</sup> *See Doe v. Dep't of Pub. Welfare*, 257 N.W.2d 816, 819 (Minn. 1977).

1. Jail practitioners were not familiar with the process, and were therefore hesitant to initiate the therapy;<sup>26</sup>
2. Inmates tended to be in county jails for relatively short periods of time, rendering the evaluative process, initiation of medication, and follow-up lab studies impossible to complete;
3. Because there was no life-threatening condition at stake, the jail medical personnel preferred to defer initiation of hormone therapy until release.

Given that the hesitancy to start hormone therapy derives from the perceived lengthy evaluation and counseling process and the usually short time span of county jail incarceration, training jail staff in the evaluation and counseling procedure would be helpful for two reasons. First, a transgender inmate could then start the evaluation and counseling process while in jail, putting him or her that much further ahead in the decision-making process upon release. Second, if the inmate had already engaged in the evaluation and counseling process prior to incarceration and hormone therapy was recommended, then the jail could simply continue the process by starting the hormones (in fact, some inmates who had been followed by the Tom Waddell Transgender Clinic of the Public Health Department were started on hormones in jail as a continuation of their treatment).

During the interviews, many current and former inmates stated that one of the contributing reasons for incarceration of transgender individuals was the poor self-esteem of some transgender people who were without the benefit of hormone therapy.<sup>27</sup> It may be useful for future recidivism studies to investigate the impact of hormone and other therapy on transgender inmate recidivism rates.

#### *Recommendations For Recruitment And Training*

Recruits for the Sheriff's Department should be screened for anti-transgender prejudice in a manner similar to the screening techniques for other forms of prejudice (e.g., racial). Likewise, the Sheriff's Department should encourage and welcome transgender job applicants and new hires as part of its recruiting, outreach, and hiring efforts.

State law requires training of law enforcement staff in gender issues.<sup>28</sup> The training should address transgender culture and its diversity; medical issues faced by transgender people, including hormone therapy and surgery; and discrimination against transgender people in the general society. The training should review pertinent anti-discrimination laws and ordinances, as well as these protocols for transgender inmates. The training should also instruct on how to house transgender inmates safely, and how to address them respectfully. Transgender people should participate in conducting this training.

Sergeant Stephan Thorne of the San Francisco Police Department and Jamison Green have developed a transgender training for police departments which could be adapted for use in county jails (they have already conducted a training for Berkeley Police Department, Berkeley CA).<sup>29</sup>

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<sup>26</sup> For evaluation and counseling protocol see the Tom Waddell Clinic, 101 Grove St., San Francisco, Cal.

<sup>27</sup> Meetings with the Trans and Gender-Variant in Prison Project, California Prison Focus Office (June, July 2001).

<sup>28</sup> CAL. PENAL CODE § 13519.4 (Deering 2001) (Requires inclusion of gender and sexual orientation in cultural diversity training).

<sup>29</sup> JAMISON GREEN, TRANSGENDER TRAINING FOR LAW ENFORCEMENT OFFICERS (1999) (Jamison Green can be contacted by e-mail at JamisonG@aol.com).

### *Review of the implementation of these protocols*

In order to ensure the successful implementation of these protocols, we recommend periodic reviews by the National Lawyers Guild and Human Rights Commission. The review could consist of meeting with transgender inmates and discussing the different issues that the protocols addressed or by asking the inmates to complete a survey. This could occur six months after the initial implementation of the protocols and annually thereafter.

### *Conclusion*

While the policy of the Sheriff's Department makes a strong effort to address transgender needs in jail, many current and former inmates complain that equitable treatment varies dramatically from deputy to deputy, with many jail personnel treating the inmates in a derogatory manner. The Sheriff's Department needs to engage in training regarding transgender issues and need to bring their protocols in line with local ordinances regarding gender non-discrimination.

These protocols are therefore offered to provide a framework for developing improved law enforcement protocols. Improved protocols would increase the safety of transgender people and thereby increase their willingness to cooperate with the police and jail. At the same time, improved protocols would decrease the city's potential liability for civil suits.

However, transgender problems within the criminal justice system are not reserved to San Francisco. Therefore, though primarily addressing San Francisco, these protocols are nevertheless designed for application in other jurisdictions in the Bay Area.

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*For further information:*

The San Francisco Human Rights Commission  
25 Van Ness Ave.  
Suite 800  
San Francisco, CA 94102-6033

<http://www.ci.sf.ca.us/sfhumanrights>

415-252-2500

(The Human Rights Commission mediates and investigates complaints of discrimination, including gender identity discrimination)

The National Lawyers Guild  
558 Capp St.  
San Francisco, CA 94110

415-285-5067

*Advocates for people who have been assaulted:*

Community United Against Violence  
160 14th St.  
San Francisco, CA 94103

[cuav@aol.com](mailto:cuav@aol.com)  
<http://www.cuav>

415-777-5500

24 hour Support Line: 415-333-HELP

*Advocates for transgender people who have been assaulted:*

TransAction  
160 14th St.  
San Francisco, CA 94103

415-777-5500, x315

*To file a complaint against a police officer:*

Office of Citizen Complaints  
480 Second St.  
Suite 100  
San Francisco, CA 94107

415-597-7711

## APPENDIX A Investigations by police

### I. Investigative Stops and Searches of Persons by Police

- a. In order to perform an investigative stop, a police officer must be able to point to specific and articulable facts that causes the officer to suspect that “(1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity.”<sup>1</sup>
- b. No police stop or questioning is justified if it is based solely on a general characteristic or membership in a general group.<sup>2</sup>
- c. A person's mere presence in a location where a crime might occur is not sufficient alone to justify an intrusion by police.<sup>3</sup>
- d. Searches related to an investigative stop may only be conducted to detect weapons<sup>4</sup>, contraband<sup>5</sup>, or other evidence<sup>6</sup> related to the purpose of the investigative stop (NOT gender or genitalia).
- e. When responding to a complaint, police must address the complaint. A complaint or call for help from a transgender person must not be ignored or simply turned into an investigation of the caller.
- f. Police will treat the person appropriate to the person's gender presentation. This includes addressing transgender persons by their adopted name and using the pronouns appropriate to the gender presentation.

#### COMMENTARY ON APPENDIX A: INVESTIGATIVE STOPS AND SEARCHES

Many members of the transgender community living in San Francisco complain that the police regularly presume that transgender people are engaged in prostitution or involved in drug use simply by virtue of being transgender. Without any particularized suspicion, the police tell transgender people on the street to "move along," or "go home." However, many transgender people in San Francisco who are low-income have episodes of homelessness which drive them onto the street. Many do not have cars and do not use public transportation to avoid being at risk in a tightly enclosed crowd. Some transgender people of color also have experienced racial profiling when they have been singled out of a racially mixed crowd of transgender people by the police. Such harassment unfairly targets low-income transgender people.

Worse, the police often stop transgender people for questioning and searches, again without any particularized suspicion. Some police are reported to behave in a manner solely calculated to humiliate the person stopped: demanding the person's "real" name, despite valid I.D.; addressing the stopped person

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<sup>1</sup> *In re Tony C.*, 21 Cal. 3d 888, 893 (Cal. Sup. Ct. 1978).

<sup>2</sup> *United States v. Berry*, 670 F.2d 583 (5th Cir. 1992).

<sup>3</sup> *Brown v. Texas*, 443 U.S. 47 (1979).

<sup>4</sup> *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

<sup>5</sup> *People v. Superior Court*, 3 Cal. 3d 807, 813-816 (Cal. Sup. Ct. 1970).

<sup>6</sup> *People v. Johnson* 231 Cal. App. 3d 1, 15 (Cal. Ct. App. 1991).

in inappropriate terms (e.g., calling a male-to-female transgender woman "he" instead of "she"), ripping off hair pieces and otherwise harassing the person on the basis of gender identity.

In addition, many transgender people complain of being searched by the police not to find weapons or contraband, but merely to determine the stopped person's genitalia. These searches often occur when the person is under suspicion merely of a misdemeanor, such as prostitution.

When performing an investigative stop, police must be able to point to specific and articulable facts which reasonably warrant the intrusion.<sup>7</sup> This means that in order for police suspicion to be reasonable enough to interfere with a person, that suspicion must be based on particular facts about that particular person.<sup>8</sup> Consequently, no police stop or questioning is justified if it is based solely on a general characteristic or membership in a general group.<sup>9</sup> Moreover, a person's mere presence in a location where a crime might occur is also insufficient to justify an intrusion by police.<sup>10</sup>

In addition, when conducting a search pursuant to a stop, police may only search for weapons, contraband, or other evidence related to the purpose of the investigative stop, not to determine genitalia.<sup>11</sup> Police may only conduct a strip search of an arrest for a misdemeanor if the misdemeanor involves violence, contraband, or weapons or if a police officer has a reasonable belief that the arrestee possesses a weapon or contraband on her person.<sup>12</sup> A court has already awarded damages against the City and County of San Francisco for conducting an unconstitutional search of a transgender person.<sup>13</sup>

Transgender community members also complain that many police also ignore acts of violence committed against transgender people and in some cases even themselves commit acts of violence against them. Transgender community members complain that when they call the police to report being assaulted and battered, some police officers ignore the complaint and start investigating the transgender victim. Over the past three years (1998-2000), Community United Against Violence has also noted a steady increase in reports by transgender persons of violence done to them by police officers. In the Bay Area in 2000, "fifty percent of the attacks against transgender women were committed by law enforcement or security personnel," which accounted for approximately eight percent of all reported accounts of violence against members of the lesbian gay bisexual transgender (LGBT) community.<sup>14</sup>

As a result, the transgender community's trust in the police is significantly low. In order to restore that trust, the police will have to be trained and disciplined to investigate people only on grounds of particularized suspicion. The Police Department needs to develop written protocols to address this and other concerns. Finally, training on transgender issues and independent oversight of the police department are needed to remedy the violence and indifference by the police department reported by members of the transgender community.

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<sup>7</sup> *Terry*, 392 U.S. at 30 (1968).

<sup>8</sup> *United States v. Cortez*, 449 U.S. 411, 418 (1981).

<sup>9</sup> *United States v. Avery*, 137 F.3d 343, 346 (6<sup>th</sup> Cir. 1997); *United States v. Berry*, 670 F.2d 583, 599-600 (5<sup>th</sup> Cir. 1992).

<sup>10</sup> *Brown v. Texas*, 443 U.S. 47, 52 (1979).

<sup>11</sup> *See Terry v. Ohio*, 392 U.S. 1, 30 (1968), *People v. Superior Court*, 3 Cal. 3d 807, 813-816 (Cal. Sup. Ct. 1970), *People v. Johnson* 231 Cal. App. 3d 1, 15 (1<sup>st</sup> App. Div 1991).

<sup>12</sup> CAL. PENAL CODE § 4030 (f) (Deering 2001).

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