Health Implications of Housing Assignments for Incarcerated Transgender Women

Transgender women (i.e., persons who were assigned male sex at birth but who live and identify as female) experience forms of discrimination that limit their access to stable housing and contribute to high rates of incarceration; once incarcerated, the approaches used to assign them housing within the jail or prison place them at risk for abuse, rape, and other outcomes. Yet, a paucity of studies explores the implications of carceral housing assignments for transgender women.

Whether the approaches used to assign housing in jails and prisons violate the rights of incarcerated transgender persons has been argued before the US federal courts under Section 1983 of the US Constitution, which allows persons who were raped while incarcerated to claim a violation of their Eighth Amendment rights.

Reforms and policy recommendations have been attempted; however, the results have been mixed and the public health implications have received limited attention. (*Am J Public Health*. 2020;110:650–654. doi:10.2105/AJPH.2020.305565)

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In 2018, Baćak et al. called for the field of public health to begin addressing the disproportionate incarceration of lesbian, gay, bisexual, transgender, and queer (LGBTQ) persons.[1] Rates of incarceration are highest among transgender women (i.e., persons who were assigned male sex at birth but live and identify as female), who are disproportionately impacted by forms of discrimination (e.g., employment discrimination) that increase their risk of both housing instability and incarceration.[2–4] Housing is widely considered a social determinant of health; from an equity perspective, everyone deserves a safe and healthy place to live.[5] This need for safe housing exists not only in community settings, where several reforms (e.g., changes to antidiscrimination policies) have already began to improve access to safe housing for transgender women, but it also extends to the carceral settings (i.e., jails, prisons) where a disproportionate number of transgender women will spend some portion of their lives.[6] Because transgender women are at high risk for sexual assault and other forms of violence while incarcerated, where and how they are housed during periods of incarceration has serious implications for their physical and mental health.[7] Yet, how housing assignments in carceral settings affect this population has received limited attention.

Precise estimates of the prevalence of incarceration among transgender women vary. In a San Francisco, California, study, an estimated 65% (335 of 515) of transgender women had histories of incarceration.[8] In another study, however, only 19.3% (748 of 3878) did.[9]

The elevated rates of incarceration increase the risk of ever experiencing physical or sexual abuse. According to the 2011–2012 National Inmate Survey, 12.2% of incarcerated persons who identified as lesbian, gay, bisexual, or other (non-heterosexual) orientation reported being sexually victimized by another incarcerated person; an additional 5.4% reported being victimized by staff. By contrast, only 1.2% of heterosexual incarcerated persons reported being sexually victimized by another incarcerated person and 2.1% by staff.[10]

Estimates of violence in prison are difficult to obtain. The available estimates likely underreport exposures to violence. An estimated 30% of persons incarcerated in a Texas prison did not report sexual assault because of embarrassment, 29% because of retaliation, 21% because of fear of harassment by other incarcerated persons, and 7% because they did not want to be sent to protective custody.[11,12] Before the implementation of various rape shield laws across the country, it was permissible to use victims' sexual history or previous allegations of violence to cast doubt on their moral character and thus discredit their allegations of sexual assault. This tactic dissuaded victims from reporting sexual assault cases.[13] To better protect witnesses, all 50 states, the federal government, and the District of Columbia passed different versions of the rape shield laws in the 1970s and 1980s; however, they do not protect victims fully. For instance, in California, the rape shield law does not apply if the rape occurs in a local detention or state jail or in prison.[13] The repercussions for transgender survivors of sexual assault is notable as many have histories of sex work.

Besides sexual victimization, transgender persons are also at higher risk for HIV and other sexually transmitted infections, mental health issues, suicide, and substance abuse,[14] which can be exacerbated behind bars depending on housing assignment. In this article, we respond to the call by Baćak et al.[1] by addressing the

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This article was accepted January 2, 2020.

doi: 10.2105/AJPH.2020.305565

treatment of carceral housing assignments for transgender women as a public health issue.

HOUSING IN COMMUNITY AND CARCERAL SETTINGS

For transgender women, the threats to physical and mental health associated with housing assignments begin with arrest, and they are tied to both the type of facility to which one is assigned (male vs female) and the unit within the facility where they will reside. Despite medical advances that treat transgender women based on the fluidity of gender identity[14] and court decisions affirming their civil rights,[15] prisons and jails continue to rely primarily on one's genitalia or their sex assigned at birth to decide where to house persons, including transgender persons, entering jail or prison.[16] Typically, officials make the determination about a detainee's sex as male or female upon arrest. Based on this approach, transgender women are routinely assigned to facilities designated for men.

They are also frequently placed in solitary confinement units known as administrative segregation or "ad-seg," even though such units are usually reserved for people who either were convicted of violent crimes or who committed an offense while incarcerated. Prison abolitionists consider such units a form of torture, because people assigned to them have minimal interactions with other human beings and no access to jobs, treatment programs, or basic privileges such as phone use.[17] The resulting isolation and alienation adversely affect mental health.[18]

ATTEMPTS AT LEGAL INTERVENTIONS

Whether the approaches used to assign transgender persons housing in carceral settings are safe and legal has been argued before US federal courts based on Section 1983 of the US Constitution, which states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" (US Const. amend. VIII). Thus, transgender persons raped while incarcerated may allege a violation of their Eighth Amendment rights.[19,20] To prove the violation, the incarcerated person must meet 2 prongs. The first, an objective prong, requires proof of a serious medical need or of the seriousness of deprivation. The second, a subjective one, requires incarcerated persons to prove prison administrators acted with deliberate indifference. Courts have interpreted the rulings from the cases as setting forth humane conditions for confinement that ensure incarcerated persons receive adequate food, clothing, shelter, and medical care.

In a 1995 case filed in the US District Court of California, Bianca Lucrecia, who was born male, sued the regional director of the Federal Bureau of Prisons, Samuel Samples, after being transferred to an all-male prison in Boron, California.[19] Before incarceration, she had begun female hormone therapy, developed breasts, and had her testicles removed. Nevertheless, upon incarceration, she was housed in a cell with 3 cis (i.e., nontransgender) men, forbidden to wear female undergarments, and instructed to dress in a manner that would conceal her female physical characteristics. Incarcerated persons and prison staff harassed, abused, and degraded Lucrecia because of her feminine appearance. Prison guards physically assaulted, strip-searched, and fondled her. Lucrecia's requests to be treated as a female were denied by prison officials on the grounds that her pre-sentence report identified her as a 32-year-old White male. In a similar case, Kelly McAllister received threats and slurs based on her transgender identity, but she was nevertheless assigned to share a cell with a cis male who raped her brutally.[21]

Cases involving transgender women arrested while still undergoing medical transitions from male to female highlight unique considerations for health care. In a case heard by the US Court of Appeals, Michelle Kosilek sued the commissioner of the Massachusetts Department of Corrections, Luis S. Spencer, for refusing to provide sex reassignment surgery (SRS) to treat her gender dysphoria,[20] which the American Psychiatric Association defines as a conflict between a person's physical or assigned gender and the gender with which they identify. Kosilek argued that SRS was medically necessary.[22] Federal courts have upheld the rights of transgender persons to receive gender-affirming care, including in the case of Kosilek.[23] In 2012, the District of Massachusetts Court ordered the Massachusetts Department of Corrections to provide SRS for Kosilek. As we have shown, violations of the Eighth Amendment rights of transgender women also have public health implications. Dee Farmer, who had undergone considerable physical transformation but whose surgery to remove her testicles was unsuccessful was transferred to an all-male penitentiary in Terre Haute, Indiana, where she was forcibly raped and sexually assaulted.[21]

Challenges and barriers arise for transgender women trying to meet both prongs as needed to establish a violation of the Eighth Amendment. For example, what constitutes medical need may be contested. For a condition to be considered a medical need, either a physician must mandate treatment or the need for treatment must be obvious, even to a layperson. In Kosilek's case, the Department of Corrections requested multiple opinions regarding the medical necessity of SRS asserting that the provision of other ameliorative treatments, such as antidepressants, gender-appropriate clothing, electrolysis, and hormonal treatment should suffice to treat her gender dysphoria. However, an independent evaluation of the case conducted by the Fenway Institute, a leading organization dedicated to addressing the health and health care needs of the LGBTQ population, found that these affirmatives were not comparable to SRS. Kosilek was so significantly distressed by her male genitalia that she had attempted self-castration and twice attempted suicide. The Fenway report concluded she might attempt suicide again if her request for SRS were denied.[20]

Establishing a medical necessity can also be difficult for those whose sexual identity or gender expression requires no psychological, hormonal, or surgical treatment.[24] As with all medical care, treatment of gender dysphoria and related conditions should be individualized given some transgender persons may not wish to undergo surgical procedures. Cruel and unusual punishment is not limited to the physical and sexual abuse that incarcerated persons may suffer; it also encompasses the mental and emotional damage that comes from the denial of medical treatments and the failure to recognize incarcerated persons

according to their gender identity.

Meeting the subjective prong is challenged by the burden placed on the plaintiff to prove that prison officials knew their actions might cause harm, and that they acted with deliberate indifference or wanton disregard for the transgender plaintiffs. Proving this is further challenged by the qualified immunity prison administrators have, which is intended to shield them from liability (i.e., if acting in accordance with penological objectives, such as maintaining order and safety, they are shielded from liability).

The process of making a claim is challenging, and the high burden of proof needed to win a case likely prevents many transgender women from pursuing any legal action. Indeed, such complaints rarely reach a court.[13] Incarcerated persons must first meet the exhaustion requirement of the 1996 Prison Litigation Reform Act, which requires them to submit their claims through all the sequential administrative channels of the jail or prison. If a claim does reach the court, then prison officials may challenge the allegations by asserting that they did not know their decisions could inflict harm. While prison officials have substantial leeway in contesting the claims, incarcerated persons are not permitted access to prison records that might support their case.

The ramifications of housing assignments go beyond the potential for immediate physical and sexual abuse. Some transgender persons are diagnosed with gender dysphoria while incarcerated.[25] Gender dysphoria can lead to severe psychological distress and intense emotional pain that if left untreated can result in dysfunction, debilitating depression, suicidality, and even death.[24,26] Being placed in a housing unit that does not align with an individual's gender identity exacerbates these issues by limiting access to gender-affirming sources and other support. In addition, the strip searches that are routinely performed on all incarcerated persons, especially those performed before other incarcerated persons or prison staff, expose transgender persons to humiliation, ridicule, sexual harassment, and violence.[8]

Transgender women, like others, prefer to define their identity for themselves and have it be accepted and validated by others. By relying on genitalia and sex at birth to classify incarcerated persons, the criminal system directly undermines one's ability to define her identity for herself. It is not uncommon for transgender women to resort to self-harm, substance abuse, and risky sexual behavior in attempts to reclaim their identities.[27] Dixen et al. reported that 9.4% of transgender women sex reassignment applicants reported self-mutilation.[28] Suicide and suicide attempts are also prevalent among transgender persons, especially among those diagnosed with gender dysphoria. Clements-Nolle et al. documented depression among 62% of 392 transgender women, 32% of whom had attempted suicide.[29] De Cuypere et al. reported a lifetime prevalence of attempted suicide of 55% in this population with recent studies supporting similar figures.[30–32]

The Minority Stress Model, a theoretical framework for understanding the complex web of factors influencing the health of LGBTQ people, suggests the need for social support may be particularly strong for members of this population because they experience multiple, compounded layers of social stigma, isolation, and stress.[33]

Some individuals might turn to substance abuse as a way to cope with the discrimination, stigma, and social marginalization. The Transgender Community Health Project survey conducted in 1997 in San Francisco observed that 34% of transgender women had a history of injection drug use.[34] Substance abuse can also lead to engaging in risky sexual behavior, which increases the risk of HIV/AIDS. Transgender women tend to be more sexually active than other incarcerated persons, not only because of rape and coerced sex but also because of coerced prostitution while incarcerated and the need to exchange sex for protection.[21] According to Harawa et al., 13% of formerly incarcerated transgender women traded sex for money, protection, food, or other goods, with transgender women more likely to report this practice than cis men (28% vs 10%).[35]

POTENTIAL SOLUTIONS

There are no easy solutions to these problems. The movement to abolish the prison industrial complex offers the most far-reaching and permanent solution by eliminating the need to decide where to house any incarcerated persons, including transgender women.[36] The extremely high incarceration rates and extreme forms of violence associated with it make this an urgent public health issue requiring immediate reforms and policy. We offer the following recommendations.

Gender Identity Instead of Sex

Replace approaches based on one's genitalia or sex assigned at birth with flexible, self-identification systems instead. Reforms implemented in at least 2 cities illustrate how shifting from genitalia-based criteria to gender identity better accounts for the health, safety, and self-identification of transgender incarcerated persons.[18] In both Washington, DC, and Denver, Colorado, an implementing committee or review board now decides on a case-by-case basis whether each transgender person entering prison should go to a male versus female facility and which type of housing unit within the prison would be safest. Washington's transgender committee includes a medical practitioner, mental health clinician, correctional supervisor, chief case manager, and Department of Corrections–approved volunteer from the transgender community.[18] In addition to addressing the housing-related issues, the Denver review board also addresses strip searches and health care needs. Although it does not have a permanent member of the LGBTQ community, an incarcerated person may request that a representative from the LGBTQ community be present during their hearing. The review board also allows prison staff to consult with community members for assistance, though this raises several ethical questions, including privacy rights.

Federal reforms also emphasize the need to evaluate physical safety and health care needs on a case-by-case basis. For instance, one reform limits how long transgender persons can be held in administrative segregation to 72 hours (usually).[18] More recently, however, the US Department of Justice has begun rolling back policies aimed at protecting gay and transgender incarcerated persons. Furthermore, the US Bureau of Prisons continues to rely primarily on an incarcerated person's biological

sex when determining housing designation as evidenced by their policy change in the Bureau's Transgender Offender Manual.[37]

Separate Units for Gay or Transgender Persons

A second potential reform is to house incarcerated persons who identify as gay or transgender in a separate unit within the facility, similar to the K6G unit created by the Los Angeles Men's Central Jail in response to a 1985 American Civil Liberties Union lawsuit. Several important drawbacks constrain this approach. First, to make the housing available to all intended incarcerated persons, the criteria used to classify someone as gay or transgender must strike a balance between recognizing the variety of diverse identities that exist in the population versus establishing discrete, unambiguous categories.[21] To be assigned to an LGBTQ unit may also "out" LGBTQ people to other incarcerated persons, family members, and members of their home community. Finally, the segregation of units may impose a financial hardship to institutions with few transgender incarcerated persons.

Female Facilities

A third potential reform is to house transgender women in female jails or prisons. This approach might reduce risk but not eliminate risk of sexual assault as studies have shown female incarcerated persons as having perpetrated half of all incidents of sexual abuse upon other female incarcerated persons.[23] In addition, the inaccurate, stigmatizing, and transphobic trope of transgender women as "predators" exists behind bars as it does in society; therefore, prison staff and other incarcerated persons may continue to perceive transgender women housed on the basis of their gender identity as threats to the safety of female incarcerated persons.[23]

Local Guidance

Local policy recommendations have also been made. For instance, a Transgender Working Group established following a forum the Los Angeles Police Department (LAPD) hosted for the transgender community urges the codification of policies and procedures to guide how the police treat transgender persons, "including appropriate name and pronoun usage, proper arrest procedures and housing in LAPD jails."[38(p5)] One of the goals of the Transgender Working Group was to help the LAPD formally adopt a written housing policy that acknowledges individuals' gender identity and ensures their safety while in LAPD custody. The Transgender Working Group recommends developing segregated units for nonviolent transgender women in female facilities; revising the sex and gender categories used on LAPD forms and reports to accommodate the population's diversity while improving the accuracy of data about it; and mandating that invasive searches, such as strip searches, be conducted by officers of the sex requested by the transgender person and that they be conducted in private in the presence of relevant personnel only. Policies such as these may help reduce inappropriate conduct by staff, such as conducting pat-downs to determine the "real" sex of the incarcerated person, and the humiliation of transgender persons in front of other incarcerated persons. Finally, the Transgender Working Group recommends that transgender persons be allowed to keep personal items (e.g., undergarments, wigs, make-up, binders) that reflect their gender identity.

IMPLICATIONS FOR PUBLIC HEALTH PRACTICE

Poor access to housing and employment in community settings leads many transgender women to engage in behaviors that increase their likelihood of incarceration.[9,17] Once incarcerated, the housing assignments they receive often increase their risk of exposure to extreme levels of sexual and physical violence, which contributes, in turn, to adverse physical and mental health sequelae.[7] Inappropriate housing assignment during incarceration can also exacerbate isolation, psychological distress, risky behavior, and sexual abuse, and it may culminate in suicide.[3,7,27,31,32] Upon release, having a history of incarceration makes it harder for individuals to qualify for public housing, often leading to a cycle of reincarceration.[39] Cases argued before the courts highlight the need not only for legal reforms but also for public health professionals to treat housing assignments in prison as a public health problem. Public health can help by, for instance, expanding the definition of "medical necessity," documenting links between the social determinants of health (e.g., housing) and adverse health outcomes in this population and setting, illuminating the challenges transgender women face, and affirming their assessments of their lived experiences.

In addition, interventions addressing cultural and clinical competence can increase willingness to provide gender-affirming care among health care providers working in prisons.[40] While the optimal public health intervention would eliminate the disproportionate incarceration of transgender women by eradicating the root causes, the devastating impacts on this community underscore the need for immediate action in prisons and other settings, including immigration and detention centers.

CONCLUSION

The nation's legal, correctional, and public health sectors have an obligation—as well as a unique opportunity—to co-create the policies and practices needed to support the safety and well-being of transgender persons while they are in the custody of the state. Failure to do so implicates the nation and our field in contributing to the social, psychological, and health-related consequences of our collective inaction. AJPH

CONTRIBUTORS

E. Ledesma was responsible for idea conceptualization and literature review and led the writing. C. L. Ford assisted in the writing.

ACKNOWLEDGMENTS

C. L. Ford was supported by the National Institute of Nursing Research (5R01NR14789-04).

We give special acknowledgment to Karen Carson for providing feedback on the article and Carmen Ledesma for helping gather the legal cases.

Note. The views presented in the article do not necessarily reflect those of the National Institutes of Health.

CONFLICTS OF INTEREST

There are no conflicts of interest.

HUMAN PARTICIPANT PROTECTION

This review of the literature did not involve human participants. Institutional review board approval was not needed.

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