

The Lesbian, Gay, Bisexual, Transgender, or Intersex Inmate Population: “A 21st Century Dilemma!”

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Jails, prisons, and law enforcement in general across the country have been forced—either by litigation, threat of litigation, or legislation—to develop strategies to deal with a variety of social issues from which they used to be insulated. Pick your issue—AIDS, elderly populations, the differently abled, education, gangs, religious issues, etc. They have all forced jails, prisons, and law enforcement agencies to change the fundamental way they do business. Agencies have needed to change in order to accommodate the needs of people in these groups or affected by these issues, to mitigate potential liabilities, or to simply keep order in an environment that can be chaotic if not managed effectively.

One of the latest and most diverse of the social issues facing corrections and law enforcement is that posed by the gay, lesbian, bisexual, transgender, or intersex (LGBTI) inmate. Proper management of this population requires administrators to evaluate how their staff deal with them at all levels: who will search them, who will transport them, where to house them, how to provide medical care, and how to keep them safe while in custody. The LGBTI population requires humane treatment, as do all inmates. However, they also require understanding and significantly more in the way of management than inmates not in that population. This area has placed significant stress on staff and the infrastructure of our facilities at the Washoe County Sheriff's Office in Reno, Nevada.

We are confident that some of you reading this article are saying to yourself, “We don't have this issue in our facility.” To that we say, you don't know what you don't know. You have them; they just have not made themselves known. Or you may know you have them but are choosing to ignore the problem, hoping it won't bite you when you're not looking. Believe me, it will. None of us want our names or our agencies' names attached to case law in a negative light. So it's best to face the issue squarely and be prepared to take the right actions when the situation arises.

In this article, we will share our own experiences as well as those of our agency in three major areas:

- Who are you dealing with? Understanding the characteristics of LGBTI inmates.
- Where to start? Ensuring an appropriate response starting at arrest.
- What should we do, once they are in our facility? Anticipating the specifics of search, medical care, and more.

WHO ARE YOU DEALING WITH?

If you are like most public safety personnel, you are confused about LGBTI characteristics, classes, and definitions. Table 1 can help you with this. Realize, however, that no one will fit exactly into any of these classes so you will have to adapt as necessary.

Table 1. LGBTI Definitions

Sexual Orientation	The gender(s) that a person is attracted to emotionally, physically, sexually, and romantically.
Heterosexual	Man or woman who is attracted to members of the opposite sex.
Straight	Slang term used for heterosexual.
Homosexual	Man or woman who is attracted to members of the same sex.
Bisexual	A person who is attracted to members of either sex (one at a time or both at the same time).
Lesbian	A woman who is attracted to other women.
Gay	Predominantly used to describe men who are attracted to other men.
Gender Binary	A way of classifying genders that divides people into two groups—male and female, or masculine and feminine.
Gender Spectrum	A way of understanding gender that includes a continuum of possibilities of biological gender, gender identity, gender expression, and sexual orientation.
Gender Dysphoria	As defined in the DSM-V (2013), a condition in which a person feels extreme confusion and/or discomfort caused by a mismatch between his or her biological sex and gender identity.
Gender Identity	A person’s inner sense of being male or female. The gender identity may not match the biological sex of the individual.
Gender Identity Disorder	Formerly, a disorder in which a person has a strong and persistent identification with the other sex or the gender role of the other sex and is uncomfortable with his or her own biological sex or gender role. This diagnosis was replaced in the DSM-V (2013) by the diagnosis of gender

	dysphoria.
Androgyny	Having high levels of both masculine and feminine characteristics.
Transgender (“Trans”)	A term referring to people who identify or express their gender in a variety of different ways, typically in opposition to their biological sex.
Transsexual	A person who identifies with a gender other than the one he or she had at birth. (The person can be pre- or post-sex reassignment surgery.)
Transwoman	A term describing a male-to-female transsexual to signify they are female with a male history.
Transman	A term describing a female-to-male transsexual to signify they are male with a female history.
Transvestite	A person who dresses in clothing of the opposite sex. This person is not necessarily homosexual.
Intersex	A person with a physical disorder of sexual development, such that the person has gonads (testes or ovaries) of one sex but, often, ambiguous external genitalia.

We have provided these definitions not as an effort to “label” these individuals, but to assist you in identifying and understanding those individuals who may be different from the rest of your population. It is important to realize that most LGBTI people believe that none of the orientations, statuses, or conditions listed above is a choice. For some, the stigma of being homosexual or otherwise different from straight can be devastating. Without judging the “rightness” or “wrongness” of the alternative lifestyle, it seems that the LGBTI community is making strides in the U.S. with domestic partnerships and the legalization of same-sex marriage. Many heterosexuals are still uncomfortable with or even hostile toward gays. Since acceptance of gays is correlated with higher education levels, it makes sense that jail inmates tend to be more homophobic than the average American. This stands true in detention facilities nationwide as they are microcosms of society as a whole. This places the responsibility on custody staff to keep everyone safe.

Don L. Leach II, PhD (2007) describes this population by using a three-sided matrix of a “sexual being.” He describes one side of the matrix as *physiognomy* (sexual genitalia), the second side as *gender identity*, and the final side as *sexual orientation*.

This is a compelling framework for understanding. While determining the sex of a person can sometimes be difficult by outward appearance (physical characteristics and demeanor) alone, determination by examining sexual genitalia opens up a much more liability-laden process for your staff.

Lieutenant Hopkins had the following experience:

Twenty years ago I faced this dilemma after being told by a female deputy that there was a man being housed in one of our female housing units. I was certain that I would be able determine the person's sex using all of the identifiers I had learned growing up observing males and females: outward appearance, voice, facial hair, muscle tone, etc. In this situation, however, all attempts to identify the sex of the subject by the methods I had honed over the years were unsuccessful, causing me to finally opt for determining the person's gender through observation of genitalia. We had the inmate disrobe in a small room with the windows covered, with the female deputy and myself present. Ultimately, the inmate was determined to be female.

This method, although perceived to be a necessity at the time, should never have been done by detention staff, and in 2014 it may very well open your staff up to liability and litigation. What we should have done—and what we now do—is to take the inmate to our medical staff for a determination of gender. After all, this is a medical issue, not a custody issue. It becomes a custody issue after the determination is made. Have a policy in place to deal with this very issue!

The big question regarding this population is, “What do you do if you cannot determine the sex of an inmate based on a visual inspection?” What if the subject has genitalia of a male but has breasts, or has the outward appearance of a male but has the genitalia of a female? What if the outward appearance of the subject's genitalia is ambiguous, not clearly male or female, such as with an intersex inmate?

We bet you're wondering right about now, “What happened to the good old days where I was arresting bad guys, throwing them in jail, and letting them be someone else's problem?” Those days are gone, and you already have read too much and know too much to turn back. To do nothing at this point is to expose yourself and your facility to liability for “deliberate indifference.” But please keep reading! There are ways to mitigate some of this liability without building a new facility. You will however, have to review and re-write many of your policies as they relate to the LGBTI population. (But you should be doing this on a yearly basis anyway.)

If an inmate is determined to be intersex, by necessity you will have to provide the person a safe environment through segregation. If you have no way to segregate inmates, you may have to explore the option of housing the person elsewhere. What you should not do is house an inmate based solely on their sexual orientation if it is different from their genitalia. For example, if you house a genetic female in a male housing unit, the chance of this person being sexually victimized increases greatly. Although less likely, a genetic male housed in a female housing unit might also be victimized. Either way, your primary obligation is to provide a safe and secure environment.

Next, we will touch on the second side of the triad, gender identity. While gender physiognomy usually is relatively easy to determine, gender identity is far more difficult to determine, or at least to manage, because you cannot see it. Some inmates will enter the jail fully aware of a gender identity mismatch (dysphoria) and feel that they were simply born the wrong sex. Other inmates with gender identity issues may have found ways to hide their confusion, including having relationships considered normal by society based on their biologic gender. This may be due to environmental pressures from their family, their religion, or simply society's expectations. The inmate may not have a full understanding of their condition and may function normally within society until something occurs to trigger the realization.

However strong your inclination to accommodate or not accommodate these inmates, you must put on your "risk manager" hat and place them in the environment that is the safest for them and for staff and which disrupts your operation the least. In most cases, this will be based on the inmate's biologic gender. This does not preclude you from providing gender identity counseling while housing them where they are the safest.

While it is impractical to segregate each class of inmate, we must pay attention to those who absolutely cannot be placed in a general population unit, and we must enforce all rules and regulations. Predatory behavior and overt sexual behavior are the most common forms of inappropriate behavior seen in custody. These are the inmates who will place themselves and others in situations that can cause discomfort to surrounding inmates and may ultimately lead to violence. Inmates may engage in problem behaviors such as sexual misconduct, inappropriate touching, and verbal harassment. All of these high-risk behaviors place staff and inmates in potential danger.

Inmates who act in an overtly feminine or masculine manner also may attract unwanted and/or violent attention to themselves simply for being "out and proud."

Most members of the LGBTI community are not predators, of course. But simply their presence can attract a disturbance or worse, if the jail is not attentive. It is very important that jail staff realize how strongly negative some people's convictions may be in regard to the "alternative lifestyle" community. Hate is a very powerful emotion which can take over rational behavior and have dire consequences. LGBTI inmates must be protected from people who want to harm or intimidate them. Treating all inmates equally and consistently, using your officers' best discretion and judgment, can be a great tool in preventing violence within the walls of your facility.

Sexual orientation, the third part of Dr. Leach's "sexual being triad," will prove to be the most problematic aspect for jails to manage on a daily basis. Often, sexual orientation seems to change with the wind. Though it is widely accepted that sexual orientation is not learned but is innate, it sometimes seems to be situationally changeable. Human sexuality and the need for human contact is a basic drive in all humans, creating the possibility for situationally changeable preferences based on availability of sexual partners.

Let's be clear, sexual orientation must not be confused with the physical affection female inmates commonly show toward one another. Women in our society are conditioned from birth to be caregivers. Jail staff will see frequent manifestations of this, with females braiding each other's hair, holding hands, and hugging each other during times of stress. It is incumbent upon your facility to determine the level of physical contact you will allow. Our suggestion is that you severely limit physical contact between inmates, because any contact may lead to unwelcome contact or, at minimum, allegations of unwelcome contact.

WHERE TO START

The journey to providing adequate and appropriate care and custody of the LGBTI population must begin at the time of arrest. Officers on the street who make an arrest, must, at a minimum, conduct a pat search of the arrestee for weapons. When the arrestee is LGBTI, there are dynamics that are in play that simply are not there with someone who is not LGBTI. This can cause heightened liability, as well as significant psychological trauma to the arrestee, who is in an already emotionally charged situation. We know what you're thinking: "When I arrest someone, the last thing I am worried about is the trauma I am going to cause the arrestee; after all, they brought this on themselves." We understand this way of thinking and have been there countless times. However, since our job is not to punish or cause trauma, we have to ask ourselves how we would want to be treated or how we would want our family members to be treated if they were in this situation.

Understanding the need to perform your job, if you can lessen the trauma associated with the arrest, you should do that. The last thing any of us wants is to be called into court on a civil rights violation. Consider yourself a "risk manager" and manage that risk to the best of your ability. If at all possible, attempt to call someone of the gender to which the arrestee most closely associates. If the arrestee is biologically male, but most closely identifies with being female, make your best effort to have a female officer respond to the scene to either perform the search or to be present during the search. If this is not possible or is against policy, the search still must be done, so do it with the utmost professionalism. Use technology to your advantage by placing the subject in the line of sight of cameras and audio tape the contact whenever possible. It is always a good practice to have a second officer with you when conducting the search. We understand that many facilities, on receiving a biological female who most closely identifies as a male, would not necessarily call a male to conduct the initial search. After all, there is far less stigma associated with a female searching a male than the other way around. Although we understand this reluctance, the benefit to having a policy regarding LGBTI situations and following it with all inmates is that consistency will assist you in mitigating liability.

WHAT TO DO, NOW THAT THEY ARE IN YOUR FACILITY . . .

Once the arrestee is taken to the county or city jail, a myriad of issues come into play. Do you ask the person what gender of officer they would like to search them? What if an unclothed visual inspection is

necessary or is required by your policy? Where will this person be housed? Is the person likely to be victimized based on their gender or their sexual orientation? Finally, when do you determine the answers to these questions? There are no hard and fast answers, but you had better ask them and prepare policies to address them.

How will staff know that an arrestee is LGBTI? Frankly, they may not know until they are told by the inmate, and the inmate may choose not to disclose his/her status. However, if a staff member has identified an offender as LGBTI based on appearance or being told by the arresting officer, steps can be made to accommodate the inmate and begin the liability mitigation process. The first principle, and one of the most important things staff must strive for, is professionalism at all times. To do this, they must keep their personal opinions and beliefs about alternative lifestyles, gender roles, gender identification, and gender identification disorders to themselves. Their opinions and beliefs, whether tolerant or intolerant of alternative lifestyles, must not be conveyed to the in-custody inmate at any time.

Searching

As far as an initial inventory search when the arrestee first arrives, a policy of asking an LGBTI person what gender they would like to have search them is appropriate. Some facilities have the inmate sign a form regarding their preference. Your medical staff should be brought into the conversation at this point as well. There may be a time when medical or psychiatric personnel will need to become involved in the care and custody of the inmate. It is also at this point that your classification personnel need to be notified, either in person or through documentation. We are not suggesting a report be written every time a subject comes in who may be LGBTI, but a classification questionnaire that is forwarded to the appropriate personnel may be more easily managed. By bringing medical and classification staff into the situation early in the incarceration process, the liability mitigation process immediately begins. This can help an agency sidestep the “deliberate indifference” allegation that so often accompanies litigation connected with any type of victimization while the individual is in custody.

Some agencies require that an unclothed visual search must be conducted for inmates who are being moved from the intake area to housing. Because the staff member has to view the genitalia of the inmate, the unclothed visual search should be conducted by an officer of the same gender—not sexual orientation—as the inmate. If a same-gender officer is unavailable, but technology such as a body scan machine is available, take full advantage of this and use it as a tool. Your final option may be to use civilian medical staff to complete the visual inspection. This should only be done as last resort because of the medical staff’s lack of training in visual inspections and to ensure officer safety. Smaller jails will sometimes opt for leaving the inmate in a holding cell in the intake area until a same-gender officer comes on shift. While this is certainly an option and in some cases a necessity, remember that once an inmate is brought into your facility, you are bound by the Eighth Amendment to provide protection from cruel and unusual punishment. Agencies need to be careful to review and improve, if necessary, their processes in this area.

Medical and Housing

Once an inmate is cleared for housing, the determination of where to house the inmate should already have been made, either by custody staff or medical staff. As stated earlier, while the initial search may be done by staff of the gender with which the inmate most closely identifies, the housing decision should be based on the physical sex of the inmate if it can be determined reliably. To house otherwise may encourage victimization. Also keep in mind that although segregation may be necessary at first and in the short term, continued segregation must be on a case-by-case basis and based on the safety and security of the facility, the overall functioning of the facility, and the welfare of the inmate. Continued segregation that is not based on these criteria may lead to litigation. Medical staff and, more importantly in most cases, classification staff should be very familiar with issues surrounding the LGBTI inmate population in order to provide the safest and most efficient environment possible.

Another issue is that of the initiation of or ongoing hormone therapy that may be provided to this population. You may encounter some inmates who have begun hormone therapy to change their physiognomy. This is a very involved process that usually requires in-depth medical consultation and often years of therapy to assist them in this transition. Although detention facilities are commonly required to provide medical treatment, including medications, you should be in conversation with your medical provider on this issue. If hormone therapy for gender re-assignment is classified as a pre-existing condition, the cost may be borne by the inmate rather than your medical provider or your county or city. If the inmate has private insurance, the cost may be submitted to their insurance provider. The Washoe County Sheriff's Office, in cooperation with our contracted medical provider, chooses to continue providing hormone therapy to individuals who are currently on these medications when arrested. We do not normally accept medications brought in by the inmate off of the street; however, in the case of hormone therapy, after confirmation of the medication and conference with the treating physician, we continue the therapy as prescribed. When discussing the continuation of current therapy, you must consider that these medications assist in changing a person's gender, so stopping therapy can have not only physiological affects but psychological affects as well.

Where this issue becomes muddy is when gender reassignment is considered a "serious medical need" and the jail may be considered to have an obligation to continue treatment while the inmate is in custody. Case law such as *Kosilek v. Maloney*, 221 F.Supp.2d 156 (D. Mass. 2002) and *Wolfe v. Horn*, 130 F.Supp.2d 648 (E.D.Pa. 2001) characterizes "transsexualism" or "transgenderism" as a serious medical need, referred to as gender identity disorder (GID), a psychological disorder. GID was recognized as a serious medical need due to the psychological issues associated with the diagnosis, such as suicidal thoughts and actions and self mutilation. While understanding the necessity of having this diagnosis to receive treatment, the LGBTI community was not always willing to accept the diagnosis of a psychological disorder involving gender identity. (In 2013, the American Psychological Association removed the diagnosis of GID from its *Diagnostic and Statistical Manual*, Fifth Edition, replacing it with the diagnosis of "gender dysphoria.") More recently, the January 2014 decision of the U.S. Court of

Appeals, First Circuit, in *Kosilek v. Spencer* has further affirmed the principle of corrections agencies' duty to respond to a serious medical need. Advocates for the LGBTI community are likely to justify continued hormone therapy at the cost of the facility, not the inmate, on the precedent set by these cases.

In 2005, the State of Wisconsin passed an inmate sex change prevention act, which barred prison doctors from providing transgender inmates "medically necessary" hormone therapy or sex reassignment surgery while in custody. The American Civil Liberties Union (ACLU) and Lambda Legal sued, arguing the law was discriminatory in that it cruelly singled out transgender people by denying them, and only them, the medical care they need. On August 5, 2011 the U.S. Court of Appeals for the Seventh Circuit struck down the law, upholding the rights of transgender people to receive this medical care while in custody. The court was cited as saying *"Surely, had the Wisconsin legislature passed a law that DOC inmates with cancer must be treated only with therapy and pain killers, this court would have no trouble concluding that the law was unconstitutional. Refusing to provide effective treatment for a serious medical condition serves no valid penological purpose and amounts to torture."*

Whereas the Wisconsin decision clearly determined that the state must provide continued medical treatment for gender identity disorder while inmates are incarcerated by the state, it does not delineate the difference between incarceration by the state and incarceration by county and city entities. It also does not deal with the issue of starting hormone therapy for transgender persons in custody when they had not previously been receiving this medical treatment. We could find no case law requiring hormone therapy to be started while in custody if no previous treatment is documented. The average length of stay for an inmate at the Washoe County Sheriff's Office varies but is currently no longer than 23 days. While starting therapy in custody may be unlikely, it is an issue that must be vetted by your legal counsel.

Clothing

The issuance of clothing, or allowance of the purchase of clothing, also are topics we deal with at our facility. Your decision on whether to use the color or style of issued clothing to indicate the gender or classification of your inmates (or to dress your inmates in one color and style of uniform) will dictate your stance on clothing for LGBTI inmates. Consistency is the key to avoiding liability. Agencies should articulate, through written policy, your reasoning for either method—and then follow that policy. If your facility has chosen to allow the purchase of clothing through commissary, be prepared for the issue of males buying female clothing and females buying male clothing. The latter is by far the most common in our jail, because women in our society frequently wear items such as boxer shorts or muscle shirts with little to no negative feedback. Men, on the other hand, are seldom allowed by society to purchase and openly wear—without ridicule—clothing designed for women. Because of this societal dynamic, a jail may decide to limit the purchase of clothing based on biologic gender and housing rather than gender identity. The aim is to protect the inmate from unnecessary ridicule or possibly physical harm.

LEARNING MORE

It is highly recommended that you spend some time reviewing the latest publication on the LGBTI population published by the National Institute of Corrections, *Policy Review and Development Guide: Lesbian, Gay, Bisexual, Transgender and Intersex Persons in Custodial Settings*. This guide documents an in-depth study of issues involving the LGBTI population and gives case law associated with their recommendations. The guide also touches on issues surrounding youthful offenders and the LGBTI population that have not been addressed in this article.

The more you know about the LGBTI community, its composition, the needs these types of detainees may bring into your jail, and the potential pitfalls of addressing these issues inadequately, the more equipped your facility will be to provide a safe and secure environment and to sidestep potential liability and litigation. Our intent was to not only provide you with a baseline knowledge of this inmate population, but give you insight into some of the issues you are or will be facing. Remember to treat others with respect and dignity and practice your risk management skills whenever possible.

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http://community.nicic.gov/blogs/national_jail_exchange/archive/2014/03/03/the-lesbian-gay-bisexual-transgender-or-intersex-inmate-population-a-21st-century-dilemma.aspx

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