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PERSPECTIVE

SF jail housing policy a big step

By Sanford Jay Rosen and Aaron Fischer

On Sept. 10, San Francisco's sheriff, Ross Mirkarimi, announced that transgender prisoners who identify as female will soon be allowed to participate in educational and vocational programming in the women's jail housing facility. By the end of the year, the city plans to house transgender prisoners based on their preferred gender identity, regardless of their gender as assigned at birth. The policy will immediately affect the six transwomen currently at the jail, all of whom are currently segregated from the jail's general population. This is a considerable advance for transgender people, who have been among the most marginalized in our society.

Transgender individuals face harassment, violence and other abuse at staggering rates throughout society. Transgender prisoners are particularly at risk. A recent study found that 59 percent of transgender prisoners in California's male prisons reported having been sexually assaulted — more than 13 times the overall rate.

This horrific state of affairs persists despite the Prison Rape Elimination Act, passed by unanimous vote in Congress in 2003. The law was meant to address the high rates of rape and other violence in our prisons and jails. The PREA and its implementing regulations specifically mandate enhanced protections for transgender prisoners given their unique vulnerability. Under this law, prison and jail officials must give serious consideration to each transgender prisoner's circumstances and views. The PREA specifically provides for housing prisoners based on their gender identity rather than assigned gender alone. Unfortunately, implementation of the PREA nationwide has been decidedly slow, with compliance efforts lagging or stalled in many states.

San Francisco's new policy is consistent with the PREA, and once again makes the city a leader in advancing LGBT rights as well as the PREA's key objectives. The city now has joined several prison and jail systems in other cities, counties and states that have implemented similar policies — including Cook County, Ill.; Denver, Colo.; Washington D.C.; and Washington state. The Los Angeles County jail system has designated a separate unit for gay and transgender prisoners, and New York City's jail on Rikers Island recently established a specialized unit for transwomen prisoners. San Francisco's policy may go further than those of some of these other systems by making it the *presumption* that prisoners be housed based on their gender identity.

These reforms reflect the American public's evolving views about the transgender and broader



The New York Times
Ross Mirkarimi, the sheriff of San Francisco in San Francisco in July.

LGBT community. Progress towards social justice for LGBT people, like progress for other historically marginalized groups in America, runs on many tracks — social, political, academic and grassroots. Recent developments highlight another common thread: In this country, all people — regardless of race, religion, national origin, age, disabilities, sex, sexual orientation or sexual identity — must be afforded treatment by government that recognizes our common humanity and dignity. This idea was at the core of Justice Anthony Kennedy's majority decision in *Obergefell v. Hodges*, affirming same-sex couples' constitutional right to marry. See, e.g., Sanford Jay Rosen, "In Praise of Justice Kennedy's Jurisprudence of Human Dignity: The Lasting Take Away from the *Obergefell* Decision," <https://casetext.com/posts/in-praise-of-justice-kennedys-jurisprudence-of-human-dignity>.

Recent success in protecting transgender people's rights and human dignity are inextricably linked to more general progress in eliminating discrimination based on gender and sexual orientation. It may be more than happenstance that on June 26, the day that the U.S. Supreme Court announced its decision in *Obergefell*, the 9th U.S. Circuit Court of Appeals decided that a California transgender prisoner could pursue her claim that the state had violated her constitutional rights in denying her medically necessary genital sex reassignment surgery. In *Rosati v. Igbinoso*, the 9th Circuit held that the prisoner's allegations — that she had been denied appropriate care pursuant to a blanket policy against providing such surgery, in reckless disregard of the excessive risks to her health — were sufficient to state a claim under the Eighth Amendment's ban on cruel and unusual punishment. Six weeks later, the California Department of Corrections and Rehabilitation settled a similar case involving another incarcerated transwoman. For the first time, CDCR agreed to provide sexual reassignment surgery when medically necessary. It also agreed to treat and house the prisoner as a female, and to review and revise its statewide policies on these subjects.

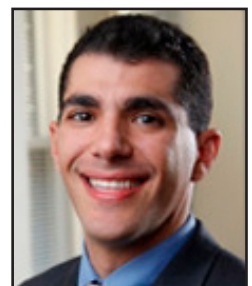
Earlier this month, we saw yet another example of how our constitutional principles lead us to reject old and unfair stereotypes about sex and gender, and towards greater equality. In *Sassman v. Brown*, Chief Judge Morrison C. England Jr. of the Eastern District of California held that California's Alternative Custody Program, which provides for the early release of female (but not male) nonviolent prisoners, violated the Fourteenth Amendment equal protection rights of male prisoners. The court rejected the state's arguments for the unequal treatment of men and women, finding no basis to "justify keeping fathers but not mothers from their children." Applying well-established constitutional principles, the court affirmed all Americans' rights to be free of invidious discrimination on the basis of gender. The Supreme Court's *Obergefell* decision and the 9th Circuit's *Rosati* decision may well have been on Judge England's mind as he penned his strongly worded decision in *Sassman*.

The path to justice and equal treatment for transgender people and other marginalized groups in America is slow and rarely moves in a straight line, but by and large it is a one-way route. Evolving American values and social movements propel us forward on civil rights, while the U.S. Constitution and the primacy of the rule of the law keep us pointing in the right direction. We have every reason to expect other jurisdictions to follow San Francisco's leadership in its treatment of transgender prisoners.

Sanford Jay Rosen is a partner at *Rosen Bien Galvan & Grunfeld LLP* and **Aaron Fischer** is an associate at the firm. Representing *Bay Area Lawyers for Individual Freedom (BALIF)*, we wrote and our firm filed an *amicus curiae* brief supporting a transgender prisoner's lawsuit seeking sex reassignment surgery, in the case *Norsworthy v. Beard*. Our firm also is lead counsel in the *Sassman* case, and filed *amicus curiae* briefs in the Supreme Court in the *Obergefell*, *Proposition 8*, and *DOMA* cases, as well as other *amicus curiae* briefs in cases involving LGBT issues in the 9th and 3rd Circuits.



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