

**“ONE IS NOT BORN, BUT BECOMES A WOMAN”: A FOURTEENTH  
AMENDMENT ARGUMENT IN SUPPORT OF HOUSING MALE-TO-FEMALE  
TRANSGENDER INMATES IN FEMALE FACILITIES**

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I. INTRODUCTION

Renita<sup>1</sup> is a successful hair stylist and business owner. She is a beloved daughter and friend to many. She is also a bipolar, male-to-female transgender individual currently sitting in solitary confinement in a male Texas prison for a non-violent offense. She has been placed in solitary confinement for her own safety. However, her weak mental state is being compromised for her physical safety. This sacrifice is being made in vain because despite being housed in solitary confinement, Renita has been repeatedly beaten and raped. Now, in addition to her regiment of bipolar medication, she is being treated for HIV.

Transgender individuals defy society’s rigid conception of what it means to be male or female. As a result of this nonconformity, they are marginalized, humiliated, and discriminated against.<sup>2</sup> This marginalization and discrimination is oftentimes felt at an early age, when some transgender youth are ostracized by their families because of their perceived difference.<sup>3</sup> This leads to a disproportionate number of transgender youth living in foster care, juvenile detention centers, or on the streets,<sup>4</sup> where their access to transgender-specific medical care, like hormone treatment, and their

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<sup>1</sup> Name changed to protect the inmate’s identity.

<sup>2</sup> See Nancy J. Knauer, *Gender Matters: Making the Case for Trans Inclusion*, 6 PIERCE L. REV. 1, 46 (2007) (“To the contrary, a transgender individual can be subject to ridicule, harassment, and violence when her/his gender expression and/or embodiment does not match her/his legal gender.”).

<sup>3</sup> SYLVIA RIVERA LAW PROJECT, “IT’S WAR IN HERE”: A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN’S PRISONS 12 (2007) [hereinafter *IT’S WAR IN HERE*], available at <http://www.srlp.org/files/warinhere.pdf>.

<sup>4</sup> *Id.*

ability to determine their gender expression may be limited.<sup>5</sup> As a result of domestic instability, detention, and homelessness, a fair number of transgender youth—mostly poor students of color—do not receive an adequate education.<sup>6</sup> Those who are able to go to school face discrimination from their fellow students, teachers, and administrators, which prompts many transgender students to drop out<sup>7</sup> or negatively impacts their ability to learn.<sup>8</sup>

Discrimination and marginalization do not stop with adulthood, and neither do the consequences of unemployment and homelessness. A 2008 study estimated that unemployment for the transgender population ranged from 23% to over 50%, compared to 10% unemployment nationally.<sup>9</sup> Some in the transgender community find it very difficult to find employment because of the observed incongruence between their gender identity and their birth-assigned sex. One male-to-female (“MTF”)<sup>10</sup> individual captures the problem, stating “Look at me. [Prostitution is] the only line of business some of us can get. They aren’t going to hire us at Target. Only real girls get hired at Target.”<sup>11</sup> There is very limited legislation in place to prevent employment discrimination in hiring practices or wrongful termination if a transgender person is already employed.<sup>12</sup> Without gainful employment or a safe learning environment, and oftentimes without legal recourse to protect

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<sup>5</sup> Knauer, *supra* note 2, at 47 n.222.

<sup>6</sup> See JAIME M. GRANT ET AL., NAT’L GAY AND LESBIAN TASK FORCE & NAT’L CTR. FOR TRANSGENDER EQUAL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 33 (2011) [hereinafter INJUSTICE AT EVERY TURN], available at [http://www.thetaskforce.org/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf); IT’S WAR IN HERE, *supra* note 3, at 12.

<sup>7</sup> *Id.* at 13 (detailing a survey conducted of transgender people in Washington D.C. that found that 40% of the participants were high school dropouts).

<sup>8</sup> *Id.* at 12–13 (finding that 64% of LGBT youth questioned reported feeling unsafe in school, producing “a climate in which many transgender youth find themselves unsafe and unable to complete educational programs”).

<sup>9</sup> Lorie Sexton et al., *Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men’s Prisons*, 27 JUST. Q. 835, 847 (2010), available at <http://dx.doi.org/10.1080/07418820903419010>.

<sup>10</sup> For purposes of this Comment, “MTF” is defined as “[a] person who transitions ‘from male to female,’ meaning a person who was assigned male at birth, but identifies and lives as or hopes to live as a female.” INJUSTICE AT EVERY TURN, *supra* note 6, at 180. I will also use the term “transgender woman” and “trans woman” as synonyms. *Id.*

<sup>11</sup> Sexton et al., *supra* note 9, at 847 (internal quotation marks omitted).

<sup>12</sup> See Dean Spade, *Introduction: Transgender Issues and the Law*, 8 SEATTLE J. SOC. JUST. 445, 446 (2010) (reporting that 97% of transgender people reported experiencing some form of workplace harassment or discrimination because of their chosen gender identity or expression).

their rights to engage in such activities, some transgender individuals turn to criminal activity to provide for themselves.<sup>13</sup>

Many transgender people are incarcerated for minor offenses like loitering and sleeping outside due to homelessness or “survival crimes” like sex work and distribution of black market hormone therapy.<sup>14</sup> In fact, in a recent national survey analyzing the responses of over 6000 transgender participants, respondents that were homeless were 2.5 times more likely to be incarcerated than those who were not homeless,<sup>15</sup> while those who performed sex work were four times more likely to be incarcerated than the overall sample.<sup>16</sup> Additionally, transgender individuals, especially those who are Black or Latino, are profiled by the police as sex workers, a practice referred to as “Walking While Transgender.”<sup>17</sup> This form of profiling makes it more likely that they will get arrested for solicitation without cause<sup>18</sup> or for minor infractions like not having identification that matches their gender expression.<sup>19</sup> Many times, transgender persons are unable to afford an attorney who would adequately represent their interests, which may lead to long prison sentences for minor offenses.<sup>20</sup> For these reasons, transgender persons are sent to prisons at an alarming rate where they are subject to heinous assaults against their bodies and personhoods.

The overwhelming majority of jails, prisons, and detention centers house transgender individuals according to their birth-assigned genders or genitalia.<sup>21</sup> While following such a bright-line rule may facilitate easier prison administration, it subjects transgender inmates to horrific degradation, assaults, and sexual violence. Although most new inmates must

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13 IT’S WAR IN HERE, *supra* note 3, at 11–16 (explaining that transphobia and other forms of discrimination preclude transgender individuals from taking advantage of educational and employment opportunities, which in turn may motivate them to commit survival crimes like theft, drug sales, and sex work to make ends meet).

14 *Id.* at 15.

15 INJUSTICE AT EVERY TURN, *supra* note 6, at 106.

16 *Id.* at 65; *see also* Sexton et al., *supra* note 9, at 854 (reporting that over 40% of MTF inmates surveyed in California have participated in sex work).

17 INJUSTICE AT EVERY TURN, *supra* note 6, at 158.

18 *Id.*

19 IT’S WAR IN HERE, *supra* note 3, at 16.

20 *Id.*

21 *See* NAT’L CTR. FOR LESBIAN RIGHTS, RIGHTS OF TRANSGENDER PRISONERS I (2006), available at <http://www.nclrights.org/site/DocServer/RightsofTransgenderPrisoners.pdf?docID=6381> (“Transgender people who have not had genital surgery are generally classified according to their birth sex for purposes of prison housing, regardless of how long they may have lived as a member of the other gender, and regardless of how much other medical treatment they may have undergone. . . .” (footnote omitted)); *see also* Farmer v. Brennan, 511 U.S. 825, 829 (1994) (“The practice of federal prison authorities is to incarcerate preoperative transsexuals with prisoners of like biological sex . . .”).

prove themselves masculine enough to resist becoming a “punk”<sup>22</sup> or being “turned out”<sup>23</sup> by a stronger inmate to secure a position atop the prison hierarchy, the feminine characteristics of MTF inmates’ bodies and mannerisms make them particularly vulnerable to the sexual desires<sup>24</sup> of sex-deprived male inmates.<sup>25</sup> Therefore, the question is not whether a MTF inmate will become a punk or “housewife”<sup>26</sup> but *when*, and by *which* alpha male inmate or group of inmates.<sup>27</sup> Without the ability to choose her placement within the rigid prison caste system, a MTF inmate must either surrender without physical opposition or face repeated rapes<sup>28</sup> and other forms of sexual violence. Although there are not a lot of reliable statistics on the incidences of prison rape and sexual assault perpetrated against MTF inmates,<sup>29</sup> countless personal experiences of MTF inmates recount repeated instances of violent rapes, coercive sex,<sup>30</sup> and sexual slavery inside this nation’s prisons.<sup>31</sup>

Many institutions recognize the extremely high probability of sexual assault against MTF inmates and house them in protective custody or in a separate wing of the prison designated for “vulnerable” inmates.<sup>32</sup> However,

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22 A punk is a weak inmate who cannot defend himself or does not try to defend himself from sexual advances. MARK S. FLEISHER & JESSIE L. KRIENERT, *THE MYTH OF PRISON RAPE: SEXUAL CULTURE IN AMERICAN PRISONS* 175 (2009).

23 To be “turned out” means to have been a heterosexual male “on the street” who is forced to have sex inside prison. *Id.* at 187.

24 Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUM. J. GENDER & L. 185, 204 (2006) (“Notwithstanding the desire to think otherwise, individuals continue to have an affirmative interest in sexual expression even during institutionalization.”).

25 HUMAN RIGHTS WATCH, *NO ESCAPE: MALE RAPE IN U.S. PRISONS* 74 (2001) [hereinafter *NO ESCAPE*], available at <http://www.hrw.org/legacy/reports/2001/prison/report.html>.

26 A “housewife” is a male inmate who takes on a traditionally feminine role and cares for a “husband,” or male inmate who plays the man role in the relationship, cell. FLEISHER & KRIENERT, *supra* note 22, at 166.

27 *Id.*

28 For purposes of this Comment, “rape” within the male prison context refers to forcible anal and oral sex.

29 IT’S WAR IN HERE, *supra* note 3, at 5. *But see* INJUSTICE AT EVERY TURN, *supra* note 6, at 167 (reporting that 20% of MTF individuals surveyed responded that they had been sexually assaulted by either other inmates or by prison staff).

30 For purposes of this Comment, “coercive sex” is sexual contact where the act of sex is not physically forced, but the consent to sex is through threats, manipulation, or in exchange for safety. *See generally* *NO ESCAPE*, *supra* note 25, at 67–69 (discussing coercive sex in U.S. male prisons).

31 *See generally* ALEX COOLMAN ET AL., *STOP PRISONER RAPE*, ACLU NAT’L PRISON PROJECT, *STILL IN DANGER: THE ONGOING THREAT OF SEXUAL VIOLENCE AGAINST TRANSGENDER PRISONERS* (2005) [hereinafter *STILL IN DANGER*], available at [www.justdetention.org/pdf/stillindanger.pdf](http://www.justdetention.org/pdf/stillindanger.pdf); IT’S WAR IN HERE, *supra* note 3.

32 *See, e.g.*, Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309 (2011) (discussing the Los Angeles County Men’s Jail’s practice of segregating gay, bisexual, and transgender inmates in its K6G Unit).

“protective custody” is often just another term for solitary confinement<sup>33</sup> in which the MTF inmate is in her cell for up to twenty-three hours per day, cut off from recreational, educational, and social opportunities as well as other prison privileges.<sup>34</sup> This solution is more of a punishment for not neatly falling within the prison’s definition of masculinity rather than a form of protection. Additionally, neither protective custody nor housing in a separate wing adequately protects MTF prisoners. Despite segregation, there is still the threat of abuse from other “vulnerable” inmates as well as prison staff, as illustrated by Renita’s story. This is a result of correctional staff either sexually taking advantage of MTF inmates themselves or allowing other inmates to do so.<sup>35</sup> Although taking measures beyond simply placing MTF inmates in the general population is a step in the right direction, it is not enough to protect the personal and bodily integrity of this vulnerable class of inmates.

This Comment will argue that to provide adequately for the safety of MTF transgender inmates, this nation’s jails and prisons must house them in accordance with their gender identities rather than their birth-assigned genders. To accomplish this end, this Comment will ground its argument in the Due Process Clause of the Fourteenth Amendment to argue that gender self-determination is a fundamental right, which, if recognized, would not undermine legitimate penological interests and therefore should be recognized despite incarceration. Finally, this Comment will demonstrate the feasibility and benefits of gender identity-based housing.

Part II will explore societal, legal, and medical conceptions of sex, gender, and transgender women, and how those conceptions affect prison placement. Part III will discuss MTF inmates’ experiences in prisons and catalogue the humiliation, discrimination, and sexual abuse that they endure at the hands of fellow prisoners and prison staff. Part IV will present the Fourteenth Amendment framework by which gender identity should be considered a fundamental right like other forms of decisional autonomy. Part V will balance the recognition of gender, as a constitutionally

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<sup>33</sup> See Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 540 (2009) (“Protective custody is frequently literally the same as punitive segregation.”).

<sup>34</sup> *Id.* at 537–38 (“While systems vary somewhat, people are commonly confined to a tiny cell for twenty-one to twenty-four hours a day. They often have little or no human contact except for highly limited (and often unpleasant) interactions with facility staff.”).

<sup>35</sup> See IT’S WAR IN HERE, *supra* note 3, at 25 (“Another aspect of the abuse that transgender, gender non-conforming, and inter-sex people in prison face is collaboration between correctional officers and other prisoners to implement forced prostitution and coerced sexual engagement.”); see also Arkles, *supra* note 33 (“Some trans people have reported that they are more likely to be attacked in protective custody or other forms of segregation because it is easier for abusive correctional staff to access them alone and out of the sight of other prisoners or video surveillance.” (footnote omitted)).

recognized right with legitimate penological interests to demonstrate that gender-based assignment, as opposed to genitalia-based assignment, is both a proper and feasible solution to housing MTF inmates. Finally, Part VI will conclude.

## II. CONCEPTIONS OF TRANS WOMEN: INTERSECTION OF ADVOCACY, MEDICINE, AND LAW

It is difficult to articulate with pinpoint accuracy a fully comprehensive definition of what it means to be transgender. Many attribute this difficulty to the ways in which transgender individuals defy the rigid male and female gender binaries and operate within, in between, or outside of these static regimes.<sup>36</sup> Transgender individuals, and others within the lesbian, gay, bisexual, and transgender (“LGBT”) community,<sup>37</sup> seek a broader definition of gender that incorporates the viewpoint that gender-identity and performance are determined by the person. Conversely, medicine, law, and society seek to place transgender individuals within either the female or male box through bright-line tests like genitalia and attributable sex at birth. For these reasons, each definition of what it means to be transgender will be taken in turn.

### A. *Transgender Defined: LGBT Community*

A transgender person is an individual whose gender identity is different than their birth-assigned gender.<sup>38</sup> Early on, there was a belief held within the LGBT community that in order to be considered trans, one must undergo some sort of body modification.<sup>39</sup> Now, the LGBT community has recognized the fluidity of gender identity and the many ways in which one

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<sup>36</sup> The space in between and outside of the gender binary exists as a multiplicity of gender identities/expressions, including transgender, transsexual, gender non-conforming, genderqueer, and third gender. See INJUSTICE AT EVERY TURN, *supra* note 6, at 24.

<sup>37</sup> The LGBT community, like many other communities (e.g., Black, Latino, Catholic, or deaf communities), is comprised of many different viewpoints and subjective positions. Therefore, one single definition cannot adequately account for this diversity. However, for the purposes of this Comment, the LGBT community refers to those who identify as gay, lesbian, bisexual, and/or transgender, and their allies, who are more likely to be sensitive to the needs and issues of “non-conforming” identities.

<sup>38</sup> See Anita C. Barnes, Note, *The Sexual Continuum: Transsexual Prisoners*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 599, 608 (1998) (“Transsexualism occurs when there is an incongruence between gender identity and assigned sex.” (footnote omitted)).

<sup>39</sup> Darren Rosenblum, “Trapped” in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 507 (2000) (“The use of the word ‘transgender’ in place of ‘transsexual’ reflects this shift away from the historical primacy of medical treatment, toward a growing awareness of the psychological element of gender identity . . . . The shift to ‘transgender’ rather than ‘transsexual’ reflects some hostility toward the medicalization of cross-gender identity.” (footnote omitted)).

chooses to manifest those disparate identities through gender performance. There seems to be more of a consensus that identifying as transgender or transsexual, or choosing to identify as one's preferred gender, i.e., as man or woman, is up to the individual. This focus on the individual is captured in a definition of transgender provided by the Sylvia Rivera Law Project:

Transgender is a term used to describe people whose way of understanding their own gender, or whose way of expressing their gender (clothing, hairstyle, etc.), is different from what society expects based on what gender they were identified with when they were born. This term includes a wide range of people with different experiences—those who change from one gender to another as well as those who sometimes express different gender characteristics, or whose gender expression is not clearly definable as masculine or feminine.<sup>40</sup>

While those within and sensitive to the needs and concerns of the transgender community leave the task of defining what it means to be transgender to the individual, medicine and law favor an objective definition.

#### *B. Transgender Defined: Medicine and Sexual Reassignment Surgery*<sup>41</sup>

The field of medicine strips an individual of the autonomy to determine their gender-identity at birth. Once a child is born, a quick examination of the genitalia usually determines whether one is a boy or a girl. Medicine is

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<sup>40</sup> IT'S WAR IN HERE, *supra* note 3, at 38; *see also* INJUSTICE AT EVERY TURN, *supra* note 6, at 181 (defining “transgender” as “[g]enerally, a term for those whose gender identity or expression is different than that typically associated with their assigned sex at birth, including transsexuals, androgynous people, cross-dressers, genderqueers, and other gender non-conforming people who identify as transgender. Some, but not all, of these individuals desire to transition gender; and some, but not all, desire medical changes to their bodies as part of this process.”).

<sup>41</sup> Many commentators have begun to eschew the term “sexual reassignment surgery” for a more accurate nomenclature like “gender confirmation surgery.” *See, e.g.*, Loren S. Schechter, *Gender Confirmation Surgery: What's in a Name?*, HUFFINGTON POST (Apr. 20, 2012), [http://www.huffingtonpost.com/loren-s-schechter-md-facs/gender-confirmation-surgery\\_b\\_1442262.html](http://www.huffingtonpost.com/loren-s-schechter-md-facs/gender-confirmation-surgery_b_1442262.html) (explaining that terms like “sexual reassignment surgery” imply a choice to switch genders while “gender confirmation surgery” captures the way in which surgery is used as “one of the therapeutic tools to enable people to be comfortable with their gendered self”). Though I agree with the change in terminology, I have decided to maintain use of “sexual reassignment surgery” as it is the terminology that is currently in use in the Seventh Edition of the World Professional Association for Transgender Health *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, and in case law. *See* Glenn v. Brumby, 663 F.3d 1312, 1314 (11th Cir. 2011); *In re Heilig*, 816 A.2d 68, 72 (Md. 2003); M.T. v. J.T., 355 A.2d 204, 207 (N.J. Super. Ct. App. Div. 1976); WORLD PROF' ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 97 (7th ed. 2012) [hereinafter STANDARDS OF CARE].

so reliant on this binary that parents of some intersex<sup>42</sup> children are strongly encouraged to elect corrective surgery of their child's genitalia so that the male or female box on the birth certificate can be checked.<sup>43</sup> When the child becomes able to articulate his or her gender identity, and that identity does not match with his or her assigned gender, rather than admitting that there may have been a mistake, the medical field, until recently, has attributed this incongruence to a psychiatric abnormality.<sup>44</sup>

Medicine has been unable to determine conclusively what causes a person to be transgender, but some studies suggest that it is a result of a sexual differentiation disorder affecting the brain.<sup>45</sup> However, this gap in information did not preclude the medical field from defining transgender as a psychiatric disorder for almost fifty years.<sup>46</sup> Despite vehement debates between medical professionals and transgender people, the American Psychiatric Association ("APA") continued to define the transgender experience as a psychiatric disorder.<sup>47</sup> Specifically, the psychiatric disorder was called gender identity disorder ("GID") and defined as a "significant incongruence" between one's gender identity and one's sex.<sup>48</sup> According to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition ("DSM IV") put out by the APA, a diagnosis of GID is appropriate if there is evidence of "a strong and persistent . . . insistence that one is of the other sex" and a "persistent . . . sense of inappropriateness in the gender role of

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42 The term "intersex" may be defined as "a term used for people who have differences of sex development, such as being born with external genitalia, chromosomes, or internal reproductive systems that are not traditionally associated with typical medical definitions of male or female." INJUSTICE AT EVERY TURN, *supra* note 6, at 180 (alterations omitted).

43 See Julie A. Greenberg, *The Roads Less Traveled: The Problem with Binary Sex Categories*, in TRANSGENDER RIGHTS 51, 68 (Paisley Currah et al. eds., 2006) ("[T]he medical community . . . recommended that intersex persons be surgically and/or hormonally altered at an early age so that they have the physical appearance of only one sex.").

44 See *infra* text accompanying notes 46–49.

45 Travis Wright Colopy, Note, *Setting Gender Identity Free: Expanding Treatment for Transsexual Inmates*, 22 HEALTH MATRIX 227, 231 (2012) ("There is an increasing amount of scientific evidence that gender-sex incongruity is related to how the brain structure that governs gender develops in response to sex hormones in the womb. This does not mean that transgender people have brain deformities. Instead, the gender-sex incongruity only means that the brain developed under different hormonal influences than the rest of the body." (footnotes omitted)).

46 Sally Hines, *Recognising Diversity?: The Gender Recognition Act and Transgender Citizenship*, in TRANSGENDER IDENTITIES: TOWARDS A SOCIAL ANALYSIS OF GENDER DIVERSITY 87, 92–93 (Sally Hines & Tam Sanger eds., 2010).

47 Heino F.L. Meyer-Bahlburg, *From Mental Disorder to Iatrogenic Hypogonadism: Dilemmas in Conceptualizing Gender Identity Variants as Psychiatric Conditions*, 39 ARCHIVES SEXUAL BEHAV. 461, 461 (2010).

48 Louis J. Gooren, *Care of Transsexual Persons*, 364 NEW ENG. J. MED. 1251, 1251 (2011); see also Hines, *supra* note 46, at 92 ("Transsexualism is read as a state of discord between 'sex' (the body) and gender identity (the mind).").



[one's assigned] sex."<sup>49</sup> Recently however, the APA announced that it would be replacing GID with gender dysphoria, which will be defined as a "marked incongruence between one's experienced/expressed gender and assigned gender."<sup>50</sup> This change in terminology is being made to "remove the stigma [that] transgender people face by being labeled 'disordered'" by replacing GID with a new term that "implies a temporary mental state rather than an all-encompassing disorder."<sup>51</sup> Whether gender dysphoria is considered a psychiatric disorder or a temporary mental state, there has been a widely accepted plan to treat trans people who seek medical intervention.

Many physicians rely upon the World Professional Association for Transgender Health ("WPATH") Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People ("SOC") when treating those who have been diagnosed with gender dysphoria.<sup>52</sup>

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49 Hines, *supra* note 46, at 92–93.

50 Camille Beredjick, *DSM-V To Rename Gender Identity Disorder 'Gender Dysphoria,'* ADVOCATE.COM (Jul. 23, 2012), <http://www.advocate.com/politics/transgender/2012/07/23/dsm-replaces-gender-identity-disorder-gender-dysphoria> (internal quotation marks omitted). For another definition of gender dysphoria, see STANDARDS OF CARE, *supra* note 41 at 96 (defining "gender dysphoria" as, "distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth (and the associated gender role and/or primary and secondary sex characteristics)").

51 Beredjick, *supra* note 50. Many individuals in the LGBT community resent transgender identity being labeled as a rare psychiatric disorder, and one commentator refers to medical labels such as transsexual, gender dysphoria, and gender identity as "slave names" that were "bestowed by the medical community." See Dallas Denny, *Transgender Communities of the United States in the Late Twentieth Century*, in TRANSGENDER RIGHTS, *supra* note 43, at 171, 184. However, its designation as such has been beneficial in the assertion of some legal rights. See Barnes, *supra* note 38, at 611–12 (cataloguing several cases where characterizing being transgender as a treatable "complex medical and psychological problem" has resulted in individuals getting sex reassignment surgeries paid for by Medicare as necessary medical treatments (quoting *Doe v. Dep't of Pub. Welfare*, 257 N.W. 2d 816, 819 (Minn. 1977)); see also Franklin H. Romeo, Note, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 728–30 (2005) (discussing how transgender litigants have had success in bringing disability discrimination claims under state statutes, which sometimes give broader definitions of disability than the federal Americans with Disabilities Act); Beredjick, *supra* note 50 (capturing the sentiments of Shannon Minter, Legal Director of the National Center for Lesbian Rights, who asserts that, "[h]aving a diagnosis is extremely useful in legal advocacy . . . We rely on it even in employment discrimination cases to explain to courts that a person is not just making some superficial choice . . . [but rather] that this is a very deep-seated condition recognized by the medical community").

52 Amy Ballard, Note, *Sex Change: Changing the Face of Transgender Policy in the United States*, 18 CARDOZO J.L. & GENDER 775, 789 (2012) ("The American Medical Association considers WPATH to be an authority in the field of transgender health." (footnote omitted)). Consistent with the American Psychiatric Association ("APA"), WPATH has substituted the term "gender identity disorder" with gender dysphoria. STANDARDS OF CARE, *supra* note 41, at 5–6, 69. Though WPATH recognizes that some people may experience gender dysphoria to such an extent that their distress meets the criteria for a

Recognizing the required individual nature of treatment for gender dysphoria, the SOC are intended to be flexible guidelines that allow health professionals “to assist transsexual, transgender, and gender-nonconforming people with safe and effective pathways to achieving lasting personal comfort with their gendered selves, in order to maximize their overall health, psychological well-being, and self-fulfillment.”<sup>53</sup> To achieve this end, the SOC establish criteria that health professionals may follow when providing psychological, hormonal, or surgical treatments.<sup>54</sup> Some transgender people do not feel the need for medical intervention to treat their gender dysphoria,<sup>55</sup> but for those who do, hormone therapy and various types of surgical interventions are common treatments.<sup>56</sup>

Hormone therapy is used to feminize, masculinize, or provide for an androgynous presentation of a person’s physical features.<sup>57</sup> Among other things, a patient must have a referral from a mental health professional and present “[p]ersistent, well-documented gender dysphoria” to receive hormone therapy.<sup>58</sup> Additionally, twelve months of hormone therapy is a recommended prerequisite for surgical treatments such as sexual reassignment surgery (“SRS”).<sup>59</sup> SRS unifies one’s body and mind by bringing one’s genitalia in line with one’s gender identity. Although SRS is not the only type of surgical treatment for gender dysphoria,<sup>60</sup> studies have shown that it has undeniable benefits on the overall well-being of those who have had the procedure.<sup>61</sup> In fact, despite a transition to a more progressive approach to the treatment of transgender people, many in the medical profession regard SRS as the cure for gender dysphoria.<sup>62</sup> The assertion that

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diagnosis that may be classified as a mental disorder, it also recognizes that a person should not be stigmatized by this classification. *Id.* at 5 (“A disorder is a description of something with which a person might struggle, not a description of the person or the person’s identity.”).

53 *Id.* at 166.

54 *Id.* (“The overall goal of the *SOC* is to provide clinical guidance for health professionals to assist transsexual, transgender, and gender-nonconforming people with safe and effective pathways to achieving lasting personal comfort with their gendered selves, in order to maximize their overall health, psychological well-being, and self-fulfillment. This assistance may include . . . mental health services (e.g., assessment, counseling, psychotherapy), and hormonal and surgical treatments.”).

55 *Id.*

56 *Id.* at 1, 188.

57 *Id.* at 36.

58 *Id.* at 34.

59 *Id.* at 60.

60 *See id.* at 63 (describing the other forms of surgical intervention).

61 *Id.* at 55.

62 *See* Yolanda L. S. Smith et al., *Sex reassignment: outcomes and predictors of treatment for adolescent and adult transsexuals*, 35 *PSYCHOL. MED.* 89, 94 (2005) (concluding that after undergoing SRS, the individuals studied were no longer gender dysphoric); *see also*

surgical intervention is the cure for gender dysphoria suggests the medical field's reliance on a bright-line rule that allows a check to be placed in the male or female box. Law, relying heavily on medicine for guidance, likewise relies on the clear-cut line drawn by surgical intervention.

*C. Transgender Defined: Intersections of Law and Medicine*

Though the Supreme Court has not defined gender,<sup>63</sup> it has both acknowledged and defined the term transgender.<sup>64</sup> In *Farmer v. Brennan*, the Court, relying on a definition from the medical community, defined a transsexual as “one who has ‘[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,’ and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change.”<sup>65</sup> Despite the Court's recognition of the possibility of a transgender identity and its provision of a definition, the legal system still operates within the dichotomous categories of male and female<sup>66</sup> and relies heavily on medical experts to help determine who is male and who is female<sup>67</sup> based on such indicia as chromosomes, gonads (ovaries or testes), sex hormones (estrogen or androgen predominance), internal reproductive organs (uterus or sperm ducts), external genitalia (clitoris and labia or penis and scrotum), secondary sex characteristics (presence of breasts, body hair distribution, etc.), and gender identity or psychological sex.<sup>68</sup> However, most courts apply medical testimony inconsistently,<sup>69</sup> and

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Barnes, *supra* note 38, at 611 (“[T]he only true cure remains in changing the body to fit the mind.” (footnote omitted) (internal quotation marks omitted)).

63 *Id.* at 604 (“Though the United States Supreme Court hesitates to differentiate gender from sex or to acknowledge gender as separate from sex, Supreme Court cases implicitly focus on gender stereotyping as grounds for sex discrimination.” (footnote omitted)).

64 *See* *Farmer v. Brennan*, 511 U.S. 825, 829 (1994).

65 *Id.* (citing AM. MED. ASS'N, *ENCYCLOPEDIA OF MEDICINE* 1006 (1989)).

66 Laura K. Langlely, Note, *Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities*, 12 *TEX. J. C.L. & C.R.* 101, 107 (2006) (“In contrast to the understandings of sex which give great weight to gender self-identification, the traditional social and legal view ‘produces a narrative in which biological sex is immutable, is limited to two categories, and is determined by the body—and in which gender, although socially constructed, is produced in a predictable relation to sex.’ This model maintains that one’s sex may be determined at birth simply by a quick check of an infant’s genitals. The genital check becomes the locus from which the child’s legibility is read.” (footnotes omitted)).

67 *See In re Heilig*, 816 A.2d 68, 87 (Md. 2003) (“Almost all courts have recognized that the question of whether and how gender can be changed is one where the law depends upon and, to a large extent, must follow medical facts (medical facts, in this context, to include relevant psychological facts).”); *see also* Debra Sherman Tedeschi, *The Predicament of the Transsexual Prisoner*, 5 *TEMP. POL. & CIV. RTS. L. REV.* 27, 34 (1995) (“In cases involving transsexuals, it is apparent that courts often base their decisions upon one or more of the factors used in the medical community to determine sex.”).

68 *Id.* at 31.

others will reject a medical opinion if it is contrary to their own desired outcome.<sup>70</sup> Additionally, courts that do consider medical testimony and relevant medical literature oftentimes ground their holdings on the bright-line rule that genitalia reassignment surgery provides, as seen in the following cases.

In *In re Heilig*, the Maryland Supreme Court was called upon to decide whether or not a person's sex could be legally changed to be consistent with one's gender identity. Despite concluding, inter alia, that "[s]ex reassignment surgery . . . merely harmonizes a person's physical characteristics with [their gender] identity," and "that external genitalia are not the sole medically recognized determinant of gender," the court held that a person may legally change their sex to make it consistent with their gender only if they have undergone SRS.<sup>71</sup> The court reasoned that SRS was necessary to change one's sex because of the clarity provided by genitalia consistent with claimed identity and the definitiveness that the procedure provided.<sup>72</sup> Although not a favorable outcome, the court in *In re Heilig* at least suggested that one could change his or her legal gender. Other courts have found that one is incapable of legally changing his or her gender. In *Littleton v. Prange*, the Texas Court of Appeals held that the marriage between Christie Littleton, a transgender woman, and her deceased husband was void because despite living as a woman for over twenty years and undergoing SRS, she was, as a matter of law, still a man.<sup>73</sup> There, the court relied on implicitly religious rhetoric asserting that Ms. Littleton was "created" a man and that "[t]here are some things we cannot will into being. They just are."<sup>74</sup> Similarly, in *In re Estate of Gardiner*, the Kansas Supreme Court used the Webster's Dictionary to define male and female to support

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69 See Langley, *supra* note 66, at 109 ("There is little consistency amongst courts and regulatory regimes with regard to the method by which they determine a party's gender when it is at issue. A person who in one state is deemed legally male will be considered legally female in another jurisdiction." (footnote omitted)).

70 Harper Jean Tobin, Note, *Against the Surgical Requirement for Change of Legal Sex*, 38 CASE W. RES. J. INT'L L. 393, 411 (2007).

71 *In re Heilig*, 816 A.2d at 72, 79, 87.

72 *Id.* at 87 ("The point, or relevance, of the requirement of surgery seems to lie in the assumption that, if the person has undergone sex reassignment surgery, the change has been effected, in that at least (1) the person's external genitalia have been brought into consistency with that indicative of the new gender and with other determinants of gender, and (2) the change is regarded as permanent and irreversible."). *But see* *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. Ct. App. 1999) (holding that a marriage between a man and a post-operative MTF individual was not valid and, therefore, the petitioner did not have spousal standing under a wrongful death survival statute).

73 *Littleton*, 9 S.W.3d at 231.

74 *Id.*

its finding that transgender individuals remain the gender attributable at birth.<sup>75</sup>

Many find that the requirement of SRS for legal recognition of one's professed gender identity is both unnecessary and untenable in practice.<sup>76</sup> Many physicians following the SOC will not perform SRS until the individual has persistent, well-documented gender dysphoria, has lived continuously for twelve months in accordance with his or her gender identity, has undergone hormone therapy continuously for twelve months, and can produce two referrals from qualified health professionals.<sup>77</sup> Poor trans people who do not have continued access to healthcare may find it impossible to satisfy these requirements.<sup>78</sup> Additionally some individuals may find the risks and/or costs of surgery prohibitive.<sup>79</sup> Finally, others may be apprehensive about the irreversibility of the procedure and elect not to undergo such a permanent change.<sup>80</sup> However, the judicial system is married to clear lines of demarcation to facilitate clarity and ease of administration.<sup>81</sup> It is therefore no surprise that within the prison context where ease of administration is privileged, prison officials rely on the same bright-line rule.

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<sup>75</sup> *In re Estate of Gardiner*, 42 P.3d 120, 135 (Kan. 2002) (defining “male” as “designating or of the sex that fertilizes the ovum and begets offspring: opposed to *female*” and “female” as “designating or of the sex that produces ova and bears offspring: opposed to *male*”).

<sup>76</sup> See Tobin, *supra* note 70, at 434 (arguing that the requirement of sexual reassignment surgery to recognize legal gender is unworkable in practice, unsupported by medicine or public policy, and denies transgender persons basic rights); see also IT'S WAR IN HERE, *supra* note 3, at 40 (“There is no medical rationale for linking legal recognition of a person's new gender to genital reconstructive surgery or any other specific treatment that may not be desirable, medically appropriate, or possible for all people.”).

<sup>77</sup> STANDARDS OF CARE, *supra* note 41, at 58–60.

<sup>78</sup> Dean Spade, *Medicaid Policy and Gender-Confirming Healthcare for Trans People: An Interview with Advocates*, 8 SEATTLE J. FOR SOC. JUST. 497, 498 (2010) (noting that the expense of surgery, along with a lack of coverage from private insurance or Medicaid programs, prevents most transgender people from having genital surgeries).

<sup>79</sup> See IT'S WAR IN HERE, *supra* note 3, at 40 (“[F]ewer than 3% of male-identified transgender people undergo any reconstructive genital surgery, due to the severe limitations and medical risks associated with this surgery at this time.” (footnote omitted)); see also Chinyere Ezie, *Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination—The Need for Strict Scrutiny*, 20 COLUM. J. GEND. & L. 141, 158 (2011) (estimating that the cost of SRS with the requisite hormone treatments and mental health visits is upwards of \$100,000).

<sup>80</sup> See Gooren, *supra* note 48, at 1255 (finding that although surgery improves the lives of most transgender people, 1–2% of those who undergo SRS regret the decision).

<sup>81</sup> See Tobin, *supra* note 70, at 415 (“One reason for requiring SRS is that it ‘provides a convenient and workable line for the law to draw.’ The certainty and consistency of a bright-line rule supposedly eliminate the ‘spectral difficulties’ involved in evaluating other relevant factors, such as ‘the person’s self-perception as a man or woman [and] the extent to which the person has functioned in society as [such].’” (footnotes omitted)).

#### D. Prison Placement

“An inmate with a penis is considered male; one with a vagina is considered female. It doesn’t matter whether nature or a surgeon provided the part.”<sup>82</sup>

Inmates are generally housed according to their genitalia or gender assigned at birth.<sup>83</sup> For transgender inmates, “[g]enital surgery alone usually determines whether [they] will be classified as male or female, for the purposes of prison housing.”<sup>84</sup> Therefore, transgender prisoners who have not undergone SRS are housed in male facilities, while those inmates who have are housed in female facilities. Many reasons are given for this means of classification, such as respecting the privacy interests of female inmates in women’s facilities, protecting women from potential coercive sex by MTF inmates, and preventing pregnancy.<sup>85</sup> However, these concerns are grounded in ignorance of science<sup>86</sup> and the legal, social, and prison systems’ refusals to recognize an individual’s right to self-determine his or her

82 Rosenblum, *supra* note 39, at 522 (quoting Ken Hollen, Assoc. Superintendent, Shelton Corr. Ctr., Wash.).

83 See *Farmer v. Brennan*, 511 U.S. 825, 829–30 (1994) (“The practice of federal prison authorities is to incarcerate preoperative transsexuals with prisoners of like biological sex . . . .”); Kylar W. Broadus, *The Criminal Justice System and Trans People*, 18 TEMP. POL. & CIV. RTS. L. REV. 561, 569 (2009) (“The common policy in the U.S. prisons of placing people in sex-segregated facilities based on birth-assigned gender, [a] factor leading to the high rates of sexual assault of transgender prisoners, refuses [to recognize] transgender existence by insisting that birth-assigned gender is the only relevant criteria for placement.” (quoting Dean Spade, *Trans Formation: Three myths regarding transgender identity have led to conflicting laws and policies that adversely affect transgender people*, L.A. LAWYER, Oct. 2008, at 35, 36, available at <http://www.srlp.org/files/Trans%20Formation%20Article.pdf>)); Rosenblum, *supra* note 39, at 522 (“Prison authorities generally place transgendered prisoners, regardless of the extent of their nongenital transformation, based on their genitalia.” (footnote omitted)); Christine Peek, Comment, *Breaking Out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 SANTA CLARA L. REV. 1211, 1219 (2004) (“Genital surgery alone usually determines whether a transsexual or transgender prisoner will be classified as male or female, for the purposes of prison housing.” (footnote omitted)). *But see* *Crosby v. Reynolds*, 763 F. Supp. 666, 669–70 (D. Me. 1991) (upholding a pre-trial detention facility’s decision to house a pre-operative MTF inmate in a women’s facility based on medical opinion).

84 Peek, *supra* note 83, at 1219 (alteration in original).

85 See *Tedeschi*, *supra* note 67, at 45 (using *Crosby* to point out females’ objections to MTF inmates being housed with them based on privacy concerns and discussing potential concerns arising from housing MTF inmates in female facilities).

86 See *id.* at 45–46 (“However, through the use of estrogen, a biological male becomes chemically castrated and therefore would pose less threat of sexual assault . . . . [I]f the transsexual prisoner is placed in a female facility and provided with treatment which includes hormones, the risks to the prisoner’s safety and well-being are virtually eliminated.” (footnote omitted)); see also Rosenblum, *supra* note 39, at 510 (“Estrogen significantly feminizes men, softening facial and body features, reducing body and facial hair growth, and shrinking and disabling the penis.” (footnote omitted)).

gender.<sup>87</sup> This ignorance has dire consequences for MTF inmates. By refusing to take other considerations into account when housing MTF prisoners and placing them in male prisons, prison officials are essentially throwing the sheep to the wolves. As a result of this classification, MTF prisoners are subjected to no small number of atrocities against their bodies and personhoods—including humiliation, rape, coercion, and forced prostitution—that some argue rise to the level of cruel and unusual punishment.<sup>88</sup>

### III. CONDITIONS OF CONFINEMENT

Prison is a very dangerous place. Although it is beyond the scope of this Comment, it is important to note that all prisoners are vulnerable as a result of incarceration and need adequate safety provisions. As one commentator asserts, “[a]s a class prisoners are generally considered to have . . . a high degree of vulnerability [because] correctional administrators [have] significant power over central aspects of prisoners’ daily lives.”<sup>89</sup> In addition to having one’s life monitored and controlled by prison staff, one must navigate a prison culture ruled by violent prison gangs looking to assert control through acts of violence.<sup>90</sup> Finally, many inmates other than those who identify as MTF are vulnerable to sexual assault based on characteristics like physical stature, youth, race, or perceived feminine mannerisms.<sup>91</sup>

Additionally, female-to-male (“FTM”) inmates in female facilities are also vulnerable to harassment, sexual abuse, and other forms of discrimination.<sup>92</sup> Although I recognize the importance of all individuals’ right to gender self-

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87 See Langley, *supra* note 66, at 107 (“In contrast to the understandings of sex which give great weight to gender self-identification, the traditional social and legal view ‘produces a narrative in which biological sex is immutable, is limited to two categories, and is determined by the body—and in which gender, although socially constructed, is produced in a predictable relation to sex.’” (quoting Paisley Currah, *Defending Genders: Sex and Gender Non-Conformity in the Civil Rights Strategies of Sexual Minorities*, 48 HASTINGS L.J. 1363, 1371 (1997))).

88 See, e.g., Rosenblum, *supra* note 39, at 518–19 (asserting that although placing MTF transgender inmates in male facilities is cruel and unusual punishment, only the most egregious conditions will be successfully challenged under the Court’s present jurisprudence).

89 Richard Edney, *To Keep Me Safe From Harm? Transgender Prisoners and the Experience of Imprisonment*, 9 DEAKIN L. REV. 327, 328 (2004) (Austl.).

90 See ALAN ELSNER, GATES OF INJUSTICE: THE CRISIS IN AMERICA’S PRISONS 41–48 (2004) (describing several violent prison gangs and their propensity to perpetrate inmate-on-inmate violence).

91 See *infra* text accompanying note 125.

92 See IT’S WAR IN HERE, *supra* note 3, at 32 (“As is the case in men’s prisons, authorities in women’s prisons target transgender, gender non-conforming, and intersex people in those facilities with verbal harassment, humiliation, excessive strip searches, and isolation, and refuse to recognize their gender identities.”).

determination, I have chosen to focus on MTF individuals, rather than FTM transgender individuals, within the prison context. I do this because although FTM transgender individuals face adverse conditions and discrimination while incarcerated, they would be exposed to exponentially greater risk if placed in a male facility.<sup>93</sup> Additionally, FTM prisoners do not face the same types of abuse to the same degree in female facilities as MTF prisoners face in male facilities.<sup>94</sup> Therefore, despite the recognized challenges of incarceration to all inmates, this Comment chooses to focus on the issues of confinement for MTF inmates because of the particularly inhumane treatment that results from placing a woman in a male facility.

#### A. *Humiliation*

Similar to life outside of prison walls, MTF inmates are frequent targets for discrimination and assaults against their personhoods. This discrimination begins as soon as the MTF prisoner enters the prison facility. One MTF inmate describes her humiliation during the initial intake process:

When I arrived at the reception center . . . I stepped off the bus and was strip-searched in front of two guards and about a dozen male inmates. A sergeant yelled, "Look at the tits on that one! Those are the best-looking tits I've ever seen on a man." He pointed me out to a six-foot, three-inch inmate and said to him, "You like that one, don't you? I'm going to put you in a cell with that one." Another sergeant called me "tits" and "titty man." . . . While the rest of my group went through the intake process, I was left sitting on a bench until the afternoon so that all the other intake inmates could see me.<sup>95</sup>

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93 See Rebecca Mann, *The Treatment of Transgender Prisoners, Not Just an American Problem—A Comparative Analysis of American, Australian, and Canadian Prison Policies Concerning the Treatment of Transgender Prisoners and A "Universal" Recommendation to Improve Treatment*, 15 *LAW & SEXUALITY* 91, 131 (2006) (describing that these individuals face an increased risk of sexual assault, harassment, and abuse when placed in a male facility based on gender identity); see also *INJUSTICE AT EVERY TURN*, *supra* note 6, at 168 (providing the account of a FTM detainee who recalled: "I was arrested one day regarding something minor. Due to my gender being marked as male, I was put in with the men. Within 15 minutes, I was raped by 3 different men. My mother even called and warned the officers NOT to put me in with general population as I would be an easy target. When I got out I tried to seek help from Victims Services but was denied. I was also discouraged from trying to press charges on the men.").

94 See Rosenblum, *supra* note 39, at 517 n.84 (noting that FTM inmates in female facilities do not face the same types of abuses, ostracism, or violence that MTF inmates do in male facilities).

95 STOP PRISONER RAPE, IN THE SHADOWS: SEXUAL VIOLENCE IN U.S. DETENTION FACILITIES: A SHADOW REPORT TO THE U.N. COMMITTEE AGAINST TORTURE 9 (2006) [hereinafter STOP PRISONER RAPE], available at [www.justdetention.org/pdf/in\\_the\\_shadows.pdf](http://www.justdetention.org/pdf/in_the_shadows.pdf).



Oftentimes, this discrimination is effectuated by using incorrect pronouns to refer to MTF inmates,<sup>96</sup> performing unnecessary searches for the purpose of exposing MTF inmates' genitalia,<sup>97</sup> and denying MTF inmates gender-appropriate clothing and grooming items.<sup>98</sup>

Although the use of improper pronouns may seem insignificant in light of the other atrocities suffered by MTF inmates, there are psychological scars left when one's personhood is denied and marginalized.<sup>99</sup> Additionally, the use of improper pronouns is significant to MTF inmates, and some are willing to risk punishment to demand recognition of their gender identity. Christopher Daley, former Director of the Transgender Law Center, recounted a MTF inmate's story of how she was prompted to conflict with a correctional officer who refused to refer to her by the proper pronoun.<sup>100</sup> Although she knew she would face punishment for her actions, she believed that standing up for herself was worth the consequences.<sup>101</sup>

Strip searches are particularly humiliating for MTF inmates whose bodies are not consistent with their gender identity and expression.<sup>102</sup> Excessive searches of their person are a daily reality for MTF inmates.<sup>103</sup> One MTF prisoner reported that

One or two officers got out of line—friskings [sic] and strip searches 4–5 times a day! Non-trans people don't ever get searched unless they were suspected of something. If they want to they can just put you against a wall. And everybody knows there's a big difference between patting you

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<sup>96</sup> See Letter from Christopher Daley, Dir., Transgender Law Ctr., to Nat'l Prison Rape Elimination Comm'n 6 (Aug. 15, 2005), available at [http://www.ncrighs.org/site/DocServer/prison\\_daley081905.pdf?docID=941](http://www.ncrighs.org/site/DocServer/prison_daley081905.pdf?docID=941).

<sup>97</sup> See IT'S WAR IN HERE, *supra* note 3, at 22 (giving the account of an inmate with an intersex condition who was repeatedly stripped searched for no other purpose but to view her genitalia); Sydney Tarzwell, Note, *The Gender Lines Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 180 (2006) ("Prison staff also actively participate in the victimization of transgender prisoners by perpetrating demeaning 'gender-check' strip searches [and] mocking of genitals . . ."); Letter from Christopher Daley to Nat'l Prison Rape Elimination Comm'n, *supra* note 96, at 7 (retelling the story of MTF inmates were forced by corrections officers to walk topless down the hall to retrieve their clothing for a week).

<sup>98</sup> See IT'S WAR IN HERE, *supra* note 3, at 31. *But see* Barnes, *supra* note 38, at 632 (discussing how some prison facilities allow MTF inmates to wear feminine clothes).

<sup>99</sup> Broadus, *supra* note 83, at 569 (noting that the use of improper pronouns has been "shown to be psychologically damaging").

<sup>100</sup> Letter from Christopher Daley to Nat'l Prison Rape Elimination Comm'n, *supra* note 96, at 4 (describing a woman who fought with deputies who intentionally referred to her by using male pronouns or by her former male name because her sense of self was most important to her).

<sup>101</sup> *Id.*

<sup>102</sup> See *id.* at 7.

<sup>103</sup> IT'S WAR IN HERE, *supra* note 3, at 21.

down and massaging you, feeling you up. But I couldn't say anything cause I didn't want no trouble.<sup>104</sup>

Besides being an infuriating act of humiliation,<sup>105</sup> unnecessary searches can also be a substitute for or a precursor to more violent sexual attacks by prison personnel.

Finally, the denial of gender-appropriate clothing and proper grooming supplies adds further insult to injury. Many prisons require MTF inmates to keep a male-appropriate hair length and dress in a masculine manner and refuse to allow them to wear makeup or bras, even if they have developed breast tissue through surgery or hormone treatment.<sup>106</sup> One commentator noted, “[t]his form of harassment is the kind of on-going indignity that can lead to more significant issues down the line. . . . [S]ome health problems can result from women being denied bras . . . [a]nd the lack of bras has facilitated, in a number of cases, sexual harassment.”<sup>107</sup> In addition to the physical pain caused by inappropriate clothing, many MTF inmates suffer psychological trauma from being unable to adequately express their gender identity.<sup>108</sup> In a letter to the Office of Mental Health in her New York prison facility, one inmate expressed that

I style my long hair in a feminine manner, and I'm getting picked on and called names, and everybody is laughing at me. These are coming from the correctional officers. . . . I get so depressed, and I hide under my covers and start crying, cause this isn't fair, “why me,” I've been a respectful person. I do not deserve this. I try to stay strong, and keep in mind, that soon, I will be 100% woman the way I was ment [sic] to be, but as each day go by, I hurt, and hurt, and hurt. I need weekly psychological counseling, cause I am to [sic] depressed to feel good about myself, and consintrate [sic]. And I'm asking for help. I do not want to hurt myself no more, but I need weekly counseling in private, so I can prevent any suicidal thoughts or attempts. . . . I refuse to come out of my cell until I be able to shower and shave. If I continue to be deprived of shower and shaving, I will start with a letter to Albany Mental Health Department, followed by a hunger strike.<sup>109</sup>

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104 *Id.* at 21–22 (footnote omitted).

105 *See* Letter from Christopher Daley to Nat'l Prison Rape Elimination Comm'n, *supra* note 96, at 7 (noting an encounter of humiliation and harassment where two women were forced to walk topless through male cells).

106 *See* IT'S WAR IN HERE, *supra* note 3, at 31–32; Letter from Christopher Daley to Nat'l Prison Rape Elimination Comm'n, *supra* note 96, at 4–5.

107 Letter from Christopher Daley to Nat'l Prison Rape Elimination Comm'n, *supra* note 96, at 5.

108 *See* IT'S WAR IN HERE, *supra* note 3, at 32 (asserting that transgender people in prisons are more likely to suffer from depression, anxiety, and other mental health conditions than transgender people living outside of prisons).

109 *Id.*

Stories like this are not uncommon, and repeated instances of humiliation suffered at the hands of prison staff have a detrimental effect on MTF inmates' psyches.<sup>110</sup> This observation cannot be denied, nor should it be overlooked. However, the psychological scars are oftentimes hard to quantify and qualify, as they are particular to the individual, and therefore may be missed or ignored. What is difficult to overlook and what cannot be ignored is the astounding frequency with which MTF prisoners are victims of rape, coercive sex, and forced prostitution.

### B. Rape, Coercion, and Prostitution

"[T]o live [the prison] life as a rape victim and prisoner is, at times, unbearable. I endure both, but the struggle is painful and most times scary . . . ."<sup>111</sup>

Unfortunately, there are no accurate statistics regarding sexual abuse in U.S. prisons generally.<sup>112</sup> Conservative estimates suggest that around 13% of the prison population have been sexually assaulted.<sup>113</sup> Similarly, there are no accurate statistics regarding the number of MTF inmates in prison or the number of those who have been sexually assaulted.<sup>114</sup> However, a recent national survey conducted by the National Center for Transgender Equality and the National Gay and Lesbian Task Force reported that 20% of MTF inmates reported being sexually assaulted by either other inmates or prison staff.<sup>115</sup> Another survey showed that 59% of the transgender inmates

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110 *Id.* at 32 ("Multiple interviewees described the traumatic consequences of having their appearance and gender expression monitored and curtailed by policies such as those described above. These regulations create an environment in which transgender, gender non-conforming, and intersex people are more likely to suffer from depression, anxiety, and a range of other mental health conditions.").

111 STILL IN DANGER, *supra* note 31, at 5.

112 NO ESCAPE, *supra* note 25, at 10 ("Without question, the hard facts about inmate-on-inmate sexual abuse are little known. No conclusive national data exist regarding the prevalence of prisoner-on-prisoner rape and other sexual abuse in the United States. Indeed, few commentators have even ventured to speculate on the national incidence of rape in prison, although some, extrapolating from small-scale studies, have come up with rough estimates as to its prevalence.").

113 Katherine Robb, *What We Don't Know Might Hurt Us: Subjective Knowledge and the Eighth Amendment's Deliberate Indifference Standard for Sexual Abuse in Prisons*, 65 N.Y.U. ANN. SURV. AM. L. 705, 705 (2010).

114 IT'S WAR IN HERE, *supra* note 3, at 5 ("Unfortunately, very little information has been collected about transgender people and people with intersex conditions across the United States or their experiences of confinement . . . because corrections systems do not generally keep data regarding how many people in the criminal justice system are transgender or intersex or the nature of their experiences during imprisonment . . .").

115 INJUSTICE AT EVERY TURN, *supra* note 6, at 167; *see also* Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 2 (2011) (reporting a study in the California prison system which found that that 67% percent of inmates who identified as

interviewed had experienced sexual assault and 48% stated that they had engaged in coercive sex.<sup>116</sup> Despite the paucity of empirical data, there are countless accounts of MTF inmates experiencing sexual attacks, coercive sex, harassment, and forced prostitution at the hands of prison staff and fellow inmates.<sup>117</sup> In one such account, a MTF inmate stated

[I]t's war in here. . . . I'm raped on a daily basis, I've made complaint after complaint, but no response. No success. I'm scared to push forward with my complaints against officers for beating me up and raping me. I was in full restraints when the correctional officers assaulted me. Then after they said I assaulted them. All the officers say is "I didn't do it." The Inspector General said officers have a right to do that to me. That I'm just a man and shouldn't be dressing like this . . . .<sup>118</sup>

As evidenced by this account, MTF inmates may not be able to seek assistance from correctional officers who are either implicitly or explicitly involved in their abuse.<sup>119</sup> Those correctional officers who are not involved in the abuse are similarly of no help because many believe that sexual abuse is "an inevitable part of prison life for the transgender prisoner"<sup>120</sup> and thus turn a blind eye.<sup>121</sup> Without protection from prison staff, MTF prisoners are forced to navigate and survive the prison hierarchy on their own.

Prisons are organized according to a rigid hierarchy based on one's perceived masculinity or lack thereof.<sup>122</sup> At the top of the prison hierarchy

lesbian, gay, bisexual, transgender, or queer ("LGBTQ") had been sexually assaulted by another inmate, which was a rate fifteen times higher than the inmate population overall).

116 Broadus, *supra* note 83, at 570.

117 See, e.g., STILL IN DANGER, *supra* note 31 (providing several MTF prisoners' testimonies regarding their experiences of sexual abuse while incarcerated); IT'S WAR IN HERE, *supra* note 3 (giving several personal accounts of MTF inmates experiencing sexual violence in the New York State Prison System); *National Prisoner Rape Elimination Commission Testimony of Mayra Soto*, JUST DETENTION INT'L (Dec. 13, 2006), [http://www.justdetention.org/en/survivor\\_testimony.aspx](http://www.justdetention.org/en/survivor_testimony.aspx); see also Letter from Christopher Daley to Nat'l Prison Rape Elimination Comm'n, *supra* note 96, at 1 ("It has been my experience over the last four years of providing legal information and services to California's transgender communities, that sexual violence is an ever present fact of life for far too many transgender prisoners.").

118 IT'S WAR IN HERE, *supra* note 3, at 19.

119 See generally *id.* at 19 (recounting several stories of prison guards sexually assaulting MTF inmates and providing other inmates with opportunities to sexually assault MTF inmates); Benish A. Shah, *Lost in the Gender Maze: Placement of Transgender Inmates in the Prison System*, 5 J. RACE, GENDER & ETHNICITY 39, 40 (2010) ("Correctional officers . . . participate in the continuous abuse of transgender inmates, providing them with little defense and limited resources from which to demand accountability.").

120 STILL IN DANGER, *supra* note 31, at 5.

121 NO ESCAPE, *supra* note 25, at 114 (describing how prison staff believe that homosexual men and those perceived as homosexual cannot be raped because they consent to or invite all forms of sexual contact).

122 *Id.* at 65 ("[I]n most prisons, even those where correctional authorities make a reasonable effort to maintain control of their charges, an inmate hierarchy exists by which certain

are strong and dominant males, usually gang members, who “act tough, lift weights, and [are] willing to fight to settle grudges.”<sup>123</sup> In addition to the performance of masculine acts, masculinity is determined by acts of rape, as well as other forms of sexual subjugation.<sup>124</sup> At the bottom of the prison hierarchy are those with feminine characteristics, like having a small stature, being or appearing young, being of a certain race, and being or being perceived as homosexual or bisexual.<sup>125</sup> Upon entering the prison facility, new inmates are immediately tested to see where in the prison hierarchy they will fall.<sup>126</sup> Those unable to fight and resist sexual subjugation are placed at the bottom of the prison hierarchy and forced into sexually submissive roles.<sup>127</sup>

Transgender inmates, oftentimes referred to as “queens,”<sup>128</sup> are placed slightly higher than “punks” in the prison hierarchy.<sup>129</sup> This has been attributed to the fact that they are highly coveted sexual partners and because they are perceived as women, whereas punks are men who have had their manhood stolen from them.<sup>130</sup> In addition to performing sexual acts, transgender inmates are expected to perform domestic tasks, such as doing laundry, keeping the cell clean, and making the beds.<sup>131</sup> Many MTF inmates

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prisoners enjoy a great deal of power over their fellows and other prisoners are exposed to exploitation and abuse.”).

123 Peek, *supra* note 83, at 1226 (quotation marks omitted).

124 NO ESCAPE, *supra* note 25, at 73 (“[I]n the prison context, where power and hierarchy are key, rape is an expression of power. It unequivocally establishes the aggressor’s dominance, affirming his masculinity, strength, and control at the expense of the victim’s.”).

125 *Id.* at 52.

126 *Id.* at 55 (“As one inmate explained: . . . ‘A new inmate needs to come into the system ready to fight and with a strong mind.’”).

127 Peek, *supra* note 83, at 1226–27 (explaining that the inmates referred to as punks are “usually heterosexual inmates who have been forced into a sexually submissive role, often by gang rape, but also by other coercive tactics. A ‘punk’ can also be a homosexual or bisexual who rejected the ‘queen’ role described below, but was forced into a sexually submissive role (‘turned out’) anyway” (footnotes omitted)); *see also* NO ESCAPE, *supra* note 25, at 87 (“Once a prisoner has been forced into such a [sexually submissive] role, he may easily be trapped in it. The fact of submitting to rape—even violent, forcible rape—redefines him as ‘a punk, sissy, queer.’ Other inmates will view him as such, withholding from him the respect due a ‘man.’ Having fallen to the bottom of the inmate hierarchy, he will be treated as though he naturally belongs there.”).

128 Peek, *supra* note 83, at 1227 (“Another smaller class of inmates termed ‘queens’ consists mainly of transgender and effeminate homosexual inmates who are assigned female roles and referred to as females generally.” (footnote omitted)).

129 *See* Sexton et al., *supra* note 9, at 838 (“The punk is distinct from the queen and, from the point of view of inmate culture, occupies a lower status within the prison hierarchy because *he* has been forcibly ‘turned out’ or forced to play the submissive sexual role through force or threat of force.”); *see also* Peek, *supra* note 83, at 1228.

130 Peek, *supra* note 83, at 1128.

131 *Id.* at 1227.

resent being placed in this submissive role but believe that since they cannot expect protection from correctional staff, they must align themselves with a stronger male prisoner or face more undesirable alternatives.<sup>132</sup>

One such alternative for transgender inmates is to face the harsh day-to-day realities of prison life on their own. However, as multiple personal accounts demonstrate, with this alternative, it is only a matter of time before a vulnerable inmate, such as one who is transgender, is subjected to some form of sexual assault or harassment. For example, Dee Farmer, the MTF inmate at the center of the only Supreme Court case involving transgender inmates within the prison context, was brutally raped within a mere two weeks of incarceration.<sup>133</sup> Once raped, there is no turning back. The inmates become fair game and will continually be victims of sexual abuse unless they choose one of the other undesirable alternatives: prostitution for protection or protective custody.<sup>134</sup>

“There is simply ‘no free lunch’ in prison[.]”<sup>135</sup> This is especially true when it comes to receiving protection.<sup>136</sup> It is not uncommon for MTF inmates to pay for their protection by engaging in prostitution at the behest of their protector-turned-pimp.<sup>137</sup> As one transgender inmate describes,

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132 Former MTF inmates advise against aligning oneself with a stronger inmate for protection explaining that

NEVER PUT YOUR PERSONAL SAFETY IN THE HANDS OF ANOTHER INMATE! Finding a husband for protection only provides the appearance of being protected because if someone really wants you, they will take your husband down first and once he is gone, you will find that you will now be sexually serving the stronger individual. If you are foolish enough to become involved with a “shotcaller,” God be with you because then you will be used to satisfy not only the shotcaller, but the other members of his gang as well.

FORENSIC AIDS PROJECT & TGI JUSTICE PROJECT, SURVIVING PRISON IN CALIFORNIA: ADVICE BY AND FOR TRANSGENDER WOMEN 8 (2011) [hereinafter SURVIVING PRISON], available at <http://www.bentbarsproject.org/resources/surviving-prison-california-advice-and-transgender-women>.

133 Farmer v. Brennan, 511 U.S. 825, 830 (1994).

134 NO ESCAPE, *supra* note 25, at 69–70 (“[T]he victim of rape will almost inevitably be the target of continuing sexual exploitation, both from the initial perpetrator and, unless the perpetrator ‘protects’ him, from other inmates as well. ‘Once someone is violated sexually . . . that person who was violated then becomes a mark or marked . . .’ That means he’s fair game.”).

135 SURVIVING PRISON, *supra* note 132, at 8 (emphasis omitted).

136 *Id.* (“Any protection that someone offers you, or actually provides for you, you eventually will have to pay for their service(s). This payment will normally be with your body providing sexual favors . . .”); see also Dolovich, *supra* note 115, at 13 (“[Transgender inmates] may also be expected to provide sexual access to the friends or associates of their protectors, and may be rented out for this purpose—i.e., prostituted—with their protector keeping the profits.”).

137 Although mentioned as an alternative to aligning with a prison “husband” for protection, prostitution can be an element of this type of relationship. See Peek, *supra* note 83, at 1227.

Lots of the girls were pushed into prostitution—they were pushed into sexual things in order to get by. Some were just harassed, abused, spit on. Different categories depending on how you looked. Some of us got picked out as soon as we got there, even before we got classified—apparently somebody who was doing life decided they took a liking to me.<sup>138</sup>

In addition to being prostituted, transgender inmates are also bought and sold to satisfy prison debts in a form of sexual slavery.<sup>139</sup> Often this is done with prison staff having full knowledge of what is happening and sometimes even organizing it.<sup>140</sup> It is no wonder why some transgender inmates seek protective custody as an alternative to life in general population.

### C. *Separate but Unequal: Protective Custody*

Some facilities, recognizing the inherent risks involved in placing a MTF individual in general population, have chosen to house MTF inmates in segregated housing<sup>141</sup> or more commonly, in protective custody.<sup>142</sup> Protective custody units can provide a safer alternative to being housed in general population.<sup>143</sup> However, the level of safety that protective custody affords varies from facility to facility.<sup>144</sup> Additionally, protective custody is a euphemism for solitary confinement.<sup>145</sup> While in protective custody, a transgender inmate is on lock-down for twenty-three hours a day in a small cell and is cut off from recreation, educational opportunities, employment opportunities, worship services, and all forms of human contact.<sup>146</sup> One

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<sup>138</sup> IT'S WAR IN HERE, *supra* note 3, at 25.

<sup>139</sup> See Peek, *supra* note 83, at 1228 (giving an account of a transgender inmate used as a part of such a transaction who recalls: “[w]ell, naturally, I didn’t like the idea of being pimped off and all that stuff. But O.K.; when the guy was getting short, he sold me to somebody for two hundred dollars. . . . Well, if he’d a waited for a little bit longer, he’d a got five hundred bucks cause the guy was fixin to offer five hundred.”).

<sup>140</sup> See, e.g., IT'S WAR IN HERE, *supra* note 3, at 26 (“A common form of sexual abuse of transgender, intersex, and gender nonconforming people in prison is forced prostitution. In these systems, correction officers bring transgender women to the cell of male inmates and lock them in for the male inmate to have sex with. The male inmate will then pay the correction officer in some way, for example with cigarettes or money. The correction officer sometimes gives a small cut to the woman and brings her back to her cell.”).

<sup>141</sup> See *supra* text accompanying note 32; see also *National Prison Rape Elimination Commission Testimony of Cecilia Chung*, JUST DETENTION INT’L (Aug. 19, 2005), <http://www.justdetention.org/en/NPREC/ceciliachung.aspx>.

<sup>142</sup> Barnes, *supra* note 38, at 633; Broadus, *supra* note 83, at 571.

<sup>143</sup> See IT'S WAR IN HERE, *supra* note 3, at 18 (describing the safety benefits of protective custody for MTF inmates).

<sup>144</sup> *Id.*

<sup>145</sup> See *supra* text accompanying note 33.

<sup>146</sup> Dolovich, *supra* note 115, at 3–4.

former MTF inmate gives an account of her experience in protective custody:

I was placed in protective custody, which at this facility, basically meant solitary confinement. I spent my days in a small cell with no water, magazines, or programming. I was rarely taken to the yard for recreation, and my pleas for water and something to read or occupy my time with usually went ignored. The officer who guarded the unit would pretend not to hear me. This is cruel treatment that I don't think anyone should have to experience, especially not someone who has already been victimized repeatedly.<sup>147</sup>

Generally, MTF inmates may be protected from other inmates, but they are not always protected from prison staff.<sup>148</sup> The lack of observation provides prison staff the perfect opportunity to take advantage of MTF inmates.<sup>149</sup> Additionally, MTF inmates are not always adequately protected from other inmates also in protective custody. For example, after being placed in protective custody, "Sophia" was brutally raped by another inmate in protective custody, a known "predator" who had had a prior relationship with another transgender inmate.<sup>150</sup> "Sophia" explained,

When he started I yelled Stop but nobody heard me. When he was done, he left. I closed and locked my door and cried all night. I was ashamed of feeling so helpless. . . . I don't need to be an attorney to figure out that [the Florida Department of Correction's] failure to place me in a safe atmosphere is the cause of my rape.<sup>151</sup>

Finally, even if inmates are protected from prison staff and other inmates, the cost of this protection may prove to be too high, as the mental toll of isolation may require that the MTF inmate be protected from herself.

The conditions of confinement for those in segregation are inhumane, as inmates are kept in their small cells for up to twenty-three hours a day without adequate exercise, reading material, or access to sunlight or human contact.<sup>152</sup> These types of conditions wreak havoc on those with existing mental health conditions and can even cause breakdowns in sane

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147 *National Prison Rape Elimination Commission Testimony of Mayra Soto*, JUST DETENTION INT'L (Dec. 13, 2006), available at <http://www.justdetention.org/en/NPREC/esmeraldasoto.aspx>.

148 *See IT'S WAR IN HERE*, *supra* note 3, at 18 ("[Transgender inmates] report that placement in protective custody is undesirable because it makes them more vulnerable to harassment and assault by correctional officers.").

149 *See id.* (implying that the isolation and lack of cameras allows staff to sexually assault transgender inmates without fear of being discovered).

150 *See STILL IN DANGER*, *supra* note 31, at 7.

151 *Id.*

152 *See ELSNER*, *supra* note 90, at 142–43 (describing the conditions of Wisconsin's Boscobel Supermax facility).



prisoners.<sup>153</sup> This is especially so for MTF prisoners, a good number of whom suffer from preexisting mental health issues or who, because of their vulnerability in prison, are more susceptible to developing mental health issues.<sup>154</sup> Among California transgender prisoners, 70% reported having mental health issues at some point in their lives, and 66.3% reported suffering from mental health issues since being incarcerated.<sup>155</sup> Furthermore, of the transgender individuals surveyed, 41% answered that they had attempted suicide, compared to 1.6% of Americans overall.<sup>156</sup> Therefore, placing MTF inmates in isolation may protect their physical safety but may also compromise their equally important mental stability.

For these reasons, some MTF inmates find that the burdens of protective custody outweigh its benefits and choose to be housed in general population. Additionally, as a result of this harsh treatment, many commentators have observed that reliance on the cruel measures of protective custody to protect transgender inmates acts as a double punishment—on one level for the crimes that they committed and on another for being transgender.<sup>157</sup> Others have argued that placing transgender individuals in protective custody is unconstitutional.<sup>158</sup> Although MTF inmates' experiences in either general population or protective custody are a nightmare, they are experiences that one would hope end at the end of their prison terms. However, with the high occurrence of HIV and AIDS in U.S. prisons, and MTF inmates' high risk of exposure due to their repeated sexual exploitation, many transgender individuals are forced to carry with them the burden of their incarceration, even after they have stepped outside of the prison's walls.

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153 See *id.* at 146–47 (describing several Boscobel inmates' experiences with mental health treatment in the facility); see also *Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988) (recognizing that long periods of isolation can cause “substantial psychological damage” to an inmate).

154 See *Sexton et al.*, *supra* note 9, at 851.

155 See *id.*

156 See *INJUSTICE AT EVERY TURN*, *supra* note 6, at 82.

157 See *STILL IN DANGER*, *supra* note 31, at 4 (“In some cases, this isolation is difficult to endure and may constitute a *de facto* punishment for a gender identity that does not conform to societal norms.”); see also Letter from Christopher Daley to Nat'l Prison Rape Elimination Comm'n, *supra* note 96, at 6 (“By using [protective custody] for transgender prisoners, the message is being sent that a person's gender identity itself is threatening to the institution and that person must be locked away in a prison within the prison.”).

158 See, e.g., *Barnes*, *supra* note 38, at 644 (“Placing transsexual prisoners in protective custody, given their *status*, compounds the unconstitutionality of such a practice.”); *Tedeschi*, *supra* note 67, at 44 (“[I]t is quite possible that [protective custody] under certain circumstances may amount to unconstitutional infliction of cruel and unusual punishment for the transsexual prisoner.”).

*D. Short-term Bids, Long Term Consequences: HIV/AIDS and Other STDS*

HIV rates in prisons are three times higher than those seen in the general population.<sup>159</sup> “In view of the rising prevalence of HIV and AIDS in prison, sexual violence can literally mean a death sentence for rape victims.”<sup>160</sup> Although HIV/AIDS is prevalent in the transgender community,<sup>161</sup> and one study of California prisons found that anywhere from 60–80% of MTF inmates at any time are infected with the virus,<sup>162</sup> those not living with the virus have a higher risk of contracting it while incarcerated due to high incidences of rape and coerced sex, a lack of condoms, and a lack of education in the prison system to help prevent the virus’ transmission.<sup>163</sup> One former MTF inmate articulates the problem, stating,

[T]hey don’t give you condoms because they say you’re two men and you’re not allowed to have sex. What are you supposed to do? They know it’s happening. . . . What do you expect? Men go in there for a long time, don’t have sex, and then here we come? And you won’t give us condoms because you don’t think we’re having sex. But what do you expect? It’s not a coincidence. There’s no information about HIV, no condoms, no classes. There’s almost no testing. There’s nothing. And there are people getting raped all the time.<sup>164</sup>

The horrific conditions that MTF inmates are forced to endure are needless and unacceptable. These individuals should not be punished both for their crimes against society and for falling outside of society’s gender binary. To the contrary, MTF individuals owe only one debt, and that debt should be paid in an environment where they can serve their time with dignity and without fear.

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159 See Smith, *supra* note 24, at 229 (citing LAURA M. MARUSCHAK, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, HIV IN PRISONS, 2003 (Sept. 2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/hivp03.pdf> (“[T]he overall rate of confirmed AIDS among the prison population (0.51%) was more than 3 times the rate in the U.S. general population (0.15%).”).

160 Marjorie Rifkin, Farmer v. Brennan: *Spotlight on an Obvious Risk of Rape in A Hidden World*, 26 COLUM. HUM. RTS. L. REV. 273, 285 (1995) (footnote omitted).

161 Several reasons have been offered to explain the high rate of HIV/AIDS in the transgender community, including the use of black market surgical procedures and hormone therapy, and engagement in sex work to fund those procedures. See Rosenblum, *supra* note 39, at 541.

162 Sexton et. al, *supra* note 9, at 851 (citing Emily Alpert, *Gender outlaws*, INTHEFRAY (Nov. 20, 2005), <http://inthe fray.org/content/view/1381/39>).

163 IT’S WAR IN HERE, *supra* note 3, at 29.

164 *Id.*

## VI. THE FOURTEENTH AMENDMENT AND A RIGHT TO GENDER SELF-DETERMINATION

The ability to determine and express one's gender is a "prerequisite to one's legibility as human."<sup>165</sup> Although it has yet to be explicitly articulated as such by the Supreme Court, gender self-determination is a fundamental right that both law and society must recognize. Indeed, it will be shown that the Court's decisional privacy and liberty line of cases provides a space where gender self-determination can be recognized as a fundamental right. Once this right is recognized, consistent with the LGBT community's definition of what it means to be transgender, MTF individuals will have a recognized right to determine how they would like to identify. Furthermore, this right should be recognized even within the prison context to allow for gender-based classification as opposed to the current practice of genitalia-based classification.

### A. *Gender and Privacy Framework*

Framing the ability to determine one's gender as a fundamental right would probably strike most as an unnecessary endeavor. To many in both law and society, gender, viewed as synonymous with commonly held beliefs about "biological sex," is not something that one may *determine* but rather something that one *is*, as determined by one's genitalia at birth. However, gender incorporates biology, as well as other psychological and social factors, to create a person's core concept of self. Viewed through this lens, the right to self-determine one's gender identity is no longer a foreign concept. It can now be analogized with other protected fundamental rights of decisional autonomy, such as the right to determine when, how, and even if one wants to conceive a child, the right to express one's sexual orientation, and the right to be intimately associated with the person of one's choice. All of these fundamental rights have been recognized in the Court's decisional privacy and liberty jurisprudence, which has been grounded in the Due Process Clause of the Fourteenth Amendment. It is the Court's decisional privacy and liberty jurisprudence that allows for an articulation of a fundamental right to gender self-determination.

### B. *Supreme Court Jurisprudence*

A right to privacy has been firmly rooted in the Supreme Court's due process jurisprudence since Justice Douglas situated it within the penumbras

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<sup>165</sup> Langley, *supra* note 66, at 102.

of several specific guarantees in the Bill of Rights.<sup>166</sup> Since then, the Court has used the fundamental right to privacy to protect one's private information<sup>167</sup> and, pertinent here, to protect one's decisional autonomy.<sup>168</sup> Judith Wagner DeCew has defined decisional privacy<sup>169</sup> by stating

Here privacy protects a realm for expressing one's self-identity or personhood through speech or activity. It protects the ability to decide to continue or to modify one's behavior when the activity in question helps define oneself as a person, shielded from interference, pressure, and coercion from government or from other individuals. . . . [It] limits external social control over choices about lifestyle and enhances internal control over self-expression and the ability to build interpersonal relationships.<sup>170</sup>

Although the concept of decisional privacy has been met with hostility from some commentators, others have observed that the concept is "now an entrenched practice in the United States," as "[l]arge segments of the male and female public now view excluding others from 'personal' decisionmaking as a form of privacy."<sup>171</sup> However, decisional privacy is not only a mainstay of society's collective mind, it is also deeply entrenched in the Supreme Court's recent Fourteenth Amendment jurisprudence as evidenced through *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>172</sup> and *Lawrence v. Texas*.<sup>173</sup>

In *Casey*, the Court was given its first opportunity to reverse the highly controversial holding in *Roe v. Wade*, which provided that a woman in her first trimester has a fundamental right to choose to have an abortion.<sup>174</sup> The Court declined to overrule its previous decision, but did take the opportunity to articulate a broad conception of an individual's liberty interest in decisional autonomy. Speaking for the Court, Justice O'Connor stated

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166 *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

167 *Whalen v. Roe*, 429 U.S. 589, 598–99 (1977).

168 *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (expanding the right to decisional privacy to the individual where *Griswold* seemed to limit it to couples).

169 Wagner DeCew refers to this form of privacy as "expressive privacy." Judith Wagner DeCew, *In Pursuit of Privacy, Law, Ethics, and the Rise of Technology*, in *PRIVACY L. TODAY* 22, 23–24 (Anita L. Allen ed., 2011).

170 *Id.*; see also Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, in *PRIVACY L. TODAY*, *supra*, at 373, 376 ("Decisional privacy can be understood as the liberty, freedom or autonomy to make choices about one's own life, minimally constrained by unwanted government or other outside interference.").

171 Allen, *supra* note 170, at 378.

172 505 U.S. 833 (1992).

173 539 U.S. 558 (2003).

174 *Roe v. Wade*, 410 U.S. 113, 164 (1973).

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State.<sup>175</sup>

In *Casey*, the Court reiterated that the right to choose what to do with one's own body is fundamental to one's "concept of existence." Over a decade later, the Court in *Lawrence* found this same concept applicable to one's choice of sexual partner when it held that the state of Texas's criminalization of sodomy was unconstitutional.

In *Lawrence*, the Court recognized that a person had a fundamental right to choose with whom one intimately associated in the privacy of one's own home.<sup>176</sup> Here, rather than asking whether an individual has a fundamental right to engage in homosexual sex,<sup>177</sup> the Court framed the inquiry as whether two consenting adults could engage in private sexual conduct.<sup>178</sup> In answering in the affirmative, the majority introduced the emerging awareness doctrine. This doctrine holds that fundamental rights are not backward looking, and rooted in the Framers' conceptions of what rights should be fundamental, but rather are forward looking, recognizing that "society's emerging awareness may warrant constitutional protection for human rights that are just appearing on the ever-evolving horizon of liberty."<sup>179</sup> Concluding the opinion, Justice Kennedy, writing for the majority, states

Had those who drew and ratified the Due Process Clauses . . . known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.<sup>180</sup>

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<sup>175</sup> *Casey*, 505 U.S. at 851.

<sup>176</sup> *Lawrence*, 539 U.S. at 578.

<sup>177</sup> The Court in *Bowers v. Hardwick* narrowly conceived of the issue when it upheld the constitutionality of a Georgia statute that criminalized sodomy. 478 U.S. 186, 190 (1986) ("The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal . . .").

<sup>178</sup> *Lawrence*, 539 U.S. at 564 ("We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.").

<sup>179</sup> Langley, *supra* note 66, at 120.

<sup>180</sup> *Lawrence*, 539 U.S. at 578–79.

Both *Casey* and *Lawrence* stand for the proposition that one has a constitutionally protected right to make decisions central to one's personhood, rooted in a constitutional right to privacy. *Lawrence* goes further to provide a space where emerging fundamental rights to personhood and self-determination can be recognized in an ever-evolving social consciousness that appreciates the foundational liberties of an individual. It is through this framework that transgender individuals must be given the ability to situate themselves either within or outside of socially-defined gender norms. Surely, the right to self-determine gender is one of the matters "involving the most intimate and personal choices a person may make in a lifetime" and "central to personal dignity and autonomy" to which Justice O'Connor refers in *Casey*.<sup>181</sup> Indeed, the right to gender self-determination speaks more to the core of matters "central to personal dignity and autonomy" than the right to do with one's body as one pleases because the latter is tied more closely to a question of choice—to be or not to be—while the former is tied more closely to questions of existence—I am what I am. Simply put, one woman demands that her free choice is recognized, while the other demands that her existence as a part of humanity is recognized. Justice Kennedy's emerging awareness doctrine allows law and society to honor the trans woman's demand.

### C. *The Emerging Awareness Doctrine*

The emerging awareness doctrine creates the necessary space for the recognition of gender self-determination.<sup>182</sup> There are several indicia that this generation is prepared to recognize gender self-identification as a constitutionally protected right. Heightened sensitivities to the needs of transgender persons, and to the needs of others in the LGBT community, demonstrate that the nation is prepared to recognize a person's fundamental right to determine and express their gender identity.

Twelve states and the District of Columbia have hate crime laws that address bias and acts of hate perpetrated against gender non-conforming individuals.<sup>183</sup> Additionally, 160 jurisdictions (sixteen states, D.C., and 143 counties and cities) have laws that prohibit discrimination on the basis of gender identity, and twenty-six jurisdictions (eight states and eighteen counties and cities) have, either through executive order or legislative

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181 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

182 *See Langley*, *supra* note 66, at 103 (utilizing the emerging awareness doctrine to articulate a right to gender self-determination through the Fourteenth Amendment's liberty jurisprudence).

183 *State Laws and Policies*, HUMAN RIGHTS CAMPAIGN, available at <http://www.hrc.org/resources/entry/state-laws-policies> (last updated Oct. 3, 2008).

action, prohibited discrimination in public employment on the basis of gender identity.<sup>184</sup> In the employment discrimination context, courts are doing a lot of the work in providing equal protection to transgender people.<sup>185</sup> Using *Price Waterhouse v. Hopkins*, a Supreme Court decision that held that Title VII prohibited employers from discriminating on the basis of sex stereotyping,<sup>186</sup> several lower courts have found that Title VII and similar state laws protect transgender people from employment discrimination.<sup>187</sup> Recently, President Barack Obama signed a revitalized version of the Violence Against Women Act that has expanded protections for transgender women who are victims of domestic abuse.<sup>188</sup> The Federal Bureau of Prisons has also demonstrated that law and society are inching toward an acceptance of gender self-determination by requiring that those with gender dysphoria be afforded treatment regardless of whether they were diagnosed before or after incarceration.<sup>189</sup> Additionally, the Department of Justice has gone even further by requiring that gender identity be a consideration when determining where to house LGBT inmates.<sup>190</sup> Although this is a step in the right direction, as will be discussed *infra*, the enactment of this rule is not enough to adequately protect the rights of MTF transgender inmates. Finally, international determinations that the right to gender self-determination is a fundamental human right may persuade this nation to

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184 *Non-Discrimination Laws that Include Gender Identity and Expression*, TRANSGENDER LAW & POLICY INST., available at <http://www.transgenderlaw.org/nllaws/index.htm> (last updated Feb. 1, 2012).

185 Kylar W. Broadus, *The Evolution of Employment Discrimination Protections for Transgender People*, in TRANSGENDER RIGHTS, *supra* note 43, at 93, 96–99 (discussing a growing trend of cases allowing gender non-conforming individuals to claim protection under Title VII).

186 490 U.S. 228, 251 (1989).

187 *See, e.g.*, Glenn v. Brumby, 663 F.3d 1312, 1316–17 (11th Cir. 2011) (holding that employment discrimination on the basis of gender non-conformity constitutes sex discrimination under the Equal Protection Clause); Macy v. Holder, EEOC Appeal No. 0120120821, 1 (2012), available at <http://www.hivlawandpolicy.org/resources/view/733>; *see generally* Broadus, *supra* note 185, at 97–98 (discussing several courts that have found that transgender people are afforded protection from employment discrimination and suggesting that “[t]hese recent positive decisions may be the harbinger of a new trend”).

188 Josh Lederman, *Obama Signs Violence Against Women Act*, HUFFINGTON POST, (May 7, 2013 4:14 PM), [http://www.huffingtonpost.com/2013/03/07/obama-violence-against-women-act\\_n\\_2830158.html](http://www.huffingtonpost.com/2013/03/07/obama-violence-against-women-act_n_2830158.html).

189 Memorandum for Chief Executive Officers from Newton E. Kendig, Assistant Dir. Health Servs. Div., and Charles E. Samuels Jr., Assistant Dir. Corr. Programs Div., on Gender Identity Disorder Evaluation and Treatment (May 31, 2011) (on file with author) (“[I]nmates in the custody of the Bureau with a possible diagnosis of GID will receive a current individualized assessment and evaluation. Treatment options will not be precluded solely due to level of services received, or lack of services, prior to incarceration.”).

190 Press Release, U.S. Dep’t of Justice, Justice Department Releases Final Rule to Prevent, Detect and Respond to Prison Rape (May 17, 2012) [hereinafter Press Release], available at <http://www.justice.gov/opa/pr/2012/May/12-ag-635.html>.

likewise recognize it as such.<sup>191</sup> Though there is still a lot of resistance to recognizing the rights of transgender people,<sup>192</sup> these trends in legislation and court cases suggest that law and society are moving toward a greater acceptance of those who stand outside of the gender binary.

#### D. *The Prison Rape Elimination Act and the Housing of MTF Inmates*

As previously mentioned, the Department of Justice recently released a final rule to prevent the sexual abuse of incarcerated individuals in accordance with the Prison Rape Elimination Act of 2003 (“PREA”).<sup>193</sup> The standards established by the final rule apply immediately to federal prisons and states that receive federal funding.<sup>194</sup> The rule deals specifically with the housing of transgender inmates<sup>195</sup> and requires that decisions about where transgender inmates are housed must be made on a case-by-case basis and cannot be made solely on the basis of a person’s genitalia or gender assigned

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191 See Phyllis Randolph Frye, *The International Bill of Gender Rights vs. the Cider House Rules: Transgenders Struggle with the Courts Over What Clothing They Are Allowed to Wear on the Job, Which Restroom They Are Allowed to Use on the Job, Their Right to Marry, and the Very Definition of Their Sex*, 7 WM. & MARY J. WOMEN & L. 133, 211 (2000) (“At the international level, the European Court of Justice recently held that employment discrimination against transsexual people violates the fundamental human right to be free of discrimination based on sex.”); Vanessa Allen, *Transsexual killer and attempted rapist wins ‘human rights’ battle to be moved to women’s prison*, MAIL ONLINE (Sept. 4, 2009, 8:50 PM), available at <http://www.dailymail.co.uk/news/article-1211165/Transsexual-prisoner-wins-High-Court-battle-moved-womens-jail.html> (reporting on a British High Court ruling that ordered a transsexual inmate moved to a women’s prison to protect the inmate’s human rights); see also Greenberg, *supra* note 43, at 67–68 (discussing the European Court of Human Rights ruling that required member states to allow postoperative transgender individuals to change their legal sex).

192 See *supra* Part I.

193 See Press Release, *supra* note 190.

194 *Id.*

195 28 C.F.R. § 115.41 (2012). The full list of considerations that a facility must evaluate when deciding how best to house an inmate are found in the text of § 115.41(d) which reads as follows:

- (d) The intake screening shall consider, at a minimum, the following criteria to assess inmates for risk of sexual victimization:
  - (1) Whether the inmate has a mental, physical, or developmental disability;
  - (2) The age of the inmate;
  - (3) The physical build of the inmate;
  - (4) Whether the inmate has previously been incarcerated;
  - (5) Whether the inmate’s criminal history is exclusively nonviolent;
  - (6) Whether the inmate has prior convictions for sex offenses against an adult or child;
  - (7) Whether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming;
  - (8) Whether the inmate has previously experienced sexual victimization;
  - (9) The inmate’s own perception of vulnerability; and
  - (10) Whether the inmate is detained solely for civil immigration purposes.



at birth, but must be considered with a list of other factors.<sup>196</sup> Additionally, the new standards articulate how to treat transgender inmates with regard to issues such as showering<sup>197</sup> and searches.<sup>198</sup> Although advocates have lauded the rule, they also recognize that there is still work to be done to adequately protect the rights of transgender inmates.<sup>199</sup> While there is not much commentary on the potential efficacy of the new rule as a result of its recent enactment, there are several potential issues with implementation that may prevent the regulations from adequately protecting the rights of MTF inmates.

First, the new rule delegates the ultimate determination of where to house transgender inmates to the discretion of the prison facility.<sup>200</sup> Though prison officials now have a list of considerations to evaluate before housing a transgender inmate, they are without guidance on how much weight to give considerations like the MTF inmate's gender identity and the inmate's perception of her vulnerability. Without guidance on how dispositive these considerations are, a prison facility could give lip service to these considerations but still house a MTF inmate in a male facility, and such a decision would be well within, and protected by, its discretion.<sup>201</sup> Furthermore, the likelihood that prison personnel will not give appropriate weight to these considerations is increased by the prevalent belief among such personnel that rape perpetrated against transgender and other vulnerable inmates is an inevitability of prison life.<sup>202</sup>

Additionally, this amount of discretion may prove particularly harmful in the new rule's implementation in state and local facilities where there is a

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196 National Standards To Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37106, 37110 (June 20, 2012).

197 See 28 C.F.R. § 115.42(f) (requiring that transgender and intersex inmates be given the opportunity to shower separately).

198 See 28 C.F.R. § 115.15 (prohibiting generally the physical search of an inmate for the sole purpose of determining the status of the inmate's genitalia and cross-sex searches unless "exigent" circumstances require).

199 See Leslie Cooper, *New Federal Standards Offer Unprecedented Protections to LGBTI Prisoners*, ACLU (May 21, 2012, 2:25 PM), available at <http://www.aclu.org/blog/prisoners-rights-lgbt-rights-womens-rights/new-federal-standards-offer-unprecedented> (celebrating the passage of the new law, but cautioning that "[w]e now need to ensure that they are fully enforced"); see also *LGBT People and the Prison Rape Elimination Act*, NAT'L CTR. FOR TRANSGENDER EQUALITY (July 2012), available at [http://www.transequality.org/Resources/PREA\\_July2012.pdf](http://www.transequality.org/Resources/PREA_July2012.pdf) (reminding advocates that "much still remains to be done").

200 National Standards To Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. at 37106, 37114 (admitting that full compliance "with procedural mandates is usually more within the control of a facility . . . . Accordingly, the Department lacks the discretion" to determine when a facility has fully complied with the material requirements of each standard).

201 *Id.*

202 See *supra* Part III. B.

higher variability in the progressive views regarding the treatment of transgender inmates. For example, while some states like California, Oregon, and New York,<sup>203</sup> and municipalities like Los Angeles, Chicago, and Denver, have taken action to ensure the safety of MTF inmates by taking measures to provide a safer and more humane environment for transgender inmates, states like Texas and Florida, with the largest and third largest prison populations in the country respectively,<sup>204</sup> have not. This illustrates that even with a federal standard, without clearer guidance on how much weight to give an inmate's own right to gender self-determination and perception of his or her vulnerability, the protection of body and personhood will be dependent upon where one is incarcerated.

Though the Department of Justice's new rule is an important step in the right direction, this is by no means a time to rest, believing that all the work has been done. To the contrary, it is now even more important to push for a MTF inmate's fundamental right to gender self-determination that must be given dispositive weight in deciding how she should be housed. The new standards do nothing to articulate a right to gender self-determination, and it is yet to be seen if they will have any tangible effect on a MTF inmate's right to be housed in accordance with her gender identity. Therefore, to adequately provide for the safety of MTF transgender inmates, this nation's jails and prisons must house them in accordance with their gender identities rather than their birth-assigned genders.

#### V. RECOGNIZING THE RIGHT WITHOUT UNDERMINING THE MIGHT: REMOVING MTF INMATES FROM MALE PRISONS

Incarceration may require that prisoners' constitutional rights be curtailed.<sup>205</sup> However, "[t]here is no iron curtain drawn between the Constitution and the prisons of this country."<sup>206</sup> The Supreme Court has held that a prisoner is entitled to Due Process protection under the Fourteenth Amendment.<sup>207</sup> The constitutional rights of inmates must be respected so long as they do not undermine a legitimate penological

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<sup>203</sup> Richael Faithful, *Transitioning Our Prisons Toward Affirmative Law: Examining the Impact of Gender Classification Policies on U.S. Transgender Prisoners*, 5 MODERN AM. 3, 5 (2009) (listing states that have established non-discrimination policies, hormone treatment guidelines, and staff training requirements for transgender inmates).

<sup>204</sup> Don Thompson, *California's Prison Population Eclipsed by Texas*, HUFFINGTON POST (June 13, 2012, 5:09 PM), available at [http://www.huffingtonpost.com/2012/06/13/california-prison-population\\_n\\_1594926.html](http://www.huffingtonpost.com/2012/06/13/california-prison-population_n_1594926.html).

<sup>205</sup> *Hudson v. Palmer*, 468 U.S. 517, 524 (1984).

<sup>206</sup> *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974); see also *Hudson*, 468 U.S. at 523 ("We have repeatedly held that prisons are not beyond the reach of the Constitution. No 'iron curtain' separates one from the other.").

<sup>207</sup> *Wolff*, 418 U.S. at 555.

interest.<sup>208</sup> The Court has found that providing for the health and safety of the prison population and prison staff is a legitimate goal of the penal system.<sup>209</sup> Therefore, in order for prisons to infringe upon an individual's right to gender self-determination by relying on genitalia-based classification instead of gender-based classification, there must be a nexus between the infringement and furthering institutional health and safety. Here, it will be shown that within the male prison context, there is not the required nexus between the infringement and legitimate institutional goals. To the contrary, removing transgender inmates from the male prison population would actually be beneficial. There are, however, potential safety and privacy issues that may prevent transgender individuals from being housed in female facilities. On the other hand, education on the part of prison staff and female inmates may remove these issues and allow MTF inmates to safely and comfortably be housed in female facilities.

#### A. *Male Facilities*

As has been previously demonstrated, MTF inmates are uniquely vulnerable while incarcerated because of their desirability as sexual partners. They are repeatedly humiliated and ridiculed because of their differences and constantly subjected to rape, coercive sex, and forced prostitution. As a result, many transgender inmates contract sexually transmitted diseases such as HIV/AIDS. Without a proper means of protection and with the proliferation of prison rape, HIV/AIDS and other diseases are passed along at an alarming rate. Additionally, in response to these horrific conditions of confinement, many MTF inmates use the prison grievance system and eventually the legal system to seek remedies and retribution. Both the HIV/AIDS epidemic in the prison system as well as the substantial amount of administrative costs amassed through internal grievance procedures and legal procedures are a burden to both society and the legal system.

Removing MTF inmates may be a means of mitigating the effects of both of these issues. Although removing MTF inmates from male facilities will not eliminate prison rape or other forms of consensual sexual activity that may facilitate the transmission of STDs, it would remove at least one category of vulnerable individuals. Similarly, taking MTF inmates out of male prison facilities will not eliminate the filing of grievances or prison litigation, but it may noticeably reduce their respective volumes. Additionally, there are no safety concerns implicated by removing MTF

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<sup>208</sup> *Hudson*, 468 U.S. at 524 (“These constraints on inmates, and in some cases the complete withdrawal of certain rights, are justified by the considerations underlying our penal system.” (quoting *Price v. Johnston*, 334 U.S. 266, 285 (1948))).

<sup>209</sup> *Bell v. Wolfish*, 441 U.S. 520, 546 (1979).

inmates from the male prison population. To the contrary, removing MTF prisoners from a volatile environment in which they are constantly victimized will increase their safety. It also could increase the safety of prison staff and other inmates. Indeed, maintaining MTF inmates in the male prison population may actually be detrimental to safety as conflicts may arise to assert a claim on the MTF inmate as a sexual partner. Additionally, one could envision that conflicts arise when a debt is not paid for a MTF inmate's sexual services.

Therefore, removing MTF inmates from male facilities does not undermine legitimate penal ends, while it is possible that keeping them there does. Finally, reducing the male prison population and placing MTF inmates in female prisons could solve the problem of overcrowding, which is causing both safety and health problems in the nation's prisons.<sup>210</sup>

### B. Female Facilities

Some may argue that housing a MTF inmate in a female facility will present a danger to and infringe upon the privacy rights of female inmates.<sup>211</sup> The safety and privacy of female prisoners are legitimate concerns that may prevent MTF inmates from being housed in female facilities. However, these are not insurmountable hurdles. In fact, at least one American court has held that a MTF inmate may be housed in a female facility out of concern for her safety. In *Crosby v. Reynolds*, a female inmate alleged deprivation of her constitutional right to privacy after being housed with a MTF inmate.<sup>212</sup> The court denied this claim in part because the MTF inmate had been chemically castrated due to hormone therapy.<sup>213</sup> This case stands for the proposition that housing transgender inmates in female prisons is a tenable solution to the safety problems posed by housing them in male facilities without imposing on the safety or privacy rights of female inmates.<sup>214</sup>

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210 See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-743, BUREAU OF PRISONS: GROWING INMATE CROWDING NEGATIVELY AFFECTS INMATES, STAFF, AND INFRASTRUCTURE 1 (2012) (reporting that in 2011, federal prisons at all levels of security experienced overcrowding, with high-security prisons operating at 155% capacity).

211 See Tedeschi, *supra* note 67, at 45.

212 763 F. Supp. 666, 668 (D. Me. 1991).

213 *Id.* at 669.

214 See Tedeschi, *supra* note 67, at 46 ("Denying the plaintiff's privacy claims basically amounted to an endorsement of placing the transsexual in a female facility. This decision should be viewed as representing a potential solution to the legal and management problems posed by the transsexual prisoner.").

Finally, the privacy concerns of female inmates may be eradicated through different forms of education.<sup>215</sup> Perhaps if female inmates were informed about the reasons behind housing a transgender inmate in a female facility and what it means to be a transgender individual, they will through empathy and understanding, be able to view the transgender inmate as she views herself—as a fellow female inmate.<sup>216</sup> Additionally, it is important to respect the privacy interests of MTF prisoners who are not currently being respected in male facilities due to unnecessary strip searches<sup>217</sup> and due to guards turning the transgender inmates' bodies into spectacles by forcing them to expose their naked bodies.<sup>218</sup> Although MTF inmates would still be subjected to the gaze of their fellow female inmates and corrections staff, there would be a marked difference in degree, and arguably in kind, in a female facility.

Implicit in safety concerns for female inmates is the fear that a MTF inmate will perpetrate acts of sexual violence against other female inmates. Similarly, prison officials are concerned with housing a MTF inmate with male anatomy with women because of the potential for procreation, which has the propensity to spark scandals for the prison system.<sup>219</sup> The fears of both the female inmates and prison administration can be quelled through education as well as protective measures to ensure the safety of all inmates who identify as women. Hormone therapy usually functions to chemically castrate one born with a penis, thus lessening the threat of a sexual assault.<sup>220</sup> Therefore, if transgender inmates who wish to do so receive a regimen of hormone therapy, the risks of pregnancy and sexual assaults are significantly reduced, if not completely eliminated.<sup>221</sup>

However, there is opposition to providing MTF inmates in prison with hormone therapy.<sup>222</sup> Opponents take issue with providing transgender inmates with hormones because of the high cost of a therapeutic treatment.<sup>223</sup> It is estimated that providing MTF inmates with hormone

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215 *See id.* (“Fully informing the female prisoners of the nature of transsexualism may reduce the alarm that they might initially feel.”).

216 *Id.*

217 *See IT’S WAR IN HERE*, *supra* note 3, at 21-22.

218 *See STOP PRISONER RAPE*, *supra* note 95, at 9; *supra* text accompanying note 105.

219 *See, e.g., Smith*, *supra* note 24, at 208–09 (discussing the “immense” harm suffered by the District of Columbia Department of Corrections when news that prison guards had impregnated female inmates surfaced during litigation).

220 Tedeschi, *supra* note 67, at 45.

221 *Id.*; *see also STANDARDS OF CARE*, *supra* note 41, at 100 (listing impaired fertility, decreased libido, and reduced nocturnal and sexually stimulated erections as effects of taking feminizing hormones).

222 *See Mann*, *supra* note 93, at 114.

223 *Id.*

therapy would cost \$9000 annually.<sup>224</sup> However, this amount pales in comparison to the expense of providing incarcerated individuals with cancer treatment, kidney transplants, dialysis, and other medical treatment that the prison system is obligated to provide.<sup>225</sup>

This is not to suggest that MTF prisoners *must* be on hormone treatment to be housed in female facilities. Hormone therapy carries with it an increased risk of cardiovascular disease, hypertension, liver disease, and a whole host of other dangerous side effects.<sup>226</sup> Additionally, some transgender people find comfort in living day-to-day in their preferred gender and therefore elect not to undergo hormone therapy as a treatment for their gender dysphoria<sup>227</sup> and should not be required to do so in order to be housed according to their gender. That said, for those who did elect hormone therapy, if both prison administration and female inmates knew that hormone treatment rendered MTF prisoners as an almost non-existent threat to the physical safety of female prisoners, there would be less hesitation to house them in accordance with their professed gender. For those who chose not to take hormones, education could also take the form of sensitivity training, where female inmates could learn about the transgender experience in order to recognize and remove prejudice, making room to establish common ground with their MTF counterparts.

Finally, gender and sexual orientation are two separate things. Therefore, a MTF prisoner may also identify as a lesbian, which presents the possibility of consensual sexual relationships.<sup>228</sup> These should not present insurmountable hurdles. In fact, recently in the United Kingdom, a judge found that a MTF person should be housed in a female prison despite being convicted for attempted rape of a woman.<sup>229</sup> Additionally, if a facility is concerned with consensual sexual relationships between inmates, there should be policies already in place that could be applied to MTF inmates.

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<sup>224</sup> *Id.* at 114 n.145.

<sup>225</sup> See *id.* at 114 (explaining that prison administrations are obligated to provide treatment for inmates diagnosed with cancer).

<sup>226</sup> STANDARDS OF CARE, *supra* note 41, at 98–99.

<sup>227</sup> *Id.* at 8–9.

<sup>228</sup> See Angela Pardue et al., *Sex and Sexuality in Women's Prisons: A Preliminary Typological Investigation*, 91 PRISON J. 279, 284 (2011) (finding that sexual relationships between female inmates were “extremely common”).

<sup>229</sup> Tom Whitehead, *Transsexual prisoner wins right to be in female prison*, THE TELEGRAPH (Sept. 4, 2009, 1:35 PM), available at <http://www.telegraph.co.uk/news/uknews/law-and-order/6138325/Transsexual-prisoner-wins-right-to-be-in-female-prison.html>. At the time of press, the MTF inmate was being housed separately in a female facility. However, the story did not say whether or not there were plans to keep her in segregation.

## VI. CONCLUSION

As the court in *Crosby* astutely observed, the question of where to place MTF transgender inmates has no perfect answer.<sup>230</sup> There are many considerations that must be given appropriate attention before a definitive policy can be articulated. First, there are questions concerning who to classify as a MTF inmate, like—where would the line be drawn between male and female; should there be cosmetic changes such as breast implants; should the line be drawn when one has begun hormone therapy, when one has been on hormone therapy for X number of days, months, years? Second, there are issues arising from implementing a plan to house MTF inmates in female facilities, like—what type of additional education would be needed for prison staff and administration; what would the costs be; what new policies would have to be enacted and enforced; how would those policies be enforced? These are all questions outside of the scope of this inquiry, but questions, along with many others, that must be answered. However, despite the lingering questions, and despite the lack of a *perfect* answer, there is a *better* answer—MTF inmates must be housed according to their gender identity and expression rather than their genitalia.

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230 *Crosby v. Reynolds*, 763 F. Supp. 666, 669 (D. Me. 1991).