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Ally Windsor Howell

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A COMPARISON OF THE TREATMENT OF TRANSGENDER PERSONS IN THE CRIMINAL JUSTICE SYSTEMS OF ONTARIO, CANADA, NEW YORK, AND CALIFORNIA

ALLY WINDSOR HOWELL†

I. INTRODUCTION¹

A. Who is a Transgender Person?

Like other societies, the United States utilizes a binary system of gender where being either male or female has great consequences. This binary system and its corollary system where a "normal" society is made up only of couples comprising one man and one woman are the subject of much study and disputation. The most noticeable example of this is the rancorous public debate over same-sex marriages.

But there is also another debate about sex and gender – one which is not getting the same television and print media attention as the same-sex marriage debate. It centers on the issue of whether transgender persons are male or female for various legal purposes. One of those purposes – the subject of this thesis – is whether transgender persons are housed as males or females in the corrections systems, and whether transgender persons are entitled to appropriate medical and mental health care based upon their true gender identities (as opposed to the ones assigned to them by society).

[†] Ally Windsor Howell earned her J.D. at the Thomas Goode Jones School of Law and earned her LL.M. with Honors at the State University of New York at Buffalo School of Law. She is transgendered.

¹ This thesis does not take any position on the merits or lack of merits of any transgender inmate's guilt or innocence. That is beyond the scope of this paper and would require resources not available to this author. It is assumed that all were fairly tried and duly convicted. However, like all other inmates, transgender inmates are constitutionally entitled to reasonable housing, medical care, food, clothing, and hygiene items.

The term "gender" is a misunderstood one. It is often used as a synonym for sex, even though the two terms are different. Riki Wilchins, ² a leading gender rights advocate, defines gender thusly:

We are meaning-making animals. And among the meanings we create are the meanings of what breasts or vaginas mean, what penises mean, what broken wrists and uplifted pinkies mean, and what body hair or long blond hair mean. In effect, gender is a language, a symbolic language. Put another way, gender is a system of symbols and meanings, and the rules for access to these meanings, for strength and weakness, power and vulnerability, "masculinity" and "femininity." . . . Gender, is then, more than a bit like standing a few inches from the Empire State Building – it is at once so close, so familiar, and yet so overwhelming that it is difficult to conceptualize all at once or think about it clearly.³

To understand this identity issue, it is necessary to recognize that transsexualism is not a "choice." It is now thought to be genetic in origin.⁴ Research increasingly shows that one's gender identity has very little to do with one's sex organs or genitalia.⁵

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² Riki Wilchins was the Executive Director of the Gender Public Advocacy Coalition (Gender PAC) and is the author of QUEER THEORY, GENDER THEORY: AN INSTANT PRIMER (2004).

³ Nicole Anzuoni, *Gender Non-Conformists Under Title VII: A Confusing Jurisprudence in Need of a Legislative Remedy*, 3 GEO. J. OF GENDER & L. 871, 875 (2002) (quoting from an interview with Riki Wilchins, Executive Director, Gender PAC, Washington, D.C. (Apr. 28, 2001)).

⁴ See WORLD SCIENCE, Genes behind transsexualism possibly found, May 11, 2005, http://www.world-science.net/exclusives/050511 transfrm.htm.

⁵ Sheri A. Berenbaum et al., Sex Determination, Differentiation, and Identity, 350 New Eng. J. Med. 2204 (2004) (responding to William G. Reiner & John P Gearhart, Discordant Sexual Identity in Some Genetic Males with Cloacal Exstrophy Assigned Female Sex at Birth, 350 New Eng. J. Med. 333 (2004)).

Gender variance is not new. It has been described throughout history and in many different cultures. Child development specialists used to believe that gender-typical and gender-variant behaviors were the result of the ways in which children were raised. Today, experts believe that the presence or absence of these behaviors is partly the result of the biological or genetic diversity among individuals. In other words, the genetic propensity for these behaviors is hard-wired in the brain before or soon after birth. Of course, the specific content of male and female roles has to be learned by all children, even though some children seem to be biologically predisposed toward manifesting some of the gender role characteristics of the other sex. Some experts used to believe that gender variance represented abnormal development, but today many have come to believe that children with gender-variant behaviors are normal children with unique qualities — iust as children who develop left-handedness are [emphasis added] normal.

Although science has yet to pinpoint the causes, we know that gender-variant traits are not typically caused by parenting style or by childhood events, such as divorce, sexual abuse, or other traumatic experiences. Children do not choose to have gender-variant interests anymore than other children choose gender-typical interests. Both types of interests represent what comes naturally to each child. Gender variance is not caused by an emotional disorder. However, because of societal prejudice, children with gender-variant traits may experience ongoing rejection, criticism and bullying causing adjustment difficulties.⁶

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⁶ CHILDREN'S NAT'L MED. CENTER, IF YOU ARE CONCERNED ABOUT YOUR CHILD'S GENDER BEHAVIOR 3, http://www.childrensnational.org (follow "Programs and Departments" hyperlink; the follow "Gender and Sexuality Psychosocial Programs" hyperlink) (first emphasis added).

"Transgender" and "transgendered" have become umbrella terms. Even when gender terms are being employed correctly, other terms elaborating on the concept are still widely misunderstood. For example, the terms also include transsexuals, crossdressers (also called transvestites), intersexed persons (also called hermaphrodites), drag queens (gay men who predominantly crossdress for theatrical purposes), drag kings (lesbians who predominantly cross-dress for theatrical purposes), and an emerging group known as gender variant persons, or gender queers or gender benders (persons who are either very androgynous in their appearance or who look like effeminate men or masculine women). Contrary to popular misconception, "the bottom line is that sexual orientation, being lesbian or gay, has nothing to do with gender identity, and they're really parallel lines."

The Diagnostic and Statistical Manual IV (DSM-IV) of the American Psychiatric Association (APA) contains a classification entitled "Gender Identity Disorder," previously called "Gender Dysphoria." This recognition by the APA makes Gender Identity Disorder a recognized medical condition, and, thus, facilitates its recognition by the courts. Gender Identity Disorder has several diagnostic criteria. They are:

- A. A strong persistent cross-gender identification (not merely a desire for any perceived cultural advantages of being the other sex).
- B. Persistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex.

⁷ See the Gender Glossary at Appendix 1 for definitions of these various terms.

⁸ Lori Kohler, Remarks at the 17th National HIV/AIDS Update Conference: Vulnerable Communities Track: Forging New Ground: Transgender Issues and Corrections Medicine, (Apr. 12, 2005), *available at* http://www.kaisernetwork.org/health_cast/uploaded_files/041205_amfar_vulnerable.pdf.

⁹ Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders II (2d ed. 1968), *available at* http://www.psychiatryonline.com/DSMPDF/dsm-ii.pdf; Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders IV (4th ed. 2000) [hereinafter APA].

- C. The disturbance is not concurrent with physical intersex condition.
- D. The disturbance causes clinically significant distress or Impairment in social, occupational, or other important areas of functioning.¹⁰

In effect, the APA characterizes transgenderism or gender identity as both a medical and a mental disorder. Many in the transgender community contest this classification and argue that transgenderism should not be classified as a pathology. They note the parallel between this classification as a disorder and the prior listing in the DSM-I (1952), the DSM-II (1968) and the DSM-III (1980) in which homosexuality was listed as a mental disorder. It was removed in the DSM-III-R (1987), the DSM-IV (1994), and the DSM-IV TR (2000) as a result of a reconsideration of that classification which took into account scientific developments challenging the previous paradigm of sexual orientation as a disorder.

The foregoing criteria from the DSM for a diagnosis of Gender Identity Disorder are all subjective in nature and are basically matters which are self-reported by the patient, as opposed to observed behavior in a clinical setting or results from a medical test. As a noted expert in the field of transgender medical care so eloquently put it:

[M]edicine has just gotten so high tech, and there is so much science to it. ... We want to know what's the latest study. Well, there aren't very many studies. There's no way

¹¹ See, e.g., Katherine K. Wilson, Gender as Illness: Issues of Psychiatric Classification, in Taking Sides: Clashing Views on Controversial Issues in Sex and Gender 31-38 (E. Paul ed., 2000), available at http://www.transgender.org/gidr/kwictl97.html.

 $^{^{10}}$ APA, Diagnostic and Statistical Manual of Mental Disorders IV, \S 302.85 (4th ed. 2000).

¹² R.L. Spitzer, *The diagnostic status of homosexuality in DSM-III: a reformulation of the issues*, 138 Am. J. PSYCHIATRY 210-15 (1981).

to do a test. We can't draw blood, do an x-ray, do a PET Scan, and prove that someone is transgender. You just have to accept it. You have to accept the patient directing their own care, and that is often hard, and it's probably the most challenging part, is to kind of get over ourselves and kind of let them be in the driver's seat. So, don't look for any test; there is nothing probably on the cover of *Time Magazine* about any part of the brain that's going to give a good answer. Basically, we have to trust Popeye, and Popeye says, 'I am what I am', and that's just about as far as you can go in terms of making an accurate diagnosis, okay?" ¹³

Notwithstanding this disclaimer, there are recognized treatment standards of care, ¹⁴ which bring transgender persons into the worlds of the mental health professionals and medical professionals. These standards provide that a person diagnosed with Gender Identity Disorder should be under the care of a psychologist and/or psychiatrist for evaluation and psychotherapy. Upon the recommendation of the psychologist and/or psychiatrist the person should begin hormone therapy under the supervision and care of a physician. ¹⁵ For male-to-female transgender persons this would also be the time to begin facial and body hair removal by either laser treatments or electrolysis. Then the transgender person would begin cross-living in the opposite gender role full-time. If the cross-living is successful for at least a year, the transgender person can seek Gender Reassignment surgery (also called Sexual

¹³ Kohler, *supra* note 8.

¹⁴World Prof'l Ass'n for Transgender Health, Inc., The Harry Benjamin International Gender Dysphoria Association's Standards Of Care For Gender Identity Disorders, Sixth Version (2001), available at http://www.wpath.org/documents2/socv6.pdf (see generally http://www.wpath.org/ (requirements for hormone therapy for adults) (last visited May 11, 2010)) [hereinafter WPATH].

¹⁵For male-to-female transgender persons, this involves taking estrogen and a testosterone suppressant. For female-to-male transgender persons, this involves taking testosterone and an estrogen suppressant. *See id.*

Reassignment Surgery or SRS,¹⁶ upon the recommendation of the person's psychologist and/or psychiatrist. Many male-to-female transgender persons also seek and obtain plastic surgery to reduce the size of the Adam's apple, feminize the face, and enlarge the breasts.

Sometimes, the terms "transgender" and "transsexual" can be confusing. However, for the purposes of this thesis, the word "transgender" will be used exclusively to refer to "transsexuals" (defined in the Gender Glossary in Appendix 1). This choice is not designed to minimize, denigrate, or marginalize others under the transgender umbrella, who are also denied equal civil rights. However, within the criminal justice system, it is only the transsexuals (pre-operative, post-operative, and non-operative) who seem to encounter significant problems related to their gender.

Why Worry About Transgender Persons?

Despite popular belief that transgender persons are a small and insignificant group who "choose" to be the way they are, science suggests otherwise. Professor Lynn Conway of the University of Michigan estimates that one in two hundred fifty men are male-to-female transsexuals. ¹⁷ From an epidemiological point of view, ¹⁸ the number of transsexual persons is statistically significant.

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¹⁶ Gender or Sexual Reassignment Surgery for MtF transsexuals is the surgical removal of the meatus of the penis while preserving the skin and blood supply to the skin. For the FtM it also involves the creation of a phallus and testicles.

¹⁷ Lynn Conway, How Frequently Does Transsexualism Occur?, Dec. 17, 2002, available at http://ai.eecs.umich.edu/people/conway/TS/TSprevalence.html.

¹⁸ "Statistically significant" is defined as "a mathematical measure of difference between groups. The difference is said to be statistically significant if it is greater than what might be expected to happen by chance alone." NAT'L CANCER INST., GLOSSARY OF STATISTICAL TERMS, http://www.cancer.gov/statistics/glossary#S (last visited May 10, 2010); see also JOHN GAY, CLINICAL EPIDEMIOLOGY & EVIDENCE-BASED MEDICINE GLOSSARY: EXPERIMENTAL DESIGN AND STATISTICS TERMINOLOGY, http://www.vetmed.wsu.edu/coursesimgay/GlossExpDesign.htm (last visited May 10, 2010).

Society does not understand what it is to be transgender. Remarkably, most transgender persons, especially those who are over thirty, also do not understand initially who and what they are. Dr. Lori Kohler, a transgender medical expert, has observed:

So, in the past, being transgender – it's not like any of us grow up and say 'Oh, I understand what that is.' It's not even like someone who is transgender grows up understanding what it means, and naturally having a language, and naturally being able to articulate their experience. But I think that the more we talk about it, the easier it becomes for younger people to realize what they're feeling, and actually for their parents to be there and to be supportive of that, and to work with them.¹⁹

I find Dr. Kohler's observation to be accurate based upon my own experiences and observations as well as the life stories of transgender persons from two support groups which I have facilitated in Rochester, New York, and Montgomery, Alabama. However, because the main rule of those groups is that "what is said in the group stays in the group," I am unable to discuss particulars and identities.

Dr. Kohler's observation that it is easier for younger people now to come to terms with their true gender identity is equally astute. An encouraging example of what can happen when one comes out early in life is best demonstrated by the first person account, MOM, I NEED TO BE A GIRL, ²⁰ the story of a single mother whose son successfully transitions into her daughter with the help of "Evelyn" and her other children.

Even though it is now easier for younger people to acknowledge and deal with their true gender identity, there are still major societal hurdles, if not roadblocks, to overcome. These include health care and mental health services which are too often

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¹⁹ Kohler, *supra* note 8, at 10-11.

²⁰ Just Evelyn, Mom, I Need to be a Girl (1998).

inadequate or non-existent due to providers who share societal biases and providers who are unwilling to learn the proper treatment modalities for transgender persons. However, the major problem is that society values men more than women and places the societal rank of men above that of women.²¹

Professor Katherine Franke cogently analyzes the myths of sex, sexuality and gender and their effect on society's views:

In the end, bodies end up meaning less in the fight for equality than the roles, clothing, myths, and stereotypes that transform a vagina into a she. "Analyzing the social processes that construct the categories we call 'female and male,' 'women and men,' 'homosexual and heterosexual' uncovers the ideology and power differentials congealed in these categories."

...

[T]he law assumes a natural and biological foundation of sexual difference, thereby distinguishing sexual differentiation from sexual discrimination. Upon examination, however, this assumption is revealed to be a fiction: gender norms, not precultural biological facts, make up the difference that sexual difference makes.

. . . .

[I]n those circumstances in which people present a challenge to the intrapersonal unity of biological sex, core

²¹ This is generally based on the Christian Bible's statement by St. Paul to the church at Ephesus when he said:

Wives, submit to your husbands as to the Lord. For the husband is the head of the wife as Christ is the head of the church, his body, of which he is the Savior. Now as the church submits to Christ, so also wives should submit to their husbands in everything.

Ephesians 5:22-24 (New International Version). See also Becky L. Jacobs, PMS HAHAcronym: Perpetuating Male Superiority, 14 Tex. J. Women & L. 1 (2004); Christine M. Venter, Community Culture and Tradition: Maintaining Male Dominance in Conservative Institutions, 12 J.L. & Religion 61 (1996).

gender identity, and gender role identity, they find themselves legal outsiders, either suffering judicial punishment or being refused the rights and benefits afforded as a matter of course to people who conform to contemporary gender norms.²²

"Gender norms devalue qualities that are deemed feminine vis à vis those that are deemed masculine." 23

Transgendered persons discover a truth as they transition – in our society women are valued less than men. Professor Mary Ann Case accurately describes this.

The man who exhibits feminine qualities is double despised, for manifesting the disfavored qualities and for descending from his masculine gender privilege to do so. The masculine woman ... is understandable; it can be a step up for a woman, and the qualities associated with masculinity are also associated with success So long as stereotypically feminine behavior, from wearing dresses and jewelry to speaking softly or in a high-pitched voice, to nurturing children, is forced into a female ghetto, it may be continued to be devalued.²⁴

B. What is the Problem?

Unlike genetic women²⁵ who have national laws protecting their rights, the protection of transgender persons by prohibiting

²⁴ Mary Ann C. Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence, 105 YALE L.J. 1, 3 (1995).

²² Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 39-41 (1995).

²³ Anzuoni, *supra* note 3, at 876.

²⁵ "Genetic women" is a term used in the transgender community to denote women who were born with all of the "usual" female genitalia and who develop the "usual" secondary sexual characteristics during puberty such as breasts.

discrimination against them is not uniform. Some states, cities, and counties do prohibit discrimination against persons on the basis of gender identity. Most do not. Some states are punitive. For example, Wisconsin not only fails to protect transgender persons, it also has a law denying hormone treatment to transgender inmates in its prisons. Some states have relatively easy procedures for transgender persons to change their names to a feminine or masculine names to facilitate the transition process, while others make it difficult. Some states allow a transgender persons to obtain a new or amended birth certificates reflecting their new "sex" after gender or sex reassignment surgery and others do not.

This thesis compares New York, California and Ontario – and by implication, the United States and Canada. As will be shown later in this thesis, Ontario, Canada has more progressive policies in these areas.²⁷

Although medicine, science and the social sciences now recognize that gender does not equal genitals, the wider society has been much slower to come to this realization.²⁸ Not surprisingly,

Non-genetic women would then include male-to-female transgendered persons and intersexed persons who have a feminine gender identity.

²⁶ The state has been enjoined from enforcing the law however, and the law has been declared unconstitutional. *See* Fields v. Smith, No. 06-C-112, 2010 WL 1929819 (E.D. Wis. May 13, 2010).

²⁷ See generally The T-Male, Changing Name & Sex On The Birth Certificate United States, New U.S. Citizens, Ontario, Ca., http://www.thetransitional male.com/NameChangeBC (last visited May 12, 2010) (for information on a state-by-state basis on changing name and sex on birth certificates).

²⁸ Non-exploitative and non-sensational views of the subject appeared in the HBO movie, NORMAL, the more recent critically acclaimed movie, TRANSAMERICA, and a very moving set of interviews on the *Oprah Winfrey Show*. See NORMAL (HBO Films 2003); TRANSAMERICA (IFC Films & The Weinstein Co. 2005); The Oprah Winfrey Show (CBS television broadcast May 6, 2003). The Learning Channel, the Discovery Channel, HBO, and other cable television channels have produced some very good documentaries on the subject. See SOUTHERN COMFORT (HBO Films 2001). My own and other personal observations indicate that these shows have had a positive effect on most of those who have viewed them. However, the number of people who have seen them is a relatively small proportion of the population at large because

society's misunderstandings are reflected in the criminal justice system. "To write that transgender prisoners are at a high risk of sexual violence in jails and prisons across the nation is to do a disservice to the issue.... This violence does not exist, and cannot be understood, in a vacuum."²⁹

More specifically within the correctional system, the predominant policy of housing inmates according to their genitals leads to a greatly increased risk of assault and rape for transgender inmates. Such assault and rape should not be and are not part of the punishment intended by any legislative and societal imposition of incarceration for violation of the law. Rape has never been part of the legislative or judicial scheme of punishment for any crime.³⁰

The most widely used solution to address the safety issue is to lock up transgender inmates in segregation cells by themselves. Segregation, however, is usually reserved for inmates who pose a great danger to others or who are being punished for an infraction of institutional rules. While the segregation of transgender inmates addresses the safety issue, it also deprives the inmate of social interaction and unduly limits an inmate's ability to use prison facilities such as the library, educational classes, and recreational and physical fitness facilities. In effect, it inflicts a destructive level of punishment on a transgender inmate for being one of the estimated one in two hundred fifty individuals whose gender and genitals are not congruent. This leads to a level of suffering greatly in excess of that envisioned in the penal policy of denying a person of his or her freedom as punishment for his or her crime.

these programs were on "cable" channels rather than one of the four major networks.

²⁹ Christopher Daley, testimony before the Nat'l Prison Rape Elimination Comm'n 1 (Aug. 15, 2005), http://transgenderlawcenter.org/pdf/prisonrape.pdf.

³⁰ As noted *infra* Part II.A, a female-to-male transgender ("FtMs") who was housed in a female New York prison expressed the opinion that she and other FtMs would prefer to be housed in a men's prison, but that because of their typically smaller physical size they would need to be housed in a separate cell block, pod, etc. in order to be safe from larger, predatory genetic male inmates, who also prey on smaller, weaker genetic male inmates.

II. NEEDS OF INCARCERATED TRANSGENDER PERSONS

In the United States, the federal courts have held that the states and the federal government have a constitutional duty to provide for most of these needs for individuals who are in prison.³¹ These needs include: food, housing, personal safety, medical services, and clothing.

A. Housing

As a rule, jailors and correctional officials worldwide assign housing for transgender inmates according to their genitalia.³² This is confirmed by anecdotal evidence from a Monroe County, New York Deputy Sheriff jailor as well as news articles, and studies by Amnesty International USA, the American Civil Liberties Union, and the Human Rights Campaign.³³ In a

³¹ See, e.g., Farmer v. Brennan, 511 U.S. 825 (1994) (keeping inmate safe from known dangers); Hudson v. Palmer, 468 U.S. 517 (1984) (adequate food, clothing, shelter and medical care).

HOME OFFICE, REPORT OF INTERDEPARTMENTAL WORKING GROUP ON TRANSSEXUAL PEOPLE (2000), available at http://www.dca.gov.uk/constitution/transsex/wgtrans.pdf. The sole exception is that Spain is about to change its policy. Spain will soon vote on a bill that would allow prisoners who have been transitioning for at least a year to choose whether to be housed in male or female prisons. This bill is based upon a recommendation by the Director General of Spain's prison system. See Gender Centre Inc., Spanish Transgender Gaol Inmates to Choose Female or Male Gaol to Serve Sentences, http://www.gendercentre.org.au/world_news.htm#Spanish (last visited May 10, 2010); see also Free Republic website, Spain: Transsexuals can choose jails,

http://www.freerepublic.com/focus/f-news/1590455/posts (last visited May 10, 2010).

³³ See Amnesty Int'l USA, Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S. 59-63 (2005), available at http://www.amnestyusa.org/outfront/stonewalled/report.pdf; Stop Prisoner Rape & the National Prison Project of the ACLU, Still in Danger: The Ongoing Threat of Sexual Violence against Transgender Prisoners (2005), available at http://www.justdetention.org/pdf/stillindanger.pdf; Human Rights Campaign Found.

March 25, 2006 interview with a female-to-male transsexual, who had not had any surgery yet, he related that he was assigned to New York's Bedford Hills Correctional Facility for women for a six year sentence even though several correctional officers and staff members told him that he should be housed in a men's prison.³⁴

Thus, pre-operative and non-operative transsexuals who are male-to-female are routinely assigned to cells and cell blocks where men are housed – though they may have breasts and other feminine characteristics. In some cases, these transgender prisoners are assigned to isolation cells in the men's prison or jail. This arrangement may provide greater safety but it is inappropriate.³⁵ Surprisingly, such assignments leave non-operative and preoperative transsexuals at a greater than usual risk of being sexually assaulted and raped while in confinement even while in isolation.³⁶

Inmates have a constitutional right to adequate housing.³⁷ When dealing with male-to-female transgender inmates, however. the determination of what is adequate is often a problem. The issue

TRANSGENDER AMERICANS: A HANDBOOK FOR UNDERSTANDING 44-46 (2005). available at http://www.hrc.org/documents/Transgender handbook.pdf. For examples of anecdotal evidence, see Oliver Libaw, Prisons Face Dilemma with Transgender Inmates: Inmates Who Look Like Women, Housed with Men, ABC NEWS (Jan. 22, 2005), available at http://abcnews.go.com/US/story?id=90919 &page=1 (last visited May 1, 2010); Cosmo Garvin, What's she doing in the men's jail? NEWS REVIEW, Feb. 13, 2003, http://www.newsreview.com/ sacramento/content?oid=14229.

³⁴ Interview with anonymous inmate, Female-to-male Transsexual Prisoner, Gender Coalition meeting in Albany, N.Y. (Mar. 25, 2006) (notes on file with author) [hereinafter March 25 Interview].

³⁵ Segregation or isolation are usually reserved for inmates with particularly vexatious disciplinary issues, or for inmates with a communicable illness. In short, it is usually for punishment. As a result, it confines the inmate to the cell alone for all but one hour a day of exercise and one or two showers a week. Other inmate privileges such as using the library, interacting with other inmates socially, etc. are denied to inmates in this administrative segregation or isolation. ³⁶ See, e.g., Richard Linnett, The Cruel and the Unusual Punishment of She-Males: Why Her Warden Calls the Lady Mister, HUSTLER MAGAZINE (May

³⁷ See Farmer v. Brennan, 511 U.S. 825, 832 (1994)

is not that transgender inmates are or should be entitled to any kind of special housing. Rather it is whether they will be housed with male or female inmates. As discussed below, housing pre-operative and non-operative transsexuals with male prisoners creates a grave risk to their personal safety and to their dignity. This situation was recognized by the U.S. Supreme Court which held that prison officials who were involved in transferring a transsexual prisoner to a maximum security facility in which she was allegedly raped and assaulted by other prisoners could be held liable if it were proven that they had shown deliberate indifference to the transsexual prisoner's safety, in violation of their Eighth Amendment rights.³⁸ In Farmer v. Brennan,³⁹ the Court found that the transgender inmate was safer in administrative segregation but the court did not address whether that was proper or not. 40

In Canada, the Canadian Human Rights Tribunal⁴¹ recently addressed the matter of housing. The Tribunal, presented with the options of housing transgender inmates in general population and/or administrative segregation within prisons for men as a solution for housing and protecting transgender inmates, found these alternatives unacceptable. According to the Tribunal "requiring that pre-operative transsexual inmates be placed with other inmates sharing their anatomical structure, . . . fails to recognize the particular vulnerability of this group of inmates, and their need for accommodation within the prison setting."42 Consequently, it ordered the Correctional Services of Canada "to formulate a policy that ensures that the needs of transsexual inmates are identified and accommodated.",43

³⁸ Id.

³⁹ Id.

⁴¹Kavanagh v. Canada (A.G.), [2001] C.H.R.T. P113, available at http://www. chrt-tcdp.gc.ca/ (select language; use "search cases" function) (last visited May 1, 2010).

⁴² *Id.* at para. 196.

⁴³ *Id.* at para, 197.

B. Personal Safety

Jails and prisons have a duty under the Eighth Amendment to the U.S. Constitution to provide for their inmates' safety. 44 This duty includes protecting inmates from rape, sexual assault, and battery by other inmates and by staff.⁴⁵

The biggest problem with prison rape and violence is the indifference of too many who are in control of the prisons. Massachusetts Department of Correction spokesman Anthony Carnevales said, "'Well, that's prison . . . I don't know what to tell you.' In that offhand remark, he was expressing what many feel in their hearts but are loathe to admit — 'they deserve it.'",46

Prison rape and violence are issues of control and domination. This is illustrated by the statement of a Minnesota inmate before the Congressional committee considering the recently enacted Prison Rape Elimination Act of 2003 (PREA).

> Most of the prisoners who rape are spending 5 to life. And are a part of a gang. They look for a smaller weaker individual. And make that person into a homosexual then sell him to other inmates of gangs. Anywhere from a pack of cigarettes to 2 cartons.... No one cares about you or anyone else.47

An New York inmate related the following to the Committee.

> When a man finally gets his victim, he protects him from everyone else, buys him anything, the victim washes his clothes, his cell etc. In return the entire prison knows that

⁴⁵ *Id.* at 833-34.

⁴⁴ Farmer, 511 U.S. at 832.

⁴⁶ Prison Rape Reduction Act of 2003; Hearing on H.R. 1707 Before the Subcomm. on Crime, Terrorism, and Homeland Security, 108th Cong. 92 (2003) (statement of Pat Nolan, President, Justice Fellowship).

⁴⁷ *Id.* at 20 (excerpts from Inmates Testimony to Human Rights Watch).

this guy has a 'BITCH' or 'girl.' Now I've seen this happen many times. The response from the guards is 'the strong survive,' 'who cares,' or they join in the teasing and tormenting. But someone who is not 'protected' has other problems. I've seen inmates attacked by two or three men at a time and forced to the floor, while three men hold him down the fourth rapes him. I've known two men who have hung themselves after this.⁴⁸

These statements are supported by the findings of the Congress in enacting the PREA. "Young first-time offenders are at increased risk of sexual victimization. Juveniles are 5 times more likely to be sexually assaulted in adult rather than juvenile facilities--often within the first 48 hours of incarceration."

In its findings for the PREA, the Congress stated: "Prison rape often goes unreported, and inmate victims often receive inadequate treatment for the severe physical and psychological effects of sexual assault--if they receive treatment at all." Insufficient research has been conducted and insufficient data reported on the extent of prison rape. However, experts have conservatively estimated that at least 13 percent of the inmates in the United States have been sexually assaulted in prison. Many inmates have suffered repeated assaults. Under this estimate, nearly 200,000 inmates now incarcerated have been or will be the victims of prison rape. The total number of inmates, who have been sexually assaulted in the past 20 years likely exceeds 1,000,000. 51

A U.S. Department of Justice report documented a total of 8,210 allegations of sexual violence in prisons in 2004.⁵² The

⁴⁹ 42 U.S.C. § 15601(4) (2003).

⁴⁸ Id.

⁵⁰ *Id.* § 15601(6).

⁵¹ *Id.* § 15601(2).

⁵² U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2004, (2005), *available at* http://bis.oip.usdoj.gov/content/pub/pdf/svrca04.pdf.

seriousness of this problem is illustrated by the fact that the Prison Rape Elimination Act of 2003 was passed by a *unanimous* vote in both houses of Congress. The legislation mandates that a U.S. Department of Justice report be published annually. A 2007 report by the U.S. Department of Justice stated that there were 60,500 reports of sexual victimization by inmates which represented 4.5% of adult inmates.

California has recognized the problem of prisoner rape within its correctional facilities. On September 22, 2005, Governor Arnold Schwarzenegger signed the Sexual Abuse in Detention Elimination Act.⁵⁶ This act is not specifically for transgender inmates, but it does include some provisions which would appear to be helpful to transgender inmates:

The Department of Corrections and Rehabilitation *inmate* classification and housing assignment procedures shall take into account risk factors that can lead to inmates and wards becoming the target of sexual victimization. §2636(a) [emphasis added]

Inmates and wards who file complaints of sexual abuse shall not be punished, either directly or indirectly, for doing so. If a person is segregated for his or her own protection, segregation must be nondisciplinary. §2637(b) [emphasis added]

Staff shall not discriminate in their response to inmates and wards who are gay, bisexual, or *transgender* who experi-

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⁵³ 42 U.S.C. § 15601(2003).

⁵⁴ *Id.* § 15603.

U.S. Dep't of Justice, Bureau of Justice Statistics, Sexual Victimization in State and Federal Prisons Reported by Inmates, 2007 (2008), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/svsfpri07.pdf.

⁵⁶ Cal. Penal Code § 2635-43, *et seq. See also* Press Release, Stop Prisoner Rape, Stop Prisoner Rape Hails Governor's Signing of Historic Law in California (Sept. 22, 2005), *available at* http://www.justdetention.org/en/pressreleases/2005/09 22 05.aspx.

ence sexual aggression, or report that they have experienced sexual abuse. §2637(e) [emphasis added]

For transgender persons who post-operative are transsexuals (those who have had Gender Reassignment Surgery). personal safety concerns within the criminal justice system's jails and prisons are the same as for other women and men in the system. The previously cited studies indicate that it is a serious problem for men in men's prisons, especially if the man is diminutive or has feminine features. In an interesting note, there are no cases reported of female-to-male transgender prisoners suing the their jailors. However, in an interview by this author on March 25, 2006, a female-to-male transgender who had been a prisoner in New York's Bedford Hills Correctional Facility for women from 1994 to 2000, reported that while he and other FtM transgender inmates whom he knew of would prefer to be in a men's prison, they would need to be housed in a special unit for safety because most of the FtM transgender inmates were of slight build and would not be able to protect themselves from predatory male inmates any better than genetic male inmates of slight build.⁵⁷

In addition to assaults by other inmates, transgender inmates have to deal with sexual assaults by correctional officers. An example was reported in New York City, when the City's Department of Correction took timely action in 2003 on a complaint from a transgender prisoner who was assaulted physically and sexually by a correction officer and the officer was arrested.⁵⁸

There is a snowballing effect when prison rape and violence are allowed to go on unabated. "Prison rape endangers the public safety by making brutalized inmates more likely to commit crimes when they are released – as 600,000 inmates are each year. Victims of prison rape suffer severe physical and psychological effects that hinder their ability to integrate into the community and

⁵⁷ March 25 Interview, *supra* note 34.

⁵⁸ Press Release, City of N.Y. Dep't of Investigation, DOI Arrests New York City Correction Officer (Jan. 29, 2004), available at http://www.nyc.gov/ html/doi/downloads/pdf/pr5 aphillips12904.pdf.

maintain stable employment upon their release from prison. They are thus more likely to become homeless and/or require government assistance."⁵⁹

Not only are inmates' constitutional rights being violated by prison rape and violence, but society also pays a high price when the inmates who have been raped and assaulted are released. Higher recidivism rates among those inmates are part of an increased crime rate. Also, there are the costs of government assistance to those who do not re-offend.

C. Medical Services

The U.S. Supreme Court has held that every inmate, regardless of gender identity, is entitled to reasonable medical care. This section will discuss the separate issues of the right to medications, especially hormone replacement therapy, and surgeries to meet the needs of transgender inmates.

1. Medications

Dr. Lori Kohler, a transgender medicine expert, argues that the lack of access to medical care, whether from an internist or a specialist, is attributable to the attitude of the medical profession.

One of the reasons that the transgender people are so isolated and so set aside is that the medical community has really, we've not taken on our responsibility, we've not been good citizens in terms of even addressing their healthcare needs.... That might not be comfortable for everyone, and then furthermore, just your regular old medical provider it is going to say, "Well, there's no research, there's no literature. I don't have any data, so I can't do this. It's too risky. I can't harm my patients that

⁵⁹ 42 U.S.C. § 15601(8), (11) (2003).

⁶⁰ Farmer v. Brennan, 511 U.S. 825, 832 (1994).

way." They use a lot of excuses to avoid it.... Even if you're rich and transgender, you still are medically underserved.

. . .

I do think that limited access to medical care is at the heart of the problem. And, when we look at it we say, "well we have an excuse, there's no research, and there's no education and medical training", but whose fault is that? It's really based on the transphobia in general, transphobia by the medical community, by the people who decide where the money goes for research, by the people who decide how we train people in medicine. And, when we look at that, the transphobia also leads to all the social benefits that the rest of us enjoy in terms of health coverage, legal protection, employment, and really lack of education, because we don't pass, and you're not comfortable being out in the world, and you don't feel safe, then you're not going to go to school.⁶¹

Thus, it is not surprising that medical care for transgender inmates is generally so lacking. This is because of the well-known situation that prison health care lags behind that available to non-incarcerated individuals. Some of this is attributable to public apathy towards inmate care and some is attributable to legislatures' desire to spend as little as possible on prisoner care, including health care.

Within the need for and right to reasonable medical care in prison, transgender inmates have specific essential needs – viz., hormonal medications under the relevant *Standards of Care*. ⁶² This has been held to include hormone therapy for transgender inmates. ⁶³ For male-to-female transgender persons this would be a testosterone suppressant and estrogen at a dosage is similar to one

⁶¹ Kohler, *supra* note 8, at 11-14.

⁶² WPATH, supra note 14.

⁶³ Brooks v. Berg, 289 F. Supp. 2d 286, 287 (N.D.N.Y. 2003).

prescribed for a post-menopausal woman. For the female-to-male transgender person the need is for an estrogen suppressant and testosterone. There is evidence that access to cross gender hormone therapy "not only improves people's quality of life, but it actually will improve their adherence to treatment for chronic disease."64

2. Surgeries

To complete the treatment provided by the Standards of Care⁶⁵ pre-operative transsexuals need Sex or Gender Reassignment Surgery. At present this surgery is only available from a handful of specialized surgeons in the United States (in Arizona, 66 California, 67 Colorado, 68 Florida, 69 Pennsylvania, 70 and Wisconsin⁷¹), a two-surgeon clinic in Montreal, Canada, ⁷² one in New

⁶⁴ Kohler, *supra* note 8, at 18.

⁶⁵ WPATH, *supra* note 14.

⁶⁶ Toby R. Meltzer, M.D., http://www.tmeltzer.com (last visited March 9, 2010). ⁶⁷Gary J. Alter, M.D., http://www.altermd.com/Transsexual%20Surgery/ male

to female.htm (last visited March 9, 2010); Michael L. Brownstein, http://www.brownsteinmd.com (last visited March 9, 2010).

⁶⁸ Marci L. Bowers, M.D., http://www.marcibowers.com/grs/history.html (last visited March 9, 2010).

⁶⁹Reid Centre for Genital Surgery, http://www.srsmiami.com/ (last visited March 9, 2010).

⁷⁰Sherman Leis, M.D., http://www.drshermanleis.com/transgender/index.htm (last visited March 9, 2010)

⁷¹Eugene Schrang, M.D., http://www.drschrang.com/ (last visited March 9, 2010).

⁷² Pierre Brassard, M.D. & Yvon Menard, M.D., http://www.grsmontreal.com/ anglais.html (last visited March 9, 2010)

Zealand,⁷³ one in Spain⁷⁴, and one in the United Kingdom⁷⁵ and several clinics in Thailand.⁷⁶

At this time in the United States no correctional system has a policy of paying for such surgeries. Until 2001 Canada did not provide such surgery to its inmates. Now it does as a result of a recent decision by the Canada Human Rights Tribunal.⁷⁷ The Tribunal reasoned that the Correctional Services of Canada's (CSC) Health Service Policy's "blanket prohibition on access to sex reassignment surgery" by inmates "is discriminatory on the basis of both sex and disability...."

Due to the budget problems of most correctional systems and the cost of the surgeries and associated travel to what is likely to be an out-of-state surgeon, most correctional systems in the United States are likely to resist paying for such surgeries. In fact, Wisconsin enacted a law which specifically prohibits its prison system from paying for either hormones or surgery for transgender inmates. The law was enacted because several Wisconsin legislators felt strongly that inmates should not get hormone therapy or surgery on the state's tab. "If you were on the outside, you would have to pay for it yourself. Just because you're in prison doesn't

⁷³Peter Walker, M.D. at Southern Cross Trust Hospital, http://www.plasticsurgery.co.nz/ (last visited March 9, 2010).

⁷⁴Sáenz de Cabezán, M.D., http://www.saenzdecabezon.com/angl/fresp.html (last visited March 9, 2010).

⁷⁵James Bellringer, M.D., http://www.bellringers.pwp.blueyonder.co.uk/ (last visited March 9, 2010).

⁷⁶Chettawut Tulayaphanich M.D., http://www.chet-plasticsurgery.com/ (last visited March 9, 2010); Aesthetic Plastic Surgery Center, http://www.bangkokplasticsurgery.com/ (last visited March 9, 2010); The Samui Clinic Co. Ltd., http://www.srsthailand.com/ (last visited March 9, 2010); and Phuket Plastic Surgery Center. http://phuket-plasticsurgery.com/ (last visited March 9, 2010).

⁷⁷Kavanagh v. Canada (A.G.), [2001] C.H.R.T. P113, *available at* http://www.chrt-tcdp.gc.ca/ (select language; use "search cases" function) (last visited May 1, 2010)

⁷⁸ *Id.* at para. 198.

mean you should get a free ride on the taxpayers."⁷⁹ The Wisconsin law, the Inmate Sex Change Prevention Act, 80 was a response to a federal court suit by a prisoner seeking an order to have the state pay for his gender reassignment surgery. However, the U.S. District Court for the Eastern District of Wisconsin has enjoined the implementation of the law.⁸¹ That court held that "it is likely that the plaintiff can establish an Eighth Amendment violation inasmuch as the withdrawal of hormonal therapy will injure the plaintiff's long term health, and the adverse effects will be irreparable.",82

D. Clothing

Inmates have a constitutional right to adequate clothing.⁸³ Obviously, transgender prisoners need to have clothing and underwear appropriate for their gender identity. To date no U.S. court has held that prisoners have a constitutional right to wear specific clothing other than clothing needed during religious services.⁸⁴

⁷⁹ Gina Barton, Prisoner sues state over gender rights Inmate who gets hormone therapy wants sex change, reassignment, MILWAUKEE J. SENTINEL, Jan. 23, 2005 (on file with author).

⁸⁰ Wis. Stat. § 302.386(5m) (2007).

⁸¹ Gina Barton, Inmates can keep receiving hormones. They're fighting law banning tax-funded therapy, sex change, MILWAUKEE J. SENTINEL, Jan. 2, 2006 (on file with author).

⁸² Konitzer v. Bartow, No. 03-C-717, at 4 (E.D. Wis. Nov. 14, 2007) (order denying motion for temporary restraining order and granting motion for preliminary injunction barring defendant from withdrawing plaintiff's hormonal therapy), available at http://www.websupp.org/data/EDWI/2:03-cy-00717-150-

⁸³ Farmer v. Brennan, 511 U.S. 825, 832 ("The [Eighth] Amendment imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.") (internal quotations and citations omitted).

⁸⁴ See, e.g., Standing Deer v. Carlson, 831 F.2d 1525 (9th Cir. 1987) (upholding ban on Native American headbands); Rogers v. Scurr, 676 F.2d 1211 (8th Cir. 1982) (holding that no constitutional right of prisoners of Islamic faith was violated by prohibition on wearing prayer caps and robes outside religious

At this writing, there have been no cases concerning the right of transgender inmates to wear clothing and undergarments appropriate for their gender identity. However, one court has upheld the denial of a bra and panties to an inmate who was not identified as transgender. From the description of the inmate, it appears that he may have just been a fetish cross-dresser.⁸⁵

E. Cosmetics

While makeup may be considered essential by some women and by some male-to-female transgender persons, it cannot be realistically argued that the state has a duty to furnish cosmetics to inmates. Two courts have ruled that there is no obligation on the part of the state to allow male-to-female transgender inmates to receive or wear cosmetics. ⁸⁶ In *Lamb v. Maschner*, the court held that "prison authorities must have the discretion to decide what clothing will be tolerated in a male prison and the court is not convinced that a denial of female clothing and cosmetics is a constitutional violation." In *Star v. Gramley*, the court accepted the correctional officials arguments. "[Warden] Gramley asserts that allowing an inmate to wear women's garments and makeup in an all-male prison could provoke and/or promote homosexual activity or assault, thereby creating safety and security risks.

services since the prohibition was a reasonable method of preventing the concealment of contraband).

The paraphiliac focus of Transvestic Fetishism involves cross-dressing. Usually the male with Transvestic Fetishism keeps a collection of female clothes that he intermittently uses to cross-dress. While cross-dressed, he usually masturbates, imagining himself to be both the male and the female object of his sexual fantasy. This disorder has been described only in heterosexual males. *Id.*

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⁸⁵ Jones v. Warden of Stateville Corr. Ctr., 918 F. Supp. 1142 (N.D. Ill. 1995). DSM-IV, 302.3 distinguishes Transvestic Fetishism as a Paraphilia distinct from Gender identity Disorder in the transsexual. *See* APA, *supra* note 10.

⁸⁶ See Star v. Gramley, 815 F. Supp. 276 (C.D. Ill. 1993); Lamb v. Maschner, 633 F. Supp. 351 (D. Kan. 1986).

⁸⁷ *Lamb*, 633 F. Supp. at 353.

[Warden] Gramley further maintains that an inmate dressed as a female poses an additional security risk because the potentially drastic "change in his identity" could facilitate an escape from prison."⁸⁸

It would appear reasonable, however, as well as fiscally sensible for state correctional facilities where women and male-tofemale transgender persons are housed to offer a basic assortment of cosmetics for sale in the institution's commissary or canteen.⁸⁹ In fact one New York prison, Albion Correctional Facility for women, does not sell any cosmetics in its canteen, and does not permit inmates to have or to use any cosmetics other than lipstick and nail polish. 90 The stated rationale for this policy was that it might allow an inmate to hide an injury or otherwise interfere with the correctional officers and staff's ability to monitor inmates' conditions and activities. New York is not the only state which does not allow makeup use by inmates. In Colorado, an inmate who had eveliner and other make-up tattooed in "permanent makeup," had to endure guards who continually try to wash off the tattoos even though the inmate's prison records reflect the permanent nature of the tattoos.⁹¹

In or out of jail or prison, transgender persons have the same basic needs as all other human beings — clean air, clean water, adequate food, clothing, shelter, and safety. Outside of jail or prison, like every other human, transgender people need employment. However, equal opportunity and fair treatment in employment have been elusive for transgender persons. ⁹² One

⁸⁹ One court has disagreed. *Id.* at 278 ("Providing a selection of female clothing and makeup at the prison commissary for one (or few) inmates would make little fiscal sense.").

⁸⁸ Star. 815 F. Supp. at 278.

⁹⁰ Interview with anonymous person, Albion Corr. Facility employee, (Mar. 10, 2006) (notes on file with author) [hereinafter March 10 Interview].

⁹¹ Kirk Mitchell, *Transgendered inmate demands sex change*, THE DENVER POST, March 24, 2006, at A1 (on file with author).

⁹² Only five states ban discrimination in employment based on gender identity: California, Illinois, Minnesota, New Mexico, Rhode Island. *See* Cal. Gov. Code §§ 12921-26 (2000); 775 Ill. Comp. Stat. Ann. 5/1-102 (2007); Minn. Stat. Ann.

might ask, what do equal employment opportunities for transgender persons have to do with transgender persons in the criminal justice system? The answer is rather logical. Were it not for legal discrimination, transgender persons would be better able to find legitimate employment. Thus, fewer of them would have to resort to illegal activities (mostly prostitution, drugs, or drug related violence offenses) in order to support themselves. There is no scientific or other direct link between the inability to obtain gainful

§ 363.01 (2003)). But the statutes has been weakened by the reluctance of the nation's largest legal publisher to comply with the spirit of the law. See Goins v. West Group, 635 N.W.2d 717 (Minn. 2001); N.M. Stat. Ann. § 28-1-2 (1978); R.I. Gen. Law §§ 28-5-3,-5-7 (1956). As of Jan. 1, 2009, 103 cities and counties in the United States have adopted gender identity non-discrimination laws or ordinances. See Human Rights Campaign, Transgender Inclusion in the WORKPLACE (2d ed. 2008), available at http://www.hrc.org/issues/1561.htm (follow "Download" PDF hyperlink). New York is not among those states, even though it is viewed as one of the most "progressive" states in the United States. However, a number of the cities and counties, which have gender identity nondiscrimination laws or ordinances, are in New York. The United States does not have a gender identity non-discrimination statute. However, one U.S. District Court has construed sexual non-discrimination provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. as protecting transgender persons where the discrimination was because the transgender person's appearance did not fit the customary appearance of a person of his or her biological sex. See Tronetti v. TLC Healthnet Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003) (relying on Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)). The Province of Ontario, Canada does not have a gender identity non-discrimination statute. Canada does not have a gender non-discrimination statute. While not ruling for the transgender employee, the Ontario Court of Justice (General Division) has indicated that discrimination against a transgender employee could be remediable under the Ontario Employment Standards Act, R.S.O. 1990, c. E.14. See Gill v. Fairview Chrysler Dodge Ltd., Doc. No. 8884/95, 27 C.C.E.L. (2d) 274, 1996 CanLII S.C. 1996), available at http://www.canlii.org/en/on/onsc/ doc/1996/1996canlii8164/1996canlii8164.pdf; The Canada Human Rights Tribunal has recognized gender identity discrimination as well under the Canadian Human Rights Act, R.S.C. 1985, c. H-6, § 3 and § 7, which bars sexual discrimination, but does not mention gender identity. See Montreuil v. Nat'l Bank of Canada, [2004] C.H.R.T. 7, available at http://www.chrttcdp.gc.ca/ (select language; use "search cases" function) (last visited May 1, 2010).

and lawful employment. However, this demonstrates society's attitudes towards transgender persons – which is a doctrinal flatline of law and policy. The inability to find lawful employment can also impede the re-entry and assimilation of recently released inmates. ⁹³

III. EXISTING POLICIES AND PRACTICES OF ONTARIO, NEW YORK AND CALIFORNIA

I have chosen the States of New York and California, and the Province of Ontario. They were chosen as the focus of this paper because they have progressive or "liberal" reputations on human rights issues. In addition, much of the litigation involving the issues in this paper has originated in those jurisdictions. Finally, the only published policies in North America on the issues discussed in this paper have come from California and Ontario. Thus, it was reasonable to assume that if any jurisdiction would have progressive, and what some would call enlightened polices relating to these issues, it would be one or more of these three.

The policies and practices of prisons in Ontario, as well as New York and California – and indeed the entire United States, have been and continue to be set by administrative fiat. Consequently, prisons are protected from regular scrutiny and are less responsive to prisoners' needs until litigation forces changes.⁹⁴

⁹³ Kavanagh v. Canada (A.G.), [2001] C.H.R.T. P180, *available at* http://www.chrt-tcdp.gc.ca/ (select language; use "search cases" function) (last visited May 10, 2010).

⁹⁴ See Wis. Stat. § 302.386(5m) (2007). So far, only the courts have addressed the needs of transgender inmates in the United States. The sole exception is Wisconsin, which has legislatively prohibited inmates from receiving hormones or surgeries related to their gender identity. The state has been enjoined from enforcing the law however, and the law has been declared unconstitutional. Fields v. Smith, No. 06-C-112, 2010 WL 1929819 (E.D. Wis. May 13, 2010). Contra Konitzer v. Frank, No. 03-C-717, 2010 WL 1904776 (E.D. Wis. May 10, 2010) (Granting summary judgment to corrections personnel holding that strip searches of transgender inmate with breast development by male officers was

A. Ontario

The national (federal) government of Canada does not have a statutory policy regarding discrimination against transgender persons. Neither does the province of Ontario. 95

Recognition and protection of the rights of transgender persons in Canada can be found in the recent jurisprudence of the Canada Human Rights Tribunal. In a 2004 case, it found that discrimination claims by transgender persons are cognizable under sections 3 and 7 5 of the *Canadian Human Rights Act*, ⁹⁶ which states "that it is a discriminatory practice to refuse to employ an individual on the prohibited ground of sex."

The Correctional Services of Canada (CSC) has studied the subject several times since 1980. Based on these studies, it has made and revised policies several times. In 1982, CSC promulgated its first policy, which mandated that each transsexual inmate be dealt with on an individual basis. ⁹⁷ CSC's policy revision in 1987 permitted the administration of hormones for a period of up to nine months before release; however, it did not mention sex reassignment surgery. ⁹⁸ In 1993, CSC's policy was revised again to permit hormone therapy throughout the period of incarcera-

not deliberate indifference to inmate's medical needs.); see also Barton, supra note 81.

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⁹⁵ Human Rights Act of 2002, S.N.W.T., c. 18, § 5 (Can. 2009), available at http://www.canlii.org/en/nt/laws/stat/snwt-2002-c-18/latest/snwt-2002-c-

^{18.}html#history; *See also* Human Rights Act of 2002, S.N.W.T., c. 19, § 5 (Can. 2009). It is not known why the Northwest Territories have this type legislation and the other provinces do not.

⁹⁶ Montreuil v. Nat'l Bank of Canada, [2004] C.H.R.T. 7, *available at* http://www.chrt-tcdp.gc.ca/ (select language; use "search cases" function) (last visited May 10, 2010) (relying on Kavanagh v. Canada (A.G.), [2001] C.H.R.T.).

⁹⁷ Kavanagh v. Canada (A.G.), [2001] C.H.R.T. P31, *available at* http://www.chrt-tcdp.gc.ca/ (select language; use "search cases" function) (last visited May 10, 2010).

⁹⁸ *Id.* at para. 33.

tion. 99 The most recent policy was issued in 1997 and revised to a limited extent in 2001. It provides:

- 1. "Unless sex reassignment surgery has been completed, male inmates shall be held in male institutions."
- 2. "If an inmate has been on hormones prescribed through a recognized gender program clinic prior to incarceration, they may be continued under the following conditions:
 - a) that the inmate be referred to and reassessed by a recognized gender assessment clinic; and
 - b) that continuation of hormone therapy is recommended by the gender assessment clinic."
- 3. "Sex reassignment surgery will not be considered during the inmate's incarceration." 100

The Canada Human Rights Tribunal, however, has overridden those policies regarding the housing of "transsexual" inmates and access to sex reassignment surgery. This decision of the Human Rights Tribunal in *Kavanagh* was upheld by the Federal Court of Canada in 2003. The Federal Court made some interesting findings before holding that "the tribunal did not exceed its jurisdiction."

It is clear that the tribunal regarded the determination, whether sex reassignment surgery in a particular case is essential, as a medical one.

. . . .

⁹⁹ *Id.* at para. 34.

¹⁰⁰ *Id.* at para. 35.

¹⁰¹ *Id.* at para. 200.

¹⁰² Can. (A. G.) v. Can. (Human Rights Comm'n), 2003 CarswellNat 231, 2003 FCT 89, 228 F.T.R. 231, 46 C.H.R.R. D/196 (Fed. Ct. Can. Jan. 30, 2003), *available at* http://decisions.fct-cf.gc.ca/en/2003/2003fct89/2003fct89.html

Insofar as the issue of funding is concerned, the definition of essential health service does not refer to cost nor does funding form part of the definition. Unlike most, if not all provincial health care plans ... the CSC policy does not provide a prescribed, itemized list of treatments and services that are approved for payment, if medically required. Rather, the policy provides a definition delineating the circumstances when treatments and services are to be considered essential.

. . . .

That being said, the tribunal, in addressing this issue, did no more than adhere to the provisions of the CCRA [Corrections and Conditional Release Act]. Essential health care, pursuant to the CCRA (subsection 86(1)), is provided to inmates. The provision is mandatory. If sex reassignment surgery is determined to be essential, subsection 86(1) applies. This is precisely the determination made by the tribunal. The finding does not constitute an excess of jurisdiction.

. . .

A human rights tribunal enjoys a broad discretionary power to award remedies to redress a discriminatory practice. ¹⁰³

Like the Canadian national government, the Provincial government of Ontario has studied the issues of discrimination towards transgender persons, including the housing and treatment of transgender inmates. A study by the Ontario Human Rights Commission found: "There are, arguably, few groups in society today who are as disadvantaged and disenfranchised as the transgendered

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¹⁰³ *Id.* at para. 47-53.

¹⁰⁴ See Ontario Human Rights Comm'n, Toward a Commission Policy on Gender Identity 5-6 (1999); Ontario Public Health Ass'n, Trans Health Project: Position paper and resolution adopted by the Ontario Public Health Association 23 (2003).

community. Transphobia combined with the hostility of society to the very existence of transgendered people are fundamental human rights issues." ¹⁰⁵ Tribunals in Ontario have recognized discrimination claims involving employment and other areas by transgender persons as being cognizable under the human rights laws of Ontario. ¹⁰⁶

B. United States

Though transgender persons are not specifically mentioned, Title VII of the United States Civil Rights Act of 1964 has been interpreted by several courts to apply to transgender persons. While this development has been welcomed in the transgender community, it only creates a patchwork of judicial decisions and is not the equivalent of a national policy.

The United States has no national statutory policy regarding discrimination towards or the incarceration of transgender persons. The U.S. Bureau of Prisons of the U.S. Department of Justice policy as provided:

It is the policy of the Bureau to maintain a transsexual inmate at the level of change existing upon admission.

. .

¹⁰⁵ ONTARIO HUMAN RIGHTS COMM'N, supra note 104, at 38.

¹⁰⁶ See Gill v. Fairview Chrysler Dodge Ltd., Doc. No. 8884/95, 27 C.C.E.L. (2d) 274, 1996 CanLII 8164 (ON S.C. 1996), available at http://www.canlii.org/en/on/onsc/doc/1996/1996canlii8164/1996canlii8164.pdf; Cent. Neighborhood House v. C.U.P.E., Local 4308, 137 L.A.C. (4th) 314, 2005 Carswell Ont. 3488 (Ontario Arbitration Board 2005).

¹⁰⁷ See Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874-75 (9th Cir. 2001); Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999); See generally Tronetti v. TLC Healthnet Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003) (relying on Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)); Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257 (3d Cir. 2001); Spearman v. Ford Motor Co., 231 F.3d 1080 (7th Cir. 2000); Doe v. Belleville, 119 F.3d 563 (7th Cir. 1997), vacated and rem'd on other grounds, 523 U.S. 1001 (1998).

Should the [Bureau] determine that either progressive or regressive treatment changes are indicated, the Medical Director must approve these prior to implementation. The use of hormones to maintain secondary sexual characteristics may be continued at approximately the same levels as prior to incarceration (with appropriate documentation from community physicians/hospitals) and with the Medical Director's approval. ¹⁰⁸

In the context of personal safety, a federal transsexual prisoner brought a *Bivens*¹⁰⁹ action against federal prison officials, claiming that the officials showed "deliberate indifference" by placing her in a general prison population, thereby failing to keep her from harm inflicted by other inmates. The Supreme Court held that the prison officials may be held liable under the Eighth Amendment for denying humane conditions of confinement only if they know that the inmate faces a substantial risk of serious harm and they disregard that risk by failing to take reasonable measures to abate it.¹¹⁰

The effect, if any, of this decision on federal policy toward transgender inmates in federal custody is not clear. State prison officials tend to regard a court decision as applying only to the

¹⁰⁸ Bradley A. Sultan, *Transsexual Prisoners: How Much Treatment is Enough?*, 37 NEW ENG. L. REV. 1195, 1218 n.171 (2003) (quoting U.S. BUREAU OF PRISONS, HEALTH SERVICES MANUAL PS 6000.05, c. 6, § 11 (1997)). Attempts to independently verify this on Dept. of Justice and Bureau of Prison websites were not successful. Interestingly though the Dept. of Defense's CHAMPUS health program for military dependents will pay for "repair of a prolapsed vagina in a biological male who had undergone transsexual surgery." 32 C.F.R. § 199.4(e)(8)(iv)(R)(9) (2010).

¹⁰⁹ Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (holding that a violation of the Fourth Amendment's prohibition against unreasonable searches and seizures by a federal agent acting under color of federal authority gives rise to a federal cause of action against the agent for money damages consequent upon the agent's unconstitutional conduct.).

¹¹⁰ Farmer v. Brennan, 511 U.S. 825 (1994); *see also* Cuoco v. Moritsugu, 222 F.3d 99 (2d Cir. 2000).

named plaintiff. Federal prison officials' intentions after *Farmer*¹¹¹ have not been announced. So, whether Federal prisons will make any changes in the way that they provide for the safety of transgender inmates remains to be seen.

i. New York

There is no statutory law in New York regarding discrimination against transgender persons. ¹¹² Nor is there a law regarding their treatment while in state custody. Interestingly, even though the New York State legislature has for several years kept in committee the Gender Expression Non-Discrimination Act, several of its cities and counties in the state have enacted local non-discrimination laws encompassing gender identity. These include the cities of Albany, Buffalo, Ithaca, New York City, and Rochester, as well as Suffolk and Tompkins Counties. ¹¹³

While the State of New York has not addressed transgender persons or their rights in its laws, there has been administrative action by the New York Department of Correctional Services. It has adopted a Health Services Policy Manual which provides: "The New York State Department of Correctional Services continues treating inmates for Gender Dysphoria identified prior to incarceration. Gender Dysphoria is characterized by feelings of

¹¹¹ Farmer, 511 U.S. at 832. (The Eighth Amendment "imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmates.") (internal quotations omitted)

Assembly Bill 05710 and Senate Bill 02406, has been pending since 2003. Although the Assembly version was passed in 2009, the Bills have yet to be reported out of committee in 2010. See News Release, Assembly Speaker Sheldon Silver, Assembly Passes Gender Expression Non-Discrimination Act (Apr. 21, 2009), available at http://assembly.state.ny.us/Press/20090421a/.

¹¹³ See generally Human Rights Campaign Home Page, http://www.hrc.org/.

discomfort and appropriateness about one's phenotypic sex."¹¹⁴ The policy requires that "Documentation of prior hormonal therapy must be obtained from the inmate's prior provider. Evidence of prior sex change surgery will be considered as documentation of prior therapy. Psychiatric and other consultations may be necessary to review the continued status of therapy to justify the treatment plan. The prior provider will be contacted by phone if necessary."¹¹⁵ It recognizes that "When hormonal therapies are part of the treatment plan, clothing such as bras, etc., may be ordered and obtained by the facility."¹¹⁶ However, "During incarceration transsexual surgical operations [i.e., GRS] are not honored."¹¹⁷

This latter provision was overruled in 2003, when a U.S. District Court held that the New York Department of Correctional Services could not deny the same services to an inmate who first began to manifest symptoms of Gender Dysphoria (now called Gender Identity Disorder by the DSM-IV) while in prison. Later, in the case, the Department changed its position (apparently to make it congruent with the court's earlier decision). In a followon opinion the District Court noted:

As an initial matter, the Court notes that Defendants now admit that Plaintiff is entitled to the very medical treatment that was held to be required by this Court in its prior opinion. That opinion stated, consistent with other courts that have made determinations on the issue, that Gender Identity Disorder (GID) is a serious medical need and that inmates with GID must receive some form of treatment. Id.,

¹¹⁴ N.Y. STATE DEP'T OF CORR. SERVS., DIV. OF HEALTH SERVS., HEALTH SERVICES POLICY MANUAL § 1.31. The Health Service Policy Manual was referenced in Brooks v. Berg, 270 F. Supp. 2d 302, 305 (N.D.N.Y. 2003). A copy was obtained under the New York State Freedom of Information Act on December 14, 2005 and is in the author's possession.

¹¹⁵ *Id.*

¹¹⁶ *Id*.

¹¹⁷ *Id*.

¹¹⁸ Brooks v. Berg, 270 F. Supp. 2d 302, 312 (N.D.N.Y. 2003), *vacated in part*, 289 F. Supp. 2d 286 (N.D.N.Y. 2003).

[270 F.Supp.2d] at 309-10. In their memorandum, Defendants now candidly acknowledge that Plaintiff is entitled to this treatment. They now state that "the [Department of Correctional Services] policy does not prevent an inmate who first manifests a Gender Dysphoria condition or Gender Identity Disorder while incarcerated from being evaluated or provided with potential treatment modalities."¹¹⁹

I have been unable to ascertain if any changes in the policy manual have been made or are being contemplated in light of the *Brooks v. Berg* decisions. The response to a Freedom of Information Act request by this author only provided a copy of the above-quoted policy, which had not been changed to comport with the *Brooks v. Berg* decisions. In my March 3, 2006 visit to the Attica Correctional Facility in Attica, New York, a correctional officer there confirmed that the state correctional facilities assign inmates to male or female prisons based upon their genitalia. This was confirmed a week later in my visit to the female Albion Correctional Facility by a correctional officer there. 120

On October 29, 2005, a deputy sheriff, who works in the Monroe County New York jail, was interviewed by this author. The deputy reported that inmates are assigned to the men or women sections of the county jail based upon their genitalia, and that to the deputy's 121 knowledge no transgender inmates had been

¹¹⁹ Brooks v. Berg, 289 F. Supp. 2d 286, 287 (N.D.N.Y. 2003).

¹²⁰ Interview with anonymous employee, Albion & Attica Correctional Officers, Albion & Attica Correctional Facilities, N.Y. (Mar. 3 & May 10, 2006) (notes of interview on file with author). These visits were part of a Prisoner Law course taught by Professor Teresa Miller of the State University of New York at Buffalo School of Law. Because these correctional officers may not have been authorized to speak for the Department of Correctional Services of New York, and because their permission has not been obtained to breach their privacy by disclosing their identities, their identities are being withheld.

¹²¹ Interview with anonymous employee, Monroe County Deputy Sheriff, Monroe County, N.Y. (Oct. 29, 2005) (notes of interview on file with author).

raped in the county jail. The deputy said that the transgender inmates that this deputy had seen had been arrested for drugs and prostitution charges were generally able to fend for themselves against men. Moreover, the deputy hypothesized that male inmates did not want to risk being labeled as the man who was beaten in a fight with a "trannie."

Anecdotal evidence from news reports gathered and reviewed by the author indicates that assignment by genitalia is the usual practice among county and city jails in New York outside of New York City. This was substantiated in a February 15, 2006 interview by this author with a member of the Rochester (New York) Transgender Group, who had been incarcerated in the Ontario County (New York) Jail in the men's section even though she presents as a woman. 122 On March 25, 2006, another member of the Rochester Transgender Group, who is a female-to-male transgender, was interviewed. He reported that he was housed in the Monroe County Jail in the women's section of that jail. He also had been incarcerated from 1994 to 2000 in New York's Bedford Hills Correctional Facility for women, and he related that some guards and staff agreed hat he should have been housed in a men's prison. He reported that male correctional officers regularly harassed him and other female-to-male transgender inmates. He also related that the harassment was particularly acute when some of the female inmates wanted him to become their boyfriend in preference to a few male guards who had been their boyfriends.¹²³

The New York City Department of Correction's (NYC DOC) policies regarding transgender inmates were to house them

This deputy sheriff is referred without reference to his/her gender to protect his/her identity.

¹²² Interview with anonymous member, Rochester Transgender Group member, Rochester, N.Y. (Feb. 15, 2006) (notes of interview on file with author). Because the rules of the Rochester Transgender Group include protecting member's privacy, that member's identity is being withheld.

¹²³ Interview with anonymous member, Rochester Transgender Group member, Rochester, N.Y. (Mar. 25, 2006) (notes of interview on file with author). Because the rules of the Rochester Transgender Group include protecting member's privacy, that member's identity is being withheld.

and gay and lesbian inmates in a separate unit at the city's correctional facility on Rikers Island. However, a December 30, 2005 news report indicates that the New York City Department of Correction plans to close the unit and to begin a new program in which LGBT inmates will only be accommodated by placing them in protective custody for which they must apply in a special hearing before a NYC DOC hearing officer. If granted, protective custody requires inmates to be held in individual cells for twenty-three hours a day – just as inmates punished for disciplinary reasons are held.¹²⁴

For juveniles and youth, who are in the custody of the New York Office of Children and Family Services (OCFS), the proper treatment of transgender individuals is a problem. One youth placed with OCFS had her hormones discontinued (even though oddly she was continued on a testosterone blocker medication). She was placed in a male facility. Her estrogen withdrawal symptoms were ignored by OCFS, and she was also forced to wear male clothing. 125

ii. California

California is considered progressive insofar as the provision for non-discrimination against transgender persons is concerned. The protections that California provides in various state codes include: Non-discrimination in Employment, Non-discrimination in Housing, Non-discrimination as to Foster

Paul von Zielbauer, *New York Set to Close Jail Unit for Gays*, (Dec. 30, 2005), NYTimes.com, http://www.nytimes.com/2005/12/30/nyregion/30jails.html.

¹²⁵ See Sonja Shield, The Doctor Won't See You Now: Rights of Transgender Adolescents to Sex Reassignment Treatment, 31 N.Y.U. REV. L. & SOC. CHANGE 361, 368 n.85 (2007) (citing Duncan Osborne, Trans Inmate Denied Treatment: Dutchess County Juvenile Facility Withholds Hormones from 17-year-old, GAY CITY NEWS, Aug. 1-7, 2003, available at http://www.gaycitynews.com/gcn231/transinmate.html).

¹²⁶ See CAL. GOV'T CODE (West 2005).

¹²⁷ *Id.*

Children, ¹²⁸ Non-discrimination in Group Homes, ¹²⁹ Inclusion of Gender Identity in its Hate Crimes law, ¹³⁰ Non-discrimination by correctional personnel in dealing with sexual abuse claims by transgender inmates, ¹³¹ Non-discrimination on the part of those who contract with the state. ¹³² Gender Reassignment Surgery (GRS or SRS) is covered by the state's Medi-Cal program (the California version of Medicaid). ¹³³

Despite these protections for transgender citizens in California, there is no provision dealing with transgender inmates in the criminal justice system other than one concerning the processing of sexual abuse complaints.¹³⁴ It is interesting to note, however, that the California Administrative Code provides that "Inmates, parolees and employees will not subject other persons to any form of discrimination because of race, religion, nationality, sex, political belief, age, or physical or mental handicap."135 Furthermore, the California Penal Code provides that "Gender' means sex, and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." [emphasis added]¹³⁶ Thus, there may be a basis for a state law claim that transgender inmates shall not be discriminated against on the basis of their gender identity. Nevertheless, no one has tried to use that statute in that way yet.

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¹²⁸ See CAL. HEALTH & SAFETY CODE § 1529.2 (West 2008) (foster parents to be trained on non-discrimination); *Id.* § 1563 (foster parent licensing personnel to be trained on non-discrimination); CAL. WELF. & INST. CODE § 16001.9 (West 2009) (rights of foster children); *Id.* § 16013 (non-discrimination by foster parents).

¹²⁹ See CAL. HEALTH & SAFETY CODE § 1522.41 (West 2008) (group home personnel to be trained on non-discrimination).

¹³⁰ CAL. PENAL CODE § 422.56 (West 2009).

¹³¹ Id. § 2637 (protocols for dealing with sexual abuse claims by inmates).

¹³² CAL. PUB. CONT. CODE § 6108(g)(9) (West 2007).

Doe v. Lackner, 145 Cal. Rptr. 570, 572 (Cal. Ct. App. 1978); G.B. v. Lackner, 145 Cal. Rptr. 555, (Cal. Ct. App. 1978).

¹³⁴ CAL. PENAL CODE § 2637 (West 2006).

¹³⁵ Cal. Code Regs. tit. 15, § 3004(c) (2004).

¹³⁶ CAL. PENAL CODE § 422.56(c) (West 2005).

However, "[i]t is unfortunately not hyperbole to write that no institution in California is free of bias against transgender people." This bias is evidenced not just by policies of the jails and prisons, but also by the state of mind of the jail and prison staff members. Christopher Daley, an attorney with the Transgender Law Center in San Francisco, reports, "[W]hen I am visiting a transgender prisoner and I refer to that person by the correct pronoun, I am regularly corrected by the facility employee and told to use the pronoun that is 'appropriate' for the facility (i.e., that I should refer to a male-to-female prisoner as 'he' simply because it was a male facility). This is true despite the fact that the deputy or officer often knows that I am a civil rights attorney who works on behalf of transgender people." 138

In the California prison system, almost all the transgender inmates are housed in the California Medical Center at Vacaville. This institutional segregation exists "because their transgender status is deemed a medical issue" according to California Department of Corrections spokesman Russ Heimrich. Mr. Heimrich stated that few problems arise at Vacaville because the general inmate population is generally not as "hardcore" as in high-security prisons. ¹⁴¹

Insofar as access to medication is concerned, California's state correctional personnel have been ordered by a federal court to reinstate a transgender inmate's estrogen therapy because of demonstrated harm from discontinuing the hormones. Moreover, state personnel were held to not be entitled to qualified immunity as to the inmate's claim for damages for terminating the estrogen therapy because of their "deliberate indifference to her serious

¹³⁹ Garvin, *supra* note 33.

¹³⁷ Daley, *supra* note 29, at 2.

¹³⁸ *Id.* at 4.

¹⁴⁰ Mr. Heimrich did not explain what he meant by "hardcore," but it is believed that he was comparing transgender inmates to those sent to prison for violent crimes such as murder, robbery, burglary, etc.

¹⁴¹ Garvin, *supra* note 33.

¹⁴² See South v. Gomez, 129 F.3d 127, Nos. 97-15191,-15260, 1997 WL 683661 (9th Cir. Oct. 23, 1997).

medical need." This is important because it recognizes the medical necessity of hormones for the transgender prisoner.

After the 1997 decision in *South v. Gomez*, ¹⁴⁴ Dr. Lori Kohler, the founder of the Transgender Clinic of the Tom Waddell Health Center in San Francisco was asked by the chief medical officer of the California prison system to create a clinic for the prison's transgender inmates at the California Medical Facility (CMF) in Vacaville. At the time of the clinic's founding, the chief medical officer estimated that Kohler would be serving a total population of ten to fifteen patients. Six years later, in a published interview, Dr. Kohler contests this estimate. She has seen roughly three thousand unduplicated ¹⁴⁵ patients; moreover, there are about sixty transgender prisoners at CMF at any given time.

Dr. Kohler says that her exposure to transgender health issues is unusual among health professionals. "Care of trans people is not something that most medical people understand,' she says, and sighs. This ignorance is manifested most clearly, she says, in the issue of cross-gender hormone provision." As far as I know of, CMF and now CMC [California Men's Colony] are the only two prisons in the country that actually have a physician who's dedicated to providing good care, including cross-hormone therapies," says Kohler. "In all other California prisons, access to cross-gender hormones is not guaranteed. It's sporadic and inconsistent, and only given to very few people."

Despite this reported progress, in a subsequent presentation Dr. Kohler reported that the rest of the medical staff at the California corrections facilities and the correction officers are, at

¹⁴³ South v. Gomez, 211 F.3d 1275, No. 99-15976, 2000 WL 222611 (9th Cir. Feb. 25, 2000).

¹⁴⁴ Gomez, 1997 WL 683661, at *1 (affirming a preliminary injunction requiring the prison to provide inmate Torey Tuesday South with female hormone therapy).

[&]quot;unduplicated patients" means that return visits by patients are not included in the total.

Emily Alpert, Gender Outlaws, InTHEFRAY MAGZINE, Nov. 20, 2005, http://inthefray.org/content/view/1381/39/.

best, not supportive of her treatment plans, or are actually hostile to them. She states that she is more afraid of the prison staff than she is of the prisoners.¹⁴⁸

Local government policies in California regarding transgender inmates vary from very enlightened to very discriminatory, crude, and insensitive. The most enlightened is the San Francisco County Jail, which has promulgated its "Model Protocols on the Treatment of Transgender Persons by San Francisco County Jail" which were edited by Murray D. Scheel and Claire Eustace and prepared by the City and County of San Francisco Human Rights Commission and the National Lawyers Guild. 149 It provides:

Jail staff will always address transgender inmates by the inmate's adopted name. This is true even if the inmate has not gotten legal recognition of the adopted name. In addressing or discussing an inmate who is transgender, staff will use pronouns appropriate for that person's gender identity. (e.g., 'she, her, hers' for inmate who is male-to-female; 'he, him, his' for an inmate who is female-to-male). If the staff is uncertain which pronouns are appropriate, then staff will respectfully ask the inmate for clarification. (¶ I.b., p. 4)

All transgender inmates in San Francisco County jails will be assigned housing based on their gender identity, not their genitalia. (¶ II.a., p. 5)

A transgender inmate will be housed in Protective Custody or Administrative Confinement ONLY when there is reason to believe the inmate presents a heightened risk to himself or herself or to others, and only for that limited

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¹⁴⁸ Kohler, *supra* note 8.

Murray D. Scheel & Claire Eustace, MODEL PROTOCOLS ON THE TREAT-MENT OF TRANSGENDERED PERSONS BY SAN FRANCISCO COUNTY JAIL 4-7 (2002), available at http://www.transgenderlaw.org/resources/sfprison guidelines.doc.

period of time during which the heightened risk exists. (¶ II.d., p. 6)

Transgender inmates will be permitted to wear, and provided with, the same clothing and cosmetics as any other inmates of their gender (a male-to-female inmate is permitted to wear female clothing). (¶ II.f., p. 6)

These model protocols favor housing based on gender identity rather than genitalia in order to treat transsexual persons appropriately with respect to their gender and to enhance safety. For example:

An MTF¹⁵⁰ pre-operative or non-operative transsexual with male genitalia who is on hormones is more safely housed with females than even with vulnerable males.

An FTM pre-operative or non-operative transsexual with female genitalia is more safely housed with vulnerable males than with the general population of women. Housing FTMs who have not had genital surgery with vulnerable males rather than women also ensures the safety of the women since FTMs may be physically stronger than most women. (¶ II.g., p. 6)

Other provisions underscore the need for counseling services.

a. The jail medical staff will be trained on the evaluation and counseling process used to determine whether hormones are appropriate therapy, so that the jail medical

¹⁵⁰ MTF and MtF both are acronyms for Male-to-Female. MTF and MtF are widely used in the transgender community and by those who work with members of the transgender community. Those acronyms will not be changed in quotations, but will be avoided by the author in other parts of this thesis. *See infra* Appendix, Gender Glossary.

staff may either: continue the transgender inmate on his or her evaluation process; or begin hormone therapy for an inmate who has been identified as a candidate for hormone therapy, but did not begin therapy prior to incarceration; or determine that a previously undiagnosed inmate is a good candidate for hormone therapy and prescribe that therapy.

- b. Transgender inmates shall have access to all other necessary medical and mental health care, including psychotherapy, if needed.
- c. Jail medical staff will be trained on the interactions between hormones and HIV, other STD's, and other common ailments." (¶ III., p. 7)

The Sacramento County Jail stands in stark contrast to the San Francisco County Jail. The title of an article on the subject basically tells it all – What's she doing in the men's jail? – Marched around half-naked. Raped. Kept in isolation. The life of a transgender prisoner in the Sacramento County Jail is basically hell. ¹⁵¹ This article relates a litany of mistreatment by the staff of the Sacramento County jail of two transgender persons, Jackie Tates and Luisa Espinoza.

The allegations of Jackie Tates and Luisa Espinoza were found to be true by a United States District Judge in Tates' suit against Sheriff Lou Blanas and other jail personnel. The court granted injunctive relief and the Sheriff was ordered to develop and submit to the court plan for dealing with transgender inmates. Judge Panner imposed the following conditions on the sheriff and his correctional staff:

1) Defendants can, and must, adopt a classification scheme that more appropriately addresses the special circumstances

¹⁵² Tates v. Blanas, No. S-00-2539 OMP P, 2003 WL 23864868, at *9 (E.D. Cal. Mar. 11, 2003).

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Garvin, supra note 33; see also Tammye Nash, Transsexuals File Suit, http://www.toddlertime.com/dx/ts/file-suit.htm (last visited May 18, 2010).

of transgender inmates. 153

- 2) Defendants need not treat every transgender inmate in the identical manner. Transgender inmates are not immune from discipline for rules violations. 154
- 3) The determination of whether or not transgenders can attend group religious services must be made based on all factors and not simply because the person is a transgender.¹⁵⁵
- 4) Transgender inmates must be allowed reasonable use of the dayroom, outdoor recreational facilities, and telephones during normal hours. 156
- 5) Transgender inmates must have an adequate opportunity to shower without being sexually assaulted or harassed, and their cells should be cleaned at least as often as those of other similarly situated inmates.¹⁵⁷
- 6) Denial of a bra because it might be misused as a weapon or noose must be balanced against any medical or mental harm resulting from a denial of a bra. The policies regarding the provision of bras to female inmates should provide a good guide. ¹⁵⁸
- 7) Transgender inmates are entitled to be treated with the same respect as other inmates. 159

¹⁵⁵ *Id.*

¹⁵³ *Id.* at *10.

¹⁵⁴ *Id.*

¹⁵⁶ *Id*.

¹⁵⁷ *Id*.

¹⁵⁸ *Id*.

¹⁵⁹ *Id.* at *11.

The only information relating to any such policy found by this author is a Power PointTM presentation titled "Transgender Clients in the Correctional System" by James Austin, R.N., N.P., M.S.N., C.C.H.P., of the Sacramento County Sheriff's Office. However, no policy specifics in accordance with the *Tates* decision can be found. ¹⁶⁰

Unsurprisingly, the Sheriff of Sacramento County was again sued by another transgender inmate. A court found that the Sheriff was still using the "T-sep" policy condemned in *Tates v. Blanas*. ¹⁶¹ The Sheriff chose not to change the policy which the *Tates* Court had previously condemned.

IV. THE FUNDAMENTALS OF A COHERENT POLICY

A. Reasons for a Coherent Policy

The review of existing policies and practices in the preceding sections clearly establishes the need for a coherent uniform policy at the national level both in the U.S. and in Canada. Correctional authorities in both countries use very similar, if not identical, policies for dealing with physically and mentally ill inmates, dangerous inmates, and many other categories of inmates. So, why do they not adopt a coherent and similar, if not uniform, policy with regards to their transgender inmates?

Giving individual correctional systems, prisons and jails autonomy or great latitude to deal with individual cases has led to gross inequalities. For example, even when an inmate succeeds in getting hormones after suing the corrections officials, the response

¹⁶¹ See Medina-Tejada v. Sacramento County, No. Civ. S-04-138 FCD/DAD, 2006 WL 463158 (E.D. Cal. Feb. 27, 2006).

¹⁶⁰ James M. Austin, Board of Director for the Academy of Corr. Health Prof'ls, Nat'l Conference on Corr. Health Care presentation on Transgender Clients in the Correctional System (Apr. 2005) (copy on file with author).

is to give hormones to only that one inmate and to continue to ignore the needs of the other inmates. 162

In other words, litigation does not lead to the development of policy. Is this a fault of the courts for not ordering the development of policy? Do courts give greater latitude to prison officials when inmates are suing generally? Do courts give greater latitude to prison officials when transgender inmates are suing? The answer is "yes." Courts give a great deal of deference to prison administrators. 163 A uniform or, at least consistent, approach is clearly necessary. The failure to have a coherent, consistent policy on hormones affects not just the gender transition of transgender individuals, but can be life threatening. Dr. Nick Gorton, a transgender health expert has noted severe health consequences that termination of treatment can have for the transgender patients:

> Numerous studies in the medical literature as well as the clinical experience of experts in the field demonstrate that denial of sexual reassignment therapies not only cause patients significant anguish and suffering but that it also results in significant morbidity and mortality. Untreated transsexual patients have a suicidality of 20-30%, which is reduced to less than 1-2% after treatment. Delay of treatment for transsexual patients not only exposes them to a longer duration of pain, suffering, and decreased social

¹⁶² Kohler, *supra* note 8.

¹⁶³ See Turner v. Safley, 482 U.S. 78, 84-85 (1987)

Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have, as we indicated in Martinez, additional reason to accord deference to the appropriate prison authorities. Id.

see also O'Lone v. Shabazz, 482 U.S. 342, 353 (1987) (quoting Block v. Rutherford, 468 U.S. 576, 588 (1984)).

functionality, but also unnecessarily places their lives at risk. The longer the duration of suicidal feelings, the greater risk that a patient will be a completer. Treated transsexual patients have a durable and sustained remission of their illness resulting in decreased psychiatric morbidity and mortality as well as improvements in wellbeing, social and occupational functioning, and interpersonal relationships. ¹⁶⁴

1. Components of Coherent Policy

a. Medical Care

Of perhaps greatest importance is the need for a consistent policy requiring that transgender inmates receive appropriate hormone therapy while they are incarcerated. This treatment should not be limited to those who are receiving prescribed hormones at the time of commitment to correctional authorities. Many transgender persons only begin to come to terms with their true gender identity in mid-life (i.e., thirty-five to fifty-five years of age). Thus, for example, if the inmate is originally committed and housed and treated as a man, but after some period of time begins to come to grips with his gender identity as a woman, there is no logical or medical reason why such an inmate should not be provided with appropriate hormonal treatment, if it is recommended by a mental health professional who has diagnosed him as suffering from Gender Identity Disorder. This would be consonant with the Harry Benjamin International Gender Dysphoria Association (HBIGDA) Standards of Care for Gender Identity Disorders, which provide:

164 D. MORGAN BASSICHIS, "IT'S WAR IN HERE": A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN'S PRISONS 28 (Dean Spade ed., 2007), available at http://srlp.org/files/warinhere.pdf.

Eligibility Criteria. The administration of hormones is not to be lightly undertaken because of their medical and social risks. Three criteria exist:

- Age 18 years;
- Demonstrable knowledge of what hormones medically can and cannot do and their social benefits and risks:
- Either:
 - a documented real-life experience of at least three months prior to the administration of hormones; or
 - a period of psychotherapy of a duration specified by the mental health professional after the initial evaluation (usually a minimum of three months).

In selected circumstances, it can be acceptable to provide hormones to patients who have not fulfilled criterion 3 - for example, to facilitate the provision of monitored therapy using hormones of known quality, as an alternative to black-market or unsupervised hormone use. 165

Dr. Lori Kohler¹⁶⁶ makes several observations in her presentation "Transgender People." 167 "The goal for treatment of transgender

¹⁶⁵ WPATH, supra note 14.

¹⁶⁶ Lori Kohler, is the Medical Director of the Family Health Center at San Francisco General Hospital. She is an Assistant Clinical Professor in the U.C.S.F. Department of Family and Community Medicine, and works for the S.F.G.H. Family Practice Residency Program. Dr. Kohler has provided primary care for transgender patients since 1994. She worked at the Tom Waddell Health Center Transgender Clinic during its first four years, and continues to see transgender patients at the Family Health Center. Dr. Kohler also developed a clinic for transgender inmates at the California Medical Facility in Vacaville, and serves as a consultant for the California State Prisons. She is committed to increasing access to primary care for transgender people, through education and advocacy.

people is to improve their *quality of life* by facilitating their transition to a physical state that more closely represents their sense of themselves." Transgenderism is not a mental illness and cannot be objectively proven or confirmed." Medical provider ignorance limits access to care. Regardless of their socioeconomic status *all transgender people are medically underserved.*" Studies in several large cities have demonstrated that transgender women are at especially high risk for poverty, HIV disease, addiction, and incarceration. This was backed up by a study by the San Francisco Department of Public Health Transgender Community Project, which found that eighty percent of transgender persons had engaged in sex work, 65% had a history of incarceration, and thirty-one percent incarcerated in the preceding year. Only thirteen percent had a college degree, their median monthly income was \$744, and 47% were homeless. 173

Thus, the question is not whether inmates and prisoners who are transgender are entitled to reasonable medical care, but how that care is delivered. It is not whether transgender inmates are entitled to protection from violence at the hands of other inmates and correctional officers, but how the protective measures are to be implemented. Quite obviously, if there were one standard or a uniform standard with only slight state-to-state variations (much like the Uniform Commercial Code and other uniform laws) it would make the provision of such care and safety much easier for corrections personnel. It could even become (and should become) something taught in criminal justice curricula and continuing professional education programs for correctional personnel and law enforcement personnel:

Lori Kohler, Associate Clinical Professor, Univ. of Cal. at San Francisco, Presentation at the Transgender Care Conference (May 5, 2000), *available at* http://hivinsite.ucsf.edu/InSite?page=cftg-04&ss=xsl%2Fconf-t2.

¹⁶⁸ *Id.* at slide 8.

¹⁶⁹ *Id.* at slide 14.

¹⁷⁰ *Id.* at slide 19.

¹⁷¹ *Id.* at slide 20.

 $^{^{172}}$ *Id.* at slide 23.

¹⁷³ *Id.* at slide 24.

GID [Gender Identity Disorder] is treatable. While psychotherapy is considered helpful, it is not intended to cure the illness, nor is it one of the three standard treatments according to the Standards of Care. The Standards of Care, which is considered to be the generally accepted course of treatment in the medical community, establish three types of treatment options: (1) hormone therapy; (2) real-life experience; and (3) sex-reassignment surgery.

The aim of the different treatment options is to provide "personal comfort with the gendered self in order to maximize overall psychological well-being and self-fulfillment." The treatment options are intended to be flexible and individualized in order to ensure the best possible result for the patient. [Prison officials have very valid concerns other than just providing optimal medical care to transgendered inmates. Thus,] ... when the patient is a prisoner, the responsible officials in charge of maintaining an orderly prison may not be willing to be as flexible as the Standards of Care suggest - especially when issues like security, politics and expense arise. ¹⁷⁴

In the case of *Kosilek v. Maloney*, ¹⁷⁵ the court found the inadequate care of a transsexual inmate entirely the result of a rigid

¹⁷⁴ Nikolas Andreopoulos, *Criminal Law -- Kosilek v. Maloney: In Prison While Imprisoned In The Body Of The Opposite Sex: Examining The Issue Of "Cruel And Unusual Punishment" Presented By An Incarcerated Transsexual*, 27 W. NEW ENG. L. REV. 219, 235-36 (2005) (emphasis added).

¹⁷⁵ Kosilek v. Maloney, 221 F. Supp. 2d 156 (D. Mass. 2002), aff'd 29 Fed. App'x 621 (1st Cir. 2002). Prior to formal adoption of the guidelines, Maloney had read Dr. Forstein's recommendations and was aware of the numerous risks involved with inadequately treating GID, including acute depression, self-mutilation or autocastration, and suicide. DOC employees, who interacted with Kosilek the most, as well as medical experts retained by Kosilek for purposes of trial, agreed that if adequate treatment was not provided the future risk of attempted suicide would be high.

"blanket policy" adopted by the Commission of the Massachusetts Department of Corrections (DOC) based upon an administrative decision rather than sound medical advice. In assessing this administrative decision, the court considered the agreement among medical experts who concluded that "prohibiting the initiation of hormones in every case is not appropriate." Prior to concluding that the treatment offered by the Massachusetts DOC was inadequate, the court contrasted the treatment of Gender Identity Disorder with other illnesses. It found that "if an inmate were depressed because he had cancer, the DOC would not limit its efforts to addressing the depression. Rather, it would also attempt to cure, or at least diminish, the cancer by providing care that would be regarded as adequate in the community." The court also criticized the Massachusetts DOC's failure be aware of the Standards of Care, and the failure to make a "clinical assessment of Kosilek's individual circumstances and medical needs." ¹⁷⁶

It is predictable that legislatures and county and city governing bodies will claim penury and that there will be resistance to the provision of Gender Reassignment Surgery and other related surgeries. The costs of these to the correctional authorities must be within reason. However, correctional systems in other countries, including Great Britain and Canada, provide such surgeries. The cost varies with the surgeon and hospital. For a male-to-female transgender person the SRS will cost about \$15,000 (U.S.) in Montreal and \$20,000 to \$25,000 in the United States. The cost in Thailand is about \$8,000. Having a tracheal shave so that the Adam's apple is no longer noticeable

¹⁷⁶ Id. at 175

¹⁷⁷ In the case of the male-to-female transgender persons, the needed surgeries would be vaginoplasty, labiaplasty and clitoroplasty (collectively known as Gender Reassignment Surgery), chondrolaryngoplasty (reduction of the Adam's apple), and cricothyroid approximation (voice surgery).

Patrick Sawer, Convicts win right to NHS sex changes, LONDON EVENING STANDARD, Mar. 13, 1999, available at http://www.pfc.org.uk/node/840.

¹⁷⁹ Kavanagh v. Canada (A.G.), [2001] C.H.R.T. P198, *available at* http://www.chrt-tcdp.gc.ca/ (select language; use "search cases" function) (last visited May 1, 2010).

costs about \$2,500 (U.S.) in Montreal if done with the SRS. In the U.S. the surgeons who do SRS usually do not do any other gender-related surgery. So, the transgender person would have to seek out the services of an otolaryngologist for the tracheal shave. Additional surgeries that a male-to-female transgender might need or desire are mammoplasty (breast enhancement) and facial feminization surgery. The mammoplasty can be done in Montreal for about \$3,000 if done with the SRS. The cost of facial feminization in Montreal would depend on what was required. In the U.S. a plastic surgeon will be needed to do the mammoplasty and the facial feminization. The cost would depend on what was required.

For the female-to-male transgender person, the surgeries are more expensive because there are more of them and they are more involved. The mastectomy is usually the first surgery for the FtM so that he can quit having to bind his breasts. A general surgeon can perform the mastectomy. Then there is a total hysterectomy which is followed at a later time by the phaloplasty and creation of testicles. The hysterectomy requires the services of a gynecologist. The phaloplasty and testicle creation require the combined services of plastic surgeon. A urologist is also needed to re-route and extend of the urethra. These combined surgeries cost about \$75,000 to \$100,000.

Electrolysis and laser hair removal are not normally considered "medical" procedures, but these should also be afforded to transgender inmates in a manner consonant with the *Standards of Care*. This is especially important to male-to-female transgender persons to remove facial and body hair. The cost of laser facial hair removal is \$800 to \$1,500 for the series of treatments which take three to four months to complete. Removal of other body hair (such as arms and chest) would be a similar cost. If electrolysis is used for hair removal, the cost is \$35 to \$60 per hour. Facial hair removal by electrolysis can take from 200 to 500 hours. ¹⁸⁰

¹⁸⁰ These numbers are based upon ten years of interviews of over a hundred MtF transgendered persons. Costs will vary from provider to provider and by region. The number of hours required for electrolysis depends on the density of the male

At present, there is no evidence that such hair removal procedures are provided by any prison system in the U.S. or Canada. However, a pilot study of the penal system in Great Britain recommended that it be provided. 182

At least one commentator has argued that providing adequate treatment to transgender prisoners, especially providing Gender Reassignment Surgery, is contrary to penal goals:

Another issue raised by providing healthcare to transgendered prisoners is the question of "To what end?" If the purpose of punishment is for retribution then why should the quality of life of the incarcerated be improved by the government and taxpayers? GRS is a medical procedure which is said to have drastically improved the lives of transsexuals. Their social situations are greatly improved, and most importantly, they feel better and comfortable about themselves. However, applying the same medical procedures to the incarcerated is totally different. Prisoners deserve the basic treatment as discussed in the Supreme Court's Gamble decision, but GRS seems to be something above basic medical necessity.

It is rather hypocritical to lock someone behind bars for an

facial hair and the coarseness of the hair and the skill of the person performing the electrolysis. These interviews occurred while leading and attending transgender support groups, and attending conferences such as the renowned *Southern Comfort* conference in Atlanta which offers not only seminars but discussion groups. There are no published data on these costs.

¹⁸¹ It is also worthy of note that in a December 8, 2005 interview by this author with a transgender employee of I.B.M., the employee said that I.B.M.'s health plan (which was the first private health plan to cover GRS) was also paying for electrolysis. Interview of anonymous employee, Transgender I.B.M. employee (Dec. 8, 2005) (notes on file with author). However, surgeries such as breast augmentation and facial feminization are excluded under the general denial of coverage for purely cosmetic surgeries. *Id.*

¹⁸² Paula Stephens & Stephen Whittle, A Pilot Study of Provision for Transsexual and Transgender People in the Criminal Justice System, and the Information Needs of their Probation Officers 29 (2001).

extended period of time, then to worry about said person's quality of life, social interactions, etc. If society was truly worried about such issues, it would not imprison criminals in jail where rape and other types of assault are the norm rather than the exception. Society would not cage people like animals and dictate to them when they can eat, go play in the prison yard, and use the bathroom. Society chooses to do these things because of its reasons for punishment-retribution, deterrence, incapacitation, and rehabilitation. Working humanity into some of these theories of punishment is the difficult part. ¹⁸³

No published suggested policy thus far has suggested more than provision of hormones for transgender prisoners. Linda Chin argues in her article:

> This note argues that the human rights and constitutional rights of prisoners do not entitle them to governmentfunded gender reassignment surgery (GRS). Under the current health insurance model, the convicted should not be entitled to receive GRS when the majority of nonconvicted cannot afford GRS. Prisoners do deserve basic medical care and the right to psychiatric counseling, but providing an arguably non-essential medical procedure is well beyond the duty of the government. While GRS is an important and necessary procedure for transsexuals in the general population who have undergone counseling and other treatment options, those who are imprisoned should not be provided access to the surgery, especially since these procedures are not readily available to the indigent in America and are rarely covered by health insurance providers. 184

¹⁸³ Linda Chin, *A Prisoner's Right to Transsexual Therapies: A Look at Brooks* v. *Berg*, 11 CARDOZO WOMEN'S L.J. 151, 174-75 (2004).

¹⁸⁴ *Id.* at 152 (emphasis added).

However, Ms. Chin and others with a similar argument miss the point that the provision of healthcare should not be measured by what is "available outside." The provision of televisions, radios, recreation and exercise equipment and facilities, and libraries should not be denied because people on the "outside" do not have those things available to them. The provision of those "amenities" are for two reasons – first, because it seems like the right thing to do to further the rehabilitation mission of correctional facilities, and second, because they are privileges which correctional personnel can grant or withhold as a way of rewarding good or punishing inmate conduct.

b. Protection of Transgender Inmates

The protection of transgender inmates has several dimensions. The most obvious is protection from rape and assault by other inmates. Another dimension, which may not be obvious to the average person concerns protection *by and from* correctional officers.

Protection by correctional officers is important because many officers tend to turn a blind eye toward violence by other inmates. They view it as just a part of prison life. This is a reflection of the general societal attitude that prisoners deserve whatever happens to them in prison.

Protection *from* correctional officers is also a concern. A small, but nevertheless very troubling number, of correctional officers extract sexual favors from transgender as well as other inmates (male and female). The officers do this under threat of a failure to protect the inmate from other inmates. They also threaten retaliation in the form of unjustified restrictions on or removals of privileges, and transfers to a different work detail or even transfers to other institutions.

The housing of transgender inmates, especially male-tofemale transgender (pre-operative and non-operative) inmates becomes a very important protection issue. When such individuals are housed with the general population of male prisoners a great a risk of sexual assault and rape is created. Subjecting prisoners to such conditions is totally inhumane and unconstitutional.¹⁸⁵ There is a constitutional right to safety when one is a prisoner.¹⁸⁶

Until a female-to-male transgender former prisoner had been interviewed, there was no information about the needs of FtM transgender prisoners. On March 25, 2006 a FtM transgender who had been incarcerated in New York's Bedford Hills Correctional Facility for women was interviewed. He related that even though he and other FtM inmates that he met while at Bedford Hills wanted to be housed in a men's prison, they would have had to be housed in a special unit for safety. This is because the average FtM is of slight build (like the average genetic woman) and those FtMs would be unable to protect themselves from predatory male inmates who pose a danger to slightly built genetic male inmates. He acknowledged that FtMs, if not housed in a special unit, would have to align themselves with stronger male inmates as their "bitches" for protection. 187

c. Avoiding the Infliction of Cruel and Unusual Punishment

It is beyond doubt that a failure to furnish food, clothing, shelter, medical care and reasonable safety to a prisoner constitutes a violation of the Eighth Amendment's prohibition of cruel and unusual punishments. However, as the old saying goes, "the devil is in the details." This is because the courts give considerable leeway to prison administrators as to how to run the prisons. It is only when a prison administrator or official exhibit "deliberate

¹⁸⁵ See James E. Robertson, Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates, 36 Am. CRIM. L. REV. 1 (1999).

¹⁸⁶ Farmer v. Brennan, 511 U.S. 825, 832-33 (1994).

¹⁸⁷ March 25 Interview, *supra* note 34.

¹⁸⁸ See Farmer, 511 U.S. at 833.

indifference" to the safety or need for medical care of a prisoner that the courts will intervene. 189

It has been argued that the failure to protect an inmate amounts to "cruel and unusual punishment" in violation of the Eighth Amendment to the United States Constitution. ¹⁹⁰ This claim is based upon several decisions of the United States Supreme Court:

The rationale ... is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needse.g., food, clothing, shelter, medical care, and reasonable safety--it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him but from the limitation which it has imposed on his freedom to act on his own behalf. ¹⁹¹

In *Wilson v. Seiter*,¹⁹² the Court held that all challenges to conditions-of-confinement, including "the protection … to be afforded against other inmates," are to be decided by applying a two-part test. The first component, which the Court characterized as "objective" in nature, requires that the deprivation be "sufficiently serious." Speaking for the Court, Justice Scalia observed that a deprivation of this magnitude "denies 'the minimal civilized measure of life's necessities." A second component of

¹⁸⁹ See Wilson v. Seiter, 501 U.S. 294 (1991).

¹⁹⁰ Robertson, *supra* note 185, at 1.

¹⁹¹ DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 200 (1989) (citation omitted).

¹⁹² Wilson, 501 U.S. at 303.

¹⁹³ *Id.* at 303.

¹⁹⁴ *Id.* at 298.

¹⁹⁵ *Id.* at 298 (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).

the test is a subjective one. It focuses on a determination of whether the defendant prison officials were "deliberately indifferent" to the deprivation. 196

Given that "ordinary" male-on-male rape is now recognized as a national problem among prison inmates¹⁹⁷ and the Supreme Court has recognized that transgender inmates may be able to hold their jailors civilly liable in damages if they are not protected from that known risk,¹⁹⁸ it should be clear that there is a duty to protect all inmates, and especially transgender inmates, from prison violence and rape. Prisoners also have a right under the Eighth Amendment to be protected from violence at the hands of other prisoners.¹⁹⁹ This right extends to transgender inmates.²⁰⁰

It is well-known in American culture that recalcitrant inmates are put into "solitary confinement," or "the hole," as punishment. Within corrections in the twenty-first century, "solitary confinement" is falling into disuse. Now, the practice is given other, more euphemistic names such as "administrative segregation" ("ad-seg"), "disciplinary segregation" ("d-seg"), "total separation" ("t-sep"), and "protective custody" ("p.c."), This housing classification is very restrictive. "T-sep inmates are housed in the same pods as other inmates, but forbidden to have any contact with other inmates or even to be in the same room as them. ²⁰¹ As discussed below, T-sep inmates are subject to many

¹⁹⁷ Allen J. Beck & Timothy A. Hughes, Sexual Violence Reported by Correctional Authorities, NCJ 210333 Bureau of Justice Statistics Special Report 1, 8 (2005).

¹⁹⁶ *Id.* at 303.

¹⁹⁸ Farmer v. Brennan, 511 U.S. 825, 837 (1994).

¹⁹⁹ Youngberg v. Romeo, 457 U.S. 307, 315 (1982) ("right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause, [a]nd...is not extinguished by lawful confinement, even for penal purposes." (alteration in original) (citation omitted)).

²⁰⁰ Farmer, 511 U.S. at 833.

²⁰¹ See, e.g., Cerniglia v. County of Sacramento, 566 F. Supp. 2d 1034, 1037 (E.D. Cal. 2008) ("[prisoner] lacked socialization with the other prisoners, access to television and telephone in the dayroom..."); Carmony v. County of Sacramento, 2008 WL 435343, at *7 (E.D. Cal. 2008) ("significant limitations on, or total denials of, recreational activities, exercise, phone calls, visitation

burdens and restrictions not shared by other inmates."202 Apparently for administrative convenience, prison administrators tend to place male-to-female transgender prisoners in segregation.²⁰³ Conditions in such segregation are vastly different from those of prisoners in general population. In segregation a prisoner gets at most an hour a day out of her cell for exercise and it has been know to be as little as five to ten minutes a day. 204 Inmates in segregation get at most one shower per week and it is not uncommon for showers to be less frequent than that. 205 Access to the prison library, educational classes, laundry, and other prison facilities is either very restricted or totally denied to inmates in isolation. Medical care is also known to be restricted and even denied to inmates in segregation.²⁰⁶ Emotional distress has been found to occur when an inmate is placed in such solitary confinement.²⁰⁷ Solitary confinement, even when not used as a punishment, still amounts to punishment. It is punishment in excess of what would be imposed if the inmate were not transgender and it is thus cruel and unusual punishment to automatically place transgender inmates into solitary confinement when they have committed no breach of prison rules. ²⁰⁸

Transgender inmates require not only protection from predatory inmates, but from correctional officers as well. The reports are legend about correctional officers conducting strip searches of transgender inmates more frequently than other

privileges, out-of-cell time, access to religious services, and access to law library....")

²⁰² Tates v. Blanas, 2003 WL 23864868, at *3 (E.D. Cal. Mar. 11, 2003).

²⁰³ See, e.g., Id.; Farmer, 511 U.S. at 830.

²⁰⁴ Hewitt v. Helms, 459 U.S. 460, 480 (1983).

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²⁰⁶ Estelle v. Gamble, 429 U.S. 97, 114 n. 8 (1976).

²⁰⁷ See Cox v. Cook, 420 U.S. 734, 735 (1975).

²⁰⁸ Meriwether v. Faulkner, 821 F.2d 408, 415 (7th Cir. 1987), *cert. denied*, 484 U.S. 935 (1987) ("The Eighth Amendment prohibits punishments which involve the unnecessary and wanton infliction of pain, are grossly disproportionate to the severity of the crime for which an inmate was imprisoned, or are totally without penological justification."); *see also* Veal v. Lane, 14 F.3d 605 (7th Cir. 1993)

inmates, sometimes as often as several times a day, for no apparent purpose other than to satisfy prurient curiosity.²⁰⁹

It is the well-established law of the United States that the denial of reasonable medical care to a prison inmate is a violation of the prisoner's rights to not be subjected to cruel and unusual punishment under the Eighth Amendment of the United States Constitution.²¹⁰

2. Review of Model Policy Proposals

Several renowned organizations and other lesser known organizations and individuals have studied the problems and issues concerning the incarceration and proper treatment of transgender inmates. Some have proposed models or other guidelines for the treatment and housing of transgender inmates in correctional institutions. In this section I analyze and evaluate the studies and model policies.

Amnesty International USA produced a study in 2005 which deals, in part, with the conditions encountered by transgender inmates, *Stonewalled – Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S.* This publication deals mostly with the failure to protect

Transgender men and people with intersex conditions have reported to me that they were repeatedly, unnecessarily strip searched after their arrest, sometimes four or five times within an hour or two, by officers who gawked at their genitals and humiliated them. The offenses for which the individuals were arrested, such as reckless driving and embezzlement, did not indicate a reason for one strip search, much less five. *Id.*

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²⁰⁹ See Daley, supra note 29, at 7("[Strip searches are] a frequent substitute for, or precursor to sexual violence or coercion."); Z. Gabriel Arkles, testimony before the Nat'l Prison Rape Comm'n 2 (Aug. 15, 2005), http://srlp.org/files/documents/NPREC testimony Arkles.pdf

Jody Marksamer, testimony before the Nat'l Prison Rape Comm'n 6 (Aug. 15, 2005), http://www.nclrights.org/site/DocServer/prison_nclr_ adult081905.pdf? docID=942 ("She was regularly stripped searched by male staff who were inappropriate with her."); BASSICHIS, *supra* note 164.

²¹⁰ See Estelle v. Gamble, 429 U.S. 97, 97 (1976).

transgender persons from other inmates.²¹¹ Among its findings were that 72% of police departments had no policy regarding interactions with transgender persons. Even those departments with policies had reports of officers who routinely failed to follow the policies.²¹² This suggests that implementation issues must be incorporated into the policies. Amnesty International limited its recommendations to general suggestions in the area of training of law enforcement and corrections personnel, establishing complaint procedures and review boards,²¹³ and consulting with transgender groups in establishing more detailed policies.

In 2005, the American Civil Liberties Union's National Prison Project produced a report entitled *Still in Danger: The Ongoing Threat of Sexual Violence against Transgender Prisoners.* It concentrates on the housing of transgender inmates and is critical of what it terms the "excessive reliance on isolation." This report made no recommendations but mostly pointed out the nature of change since the Supreme Court's decision in *Farmer v. Brennan* in 1994. It, too, finds that corrections officials tend to change their practices toward the inmate who initiated the litigation and do not use the litigation outcome as a basis for making systemic changes. ²¹⁵

The Women/Trans Dialogue Planning Committee, the Justice Institute of British Columbia, and the Trans Alliance Society (also of British Columbia) produced *Trans People in the Criminal Justice System – A Guide for Criminal Justice Personnel.* ²¹⁶ This document made it clear that:

 214 Stop Prisoner Rape & the National Prison Project of the ACLU, supra note 33, at 4.

²¹¹ AMNESTY INT'L USA, *supra* note 33, at 59-63.

²¹² *Id.* at 14-23.

²¹³ *Id.* at 122.

²¹⁵ See infra Part III.B(i).

²¹⁶ Joshua Mira Goldberg, Trans People in the Criminal Justice System – A guide for criminal justice personnel (Shelly Rivkin & Caroline White eds., 2003)

[W]hile case-by-case assessments are a good approach, there needs to be a framework to guide the assessment. After two incidents of gang rape of MTF inmates, Australian correctional services implemented a three-tier policy for placement that prioritizes the prisoner's safety: 1) What facility would provide the safest environment for the trans prisoner? Is it safer to place them in a male facility or a female facility? Which unit in a particular facility is safest? 2) A secondary consideration is general appearance, i.e., what gender does the prisoner live as? 3) The last consideration is physiology, i.e, has the prisoner had genital surgery?²¹⁷

The document also strongly supports access to appropriate health care for transgender inmates, whether they were being treated prior to commitment or not. While the document is an excellent resource and is a factual report rather than a judicial decision, its usefulness in the United States may be limited considering the comments of Chief Justice John Roberts about the use of foreign precedent by U.S. courts.²¹⁸ Being against the use of foreign precedent is only one step removed from being against the use of all sources of foreign knowledge and enlightenment.

In their well-researched reference, *Transgender Care – Recommended Guidelines, Practical Information & Personal Accounts*, ²¹⁹ Gianna E. Israel and Dr. Donald E. Tarver II provide policy recommendations for the Residential Placement and Support of Transgender Individuals in Social Service, Mental Health, and Correctional Settings:

²¹⁷ *Id.* at 431 (citing HOME OFFICE, *supra* note 32).

James G. Lakely, *Roberts criticizes foreign law used as precedent*, WASHINGTON TIMES, Sept. 14, 2005, http://www.washtimes.com/national/20050913-095459-9880r.htm (last visited May 19, 2010).

²¹⁹ GIANNA E. ISRAEL & DONALD E. TARVER, II, TRANSGENDER CARE – RECOMMENDED GUIDELINES, PRACTICAL INFORMATION & PERSONAL ACCOUNTS (Temple Univ. Press 1997).

- Transgender identity and gender identity issues are 1. not mentally disordered, diseased, or pathologic. Thousands of transgender individuals lead well-adjusted lives as productive and law-abiding participants in society.
- Transgender individuals are not known to have a higher incidence of mental health disorders than the general population, although stereotypes, social isolation, and prejudice are known to exacerbate circumstantial difficulties in the lives of transgender people.
- 3. Because transgender identity and gender-identity issues are not pathologic conditions, the presence of a transgender identity or fulfillment of transgender needs (such as a desire to crossdress, live in a role, pursue and undergo hormone administration or aesthetic or Genital Reassignment Surgery) is not a reason to institutionalize, incarcerate, or detain transgender individuals in mental health, correctional, or similar residential facilities.
- Those making decision[s] about residential place-4. ment within mental health, social service, and correctional settings are advised to take into account an individual's current gender presentation and her or his actual placement request, as well as the individual's gender-related history. Placement decisions should also take into account the needs of other populations served at the receiving facility, although any decisions made should not prove discriminatory to any population.
- Where uncertainty exists with regard to residential placement and support services or where care providers are unfamiliar with gender identity issues, a Gender Specialist should be consulted for assistance in the negotiation and evaluation of placement decisions, as well as for staff and peer-sensitivity training.

- 6. Residential or correctional staff are advised that hormone administration should not be denied transgender individuals when they have a verifiable history of hormone usage, or when they fall within the criteria established in the Guidelines for Hormone Administration (see Chapter 3). Staff and physicians are reminded that in Recommendation 1b of the Guidelines for Hormone Administration, exceptions to the three month assessment period may be considered by the evaluating Gender Specialist or prescribing physician if a well-established transgender identity exists and when other aspects of the Guidelines for Hormone Administration are observed.
- 7. Residential staff and correctional officers are advised to refer to transgender individuals in a manner respectful of each individual's stated preference for gender presentation and name and pronoun usage requests. They should also direct peers to respect the gender self-identification of transgender residents.
- 8. Residential staff and correctional officers are advised that some transgender individuals may be unable to voice their gender-identity needs after suffering a crisis situation. Therefore, residential staff and correctional officers are advised to consult a professional Gender Specialist whenever they are aware that an individual is transgender-identified but unable to speak on her or his own behalf.
- 9. Residential staff and correctional officers are advised that, in order to maintain their gender identification, transgender persons need gender-specific clothing, cosmetics, and toiletry supplies. MTF individuals typically need shaving razors, cosmetics (lipstick, blush, foundation, mascara), brassieres, female clothing and the like. FTM

individuals typically need binding material (large Ace bandages), prostheses, and small shoes. Supplies for transgender persons may need to be "exception" or "catalog" ordered if not included on standard residential or inmate supply order forms. Shoes in small sizes and clothing in large sizes may also need to be catalog ordered.

10. Transgender individuals, in their interactions with mental health and social service providers, are advised that many staff and correctional officers may be unfamiliar with transgender identification and needs. With this understanding, transgender individuals are advised to express their placement requests and support needs and to be prepared to explain their needs in calm, consistent, easy-to-understand language. If a care provider or correctional officer seems unfamiliar with gender issues and the needs of the transgender individual are not being met, the transgender person is advised to request to speak with a supervisor, or to ask that the agency consult with a Gender Specialist regarding transgender needs.²²⁰

Israel and Tarver's guidelines are a very good starting point for formulating policies concerning the placement and treatment and protection of transgender inmates and prisoners.

The Second International Conference on Transgender Law and Employment Policy (ICTLEP), an advocates' forum, has also contributed to policy discussions by its adoption of a Policy for the Imprisoned, Transgender on August 28, 1993.²²¹ That policy includes:

 Segregation in the interest of the inmate's safety and dignity shall not deprive any inmate from the rights,

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²²⁰ Id. at 54-55.

²²¹ 2 PROCEEDINGS FROM THE INT'L CONFERENCE ON TRANSGENDER LAW AND EMPLOYMENT POLICY 3, 134-141 (1993), *available at* http://www.transgender legal.com/imprison1.htm.

privileges and facilities afforded to other general population inmates.

- Access to counseling shall be afforded all transgendered inmates and shall include peer support group participation by those from inside the institution and those from outside where possible. Counseling professionals should be qualified with respect to the current standard in gender science.
- Transgendered inmates shall be allowed to initiate or to continue hormone therapy, electrolysis and other transgender treatment modalities as prescribed by involved professionals.
- The transgendered inmate shall have access to clothing, personal items and cosmetics that are appropriate to the gender presentation of that inmate and appropriate within the institutional setting.
- Special care shall be taken not to make a spectacle of transgendered inmates to the amusement of others, or to deny or to deprive transgendered inmates of their dignity.
- A process shall be established to afford the hearing of grievances to the above policy items and appropriate resolution shall be made.²²²

In addition to organizational responses, individual experts also have contributed to the body of knowledge regarding transgender persons. Dr. Lori Kohler prepared a number of charts and graphs²²³ demonstrating the effects and results of limited access to

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²²² *Id.* at 134-41.

²²³ Kohler, *supra* note 167, at slides 21-35.

quality health care by transgender persons, the results of low self esteem, and the effect of adding incarceration to the mix. Also, the effects of the limited access to health care is juxtaposed to the results if access to health care is not limited.

She describes the Gender Program and the California Medical Facility at Vacaville as: A Gender Clinic; Transgender support group; Harm reduction education by inmate peer educators; 250+ unduplicated patients; 25 patient encounters/ session, avg.: 800 patient encounters; 50-70 inmates receiving feminizing hormones at any given time: 5 new patients/session. avg.; Inmates transported from other facilities for consultation; >95% of patients evaluated receive hormones: 60-70% HIV+: Majority are people of color; Majority committed nonviolent crimes; and Many with life sentences for nonviolent crimes under three strikes²²⁴

She identifies the following issues as challenges to the identification of transgender inmates: Strict grooming standards: No access to usual feminizing accessories; No access to evidence of usual appearance; No friends or family to support patient identity; Hormones as income or barter; Secondary gain in a man's world; Temporary loss of social stigma and separation from family influence: The grapevine impedes clinician use of consistent subjective tests, lines of questioning; and The grapevine creates competition and influences treatment choices [i.e., some prisoners will discover which answers to subjective tests will allow them access to the program and to various treatments and will sell and/or just pass those answers down to others on the "grapevine". 225

She identifies the challenges of hormones in prison as including:²²⁶ Estradiol should be given in injections only with no orally administered hormones. This is non-negotiable to avoid the use of oral hormones as barter [i.e., some inmates will seek access to various kinds of oral medications not for their own use, but to

 $^{^{224}}$ *Id.* at slides 93-95. 225 *Id.* at slides 96-98.

²²⁶ *Id.* at slide 99.

trade for items from other inmates]. Provide hormones to inmates despite prior use by the inmate.

Among the special concerns of the gender program were:²²⁷ lack of access to bras; prisoner safety in showers and housing; prisoner vulnerability to sexual abuse: visibility to corrections officials; and the empowerment as a woman in a men's facility. These concerns were echoed in testimony before the National Prison Rape Elimination Commission. One inmate reported: "[t]he showers were the worst. They are one big open area with shower heads. If you get in there with titties, or with any other work done, it becomes a masturbation-athon. The officers are right next to you, they can see everything. How I survived is sticking with the girls. Or you find somebody big and you become the typical jailhouse punk."228 Another inmate reported: "I am currently serving a 30 day keeplock²²⁹ for possession of brassieres which were not authorized. Unless I develop breast tissue, I will never get authorization for bras. And I will only develop breast tissue after receiving hormonal therapy, which the state has continuously denied me."²³⁰ Yet another inmate reported, "One time I had 2 [two] bras missing from my laundry, which I reported to the COs [Correctional Officers]. A Correctional Officer came on the loud speaker and announced it to the entire prison. It was one of the most mortifying things that's ever happened. I couldn't believe it.",231

The Kaiser Family Foundation has hosted an annual National HIV/AIDS Update Conference since 1988. At the 17th National HIV/AIDS Update Conference on April 12, 2005, Dr. Lori Kohler was a speaker in the "Vulnerable Communities Track"

²²⁸ BASSICHIS, *supra* note 164, at 30.

²²⁷ *Id.* at slide 100.

²²⁹ "Keeplock" is a form of solitary confinement. Keeplock inmates are confined to their cells 23 hours a day, with one hour of court-mandated recreation.

²³⁰ BASSICHIS, *supra* note 164, at 22-23.

²³¹ *Id.* at 21.

on "Forging New Ground." She spoke on "Transgender Issues and Corrections Medicine." 232

An international survey of correctional services concerning transsexuals in prison conducted by the Clarke Institute of Psychiatry in Toronto, Canada revealed the following findings:

- Twenty-nine of sixty-four correctional institutions stated they would maintain existing hormone therapy provided this had been prescribed prior to admission to prison.
- Sixty-two indicated that all inmates must wear the clothing appropriate to the institution regardless of the inmate's felt gender.
- Fifty-three jurisdictions reported that reassignment surgery would never be considered, while eleven reported that, in certain specific circumstances, sex reassignment surgery would be permitted. For example, under court order or where the inmate could afford to pay the cost himself or herself.
- The perception of risk of assault and sexual assault against transsexual inmates was mixed, some estimated the risk to be higher while several estimated that it was no higher than that faced by non-transsexual inmates.
- Of the sixty-four corrections departments that responded to the survey, only twenty percent reported any kind of formal policy in the housing or treatment of incarcerated transsexuals with another twenty percent reporting an informal policy.²³³

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²³² Kohler, *supra* note 8.

Maxine Petersen et al., Transsexuals within the Prison System: An International Survey of Correctional Services Policies, 14 BEHAV. SCI. & L. 219, 222-24 (1996).

V. CONCLUSION

The debate over the proper care, housing, and protection of transgender inmates has finally entered discussions by correctional professionals. Correctional professionals are finally discussing the proper care, housing and protection of transgendered inmates.²³⁴ There was nothing positive in those conferences and articles until 2009. They basically just re-hash the existing case law and view the issues associated with transgender inmates as just another administrative burden. It is no doubt influenced more generally by the jaded view of correctional officials about the prisoners in their charge. By "jaded" it is meant that correctional officials, not without some justification, view complaints by inmates with skepticism and mistrust inmates. However, in 2009 the National Commission on Correctional Health Care issued a policy statement entitled "Transgender Health Care in Correctional Settings," which presents a fair and balanced approach to providing for the special health care needs of transgendered inmates.²³⁵ Hopefully. corrections systems will adopt the provisions of this policy statement.

This is not to say that every inmate who wants it should be provided with government paid Gender Reassignment Surgery. Rather, because it is arguably an "elective" surgery, it should be granted under specified circumstances, and perhaps should used as a reward for good conduct. Fiscal constraints would reasonably be taken into account and a rationing system of granting the surgery would make sense.

Although they should not be excluded altogether, inmates serving life or nearly life sentences (i.e., thirty or more years

See, e.g., Rodney L. Fry, *Transsexualism: A Correctional, Medical or Behavioral Health Issue?*, CORRECTCARE, Winter 2003, available at http://www.ncchc.org/pubs/CC/transsexualism.html.

Nat'l Comm'n on Corr. Health Care, Transgender Health Care in Correctional Settings, http://www.ncchc.org/resources/statements/transgender. html (adopted by the Nat'l Comm'n on Corr. Health Care Board of Directors on Oct. 18, 2009). This document is reproduced as Appendix 3 to this article.

before parole is a possibility) would obviously be low priority candidates for Gender Reassignment Surgery. The biggest problem with such inmates would be fulfilling the one year cross-living criterion of the Standards of Care. This, however, could be overcome with little effort. First, an MtF inmate would have to have been on hormone therapy long enough (and possibly even have to have had an orchiectomy) so that his normal male hormonal sexual instincts would not make him a danger to female inmates. He would not be a potential danger sexually because after six months to a year of estrogen therapy combined with the suppression or elimination of testosterone production, he would no longer be able to achieve an erection. Estrogen therapy also causes genetic males to lose muscle mass. Second, he would need a letter of recommendation from a therapist. Then, he could be transferred to a women's correctional facility to meet the cross-living requirement. True, this would not be the same as living in the outside world and having to contend with men and women in the new role, but at women's correctional facilities there are male and female correctional officers. So, there would be an opportunity to interact with men and women in the MtF's new gender role, while being safe from sexual assault by male prisoners. Then, with a further recommendation from a therapist, the inmate could be put on the waiting list for Gender Reassignment Surgery. Also, the assignment to the women's correctional facility could be made permanent if the trial period were successful.

First in line for the surgery should be those inmates who have a foreseeable release date. Before approval for the surgery, he or she should be eligible for serving the end of his or her sentence in a half-way house or other transitional facility. Then, pursuant to the *Standards of Care*, he or she should be required to cross-live for a minimum of one year while in the half-way house.²³⁶

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The one year of cross-living is important as a prerequisite for gender reassignment surgery (GRS) because it allows the transgender person to see what it is like to live as a member of the opposite gender or sex. Male-to-female transgender persons in particular are sometimes shocked by and unable to cope with the second-class treatment that women still receive in the twenty-first

Cooperation of the correctional system will also be required to assist the person with getting his or her name changed as many states have a reluctance to, if not a policy of, not granting judicial name changes to inmates or even to those on parole.²³⁷ If that cross-living experience is successful and if the person's therapist recommends it, then surgery should be provided at or near the end of the sentence (along with assistance in obtaining new identification documents).

Great Britain and Canada grant Gender Reassignment Surgery to their inmates.²³⁸ The United States government and state governments should examine how those countries handle the issue and learn from them. Doing the right thing. Such a policy would foster multiple goals of the corrections system. Prisons would be safer places, and inmates better able to re-enter life outside the prison with less risk of re-offending by increasing the likelihood of their becoming contributing members of society

century. Prior to the GRS, the MtF transgender person can revert to being a man with the only change in his appearance being having diminished or no facial hair and being impotent. Once the GRS is performed, it makes permanent changes in the transgender person's body. Thus, the cross-living provides a safety net to allow one who is not psychologically ready for living as a member of the opposite sex or gender to change his or her mind before irreversible bodily changes are made.

²³⁷ See, e.g., In re Parrott, 392 S.E.2d 48 (Ga. Ct. App. 1990); Whitmore v. State, 752 So.2d 365 (La. Ct. App. 2000); In re Verrill, 660 N.E.2d 697, (Mass. App. Ct. 1996); Brown v. Wyrick, 626 S.W.2d 674 (Mo. Ct. App. 1981); In re Gutkaiss, 806 N.Y.S.2d 402 (N.Y. Sup. Ct. 2005); In re Paxson, 1992 WL 154139 (Ohio Ct. App. June, 30 1992); In re Dickey, 919 S.W.2d 790 (Tex. App. 1996); Kruzel v. Podell, 226 N.W.2d 458 (Wis. 1975).

²³⁸ See, e.g., Kavanagh v. Canada (A.G.), [2001] C.H.R.T. P113, available at http://www.chrt-tcdp.gc.ca (last visited May 10, 2010); Sawer, *supra* note 178.

APPENDIX

Gender Glossary²³⁹

Coming out – The process of first recognizing and acknowledging non-heterosexual orientation or Transgender identity to oneself and then sharing it with others. Coming out means dropping the secrecy and pretense and becoming more emotionally integrated. This usually occurs in stages and is a non-linear, life-long process.

Congruent – Having a Gender and a gender identity that match. Non-transsexual and post-operative Transsexual people are congruent.

Cross-dressing – Wearing clothing most often associated (in one's culture and historical timeframe) with people of the other gender.

Drag Queen or Drag King – Wearing the clothing of another gender, often involving the presentation of exaggerated, stereotypical gender characteristics. Individuals may identify as drag kings (female in drag) or drag queens (male in drag) when performing gender as parody, art or entertainment.

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Definitions are a combination of borrowed terms and this author's general understanding. See Safe Schools Coalition Home Page, Glossary (2005), http://www.safeschoolscoalition.org/safe.html (follow "SSC Reports, Handouts, Brochures and Posters" menu; then follow "Handouts for Educators 2" menu; then follow "Glossary" hyperlink.); UNIV. OF SOUTHERN CAL. LESBIAN GAY BISEXUAL TRANSGENDER (LGBT) RESOURCE CENTER, TRANSGENDER TERMINOLOGY, available at http://www.usc.edu/student-affairs/glbss/PDFS/TransgenderTerms.pdf; Equality Florida Home Page, http://eqfl.org/issues/gender.php (last visited May 10, 2010); Louis J. G. Gooren, Hormonal Sex Reassignment, 3 INT'L J. OF TRANSGENDERISM 3, 4-5 (July/Sept. 1999), available at http://www.wpath.org/journal/www.iiav.nl/ezines/web/IJT/97-03/numbers/symposion/ijt990301.htm; Intersex Society of North America, http://www.isna.org/faq/frequency (last visited May 10, 2010).

FtM or FTM – An acronym for Female-to-Male transgender or transsexual

Gay – A man whose sole or primary sexual and romantic attraction is to other men.

Gender – A social construct based on a group of emotional and psychological characteristics that classify an individual as feminine, masculine, androgynous or other. Gender can be understood to have several components, including gender identity, gender expression and gender role.

Gender Characteristics – Primary or secondary sexual characteristics such as height, weight, shape, and facial/body hair.

Gender Expression – The manifestation of an individual's fundamental sense of being masculine or feminine through clothing, behavior, grooming, etc.

Gender Identity – An inner sense of being male or female.

Gender Reassignment Surgery – The surgical removal of a transsexual's genitalia and the surgical formation of genitalia of the opposite gender to make the transsexual's gender and sex congruent. For the male-to-female transsexual, SRS or GRS involves a bi-lateral orchiectomy (castration or removal of the testicles), removal of the meatus of the penis, the use of the scrotum to create a labia, and the use of the penis' skin covering and possibly part of the scrotum to form a vagina. For the female-to-male transsexual, this would involve a bi-lateral, radical mastectomy, a complete hysterectomy, plastic surgery on the chest to make the nipples and pectorals look masculine, and removal of a section of muscle and skin from the forearm to form a penis. The cost for a male-to-female's surgery would be about \$15,000 or

more. The cost for a female-to-male's surgeries would be about \$75,000 or more.

Gender Role – One's Gender expression and one's beliefs and feelings about the appropriate and/or comfortable expression of one's Gender. To some degree, Gender role is clearly learned (socially constructed and culture-specific). To some degree, people are probably biographically predisposed to be more "feminine" or "masculine"

Gender Stereotypes – Mental templates we all have for how each sex should look, dress, and act.

Gender Stereotyping – The act of trying to compel an individual's conformity to gender stereotypes.

GLBT – see LGBT

Hormonal Sex Reassignment – Using hormones of the opposite biological sex and suppressants for one's own biological sex hormones to develop the secondary sexual characteristics that reflect one's chosen gender. Male-to-female transgendered persons taking estrogen and suppressing testosterone will result in softening of the skin, growth of breast tissue, loss of muscle mass, and an appreciable change in one's sense of self. In female-to-male transgendered persons taking testosterone and suppressing estrogen will result in a deepening of the voice by one or more octaves, growth of facial and body hair, increase in muscle mass, and an appreciable change in one's sense of self.

Intersexed or Intersexual – An adjective to describe a person (referred to archaically as a *hermaphrodite*) who was born with an anomaly of the reproductive system – with genitals or chromosomes that were not clearly male or female. At least 1 in 2,000 children is born with genitals that make it difficult for even an expert to determine the baby's sex. Some doctors consider such

anomalies as hypospadias (in which the urethral opening is somewhere other than the tip of the penis) which occurs in 1 of every 200 baby boys to be intersexed conditions. Many intersexed infants born with ambiguous genitalia are surgically "normalized" at the wishes of their anxious parents. This is a controversial procedure which later results in the loss of sexual response in adulthood. The Intersex Society of North America has called this practice Genital Mutilation. Some intersexed infants have even been sexually reassigned – without their consent – and later in life develop gender identity issues strikingly similar to those of transsexual people.

Lesbian – A woman whose sole or primary sexual and romantic attractions are to other women.

LGBT – An acronym for Lesbian, Gay, Bisexual and Transgendered

LGBTI – An acronym for Lesbian, Gay, Bisexual, Transgendered and Intersexed

Lifestyle – An inaccurate term sometimes used to describe the lives of Gays, Lesbians, Bisexuals and Transgendered persons. It implies that the homes, careers, and relationships of all sexual and gender minorities are identical. There is a GLBT culture, with its own performing arts and body of literature. There is a GLBT community with gay- and lesbian-identified businesses, publications and holidays. But the degree to which people who identify as Gay, Lesbian, Bisexual or Transgender take part in this culture and community varies from not-at-all to almost-exclusively. There is no Gay lifestyle, or Lesbian lifestyle, or Transgendered lifestyle, just as there is no straight lifestyle.

MtF and MTF – an acronym for Male-to-Female transgender or transsexual

Sex – Biological sex, as evidenced by chromosomes, body type, genitals, and physical characteristics. The sum of the biological (chromosomal, hormonal, and anatomical) factors that make one male, female, or intersexual.

Sexual Reassignment Surgery – See Gender Reassignment Surgery, which is now the preferred term.

Transgender – An umbrella term used to describe **Gender Variant** people who have Gender Identities, Expressions or behaviors not traditionally associated with their birth sex. **Transgender** is preferred over *transvestite* or *transsexual*, older terms which do not accurately describe all transgendered people, and which also have a clinical or stigmatizing connotation. **Transgender** can also mean anyone who *transcends* the conventional definitions of 'man' and 'woman.' Thus, transgender also can include **Butch Lesbians**, **Radical Faeries**, **Drag Queens**, **Drag Kings** and many other kinds of **Gender Variant** people who use a variety of terms to self-identify. Transgender is often mistakenly understood to mean **Transsexual**. Transsexuals are but one component of the Transgender umbrella.

Transsexual – A person who wishes and seriously acts upon the sense of having the wrong body – often, though not always, culminating in Sexual Reassignment Surgery. Preoperative transsexuals include those not yet undergoing surgery. Post-operative transsexuals include those who have received surgery. Non-operative transsexuals are those who, for whatever reason (financial, medical, or other) cannot or choose not to have surgery.

Transvestite – A person – not necessarily gay – who dresses in clothing most often associated with the other gender. The increasingly preferred term is a person who cross-dresses.