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## CEDAW Disapproves: The United States' Treatment of Transgender Women in Prisons

Victoria Harrison

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## **CEDAW DISAPPROVES: THE UNITED STATES' TREATMENT OF TRANSGENDER WOMEN IN PRISONS**

Victoria Harrison\*

<b>I. INTRODUCTION</b> .....	<b>2</b>
<b>II. THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN</b> .....	<b>3</b>
<b>III. THE UNITED STATES' FAILURE TO RATIFY CEDAW</b> .....	<b>4</b>
<b>IV. AN OVERVIEW OF THE TREATMENT OF TRANSGENDER WOMEN IN U.S. PRISONS</b> .....	<b>5</b>
A. GENITALIA-BASED PLACEMENT .....	6
B. SEXUAL ABUSE BY STAFF AND OTHER PRISONERS .....	6
C. HOUSING - SOLITARY CONFINEMENT.....	7
D. SEARCHES.....	8
E. MEDICAL CARE.....	8
F. PRIVACY.....	9
G. EQUAL TREATMENT IN VISITATION, CONDUCT, AND OTHER OPPORTUNITIES ...	10
<b>V. CASE STUDIES HIGHLIGHTING ISSUES FACED BY TRANSGENDER WOMEN INMATES</b> .....	<b>10</b>
A. DEE FARMER .....	10
B. LAYLEEN POLANCO.....	11
C. JENA FAITH .....	12
<b>VI. THE GAP IN GOVERNING LAW AND LACK OF ENFORCEMENT TO PROTECT TRANSGENDER WOMEN INMATES</b> .....	<b>12</b>
A. CEDAW .....	13
1. <i>Gap in CEDAW</i> .....	13
a. CEDAW Recommendations .....	14
2. <i>Transgender Women Under CEDAW</i> .....	17
B. DOMESTIC LAW .....	18
1. <i>The Eighth Amendment – Cruel and Unusual Punishment</i> .....	18
2. <i>The Fourteenth Amendment – Equal Protection Clause</i> .....	20
3. <i>Prison Rape Elimination Act of 2003</i> .....	21

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**VII. HOW THE UNITED STATES WOULD BE IN VIOLATION OF CEDAW DUE TO THE TREATMENT OF TRANSGENDER WOMEN IN THE CRIMINAL JUSTICE SYSTEM..... 22**

A. GENITALIA-BASED PLACEMENT ..... 23

B. SEXUAL ABUSE BY STAFF AND OTHER PRISONERS ..... 24

C. HOUSING - SOLITARY CONFINEMENT..... 25

D. SEARCHES..... 26

E. MEDICAL CARE..... 27

F. PRIVACY..... 28

G. EQUAL TREATMENT IN VISITATION, CONDUCT, AND OTHER OPPORTUNITIES ... 29

**VIII. RECOMMENDATIONS ..... 30**

**IX. CONCLUSION ..... 31**

**I. Introduction**

The Convention on the Elimination of all Forms of Discrimination Against Women (“CEDAW” or “the Convention”) is the only key international human rights instrument that exclusively addresses women and the discrimination they face.<sup>1</sup> CEDAW provides protections to women against all forms of discrimination, including incarcerated women.<sup>2</sup> The United States has failed to ratify the Convention. However, if the United States was a party to CEDAW, the United States would be in violation of the Convention given the treatment of transgender women in the U.S. criminal justice system, specifically in prisons.

This article is broken down into specific sections to prove the United States would be in violation of CEDAW for its treatment of transgender women in prisons. Section II will provide background on CEDAW and Section III will examine the United States’ failure to ratify the Convention. Section IV will give an overview of the treatment of transgender women in the United States criminal justice system. Next, Section V will look at specific case studies of transgender women who have faced discrimination in United States prisons. Section VI will analyze the gaps in other governing laws that are supposed to protect transgender women as well as the lack of enforcement of these laws. Moreover, Section VII will analyze how the United States would be in violation of CEDAW due to the treatment of transgender women in the criminal justice system. Finally, Section VIII will provide recommendations the United States can take to remedy the injustice and issues transgender women face in U.S. prisons.

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<sup>1</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; 19 I.L.M. 33 [hereinafter CEDAW].

<sup>2</sup> *Id.* at art. 1.

## II. The Convention on the Elimination of all Forms of Discrimination Against Women

CEDAW is “one of the very concrete results of the UN Decade for Women 1976-1985.”<sup>3</sup> CEDAW is a treaty that was drafted around the concept of elimination of discrimination regarding women.<sup>4</sup> It defines discrimination against women as:

Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>5</sup>

This definition has a wide scope, which requires States parties to address how the enjoyment of recognized human rights is adversely affected by gender-based distinctions, exclusions, and stereotypes.<sup>6</sup> Although the treaties' scope might be wide, it has been argued that because CEDAW is drafted around the concept of elimination of discrimination it is too specific and narrow, therefore, making it problematic. It is problematic because structuring an argument under CEDAW requires a comparison to males.<sup>7</sup> Making an argument is a two-part process: first, an individual has to prove a violation occurred, and second, an individual has to prove the violation occurred as a form of discrimination based on the individual being a woman.<sup>8</sup> This pragmatic approach to drafting CEDAW might be critiqued, but it does not diminish the importance of the Convention.

Although women are protected by other international treaties, the drafting of CEDAW was necessary to specifically address problems that impact women but do not impact men, and explicitly discuss that women are included in vulnerable groups.<sup>9</sup> As noted, CEDAW applies to all forms of discrimination against women and is not limited to the specific fields discussed within the treaty: “The Convention affirms the rights of all women to exercise on an equal basis their ‘human rights

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<sup>3</sup> Margareta Wadstein, *Implementation of the UN Convention on the Elimination of All Forms of Discrimination against Women*, 6 NETH. Q. HUM. RTS. 5 (1988).

<sup>4</sup> CEDAW, *supra* note 1, at art. 2.

<sup>5</sup> *Id.* at art. 1.

<sup>6</sup> Brad R. Roth, *The CEDAW as a Collective Approach to Women's Rights*, 24 MICH. J. INT'L L. 187, 189 (2002).

<sup>7</sup> Alexandra R. Harrington, *Don't Mind the Gap: The Rise of Individual Complaint Mechanisms within International Human Rights Treaties*, 22 DUKE J. COMP. & INT'L L. 153, 167 (2012).

<sup>8</sup> *Id.*

<sup>9</sup> Roth, *supra* note 6, at 190.

and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”<sup>10</sup> CEDAW guarantees women among other things the right to not be discriminated against and to be treated equally.<sup>11</sup> Further, CEDAW creates remedies for women who have been discriminated against.

CEDAW was adopted by the United Nations General Assembly on December 18, 1979.<sup>12</sup> The treaty entered into force on September 3, 1981.<sup>13</sup> CEDAW is the second most ratified treaty.<sup>14</sup> The six United Nation Member States that have not ratified or acceded to CEDAW are Iran, Palau, Somalia, Sudan, Tonga, and the United States.<sup>15</sup> The United States signed onto CEDAW during the Carter Administration, but has not ratified the Convention.<sup>16</sup> Ratification would require the United States to incorporate CEDAW’s principles into domestic law. For a country that proudly boasts about its support and record of recognizing human rights, it is disgraceful for the United States to have not yet ratified the Convention, especially because it is the only economic world leader to have failed to ratify the treaty.<sup>17</sup>

### III. The United States’ Failure to Ratify CEDAW

There are multiple issues of controversy regarding the United States’ ratification of CEDAW. It is important to acknowledge why the United States has failed to ratify the Convention before discussing why the United States would be in violation of CEDAW due to its treatment of transgender women inmates in prisons. The issues of controversy regarding the United States’ failure to ratify include: abortion, sex work, sexual preference, women in the military, maternity benefits, and the federal government’s role in enforcing rights.<sup>18</sup> Harold Koh addresses these “myths and fallacies” by directly pointing out that nowhere in CEDAW does it mandate States parties to provide a right to an abortion or contraceptives.<sup>19</sup> Abortion is one of the leading and most used arguments against the ratification of CEDAW; however, to reiterate, the treaty is neutral on this topic. Another frequently used

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<sup>10</sup> Harold Hongju Koh, *Why America Should Ratify the Women's Rights Treaty (CEDAW)*, 34 CASE W. RES. J. INT'L L. 263, 266 (2002).

<sup>11</sup> CEDAW, *supra* note 1.

<sup>12</sup> Fayeeza Kathree, *Convention on the Elimination of All Forms of Discrimination against Women*, 11 S. AFR. J. ON HUM. RTS. 421 (1995).

<sup>13</sup> *Id.* at 422.

<sup>14</sup> *A Fact Sheet on CEDAW: Treaty for the Rights of Women*, AMNESTY INT’L, [https://www.amnestyusa.org/files/pdfs/cedaw\\_fact\\_sheet.pdf](https://www.amnestyusa.org/files/pdfs/cedaw_fact_sheet.pdf) (last visited Dec. 13, 2019).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Koh, *supra* note 10, at 265.

<sup>18</sup> *Id.* at 270-71.

<sup>19</sup> *Id.* at 272.

argument against the ratification of the treaty is that the treaty would require sex work to be legal. However, Article 6 of CEDAW states, parties who have signed onto the treaty “shall take all appropriate measures... to suppress all forms of traffic in women and exploitation of prostitution in women.”<sup>20</sup> This language directly contradicts the argument that ratifying CEDAW would require the legalization of sex work.

Further, “CEDAW does not contain any provisions seeking to regulate any constitutionally protected interests with respect to family life,” so the argument that the ratification of CEDAW would undermine the family unit, as it is known in the United States, is inapplicable.<sup>21</sup> According to Koh, the most pervasive argument against the United States’ ratification of CEDAW is that it “would diminish our national sovereignty and states’ rights by superseding or overriding our national, state or local laws.”<sup>22</sup> It is Koh’s belief that this argument is pervasive because the treaty gives some discretion to Member States on how it will implement “appropriate measures.”<sup>23</sup> Although Koh’s writing is persuasive, it is because of the issues he addresses that the United States will most likely never ratify CEDAW. However, if the United States was to ratify the treaty it would be in violation because of the many issues transgender women face in U.S. prisons.

#### **IV. An Overview of the Treatment of Transgender Women in U.S. Prisons**

The following section provides an overview of the treatment of transgender women in the United States criminal justice system, highlighting specific issues transgender women face in prisons. It is critical to address the following issues that transgender women inmates face in prisons because these issues would cause the United States to be in violation of CEDAW, if the United States was a party to the Convention. The National Center for Transgender Equality reported that transgender women face the following key issues in U.S. prisons: violence by State and other prisons, housing and placement, searches, medical care, privacy, and the equal treatment in visitation, conduct, and other opportunities.<sup>24</sup> It is important to note that the issues discussed in this section are not exhaustive, and transgender women inmates face a great deal more. It is equally important to note that

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<sup>20</sup> CEDAW, *supra* note 1, at art. 6.

<sup>21</sup> Koh, *supra* note 10, at 272.

<sup>22</sup> *Id.* at 273.

<sup>23</sup> CEDAW, *supra* note 1, at art. 2.

<sup>24</sup> *LGBTQ People Behind Bars: A Guide to Understanding the Issues Facing Transgender Prisoners and their Legal Rights*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/sites/default/files/docs/resources/TransgenderPeopleBehindBars.pdf> (last visited Dec. 13, 2019).

transgender women of color inmates face these issues at a heightened degree and more frequently than white transgender women inmates.<sup>25</sup>

### **A. Genitalia-Based Placement**

Many of the issues transgender women inmates face are due to genitalia-based placement. Genitalia-based placement is the practice of “prison authorities generally plac[ing] transgendered prisoners, regardless of the extent of their nongenital transformation, based on their genitalia.”<sup>26</sup> Under this practice, individuals with typically female genitalia are placed in female prisons and individuals with typically male genitalia are placed in male prisons, regardless of which gender the individual identifies. This means that postoperative transgender individuals who have genitalia that match the gender they identify with do not necessarily face the issue of genitalia-based placement. Therefore, pre and nonoperative transgender women face the majority of the abuse that comes from genitalia-based placement. “Genitalia-based placement is faulty because it assumes a rigid gender binary that, by definition, denies the existence of transgender individuals.”<sup>27</sup> Genitalia-based placement causes further issues for transgender women in prison.

### **B. Sexual Abuse by Staff and Other Prisoners**

Violence and sexual abuse in prisons are among the many issues transgender women face due to genitalia-based placement. Transgender women face violence and sexual abuse by prison staff as well as by other prisoners due to the fact that “[t]ransgender people in prison are exposed to horrific rates of abuse by both staff and their fellow inmates, facing physical and sexual assault at much higher rates than their counterparts.”<sup>28</sup> The Bureau of Justice Statistics under the U.S. Department of Justice reported that the rate of sexual assault in 2011-2012 was

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<sup>25</sup> *Id.* at 5.

<sup>26</sup> Darren Rosenblum, *Trapped in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 522 (2000). It is important to note that “transgendered” is no longer a phrase that is in use today. “Transgender” is the correct terminology because the former implies a medical condition or problem, which is not the case.

<sup>27</sup> Sydney Tarzwell, *The Gender Liens are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 195 (2006).

<sup>28</sup> *Issues: Polices, Jails & Prisons*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/issues/police-jails-prisons> (last visited Dec. 13, 2019).

about ten times higher for transgender prisoners as compared to cisgender prisoners.<sup>29</sup>

One of the many reasons it is extremely dangerous to place transgender women in male prisons is because “male prisons have an infamous history of creating and reinforcing barbarous hierarchies of economic, social, and sexual subjugation of the weak to the strong, hierarchies that affect and victimize all male prisoners.”<sup>30</sup> These hierarchies victimize members of the LGBTQ+ community. A horrific example of this victimization is dominant, masculine inmates raping transgender women inmates.<sup>31</sup> Unsurprisingly, placing vulnerable individuals in these situations makes them easy targets for sexual violence, whether it is at the hands of other prisoners or prison staff.<sup>32</sup> “Not only do authorities turn a blind eye to abuse by prisoners of transgendered inmates, but they permit and occasionally encourage the mistreatment of transgendered inmates by prison employees.”<sup>33</sup> Prison officials are trusted with the duty and obligation to oversee inmates; however, this trust is regularly violated when they abuse and/or supervise the abuse of transgender women. Further abuse and victimization at the hands of prison officials occur when transgender women inmates are placed in solitary confinement.

### C. Housing - Solitary Confinement

Transgender women face additional issues in solitary confinement due to genitalia-based placement.<sup>34</sup> Specifically, The National Center for Transgender Equality notes, “often, jail or prison officials will respond to the vulnerability of LGBTQ prisoners by placing them in solitary ‘protective custody’ –effectively punishing them for being potential victims.”<sup>35</sup> This “protective custody” is typically solitary or isolated confinement. “The practice of moving transgender prisoners to [solitary confinement] when a threat becomes imminent (or after an assault occurs) punishes and stigmatizes transgender prisoners for their gender nonconformity, yet fails to prevent further victimization.”<sup>36</sup>

Solitary confinement brings with it a wide range of symptoms, including but not limited to: anger, hatred, bitterness, boredom, stress, loss of sense of reality,

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<sup>29</sup> A.J. BECK, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12: SUPPLEMENTAL TABLES: PREVALENCE OF SEXUAL VICTIMIZATION AMONG TRANSGENDER ADULT INMATES (Bureau of Justice Statistics, United States Department of Justice, NCJ 241399, 2014).

<sup>30</sup> Rosenblum, *supra* note 26, at 523.

<sup>31</sup> *Id.*

<sup>32</sup> *LGBTQ People Behind Bars*, *supra* note 24, at 6.

<sup>33</sup> Rosenblum, *supra* note 26, at 525.

<sup>34</sup> Eleanor Umphres, *Solitary Confinement: An Unethical Denial of Meaningful Due Process*, 30 GEO. J. LEGAL ETHICS 1057, 1076 (2017).

<sup>35</sup> *LGBTQ People Behind Bars*, *supra* note 24, at 14.

<sup>36</sup> Tarzwell, *supra* note 27, at 196.



suicidal thoughts, trouble sleeping, impaired concentration, confusion, depression, and hallucinations.<sup>37</sup> Amnesty International released a report analyzing how solitary confinement is akin to cruel and unusual punishment and should only be imposed “as a last resort and for the minimum period possible.”<sup>38</sup> In general, solitary confinement is extremely comparable to torture, but to be subjected to these conditions only because an individual is vulnerable is unacceptable and perpetuates the victimization of transgender women in prisons.

#### D. Searches

Relating back to genitalia-based placement, inmates are subjected to strip searches in front of prison staff, and sometimes other inmates, during the intake process to determine to which facility they should be assigned. These searches, although incredibly violating for all inmates, specifically impact transgender prisoners to a higher degree because the search essentially “outs” them to the prison staff and other inmates. These searches confirm that an individual is transgender, therefore alerting everyone present that the individual is vulnerable. Further strip searches and pat-downs “serve as a direct form of victimization by correctional staff.”<sup>39</sup> Prison safety is the argument used to validate searches conducted by prison staff, “however, in most instances, this practice becomes sexualized when correctional staff focus on certain bodily areas for extended periods of time, and by pressing the transgender inmate against the wall with their bodies.”<sup>40</sup> To make matters more unbearable, transgender women inmates are typically searched by male prison officials, which adds to the abuse and trauma.

#### E. Medical Care

Access to proper medical care is also an issue transgender women face while in prison. As rudimentary as this notion is, transgender women have their own set of health issues. Specifically, many transgender women struggle with gender dysphoria. The World Health Organization defines gender dysphoria as “the feeling of distress when an individual's gender identity is at odds with the gender assigned

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<sup>37</sup> Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 488 (2006).

<sup>38</sup> *Entombed: Isolation in the US Federal Prison System*, AMNESTY INT’L, <https://www.amnestyusa.org/wp-content/uploads/2017/04/amr510402014en.pdf> (last visited Dec. 13, 2019).

<sup>39</sup> Douglas Routh et al, *Transgender Inmates in Prisons: A Review of Applicable Statutes and Policies*, 61 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 645, 651 (2017).

<sup>40</sup> *Id.*

at birth.”<sup>41</sup> This medical condition impacts transgender individuals who are not incarcerated, but is specifically damaging to transgender women in prisons because of the lack of medical care to address this medical condition. On top of this, transgender prisoners are regularly prevented by prison officials from receiving health care related to transition, for example, hormone therapy or sex-reassignment surgery.<sup>42</sup>

Transgender women not receiving these healthcare procedures not only impacts their physical health, but weighs heavily on their mental health. Confinement, in general, hugely impacts prisoners' mental health, but tacking this onto the struggle of gender dysphoria can be overwhelming for transgender inmates, and is very comparable to cruel and unusual punishment. Further, some prison officials argue that denying gender dysphoria treatment is valid because “such treatments would increase the risk of violence towards the prisoners receiving the treatments.”<sup>43</sup> Again, transgender women are victimized just for existing in the United States prison system.

## **F. Privacy**

Not only do transgender women face issues of physical privacy in prisons, they face the issue of privacy around sensitive information.<sup>44</sup> The National Center for Transgender Equality reported that “information about [inmates'] LGBTQ status or medical information, like their HIV status or past treatments for gender dysphoria” is sometimes disclosed by prison staff to other prisoners “for the purpose of gossip or harass[ment].”<sup>45</sup> The disclosure of this private information is a clear violation of inmates' rights to privacy, but regardless, the impact of the disclosure goes beyond a violation of a right. It is understood that the LGTBQ+ community is especially vulnerable in confinement, but other prisoners knowing private information about an individual further puts them in harm's way to be abused and taken advantage of.

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<sup>41</sup> Sophie Lewis, *World Health Organization Removes “Gender Identity Disorder” from List of Mental Illnesses*, CBS NEWS, (May 29, 2019, 9:37 PM), <https://www.cbsnews.com/news/world-health-organization-removes-gender-dysphoria-from-list-of-mental-illnesses/>.

<sup>42</sup> Esinam Agbemenu, *Medical Transgressions in America's Prisons: Defending Transgender Prisoners' Access to Transition-Related Care*, 30 COLUM. J. GENDER & L. 1, 2 (2015).

<sup>43</sup> *LGBTQ People Behind Bars Rights*, *supra* note 24, at 16.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

### **G. Equal Treatment in Visitation, Conduct, and Other Opportunities**

Transgender women inmates are further victimized for being transgender in the context of unequal treatment in visitation, conduct, and other opportunities in U.S. prisons. Although courts have “held that facilities may not ban visitation by same-sex partners, completely prohibit same-sex hugging or kissing between prisoners, or prohibit prisoners from receiving LGBTQ publications,” transgender inmates are still punished for these acts.<sup>46</sup> For example, prisoners have reported being stigmatized and harassed by prison staff for consensual displays of affection between prisoners.<sup>47</sup> The Prison Rape Elimination Act, which will be discussed in Section VI, provides standards for prisons to help combat sexual abuse, however, these standards allow prisons to prohibit consensual contact and relationships between prisoners—“prohibitions that have been disproportionately used against LGBTQ people,” specifically transgender inmates.<sup>48</sup>

### **V. Case Studies Highlighting Issues Faced by Transgender Women Inmates**

In order to fully understand the hardships transgender women inmates face, it is important to contextualize the issues in the form of real-life examples. Below are case studies that exhibit the issues discussed in Section IV.

#### **A. Dee Farmer**

Dee Farmer was a preoperative transgender woman who was placed in a federal prison with male inmates.<sup>49</sup> Ms. Farmer was victimized for being transgender and was usually segregated from the male inmates.<sup>50</sup> However, Ms. Farmer was later transferred to a U.S. Penitentiary in Terre Haute, Indiana and was placed in the general population with male inmates.<sup>51</sup> Subsequently, Ms. Farmer was repeatedly raped, abused, and beaten by male inmates.<sup>52</sup> Ms. Farmer bravely filed a lawsuit against the penitentiary alleging that prison officials “deliberately and indifferently failed to protect her” which violated her Eighth Amendment right against cruel and

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<sup>46</sup> *Id.*; Doe v. Sparks, 733 F. Supp. 227 (W.D. Pa. 1990); Whitmire v. Arizona, 298 F.3d 1134 (9th Cir. 2002).

<sup>47</sup> *Id.*

<sup>48</sup> *LGBTQ People Behind Bars*, *supra* note 24, at 16.

<sup>49</sup> Chase Strangio, *Dee’s Triumph: One of the Most Important Trans Victories You Never Heard Of*, ACLU (Jun. 6, 2014, 2:45PM), <https://www.aclu.org/blog/smart-justice/mass-incarceration/dees-triumph-one-most-important-trans-victories-you-never>.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

unusual punishment.<sup>53</sup> In her lawsuit, Ms. Farmer sought damages as well as an injunction to being placed in male general population.<sup>54</sup> Ms. Farmer's case went to the Supreme Court, where it was ruled that Ms. Farmer may seek to receive damages if the prison staff showed "deliberate indifference."<sup>55</sup> Ms. Farmer's case was actually the first time the Supreme Court directly addressed the problematic issue of prison rape.<sup>56</sup>

An important note to mention when discussing Ms. Farmer's case, is that even in her lawsuit, she is referred to as "he," even though she is correctly referred to as Dee Farmer at other times.<sup>57</sup> The bare minimum that society can do is use an individual's preferred pronouns. The simple, deliberate, and careless act of referring to Ms. Farmer as "he" shows the role the court system plays in perpetuating and upholding systemic transphobia.

## **B. Layleen Polanco**

Layleen Polanco's story reiterates how barbaric solitary confinement is and again shows the victimization transgender women of color face just for existing.<sup>58</sup> CNN reported that Ms. Polanco was sent to New York's Rikers Island jail because she was unable to pay her \$500 bail.<sup>59</sup> Rikers Island, in general, has many problems that cannot be addressed here, but the fact that an individual was moved to this jail because she was unable to afford \$500 bail is mindboggling. What is further mindboggling is that Ms. Polanco was placed in solitary confinement at Rikers Island.<sup>60</sup>

The Department of Corrections argues that Ms. Polanco was not placed in solitary confinement; rather she was placed in "a restrictive housing unit." However, regardless of what the Department of Corrections wants to call solitary confinement, being in lockdown for seventeen hours out of the day is wrong and excessive. Further, what cannot be contested is that Ms. Polanco was found dead in her Rikers cell on June 7, 2019 due to complications from epilepsy. Documents show that a prison doctor signed off on approval for moving Ms. Polanco to solitary confinement, ultimately signing her "death warrant." This awful outcome did not have to happen. Ms. Polanco's story serves as a reoccurring reminder of the lack of

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<sup>53</sup> Farmer v. Brennan, 511 U.S. 825 (1994).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Strangio, *supra* note 49.

<sup>57</sup> Farmer, 511 U.S. at 825.

<sup>58</sup> Natasha Lennard, *How New York's Criminal Justice System Killed a Transgender Woman at Rikers Island*, THE INTERCEPT (Jun. 13, 2019, 11:28 AM), <https://theintercept.com/2019/06/13/layleen-polanco-death-rikers-trans-woman-sex-work/>.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

medical care given to transgender women inmates in prison and the sickening reality of solitary confinement used against transgender women inmates.<sup>61</sup>

### C. Jena Faith

Jena Faith, a transgender woman, awaited trial at Steuben County jail for four weeks.<sup>62</sup> Originally, Ms. Faith was placed in a women's facility.<sup>63</sup> This housing placement was appropriate because Ms. Faith identifies as a woman and has been recognized as such, "from her daily interactions with friends and family, to the gender marker on her New York driver's license and U.S. Social Security records, to being recognized as a woman at the VA medical center."<sup>64</sup> Despite these facts, Ms. Faith was abruptly moved from the women's facility to a men's facility.<sup>65</sup>

New York Civil Liberties Union, who represent Ms. Faith, wrote, "As a woman in the men's facility, [Ms. Faith] lived a nightmare, suffering sexual harassment from other incarcerated individuals, mistreatment at the hands of guards, and denial of medication prescribed by her physician."<sup>66</sup> Ms. Faith's experience again serves as a reminder of the systematic discrimination transgender women face in prisons. Ms. Faith summarized her experience best when she said, "Being incarcerated was hard enough, but being denied my medication and subjected to sexual harassment because of who I am made my time in the Steuben County jail even worse."<sup>67</sup>

## VI. The Gap in Governing Law and Lack of Enforcement to Protect Transgender Women Inmates

Understanding the horrors transgender women inmates face in U.S. prisons is the first step in analyzing the gap in governing laws that are supposed to protect transgender women as well as the lack of enforcement of these laws. The governing laws discussed in this section will include both international and domestic law.

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<sup>61</sup> Emanuella Grinberg, *Cause of Death Revealed for Transgender Woman who Died at Rikers Island*, CNN (Jul. 31, 2019, 6:50 PM), <https://www.cnn.com/2019/07/31/us/layleen-polanco-rikers-island-autopsy/index.html>.

<sup>62</sup> Press Release, NYCLU: ACLU of New York, *Lawsuit: Steuben County Jail Violates Rights of Transgender People*, (Aug. 22, 2019), <https://www.nyclu.org/en/press-releases/lawsuit-steuben-county-jail-violates-rights-transgender-people>.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

## A. CEDAW

CEDAW is one of the governing laws that can be used to protect transgender women inmates. In order to analyze how CEDAW can protect transgender women in the United States, it is necessary to hypothetically assume that the United States has ratified the Convention. As mentioned in previous sections, CEDAW's intention is to eliminate discrimination against women. CEDAW contains specific articles that can be used to address the issues incarcerated transgender women face.

Article 2 of CEDAW “condemns discrimination against all women in all its forms and calls on governments to take all appropriate measures to eliminate such discrimination [and] prohibits discrimination in both the public sphere and in the private sphere.”<sup>68</sup> Specifically, Article 2(d) states that Member States are “to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation.”<sup>69</sup> Under this article, U.S. prisons are prohibited from discriminating against transgender women. This means that issues transgender women inmates face, specifically the sexual violence, physical abuse, housing placement, violations of privacy, and lack of medical care, are forms of discrimination that are prohibited under CEDAW.

In addition, Article 2 of CEDAW applies to both the public and private spheres of a State because CEDAW places an obligation on States parties to ensure that the Convention is being complied with domestically.<sup>70</sup> Further, Article 2(e) specifically requires States parties, “To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.”<sup>71</sup> Under this provision, private and State held prisons are held to the same standard regarding discrimination against women because States parties are obligated to ensure that the Convention is being complied with domestically, regardless of whether the institution is public or privately held.

### 1. Gap in CEDAW

It is incredibly important to address that while CEDAW is a progressive treaty and catapulted women's human rights, it is not an end all be all to addressing discrimination against women. While the Convention was a huge step forward, there is still much work to do to secure women's human rights, and ratification of the Convention does not serve as a fix all. Further, while the United States' adoption

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<sup>68</sup> Alice Edwards, *Violence against Women as Sex Discrimination: Judging the Jurisprudence of the United Nations Human Rights Treaty Bodies*, 18 TEX. J. WOMEN & L. 1, 22 (2008).

<sup>69</sup> CEDAW, *supra* note 1, at art. 2.

<sup>70</sup> CEDAW, *supra* note 1.

<sup>71</sup> *Id.* at art. 2.

of the treaty would provide further protections to transgender women inmates, ratification would not remedy all of the inequality women, specifically transgender women inmates in U.S. prisons, face. Based on this point, and because this is a hypothetical article, it is necessary to note the shortcomings of CEDAW, so the reader is aware that although CEDAW is a progressive human rights treaty, there are many more steps needed to address the inequality women face.

While it is true that the United States would be in violation of the Convention based on the treatment of transgender women inmates in U.S. prisons, none of the Convention's substantive issue articles directly address incarcerated women and the issues they face. Because the Convention fails to address these substantive issues, there is a gap in CEDAW.<sup>72</sup> However, one of the ways the Convention attempts to remedy these gaps is through recommendations drafted by the CEDAW Committee.

#### *a. CEDAW Recommendations*

Apart from the substantive articles of CEDAW, the Convention also creates a committee that has the authority to issue recommendations to States parties that further elaborate on the text and intent of the Convention, filling some of the gaps in the treaty. The CEDAW Committee ("the Committee") is composed of twenty-three experts on women's issues from around the globe, charged with the responsibility of monitoring the implementation and enforcement of CEDAW.<sup>73</sup> One of the Committee's responsibilities is to issue general recommendations on any issue impacting women to which it believes the State party should devote more attention.<sup>74</sup> If a State has ratified CEDAW, it has agreed to this recommendation process, therefore, what comes out of the committee is binding on the State party.<sup>75</sup>

If the United States was a party to CEDAW, the Committee's recommendations would be binding because the United States would have agreed to the Committee's recommendation process by ratifying the treaty. Pragmatically speaking, the

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<sup>72</sup> CEDAW has further gaps that while not necessarily relevant to this paper are worth noting. Firstly, the Convention fails to acknowledge women's multiple identities. Further, the Convention fails to capture the diversity of women and thus the range of their experiences. Apart from Article 14, the Convention does not stress the importance of social signifiers in addition to those of sex and gender and relies on the single signifier, women. See THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY (Christine Chinkin & Marsha Freeman eds., 2012).

<sup>73</sup> CEDAW, *supra* note 1, at art. 17.

<sup>74</sup> *Committee on the Elimination of Discrimination Against Women*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Introduction.aspx> (last visited Dec. 13, 2019).

<sup>75</sup> *Id.*

Committee cannot make a State change its domestic law, so even though general recommendations are binding on States parties, they have the same effect as soft, non-binding law. Even so, it is relevant to discuss the Committee's recommendations that are applicable to transgender women inmates.

The Committee's General Recommendation No. 19 addresses violence against women. The recommendation elaborates on CEDAW's Article 1 definition of discrimination against women, adding:

The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.<sup>76</sup>

The recommendation further reiterates that the Convention "applies to violence perpetrated by public authorities," but is not limited to government action.<sup>77</sup> Therefore, the recommendation confirms the notion that private entities whose State has ratified the Convention are bound by CEDAW. The recommendation puts more of an obligation on States parties because "States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation."<sup>78</sup> Under General Recommendation No. 19, the United States, as a State party, would have an obligation to combat violence against women committed in both State and privately held prisons.

The Committee's General Recommendation No. 33 addresses women's access to justice.<sup>79</sup> In this recommendation the Committee puts forth recommendations to States parties to ensure that women have equal access to justice. While the entire recommendation is applicable to transgender women, the Committee's recommendations to States parties regarding criminal law are most relevant here.

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<sup>76</sup> Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence against women*, U.N. Doc. A/47/38 (11th session, 1992), <https://www.refworld.org/docid/52d920c54.html>.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Committee on the Elimination of Discrimination Against Women, *CEDAW General Recommendation No. 33 on Women's Access to Justice*, U.N. Doc. CEDAW/C/GC/33 (23 July 2015), [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/CEDAW\\_C\\_GC\\_33\\_7767\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_33_7767_E.pdf).



First, the Committee reiterates that under Articles 2 and 15 of the Convention, States parties are obligated “to ensure that women have access to the protection and remedies offered through criminal law and that they are not exposed to discrimination within the context of those mechanisms either as victims or as perpetrators of criminal acts.”<sup>80</sup> The Committee acknowledges that “The secondary victimization of women by the criminal justice system has an impact on their access to justice, owing to their heightened vulnerability to mental and physical abuse and threats during arrest, questioning and in detention.”<sup>81</sup> Further, the Committee asserts that transgender women are “disproportionately criminalized due to their situation or status.”<sup>82</sup>

The Committee offers multiple recommendations regarding criminal law to States parties, including two that are directly relevant to transgender women inmates. The Committee recommends States parties:

Take effective measures to protect women against secondary victimization in their interactions with law enforcement and judicial authorities. Consider establishing specialized gender units within law enforcement, penal and prosecution systems... [and] ensure that mechanisms are in place to monitor places of detention; pay special attention to the situation of women prisoners; and apply international guidance and standards on the treatment of women in detention.<sup>83</sup>

Many of the issues transgender women inmates face are due to victimization based on their gender. The Committee understands this victimization occurs and offers realistic measures States parties can take to help combat this, such as, specialized gender units within the criminal justice system. The Committee’s recommendation to closely monitor prisons seems a bit rudimentary, but could greatly improve the conditions and well-being of transgender women inmates. These recommendations, if followed, would drastically change all women’s experiences in confinement, but specifically transgender women inmates’ experiences.

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<sup>80</sup> *Id.* at 17-18.

<sup>81</sup> *Id.* at 18.

<sup>82</sup> *Id.* at 18.

<sup>83</sup> See UN General Assembly, *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules): Note by the Secretariat*, A/C.3/65/L.5, (Oct. 6, 2010), <https://www.refworld.org/docid/4dcbb0ae2.html>.

## 2. Transgender Women Under CEDAW

Unfortunately, the idea that a women's rights treaty protects all women, including transgender women, is questioned and contested today. This sub-section's purpose is to address this cruel argument and not to diminish the idea that transgender women are women or create doubt that CEDAW might not apply to transgender women.

During the drafting of CEDAW, discussions were had on "whether the treaty ought to be limited in its scope to sex discrimination against women specifically or on grounds of gender/sex more generally."<sup>84</sup> The drafters ended up settling on incorporating both these ideas into the treaty.<sup>85</sup> Alice Edwards writes that "both discrimination 'against women' and 'distinction, exclusion or restriction on the basis of sex'" are included in the treaty, therefore, the scope is much broader than limiting it to just sex or gender.<sup>86</sup> Edwards argues for the use of the term "women" in the treaty because it encompasses both sex and gender. Therefore, regardless of an individual's biological sex assigned at birth, if they currently identify as a woman, they are owed the protections stated in CEDAW. Under Edwards' argument, the protections provided by CEDAW apply to a broader group of persons.

Because CEDAW incorporates both "discrimination against women" and "on the basis of sex," transgender women are a protected group under this treaty. Therefore, even though there is controversy associated with CEDAW providing protections to transgender women, it is ill placed and invalid because the treaty provides protection to women, and transgender women are in fact women.<sup>87</sup>

Further, the CEDAW Committee addresses this argument in General Recommendation No. 28. The Committee wrote:

Although the Convention only refers to sex-based discrimination, interpreting article 1 together with articles 2 (f) and 5 (a) indicates that the Convention covers gender-based discrimination against women. The term "sex" here refers to biological differences between men and women. The term "gender" refers to socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and

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<sup>84</sup> Edwards, *supra* note 68, at 22.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> For the purpose of this paper, the discussion in this sub-section is limited and incredibly concise. For further information and reading material regarding the topic of who is protected by CEDAW and sex versus gender, *see id.*

in the distribution of power and rights favouring men and disadvantaging women... The application of the Convention to gender-based discrimination is made clear by the definition of discrimination contained in article 1.<sup>88</sup>

Based on the Committee's recommendation and interpretation of the Convention, CEDAW is meant to combat gender-based discrimination against women. Clearly, with the Committee's definition of gender, transgender women are protected individuals under the Convention.

## **B. Domestic Law**

Apart from CEDAW, United States domestic law also provides protections to transgender women inmates. Some of the case studies discussed above highlight how transgender women have fought to have existing, governing domestic laws apply to them; however, there is a gap in domestic law as well as a lack of enforcement. Beyond violating CEDAW, the United States' treatment of transgender women inmates also violates its own domestic law. The following subsections will analyze the gap in governing domestic laws that are supposed to protect transgender women as well as the lack of enforcement of these laws.

### **1. The Eighth Amendment – Cruel and Unusual Punishment**

It is critical to address domestic law that provides protections to transgender women inmates because it is important to acknowledge that even without the United States' ratification of CEDAW, there are still protections owed to transgender women inmates that are being violated by the treatment of these individuals in U.S. prisons. One source of domestic law that is meant to protect transgender women inmates, like the protections provided by CEDAW, is the Eighth Amendment found in the United States Bill of Rights. The Bill of Rights provides inalienable rights with no prejudice to any race, color, or gender.<sup>89</sup> Further, the Bill of Rights provides these rights to persons rather than citizens, which arguably means non-citizens within the territory of the United States are provided these rights.<sup>90</sup> The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments

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<sup>88</sup> Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010), <https://www.refworld.org/docid/4d467ea72.html>.

<sup>89</sup> U.S. Const. amend. I-X.

<sup>90</sup> *Id.*

inflicted.”<sup>91</sup> The Eighth Amendment’s prohibition of cruel and unusual punishment will be specifically looked at in the context of domestic laws meant to protect transgender women inmates.

The Eighth Amendment protects all prisoners, regardless of whether they are in a federal or state prison.<sup>92</sup> Therefore, the Eighth Amendment applies to incarcerated transgender women. Unfortunately, just because transgender women inmates are protected by the Eighth Amendment does not mean they do not experience cruel and unusual punishment. Because transgender women inmates still face cruel and unusual punishment in multiple forms including solitary confinement, sexual abuse, and lack of necessary medical care, an analysis of whether or not there is a gap in the law or poor enforcement is needed. In this case, the Eighth Amendment lacks the proper enforcement required to protect vulnerable communities in the criminal justice system.

The Eighth Amendment lacks enforcement because it is up to the courts to decide what constitutes cruel and unusual punishment. This determination has troubled courts since the adoption of the Bill of Rights. In 1910, the Supreme Court wrote “what constitutes a cruel and unusual punishment has not been exactly decided.”<sup>93</sup> In 1958, the Supreme Court acknowledged that the cruel and unusual punishment clause “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>94</sup> Although courts still use the “evolving standards of decency” test today, what constitutes cruel and unusual punishment remains unclear and the final determination is up to the courts. Without knowing what constitutes a cruel and unusual punishment, it is next to impossible to use the Eighth Amendment to stop the activity in question, unless the courts rule that the punishment qualifies. This means that in order for a punishment to be determined cruel and unusual, an individual must bring suit to give the courts an opportunity to rule on that specific punishment, or an individual must rely on a court’s previous holding that a similar punishment was deemed cruel and unusual. By restricting cruel and unusual punishment determinations, the Eighth Amendment’s enforcement potential is minimal.

The Eighth Amendment’s lack of enforcement particularly negatively impacts transgender women inmates. The long and taxing process of bringing suit places a huge burden on an individual who is already facing hardship. This process deters potential plaintiffs from filing suit along with their lack of means. These obstacles render the Eighth Amendment unenforceable, specifically for issues transgender women inmates face in prisons.

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Weems v. United States*, 217 U.S. 349, 354 (1910).

<sup>94</sup> *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

## 2. The Fourteenth Amendment – Equal Protection Clause

Another source of domestic law that provides protections to transgender women inmates is the Fourteenth Amendment to the United States Constitution. To reiterate, it is important to address domestic law that is being violated, along with CEDAW, by the treatment of transgender women inmates in prisons because even without the United States' ratification of the Convention, transgender women inmates are still owed the protections given to them by U.S. domestic law. The Fourteenth Amendment provides persons within the territory of the United States equal protection of the laws.<sup>95</sup> The Fourteenth Amendment states, “nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>96</sup> “It is well established that... the Equal Protection Clause of the Fourteenth Amendment follow[s] [individuals] into prison and protect[s] [inmates] from unconstitutional action on the part of prison authorities.”<sup>97</sup> Therefore, under the Fourteenth Amendment's Equal Protection Clause, transgender women inmates are to be protected from unconstitutional acts committed against them by prison officials.

More specifically to this article, the Fourteenth Amendment “prohibits discriminatory treatment based on gender, including transgender status and nonconformity to gender stereotypes, in many contexts.”<sup>98</sup> This means that transgender inmates should not be discriminated against for being transgender. However, this is not the case and many, if not most, transgender inmates face discrimination because of their gender identity.<sup>99</sup> There must be a gap in the law as well as a lack of enforcement since transgender inmates are protected from discrimination under the Equal Protection Clause, but discrimination still occurs.

In order to understand the Equal Protection Clause's lack of enforcement, it is first important to understand Congress' role in interpretation and enforcement. Section 5 of the Fourteenth Amendment vests in Congress the ability to pass legislation that implements the amendment. This role has been contested throughout history by the courts; however, Justice Brennan wrote, “§ 5 [of the Fourteenth Amendment] authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment.”<sup>100</sup> Based on this reasoning, it is up to Congress to implement legislation for rights that are protected by the Fourteenth Amendment. Because implementation is left up to Congress, there is a gap in the law when Congress fails

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<sup>95</sup> U.S. Const. amend. XIV.

<sup>96</sup> U.S. Const. amend. XIV, § 1.

<sup>97</sup> *Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1966).

<sup>98</sup> *LGBTQ People Behind Bars*, *supra* note 24, at 11.

<sup>99</sup> *Id.* at 6.

<sup>100</sup> *United States v. Guest*, 383 U.S. at 745, 782 (1966).

to pass legislation dictating what rights are protected under the Fourteenth Amendment. If Congress has failed to pass legislation, there is also a lack of enforcement since a statute that has not been passed is unenforceable. However, “the Court will not always defer to Congress’s determination as to what legislation is appropriate to ‘enforce’ the provisions of the Fourteenth Amendment.”<sup>101</sup>

When the courts strike down legislation passed by Congress intended to enforce the rights provided by the Fourteenth Amendment, individuals are left again at the mercy of a third-party to determine how their rights are protected and enforced by the Fourteenth Amendment. Similar to the Eighth Amendment, Congress and courts move at a slow pace that can be detrimental to an individual seeking protection under these amendments. Further, individuals are forced to rely heavily on the U.S. judicial and legislative branches to ensure their rights are adequately enforced while also minimizing gaps in the law. Although this analysis might explain why transgender women inmates still face discrimination, it does not excuse the failing of U.S. law.

### **3. Prison Rape Elimination Act of 2003**

Acknowledging that gaps in domestic law exist is critical to remedying these gaps with further legislation — similar to the CEDAW Committee’s practice of addressing gaps in the Convention with recommendations. In 2003, the Prison Rape Elimination Act (“the Act”) was passed by a bipartisan effort in Congress to address a gap in U.S. domestic law regarding sexual assault in prisons. The Act is a byproduct of national outrage after Human Rights Watch published the first national study on prisoner sexual assault in 2001.<sup>102</sup> After this publication, talk began of the cruel and unusual punishment prisoners were subject to.<sup>103</sup> The New York Times reported that while “America’s two million prison inmates have been lawfully deprived of their liberty... they have not been sentenced to [the] physical and psychological abuse” and prison rape and sexual assault.<sup>104</sup> Soon after, Congress unanimously passed the Prison Rape Elimination Act. The Act’s purpose is to “provide for the analysis of the incidence and effects of prison rape in Federal, State, and local institutions and to provide information, resources, recommendations and funding to protect individuals from prison rape.”<sup>105</sup>

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<sup>101</sup> *Enforcement: Section 5*, JUSTIA US LAW, <https://law.justia.com/constitution/us/amendment-14/12-enforcement.html#fn-2249> (last visited Dec. 13, 2019).

<sup>102</sup> Robert Dumond, *Confronting America’s Most Ignored Crime Problem: The Prison Rape Elimination Act of 2003*, 31 J. AM. ACAD. PSYCHIATRY & L. 354 (2003).

<sup>103</sup> *Id.*

<sup>104</sup> *Rape in Prison*, N.Y. TIMES (Apr. 23, 2001), <https://www.nytimes.com/2001/04/22/opinion/rape-in-prison.html>.

<sup>105</sup> Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972.

The Prison Rape Elimination Act “provides a tangible, comprehensive strategy to address the complex challenges posed by prisoner sexual assault.”<sup>106</sup> The National Center for Transgender Equality views the Prison Rape Elimination Act’s standards as “a comprehensive set of federal rules that address all aspects of a prison’s operations as they relate to preventing, detecting, and responding to sexual abuse.”<sup>107</sup> The Act provides protections regarding screening and classification, housing transgender inmates, protective custody, strip searches, and segregated LGBTQ+ units.<sup>108</sup> These protections are provided to all inmates and all prisons must be in compliance. However, while these protections are incredibly vital to the transgender community within prisons because they are more susceptible to being abused, it is a double-edged sword because the protections are applied inequitably to LGBTQ+ inmates, specifically in the context of consensual relationships.

## **VII. How the United States would be in Violation of CEDAW due to the Treatment of Transgender Women in the Criminal Justice System**

Now that it is understood how transgender women inmates in U.S. prisons are treated and that there is governing law that should protect them, this section will specifically address how the United States would be in violation of CEDAW due to the treatment of transgender women in prisons.<sup>109</sup> To complete this analysis, it is important to first understand that every violation of CEDAW is both a violation of one of the Convention’s substantive articles as well as Article 2, which requires States parties to “condemn discrimination against women in all its forms... [and] to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.”<sup>110</sup> The same can be said for the alternative: every violation of Article 2 of CEDAW is also a violation of one of the Convention’s substantive articles.<sup>111</sup> Therefore, this analysis will be broken down based on the right rather than the specific article. This analysis will be completed by first looking at the issues transgender women inmates face in U.S. prisons, addressed in Section IV, and identifying what article of CEDAW that specific issue violates; ultimately proving that the United States would be in violation of the Convention.

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<sup>106</sup> Dumond, *supra* note 101, at 358.

<sup>107</sup> *Issues: Resources*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/issues/resources/lgbt-people-and-prison-rape-elimination-act> (last visited Dec. 13, 2019).

<sup>108</sup> *Id.*

<sup>109</sup> Angela Okamura, *Equality behind Bars: Improving the Legal Protections of Transgender Inmates in the California Prison Systems*, 8 HASTINGS RACE & POVERTY L.J. 109, 113 (2011).

<sup>110</sup> CEDAW, *supra* note 1, at art. 2.

<sup>111</sup> Jennifer Riddle, *Making CEDAW Universal: A Critique of CEDAW’s Reservation Regime under Article 28 and the Effectiveness of the Reporting Process*, 34 GEO. WASH. INT’L L. REV. 605, 628 (2002).

## A. Genitalia-Based Placement

The practice of placing inmates in housing based on their genitalia instead of the gender with which they identify is extremely problematic and harmful. There is a strong argument to be made that genitalia-based placement violates U.S. domestic law, but it is clear that this placement violates Article 2 of CEDAW.

As previously noted, Article 2(d) states that Member States must “refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation.”<sup>112</sup> Based on this article, State institutions, like prisons, cannot discriminate against women. Placing a woman in male inmate housing is discriminatory and a clear violation of Article 2. It is important to note that while the Convention only applies to States parties, it is the responsibility of States parties to ensure that CEDAW is being complied with at the domestic level. This means that while CEDAW does not directly apply to privately held prisons, it is the United States' duty, as a State party, to ensure that institutions operating domestically are complying with the Convention. Therefore, the United States has an obligation to ensure that the Convention is being complied with by both State and privately held prisons, meaning that if either engage in genitalia-based placement of transgender women inmates, the United States is in violation of CEDAW.

To reiterate, a violation of Article 2 of CEDAW means that another violation of a specific substantive article of CEDAW also took place. In this particular example, genitalia-based placement also violates Article 15 of CEDAW, which requires States parties to treat women and men equally before the law.<sup>113</sup> Generally, women with typically female anatomy who identify as women are placed in female housing facilities in prisons; the same is true for men with typically male anatomy who identify as men, who are placed in male housing facilities.<sup>114</sup> When transgender women inmates are placed in housing facilities strictly based on their anatomy, instead of the gender with which they identify, they are not being treated equally before the law. Therefore, placing transgender women inmates in male housing based on their anatomy is a violation of Article 15 of CEDAW. The United States is in violation of Articles 2 and 15 of CEDAW because U.S. prisons are engaging in genitalia-based placement and not complying with the Convention. United States prisons' practice of genitalia-based placement violates CEDAW because of the discriminatory nature of the act.

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<sup>112</sup> CEDAW, *supra* note 1, at art. 2.

<sup>113</sup> *Id.* at art. 15.

<sup>114</sup> Steven L. Winter, *Domestic Compliance with the Helsinki Accords: United States Prison Conditions and Human Rights*, 8 NEW ENG. J. ON PRISON L. 65 (1982).



## B. Sexual Abuse by Staff and Other Prisoners

It has been discussed that one of the outcomes of genitalia-based placement is the sexual abuse transgender women inmates experience by both prison staff and other prisoners. This sexual abuse violates U.S. domestic law as well as multiple articles of CEDAW, including Articles 1, 2, and 15.

Article 1 provides the definition for discrimination against women as “any distinction, exclusion or restriction that affects women's enjoyment of political, economic, social, cultural, civil or any other rights on an equal basis with men.”<sup>115</sup> Transgender women inmates are typically targeted and sexually assaulted because they are viewed as vulnerable. The targeting of transgender women inmates because they are vulnerable clearly impacts the enjoyment of their rights, specifically their right to be protected in prisons from sexual assault. Therefore, the United States violates Article 1 of CEDAW when transgender women inmates are sexually assaulted because it falls under the Convention’s definition of discrimination against women.

Further, Article 2(e) of the Convention puts an obligation on States parties “to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.”<sup>116</sup> The United States continuously violates this article because of its failure to take appropriate action to ensure that transgender women inmates are not sexually assaulted while in U.S. prison custody. Article 15 of CEDAW requires States parties to equally treat women and men before the law.<sup>117</sup> Transgender women inmates who are sexually assaulted by other prisoners and prison staff are not being treated equally as men while in U.S. prisons because they are targeted due to their gender identity. Under this interpretation, the United States would also be in violation of Article 15 of the Convention. These arguments are supported by the CEDAW Committee, who has stated that States parties will be held in violation of Articles 1, 2, 3, 5, 12 and 15 of CEDAW for inadequate legal protections against sexual violence, including the failure of the State to exercise due diligence in relation to sexual assault.<sup>118</sup>

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<sup>115</sup> *CEDAW at a Glance*, INT’L WOMEN’S DEV. AGENCY, <https://iwda.org.au/assets/files/CEDAW-at-a-Glance.pdf> (last visited Dec. 13, 2019).

<sup>116</sup> *CEDAW*, *supra* note 1, at art. 2.

<sup>117</sup> *Id.* at art. 15.

<sup>118</sup> Committee on the Elimination of Discrimination Against Women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women Concerning Communication No. 31/2011, *S.V.P. v. Bulgaria*, CEDAW/C/53/D/31/2011, [https://www.ohchr.org/Documents/HRBodies/CEDAW/Jurisprudence/CEDAW-C-53-D-31-2011\\_en.pdf](https://www.ohchr.org/Documents/HRBodies/CEDAW/Jurisprudence/CEDAW-C-53-D-31-2011_en.pdf). The Optional Protocol to CEDAW provides an individual complaint process where anyone in a country that has ratified the Optional Protocol can file a claim with the CEDAW Committee, alleging that the State party violated CEDAW. The individual must first exhaust

### C. Housing - Solitary Confinement

It has been established that solitary confinement constitutes cruel and unusual punishment, therefore violating the Eighth Amendment of the United States Constitution. Furthermore, solitary confinement of transgender women inmates also violates CEDAW, specifically Articles 2(d)-(e) and 15. As previously discussed, transgender women inmates are victimized due to their gender and placed in solitary confinement, typically due to prison officials not knowing how to protect and care for them or as veiled punishment for being transgender. It is true that other inmates besides transgender women are placed in solitary confinement as well. However, the placing of transgender women inmates in solitary confinement is discriminatory treatment because they are placed in confinement due to their gender. Therefore, the placement of transgender women in solitary confinement based on their gender alone violates Article 2 of CEDAW because prisons are directly engaging in an act of discrimination against women.<sup>119</sup>

Under Article 2(d)-(e) of CEDAW, States parties are obligated to “refrain from engaging in any act or practice of discrimination against women [and] take all appropriate measures to eliminate discrimination against women.”<sup>120</sup> This means that States have a duty to ensure that prisons are operating in a way that does not discriminate against women. The United States has failed to do this in the U.S. prison system because transgender women inmates are still discriminated against; placing transgender women inmates in solitary confinement because of their gender is discriminatory behavior. Because the United States has failed to remedy and eliminate this discrimination it is in clear violation of Article 2 of CEDAW.

Further, the placement of transgender women inmates in solitary confinement due to their gender violates Article 15 of CEDAW because this treatment does not “accord to women equality with men before the law.”<sup>121</sup> Article 15 requires States parties to treat women equally as men before the law, which means that women are to be treated equally as men in the prison system.<sup>122</sup> Again, while it is true that people of all genders are also placed in solitary confinement, the discrimination occurs when transgender women inmates are placed in confinement because of their

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domestic remedies, but after doing this the individual can submit an individual complaint to the CEDAW Committee. There are multiple stages of the communication procedure, one of them being the Committee issuing a merits decision, which can be seen in *V.P.P. v. Bulgaria*. See Alexandra R. Harrington, *Don't Mind the Gap: The Rise of Individual Complaint Mechanisms within International Human Rights Treaties*, 22 DUKE J. COMP. & INT'L L. 153, 167 (2012) (providing further information about the individual complaint process).

<sup>119</sup> CEDAW, *supra* note 1, at art. 2.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at art. 15.

<sup>122</sup> *Id.*

gender. Since cisgender men are placed in solitary confinement for their actions rather than their gender, and transgender women are placed in solitary confinement due to their gender, women inmates are not being treated equally as men. This discriminatory practice clearly violates Article 15 of CEDAW.

#### D. Searches

Similar to solitary confinement, other inmates besides transgender women inmates are subjected to searches. The discriminatory action occurs, however, when searches are conducted to “out” the transgender women to other inmates and prison staff. The outing of transgender women inmates puts them in grave danger and further victimizes them. Searches conducted by prison officials in this manner violate Articles 1, 2, and 15 of CEDAW.

As previously established, Article 1 of CEDAW offers a definition for discrimination against women.<sup>123</sup> Under Article 1, any distinction made because an individual is a woman that has the purpose of impairing their rights, violates the Convention.<sup>124</sup> A distinction is made that impairs transgender women inmates’ rights when they are unlawfully searched because of their gender identity; this violates Article 1 of the Convention.

Further, Article 2 requires States parties to “condemn discrimination against women in all its forms” and to “pursue by all appropriate means and without delay a policy of eliminating discrimination against women.”<sup>125</sup> Under Article 2(b), the United States is required to implement a policy that would eliminate discrimination against women. In this specific example, the United States is required to take the necessary measures needed to eliminate discriminatory searches conducted by prison staff on transgender women inmates.<sup>126</sup> Although strip searches are humiliating for all inmates, adopting a policy that would allow prison officials to still maintain prison safety while also protecting transgender women inmates from humiliation and future violence that stems from discriminatory searches would aid the United States in Article 2 compliance.

As with solitary confinement, because transgender women inmates are subjected to discriminatory searches because of their gender, they are not being treated equally as men before the law. This violates Article 15 of CEDAW. To reiterate, Article 15 requires States parties to treat women and men equally before the law.<sup>127</sup> Unfortunately, Article 15 does not eliminate strip searches, it just requires women to be treated equally as men before the law. Therefore, since male inmates are

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<sup>123</sup> *Id.* at art. 1.

<sup>124</sup> *Id.*

<sup>125</sup> CEDAW, *supra* note 1, at art. 2.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at art. 15.

subjected to strip searches, so are women inmates. What Article 15 does eliminate are the discriminatory searches that are conducted on transgender women inmates because of their gender. Under Article 15, searches that are conducted to out transgender women inmates as well as sexualized strip searches are not permitted because they are discriminatory towards women.

Further, sexualized searches on transgender women inmates by prison officials clearly constitutes sexual abuse and harassment. As well as violating Article 2 of CEDAW, sexualized strip searches violate Article 5 of CEDAW. Article 5(a) requires States parties to:

Modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.<sup>128</sup>

Some argue that prison officials conduct sexualized strip searches on transgender women inmates because they are vulnerable individuals and more susceptible to being abused and taken advantage of. This idea is perpetuated by societal and cultural beliefs and norms that view transgender women as less than. By eliminating the idea of inferiority or the superiority of men and women, as Article 5 requires, prison officials would feel less superior to transgender women inmates, which in turn would diminish prison officials' feelings of power over a vulnerable group. Prison officials who feel less superior to a group of vulnerable inmates, in this case transgender women, would, ideally, be less likely to sexually abuse and harass them. Because the United States has failed to eliminate these negative stereotypes surrounding the superior and inferior gender, it violates Article 5 of CEDAW.

## **E. Medical Care**

Transgender women inmates do not have access to the proper medical care in U.S. prisons; more specifically, transgender women inmates do not receive proper mental health care, hormone therapy, or sex-reassignment surgery. The lack of proper medical care for transgender inmates in U.S. prisons violates Article 2 and Article 12 of CEDAW.

Article 2 of CEDAW requires States parties to take the necessary measures to eliminate discrimination against women.<sup>129</sup> Therefore, the United States is required to take the necessary steps to eliminate the discrimination in prison medical care that transgender women inmates face. Transgender women often need gender-

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<sup>128</sup> CEDAW, *supra* note 1, at art. 5.

<sup>129</sup> *Id.* at art. 2.

specific care related to their transition.<sup>130</sup> This means that when prisons withhold the proper medical care transgender women inmates need, it is because the inmate needing these services is transgender. The United States has failed to eliminate the discrimination against transgender women inmates that occurs when seeking healthcare, therefore, violating Article 2 of CEDAW.

Further, Article 12(1) of CEDAW requires States parties to “take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services.”<sup>131</sup> Although this article’s language does not directly coincide with health care services in prisons, it does provide the right of transgender women inmates to have access to necessary healthcare services, which also applies in prisons. Transgender women inmates could need mental health services, hormone therapy, sometimes sex-reassignment surgery, and treatment for gender dysphoria. These health services are vital for transgender women’s mental and physical health. Typically, male inmates are not denied health services that are vital to their well-being.<sup>132</sup> Because male inmates are not denied the necessary medical care, transgender women inmates should not be denied proper medical care either. By denying transgender women inmates proper healthcare services in U.S. prisons and failing to remedy this discrimination, the United States is in violation of Article 12 of CEDAW.

## F. Privacy

It has been proven that some prison officials disclose transgender inmates’ information, such as LGBTQ+ status and medical information, as a form of harassment.<sup>133</sup> The disclosure of transgender women inmates’ personal information by prison officials violates the inmates’ right to privacy as well as Articles 2 and 15 of CEDAW.

Article 2 of the Convention puts an obligation on States parties to implement the necessary legislation or take the appropriate steps to eliminate discrimination against women. Specifically, Article 2(e)-(f) require States parties to take the necessary measures to eliminate discrimination against women including existing discriminatory practices.<sup>134</sup> Under this article, the United States is required to take the appropriate measures to eliminate the discriminatory practice of revealing

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<sup>130</sup> Christine Peek, *Breaking out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 SANTA CLARA L. REV. 1211, 1218 (2004).

<sup>131</sup> CEDAW, *supra* note 1 at art. 12.

<sup>132</sup> Esinam Agbemenu, *Medical Transgressions in America's Prisons: Defending Transgender Prisoners' Access to Transition-Related Care*, 30 COLUM. J. GENDER & L. 1, 44 (2015).

<sup>133</sup> *LGBTQ People Behind Bars Rights*, *supra* note 24, at 16.

<sup>134</sup> CEDAW, *supra* note 1, at art. 2.

transgender women inmates' personal information as a form of harassment. Because the United States has failed to address and remedy this practice, it is in violation of Article 2 of the Convention.

States parties are obligated under Article 15 of the Convention to treat women equally as men before the law.<sup>135</sup> This is interpreted to mean that men and women are to be treated equally while in U.S. prisons. By revealing personal information such as LGBTQ+ status or medical information, like HIV status or past treatments, U.S. prison officials are not treating women equally as men because male inmates experience this disclosure of information less frequently than transgender women inmates. Because transgender women inmates' personal information is being disclosed to other prisoners and prison staff, while male inmates' personal information is not, women are not being treated equally as men before the law, thus violating Article 15 of the Convention.

### **G. Equal Treatment in Visitation, Conduct, and Other Opportunities**

Prison officials have notoriously harassed LGBTQ+ inmates, specifically transgender women inmates, for consensual relationships with other inmates. This behavior is further discrimination against transgender women inmates in U.S. prisons and violates Articles 1, 2, 3, and 5 of the Convention. Prison staff harass transgender women inmates for consensual public displays of affection as well as consensual relationships because these relationships do not fit within prison officials' heteronormative views.<sup>136</sup> This harassment is discriminatory because it occurs due to an individual being a transgender woman; therefore, it violates Article 1's definition of discrimination against women.<sup>137</sup> This treatment further violates Article 2(e)-(f) because the United States has not taken any appropriate measures to correct this inappropriate behavior by the prison staff.<sup>138</sup>

Further, harassing a transgender woman because she is having a consensual relationship with another inmate violates Article 3 of the Convention. Article 3 requires States parties to take appropriate measures to guarantee women "the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."<sup>139</sup> Transgender women inmates, who are harassed for consensual relationships, are not able to enjoy their human rights and fundamental freedoms that are guaranteed to them, therefore, violating Article 3 of the Convention. States parties have an obligation under Article 5 of the Convention to

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<sup>135</sup> *Id.* at art. 15.

<sup>136</sup> Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309, 1351 (2011).

<sup>137</sup> CEDAW, *supra* note 1, at art. 1.

<sup>138</sup> *Id.* at art. 2.

<sup>139</sup> *Id.* at art. 3.

modify cultural and social norms to eliminate discrimination against women.<sup>140</sup> Article 5 applies to the treatment of transgender women outside the U.S. prison system as well as transgender women inmates. Because the United States has not taken appropriate measures to correct the behavior of individuals who discriminate against transgender women and the prominent heteronormative views of society, it is in violation of Article 5.

The United States has much work to do to remedy the treatment of transgender women in prisons. However, there are realistic and obtainable measures that can be taken to rectify and improve transgender women inmates' experiences within the U.S. criminal justice system, specifically in prisons.

### **VIII. Recommendations**

Because the points discussed are only theoretical, the most obvious recommendation for the United States to adopt is ratifying CEDAW. However, under the current Administration, who loathes multilateralism, it seems very unlikely CEDAW will be ratified. Regardless, even if the United States were to ratify the treaty it would be in violation of CEDAW because of its treatment of transgender women inmates in prisons. However, there are recommendations the United States can adopt to comply with the spirit of CEDAW, without ratifying the treaty, to promote justice for transgender women inmates. Five recommendations will be offered for the United States to adopt in order to better protect transgender women inmates.

The first recommendation is to do away with genitalia-based placement of transgender women inmates in prisons. By eliminating this practice, transgender women inmates could be placed in the proper housing based on the gender with which they identify. Placing transgender inmates in the housing applicable to their gender identity would help reduce the threats of violence transgender women face because of genitalia-based placement.

The second recommendation for the United States is to stop victimizing an already vulnerable group of people. This may sound easier said than done, but there are practical approaches the United States can take to ensure that transgender women inmates are not further victimized because of their gender. For example, prison officials, who have a duty to protect vulnerable groups, like transgender women inmates, can uphold this duty to ensure further victimization does not occur. In order to guarantee further victimization does not occur, additional measures are necessary to ensure accountability. Prison officials who fail to uphold their duty will be held accountable by a separate body whose purpose will be to investigate anonymous tips given by inmates as well as prison staff who believe a specific

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<sup>140</sup> *Id.* at art. 5.

official is neglecting his or her duty to transgender women inmates by victimizing them further.

The third recommendation for the United States is to ensure that transgender women inmates' personal information is kept private. By keeping this information private, the United States can protect the transgender community from violence by other inmates and staff based on their personal information. Moreover, the fourth recommendation is to provide transgender women inmates with the necessary medical care. For example, U.S. prisons should provide transgender inmates with proper mental health services, treatment for gender dysphoria, hormone therapy, and sex-reassignment surgery, as requested.

The final recommendation is for the United States to provide equal treatment to transgender women inmates in visitation and conduct. The first step in achieving this is to do away with the practice of weaponizing regulations, like the Prison Rape Elimination Act standards, that are meant to protect inmates. This can be achieved by eliminating the disproportionate application of these standards on transgender inmates because of their gender identity.

Some might argue these recommendations are too optimistic, but a country like the United States, which preaches freedom and justice for all along with having the means to follow these recommendations, should be obligated to do the bare minimum to ensure transgender women inmates are not discriminated against in the criminal justice system, specifically in its prisons.

## **IX. Conclusion**

In conclusion, after critiquing and analyzing the United States' failure to protect transgender women inmates in its prison system, specifically outlining the issues transgender women inmates face in prison and how governing law fails to protect these inmates, it is clear the United States has failed to protect one of the most vulnerable populations. Not only has the United States violated its own domestic laws that provide protections to transgender women inmates, the United States has failed to abide by international norms in its treatment of transgender women in the criminal justice system. Specifically, after extensively analyzing CEDAW and the protections it provides to all women, including transgender women inmates, it is clear if the United States was a party to CEDAW, it would be in violation of the Convention because of the treatment of transgender women inmates in prisons.

The United States would be in violation of CEDAW due to the treatment of transgender women inmates, specifically given genitalia-based housing, sexual abuse by prison staff and other prisoners, solitary confinement placement, discriminatory strip searches, lack of necessary medical care, the unlawful disclosure of personal information, and the discriminatory treatment in visitation and conduct. The Convention aims to eliminate discrimination against women and



puts an obligation on States parties to ensure that CEDAW is being complied with domestically. The United States' failure to ensure that all prisons are complying with the Convention by remedying and eliminating the discrimination transgender women inmates face, whether through legislation or changing cultural and societal views, demonstrates that if the United States was a party to CEDAW, it would be in violation of the treaty.