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Breaking the Binary: A Blueprint for Transgender Inmate Housing Policies

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I. Introduction

The Federal Bureau of Prisons reported on November 25, 2023, that 146,775 male inmates and 10,634 female inmates are in custody at a federal prison.¹ But over 1,200 inmates in federal prison are transgender—where are they accounted for in these numbers?² Just as the Federal Bureau of Prisons fails to acknowledge the existence of transgender inmates in its statistical reporting, the inmate housing placement policies and practices disregard transgender existence as well. The default policy is to place an inmate by their gender at birth, regardless of present gender identity. If an inmate is transgender, prison officials default to placing the inmate according to their gender at birth, instead of placing them according to their gender identity. This current inmate housing placement policy further emphasizes transgender invisibility within America’s prison system.

This Comment highlights issues that nonbinary and transgender individuals experience in the incarceration system of the United States. It explains how the current processes and procedures of housing transgender inmates violate Equal Protection, the Eighth Amendment, and Due Process. This Comment also proposes solutions for how to safely house transgender inmates without violating their constitutional rights. Because this issue is unprecedented, the goal of this Comment is to serve as a blueprint for both attorneys arguing the issue before a court, and for judges and justices deciding the constitutionality of the matter.

It is crucial to note that several unprecedented issues regarding the incarceration of transgender inmates are presently being litigated, including the constitutionality of solitary

¹ *Inmate Gender*, Federal Bureau of Prisons (Nov. 25, 2023) https://www.bop.gov/about/statistics/statistics_inmate_gender.jsp.

² The Associated Press, *Justice Department Reviewing Policies on Transgender Inmates*, NBC News (Sept. 17, 2021, 11:01 AM) <https://www.nbcnews.com/nbc-out/out-news/justice-department-reviewing-policies-transgender-inmates-rcna2067>.

confinement as a means of safeguarding a transgender inmate, the rights of transgender inmates to receive gender confirmation surgery, and the lack of mental health services in correctional facilities. While these issues are of equal importance, this Comment does not discuss them.

II. Background

This section describes current inmate housing placement procedures. It also discusses the scope and gravity of transgender inmate placement decisions.

A. Physical Violence

Transgender housing issues in prison were sensationalized by the show, *Orange is the New Black*.³ But the series paints an overly optimistic picture of prison life for transgender inmates. On the show, Sophia, a transgender female inmate, appears to be the center of daily life and gossip at her correctional facility with one of the cushiest prison jobs in existence—cutting hair. For Sophia, life is as good as it can be—she prances around the prison, establishes strong relationships with prison guards, and is supported by her fellow inmates.⁴ But most importantly of all, Sophia is housed in a women’s facility, consistent with her gender identity.⁵

However, Sophia’s story is not like most. The unfortunate reality of the lives of transgender inmates is depicted through inmate Carmen Guerrero’s experience. She was a transgender female housed at Kern Valley State Prison, a facility for males.⁶ On her first day at the facility, her cellmate told corrections officers that he would kill Carmen if he had to share a cell with her.⁷ The guards disregarded his remarks and kept Carmen in the same cell.⁸ Later that

³ *Orange is The New Black* (Titled Productions & Lionsgate Television 2013).

⁴ *Id.*

⁵ *Id.*

⁶ Miranda Leitsinger, *Transgender Prisoners Say They 'Never Feel Safe.' Could a Proposed Law Help?*, KQED (Jan. 20, 2020), <https://www.kqed.org/news/11794221/could-changing-how-transgender-inmates-are-housed-make-prison-safer-for-them>.

⁷ *Id.*

⁸ *Id.*

evening, Carmen was strangled to death by her cellmate.⁹ It was later discovered that in addition to the remarks he made about Carmen, he had a history of violence against other LGBTQ inmates.¹⁰

In addition to violence from other inmates, transgender prisoners suffer from physical abuse promulgated by prison staff.¹¹ For example, a corrections officer in Illinois forced a transgender inmate to perform oral sex.¹² Another corrections officer pulled the same inmate's shorts down and asked what genitalia she had.¹³ Meanwhile, a corrections officer in New Jersey fondled a transgender inmates' breasts.¹⁴

Placing transgender inmates with other transgender inmates is important because it provides them with the physical safety they deserve and are constitutionally entitled to. Inmates are sentenced to serve time in a correctional facility. They are not sentenced to death, extreme physical beatings, or sexual assault.

B. Psychological Abuse

Living in a male prison when an inmate is not male, or living in a female prison when an inmate is not female, opens the possibility for deadnaming.¹⁵ Deadnaming occurs when an individual is misgendered or called by the wrong name.¹⁶ While one-off instances may seem insignificant, frequent deadnaming can become degrading, humiliating, invalidating, and mentally devastating.¹⁷ Prison cultivates a setting where deadnaming is nearly certain to

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Hampton v. Baldwin*, No. 3:18-CV-550-NJR-RJD, 2018 WL 5830730, at *2 (S.D. Ill. Nov. 7, 2018).

¹² *Id.*

¹³ *Id.*

¹⁴ Jessica Szuminski, Note, *Behind the Binary Bars: A Critique of Prison Placement Policies for Transgender, Non-Binary, and Gender Non-Conforming Prisoners*, 105 Minn. L. Rev. 477 (2020).

¹⁵ *Stanley v. City of New York*, 141 N.Y.S.3d 662, 673 n.5 (N.Y. Sup. Ct. 2020).

¹⁶ *Id.*

¹⁷ *Hampton v. Baldwin*, No. 3:18-CV-550-NJR-RJD, 2018 WL 5830730, at *2 (S.D. Ill. Nov. 7, 2018).

frequently occur because Corrections staff assumes everyone in the facility identifies with the gender of that facility, and prisons tend to cultivate a culture of abuse for transgender inmates.

In addition to problems of safety, housing placements, if erroneous, can cause substantial psychological harm. Cohabiting with individuals of a shared gender identity entitles an inmate to basic dignity no human should live without. It is a well-established fact that inmates in prison lack the same right to privacy that individuals who are not incarcerated are entitled to—in prison, an inmate is constantly monitored: visitations are observed, showers are curtainless, toilets are in open spaces in bunks, and cells are shared with other inmates. If an inmate is not “like” the other inmates, the lack of privacy can be traumatic. That inmate’s sentence now includes using the restroom, showering, and living with someone of the opposite sex. They were not sentenced to experiencing the trauma of using the restroom with the opposite sex watching.

C. Social Marginalization

Incarceration disproportionately affects transgender individuals because social marginalization results in food, housing, and employment insecurity, forcing many to turn to crime.¹⁸ Historically, transgender discrimination was not protected by law and as a result, it was difficult for transgender individuals to stay in school, find a job, and otherwise support themselves.¹⁹ Because they were so marginalized, transgender individuals struggled to provide for themselves, facing no option but to turn to criminal activity.²⁰

D. Disproportionate Rates of Incarceration

¹⁸ Sari L. Reisner et al., *Racial/Ethnic Disparities in History of Incarceration, Experiences of Victimization, and Associated Health Indicators Among Transgender Women in the U.S.*, National Library of Medicine (May 23, 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5441521/>.

¹⁹ Cruel and Unusual (Entertainment One 2006).

²⁰ *Id.*

At the time of this writing, over 1.6 million people in the United States identify as transgender.²¹ The incarceration rate of transgender people is several times higher than that of the general population.²² As of 2012, approximately one in six transgender individuals has been incarcerated, while the same is true for only one in every twenty people of the general population.²³ This has led to an increase in volume of transgender inmates across correctional facilities nationwide. At this moment, only two kinds of correctional facilities exist in the United States: male prisons and female prisons. In 2020, there were approximately 5,000 transgender inmates in state penitentiary systems, but only fifteen were housed according to their gender identity. Similarly, approximately 1,200 transgender inmates are presently housed in federal prisons, but it is not clear how many are housed according to their gender identity.²⁴

E. Current Procedures for Housing Transgender Inmates

Returning to Carmen's story, she was housed at Kern Valley State Prison, which was built to accommodate over 2,400 inmates.²⁵ Of the thousands of inmates that she could have bunked with, why was Carmen housed with an inmate that had a pattern of animus and violence towards LGBTQ individuals? In Carmen's case, the answer is unclear. Perhaps it was due to negligence. But for many transgender inmates, issues like this arise because current policies and procedures fail to adequately address the needs and constitutional rights of transgender inmates.

In 2018, the Trump Administration diminished the inmate housing placement procedure for transgender inmates from placement "by gender identity when appropriate" to using

²¹ Jody L. Herman et al., *How Many Adults and Youth Identify as Transgender in the United States?* The Williams Institute, UCLA, (June 2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf>.

²² *Id.*

²³ *A Blueprint for Equality: Prison and Detention Reform*, National Center for Transgender Equality (2012), https://transequality.org/sites/default/files/docs/resources/NCTE_Blueprint_for_Equality2012_Prison_Reform.pdf.

²⁴ *Iglesias v. Fed. Bureau of Prisons*, No. 19-CV-415-NJR, 2021 WL 6112790, at *1 (S.D. Ill. Dec. 27, 2021), modified, 598 F. Supp. 3d 689 (S.D. Ill. 2022).

²⁵ Kern Valley State Prison Inmate Search, <https://kernvalleystateprison.org> (last visited Nov. 8, 2023).

“biological sex as the initial determination for designation”.²⁶ “Although prison officials can consider other factors in determining transgender inmate placement, the guidance indicates that only in rare cases will an inmate be placed in a facility that aligns with their gender identity if it differs from their biological sex at birth.”²⁷ The Prison Rape Elimination Act requires inmates to be screened for risk of sexual abuse upon intake to protect against sexual assault.²⁸ That screening requires the intake specialist to determine, “[a] whether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, or gender nonconforming; [b] whether the inmate has previously experienced sexual victimization; the inmate’s own perception of vulnerability.”²⁹

However, when a transgender inmate has a high risk for sexual abuse, the default protection taken is not to transfer an inmate to a facility aligned with their gender identity, but to place that inmate in solitary confinement.³⁰ The Prison Rape Elimination Act requires segregation to be a last resort option:

Inmates at high risk for sexual victimization shall not be placed in involuntary segregated housing unless an assessment of all available alternatives has been made, and a determination has been made that there is no available alternative means of separation from likely abusers. If a facility cannot conduct such an assessment immediately, the facility may hold the inmate in involuntary segregated housing for less than 24 hours while completing the assessment.³¹

²⁶ *Transgender Offender Manual*, U.S. Dep’t of Just., Fed. Bureau of Prisons (2018), <https://www.documentcloud.org/documents/4459297-BOP-Change-Order-Transgender-Offender-Manual-5.html>.

²⁷ Brenda V. Smith, *Promise Amid Peril: PREA's Efforts to Regulate an End to Prison Rape*, 57 *Am. Crim. L. Rev.* 1599, 1631 (2020).

²⁸ 28 C.F.R. § 115.41.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

Despite the explicit terminology within the Prison Rape Elimination Act that states segregation must only occur when there are no available alternatives, this is the default procedure.

III. The Constitutionality of Present Practices

Current placement policies violate Equal Protection, the Eighth Amendment, and Due Process. The inmate housing placement policy violates Equal Protection because heightened scrutiny applies, and general security concerns do not meet heightened scrutiny. Furthermore, the policy violates the Eighth Amendment because the lack of dignity, coupled with the lack of privacy due to prison conditions, constitutes a cruel and unusual punishment. Nevertheless, the inmate housing placement policy violates Due Process because the Supreme Court has established a right to liberty in individual decision-making, and emerging traditions require gender to be redefined.

A. Equal Protection

The inmate housing placement policy violates Equal Protection because heightened scrutiny applies, and general security concerns do not meet heightened scrutiny. Equal Protection requires that certain distinctions among different classes of people cannot be drawn by the law.³² It states that the government must not, “deny to any person within its jurisdiction the equal protection of its laws.”³³ This requires that, “all persons similarly situated be treated alike.”³⁴ The government may only discriminate if it is rationally related to a legitimate state interest.³⁵ However, if the discrimination is based on gender, heightened scrutiny applies.³⁶ As a result, a classification must be substantially related to a sufficiently important governmental interest to be

³² U.S. Const. amend. XIV.

³³ *Id.*

³⁴ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

³⁵ *Id.*

³⁶ *Id.* at 440.

constitutional.³⁷ Nevertheless, “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”³⁸

i. Heightened Scrutiny Applies

Although courts have not yet held that transgender status is a protected class, heightened scrutiny applies when the government treats cisgender and transgender individuals differently because sex stereotyping is rooted in the protected class of sex.³⁹ In *Whitaker v. Kenosha Unified School District*, a school-aged boy was repeatedly denied the use of the male restrooms because he was transgender.⁴⁰ As a result, he asserted a claim under Title IX.⁴¹ The court reasoned that although Title IX did not define “sex”, and therefore should be narrowly construed to only be defined as “male” and “female,” transgender individuals are protected by Equal Protection through sex-stereotyping theory. Established in *Price Waterhouse v. Hopkins*, the Supreme Court held, “by definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.”⁴²

In *Hampton v. Baldwin*, prison officials housed a transgender inmate, Strawberry, in a male facility. She subsequently filed an Equal Protection claim, asserting that “housing cisgender women in women’s prisons but forcing transgender women to be housed with men based on their assigned gender at birth is a classification based on sex that causes her to be treated differently from similarly situated female inmates.”⁴³

Heightened scrutiny applies here because prison administrators treat cisgender and transgender inmates differently. Just as how the court in *Whitaker* held that Title IX does not

³⁷ *Id.* at 441.

³⁸ *Craig v. Boren*, 419 U.S. 190, 197 (1976).

³⁹ *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1040 (7th Cir. 2017).

⁴⁰ *Id.*

⁴¹ *Id.* at 1046.

⁴² *Id.* at 1048; see also *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

⁴³ *Hampton v. Baldwin*, No. 3:18-CV-550-NJR-RJD, 2018 WL 5830730, at *10 (S.D. Ill. Nov. 7, 2018).

define sex, the Constitution does not define sex either. However, this issue does not require a court to make such determination because transgender inmates have an established cause of action under stereotype theory.⁴⁴ Transgender inmates can establish an Equal Protection claim because transgender inmates do not conform to the stereotypes of a similarly situated cisgender inmate.⁴⁵ Because corrections staff place cisgender inmates in facilities aligned with their gender identities, but they place transgender inmates in facilities that are inconsistent with their gender identities, heightened scrutiny applies.

ii. Substantially Related?

Although general security claims further important governmental objectives, they are not substantially related to restricting the placement of transgender individuals.⁴⁶ Citing the Supreme Court, the court in *Hampton* held that generalized safety concerns are not sufficient to establish heightened scrutiny.⁴⁷ Additionally, while prison officials argued that Strawberry was a dangerous inmate, they provided no evidence indicating that transgender inmates on a general level pose any more of a threat than their cisgender counterparts.⁴⁸ Furthermore, the court in *Iglesias* held that, “[t]he Court is concerned that BOP repeatedly stresses safety yet provides merely two situations where transgender women have experienced difficulties or posed a threat to other inmates upon transfer to a female facility.”⁴⁹ As a result, the court asserted that the defendants failed to demonstrate that transgender inmates pose a greater security threat than cisgender inmates.⁵⁰

⁴⁴*Whitaker*, 858 F.3d at 1040.

⁴⁵ *Id.* at 1048.

⁴⁶ *Hampton v. Baldwin*, No. 3:18-CV-550-NJR-RJD, 2018 WL 5830730, at *11 (S.D. Ill. Nov. 7, 2018).

⁴⁷ *Id.* at *11; *see also United States v. Virginia*, 518 U.S. 515, 531 (1996).

⁴⁸ *Id.*

⁴⁹ *Iglesias v. Fed. Bureau of Prisons*, No. 19-CV-415-NJR, 2021 WL 6112790, at *1 (S.D. Ill. Dec. 27, 2021), modified, 598 F. Supp. 3d 689 (S.D. Ill. 2022).

⁵⁰ *Id.*

Transgender inmates are over four times more likely to be victims of a crime.⁵¹ Despite this, no evidence exists suggesting that transgender inmates are more likely to perpetrate crimes in prison. The state argued in *Hampton* that she should remain in a male facility because she was violent towards other inmates.⁵² However, Strawberry argued that “female inmates can be equally aggressive and violent, perhaps more so than Strawberry. Yet, no one would suggest those [violent] women should be housed in the men’s division.”⁵³ As a result, not only is there no evidence that indicates that transgender inmates are more violent than cisgender inmates, but also the level of violence of an inmate is completely irrelevant to whether they should be placed in a male or female prison.

Correctional facilities cannot meet the requisite heightened scrutiny to treat transgender inmates differently than cisgender inmates with generalized security claims. The defendants in *Hampton* failed to establish that transgender inmates pose a more substantial security threat than cisgender inmates because the claim is unfounded. Regardless, just as the court held in *Hampton* that generalized safety concerns are not sufficient to establish heightened scrutiny, the same applies here.⁵⁴ As a result, placing cisgender inmates with other cisgender inmates, but placing transgender inmates with cisgender inmates is unconstitutional because the policy discriminates based on the inmates’ sex, requires intermediate scrutiny to be satisfied, and cannot be satisfied through generalized safety concerns.

⁵¹ Andrew R. Flores et al., *Gender Identity Disparities in Criminal Victimization: National Crime Victimization Survey*, (2017–2018), https://escholarship.org/content/qt7c3704zg/qt7c3704zg_noSplash_bdcad281b67fab6fb166297adfc6b4a8.pdf.

⁵² *Hampton v. Baldwin*, No. 3:18-CV-550-NJR-RJD, 2018 WL 5830730, at *10 (S.D. Ill. Nov. 7, 2018).

⁵³ *Id.*

⁵⁴ *Id.* at *11.

iii. Cases Asserting Equal Protection

Tay v. Dennison asserted that the inmate housing placement policies violated Equal Protection.⁵⁵ In *Tay*, the plaintiff was a transgender female inmate who was incarcerated in a facility for men.⁵⁶ She asserted that her placement based on her gender at birth violated Equal Protection and that she did not have to demonstrate further harassment to substantiate a claim.⁵⁷ The court expressed its concerns for how prison officials carried out its housing placement policies, specifically highlighting the fact that the plaintiff's placement in a male facility was a result of her type of genitals. This was in direct violation of the prison's own guidelines stating that an inmate's genitals should not be the sole factor in determining placement.⁵⁸ Additionally, the court expressed its concerns about the prison official's assertion that *Tay* could not be placed in a women's facility because of her size.⁵⁹ "There is no evidence before the Court to suggest that IDOC would automatically assign a very small man to a women's prison—or an exceptionally large woman to a men's prison—based on that individual's size alone."⁶⁰ The court indicated that these factors demonstrate that *Tay* was placed in a facility based on her sex without adequate justification.⁶¹ Despite this, the court still refrained from ordering IDOC to transfer *Tay* to a women's facility. The court held, "it may not cure the problem".⁶²

The constitutionality of the housing placement policy was also challenged in *Turner v. Ralkey*.⁶³ The court cited *Hampton*, asserting that the court in *Hampton* only expressed

⁵⁵ *Tay v. Dennison*, 457 F.Supp.3d 657, 681 (S.D. Ill. 2020).

⁵⁶ *Id.* at 662.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Turner v. Ralkey*, No. 19-cv-0051-NJR, 2023 WL 401931 at *4 (W.D. Wash. 2020).

constitutionality concerns because she was both misgendered *and* endured severe harassment.⁶⁴ However, the court in *Turner* seriously misinterpreted *Hampton* by doing so.⁶⁵ The conduct towards Hampton was unquestionably severe and pervasive, however the court does not indicate that the level of abuse suffered by Strawberry was the threshold level of abuse required to bring an Equal Protection claim.⁶⁶

Nevertheless, *Turner* underestimated the potential harm caused by misgendering. When an individual is misgendered, their existence as a human is invalidated. This can lead to a significant amount of stress, deteriorating both emotional and physical health. Furthermore, the frequency at which an individual is misgendered when placed in a facility inconsistent with their gender identity will be substantially high and will likely happen several times a day. As a result, misgendering an inmate by placing them in a facility that does not align with their gender identity is severe and pervasive conduct. The inmate placement policy violates Equal Protection because heightened scrutiny applies, and general security concerns do not meet heightened scrutiny.

B. The Eighth Amendment

The inmate housing placement policy violates the Eighth Amendment, because the lack of dignity, coupled with the lack of privacy of prison conditions, constitute cruel and unusual punishment.⁶⁷ The Eighth Amendment states that cruel and unusual punishments may not be inflicted upon inmates.⁶⁸ The Supreme Court has held that wanton infliction of pain is cruel and unusual, and therefore unconstitutional.⁶⁹ The Supreme Court has further held that punishment,

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981).

⁶⁸ U.S. Const. amend. XIV.

⁶⁹ *Rhodes*, 452 U.S. at 346.

“totally without penological justification” is wanton infliction of pain.⁷⁰ Furthermore, punishments may not “transgress today’s ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency.’”⁷¹ By denying transgender inmates all levels of dignity, their conditions of incarceration deprive them of life’s necessities. The punishment is therefore cruel and unusual.

i. Lack of Penological Justification

A policy is cruel and unusual when it lacks penological justification.⁷² In *Rhodes v. Chapman*, an inmate was housed in a 63 square foot cell with another inmate.⁷³ The Supreme Court held that the double celling was not cruel and unusual because every other aspect of her incarceration was adequate, and it can be expected to relinquish some comforts while serving time.⁷⁴ However, in *Trop v. Dulles*, the plaintiff’s citizenship was revoked after being found guilty of desertion of military duties.⁷⁵ The Supreme Court reasoned that “fines, imprisonment, and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.”⁷⁶ As a result, the plaintiff’s punishment was deemed cruel and unusual because it was unrelated to standard punishment practices.⁷⁷

The policy of placing transgender inmates with cisgender inmates is unconstitutional because it lacks legitimate penological justification. While the Court in *Rhodes* held that double-celling inmates coincided with a penological purpose because inmates are expected to experience

⁷⁰ *Id.*

⁷¹ *Hutto v. Finney*, 437 U.S. 678, 685 (1978).

⁷² *Rhodes*, 452 U.S. at 343.

⁷³ *Id.*

⁷⁴ *Id.* at 352.

⁷⁵ *Trop v. Dulles*, 356 U.S. 86, 88 (1958).

⁷⁶ *Id.* at 100.

⁷⁷ *Id.*

some level of discomfort during incarceration, requiring an inmate to constantly use the restroom, change, shower, and coexist with an individual of a different gender serves no penological interest and extends beyond the bounds of basic discomfort due to incarceration.⁷⁸

Similarly, just as the court held in *Trop* that techniques used for punishment outside the traditional bounds for punishment, such as loss of citizenship, are suspect, forcing inmates to live with other inmates of different genders than their own is not a traditional method of punishment and is therefore also suspect—men and women have been segregated in prisons since the establishment of prisons.⁷⁹

ii. Lack of Dignity, Humanity, and Decency

Furthermore, a policy is cruel and unusual when it denies the inmate all levels of dignity, humanity, and decency.⁸⁰ The Court in *Trop* held that the loss of citizenship was cruel and unusual because it led to “the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture.”⁸¹ The court also held in *Roper v. Simmons* that evolving standards of decency must be considered when determining whether a punishment is cruel or unusual.⁸²

Furthermore, the policy of placing transgender inmates with cisgender inmates is cruel and unusual because it utterly lacks dignity, humanity, and decency. If the Court in *Trop* held that losing citizenship is a punishment that transgresses dignity, humanity, and decency, it is without a doubt that amplifying a transgender inmate’s lack of privacy in jail by forcing them to shower, use the restroom, and live with the opposite gender meets this standard.⁸³ As a result, the

⁷⁸ *Rhodes*, 452 U.S. at 343.

⁷⁹ *Trop*, 356 U.S. at 88.

⁸⁰ *Id.* at 101.

⁸¹ *Id.*

⁸² *Roper v. Simmons*, 543 U.S. 551, 561 (2005).

⁸³ *Id.*

inmate housing placement policy violates the Eighth Amendment because the lack of dignity, coupled with the lack of privacy of prison conditions, constitutes cruel and unusual punishment.

C. Due Process

The inmate housing placement violates Due Process because the Supreme Court has established a right to liberty in individual decision-making, and emerging traditions require gender to be redefined. To determine whether a state or federal action violates substantive due process, the activity at issue must first be analogous to other activities that are a part of the right to privacy.⁸⁴ Once a right is determined, courts must establish whether this right fits within history and tradition.⁸⁵ “History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”⁸⁶

i. Individual Autonomy

A fundamental right is congruent to the well-established right to privacy when it is rooted in individual decision-making and personal decisions.⁸⁷ The court held in *Lawrence v. Texas* that the Fourteenth Amendment included a right to liberty in individual decisions concerning the intimacies of their physical relationship, and ultimately held that the criminalization of gay marriage was unconstitutional.⁸⁸ The court held, “it is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”⁸⁹

The decision to identify as transgender is protected by due process’s liberty interests because proclaiming oneself as transgender is one of the most personal decisions an individual could make. It is deeply rooted in one’s identity, and it is a decision that the government may not

⁸⁴ *Roe v. Wade*, 410 U.S. 113, 129 (1973).

⁸⁵ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 578.

⁸⁹ *Id.*

enter into. The Court in *Lawrence v. Texas* established precedent that individuals are entitled to personal autonomy to make deeply personal decisions free from governmental interference. Failing to accept their proclaimed gender by placing transgender inmates into correctional facilities that misidentify them invades the zone of privacy established.⁹⁰

ii. Prisons are Homes

Furthermore, emerging tradition demands that the right to privacy in one's home encapsulates the right to some degree of privacy in a correctional facility. While for most inmates, a correctional facility is only temporary, it is still the place in which an inmate is located and resides. Therefore, the right to privacy in one's home extends to correctional facilities.

iii. Cases Asserting Due Process

However, the California Eastern District Court did not hold that transgender inmates were constitutionally protected by Due Process in *Guy v. Espinoza*.⁹¹ In this case, a cisgender female inmate sought relief, claiming that her due process rights were violated by being housed with a transgender inmate.⁹² The court held that an inmate does not possess a Due Process right to be housed with compatible inmates, citing *Allen v. Purkett*.⁹³ However, applying *Allen* to the facts in *Guy* substantially misrepresents the court's holding in *Allen*— in *Allen*, inmates claimed that their Due Process rights were violated when they were moved from the honors dorms to another housing unit after allegedly using drugs.⁹⁴ Consequently, the court held that an inmate didn't have a right to house with a certain inmate, or in a certain cell, and the transfer from the honors unit to another housing unit did not violate the inmates' Due Process.⁹⁵ The court in *Guy*

⁹⁰ *Id.*

⁹¹ *Guy v. Espinoza*, No. 1:19-cv-00498-AWI-EPG (PC), 2020 U.S. Dist. LEXIS 9893, at *28 (E.D. Cal. Jan. 17, 2020).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Allen v. Purkett*, 5 F.3d 1151, 1152 (8th Cir. 1993).

⁹⁵ *Id.*

misapplied *Allen*'s holding because this holding was in the context of inmates moving from one place to another, where both the old and new facilities were not violative of any constitutional right.⁹⁶ This differed from the facts in *Guy* because in *Guy*, a cisgender inmate argued her rights were violated by not receiving another cisgender cellmate. As a result, the inmate housing placement policy violates Due Process because the Supreme Court has established a right to liberty in individual decisions and emerging traditions requires gender to be redefined.

IV. Proposed Reforms

Up until the holding, the *Hampton* opinion exudes a fact pattern, logic, and reasoning that suggests to any reasonable person that the court was going to hold in Strawberry's favor.⁹⁷ For example, regarding the equal protection claim, the court held, "the Court is not convinced that the IDOC's policy of placing transgender inmates in the facility of their assigned sex at birth is substantially related to the achievement of prison security."⁹⁸ Despite this, the court did not order Strawberry to be moved to a female prison.⁹⁹ In fact, the court flipped without justification within the last pages of the opinion, stating, "[t]he Court is not convinced at this point that ordering the IDOC to transfer Hampton to Logan Correctional Center is in the best interest of the parties or the public."¹⁰⁰ The court acted similarly in *Tay*.¹⁰¹

The U.S. Constitution cannot continue to be steamrolled for the sake of upholding the custom of staying out of correctional facilities' sandbox. This section discusses possible remedies that a court could order to address the present constitutional issues with the current inmate housing placement policy.

⁹⁶ *Id.* at 1153.

⁹⁷ *Hampton v. Baldwin*, No. 3:18-CV-550-NJR-RJD, 2018 WL 5830730, at *11 (S.D. Ill. Nov. 7, 2018).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at *16.

¹⁰¹ *Tay v. Dennison*, 457 F.Supp.3d 657, 681 (S.D. Ill. 2020).

A. The Establishment of a Transgender Prison

As courts have repeatedly expressed, they remain concerned that moving transgender inmates between male and female facilities may not be in the best interest of the inmate or the public. But as discussed in the previous section, the U.S. Constitution requires equal treatment of inmates regardless of their gender identity when initially placing them at a correctional facility. If cisgender inmates are placed in cisgender prisons, then transgender inmates should be placed in transgender prisons. To meet this standard, prison officials should establish a prison facility for transgender inmates.

i. Cost

The estimated cost of building a new prison is between \$98 million and \$162 million per facility.¹⁰² Factors that determine the cost of the construction include the geographic location, the level of security needed, and size of the correctional facility. The Federal Bureau of Prisons is currently in the process of constructing thirteen additional prisons to address overcrowding in established facilities.¹⁰³ Each of these new prisons expect to hold between 900 and 1,200 inmates per facility.¹⁰⁴

Because there are approximately 1,2000 transgender inmates in the custody of the federal prisons, this resolution only requires the establishment of one additional facility. The Federal Bureau of Prisons received \$8.6 billion in funding in 2022.¹⁰⁵ As a result, establishing a transgender prison requires funding allocations of only approximately one percent of the Federal

¹⁰² *Executive Summary*, Federal Bureau of Prisons Management of Construction Contracts (last visited Nov. 8, 2023), <https://oig.justice.gov/reports/BOP/a0232/final.pdf>.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Rep. Cartwright Announces Over \$180 Million to Increase Fed. Bureau of Prison Hiring Efforts Nationwide, Congressman Matt Cartwright (last visited Nov. 8, 2023), <https://cartwright.house.gov/news/documentsingle.aspx?DocumentID=392511#:~:text=Overall%2C%20the%20Federal%20Bureau%20of,upgrades%20and%20other%20maintenance%20and.>

Bureau of Prison's budget. Given that transgender inmates account for approximately 0.7% of the federal prison population, this spending is feasible and proportional to the number of prisoners it would benefit.

ii. Design

Because this correctional facility will be designed specifically for transgender inmates, the possibilities for design are endless. The prison could include an infirmary specifically for gender re-affirming care. Additionally, since privacy concerns are heightened with transgender inmates, the facility could be created in a way that balances security of the inmates and security for the public. For example, showers and toilets could have stalls with doors to protect the privacy of inmates. However, to ensure that inmates are still continuously monitored, surveillance cameras could be installed in these private areas so that prisoners feel a sense of safety, but prison officials and guards are still able to constantly monitor prisoners. Furthermore, the facility could be designed to accommodate multiple security levels.

iii. Benefits

In addition to compliance with constitutional requirements, there are many benefits of establishing a prison for transgender inmates. Placing transgender inmates with other transgender inmates increases the safety for both transgender and cisgender inmates. While the action is unprecedented and therefore statistics regarding the effect of inmate safety when housing transgender inmates together do not yet exist, the established practice of allowing LGBTQ inmates to bunk together separate from the prison's general population indicates its expected success. "As a consequence of this segregated unit[,] gay men and trans women detained in the Jail are relatively free from the sexual harassment and forced or coerced sexual conduct that can

be the daily lot of sexual minorities in other men's carceral facilities.”¹⁰⁶ While the newly established prison would only hold transgender and non-binary inmates and not extend to be so broad as to hold LGBTQ inmates, transgender and LGBTQ inmates face similar issues in prison regarding their safety and interactions with other inmates, and therefore it is expected that a prison for transgender inmates would reap similar benefits as a segregated LGBTQ wing.

Furthermore, the establishment of a transgender prison quashes the concern of a transgender inmate harming a cisgender inmate. For example, a cis-gendered woman at the Edna Mahan Correctional Facility sued New Jersey Department of Corrections because claims she was raped by a transgender inmate who still maintained fully functioning male anatomy.¹⁰⁷ The case is still pending litigation. However, regardless of the outcome, the establishment of a transgender prison prevents the possibility of transgender-on-cisgender crime from happening, and it increases safety for all inmates.

Additionally, establishing a transgender facility helps address the overcrowding of current male and female facilities because it will make available the approximate 1,200 beds that are currently occupied by transgender inmates in male and female facilities. The Federal Bureau of Prisons states that many of their facilities are seriously overcrowded.¹⁰⁸ Despite their best efforts, as of this writing in 2023, federal prisons continue to operate at approximately 103% of their capacity.¹⁰⁹ Establishing a transgender facility will decrease overcrowding in both male and female facilities.

¹⁰⁶ Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 Am. Crim. L. Rev. 1, 4 (2011).

¹⁰⁷ *Id.*

¹⁰⁸ *Executive Summary*, Federal Bureau of Prisons Management of Construction Contracts (last visited Nov. 8, 2023), <https://oig.justice.gov/reports/BOP/a0232/final.pdf>.

¹⁰⁹ Emily Widra, *Since You Asked: Just How Overcrowded Were Prisons Before the Pandemic, and at this Time of Social Distancing, How Overcrowded are they Now?*, Prison Policy Initiative (Dec. 21, 2020), <https://www.prisonpolicy.org/blog/2020/12/21/overcrowding/#:~:text=Despite%20the%20ongoing%20pandemic%2C%20and,operating%20at%20more%20than%20100%25>.

Additionally, establishing a transgender correctional facility is the only solution that is inclusive of not only transgender male and females, but also nonbinary individuals. While placing inmates solely upon their gender identity would alleviate relief for much of the 1,200 transgender inmates, this solution would still violate constitutional protections for anyone who identifies as gender nonconforming, non-binary, or genderqueer. As of November 28, 2023, approximately 1.2 million people in the United States identify as nonbinary.¹¹⁰ If any of those individuals were imprisoned, the only way they could be provided with a prison consistent with their gender identity is if a nonbinary prison existed.

iv. Risks and Challenges

Difficulties exist with the establishment of a transgender prison. For example, if only one facility exists, inmates will have to relocate from across the United States to this one facility. This poses hardships for family members of inmates who may now be required to travel thousands of miles for a visit of a few hours. It also creates a challenge for transporting prisoners because the transport may not always be able to be done in one day's worth of driving. However, distance from home and from loved ones is not a constitutionally protected right. Likewise, prison officials have the expertise and capabilities to circumvent these obstacles.

Another difficulty that arises from establishing a transgender facility is addressing the variety of levels of security needed for different inmates. For example, one transgender inmate may be a low-risk and therefore would likely be placed at a camp-style facility, while another requires maximum security. However, this can be addressed with a thoughtful design of the new prison that accommodates for a variety of security levels.

¹¹⁰ Bianca Wilson & Ilan Meyer, *Nonbinary LGBTQ Adults in the United States*, The Williams Institute at UCLA School of Law (June 2021) <https://williamsinstitute.law.ucla.edu/publications/nonbinary-lgbtq-adults-us/>.

Similarly, another risk that arises from the establishment of a transgender prison is the risk of sexual assault between transgender inmates. For example, if a transgender male inmate was celled with a transgender female inmate, the risk of sexual assault increases. However, this can be mitigated by creating different wings in the prison for different identities: a wing for transgender women, a wing for transgender men, and a wing for gender nonconforming individuals. The risk of sexual assault in prison will unfortunately never be zero. However, the Prison Rape Elimination Act still applies and protects transgender inmates, even in a transgender facility. As a result, if an inmate is at an elevated risk for sexual assault, prison officials still have a duty to address their circumstances and take steps to ensure that they are safe.¹¹¹

Establishing a transgender prison remedies current constitutional violations because it treats all inmates the same: male inmates attend male prisons, female inmates attend female prisons, and transgender inmates attend transgender prisons. It also protects against cruel and unusual punishment of violating dignity and humanity interests of the transgender inmate by designing the facility in a way that considers the needs of transgender inmates. Nevertheless, the Federal Bureau of Prisons is already in the process of building new prisons. Given the reasonableness of the cost of implementing this solution, federal courts should hold that sending transgender inmates to cisgender prisons is unconstitutional and order prison officials to establish a transgender correctional facility.

B. Redefining Gender

The current inmate housing placement policy violates the constitution is because the definition of gender that prison officials currently use is so narrowly drawn that it is both over- and under- inclusive of transgender individuals. For example, the prison's policy defines a

¹¹¹ 34 U.S.C. § 30302 (2003).

transgender woman who has kept her male genitalia as a male because the definition is so broad that it includes individuals who no longer identify as such. Furthermore, the prison's policy is also under-inclusive because the definition of a woman is so narrowly drawn that it precludes anyone other than those who possessed female anatomy at birth. Some argue that the constitutional issues can be resolved by redefining gender and broadening its scope, however, this solution is not the better solution because it entrusts prison officials with too much discretion and will likely be poorly executed.

i. Balancing Test

Courts can implement a broader definition of gender by establishing a balancing test that considers the individual's gender at birth, the individual's gender identity, whether the individual has publicly transitioned, whether the individual has been diagnosed with gender dysphoria, how the individual is perceived from their peers, and whether the individual has taken steps to obtain gender affirming care. By establishing a balancing test, Courts are requiring prison officials to adopt a holistic definition of gender. Courts should be clear that the test should be construed liberally in favor of the individual's gender identity to prevent further constitutional violations.

ii. Benefits

Establishing a broader definition of gender resolves the Equal Protection violation because it transforms the placement of all inmates to the same process—the process by which they are placed according to their gender identity. Additionally, it protects correctional facilities from cruel and unusual punishment claims because it ensures that individuals with heightened privacy needs are placed in facilities that do not violate those needs.

Similarly, establishing a broader definition of gender creates a safer housing situation for all inmates. It protects transgender inmates who inherently possess a higher risk of sexual assault

and violence by placing them according to their gender identity. It also protects cisgender inmates who are bunking with transgender inmates because it mitigates the risk of an inmate implementing a bad-faith belief that they are transgender only to change their relocation.

iii. Risks

However, entrusting prison officials to apply a balancing test accurately for every inmate poses substantial risk—it entrusts the administrator making the determination with too great of a margin for error. Decisions will likely vary from staff member to staff member, and as a result, the implementation of this remedy will be sporadic and unpredictable.

Furthermore, requiring this additional step in the intake process will slow down the process altogether, demanding additional staff, which therefore increases expenses. If a prison staff member must take an individualized approach to placing inmates, a decision that was formerly automatic, the number of prisoners in which the prison staff member can process in a day will dramatically decrease.

Nevertheless, resolving constitutional protections with an individualized approach will open the floodgates to mass litigation. Inmates who believe that they were misgendered and placed into the incorrect facility will likely sue for relief. Prisons are complicated, and courts generally prefer to defer to administrative decisions by prison officials. However, adopting a policy for inmate placement that requires an individualized approach will require the court to be more involved in the oversight of correctional facilities. As a result, while there are many benefits to expanding the definition of gender so that it is more inclusive, redefining gender without also establishing a transgender incarceration facility will not achieve the desired outcomes, nor will it adequately remedy constitutional violations.

V. Conclusion

In conclusion, correctional institutions' current policies of initially placing a transgender inmate in a correctional facility that is inconsistent with their gender identity violates Equal Protection, Due Process, and the Eighth Amendment. This issue is unprecedented and demands court attention. The inmate housing placement policy violates Equal Protection because it implements a process for cisgender inmates that differs from transgender inmates. It also violates Equal Protection because it has resulted in substantial disparate treatment between transgender and cisgender inmates. The housing placement policy violates the Eighth Amendment because forcing transgender inmates to bunk with inmates who do not align with their gender identity is cruel, unusual, inhumane, and undignified. The housing placement policy violates Due Process because it violates an individual's fundamental right to privacy and individual decision-making.

Not only should courts hold that the current practice is unconstitutional, but courts should also go further as to order a remedy, namely the establishment of a transgender prison.