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Jordan Emma Mintz

Law and Sexuality AWR

Treatment of Transgender Inmates—the Double Punishment

I. Introduction

Transgender people face immense prejudice in their daily lives, but being transgender in jail puts them in a particularly precarious position. In the confined space of a prison, societies general discomfort, and at times disgust, with the transgender body manifests itself in a variety of ways.

This paper explores the evolution of the treatment of transgender inmates in federal, state and municipal confinement. Section II presents background on gendered nature of American prison systems. Section III presents an overview of housing policies in different jurisdictions, as well as the complications that accompany different methods. The majority of prisons make housing classifications based solely on genitalia. This determination often creates a substantial risk of rape and sexual abuse for transgender prisoners. Under the Eighth Amendment, prison officials are required to protect all inmates. While transgender inmates are one of the most vulnerable populations in prison, many prisons and prison officials are unable or unwilling to protect them. The traditional response to victimization has been to place them to solitary confinement to keep them “safe.” This procedure punishes the victim rather than the aggressor. In recent years, through the use of litigation as well as the political process, transgender inmates have made substantial progress in attaining protections. The Prison Rape Elimination Act (PREA) sets standards to address the problem of violence and rape in prisons and to

protect the most vulnerable inmates. Further, many local prisons and jails have instituted housing placement policies to protect transgender inmates, using identity-based classification.

Section IV addresses the problem of access to appropriate health care in prison facilities across the United States. The discomfort with the transgender body manifests in institutional unwillingness to afford transgender inmates appropriate health care.

Jurisdictions take divergent approaches to the level of health care they cover.

Transgender inmates are consistently refused gender reassignment surgery, and in many cases refused identity sustaining hormone therapy treatment. Litigation has been a powerful tool for many transgender inmates, as many of these policies have been successfully challenged in the courts, forcing prison officials to provide the required health care. As a result of such litigation, the federal government entered into a settlement that required a changed the federal prison health care access guidelines. These new guidelines grant transgender inmates far greater access to health care treatments than under the prior standards. Courts have been far more willing to grant hormone therapy than gender reassignment surgery. A court has only mandated gender reassignment surgery in one case, and it is currently being appealed by the state.

In sum, this paper analyzes the marginalization of transgender individuals in American prisons. This paper argues for the need for reform in both housing policies and access to medical care, in order to treat every individual with the dignity they deserve.

II. Background

Transgender individuals are disproportionately imprisoned in the United States.¹ The United States prison system has traditionally and lawfully been segregated into separate institutions for men and women.² Men and women's prisons differ greatly in many ways based on gendered bias.³ Both prisons are set up to "mirror a hyper expression of traditional gender roles."⁴ Men's prisons are designed to be hyper-masculine, and "control is designed to be violent, to reinforce the hyper masculinity of competition, dominance, control, force, suppression of emotion or weakness."⁵ Women's prisons, however, force their inmates to be "passive, emotional, weak, submissive, and dependent."⁶ This makes men's prisons significantly more violent than women's, as "violent control over men in prisons breeds violence in return."⁷

Transgender people are "individuals whose gender identity is outside the traditional gender binary of masculine and feminine for the bodies they are perceived to have" and thus "challenge gender expectations."⁸ The transgender body thus poses special challenges to the rigid gendered structure of the prison system. As transgendered persons

¹ Sydney Tarzwell, *The Gender Lines Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 177 (2006) (Tarzwell argues that this is due, in part, to the way transgender individuals are shunned from society and driven into criminalized economies.).

² Julie Kocaba, *The Proper Standard of Review: Does Title IX Require "Equality" or "Parity" of Treatment When Resolving Gender-Based Discrimination in Prison Institutions?*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 607, 608 (1999).

³ Nicole Hahn Rafer, *Gender, Prisons, and Prison History*, 9 SOC SCI HISTORY, 233, 236 (1985), available at <http://www.umass.edu/legal/Benavides/Spring2005/397G/Readings%20397G%20Spring%202005/10Hahn.pdf>.

⁴ Lori Girshick, *Out of Compliance: Masculine-Identified People in Women's Prisons*, in CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX 189, 191 (Eric A. Stanley & Nate Smith eds., 2001).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 190.

do not fit into the traditional and neat gendered dichotomy, prison officials struggle with how to accommodate the special needs of the transgender prison population, and often fail. “The discrimination transgender people face in prison systems is more than simple inequality: it can threaten dignity, safety, bodily integrity, and even life.”⁹

In spite of the clear challenge posed to prison officials by transgender inmates, many prison systems refuse to acknowledge the problem. In a 2009 survey of forty-four states, the District of Columbia, and the U.S. Bureau of Prisons, researchers found nineteen states had no policies or directives on the management of transgender inmates.¹⁰ In total, there are twenty-seven states with policies regarding treatment of transgender inmates, all to varying levels of accommodation.¹¹ In the absence of policies specifically addressing the needs of transgender individuals, “in such a gendered system, transgender prisoners are routinely forced into dangerous placements and denied gender-affirming medical care.”¹²

III. Accommodations

From the moment transgender inmates are booked into prison, they are forced to conform to gender roles based on their birth anatomy. Inmates are housed, for the most part, based on their birth-assigned genitalia, regardless of their current appearance or gender-identity.¹³ Prison systems have historically employed genitalia-based classifications rather than identity-based classifications because many prisons view

⁹ *Transgender Prisoners, Identity, and Detention: Policy Recommendations*, HUMAN RIGHTS WATCH (2009), available at http://www.outcast-films.com/films/cu/transgender_prisoners.pdf.

¹⁰ George R. Brown & Everett McDuff, *Health Care Policies Addressing Transgender Inmates in Prison Systems in the United States*, 15 J. CORRECTIONAL HEALTH CARE 280 (2009).

¹¹ *Id.*

¹² Tarzwell, *supra* note 1, at 171.

¹³ Silpa Maruri, *Hormone Therapy for Inmates: A Metonym for Transgender Rights*, 20 CORNELL J.L. & PUB. POL'Y 807, 812 (2011).

gender as something that is “assigned at birth, and will remain that way.”¹⁴ Thus, transgender inmates are forced to conform their clothing, hair and makeup to that which is consistent with their genitalia.¹⁵ This section discusses the ways in which prison housing policies further marginalize transgender inmates and place them at risk of physical as well as emotional distress.

a. Housing

Prison housing policies can set the stage for abuse of transgender prisoners. The discrimination experienced by transgender individuals starts at the booking phase, when individuals are initially housed in jail before being charged or sentenced.¹⁶ The current policy of the vast majority of prisons across the country is to assign housing based on genitalia, not gender identity.¹⁷ This means that transgender inmates that have not had gender reassignment surgery “are housed in facilities that may not be the best placement for them.”¹⁸ Thus, these inmates “in addition to living daily within their own personal prisons...face additional confinement in a ward in which they feel they do not belong.”¹⁹

Considerations for male-to-female (MTF) inmates in men’s prisons are different than female-to-male (FTM) inmates in women’s prisons. The problems faced by FTM inmates in women’s prisons come from the male staff.²⁰ FTM inmates are often singled out for harsher treatment by male staff for not fitting into the feminine role they are

¹⁴ Angela Okamura, *Equality Behind Bars: Improving the Legal Protections of Transgender Inmates in the California Prison System*, 8 HASTINGS RACE & POVERTY L. J. 109, 118 (2011).

¹⁵ Ally Windsor Howell, *A Comparison of the Treatment of Transgender Persons in the Criminal Justice Systems of Ontario, Canada, New York, and California*, 28 BUFF. PUB. INT. L.J. 133, 157 (2010).

¹⁶ Benish A. Shah, *Lost in the Gender Maze: Placement of Transgender Inmates in the Prison System*, 5 J. OF RACE, GENDER & ETHNICITY 39 (2010), available at http://www.tourolaw.edu/journalrge/uploads/issues/vol5issue1/shah_final.pdf.

¹⁷ Girshick, *supra* note 4, at 203.

¹⁸ *Id.*

¹⁹ Rebecca Mann, *The Treatment of Transgender Prisoners, Not Just an American Problem-A Comparative Analysis of American, Australian, and Canadian Prison Policies Concerning the Treatment of Transgender Prisoners and a "Universal" Recomm.*, 15 LAW & SEXUALITY 91, 106-07 (2006).

²⁰ Girshick, *supra* note 4, at 200.

supposed to embrace.²¹ While these issues are significant, they are beyond the scope of this paper.

MTF inmates in men's prisons are marginalized and abused by both prison staff and other inmates. These inmates are not simply "out of place", in the hierarchical and hypermasculine world of a men's prison" they are "the ultimate target."²² Transgender individuals are "uniquely at odds with these gender stereotypes, and are singled out for assault because of their gender non-conformity."²³ Prison rape is all too common, and "for a person who identifies as a woman and has feminine looks and breasts, it's almost inevitable."²⁴ Once placed in a facility based on genitalia, transgender inmates "live under constant threat of either physical and/or sexual assault by other inmates living in the same dormitory."²⁵ This fails to address the problem of where to place transgender inmates so they are kept in relative safety.

i. The problem of violence, abuse and rape

Transgender inmates are raped, physically assaulted, and beaten not only by other inmates, but also by the prison personnel who are sworn to protect them.²⁶ A 2007 study of California's prison system found that transgender women in men's prisons were 13.4 times more likely to have reported sexual assault than the rest of the population.²⁷

²¹ *Id.*

²² Tali Woodward, *Life in Hell: In California Prisons, an Unconventional Gender Identity can be like an Added Sentence*, S.F. BAY GUARDIAN (Mar. 21, 2006), available at http://www.sfbg.com/40/24/cover_life.html.

²³ Tarzwell, *supra* note 1, at 177.

²⁴ *Id.*

²⁵ *Statement from A Transgender Woman Prisoner in California*, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, available at http://www.ojp.usdoj.gov/reviewpanel/pdfs_nov06/written-martinez.pdf.

²⁶ Clifton Goring & Candi Raine Sweet, *Being an Incarcerated Transperson: Shouldn't People Care?*, in CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX 185, 186 (Eric A. Stanley & Nate Smith eds., 2001).

²⁷ VALERIE JENNESS, CHERYL L. MAXON, KRISTY N MATSUDE, & JENNIFER MACY SUMNER, CENTER FOR EVIDENCE-BASED CORRECTIONS, DEPARTMENT OF CRIMINOLOGY, LAW AND SOCIETY, UNIVERSITY OF CALIFORNIA, IRVINE, VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES: AN EMPIRICAL STUDY OF

Overall, 4.4% of a randomly selected sample of the entire population reported they were victims of sexual assaults while 59% of the transgender population reported being victims of sexual assault.²⁸ The prevalence of such abuse is due, in part, to inadequate safety precautions taken by prison officials.²⁹

Eighth Amendment standards govern the minimum level of protection prison officials are required to provide inmates. The Eighth Amendment protects inmates from cruel and unusual punishment. In *Farmer v. Brennan*, the Court held “that a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement” to transgender inmates.³⁰ In that case, a transsexual inmate, born with male genitalia but identified as a female, was put in with the male population.³¹ She was repeatedly raped and beaten by other inmates, and, as a result, she acquired HIV.³² The court clarified, however, that §1983 liability would only attach to a prison official “if he knows that inmates face a substantial risk of serious harm and disregard that risk by failing to take responsible measures.”³³ In *Farmer*, the Court found that such a risk was clearly apparent, as prison guards were aware of her constant harassment and did nothing to protect her.

ii. Treatment by Staff

Another significant problem facing transgender inmates is the way they are treated by prison staff. A study released by the National Center for Transgender Equality found that 22% of transgender individuals that have interacted with law

SEXUAL ASSAULT 32 (2007), available at

http://ucicorrections.seweb.uci.edu/pdf/PREA_Presentation_PREA_Report_UCI_Jenness_et_al.pdf.

²⁸ *Farmer v. Brennan*, 511 U.S. 825 (1994).

²⁹ Okamura, *supra* note 14, at 11.

³⁰ *Farmer*, 511 U.S. at 837.

³¹ *Id.* at 838.

³² *Id.*

³³ *Id.*

enforcement report experiencing harassment.³⁴ The problem has historically been caused by the lack of standards imposed on prison officials.³⁵ Prison norms require strip searches to be done by a guard of the same gender as the inmate. This is often ignored when it comes to transgender inmates, “who are often searched by guards of their birth gender.”³⁶ Transgender inmates are often subject to “unjustified strip searches for the purpose of satisfying curiosity about the person's body.”³⁷ Verbal harassment, humiliation, and denial of basic necessities, such as food or showers, are other common forms of violence transgender inmates face at the hands of those who are supposed to protect them.³⁸ Transgender inmates are often raped, beaten and sexually assaulted by prison guards, and face “intense retaliation should the person report any of this abuse.”³⁹

iii. Prison Rape Elimination Act

In 2003, prompted by the lack of legal remedies afforded to victims of sexual assault in prison, whether or not transgender, Congress enacted the Prison Rape Elimination Act (“PREA”).⁴⁰ PREA created the Prison Rape Elimination Commission (“Commission”) and authorized it to hold hearings and submit its findings to Congress.⁴¹ The stated purpose of PREA, according to Congress, is to “develop and implement national standards for the detection, prevention, reduction, and punishment of prison

³⁴ JAMIE M. GRANT, LISA MOTTET, & JUSTIN TANISM, NATIONAL CENTER FOR TRANSGENDER EQUALITY, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY (2011), available at http://transequality.org/PDFs/Executive_Summary.pdf.

³⁵ *Transgender Prisoners, Identity, and Detention*, *supra* note 9.

³⁶ *Id.*, at 6.

³⁷ Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 527 (2009).

³⁸ *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual, and Transgender People in the United States*, AMNESTY INT'L 64 (2005), available at <http://www.amnestyusa.org/outfront/stonewalled/report.pdf>.

³⁹ Arkles, *supra* note 37, at 527.

⁴⁰ 42 U.S.C. § 15602 (2006).

⁴¹ 42 U.S.C. § 15606 (2006).

rape.”⁴² PREA was intended to increase the accountability for prison officials who fail to prevent and punish prison rape.⁴³ PREA fails to create a cause of action for violation of the standards it created.⁴⁴ These standards can, however, be used to show that prison officials fell below the standard of care in a §1983 claim for a violation of the Eighth amendment.

In 2009, the Commission released its findings as well as the recommended standards required by the PREA.⁴⁵ These standards are summarized below. On May 16, 2012, Attorney General Eric Holder signed the standards, and became effective for enforcement in jails on August 20, 2012.⁴⁶ While the standards promulgated by the Commission are a good start, they do not go far enough to ensure protection of the most vulnerable of inmates.⁴⁷

b. Standards for housing placement

The majority of prison systems use a genitalia-based placement system,⁴⁸ which creates its own challenges to prison officials to keep inmates safe. As the Commission found, major problems occur when there is too much discretion in housing placement of transgender inmates.⁴⁹

⁴² 42 U.S.C. § 15602 (2006).

⁴³ *Id.*

⁴⁴ *The Impact of Prison Rape Elimination Act (PREA) on Lock-Ups and Short Term Holding Facilities*, available at <http://www.cipp.org/pdf/OverviewPREA.pdf>.

⁴⁵ NAT'L PRISON ELIMINATION COMM'N, NATIONAL PRISON RAPE ELIMINATION REPORT 129 (June 2009), available at <http://www.ncjrs.gov/pdffiles1/226680.pdf>.

⁴⁶ 28 C.F.R. § 115 (2012).

⁴⁷ State and local prisons are not required to comply with the standards. They are subject to a mere 5% reduction in funds for noncompliance, however, they can recuperate the loss of funds if the governor certifies that the 5% will be used to enable compliance if the future.

⁴⁸ Girshick, *supra* note 4, at 203.

⁴⁹ NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 45, at 15.

Under PREA standards, officials must screen inmates in the first seventy-two hours of detention to determine whether they are at high risk of abuse.⁵⁰ Based on the determination that an inmate is vulnerable, prison officials are to use this information to keep such inmates “away from potential abusers.”⁵¹ Decisions on housing and program assignments are to “be made based on an individual assessment.”⁵² Further, “facilities cannot search or physically examine a transgender or intersex inmate solely to determine the inmate’s genital status.”⁵³

Other prison systems, for example California, have similar classification systems. Currently, the California Department of Corrections and Rehabilitation (CDCR) classifies and houses inmates by taking into account certain risk factors, including: age, violent/nonviolent offender status, repeat offender status, and history of mental illness.⁵⁴ Significantly absent from this list is gender identification or the issues associated with a history of victimization.⁵⁵ Most transgender inmates are put in the position where they must wait and see if they will be attacked before they receive protection.

i. Segregation

While prison officials cannot dispense with their duty to protect inmates, they are often given leeway in how they fulfill their duty. While some prison systems, such as New York and San Francisco, use the “pod” model, in which vulnerable inmates are put in separate pod,⁵⁶ this is not the norm. For most state prisons and county jails, the

⁵⁰ 28 C.F.R. § 115.41(2012).

⁵¹ *Id.*

⁵² 28 C.F.R. § 115.42 (2012).

⁵³ *Id.*

⁵⁴ CAL. PENAL CODE § 2636(a)(1)-(4) (2006).

⁵⁵ There was, however, a proposed amendment to the statute in 2009 to add sexual orientation and gender identity to the list. The amendment passed both the Assembly and the Senate, but was vetoed by Governor Schwarzenegger.

⁵⁶ Mann, *supra* note 19, at 7.

solution to the problem of potential sexual abuse is to put transgender inmates in twenty-three hour-a-day lockdown.⁵⁷ In *Louis v. Bledsoe*, the Third Circuit denied a transgender, male-to-female, inmate's motion for a transfer to an individual cell.⁵⁸ The inmate, Louis, claimed she felt unsafe with her "aggressively gay" cellmate who was sexually abusing her.⁵⁹ The prison responded by transferring her to the Special Management Unit, where she was isolated from the prison population for two weeks against her wishes.⁶⁰

According to the court, by simply moving Louis away from her original threat, the prison had satisfied its duty to protect her.⁶¹ This case exemplifies the harsh reality of life for at risk transgender inmates. Either they risk abuse at the hands of their fellow inmates, or they face the punishment of isolation.

Transgender inmates disproportionately end up in administrative segregation because they are disproportionately the victims of sexual assault.⁶² A major problem with this policy, however, is that "administrative segregation differs little from punitive segregation, or solitary confinement."⁶³ Such a policy operates, in essence, to punish the victim rather than the perpetrator. The limited contact inmates receive when in isolation is psychologically damaging.⁶⁴ Administrative segregation also results in exclusion from recreation, educational and occupational opportunities, and associational right.⁶⁵ Many

⁵⁷ *Id.*

⁵⁸ *Louis v. Bledsoe*, 438 Fed.Appx 129 (3d Cir. 2011).

⁵⁹ *Id.* at 131.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Arkles, *supra* note 37, at 544-45.

⁶³ Tarzwell, *supra* note 1, at 180.

⁶⁴ Arkles, *supra* note 37, at 544-45.

⁶⁵ See Darren Rosenblum, "Trapped" in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH J. GENDER & L. 499, 530 (2000).

transgender inmates do not report abuse and sexual assault “for fear of being placed in Ad. Seg. [administrative segregation], supposedly for their own protection.”⁶⁶

The conventional wisdom states that isolation is the better of the two evils. In *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, however, Gabriel Arkles argues that segregation of transgender inmates is actually counter-productive to the goals of safety.⁶⁷ According to Arkles, involuntary segregation “is in reality one of the greatest threats to the safety of TIGNC [transgender, intersex, and gender nonconforming] people in these systems.”⁶⁸ Arkles asserts two main reasons for this theory. First, segregation “disrupts networks of solidarity.”⁶⁹ Second, transgender inmates are often placed in segregation by staff “because it is easier for abusive correctional staff to access them alone and out of sight of other prisoners and video surveillance.”⁷⁰ Under the guise of protection, prison officials use segregation as another mechanism to further marginalize transgender inmates. They are kept from forming bonds with other inmates and are placed at the mercy of the guards who do not always have the inmate’s best interest in mind.

ii. Gender-Identity Based Classifications

The problem of where to house transgender inmates, while challenging, is not without a solution. A shift from the traditional strict genitalia-based classifications to a more flexible identity-based classification would reduce the risk of violence against the vulnerable transgender inmates. Identity-based classifications are not without their

⁶⁶ *Statement from A Transgender Woman Prisoner in California*, *supra* note 25.

⁶⁷ See Arkles, *supra* note 37, at 537.

⁶⁸ *Id.* at 518.

⁶⁹ *Id.* at 539.

⁷⁰ *Id.*

criticism.⁷¹ Such criticism stems from the fact that “women's prisons lack the resources necessary to deal with the basic needs of a male-to-female transgender prisoner,”⁷² and the fear that “male-to-female transgender inmates should not be housed in a women's facility for fear that the transgender inmate might have sex with other female inmates.”⁷³ Rebecca Mann argues that these criticisms are misplaced, as they show “no concern for the safety and well-being of the transgender prisoner who is automatically sent to a male facility.”⁷⁴

In recent years, a few prison systems have begun to shift away from genitalia-based classifications to identity-based classifications in housing determinations. Los Angeles, Denver, and Cook County, Illinois jails have instituted innovative new housing policies that challenge the norm. Such policies recognize the special problems transgender people face when incarcerated, and focus on treating transgender inmates with the respect and dignity.

In March 2011, Cook County Jail instituted a policy for housing based on gender identity rather than birth sex.⁷⁵ This policy was the first of its kind in the country, “in that it not only aims to place transgender people based on how they identify, it defers to a ‘gender identity panel’ of doctors and therapists to make that decision, not just correctional officers.”⁷⁶ Further, the policy also “requires transgender sensitivity training for jail employees, and is backed by a system of supervisor check-offs to ensure it is

⁷¹ See Christine Peek, *Breaking Out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 SANTA CLARA L. REV. 1211, 1241-42 (2004).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Mann, *supra* note 19, at 106-07.

⁷⁵ Kate Stone, *Cook County Jail Will House Transgender Detainees Based On Gender Identity*, HUFFINGTON POST (June 7, 2011), http://www.huffingtonpost.com/2011/04/07/cook-county-jail-transgender_n_846404.html.

⁷⁶ Kate Sosin, *Cook Country Jail Using Gender Identity to Determine Housing*, WINDY CITY TIMES (June 4, 2011), <http://www.windycitymediagroup.com/gay/lesbian/news/ARTICLE.php?AID=31243>.

followed.”⁷⁷ Accordingly, the Cook County Jail policy is a “comprehensive policy for placing detainees as well as educating medical and correctional staff.”⁷⁸

The gender-identity policy in place at the Cook County Jail, while a good start, has been utilized sparingly. In the first nine months the policy was in place, only two out of sixty transgender detainees who identified as being female were housed in the women’s facility.⁷⁹ Owen Daniel-McCarter, the project attorney for Transformative Justice Law Project of Illinois⁸⁰, believes this can be attributed to the fact that “the gender identity panel has too much power and too little knowledge to decide where a transgender person should be placed.”⁸¹

Denver has instituted a policy that focuses on the safety of the inmates while in their care.⁸² Under their new policy, a review board with multiple experts will now help place inmates where they belong.⁸³ When the inmate is booked, he or she will “spend 72 hours away from others while experts determine what's best for them.”⁸⁴ According to Denver Undersheriff Gary Wilson, such a policy was imperative, as they “believe it was important for us to not just protect the persons from physical harm but also from psychological harm while they're with us inside the jail.”⁸⁵

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Adrienne Lu, *For Transgender Detainees, a Jail Policy Offers Some Security*, N.Y. TIMES (Dec. 22, 2011), http://www.nytimes.com/2011/12/23/us/for-transgender-detainees-a-jail-policy-offers-some-security.html?pagewanted=all&_r=0.

⁸⁰ The Transformative Justice Law Project of Illinois is a collective of lawyers, social workers, activists, and community organizer who are deeply committed to prison abolition, transformative justice and gender self-determination.

⁸¹ Sosin, *supra* note 76.

⁸² Anastasiya Bolton, *Denver changes the way it handles transgender inmates*, (July 6, 2012), <http://www.9news.com/news/article/276191/188/Denver-changes-the-way-it-handles-transgender-inmates>.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

In 2012, the Los Angeles Police Department announced many significant changes in the way transgender inmates are treated, effectively creating the most progressive policy in the nation.⁸⁶ The department cited an “increased risk of violence, rape and emotional abuse compared to other inmates” as the reasoning behind the change.⁸⁷ Among the changes instituted by the LAPD “including a separate holding facility where transgender inmates will be able to receive male and female clothing and special medical treatments like hormones, KTLA.”⁸⁸ Further, officers are “now instructed to address transgender inmates by their preferred names” and police are no longer permitted to “pat down a transgender inmate for the sole purpose of determining his or her anatomic sex.”⁸⁹ The strides made in the LA city jail have been heralded as “a huge victory for transgender people.”⁹⁰ While this policy is a huge step in the right direction, LA city jail only houses inmates for up to three days before they are arraigned and then inmates are moved to a different facility.⁹¹

While the majority of prisons maintain policies that continue to marginalize transgender inmates, these recent changes are promising. Advocates must continue to press their legislators to push this positive trend forward.

⁸⁶ Kathleen Miles, *Transgender Prison: LA Police Open Separate Detention Facilities For Transgender Inmates*, HUFFINGTON POST, (Apr. 13, 2012), http://www.huffingtonpost.com/2012/04/13/transgender-prison-la-police_n_1423879.html.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

IV. Access to Appropriate Health Care

The other fundamental way transgender inmates are marginalized and mistreated in the prison system is through their inability to receive appropriate health care. The harm that can be caused from lack of health care can be as great as the harm caused by physical abuse. Transgender inmates are “more likely to suffer from depression, anxiety, posttraumatic stress disorder, schizophrenia, and substance abuse problems.”⁹² These problems are exacerbated by the denial of treatment; in particular, the denial of hormone therapy can lead to auto-castration.⁹³ Regardless, many prison systems ignore the problem and refuse treatment.

Much of the problem with access to health care comes from lack of political will to afford transgender inmates access to appropriate health care. Some who oppose providing transgender inmates with access to health care believe that there is a distinction to be made between the appropriateness of the care and whether it should be paid for by the state.⁹⁴ While this notion may be misguided, as inmates are physically restrained from providing care for themselves, it is nonetheless prevalent in society.

Some transgender inmates, however, have been able to gain access to appropriate health care through the courts. Access to hormone therapy and sex-reassignment surgery has been litigated extensively under the Eighth Amendment.⁹⁵ The United States Supreme Court has stated that the “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ proscribed by the

⁹² Maruri, *supra* note 13, at 812.

⁹³ *Id.* (defining autocastration as self-surgery of the testicles).

⁹⁴ James Phillips, *Gender Identity Disorder in Prison: Depending on a Diagnosis That is soon to Disappear?*, PSYCHIATRIC TIMES (Sep. 28, 2012), <http://www.psychiatristimes.com/gender-disorders/content/article/10168/2105073>.

⁹⁵ See *Kosilek v. Spencer*, 889 F. Supp. 2d 190, (D. Mass. 2012); *De'Lonta v. Angelone*, 330 F.3d 630 (4th Cir. 2003); *Supre v. Ricketts*, 792 F.2d 958, 962–63 (10th Cir. 1986).

Eighth Amendment.”⁹⁶ Denial of treatment in the face of a known risk of serious harm to an inmate, “taken without reasonable, good faith penological justification,” is the sort of “unnecessary and wanton infliction of pain” that the Eighth Amendment prohibits.⁹⁷ Such indifference violates the Eighth Amendment if it is “manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.”⁹⁸

The problem of denial of appropriate health care to transgender inmates falls into two different categories: access to hormones and access to gender reassignment surgery. Initially, transgender inmates were unsuccessful. Yet, in recent years the courts have been much friendlier to claims of denial of health care under the Eighth Amendment. Most of this success, however, has been in obtaining rights to hormone therapy. Transgender inmates have been denied access to sex-reassignment surgery in every case but one.⁹⁹

a. Diagnostic assessment

A key factor in these transgender prison health care cases is the presentation of expert medical testimony regarding the harmful effects of withholding hormone therapy and other medically necessary treatment for persons who suffer from profound Gender Identity Disorder (GID).¹⁰⁰ According to the National Commission on Correctional Health Care, “the health risks of overlooking the particular needs of transgender inmates

⁹⁶ *Estelle v. Gabel*, 429 U.S. 97, 104-05 (1976).

⁹⁷ *Hope v. Pelzer*, 536 U.S. 730, 737 (2000).

⁹⁸ *Id.*

⁹⁹ *Kosilek v. Spencer*, 889 F. Supp. 2d 190, (D. Mass. 2012). Althea Fung, *New Federal Prison Rules May Impact Transgender Inmates Suits*, MEDICAL DAILY (Oct. 11, 2011), <http://www.medicaldaily.com/articles/7367/20111011/transgender-federal-prison-state-prison-inmates-regulation-surgery.htm>.

¹⁰⁰ Karen Moulding, *Sexual Orientation and the Law* § 10:26 (2002).

are so severe that acknowledgment of the problem and policies that assure appropriate and responsible provision of health care are needed.”¹⁰¹

i. Standards of care

The World Professional Association for Transgender Health (WPATH), formerly known as the Harry Benjamin Standards of Care, has promulgated protocols used by qualified professionals in the United States to treat individuals suffering from gender identity disorders.¹⁰² Most courts that have found violations of the Eighth Amendment based on a finding of GID have done so using these standards.¹⁰³

The WPATH standards are “are based on the best available science and expert professional consensus.”¹⁰⁴ Their stated overall goal is to “provide clinical guidance for health professionals to assist transsexual, transgender, and gender nonconforming people with safe and effective pathways to achieving lasting personal comfort with their gendered selves, in order to maximize their overall health, psychological well-being, and self-fulfillment.”¹⁰⁵

The Standards of Care approach is referred to as "triadic therapy" and includes: (1) a real-life experience in the desired gender role, (2) hormone therapy for the desired gender, and (3) sex reassignment surgery to change the genitalia and other sex characteristics.¹⁰⁶ The standards of care are intended to be flexible “in order to meet the

¹⁰¹ *Transgender Health Care in Correctional Setting*, NAT’L COMMISSION ON CORRECTIONAL HEALTH CARE, (Oct. 18, 2009), available at <http://www.ncchc.org/transgender-health-care-in-correctional-settings>.

¹⁰² See World Prof’l Ass’n of Transgender Health, *The Harry Benjamin International Gender Dysphoria Association’s Standards of Care for Gender Identity Disorders* (7th ed. 2013), [hereinafter *Standards of Care*] available at <http://www.wpath.org/documents/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf>.

¹⁰³ See *Kosilek v. Spencer*, 889 F. Supp. 2d 190, (D. Mass. 2012).

¹⁰⁴ *Standards of Care*, *supra* note 101.

¹⁰⁵ *Id.*

¹⁰⁶ See *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 166 (D. Mass. 2002); *Standards of Care*, *supra* note 102.

diverse health care needs” of transgender individuals.¹⁰⁷ According to the Standards of Care, psychotherapy with a qualified therapist is sufficient treatment for some individuals.¹⁰⁸ In other cases psychotherapy and the administration of female hormones provide adequate relief.¹⁰⁹ There are some cases, however, in which sex reassignment surgery is medically necessary and appropriate.¹¹⁰

ii. Access to Assessments in American Prisons

A major concern for transgender inmates is access to health care professionals equipped to make a diagnosis of GID. Much of the success transgender inmates have found in litigation has come in part due to the important testimony of medical experts. This shows the importance of having trained staff in prison facilities to identify and diagnose transgender inmates. The problem with access to assessments in prisons across the United States is twofold: (1) many prisons do not have policies that provide for such access to mental health officials, (2) those prisons who do have such policies often lack trained professionals to conduct such assessments.

Some states, such as Mississippi, specify in their Department of Corrections policies that any treatment or “evaluation” related to GID would not be provided.¹¹¹ Other policies allow for psychological evaluations generally, but do not provide GID specific evaluations.¹¹² While the new U.S. Bureau of Prisons policy requires that every inmate with a possible GID diagnosis “will receive thorough medical and mental health

¹⁰⁷ Standards of Care, *supra* note 102.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Brown & McDuff, *supra* note 10, at 287.

¹¹² *Id.*

evaluations from medical professionals with basic competence in the assessment of the DSM-IV/ICD-10 sexual disorders,”¹¹³ many prisons around the country do not have trained staff. Research shows that health care professionals in the California prison system have almost no experience treating transgender people.¹¹⁴ This has led to a “lack of proper knowledge, training and experience of how to effectively treat transgender people.”¹¹⁵ According to Mara Keisling, Executive Director of the National Center for Transgender Equality, “there’s insufficient training, insufficient cultural competency, and insufficient humanity” when it comes to the medical care of transgender inmates.¹¹⁶

While relying on a diagnosis based on GID has been beneficial to accessing hormones through the legal system, this classification is controversial. While GID appears in the DSM-VI, it will be taken out of the DSM-V.¹¹⁷ As Judith Butler notes, “To be diagnosed with gender identity disorder is to be found, in some way, to be ill, sick, wrong, out of order, abnormal, and to suffer a certain stigmatization as a consequence of the diagnosis being given at all.”¹¹⁸ Thus, the denial of hormone therapy “implicates a greater historical struggle within the transgender community as to autonomy in self-definition.”^{119 120}

¹¹³ See Federal Bureau of Prisons policy 6031.003, Patient Care, *available at* <http://www.bop.gov/DataSource/execute/dsPolicyLoc>.

¹¹⁴ Janness et al., *supra* note 27, at 16.

¹¹⁵ *Id.*

¹¹⁶ Meghan Barr, *Transgender-inmate ruling is movement’s latest win*, THE DENVER POST (Sep. 6, 2012), http://www.denverpost.com/fitness/ci_21479176/transgender-inmate-ruling-is-movements-latest-win.

¹¹⁷ The DSM-V includes the diagnosis of “gender dysphoria” which is described as emotional distress from a “marked incongruence between one’s experienced and expressed gender and assigned gender.” Many transgender activists believe that removing the label “disorder” will help remove the stigma from the transgender community. The DSM-V will be released in May 2013.

¹¹⁸ Judith Butler, *Undiagnosing Gender*, in *TRANSGENDER RIGHTS*, 274–75 (Paisley Currah et al. eds., 2006).

¹¹⁹ Maruri, *supra* note 13, at 813.

¹²⁰ There is a split in the transgender community regarding the appropriateness of the GID classification. While some believe it is necessary for medical treatment, others believe that the diagnosis should be

As explained below, litigation has been imperative to the success of transgender inmates in gaining access to treatment. This puts transgender inmates in a precarious position. Under the current legal structure, transgender inmates are forced to either accept the denial of hormone therapy and suffer the consequences, or fight it in court, where they are forced to claim they are sick individuals. According to Silpa Maruri, finding a solution to the problem of hormone therapy for transgender inmates “is part of a larger project of articulating a legal solution to transgender rights.”¹²¹ Such articulation, according to Maruri, must address the theorization of transgender identity by the transgender community of autonomy and self-definition, while simultaneously constituting a legally viable argument to secure rights. This would require the courts to accept transgender individuals as a suspect class, or as a fundamental right to sexual identity; however, courts have been unwilling to grant such rights. Yet, while there may be problems with utilizing the GID classification, it is, thus far, the only means to achieve access to vital forms of health care.

b. Access to Hormone Therapy

In August 2012, the U.S. Bureau of Prisons (BOP), as part of a legal settlement,¹²² changed their longstanding policy on access to health care treatments for transgender inmates. Prior to this change, the BOP employed a “freeze frame” policy in which only transgender inmates with preexisting diagnosis were eligible for transgender related care

eliminated all together and transgender individuals should be considered to be engaging in an exercise of autonomy.

¹²¹ Maruri, *supra* note 13, at 813.

¹²² Fung, *supra* note 99. (Vanessa Adams, a MTF prisoner in a federal prison, sued the Bureau of Prisons challenging BOP’s previous policy freeze frame policy. Ms. Adams was not previously diagnosed with GID she was therefore unable to receive treatment under the BOP policy. As a result of her untreated GID, Ms. Adams resorted to auto-castration.)

and they were “maintained only at the level of change which existed when they were incarcerated.”¹²³ The new policy provides for inmates with possible GID to be given medical and mental health evaluations by medical professionals competent in DSM-IV sexual disorders.¹²⁴ Once diagnosed, the medical professional must create a treatment plan, which may include “but [is] not limited to: those elements of the real life experience consistent with the prison environment, hormone therapy, and counseling.”¹²⁵

Under this new policy all “appropriate treatment options prescribed for inmates with GID in currently accepted standards of care will be taken into consideration during evaluation by the appropriate medical and mental health care staff.”¹²⁶ Although this policy seems beneficial to transgender inmates, as I will explain below, many believe that the focus on GID guidelines is misguided. Further, some are skeptical that the BOP will institute the policy appropriately without further need for litigation.¹²⁷

Much like the new federal policy, the California Department of Corrections and Rehabilitation allows for prisoners who had been prescribed hormones prior to incarceration to continue that prescription, and allows an option for those not previously prescribed hormones to obtain a prescription.¹²⁸ Inmates who would like to begin hormones after incarceration begins must follow a protocol, in which they must see a primary care physician who must then request the individual be evaluated by a specialist

¹²³ Federal Bureau of Prisons policy 6031.003, *supra* note 113.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Federal Officials revise medical rules for transgender inmates*, THE ASSOCIATED PRESS (Oct. 3, 2011), http://www.syracuse.com/have-you-heard/index.ssf/2011/10/federal_officials_revise_medic.html.

¹²⁸ Girshick, *supra* note 4, at 204.

on gender identity.¹²⁹ While this system may seem generous, prisoners often run into roadblocks, and it can take months or years to be seen and referred.¹³⁰

Many prisons have policies that allow for continuation of hormones for prisoners that can document they were receiving such treatment before incarceration.¹³¹ However, often these policies often require “extensive documentation and medical records proving this treatment had previously been ordered by a physician.”¹³² This can prove difficult for inmates who do not have the ability to access such records. Without such documentation, hormone treatment will be discontinued.¹³³ One state policy allows for the continuation of treatment only for those inmates who have “completed sexual reassignment surgery.”¹³⁴ Therefore, access to hormone therapy in the majority of prison systems that technically offer such care is greatly limited.

In other prisons, however, transgender inmates are often outright denied access to hormones as well as other treatments.¹³⁵ Some states, such as Florida, have policies in which the sole purpose is stating that male-to-female transgender inmates present “no medical necessity for treatment, nor from continuation of treatment.”¹³⁶ This poses a serious problem as “prisoners who are subject to rapid withdrawal of cross-sex hormones are particularly at risk for psychiatric symptoms and self-injurious behaviors.”¹³⁷ Some inmates have been able to gain access to such treatment through the legal system. For example, Ophelia De’lonta had her hormone therapy resumed by court order after it was

¹²⁹ *Id.*

¹³⁰ *Id.* at 205.

¹³¹ Brown & McDuff, *supra* note 10, at 287.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Supre v. Ricketts*, 792 F.2d 958, 962–63 (10th Cir. 1986).

¹³⁶ Brown & McDuff, *supra* note 10, at 287.

¹³⁷ Mann, *supra* note 19, at 4.

abruptly ended upon entering prison.¹³⁸ The termination of her hormone therapy led to “compulsive and repeated self-mutilation of her genitals.”¹³⁹ Her repeated cries for help went unanswered by prison officials, which the court found to be a violation of the Eighth Amendment.¹⁴⁰

Political will in opposition to fair treatment of transgender inmates in Wisconsin was so powerful that, in 2006 the Wisconsin state legislature passed the Inmate Sex Change Prevention Act.¹⁴¹ This was affirmative legislation banning the use of hormones “to stimulate the development or alteration of a person's sexual characteristics in order to alter the person's physical appearance so that the person appears more like the opposite gender,” as well as sexual reassignment surgery “to alter a person's physical appearance so that the person appears more like the opposite gender.”¹⁴² The chief judge of the Federal District Court for the District of Wisconsin held this law to be unconstitutional, both facially and as applied, under both the Eighth Amendment and the Equal Protection Clause.¹⁴³ The court noted that “[i]t is well established that prison officials may not substitute their judgments for a medical professional's prescription,”¹⁴⁴ and held that the Wisconsin law impermissibly mandated such substitution of judgment whenever a medical professional considered “hormone therapy or gender reassignment as necessary treatment for an inmate.”¹⁴⁵

¹³⁸ De'Lonta v. Angelone, 330 F.3d 630 (4th Cir. 2003).

¹³⁹ *Id.* at 634.

¹⁴⁰ *Id.*

¹⁴¹ WIS. STAT. §302.386 (5m).

¹⁴² *Id.*

¹⁴³ Fields v. Smith, 712 F. Supp. 2d 830 (E.D. Wis. 2010) *aff'd*, 653 F.3d 550 (7th Cir. 2011).

¹⁴⁴ *Id.* at 866.

¹⁴⁵ *Id.*

c. Access to Sex-Reassignment Surgery

As late as 2009, not a single prison policy in the United States specifically lists sex-reassignment surgery or “body modification” surgeries as possible treatment options.¹⁴⁶ While the new federal policy does not explicitly mention surgical intervention, the option appears to be left open, as are all “appropriate treatment options.”¹⁴⁷ Presumably under this policy, if prescribed by a BOP physician, gender reassignment surgery would be provided. However, no inmate “in the United States has ever received SRS [sex reassignment surgery] while incarcerated.”¹⁴⁸

For the most part, courts treat access to hormone therapy quite differently than access to sex-reassignment surgery. In *Phillips v. Michigan Department of Corrections*,¹⁴⁹ the court ordered prison officials to reinstate hormone therapy for a transgender inmate, distinguishing between the withdrawal of hormone therapy and sex reassignment surgery: the court described the former as the reversal of “healing medical treatment,” and the latter as an “improvement of medical condition.”¹⁵⁰

In 2011, Lyalisa Stevens, a pre-operative transgender woman, filed a lawsuit in a California state court asking the state to pay for her gender reassignment surgery.¹⁵¹ She argued that she was “entitled to (1) sex reassignment surgery under the Eighth Amendment...(2) reasonably safe housing.”¹⁵² Assuming the court found that she is entitled to sex reassignment surgery, the safe housing would be accomplished by

¹⁴⁶ Brown & McDuff, *supra* note 10.

¹⁴⁷ Federal Bureau of Prisons policy 6031.003, *supra* note 113.

¹⁴⁸ Brown & McDuff, *supra* note 10, at 287.

¹⁴⁹ 712 F. Supp. 2d 830 (E.D. Wis. 2010).

¹⁵⁰ *Id.* at 839.

¹⁵¹ *In re Lyalisa Lavena Stevens on Habeas Corpus*. No. A 1226466 (Cal. App. Dep’t Super. Ct.), available at <http://www.gaylawnet.com/laws/cases/A126466.pdf>.

¹⁵² *Id.*

transferring her to a women’s facility.¹⁵³ The First District Court of Appeals in San Francisco dismissed Ms. Stevens’ claim as to the sex reassignment surgery.¹⁵⁴

There has been only one case in which a judge has required prison officials to provide sex-reassignment surgery. In *Kosilek v. Spencer*, the Chief Judge for the U.S. District Court for the District of Massachusetts was faced with the question: whether it is a violation of the Eighth Amendment for the DOC to withhold gender reassignment surgery when it was prescribed as medically necessary by DOC doctors.¹⁵⁵ The petitioner, Michelle Kosilek, was a transgender woman being housed in a men’s detention facility. DOC refused to provide her with sex reassignment surgery, which “the DOC’s doctors have found to be the only adequate treatment for the severe gender identity disorder from which Kosilek suffers.”¹⁵⁶ Kosilek argued that her right under the Eighth Amendment were violated, as DOC was deliberately indifferent to her medical needs.

Applying the stringent standards for a violation of the Eighth Amendment, the court found that the denial of gender reassignment surgery to Kosilek was cruel and unusual punishment within the meaning of the Eighth Amendment.¹⁵⁷ The court clarified that a prisoner is not entitled to the “care of his choice.”¹⁵⁸ The DOC must, however, “defer to the decisions of prison officials concerning what form of adequate treatment to provide and inmate.”¹⁵⁹ Finally, the court found that “there is no less intrusive means to

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Kosilek v. Spencer*, 889 F. Supp. 2d 190, (D. Mass. 2012).

¹⁵⁶ *Id.* at 198.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 208.

¹⁵⁹ *Id.*

correct the prolonged violation of Kosilek's Eighth Amendment right to adequate health care."¹⁶⁰ The state of Massachusetts is currently appealing this decision.¹⁶¹

i. Public reaction to the *Kosilek* decision.

The public response to the Kosilek decision has been mixed. Those who applaud this decision believe it “shines a light on what many advocates view as the worst form of discrimination still faced by transgender people: lack of access to medical care.”¹⁶² The Massachusetts Department of Correction was not the only opposition to providing Kosilek sex reassignment surgery. In a 2006 editorial, appearing at the time of the trial, Ellen McNamara of the *Boston Globe* reflects the popular sentiment at the time. She wrote “Kosilek's case is not compelling for reasons even beyond the obvious distastefulness of a wife killer angling to serve out his sentence of life without parole in a women's prison.”¹⁶³

The political community reacted to this decision with vehement disapproval from both sides of the aisle. Former Republican U.S. Senator Scott Brown, from Massachusetts, called the court's decision "an outrageous abuse of taxpayer dollars."¹⁶⁴ Even liberal Democrat Senator Elizabeth Warren admitted: "I have to say, I don't think it's a good use of taxpayer dollars."¹⁶⁵ However, as the court explained in *Kosilek*, “the cost of adequate medical care is not a legitimate reason for not providing such care to a

¹⁶⁰ *Id.*

¹⁶¹ Pauline Kim, *Massachusetts appeals ruling on prisoner sex change*, CNN (Sep. 28, 2012), <http://www.cnn.com/2012/09/27/us/massachusetts-prisoner-sex-change>.

¹⁶² Barr, *supra* note 116.

¹⁶³ Ellen McNamara, *When Gender isn't relevant*, BOSTON GLOBE (June 11, 2006), http://www.boston.com/news/local/articles/2006/06/11/when_gender_isnt_relevant/.

¹⁶⁴ Kim, *supra* note 161.

¹⁶⁵ Michael Levenson, *Elizabeth Warren disagrees with judge's sex-change ruling*, BOSTON GLOBE (Sept. 7, 2012), <http://bostonglobe.com/metro/2012/09/07/elizabeth-warren-radio-interview-disagrees-with-sex-change-ruling-addresses-native-american-issue/2kiz8FGO5T9cFZxhxOm3KJ/story.html>.

prisoner.”¹⁶⁶ The fact that the public debate focuses on the cost of the procedure is indicative of the depth of the lack of understanding.

The public reaction to this decision shows little empathy for Kosilek’s struggle. Kosilek was repeatedly denied care prescribed to her by DOC doctors.¹⁶⁷ In 2002, the court found that the Department of Correction had refused to provide Kosilek with the proper medical treatment she needed, as had been prescribed by the department’s doctors.¹⁶⁸ As a result of the courts decision, Kosilek began to receive psychotherapy and hormone treatments. This was simply not sufficient, as Kosilek tried to castrate herself and attempted suicide twice.

The DOC did everything in its power to keep Kosilek from receiving therapy, including firing the doctor that recommended Kosilek receive this treatment.¹⁶⁹ The court found that the DOC’s refusal to provide treatment was “rooted in sincere security concerns, and in a fear of public and political criticism as well.”¹⁷⁰ Citing the Bill of Rights, and its purpose of withdrawing certain subjects from public controversy, the court in *Kosilek* explained it would not be “permissible for a prison official to fail to provide adequate medical care to a prisoner because it would be unpopular or politically controversial to do so.”¹⁷¹ While public opinion and political will remain opposed to access to sex-reassignment surgery for transgender prisoner, the court system is the only viable option for recourse.

¹⁶⁶ *Kosilek v. Spencer*, 889 F. Supp. at 210.

¹⁶⁷ *Kosilek v. Maloney*, 221 F. Supp. at 160.

¹⁶⁸ *Id.*

¹⁶⁹ *Kosilek v. Spencer*, at 200.

¹⁷⁰ *Id.* at 214.

¹⁷¹ *Id.* at 211.

V. Analysis

American prisons are morally, and in many cases, legally, obligated to handle the problems that face transgender inmates. If prison systems do not begin to face the challenges posed by transgender inmates, they will find themselves at risk of paying a high cost. Costs include legal liability,¹⁷² as well as the “high cost of emergency medical care for those who self-harm.”¹⁷³ Medical and psychiatric issues relevant to transgender inmates must be taken into account by prison officials when making health care policy determinations. Failure to receive hormone therapy can lead to auto-castration, or “surgical self-treatment.”¹⁷⁴ For example, after Ophelia De’Lonta, a male-to-female transgender inmate, was denied her request for sex-reassignment surgery, she attempted self-castration using a disposable razor.¹⁷⁵ While auto-castration is not necessarily consistent with a suicide attempt,¹⁷⁶ “those who engage in this behavior may inadvertently die due to severe blood loss and hemodynamic collapse.”¹⁷⁷ This could create potential liability concerns for prison institutions, and cannot be ignored.

Prison institutions must provide appropriate medical assistance. Prison systems must provide a mechanism for every inmate to receive a psychological evaluation and the appropriate treatment recommended by the attending physician. This includes, yet not limited to, introducing new hormone therapy treatment as well as gender reassignment surgery if deemed medically necessary by prison physicians.

¹⁷² See *Kosilek v. Maloney*, 221 F. Supp. 2d 156 (in which §1983 damages were awarded).

¹⁷³ *Brown & McDuff*, *supra* note 10, at 281.

¹⁷⁴ *Brown & McDuff*, *supra* note 10, at 287.

¹⁷⁵ *De’Lonta v. Angelone*, 330 F.3d 630 (4th Cir. 2003).

¹⁷⁶ *Brown & McDuff*, *supra* note 10, at 287.

¹⁷⁷ *Brown & McDuff*, *supra* note 10, at 288.

Institutions are also potentially at risk of increased cost to safely house transgender inmates. It is imperative that all prisons have a policy in place that protects the safety of all inmates. One of the most important tools available to prison officials is a classification system that takes into account the vulnerability of each inmate on a case-by-case basis. Central to any classification scheme is to ensure that all inmates are treated with dignity. In this regard the PREA guidelines are a good start, but they must be implemented appropriately in every institution nationwide. The most important facet of this policy is screening. By instituting a policy of screening inmates in advance, prisons can identify the most vulnerable inmates and avoid dangerous housing placements, or placements such as segregation that are unnecessarily punitive. Advanced screening will protect the individual from potential aggressors, as well as protect the institution from liability.

A flexible system of identity-based classification, rather than genitalia-based classifications, is preferable. Crucial to the success of the identity-based classification, is the requirement that the prisons give the individual the choice. Without the choice, FTM inmates could conceivably be placed in a male facility, placing the inmate in same precarious position as MTF inmates currently face under the genitalia-based system. A flexible identity-based system, however, would allow inmates to be placed where they are most comfortable. Such a system puts the safety of the individual at the forefront of the classification decision.

VI. Conclusion

The institutional reluctance to change the trajectory of the mistreatment of transgender inmates is perpetuated, in part, by the lack of political will. In recent years,

transgender inmates have made some gains in jails on the municipal level as well as in the federal system. While these strides are important, a more comprehensive approach is vital to assure that transgender inmates are treated with the dignity and respect that every human being deserves.