

2015

Transsexualism and Sexual Terrorism in the American Penal System

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Tasha Bradt

GENDER & THE LAW

Tasha Bradt

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TRANSSEXUALISM AND SEXUAL TERRORISM IN THE AMERICAN PENAL SYSTEM
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April 26, 2015

This paper is submitted to Professor Solangel Maldonado in satisfaction of the requirements of Gender and the Law AWR.

This paper is submitted in satisfaction of the Seton Hall Law School's Advanced Writing Requirement.

This paper is approved not approved for AWR certification.

A handwritten signature in black ink, appearing to read "S. Maldonado", is written on a white rectangular background.

I. Introduction

Two years later, Zahara Greene cannot quite finish retelling her story. The odds were already against her when she entered prison on May 10, 2012.¹ Prisons have long been plagued by a culture of sexual harassment and assault, but Greene was a transgender² woman in an all-male facility³—making her nearly thirteen times more likely to be sexually assaulted than a non-transgender inmate.⁴ Greene clearly remembers her first day in the general population at Rogers State Prison. “I kind of just felt that [the correction officer] was letting me out with the wolves.”⁵

Although under federal law states must adopt measures to protect and reasonably guarantee the safety of inmates,⁶ the state of Georgia, like most states, placed Greene in a men’s prison where she faced harrowing odds of assault.⁷ After weeks of brutal rapes,⁸ by a high-ranking gang member within in the prison, and repeated pleas to the prison administration, Greene was

¹ Jessica Testa, *A Transgender Woman Says She Was Locked In A Cell With Her Rapist*, BUZZFEED NEWS (Sept. 26, 2014, at 11:32 AM), <http://www.buzzfeed.com/jtes/a-transgender-woman-says-she-was-locked-in-a-cell-with-her-#.vIRywZY7G>.

² In this paper the term “transgender” refers to persons “whose identity or lived experience do not conform to the identity of experiences typically associated with the sex assigned to that person at birth.” Sydney Tarzwell, Note, *The Gender Lines are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. (2006) (citing Franklin H. Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 713 n.1 (2005)). Though the term transgender is fluid and encompasses many gender non-conforming individuals, this paper will specifically focus on male-to-female transgendered individuals, as they are nearly three times more prevalent than female-to-male transgenders. See Rachel Faithful, *Transitioning Our Prisons Towards Affirmative Law: Examining the Impact of Gender Classification Policies on U.S. Transgender Prisoners*, 5 THE MODERN AMERICAN 1, 3 (2009).

³ Testa, *supra* note 1.

⁴ Valerie Jenness, Cheryl L. Maxson, Kristy N. Matsuda, Jennifer Macy Sumner, *VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT*, CENTER FOR EVIDENCE-BASED CORRECTIONS, April 27, 2007, available at <http://www.wcl.american.edu/endsilence/documents/ViolenceinCaliforniaCorrectionalFacilities.pdf>.

⁵ Testa, *supra* note 1.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

finally placed in “protective custody.”⁹ However, when Greene was finally admitted into her protective custody cell, her rapist was there waiting.¹⁰ After nearly 24 hours of repeated assaults, a sergeant finally answered Greene’s pleas for help.¹¹

Greene has sued the prison officials at Rogers State Prison for violating her Eighth Amendment rights under the U.S. Constitution, and failing to prevent and condoning her assault.¹² She hopes that one outcome of her lawsuit is that transgender inmates are not forced to languish in general population before prison officials decide that it is unsafe.¹³ ““If institutions are able to make the culture shift...toward not making those auto assumptions but really focusing on what is keeping each person safe, they will start making...placements in women’s facilities more often.”¹⁴

Greene’s plight is only one harrowing story out of thousands¹⁵ among transgender inmates in the prison system across the United States.¹⁶ An estimated one percent of the U.S. population has undergone sex reassignment surgery, and one international study found that nearly eight percent of respondents self-identified as a gender other than “male” or “female.”¹⁷ Transgender individuals defy society’s rigid construction of what it means to be male or female, and suffer

⁹ Protective custody is typically a solitary cell for prisoners who believe their safety is at risk, carefully monitored by prison officials. PETER M. CARLSON, PH.D., ET AL., PRISON AND JAIL ADMINISTRATION: PRACTICE AND THEORY 374 (2013).

¹⁰ Testa, *supra* note 1.

¹¹ *Id.*

¹² Complaint at 1, Green v. Hooks, et al., (2014), (No. 6:14-cv-046-BAE-JEG).

¹³ Testa, *supra* note 1.

¹⁴ *Id.*

¹⁵ Although a precise calculation of the transgender prison population is currently unknown, due to a lack of statistical studies, the fluidity of gender self-identifications, and the concentration of transgender individuals in certain regions, an estimate that transgender prisons number in the low thousands can be gleaned from available information. See Darren Rosenblum, “Trapped” in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism, 6 MICH. J. GENDER & L. 499, 503 (2000).

¹⁶ See also SYLVIA RIVERA PROJECT, IT’S WAR IN HERE: A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN’S PRISONS (2007), available at <http://srp.org/files/warinhere.pdf> [Hereinafter IT’S WAR IN HERE]; Oliver Libaw, *Prisons Face Dilemma with Transgender Inmates*, ABC NEWS, Jan. 22, 2003, available at <http://abcnews.go.com/US/story?id=90919>; Amanda Hess, *Protecting Trans Prisoners*, SLATE, JAN. 6, 2015, available at http://www.slate.com/articles/double_x/doublex/2015/01/leslieann_manning_lawsuit_a_transgender_woman_sues_the_sullivan_correctional.html.

¹⁷ Faithful, *supra* note 2, at 3.

marginalization, humiliation, and discrimination.¹⁸ This marginalization often begins at an early age, when many transgender youths face ostracism and rejection by their families, because of their perceived differences.¹⁹ This familial ostracism leaves a disproportionate number of transgender youth living in foster care, juvenile detention centers, or on the streets, exacerbating their exposure to risk factors related to imprisonment.²⁰

Ubiquitous discrimination and targeting in housing, employment, education, public benefits, and social services narrows opportunities for legitimate employment and forces transgendered individuals to the margins of the formal economy.²¹ A 2008 study estimated that unemployment among the transgender population ranged from twenty-three percent to over fifty percent, compared to only ten percent nationally.²² Facing disproportionately high rates of poverty and homelessness,²³ many marginalized transgender individuals engage in criminal activities to survive.²⁴ These survival crimes²⁵ place transgendered individuals at an increased risk of contact with law enforcement,²⁶ which not only leads to violence and abuse at the hands of transphobic officers, but also over-representation within the criminal justice system.²⁷ As one study noted, “[m]uch of the discrimination and violence experienced by transgender people outside of the

¹⁸ See Sydney Scott, Note, “*One is not Born, but Becomes a Woman*”: Fourteenth Amendment Argument in Support of Housing Male-to-Female Transgender Inmates in Female Facilities, 15 U. PA. J. CONST. L. 1259, 1259 (2012).

¹⁹ IT’S WAR IN HERE, *supra* note 16, at 12.

²⁰ See Scott, *supra* note 18, at 1260. It is estimated that up to forty percent of homeless youth in New York City are lesbian, gay, bisexual or transgender. IT’S WAR IN HERE, *supra* note 16, at 12.

²¹ IT’S WAR IN HERE, *supra* note 16, at 13.

²² Lori Sexton et al., *Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men’s Prisons*, 27 JUST. Q. 835, 847 (2010).

²³ IT’S WAR IN HERE, *supra* note 16, at 13.

²⁴ *Id.*

²⁵ Transgendered individuals are often driven by poverty and homelessness to engage in crimes known as “survival crimes.” These would include prostitution, pick-pocketing, shop lifting, robbery and trafficking drugs. Bree Beery, *Gender Politics in the U.S. Criminal Justice System*, KNOWING THE BODY, (2004), http://serendip.brynmawr.edu/sci_cult/courses/knowbody/f04/web2/bbeery.html.

²⁶ IT’S WAR IN HERE, *supra* note 16, at 15.

²⁷ See Faithful, *supra* note 2, at 3. Transgendered individuals face incarceration rates of nearly three times that of the general population. *Id.*

criminal justice system [is] then replicated and amplified inside of it.”²⁸ As one transgendered inmate summarized, “we go from one world that hates us to another one.”²⁹

The vast majority of jails, prisons, and detention centers across the United States house transgender individuals according to their birth-assigned genders or genitalia,³⁰ subjecting them to horrific degradation, assaults, and sexual violence.³¹ Traditional gender roles are strictly enforced, and gender non-conforming transgender individuals are targeted for homophobic and transphobic violence and brutality.³² Transgender individuals housed in accordance with their genitalia also endure humiliation by corrections officers and prisoners for their gender identities and expressions, unnecessary strip searches, a lack of privacy, denial of gender appropriate clothing and hygiene products, exacerbated punishments, and a denial of adequate medical care.³³

This paper will argue that housing male-to-female (“MTF”) transgender inmates in a male facility violates the protections of the Eighth Amendment of the U.S. Constitution. To adequately protect transgender inmates from these egregious abuses, prisons and jails must house them in accordance with their gender identities, rather than their birth-assigned genders or genitalia. Part II of this paper explores the contrasting legal and societal constructions of gender and transsexualism in contemporary society, and details the lag of the law. The section further explicates how the binary legal conception of gender engenders a genitalia based prison

²⁸ IT’S WAR IN HERE, *supra* note 16, at 16.

²⁹ *Id.*

³⁰ See *Farmer v. Brennan*, 511 U.S. 825, 829 (1994) (“The practice of federal prison authorities is to incarcerate preoperative transsexuals with prisoner of like biological sex...”); see also NAT’L. CTR. FOR LESBIAN RIGHTS OF TRANSGENDER PRISONERS (2006), *available at* <http://www.nclrights.org/site/DocServer/RightsOfTransgenderPrisoners.pdf?docID=6381> (“Transgender people who have not had genitalia surgery are generally classified according to their birth sex for purposes of prison housing, regardless of how long they may have lived as a member of the other gender, and regardless of how much other medical treatment they may have undergone...” (footnote omitted)).

³¹ See *Scott*, *supra* note 18, at 1265.

³² See *Tarzwell*, *supra* note 2, at 177.

³³ See generally *IT’S WAR IN HERE*, *supra* note 16.

classification system. Part III describes how genitalia based classification in prisons creates an environment of sexual terrorism for transgendered inmates, and catalogues the humiliation, discrimination, sexual abuse, and lack of adequate health care that these inmates endure. Part IV discusses the current legal barriers to challenging genitalia based prison classification under the Eighth Amendment, particularly describing the *Farmer* standard³⁴ for use under the Eighth Amendment. Part V applies the *Farmer* standard and the evolving standards of moral decency to the pending prison rape case of Zahara Greene to conclude that housing MTF transgendered inmates in male prison facilities violates the protections of the Eighth Amendment. Part VI will conclude by proposing that MTF transgendered inmates should be housed in female facilities, despite lingering questions.

II. The Construction of Gender in Contemporary Society

Doctors wonder, want to know exactly what makes a person transgender...they want to find a simple reason, a diagnosis, a cure to make life easier. I believe it is sheer will....I would have been trans no matter what body I'd been born with. Tell the doctors that we exist for the health of humanity, which needs to find wholeness and belief in complexity...call it fate or biology, will or spiritual choice. But I was not born in the wrong body.³⁵

Transgender individuals defy the rigid male and female binaries, operating within, in between, or outside of this dualistic archetype.³⁶ Although transgender individuals, members of the lesbian, gay, and transgender (“LGBT”) community, and social theorists assert a broad

³⁴ In *Farmer v. Brennan*, the Supreme Court articulated the standard for use with the Eighth Amendment as one of deliberate indifference, refining it specifically for the needs of transgender inmates. *Farmer*, 511 U.S. at 834. Eighth Amendment claims brought by victimized prisoners must satisfy a two-fold test. *Id.* The first prong of this test requires that the “deprivation alleged must be, objectively ‘sufficiently serious.’” *Id.* To satisfy this prong an aggrieved prisoner must show he or she “is incarcerated under conditions posing a substantial risk of serious harm.” *Id.* The second prong embodies the Eighth Amendment protection against “unnecessary and wanton infliction of pain.” *Id.* Thus, the prison officials charged with violating the Eighth Amendment must have a deliberately indifferent culpable state of mind. *Id.*

³⁵ Scott Turner Schofield, *The Wrong Body*, TIME THE REVELATOR (2012), available at <http://jasperrevelator.blogspot.com/2012/05/wrong-body-scott-turner-schofield.html>.

³⁶ See Scott, *supra* note 18, at 1264.

definition of gender, incorporating both self-identified gender identity and gender performance, the law has typically operated under the assumption that this binary paradigm of male and female is fixed and unambiguous.³⁷ Despite copious social science literature indicating otherwise, the law preserves this binary gender classification scheme through bright-line tests, and amplifies transphobia and discrimination against transgendered individuals within prison walls. This Part demonstrates the incongruence between the social theory and legal definitions of transsexualism, and how this lag in the law engenders a detrimental binary prison classification scheme.

A. *The Definition of Transsexualism*

Social theorists describe gender identity as a complex rumination of how individuals view the interaction of their genotypic, physical, and social selves. An individual is considered a transgender when there is incongruence between gender identity and assigned sex.³⁸

Having to live inside that body is my prison. Seeing it in the mirror. The unhappiness. The misery and pain. The deep depression. I hate this body and I always have. [the] pain of being enshrined in the think you most abhor. I cannot help my condition. All I have known is pain and loneliness. I'm the effect not the cause.³⁹

This fluidity of gender identity accounts for the gender transgression-poverty link,⁴⁰ the prohibitive cost and risk of gender affirming medical care, and the apprehension of irreversibility

³⁷ See Julia A. Greenberg, *Symposium: Therapeutic Jurisprudence: Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 268 (1999).

³⁸ Sex refers to one's anatomy, biology and physiology, including one's genitalia, chromosomal structure, and internal sexual organs. *Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391, 394 (N.Y. Sup. Ct. 1995); *Philips v. Michigan Dep't of Corrections*, 731 F. Supp. 792, 797 (W.D. Mich. 1990) aff'd 932 F.2d 969 (6th Cir. 1991). Gender is the social construction of sex, and refers to one's emotional sense of sexual identity. *M.T. v. J.T.*, 355 A.2d 204, 209 (N.J. Super Ct. App.Div. 1976).

³⁹ Nick Cohen, *The Rose-Tinted Murdered Doug Has Killed Twice, Spent 1200 Days in Solitary and a Lifetime Trapped in the Wrong Body. Now He Wears Dresses, Is Known as Dee, and Wants to Live in a Women's Prison. And Guess Who's Paying His Legal Bills?*, THE OBSERVER (London), Sept. 15, 1996, at 3 (quoting Dee Wakefield, a transsexual prisoner in Britain, explaining her situation to the court).

⁴⁰ Recent data has found that denying LGBT people equal access to the institution of marriage, protection from employment discrimination, and other civil rights and family benefits may be contributing to higher poverty rates in the LGBT community than in the general population overall. See Nico Sifra Quintana, *Poverty in the LGBT Community*, CENTER FOR AMERICAN PROGRESS 1,1 (2014), available at <http://www.chn.org/wp->

or inability participants to reverse the results of the surgery.⁴¹ Gender-affirming treatments, such as hormone therapy, surgeries altering external genitalia, and surgical facial and body reshaping procedures are inaccessible to more than half of the transgender population.⁴² Representative studies of the transgender populations in San Francisco and Washington D.C. indicate an epidemic lack of health insurance in transgender communities. Over forty percent of those surveyed in San Francisco, and forty-seven percent in Washington D.C. had no health insurance, a rate nearly three times higher than the reported national average.⁴³ Even insured and well-resourced transgendered individuals may still find the cost of gender affirming treatments prohibitive, as procedures are generally not covered by insurance or Medicaid,⁴⁴ and can cost upwards of \$100,000.⁴⁵ Procedures that are covered by insurance are limited to individuals that narrate their experiences in ways that align with specific diagnostic criteria.⁴⁶

content/uploads/2012/08/lgbt_poverty.pdf.; see also discussion *supra* Introduction. A 2007 Williams Institute report finds that transgender people report high unemployment rates and low earnings: In sample surveys, 22 to 64 percent of transgender people reported earning less than \$25,000 per year. M.V. Lee Badgett et al., *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination*, THE WILLIAMS INSTITUTE, available at [http://www.law.ucla.edu/williamsinstitute/publications/Bias in the Workplace.pdf](http://www.law.ucla.edu/williamsinstitute/publications/Bias%20in%20the%20Workplace.pdf) (last accessed April 16, 2015). A 2009 Transgender Law Center report also found that transgender Californians are twice as likely to be below the federal poverty line than the general population. Transgender Law Center, *State of Transgender California*, March 2009, available at <http://www.transgenderlawcenter.org/pdf/StateofTransCAFINAL.pdf> (last accessed April 16, 2015).

⁴¹ See Tarzwell, *supra* note 2, at 174. Although this progressive conception of transgender individual reflects a shift away from the medicalization of the term “transgender,” historically some body modification was required to be considered transgendered. *Id.*

⁴² IT’S WAR IN HERE, *supra* note 16, at 13.

⁴³ *Id.*

⁴⁴ See Tarzwell, *supra* note 2, at 13. Some Medicaid statutes permit coverage of procedures that transgendered individuals are seeking, as long as the individual is not pursuing the procedure for purposes of sex reassignment. See e.g. 55 Pa. Code § 1163.59(a)(1) (1996). The transitional treatments most frequently covered by insurance providers are mental health services and hormone replacement therapy, as insurers are more familiar with, and therefore more accepting of transition related treatments frequently used for purposes other than transitions. Liza Khan, *Transgender Health at the Crossroads: Legal Norms, Insurance Markets, and the Threat of Healthcare Reform*, 11 YALE JOURNAL OF HEALTH POLICY, LAW, AND ETHICS 375, 402 (2011). Insurers more readily approve claims for the hormone treatments that facilitate transition, because such treatments are also regularly used to alleviate more common conditions that stem from menopause, prostate cancer, and growth hormone deficiencies. *Id.* It can also be easier to obtain transition-related care when such care serves multiple functions for a patient, at least one of which is treating an approved condition. *Id.* For example, if an insurance company covers mental health services for depression, a transgender patient suffering from depression may be able to bill his insurance company for counseling services treating both conditions even if trans-specific care is not covered. *Id.*

⁴⁵ See Cinyere Ezie, *Deconstructing the Body: Transgender Intersex Identities and Sex Discrimination—The Need*

Advocates, social theorists, and the LGBT community remain sensitive to the needs and concerns of transgendered individuals, and recognize the fluidity of gender identity and personal gender performance in their conceptualization of the term transgender.⁴⁷ This community of advocates acknowledges the widespread poverty and economic marginalization in the transgender community, and the often prohibitive costs of gender-affirming medical treatments.⁴⁸ Although an increasingly outspoken number of contemporary social theorists, scholars, and advocates argue for a broad definition of the term “transgender,” including the individual experience, gender performance, and personal gender identity, the law obsessively assigns gender identity according to gender binarism.⁴⁹

for Strict Scrutiny, 20 COLUMB. J. GEND. & L. 141, 158 (2011).

⁴⁶Many physicians will not perform gender reassignment surgery until the patient produces a record of well documented gender dysphoria, has lived continuously in accordance with his or her gender identity for twelve months, has undergone continuous hormone therapy for twelve months, and can produce numerous referral from other health professionals. See WORLD PROF’ ASS’N FOR TRANSGENDER HEALTH STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE, 97 (7th ed. 2012) [Hereinafter STANDARDS OF CARE]. Well documented gender dysphoria includes a description of symptoms that align with the following diagnostic criteria:

A marked incongruence between one’s experienced/expressed gender and assigned gender, of at least 6 months duration, as manifested by 2 or more of the following indicators:

1. A marked incongruence between one’s experienced/expressed gender and primary and/or secondary sex characteristics (or, in young adolescents, the anticipated secondary sex characteristics);
2. A strong desire to be rid of one’s primary and/or secondary sex characteristics because of a marked incongruence with one’s experienced/expressed gender (or, in young adolescents, a desire to prevent the development of the anticipated second sex characteristics);
3. A strong desire for the primary and/or secondary sex characteristics of the other gender;
4. A strong desire to be of the other gender (or some alternative gender different from one’s assigned gender);
5. A strong desire to be treated as the other gender (or some alternative gender different from one’s assigned gender);
6. A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one’s assigned gender).

THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, *Gender Identity Disorder in Adolescents or Adults* § 302.85 (Am. Psychiatric Ass’n 4th ed.) (1994).

⁴⁷ See Rosenblum, *supra* note 15, at 503.

⁴⁸ *Id.*

⁴⁹ *Id.*

B. *The Lag of the Law*

Contemporary legal theory rejects the advocate's definition of the term transgender. Although the U.S. Supreme Court crafted a legal definition of the term in *Farmer v. Brennan*,⁵⁰ when faced with transgender litigants, courts have historically become frustrated and boxed litigants into one category or another.⁵¹ Despite the Court's recognition of a transgender identity, the legal system still labors within the dichotomous categories of male and female, based on indicia such as chromosomes, gonads, sex hormones, internal reproductive organs, external genitalia, secondary sex characteristics, and gender identity.⁵² For example, in *In Re Heilig*, despite concluding that "[s]ex reassignment surgery...merely harmonizes a person's physical characteristics with [their gender] identity," and that "external genitalia are not the sole medically recognized determinant of gender,"⁵³ the Maryland Supreme Court still held that a transgender individual may only legally change their sex to match their gender identity if they have had sex reassignment surgery.⁵⁴

Although the holding in *In Re Heilig* ultimately upheld a binary gender classification system, the court seemed to suggest that a transgender individual could in fact change his or her legal gender.⁵⁵ Other courts, however, have explicitly disallowed legal gender change for

⁵⁰ "One who has '[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,' and who seeks medical treatment, including hormonal therapy and surgery to bring about a permanent sex change.," *Farmer v. Brennan*, 511 U.S. 825, 829 (1994) (citing AM. MED. ASS'N ENCYCLOPEDIA OF MEDICINE 1006 (1989)).

⁵¹ See Benish A. Shah, *Lost in the Gender Maze: Placement of Transgender Inmates in the Prison system*, JOURNAL OF RACE AND ETHNICITY 39, 41 (2010).

⁵² Debra Sherman Tedeschi, *The Predicament of the Transsexual Prisoner*, 5 TEMP. POL. & CIV. RTS. L. REV. 27, 31 (1995).

⁵³ *In re Heilig*, 816 A.2d 68, 72, 79 (Md. 2003).

⁵⁴ *Id.* at 87.

⁵⁵ By remanding the case to allow Heilig to present evidence that his gender had been changed by surgical procedure, the court upheld the notion that gender is not permanently fixed at birth. *In re Heilig*, 816 A.2d at 87; see also Ellen C. Cornelius, *Gender: Male or Female? In re Heilig and the Future of the Check Box*, 4 U. OF MD. L.J. OF RACE, RELIGION, GENDER & CLASS 411, 424 (2005).

transgendered individuals. For example, in *Littleton v. Prague*,⁵⁶ a Texas Court of Appeals voided the marriage between the petitioner, a transgender woman, and her deceased husband, because despite living as a woman for over twenty years, undergoing sex reassignment surgery, and amending her birth certificate, she was still a man as a matter of law.⁵⁷ The court noted in rhetoric that petitioner was “created” a man, and “[t]here are some things that we cannot will into being. They just are.”⁵⁸

Similarly, in both *In re Estate of Gardiner*,⁵⁹ and *Kantaras v. Kantaras*,⁶⁰ the Kansas Supreme Court and Florida District Court, respectively, reiterated gender immutability. In *In Re Estate of Gardiner*, the Kansas Supreme Court used the Webster’s Dictionary definition of male and female to substantiate its finding that transgender individuals legally remain the gender attributable at birth.⁶¹ In *Kantaras*, the Florida District Court stated that, “the common meaning of male and female, as those terms are used statutorily...refer to immutable traits determined at birth.”⁶² Although advocates and social theorists recognize the fluidity of the definition of transgender, the judicial system has continued to enforce a binary classification system through genitalia based classification. Prison officials similarly cling to this bright line test when classifying transgendered prisoners.

⁵⁶ 9 S.W. 3d 223, 230 (1999).

⁵⁷ *Id.*

⁵⁸ *Id.* at 231.

⁵⁹ *In re Estate of Gardiner*, 42 P.3d 120, 135 (Kan. 2002).

⁶⁰ *Kantaras v. Kantaras*, 884 So. 2d 155, 167 (Fla. Dist. Ct. App. 2004).

⁶¹ *In re Estate of Gardiner*, 42 P.3d at 135 (the court defined male as “designating or of the sex that fertilizes the ovum and begets offspring: opposed to female” and female as “designating or of the sex that produces ova and bears offspring: opposed to male”).

⁶² *Kantaras*, 884 So. 2d at 167.

C. Prison Placement

Inmates are generally housed according to their genitalia or gender assigned at birth.⁶³ “An inmate with a penis is considered male; one with a vagina is considered female. It doesn’t matter whether nature or a surgeon provided the part.”⁶⁴ Genital surgery alone usually determines whether a transgender inmate will be classified as male or female, for the purposes of prison housing.⁶⁵ Thus, transgender MTF individuals who have not undergone sex reassignment surgery, regardless of the extent of their non-genital physical transformation, are housed in male facilities, while inmates who have are housed in female facilities. The prison systems’ refusal to recognize an inmate’s right to self-determine his or her own gender creates a prison environment of sexual terrorism. Transgender prisoners suffer significant trauma when forced to integrate into these contrived male and female classifications, enduring degradation, humiliation, isolation, and repeated victimization, treatment that violates the Eighth Amendment.⁶⁶ Although social theorists, advocates, and members of the LGBT community have recognized a flexible definition of transsexualism, the law preserves a binary gender classification scheme in prison housing classification. This lag in the law creates an environment of prison sexual terrorism and abuse, and imperils transgendered inmates.

III. Abuses Endured During Incarceration: The Repercussions of a Binary Classification System

Placement within the prison system is central to the safety concerns of transgender individuals.⁶⁷ Male prisons are notoriously violent, and often reinforce social and sexual subjugation in the nation’s prisons. Violent gangs battle to assert control through acts of

⁶³ *Farmer*, 511 U.S. 829.

⁶⁴ Rosenblum, *supra* note 15, at 520 (quoting Ken Hollen, Assoc. Superintendent, Shelton Corr. Ctr., Wash.).

⁶⁵ See Christine Peek, *Breaking Out of the prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 SANTA CLARA L. REV. 1211, 1219 (2004).

⁶⁶ See Rosenblum, *supra* note 15, at 518.

⁶⁷ See Shah, *supra* note 51, at 44.

physical and sexual violence, and prison administrators control central aspects of inmates' lives. In this prison culture of violence and vulnerability, transgendered inmates housed in male facilities face extraordinarily high rates of victimization.

We're seen as freaks or sick either mentally or physically or both. I know this to be true from sitting back and simply living day to day the dangerous life of a Puerto Rican pre-op transsexual locked up behind bars. I ask God everyday 'when's this nightmare going to be over.' I broke the law but I never did anything to deserve this...you live in fear and do what you do to survive.⁶⁸

In male facilities, transgendered inmates face persistent physical, emotional, and sexual abuse, including verbal harassment, physical and sexual assault, humiliation, and rape. "Being violently assaulted in prison[, however] is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'"⁶⁹ This Part discusses the humiliation, rape, coerced sex, and forced prostitution that transgendered inmates endure when housed in accordance with their birth-assigned genders or genitalia, and the mentally devastating isolation of protective custody. This Part continues by explicating how this struggle for survival in a binary prison placement system is exacerbated by inadequate access to gender-affirming medical treatment and care, and a high infection rate of HIV/AIDS among inmates.

A. *Humiliation*

Transgendered inmates in male prison facilities are highly visible, and become frequent targets for humiliation within the prison walls. Often, both corrections officers and fellow inmates effectuate this humiliation, using incorrect pronouns to refer to transgendered inmates, performing unnecessary searches to expose transgendered inmates' genitalia, and denying transgendered inmates gender-expressive clothing, hygiene, and grooming items.⁷⁰ In fact,

⁶⁸ IT'S WAR IN HERE, *supra* note 16, at 17.

⁶⁹ Leonard v. Moran, 611 F.2d 397, 398-99 (1st Cir. 1979).

⁷⁰ See Scott, *supra* note 18, at 1275.

transgendered inmates reported harassment by correctional officers more often than harassment by peers.⁷¹ Vicki, a transgender woman imprisoned in general population in a maximum-security male facility in upstate New York, reported:

It's the corrections officers that create trouble. They want me to be an outcast...one guard put liquid soap in my toilet so it would overflow with bubbles. He hung my underwear all over the place as everyone was heading to chow so that they would all see. It was horrifying and humiliating...I feel like I'm being held hostage.⁷²

Similarly, Bea, a transgender woman imprisoned in the protective custody unit of a maximum-security male facility in upstate New York, reported that corrections officers disrupted the power and water flow to her cell, issued her false citations, and instigated assaults by fellow prisoners.⁷³ She contended that corrections allows staff to abuse inmates, “[a]nd the good-old-boy club supports this throughout the ranks...They laugh at you, they call you names, they collapse you emotionally”⁷⁴

Although the use of improper pronouns and name-calling may seem insignificant in light of the other egregious abuses suffered by transgendered inmates, these humiliation tactics leave psychological scars by denying transgendered inmates their personhood.⁷⁵ Transgendered inmates already fight an internal battle to reclaim their identities, and are often willing to risk punishment and retaliation from corrections officers to demand recognition of their gender identity.⁷⁶ Christopher Daley, former Director of the Transgendered Law Center, recounted a

⁷¹See Jaime M. Grant, Ph.D., et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 158 (2011), available at http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf [Hereinafter *Injustice at Every Turn*]. Nearly thirty-seven percent of transgendered inmates report enduring harassment from officers, while only thirty-five percent report harassment from their peers. Rosenblum, *supra* note 15, at 524.

⁷² IT'S WAR IN HERE, *supra* note 16, at 20.

⁷³ *Id.* at 21.

⁷⁴ *Id.*

⁷⁵ Kylar Broadus, *The Criminal Justice System and Trans People*, 18 TEMP. POL. & CIV. RTS. L. REV. 561, 569 (2009) (the use of improper pronouns has been “shown to be psychologically damaging”).

⁷⁶ See Scott, *supra* note 18, at 1275.

transgendered inmate's story of conflict with a corrections officer when the officer refused to refer to her by the proper pronoun.⁷⁷ Although she knew she would face punishment for her actions, she fought to preserve her sense of self, regardless of the consequences, and confronted the officer about using the incorrect pronoun.⁷⁸

Unnecessary frisks and abusive strip searches are also humiliating and psychologically traumatizing for transgendered inmates, particularly those whose bodies are not consistent with their gender identity or expression.⁷⁹ Sunday, a transgender woman who has been imprisoned in various New York prisons and jails, detailed the abuse of frisking and strip searches as harassment.

One or two officers got out of line—friskings and strip searches 4-5 times a day! Non-trans people don't ever get searched unless they were suspected of something. If they want to they can just put you against a wall. And everybody knows there's a big difference between patting you down and massaging you, feeling you up. But I couldn't say anything cause I didn't want no trouble.⁸⁰

Not only do these infuriating and humiliating strip searches exploit transgendered inmates' insecurities, but these tactics can serve as a precursor for more violent and sexual attacks by prison personnel.⁸¹

Finally, the denial of gender appropriate clothing, grooming supplies, and personal hygiene products exacerbates the humiliation and stigmatization that transgendered inmates endure within prison walls. Many prisons require transgendered inmates to maintain a male length haircut, some even forcibly cutting transgendered inmates hair upon entrance.⁸² Prisons also

⁷⁷ Letter from Christopher Daley, Dir., Transgender Law Ctr., to Nat'l Prison Rape Comm'n 4 (Aug. 15, 2005) available at <http://www.nclrights.org/site/DocServer/prisondaley081905.pdf?docID=941>.

⁷⁸ *Id.*

⁷⁹ See Scott, *supra* note 18, at 1275.

⁸⁰ IT'S WAR IN HERE, *supra* note 16, at 22.

⁸¹ Scott, *supra* note 18, at 1276.

⁸² IT'S WAR IN HERE, *supra* note 16, at 31. "It was the most devastating day of my life when they made me cut my hair when I was transferred...it took me so long to grow it. It was like taking an arm." *Id.*

often enforce restrictive policies around gendered clothing and expression, many even refusing to provide bras to inmates with developed breast tissue. One advocate noted

[t]oo many jails and prisons limit the ability of prisoners to dress or groom in a way that is comfortable to them. This form of harassment is the kind of on-going indignity that can lead to more significant issues down the line...health problems can result from women being denied bras...[a]nd the lack of bras has facilitated, in a number of cases, sexual harassment.⁸³

In addition to the physical pain and humiliation caused by inappropriate clothing, many transgendered inmates suffer psychological trauma from being unable to express their gender identity.⁸⁴ In a letter to the Office of Mental Health in her New York prison facility, one inmate wrote:

I style my long hair in a feminine manner, and I'm getting picked on and called names, and everybody is laughing at me. These are coming from the correctional officers...I get so depressed, and I hide under my covers and start crying, cause this isn't fair, "why me," I've been a respectful person. I do not deserve this. I try to stay strong, and keep in mind that soon, I will be 100% woman the way I was ment [sic] to be, but as each day go by, I hurt, and hurt, and hurt. I need weekly psychological counseling, cause I am to [sic] depressed to feel good about myself, and consintrate [sic]. And I'm asking for help. I do not want to hurt myself no more, but I need weekly counseling in private, so I can prevent any suicidal thoughts or attempts... I refuse to come out of my cell until I be able to shower and shave. If I continue to be deprived of shower and shaving, I will start with a letter to Albany Mental Health Department, followed by a hunger strike.⁸⁵

When transgendered inmates are housed in male prison facilities, they become targets for humiliation, and are subjected to verbal harassment, unnecessary searches, and restrictive policies limiting gender-expressive clothing and grooming. These humiliation tactics and

⁸³ IT'S WAR IN HERE, *supra* note 16, at 32.

⁸⁴ See Scott, *supra* note 18, at 1276; IT'S WAR IN HERE, *supra* note 16, at 32 ("these regulations create an environment in which transgender...people are more likely to suffer from depression, anxiety, and a range of other mental health conditions.").

⁸⁵ IT'S WAR IN HERE, *supra* note 16, at 32.

restrictive policies engender a prison environment of sexual terrorism and indignity, and unduly punish transgendered individuals for their gender deviance. Although the accounts of humiliation suffered at the hands of correctional officers and inmates is staggering, the escalation of violence into rape, coercive sex, and forced prostitution is even more prevalent.

B. Rape, Coercion, and Forced Prostitution

[I]t's war in here...I'm raped on a daily basis. I've made complaint after complaint, but no response. No success. I'm scared to push forward with my complaints against officers for beating me up and raping me.⁸⁶

When an individual is incarcerated, society agrees that rape should never be part of the sentence, but unfortunately for many transgendered inmates it is. Although no conclusive national data exists regarding the prevalence of prisoner-on-prisoner rape and other sexual abuse in prisons in the United States,⁸⁷ conservative estimates suggest that approximately thirteen percent of the prison population has been sexually assaulted.⁸⁸ Transgender inmates are sexually assaulted at an even higher rate than their peers. A recent survey conducted by the National Center for Transgender Equality and the National Gay and Lesbian Task Force related that twenty percent of transgendered inmates incarcerated in a male prison facility reported being sexually assaulted

⁸⁶ IT'S WAR IN HERE, *supra* note 16, at 19.

⁸⁷ Several factors account for this uncertainty, including that most victims do not self-report rape. They abstain out of shame and intimidation, and coercive techniques, such as the exchange of sex for protection or overdue debts, lead many victims to surrender their bodies silently, but not willingly. See James E. Robertson, Article, *A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 N.C.L. REV. 433, 444 (2003).

⁸⁸ Katherine Robb, *What We Don't Know Might Hurt Us: Substantive Knowledge and the Eighth Amendment's Deliberate Indifference Standard for Sexual Abuse in Prisons*, 65 N.Y.U. ANN. SURV. AM. L.705, 705 (2010). Compare e.g., Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 PRISON J. 379, 383 (2000) (finding sexual aggression rates of twenty percent among inmates in seven Midwestern prisons facilities); Wayne S. Wooden & Jay Parker, *MEN BEHIND BARS 1* (finding that fifteen percent of inmates in a California prison reported that they had been raped); Daniel Lockwood, *Sexual Exploitation in Prison*, in *ENCYCLOPEDIA OF AMERICAN PRISONS* 440, 440 (Marilyn D. McShane & Frank D. Williams III. Eds., 1996) (estimates of sexual assault in prison are about twenty-eight percent).

by either other inmates or prison staff,⁸⁹ while another survey indicated that nearly sixty percent of transgender inmates had experienced sexual assault.⁹⁰

Despite the paucity of empirical data, many transgendered inmates recount horrendous sexual abuse, coerced sex, and forced prostitution endured at the hands of corrections officers and inmates.⁹¹

I was arrested one day regarding something minor. Due to my gender being marked as male, I was put in with the men. Within 15 minutes, I was raped by 3 different men. My mother even called and warned the officers NOT to put me in with the general population[,] as I would be an easy target.⁹²

Glaysa, a transgender woman imprisoned in a maximum-security men's prison in upstate New York, also describes the persistent violence:

I have faced violence where I have been beaten and raped because of my being transgender with female breasts and feminine...and figured they can get away with such actions—which they do most of the time due to the fact no one care what happens to us transgenders inside.⁹³

As described by both accounts, corrections officers often implicitly condone, or even explicitly comply in the abuse.⁹⁴ Prison staff that do not perpetrate abuse against transgendered inmates often bear witness to this rampant rape and sexual assault,⁹⁵ and turn a blind eye. Justice Blackmun asserted that “prison officials either are disinterested in stopping abuse of prisoners by other prisoners or are incapable of doing so, given the limited resources society allocates to the

⁸⁹ *Injustice at Every Turn*, *supra* note 71, at 167.

⁹⁰ Broadus, *supra* note 75, at 570.

⁹¹ See Scott, *supra* note 18, at 1278.

⁹² *Injustice at Every Turn*, *supra* note 71, at 168.

⁹³ IT'S WAR IN HERE, *supra* note 16, at 25.

⁹⁴ See generally *id.*

⁹⁵ Nearly eighty-six percent of surveyed Texas correctional officers “disagreed” or “strongly disagreed” that prison rape rarely occurs. Helen Eigenberg, *Male Rape: An Empirical Examination of Correctional Officer's Attitudes Toward Rape in Prison*, 69 PRISON J. 39, 44 tbl.3 (1989). Further, officers in a California prison strongly supported the proposition that “forced or pressured sexual encounters are very common.” Wooden & Parker, *supra* note 88, at 189-204.

prison system.”⁹⁶ Some prison officials deliberately resist providing reasonable safety to inmates, believing that sexual abuse is an inevitability in prison life,⁹⁷ and leaving transgendered inmates to navigate the prison hierarchy unprotected.

Prisons are organized in a hierarchy “ranking prisoners by their fighting ability and manliness.”⁹⁸ Dominant men at the top of this masculinity hierarchy subjugate weaker men through violence and physical manipulation to prove their strength and power.⁹⁹ The bottom of the hierarchy is composed of feminized males, those having small stature, appearing young, or homosexual, known as “punks.”¹⁰⁰ When inmates enter prison, they are immediately tested. Those unable to resist subjugation are categorized as “punks” and forced into sexually submissive roles.¹⁰¹

A smaller class of inmates termed “queens,” mainly consisting of transgender and effeminate homosexual inmates, are ranked slightly higher than punks on the prison hierarchy.¹⁰² Queens are not feminized men or men whose manhood has been stolen, like punks, but are perceived as women and coveted as sexual partners.¹⁰³ Queens are charged with domestic tasks, and performing sex acts.¹⁰⁴ In exchange for protection, queens are often forced into prostitution to profit their pimps.¹⁰⁵ These transgendered inmates are bought and sold to satisfy prison debts, as sexual chattel.¹⁰⁶ Although many transgender inmates resent this degradation, they must align

⁹⁶ *United States v. Bailey*, 444 U.S. 394-421-22 (1980) (Blackmun J., dissenting)(footnotes omitted).

⁹⁷ *See Scott*, *supra* note 18, at 1278.

⁹⁸ *Peek*, *supra* note 65, at 1226.

⁹⁹ *See id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 1227.

¹⁰³ *Id.*

¹⁰⁴ *Peek*, *supra* note 65, at 1227.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

with these pimps for protection from other inmates and ambivalent corrections officers.¹⁰⁷ Transgender inmates that attempt to face the harsh realities of prison without protection are vulnerable to repeated rapes and sexual assault.

Transgender inmates that are housed in male prison facilities are forced to submit to stronger, violent inmates, and forced into sexual slavery. Those who resist are left to fend for themselves, vulnerable to repeated acts of sexual violence by other power-hungry inmates. ““Trans women in men’s prisons are left to fend for themselves in the face of an enormous danger of rape and other kinds of physical violence, or else are made to spend time alone in a cell simply because they [are] transgender and they [are] not safe.””¹⁰⁸

Genitalia-based placement in prisons is both dangerous and detrimental for transgendered inmates. In the general population of male prison facilities, transgendered prisoners suffer humiliation, restrictive regulations, rape, coerced sex, and forced prostitution. Although some prison facilities recognize these dangers and house transgendered inmates in protective custody, the isolation is often mentally devastating and leaves transgendered inmates vulnerable to abuse by prison staff.

C. Protective Custody

I was placed in protective custody, which at this facility, basically meant solitary confinement. I spent my days in a small cell with no water, magazines, or programming. I was rarely taken to the yard for recreation, and my please for water and something to read or occupy my time with usually went ignored. The officer who guarded the unit would pretend not to hear me. This is cruel treatment that I don’t think anyone should have to experience, especially not someone who has already been victimized.¹⁰⁹

Some male prison facilities recognize the inherent risks involved in housing transgendered

¹⁰⁷ Scott, *supra* note 18, at 1280.

¹⁰⁸ Hess, *supra* note 16.

¹⁰⁹ *National Prison Rape Elimination Commission Testimony of Mayra Soto*, JUST DETENTION INT’L, (Dec. 13, 2006), available at <http://www.justdetention.org/en/NPREC/esmeraldasoto.aspx>.

inmates in the general population, and instead place transgendered inmates in protective custody.¹¹⁰ Protective custody units are alternative housing units reserved for inmates who are at a higher risk of violence or harassment from other prisoners, those serving additional punishment, and inmates likely to commit acts of violence against other inmates.¹¹¹ While in protective custody, an inmate is on lock down for twenty-three hours a day with little access to the recreational, educational, and employment opportunities offered by the facility.¹¹² While inmates in protective custody are largely isolated from human contact, the level of protection actually provided by the segregation varies from facility to facility, sometimes providing a safe refuge from the violence of other prisoners, while other times isolating a prisoner and placing them at risk of victimization at the hands of prison staff.¹¹³ Bianca, a transgendered inmate currently incarcerated in general population and pursuing litigation in connection with incidences in which she was raped by corrections officers while in protective custody, noted “PC [protective custody] is even worse cause there are no cameras.”¹¹⁴ For Bianca, like many other transgendered inmates, placement in protective custody meant a diminished opportunity to document ongoing abuse.¹¹⁵

Even if inmates are protected from prison staff and other inmates, the conditions of confinement in protective custody may have psychological ramifications for transgendered inmates. Many transgendered inmates have preexisting mental health conditions or susceptibility to developing mental health conditions that may be exacerbated by the limited human contact and curtailed privileges in the protective custody unit.¹¹⁶ Among surveyed California

¹¹⁰ See Scott, *supra* note 18, at 1281.

¹¹¹ IT’S WAR IN HERE, *supra* note 16, at 18.

¹¹² See Scott, *supra* note 18, at 1281.

¹¹³ *Id.*

¹¹⁴ IT’S WAR IN HERE, *supra* note 16, at 18.

¹¹⁵ See *id.*

¹¹⁶ See Scott, *supra* note 18, at 1283.

transgender prisoners, seventy percent reported having mental health issues at some point in their lives, and sixty-six percent reported suffering from mental health issues since incarceration.¹¹⁷ Nearly forty-one percent of the transgendered inmates surveyed admitted that they had attempted suicide, compared to less than two percent of Americans.¹¹⁸ Thus, isolating transgendered inmates in protective custody may sacrifice their mental health to protect their physical wellbeing.

Regardless of whether or not it provides an increased level of safety, the detrimental psychological effects of protective custody act as a cruel double punishment—on the first level for the crimes that transgendered inmates committed and on the second for being transgendered.¹¹⁹ Many transgendered inmates prefer to be in the general population “because finding their place in the prison culture, although it is an exploitative and vulnerable one, is preferable to the isolation of protective custody.”¹²⁰ However, transgender inmates’ mental health is not the only aspect of their health endangered within prison walls. Transgendered inmates’ physical health is also imperiled, and their vulnerability and struggle to survive in a male prison facility exacerbated by the suffering caused by the denial of gender affirming medical treatment, and the high infection and transmission rate of HIV/AIDS among inmates.

D. Inadequate Access to Medical Care

“Prison inmates are literally the sickest people in our society.”¹²¹ “The root problem is that the country has tacitly decided to starve the prison system of medical care, even though AIDS, tuberculosis and hepatitis are rampant behind bars, and roughly one in six inmates suffers from a

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Letter from Christopher Daley to Nat’l Prison Rape Elimination Comm’n, *supra* note 77, at 6 (“By using [protective custody] for transgender prisoners, the message is being sent that a person’s gender identity itself is threatening to the institution and that person must be locked away in a prison within the prison.”).

¹²⁰ IT’S WAR IN HERE, *supra* note 16, at 19.

¹²¹ Editorial Desk, *Death Behind Bars*, N.Y. TIMES, March 10, 2005, at 26.

serious mental illness.”¹²² Exacerbating these barriers to adequate healthcare, transgender inmates face additional care-related discrimination and vulnerability.¹²³ Despite the fact that medical experts agree that the gender-related healthcare sought by transgendered inmates is medically necessary,¹²⁴ these services are still routinely denied to imprisoned people. Transgendered inmates also face a high HIV/AIDS infection rate, and inadequate post-infection care.

i. Denial or Withholding of Gender-Affirming Medical Treatment

Though not all transgendered inmates undergo or pursue medical treatment, those who do consider it necessary and imperative to their mental and physical health.¹²⁵ To obtain or continue hormone treatments while incarcerated many states require transgender inmates to have a GID diagnosis, and a history of hormone therapy before incarceration.¹²⁶ Transgendered inmates that overcome the administrative hurdles to gender-related care often face inconsistent treatment, and are subject to incorrect hormone dosages and arbitrary termination of treatment.¹²⁷ Inmates who are denied this gender-related medical care suffer serious mental and physical health conditions.¹²⁸

Inmates denied gender-affirming medical care are likely to seek dangerous alternatives, such as self-surgery and hormone smuggling, which make them vulnerable to formal disciplinary measures and punishment.¹²⁹ Numerous studies also indicate that this denial of treatment not

¹²² *Id.*

¹²³ See IT’S WAR IN HERE, *supra* note 16, at 27.

¹²⁴ See Yolanda Lousie Susanne Smith, *Sex Reassignment: Outcomes and Predictors of Treatment for Adolescent and Adult Transsexuals*, PSYCHOLOGICAL MEDICINE 35, 88-89 (2005); See also A. Michel et. al., *The Transsexual: What About the Future?*” EUROPEAN PSYCHIATRY 17, 353-362 (2002).

¹²⁵ See IT’S WAR IN HERE, *supra* note 16, at 27.

¹²⁶ Travis Wright Colopy, Note, *Setting Gender Identity Free: Expanding Treatment for Transsexual Inmates*, 22 HEALTH MATRIX 227, 249 (2012).

¹²⁷ See IT’S WAR IN HERE, *supra* note 16, at 27.

¹²⁸ *Id.*

¹²⁹ *Id.*

only causes patients substantial anguish and suffering, but also increases morbidity and mortality among patients.¹³⁰ Untreated transgendered patients have a suicidality of nearly thirty percent, which can be reduced to less than two percent with treatment.¹³¹ The delay and withholding of treatment amplifies the anguish that patients feel, decreases their social functionality, and unnecessarily places their lives at risk.¹³²

Bea has faced these formidable obstacles in her attempts to access regular hormone therapy while incarcerated.¹³³ The denial of gender-affirming treatment has caused Bea tremendous emotional anguish, and driven her to dangerous alternatives.¹³⁴ While in prison, Bea tried to perform surgery on herself three times.¹³⁵ She explained, “I’ve told Mental Health several times that I will not die with this on me, but they still do nothing.”¹³⁶ The failure of male prisons to provide transgendered inmates with adequate gender affirming medical treatment imperils both the mental and physical health of these inmates, and violates their inherent right to a safe and dignified space to serve their debt to society. Male prison facilities similarly fail to address and remedy the HIV/AIDS endemic within their walls, and transgendered inmates in these facilities remain particularly vulnerable to infection.

ii. The HIV/AIDS Endemic and Inadequate Treatment of Infected Transgendered Inmates

HIV/AIDS rates in prisons have reached endemic proportions, occurring at a rate nearly three times higher than that of the general population.¹³⁷ The rate of infection is even higher among transgendered inmates, who remain particularly vulnerable to infection from sexual assault,

¹³⁰ *Id.* at 28.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *See IT’S WAR IN HERE*, *supra* note 16, at 28.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Laura M. Maruschak, U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, HIV IN PRISONS, 2003 (Sept. 2005), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/hivp03.pdf>.

coerced sex, and forced prostitution while incarcerated.¹³⁸ One California prison study found that anywhere from sixty to eighty percent of transgendered inmates are infected with HIV/AIDS at any one time.¹³⁹ Sunday, an HIV positive member of an HIV positive homeless transgender advocacy group in New York City, describes the failure of prison staff to prevent the spread of infection within the prison walls:

[T]hey don't give you condoms because they say you're two men and you're not allowed to have sex. What are you supposed to do? They know it's happening... What do you expect? Men go in there for a long times, don't have sex, and then here we come? And you won't give us condoms because you don't think we're having sex. But what do you expect? It's not a coincidence. There's no information about HIV, no condoms, no classes. There's almost no testing. There's nothing. And there are people getting raped all the time.¹⁴⁰

These infected transgendered inmates face inadequate and discriminatory healthcare once infected.

As long as placement in prisons is sex-segregated and based on genitalia and birth-assigned sex, and as long as isolation is the only alternative to living in the general population, any placement for transgender inmates in correctional facilities is dangerous and detrimental.¹⁴¹ In male prison facilities, transgender inmates suffer humiliation, rape, coerced sex, and forced prostitution in general population, or face the mental devastation of isolation and vulnerability to prison staff violence in protective custody. This vulnerability and struggle for survival is exacerbated by the suffering and anguish caused by the denial or withholding of gender-affirming medical treatment, and the high infection rate of HIV/AIDS among inmates. Transgendered inmates should not be punished both for their crimes against society, and for their

¹³⁸ See generally Scott, *supra* note 18, at 1284.

¹³⁹ *Id.*

¹⁴⁰ IT'S WAR IN HERE, *supra* note 16, at 29.

¹⁴¹ *Id.*

deviation from the binary gender scheme. Transgendered inmates owe only one debt, and that debt should be paid in a safe and dignified space.

IV. Legal Barriers to Challenging Genitalia Based Housing of Transsexual Inmates

Though incarceration limits an individual's rights and the judiciary generally confers broad discretion to prison administrators,¹⁴² inmates are “not wholly stripped of [their] constitutional protections. There is no iron curtain drawn between the Constitution and the prisoners of this country.”¹⁴³ A prisoner “retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.”¹⁴⁴

The Eighth Amendment directly governs the treatment of inmates, and the conditions of incarceration.¹⁴⁵ It prohibits the infliction of “cruel and unusual” punishment,¹⁴⁶ imposes a duty to provide humane conditions of confinement and satisfy inmates' basic needs,¹⁴⁷ and to “take reasonable measures to guarantee the safety of the inmates.”¹⁴⁸ The Supreme Court defines cruel and unusual punishment as the “wanton and unnecessary infliction of pain,”¹⁴⁹ particularly harm that serves no legitimate penological interest and treatment that is grossly disproportionate to the sentence imposed.¹⁵⁰ The Eighth Amendment represents “broad and idealistic concepts of dignity, civilized standards, humanity, and decency...,”¹⁵¹ and as a result the protections afforded to prisoners continue to evolve.

¹⁴² See *Hewitt v. Helms*, 459 U.S. 460, 467 (1983).

¹⁴³ *Wolf v. McDonnell*, 418 U.S. 539, 555-556 (1974).

¹⁴⁴ Anita C. Barnes, *The Sexual Continuum: Transsexual Prisoners*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 599, 626 (1998).

¹⁴⁵ See generally *Wilson v. Seiter*, 501 U.S. 294, 297-98 (1991).

¹⁴⁶ See U.S. CONST. amend. VIII (stating “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”). The Eighth Amendment is extended to the states through the Fourteenth Amendment so that “state created right[s] [are] not arbitrarily abrogated.” *Robinson v. California*, 370 U.S. 660, 666 (1962); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1973).

¹⁴⁷ *Farmer*, 511 U.S. at 832. Basic needs include adequate food, clothing, shelter, and medical care. *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

¹⁵⁰ *Farmer*, 511 U.S. at 833, 834

¹⁵¹ *Estelle v. Gamble* 429, U.S. 97, 102 (1976) (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968).).

Although the protections under the Eighth Amendment have continued to expand as society's standards of decency have evolved, they fall short of adequately protecting the special needs of transgender prisoners. Eighth Amendment jurisprudence has failed to recognize that the appropriate placement of transgender prisoners may require an option besides general population or administrative segregation, and has preserved gender-affirming medical treatment for only a narrow segment of the transgender inmate population.¹⁵² This gap in constitutional protections for transgender inmates allows the discrimination they face outside prison walls to amplify within.

This Part articulates the two-prong *Farmer* standard of use for Eighth Amendment claims brought by victimized prisoners, and enumerates defenses under the standard. This Part continues by describing the interpretative expansion of the *Farmer* standard of use, but the ultimate failure of courts to extend this Eighth Amendment jurisprudence to protect transgendered inmates by prohibiting the placement of MTF transgendered prisoners in male facilities.

A. *The Farmer Standard*

In *Farmer*, the Supreme Court articulated the standard for use with the Eighth Amendment as one of deliberate indifference,¹⁵³ refining it specifically for the needs of transgender inmates. The plaintiff, Dee Farmer, was violently beaten and raped within two weeks of her transfer to the general male population of the United States Penitentiary in Terre Haute, Indiana.¹⁵⁴ In her *Bivens*¹⁵⁵ complaint Farmer alleged that either transfer or placement of her within the general

¹⁵² See Tarzwell, *supra* note 2, at 182.

¹⁵³ *Farmer*, 511 U.S. at 834. Deliberate indifference requires more than mere negligence, but less than acts or omissions intended to cause harm or acts done with the knowledge that such harm will result. *Id.* at 836.

¹⁵⁴ *Id.* at 830.

¹⁵⁵ In 1971, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Supreme Court created a federal cause of action against federal officers for damages due to a violation of the Fourth Amendment's prohibition on unreasonable searches and seizures. FEDERAL PRACTICE MANUAL FOR LEGAL AID ATTORNEYS, This

population violated the Eighth Amendment where, “despite knowledge that the penitentiary has a violent environment and history of inmate assaults...[Farmer] as a transsexual who ‘projects feminine characteristics’ would be vulnerable to sexual attacks by some USP-Terre Haute inmates.”¹⁵⁶

Prison officials moved for summary judgment.¹⁵⁷ The district court denied Farmer’s request to stay the proceeding pending discovery, and granted summary judgment.¹⁵⁸ The court concluded that there was no deliberate indifference where prison staff was not “reckless in a criminal sense, meaning that they had actual knowledge of a potential danger,”¹⁵⁹ and found it dispositive that Farmer had not expressed concern for her own safety to prison staff.¹⁶⁰ After the Seventh Circuit affirmed without opinion, the U.S. Supreme Court granted certiorari.

The Supreme Court acknowledged that prison officials have an affirmative duty to prevent harm to prisoners from other prisoners.¹⁶¹ The court noted that, “[p]rison conditions may be ‘restrictive and even harsh,’ but gratuitously allowing the beating or rape of one prisoner by another serves no ‘legitimate penological objective’...”¹⁶² However, not “every injury suffered by one prisoner at the hands of another... translates into constitutional liability for prison officials responsible for the victim’s safety.”¹⁶³

cause of action is not based on an express or implied statutory authority to sue, but rather is grounded in the constitution itself. *Id.* Such an action is often referred to as a “*Bivens*” action, or a “constitutional tort.” *Id.* Although the Court has not overruled *Bivens*, recently the court has disparaged *Bivens* and refused to extend it. *Id.* In *Correctional Services Corporation v. Malesko*, the Court expressly limited *Bivens* actions to the narrow range of claims previously recognized, those arising under the Fourth, Fifth, and Eighth Amendments to the U.S. Constitution. *See generally* *Correctional Services Corporation v. Malesko*, 534 U.S. 61 (2001).

¹⁵⁶ *Farmer*, 511 U.S. at 831. *See also* Barnes, *supra* note 144, at 183.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* *See also* Nikko Harada, *Trans-Literacy Within Eighth Amendment Jurisprudence: De/Fusing Gender and Sex*, 36 N.M. L. Rev. 627, 632 (2006).

¹⁶⁰ *Farmer*, 511 U.S. at 832.

¹⁶¹ *Id.* at 832. *See also* Harada, *supra* note 159, at 632.

¹⁶² *Farmer*, 511 U.S. at 833 (citation omitted).

¹⁶³ *Id.* at 834.

Eighth Amendment claims brought by victimized prisoners must satisfy a two-fold test.¹⁶⁴ The first prong of this test requires that the “deprivation alleged must be, objectively, ‘sufficiently serious.’”¹⁶⁵ To satisfy this prong an aggrieved prisoner must show he or she “is incarcerated under conditions posing a substantial risk of serious harm.”¹⁶⁶ The second prong embodies the Eighth Amendment protection against “unnecessary and wanton infliction of pain.”¹⁶⁷ Thus, the prison officials charged with violating the Eighth Amendment must have a deliberately indifferent culpable state of mind.¹⁶⁸ The Court continued by attempting to clarify the meaning of deliberate indifference.

The Court found that an Eighth Amendment Violation requires “consciousness of a risk” by the prison officials.¹⁶⁹ The Court also noted that the use of the word “deliberate” to describe the necessary culpable state of mind “arguably requires nothing more than an act (or omission) of indifference to a serious risk that is voluntary, not accidental.”¹⁷⁰ Thus, a prison must demonstrate that the official “knows of and disregards an excessive risk to inmate health or safety.”¹⁷¹ “[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”¹⁷² This subjective standard, however, preserved numerous defenses for federal official defendants.

B. Defenses Under Farmer

Although the Court retained the subjective prong of the deliberate indifference analysis, it was not convinced that the prong would allow prison officials to ignore obvious dangers to

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Farmer*, 511 U.S. at 834.

¹⁶⁹ *Id.* at 840.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 837.

¹⁷² *Id.*

prisoners.¹⁷³ Farmer argued however, that this subjective standard is challenging for inmates to satisfy. The Court posited that a prisoner is not required to show that a prison official acted or failed to act,¹⁷⁴ believing “harm would befall and inmate,”¹⁷⁵ asserting instead that “it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.”¹⁷⁶ However, prison officials may claim that they had no knowledge of the facts underlying the risk of harm, or that they knew of the facts but believed that the risk was insignificant.¹⁷⁷ It is particularly daunting for inmates to prove that a prison official was aware of facts that suggested a prisoner was at risk, and that the official actually drew the inference that the prisoner was at risk.¹⁷⁸ Prison violence is significantly underreported, as reporting is unlikely to remain confidential, and a prisoner labeled a “snitch” can expect violent retaliation.¹⁷⁹

Although the subjective test preserved the right for plaintiffs to prove that an official knew a substantial risk existed through circumstantial evidence, the standard remains onerous.¹⁸⁰ Similarly, though the Court expressly stated that failing to appreciate an obvious risk does not shield a prison official from liability,¹⁸¹ staff is still incentivized to ignore problems. The less they investigate, the fewer recorded facts bolster an inference that a risk exists.¹⁸² Further, prison

¹⁷³ See Peek, *supra* note 65, at 1234.

¹⁷⁴ Harada, *supra* note 159, at 633.

¹⁷⁵ *Farmer*, 511 U.S. at 842.

¹⁷⁶ *Id.*

¹⁷⁷ See Tarzwell, *supra* note 2, at 1234.

¹⁷⁸ *Id.* at 183.

¹⁷⁹ *Id.* at 184.

¹⁸⁰ The plaintiff must show “longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued has been exposed to information concerning the risk” to permit an inference that the official did have actual knowledge. *Farmer*, 511 U.S. at 842-43.

¹⁸¹ “Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a fact finder may conclude that a prison official knew of a substantial risk from the very fact that it was obvious.” *Id.* at 842 (citation omitted).

¹⁸² See Tarzwell, *supra* note 2, at 184.

records of reported incidences are often unavailable to inmates, and are controlled by prison authorities who could benefit from their destruction.¹⁸³

The deliberate indifference standard has also created other loopholes and defenses for prison officials. Prison officials may claim that they “responded reasonably to the risk, even if the harm was not averted,”¹⁸⁴ or that they are protected by qualified immunity.¹⁸⁵ In the case of injunctive relief, prison officials may argue that the claim is moot because they ceased “unreasonably disregarding an objectively intolerable risk of harm...”¹⁸⁶ Litigation is also arduous for inmates, because they are required to exhaust all administrative remedies before turning to the courts for assistance.¹⁸⁷ This exhaustive requirement increases opportunities for the reporting inmate to be identified and repeatedly victimized during the obligatory period, and decreases the likelihood of proving officials had knowledge of threats.¹⁸⁸ Prejudices within the legal community that prisoners’ claims generally lack merit, and the fact that prison officials tend to receive the benefit of the doubt on issues of credibility are additional barriers to successful litigation for transgendered inmates.¹⁸⁹

In *Farmer* the Supreme Court clarified that the deliberate indifference standard is subjective,¹⁹⁰ and that the lower court erred in asserting that advanced notice on the part of the prison officials is a necessary element of an Eighth Amendment failure to prevent harm case.¹⁹¹

Since *Farmer*, courts have continued to struggle with the adjudication of failure to prevent harm

¹⁸³ *Id.*

¹⁸⁴ *Farmer*, 511 U.S. at 844.

¹⁸⁵ Numerous circuit courts have attempted to protect prisoners by limiting the extent of qualified immunity, and disallowing the immunity when the prison staff themselves are responsible for the abuse. Peek, *supra* note 65, at 1234. *See e.g.* Schwenk v. Hartford, 204 F.3d 1187, 1197 (9th Cir. 2000) (The Ninth Circuit has stated that under *Farmer*, “the shield that qualified immunity provides is limited to those officials who are either unaware of the risk or who take reasonable measures to counter it.”).

¹⁸⁶ Peek, *supra* note 65, at 1235.

¹⁸⁷ *See Tarzwell*, *supra* note 2, at 184.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Farmer*, 511 U.S. at 849; *see also Harada*, *supra* note 159, at 635.

¹⁹¹ *Farmer*, 511 U.S. at 849.

cases. Although the *Farmer* standard continues to expand, courts have failed to extend this Eighth Amendment jurisprudence to its practical conclusion, to prohibit the placement of MTF transgendered inmates in male facilities.

C. Expansion of the Farmer Standard

Since *Farmer* was decided, courts have continued to struggle with how to adjudicate transgender prison claims.¹⁹² In *Murray v. Bureau of Prisons*,¹⁹³ the Sixth Circuit struggled to determine whether the harm alleged was a sufficiently serious deprivation.¹⁹⁴ Petitioner Michelle Murray was described by the Sixth Circuit as “both a biologically male transsexual and a federal prisoner.”¹⁹⁵ The Sixth Circuit described Murray’s gender history, noting “[a]lthough she has undergone extensive hormone therapy, has had breast implants, and has been castrated, she remains anatomically male.”¹⁹⁶

The BOP placed Murray in isolation on numerous occasions.¹⁹⁷ Some of these occasions were to protect Murray from assaults by other inmates, while other occasions she was segregated into protective custody for her refusal to comply with prison dress code.¹⁹⁸ The Sixth Circuit held that the deprivations¹⁹⁹ were not serious enough to trigger Eighth Amendment violations under the first prong of the *Farmer* standard of use, because the “deprivation alleged must be sufficiently serious.”²⁰⁰ However, the Sixth Circuit held that prison officials could have “subjected themselves to an Eighth Amendment claim” if they had failed to place Murray into

¹⁹² See Harada, *supra* note 159, at 633.

¹⁹³ No. 95-5204, 1997 WL 34677, at *1 (6th Cir. Jan. 28 1997).

¹⁹⁴ *Murray*, 1997 WL 34677, at *1.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* (footnote omitted).

¹⁹⁷ *Id.* at *2.

¹⁹⁸ *Id.*

¹⁹⁹ Numerous stints of isolation in protective custody. *Id.*

²⁰⁰ *Murray*, 1997 WL 34677, at *2.

protective custody for her safety.²⁰¹ Similarly, although the Sixth Circuit found that Murray's allegations of verbal harassment were also not sufficient to state a claim,²⁰² it noted that other circuits have held that psychological harm may be a sufficiently serious deprivation to satisfy the prong.²⁰³ Ultimately, the court affirmed summary judgment against Murray for all of her claims, but it preserved the actionability of the failure of prison officials to affirmatively protect transgendered inmates from harm by preserving the Eighth Amendment claim for failure to house an imperiled inmate in protective custody.²⁰⁴ Even if transgendered prisoners are able to state a claim as to the first prong, they must still overcome the second prong, mandating the culpable state of mind for prison officials.²⁰⁵

Although in *Farmer* the Court elected a subjective test to show the deliberate indifference standard for use with the Eighth Amendment, the Court did acknowledge that membership within an identifiable group from which members are frequently targeted for attack establishes a sufficiently serious risk that warrants Eighth Amendment protection.²⁰⁶ In *Knowles v. New York Department of Corrections*,²⁰⁷ the United States District Court for the Southern District of New York concluded that genuine issues of fact existed to hold prison officials responsible for an assault on a black inmate, which occurred due to the prisoner's characteristics.²⁰⁸ The court found that the circumstances of the attack indicated that prison officials acted with deliberate inference when they failed to draw an inference from the facts known to them that a substantial

²⁰¹ *Murray*, 1997 WL 34677, at *2 (citing *Farmer*, 511 U.S. at 834).

²⁰² The court found that "the Eighth Amendment does not afford [it] the power to correct every action, statement, or attitude of a prison official with which we might disagree." *Id.* at *3.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ See generally Harada, *supra* note 159, at 636.

²⁰⁶ *Farmer*, 511 U.S. at 843. The Court further implied that advance notice of a potential harm is not necessary for an Eighth Amendment failure-to-protect claim. *Id.*

²⁰⁷ 904 F. Supp. 217 (S.D.N.Y. 1995).

²⁰⁸ See Barnes, *supra* note 144, at 630.

harm existed.²⁰⁹ The attack arose from ongoing violence and animosity between Spanish and Jamaican inmates. Although the plaintiff was neither Jamaican nor involved in the feuding gangs, he had the target characteristics of dreadlocks and a Caribbean accent.²¹⁰ The court explained that, “due to his physical characteristics and accent, [the plaintiff] ‘belonged to an identifiable group of prisoners’ for whom the risk of assault [presented] a serious problem of substantial dimensions.”²¹¹ The failure of the prison officials to acknowledge the ubiquitous risk, and take steps to prevent harm to the plaintiff,²¹² established a valid claim that the prison officials acted with reckless disregard and deliberate indifference to the plaintiff’s safety,²¹³ a violation of the Eighth Amendment.²¹⁴

The assumption that a transgendered prisoner will be safe if she is removed from general population is questionable.²¹⁵ Perils may still befall transgender prisoners even if they are placed in protective custody.²¹⁶ In analyzing whether prison officials were deliberately indifferent to the petitioner in *Greene v. Bowles*,²¹⁷ the Sixth Circuit described Greene as “a male-to-female transsexual...pre-operative, but still display[ing] female characteristics, including developed breasts and a female demeanor, and was undergoing hormone therapy.”²¹⁸ She was placed in protective custody due to her feminine appearance.²¹⁹ While in protective custody, Greene was assaulted by another inmate, who was described by the warden as a “predatory inmate” and

²⁰⁹ *Id.*

²¹⁰ *Knowles*, 904 F. Supp. at 219.

²¹¹ *Id.* (quoting *Walsh v. Mellas*, 837 F.2d 789, 783 (7th Cir. 1988)) (internal citations omitted).

²¹² *Knowles*, 904 F. Supp. at 218-19. One the day of the attack, prison staff failed to strip search the inmates before they entered the yard for recreation, and permitted the Spanish inmates to intermingle with the plaintiff. *See id.*

²¹³ *Barnes*, *supra* note 144, at 631.

²¹⁴ *Knowles*, 904 F. Supp. at 221.

²¹⁵ *See Harada*, *supra* note 159, at 637.

²¹⁶ *Id.*

²¹⁷ *Greene v. Bowles*, 361 F.3d 290 (6th Cir. 2004).

²¹⁸ *Greene*, 361 F.2d at 292.

²¹⁹ *Id.*

segregated due to his incitement of a prison riot.²²⁰

The Sixth Circuit found that there was sufficient evidence that Greene was vulnerable not only to sexual assault, but also physical assault such that her presence in protective custody with other inmates, without segregation or other protective measures, was a substantial risk to her safety.²²¹ The court also found that there was sufficient evidence for the trier of fact to conclude that the warden was aware of the substantial risk that the predatory inmate posed to other inmates.²²² It found that there was sufficient circumstantial evidence to impute knowledge of the substantial risk to the warden²²³ and satisfy the deliberate indifference standard. The court noted that the warden satisfied the deliberate indifference standard by: (1) noting Greene’s physical status as the reason for her placement in protective custody;²²⁴ (2) admitting, during his deposition, that “transgendered inmates are often placed in protective custody because of the greater likelihood of [] being attacked by their fellow inmates”;²²⁵ and (3) the admitting the predatory nature of the attacking inmate.²²⁶ Although courts have struggled to interpret the deliberate indifference standard, the cases following *Farmer* have continued to expand transgendered prisoner protections under the Eighth Amendment.

A Maine District Court similarly extended the protections of the Eighth Amendment when it addressed the placement of preoperative MTF transgender inmate in a women’s correctional institution in *Crosby v. Reynolds*.²²⁷ In *Crosby*, a female inmate alleged deprivation of her

²²⁰ *Id.*; see also Harada, *supra* note 159, at 637. Green was severely attacked with a mop handle and with a fifty-pound fire extinguisher. *Greene*, 361 F.2d at 292.

²²¹ *Greene*, 361 F.2d at 292.

²²² *Id.* at 294.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* The dissent disagreed with the majority’s holding because “[d]eliberate indifference means that the prison official had actual knowledge of a substantial risk to intimate health or safety and ignored that risk or proceeded in the face of it” *Id.* at 296 (Rogers, J., dissenting).

²²⁷ 763 F. Supp. 666 (D. Me. 1991).

constitutional right to privacy after being housed with a MTF inmate.²²⁸ The court denied this claim²²⁹ after balancing the plaintiff inmate’s right to privacy against MTF inmates’ right to survival.²³⁰ The Maine district court concluded that the placement of a transgender prison in safer housing outweighed prisoner privacy rights.²³¹ This case indicates that housing transgender inmates in female correctional facilities is a satisfactory solution to the safety threats posed by housing them in male facilities, without unconstitutionally imposing on the privacy rights of female inmates.

Transgendered inmates constitute an identifiable group whose members are frequently targeted for violence.²³² Transgendered inmates are identifiable by prison officials because they usually manifest as effeminate,²³³ and some transsexuals retain female secondary sex characteristics.²³⁴ Not only do these recognizable physical traits place transgendered inmates in danger, but they also put officials on notice of an imminent and substantial risk to prisoners.²³⁵ The refusal or failure of prison officials to address this obvious and substantial risk constitutes deliberate indifference, and violates the protections of the Eighth Amendment.²³⁶ “[H]aving stripped [prisoners] of virtually every means of self-protection and foreclosed their access to

²²⁸ *Crosby*, 763 F. Supp. at 668. The plaintiff asserted that Lamson’s presence forced her to change under the covers and avoid contact while using the restroom. *See id.* The court, however, framed this issue as whether reasonable officials would understand that placing a preoperative transsexual—an anatomically male inmate—with female inmates violates a clearly established right. *See id.* at 669.

²²⁹ *Id.* at 270.

²³⁰ *Id.* The court acknowledged that placement in the male facility placed Lamson in “severe jeopardy” and that segregation also failed as a tenable solution. *Id.* The court concluded that placement in the female population best satisfied “Lamson’s unique psychological needs and that there was no risk to the female inmates.” *Id.*

²³¹ *Id.* at 669; Barnes, *supra* note 144, at 632.

²³² *See Westmoreland v. Brown*, 883 F. Supp. 67, 75 (E.D. Va. 1995).

²³³ *See Farmer*, 511 U.S. at 829.

²³⁴ *See e.g. Farmer*, 511 U.S. at 829.

²³⁵ Barnes, *supra* note 144, at 633.

²³⁶ *Farmer*, 511 U.S. at 833.

outside aid, the government and its officials are not free to let the state of nature take its course.”²³⁷

When the Supreme Court established the standard of use for Eighth Amendment claims brought by victimized prisoners, in *Farmer*, it preserved numerous defenses for prison official defendants. Although this Eighth Amendment jurisprudence has continued to evolve, courts have ultimately failed to extend protections to transgendered inmates by prohibiting the placement of MTF transgendered prisoners in male facilities. The pending Georgia case of Zahara Greene, however, remains ripe for the Court to finally expand these protections.

V. Using the Eighth Amendment to Deconstruct the Genitalia Based Housing Model

As one commentator has noted, “[t]he reality of our nation’s criminal justice system is that those who are sentenced to confinement are subject to harsh conditions and treatment that go far beyond what a judge and jury believe that they are imposing as punishment.”²³⁸ Contemporary prisons breed violence unlike any other institution,²³⁹ and courts have continued to acknowledge the environment of sexual terrorism within prison walls.²⁴⁰ This prison violence is not born in a vacuum, but rather cultivated by the cumulative actions and inactions of prison officials, who prefer to turn a blind eye to the egregious abuses. Prison culture permits inmates to regain a sense of their lost liberties and manhood through aggression, violence, and sexual terrorism. Transgendered inmates in male facilities are victimized in masses, facing an exacerbated danger of rape, coerced sex, humiliation, infectious diseases, and exposure to discriminatory and inadequate healthcare. This targeted sexual terrorism and heightened victimization engender horrific conditions of confinement that violate the Eighth Amendment.

²³⁷ *Id.*

²³⁸ Jason D. Sanabria, *Farmer v. Brennan: Do Prisoners Have Any Rights Left Under the Eighth Amendment?* 16 Whittier L. Rev. 1113, 1113 (1995).

²³⁹ See Robertson, *supra* note 87, at 473.

²⁴⁰ See Smith v. Ullman, 874 F. Supp. 979 (D. Neb. 1994); see also Wilson v. Seiter, 501 U.S. 294 (1991).

Assuring inmate safety is one of the most fundamental responsibilities of the prison administration. A failure to satisfy this duty violates the protections of the Eighth Amendment, which not only protects prisoners from actual harm, but also encompasses conditions likely to cause serious harm and needless suffering.²⁴¹ Although in *Farmer* the Supreme Court clarified the standard for use with the Eighth Amendment as one of deliberate indifference, this subjective standard is supplemented by an analysis of evolving standards of decency.²⁴² These objective indicia suggest societal recognition of minorities in need of expanded constitutional protections. The pending Rogers State Prison case of transgendered prison rape victim Zahara Greene²⁴³ remains ripe for the Court to expand the protections of the Eighth Amendment to prohibit the placement of transgendered inmates in male facilities.

This Part demonstrates that Zahara Greene should prevail on her Eighth Amendment prison victimization claim. Zahara Greene suffered a sufficiently serious deprivation when prison officials at Rogers State Prison acted with deliberate indifference to jeopardize her health and safety. Similarly, the moral compass of the evolving standards of societal decency indicates the widespread concern of the American people with the rights of transgendered individuals. The development of local, state, and federal legislation to protect transgendered individuals from gender-identity discrimination; jury verdicts awarding damages to transgendered prison rape victims and extending hate crime laws to protect transgendered individuals; and the failure of the genitalia based placement system to comport with the basic concept of human dignity evidence that society's evolving standards of moral decency demand the expansion of the Eighth Amendment to protect transgendered prisoners.

²⁴¹ See *Farmer*, 511 U.S. at 833.

²⁴² *Id.*

²⁴³ See *infra* introduction.

A. Eighth Amendment Jurisprudence: A Practical Expansion to Protect Transgendered Inmates from Genitalia Classification

The treatment that convicted prisoners receive and the conditions of their confinement are subject to scrutiny under the Eighth Amendment.²⁴⁴ In order for an inmate to prevail on a claim under the Eighth Amendment, he or she must prove that: (1) the “deprivation...[was], objectively sufficiently serious,”²⁴⁵ and (2) the prison official had a “sufficiently culpable state of mind,”²⁴⁶ described by the Supreme Court as “deliberate indifference” to inmate health and safety.²⁴⁷ First, for the deprivation in question to be objectively and sufficiently serious “the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm.”²⁴⁸ Second, for the plaintiff to prove deliberate indifference he or she must show that “the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”²⁴⁹ Zahara Greene suffered a sufficiently serious deprivation when prison officials at Rogers State Prison acted with deliberate indifference to jeopardize her health and safety.

i. Sufficiently Serious Deprivation

While incarcerated at Rogers State Prison, Greene endured an objectively serious deprivation when she faced conditions of incarceration that posed a substantial risk of serious harm. While in general population, she was repeatedly, and brutally raped by a gang member. When Greene was finally removed to protective custody, officials housed her with her identified rapist, and allowed the inmate to rape and assault Greene for 24 hours before officers removed him.

²⁴⁴ *Helling v. McKinney*, 509 U.S. 25, 31 (1993).

²⁴⁵ *Farmer*, 511 U.S. at 834 (citing *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)).

²⁴⁶ *Farmer*, 511 U.S. at 834.

²⁴⁷ *Id.* (citing *Wilson v. Seiter*, 501 U.S. 294, 302-03 (1991)).

²⁴⁸ *Farmer*, 511 U.S. at 834.

²⁴⁹ *Id.*

When Greene arrived at the facility, officials at Roger State Prison noted on her file that she was a transgendered inmate and was at high risk for victimization.²⁵⁰ The officers also observed that Greene had female secondary sex characteristics.²⁵¹ By the time that Greene entered Rogers State Prison in July of 2012, the serious risk of rape to transgender women housed in male correctional facilities was widely recognized by and among the corrections community.²⁵² Therefore, similar to the plaintiff in *Knowles*, Greene was a member of an identifiable group from which members are frequently targeted for attack, and which establishes a sufficiently serious risk under the Eighth Amendment.

Rogers State prison officials also subjected themselves to a cognizable Eighth Amendment claim, as held by the Sixth Circuit in *Murray*, by failing to place Greene in protective custody for her safety. The deprivation alleged was sufficiently serious, because prison officials failed to place Greene in protective custody when she arrived, though they acknowledged her female secondary sex characteristics²⁵³ and her heightened vulnerability to assault if housed in the general population.²⁵⁴ Prison officials again failed to place Greene in protective custody for her safety after her first, second, and third sexual assaults by a predatory gang member in general population.²⁵⁵ Zahara Greene suffered a sufficiently serious deprivation under the Eighth Amendment as her membership to an identifiable group vulnerable to attack establishes a serious risk, and Rogers State prison officials failed to place Greene in protective custody for her safety.

²⁵⁰ Complaint at 14.

²⁵¹ *Id.*

²⁵² Testa, *supra* note 1.

²⁵³ Complaint at 14.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

ii. Deliberate Indifference to Inmate Health and Safety

Defendant prison officials acted with deliberate indifference when they knew and disregarded this serious risk of harm. Upon arrival at Rogers State Prison, defendants were informed that Zahara Greene was transgender, classified as an inmate highly vulnerable to sexual assault within the prison, and observed that she had female secondary sex characteristics.²⁵⁶ Defendants were also aware that convicted rapists and sex offenders populated the general population, and that Green's cell door did not lock properly, which allowed inmates to enter her cell unsolicited.²⁵⁷ This knowledge plainly indicated the risks of housing Green in the general population, but prison officials disregarded these risks.

After Greene was assaulted by a predatory gang member while housed in the general population both she and her mother wrote letters to Brown detailing the assault and her fear for her life, and pleading to be placed in protective custody.²⁵⁸ In her letters, Green explicitly identified the inmate that assaulted her, and begged to be removed from general population to escape him. She described the forcible oral sex and the "exploitation of fear" that she endured.²⁵⁹ Defendant prison officials failed to act, despite this knowledge of ongoing abuse and a substantial risk of future harm. When Greene petitioned for protective custody, she again detailed her initial sexual assault and all subsequent attacks, and clearly identified the assailant in her submissions to defendant prison officials.²⁶⁰

When Greene was finally removed from general population to protective custody, she was housed in a cell with her identified abuser. She passed prison staff notes through the cell door begging for help, and alerting them that her cellmate was the inmate that had raped her numerous

²⁵⁶ Testa, *supra* note 1.

²⁵⁷ *Id.* at 4.

²⁵⁸ Testa, *supra* note 1.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

times in general population.²⁶¹ The prison officials received the notes, and documented them in their administrative report, but failed to act, despite this knowledge. Eventually, prison officials intentionally ceased their three-hour sweeps, and left Greene isolated and unsupervised with her attacker for 24 hours, during which time he raped her repeatedly.²⁶²

Although Greene and her mother both alerted prison officials of the dangers of general population, and of Greene's repeated attacks numerous times, prison officials remained deliberately indifferent. Officials were aware of the facts, even labeling Greene as a high-risk prisoner upon entry, and drew the inference that a substantial risk of harm existed when she was removed from general population and placed in protective housing. Further, when Greene was transferred to protective housing, she again informed officials that she was in danger, and although defendant prison officials logged the note into administrative documents, they voluntarily omitted remedial action. The failure of prison officials to acknowledge the risks that Greene faced, and take steps to prevent harm establishes a valid claim that these officials acted with reckless disregard and violated the Eighth Amendment. This Eighth Amendment standard of use analysis is supplemented by positive indications of evolving standards of decency indicating the widespread concern of the American people for the rights of transgendered individuals.

B. The Positive Indications of Evolving Standards of Decency

Although the Eighth Amendment prohibits federal and state governments from inflicting cruel and unusual punishments, such as the genitalia based prison classification of transgendered inmates, the amendment itself does not specify which acts constitute cruel and unusual treatment. The Court recognizes a strong moral and legal correlation between society's standards of

²⁶¹ *Id.*

²⁶² *Id.*

decency and Eighth Amendment protections, ruling that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of maturing society.”²⁶³ The Court has established several guidelines to assess whether standards are evolving.²⁶⁴ The Court found an “assessment of contemporary values” reflected in “objective indicia” to be helpful in evaluating certain punishments.²⁶⁵ These objective indicia include legislative response to judicial decisions,²⁶⁶ decisions by “directly involved” juries,²⁶⁷ and whether the punishment “comports with the basic concept of human dignity.”²⁶⁸

This moral and legal correlation indicates when a class or minority is in need of expanded protections. The recent legislative, legal, and electoral advancements, and increasing societal acceptance of transgendered individuals demonstrate the widespread concern of the American people with the rights of transgendered individuals. This moral compass indicates evolving social standards embracing transgender rights, and provides the moral foundation for the expansion of penal rights to protect transgender inmates from the cruel and unusual punishment of placement in male facilities.

i. Legislative Response to Judicial Decisions

Legislative responses to judicial decisions indicate the moral conceptions of the representatives of the American public, and thus serve as a moral compass for American society. Legislation has been developed at the local, state, and federal level to protect transgender individuals against gender-identity based discrimination.²⁶⁹ Since its original proposal in 1994, the Employment Nondiscrimination Act has been repeatedly propositioned before Congress.

²⁶³ *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

²⁶⁴ *Wright Colopy*, *supra* note 126, at 244.

²⁶⁵ *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

²⁶⁶ *Id.* at 179. The will and values of the people are reflected in their elected representatives. *Id.* at 180.

²⁶⁷ *Id.* at 181.

²⁶⁸ *Id.* at 182. Punishments must be penologically justified and not cause gratuitous suffering.

²⁶⁹ *Wright Colopy*, *supra* note 126, at 240.

“Despite widespread support among House members and the general public, it has not yet passed.”²⁷⁰ Thus, while there are not yet federal protections, numerous states and the District of Columbia have passed antidiscrimination legislation.

Circuit courts have also demonstrated willingness to extend protection to transgendered individuals under Title VII.²⁷¹ Beginning with *Smith v. City of Salem*,²⁷² the Sixth Circuit upheld a verdict in favor of a transgendered plaintiff on grounds that the discrimination stemmed from the plaintiff’s “failure to conform to sex stereotypes by expressing less masculine and more feminine mannerisms and appearance.”²⁷³ Similarly, in *Etsitty v. Utah Transit Authority*,²⁷⁴ the Tenth Circuit upheld the employer’s right to fire a transgender employee who frequented the women’s restroom, despite still having male genitalia.²⁷⁵ The court acknowledged that the Utah Transit Authority’s potential liability constituted a “legitimate, nondiscriminatory reason”²⁷⁶ for releasing Etsitty, despite the fact that using the women’s restroom was a nonconforming expression of her gender-identity.²⁷⁷ The court acknowledged that although gender identity and expression are protected, he or she must not offend practical boundaries between the sexes.²⁷⁸

Homeless transgendered individuals are also beneficiaries of recently expanded protection. In January 2011, the U.S. Department of Housing and Urban Development (“HUD”) announced new regulations that will ensure that all eligible people, regardless of gender identity

²⁷⁰ *Id.* at 241; ENDA by the Numbers, NAT’L CTR. FOR TRANSGENDER EQUAL 2 (2010), <http://www.transequality.org/Resources/endabythenumbers.pdf>; as of 2010 there were 202 representatives co-sponsoring the bill and according to a 2008 survey of New York voters seventy-eight percent were in favor of “anti-discrimination measures that include gender identity and sexual orientation.” *Id.*

²⁷¹ See Wright Colopy, *supra* note 126, at 241.

²⁷² 378 F.3d 566 (6th Cir. 2004).

²⁷³ *Id.* at 572.

²⁷⁴ 502 F.2d 1215 (10th Cir. 2007).

²⁷⁵ *Id.* at 1224.

²⁷⁶ *Id.*

²⁷⁷ See Wright Colopy, *supra* note 126, at 1241.

²⁷⁸ *Id.*

or sexual orientation, have access to affordable housing.²⁷⁹ HUD based its decision on the data gathered in the 2009 survey by the National Center for Transgender Equality (“NCTE”) and the National Gay and Lesbian Task Force, which indicated “the dire need for housing protections in the transgender community.”²⁸⁰ The regulations include provisions clarifying that all HUD public housing programs are available to lesbian, gay, bisexual, and transgender (“LGBT”) families, prohibiting landlords from inquiring about gender identity or sexual orientation, and forbid lenders from discriminating on the basis of gender identity or sexual orientation.²⁸¹

The transgender community also experiences difficulty obtaining insurance coverage when they disclose their transgender status or transition related medical history.²⁸² To combat this health care discrimination, in 2008 the American Medical Association began mandating that health insurers cover more transgender health needs.²⁸³ The Affordable Care Act also increases access to health insurance for the transgendered community by ensuring access to insurance policies regardless of employment status.²⁸⁴ The act also prevents discretionarily denied or dropped coverage, and bans discrimination.²⁸⁵

Although these reforms do not extend protections to the extent that many advocates desire, these legislative and regulatory acts significantly reduce, and will hopefully eliminate, the

²⁷⁹ NCTE: HUD Proposes New Regulations-Includes Gender Identity, NAT’L CENTER FOR TRANSGENDER EQUAL. (Jan. 21, 2011), <http://transequality.org/news.html>.

²⁸⁰ *Id.*

²⁸¹ See Wright Colopy, *supra* note 126, at 242. Mara Kiesling, NCTE’s executive director, said that these regulations will profoundly affect many lives because “every American needs and deserves a home.” NCTE: HUD Proposes New Regulations-Includes Gender Identity.

²⁸² See Transgender Health and the Law: Identifying and Fighting Health Care Discrimination, TRANSGENDER L. CTR. 1(July 2004), <http://www.transgenderlawcenter.org/pdf/Health%20Law%20fact%20sheet.pdf>.

²⁸³ See AMA Supports Transgender Care, Hormones, Sex-Reassignment Therapy, TEACHTHEFACTS.ORG (June 19, 2008), <http://vigilance.teachthefacts.org/2008/06/ama-supports-transgender-care-hormones.html>.

²⁸⁴ See Health Care Reform signed into Law: How Will It Impact Transgender People?, NAT’L CENTER FOR TRANSGENDER EQUAL. (Mar. 23, 2010), <http://www.transequality.org/news10.html#hcr>. The transgender community is marked by high unemployment and poverty rates.

²⁸⁵ *Id.*

amount of discrimination that transgendered individuals face.²⁸⁶ Further, these legislative enactments indicate that the American people are increasingly accepting transgendered individuals, and that the representatives and industries that serve them are also beginning to evolve.²⁸⁷ These legislative enactments suggest societal recognition of the discrimination faced by transgendered individuals, and the need for expanded constitutional protections for these individuals. Recent jury verdicts also suggest these evolving societal standards of moral decency.

ii. Decisions by Directly Involved Juries

Jury verdicts are also an objective indicator of societal standards of evolving decency, demonstrating the moral conceptions of the American public. Recent verdicts indicate burgeoning standards of protection for the transgender community. Jury verdict awarding damages to a transgender rape prison victim and extending hate crime laws to protect transgendered individuals, support the extension of the Eighth Amendment to protect incarcerated members of the transgendered community from the cruel and unusual punishment of placement in a male facility.

On Feb. 27, 2015, an Orlando jury found Orange county guilty of “failure to use reasonable care” in protecting a transgender woman.²⁸⁸ The jury awarded nearly \$40,000 in damages after the victim was assaulted by a cellmate while being held in the general population of the Orange County Correctional Facility.²⁸⁹ The victim made repeated pleas to prison officials to be held in protective custody, fearing that her transgender status would make her a target for

²⁸⁶ See Wright Colopy, *supra* note 126, at 244.

²⁸⁷ *Id.*

²⁸⁸ Paul Brinkmann, *Transgender Woman Gets \$40,000 for Rape at Orlando Jail*, Orlando Sentinel, March 3, 2015.

²⁸⁹ *Id.*

victimization.²⁹⁰ The attorney for the victim contended that the county “did[not] understand what a transgender person was, and what vulnerability they have. ‘When they take her out of protective custody three times, I think that rises to the level of indifference.’”²⁹¹ An investigator who worked for the jail confirmed the widespread staff indifference by admitting that transgendered inmates had been assaulted in the facility before.²⁹² Although the victim’s attorney plans to appeal the awarded amount, the verdict indicates societal reception to the unreasonably cruel treatment of transgendered inmates while incarcerated.

Similarly, on April 23, 2009, a Colorado man was convicted of first-degree murder and a hate crime, and sentenced to life in prison for killing a transgender teen that he met on an online social networking site.²⁹³ It was the first time in the nation that a state hate crime statute resulted in a conviction in a transgender individual’s murder.²⁹⁴ The jury deliberated for only two hours before returning the verdict that was hailed by gay and transgender rights groups.²⁹⁵ “‘This is a landmark decision,’ said Mindy Barton, the legal director of the Gay, Lesbian, Bisexual and Transgender Community Center of Colorado.”²⁹⁶ The case has become a rallying point for supporters of the transgender community, and many are calling for the inclusion of transgendered individuals in hate crimes statutes across the country and at the federal level.²⁹⁷ Currently, eleven states and the District of Columbia recognize transgender people in their hate crime laws.²⁹⁸ These jury verdicts, similar to legislative responses to judicial decisions, establish the intent of the American people to recognize transgendered individuals as a protected class,

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ Jim Spellman, *Transgender Murder Hate Crime Conviction a First*, CNN, April 23, 2009.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

and support the expansion of the Eighth Amendment to protect transgendered individuals from the cruel and unusual punishment of incarceration in male facilities. In addition to these indicators of the evolving standards of moral decency, the court must also evaluate whether the punishment comports with the basic concept of human dignity at the core of the amendment.

iii. Comports with Basic Concept of Human Dignity

When considering whether the punishment comports with the basic standards of human decency the court scrutinizes whether the punishment imposed is justified by a legitimate penological goal.²⁹⁹ Although the court cannot invalidate a category of penalties because the court deem less severe penalties adequate to serve the ends of penology, the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.³⁰⁰ The Court has found that providing for the health and safety of the prison population is a legitimate goal of the penal system.³⁰¹ Therefore, in order for prisons to infringe on a transgendered inmate's right to be free from the cruel and unusual punishment of being housed in male prison facilities, there must be an identifiable nexus between the infringement and furthering institutional health and safety. However, housing transgendered inmates in a male prison facility does not fulfill the required nexus between infringement and legitimate institutional goals.

Transgendered inmates are vulnerable while incarcerated. They are coveted sexual partners, and susceptible to harassment, humiliation, coercive sex, rape, forced prostitution. As a result, many transgendered inmates contract sexually transmitted diseases, such as HIV/AIDS.³⁰² Without prophylactic measures and with the endemic of prison rape, HIV/AIDS and other

²⁹⁹ *Gregg*, 428 U.S. at 158.

³⁰⁰ *Id.*

³⁰¹ *Bell v. Wolfish*, 441 U.S. 520, 546 (1979).

³⁰² *See Scott*, *supra* note 18, at 1294.

sexually transmittable diseases spread throughout the nation's prisons at an alarming rate, undercutting the health and safety of the facility. Additionally, many transgender inmates file internal grievances about the horrific conditions of confinement that they face, and pursue legal remedies and retribution.³⁰³ The costly treatment of the widespread disease transmission and the administrative and legal recourse are burdensome to society. The placement of transgendered inmates in male correctional facilities does not further the legitimate penological goal of improving inmate health and safety, but instead directly undermines the health of the transgendered inmates and safety of the facility.

Housing transgendered inmates in female correctional facilities, instead of male, may mitigate these costly and dangerous issues. Although removing transgendered inmates from male facilities will not eliminate prison rape or other consensual sexual activities that facilitate the spread of sexually transmitted diseases,³⁰⁴ it will remove a vulnerable population of inmates from an arena of systemic sexual abuse and exploitation. Removing transgendered inmates from male prison facilities may not eliminate grievances and legal retribution, but may drastically reduce the volume of grievances and amount of claims. Removing transgendered inmates from the volatile male prison population, in which they are constantly victimized, will not only increase their safety, but could also increase the safety of the general population. No longer housing transgendered inmates in male facilities may reduce widespread overcrowding and improve general health and safety conditions.³⁰⁵ It may also prevent conflicts that arise over sexual partnerships with transgendered inmates. Thus, housing transgendered inmates in male

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.* See also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-743, BUREAU OF PRISONS: GROWING INMATE CROWDING NEGATIVELY AFFECTS INMATES, STAFF, AND INFRASTRUCTURE 1 (2012).

correctional facilities does not satisfy legitimate penological health and safety ends, but instead undermines them.

Together these objective indicia exemplify a shift in the societal valuation of the suitability of housing transgendered inmates in a male correctional facility. Recent legislation, jury verdicts, and an assessment of whether housing transgender prisoners in male facilities comports with basic concepts of human dignity suggest a societal commitment to improving prison conditions and support for the expansion of the protections of the Eighth Amendment. The pending prison rape case of Zahara Greene both satisfies the *Farmer* standard, and is supported by the evolving standards of human decency, proving that housing transgendered inmates in male facilities is a violation of the protections of the Eighth Amendment.

VI. Conclusion

The vast majority of jails, prisons, and detention centers across the United States house transgender individuals according to their genitalia, subjecting them to horrific degradation, assault, and sexual terrorism within the prison walls. Placing transgender inmates in a male facility violates the protections of the Eighth Amendment. To protect inmates from these egregious abuses, prisons, jails, and detention centers must house MTF inmates in female facilities.

Some commentators may argue that housing a MTF inmate in a female facility will present a danger to and infringe upon the privacy rights of female inmates.³⁰⁶ However, these are not insurmountable hurdles.³⁰⁷ At least one American court has held that a MTF inmate may be housed in a female facility to preserve her right to survive. In *Crosby*, a District Court in Maine contemplated this solution, and noted that a prisoner's fundamental right to survival outweighs

³⁰⁶ See Tedeschi, *supra* note 52, at 45.

³⁰⁷ See Scott, *supra* note 18, at 1294.

inmates' privacy interests.³⁰⁸ This case represents the proposition that housing transgendered inmates in female prisons is a tenable solution to the safety issues posed by housing them in male prison facilities, without infringing upon the fundamental rights of female inmates.³⁰⁹

The privacy concerns of female inmates may also be quelled through education.³¹⁰ Educating female inmates about the reasons for housing transgendered inmates in female facilities could foster empathy and understanding. Similarly, implicit in safety concerns for female inmates is the fear that transgendered inmates will perpetrate acts of physical or sexual violence against other female inmates.³¹¹ These fears may also be eradicated through educational programming and widespread protective measures.³¹² Hormone therapy functions as chemical castration for transgender inmates with penises, both eliminating the already low risk of sexual assaults and pregnancy among inmates in female facilities and providing gender-affirming treatment for transgendered inmates who wish to take advantage of it. Offering hormone therapy to transgender inmates in female facilities would pale in comparison to the cost of other chronic care treatments provided in prisons nationwide,³¹³ and would perhaps ease the apprehension of female inmates. Transgendered inmates who elected not to undergo hormone therapy as a treatment for their gender dysphoria should not be required to do so, but could attend sensitivity training with fellow female inmates to recognize and remove prejudice and establish a common ground.³¹⁴

³⁰⁸ See *Crosby*, 763 F. Supp. at 668.

³⁰⁹ See Scott, *supra* note 18, at 1294.

³¹⁰ *Id.* at 1295.

³¹¹ *Id.*

³¹² *Id.*

³¹³ See Rebecca Mann, *The Treatment of Transgender Prisoners, Not Just an American Problem-A Comparative Analysis of American, Australian, and Canadian Prison Policies Concerning the Treatment of Transgender Prisoners and A "Universal" Recommendation to Improve Treatment*, 15 LAW & SEXUALITY 91, 114 (2006)

³¹⁴ See Scott, *supra* note 18, at 1296.

As the court in *Crosby* observed, the question of where to place transgendered inmates has no perfect answer.³¹⁵ However, despite lingering questions, there is a *better* answer—transgendered inmates must be housed in female facilities.

³¹⁵ *Id.*