

LOST IN THE GENDER MAZE: PLACEMENT OF TRANSGENDER INMATES IN
 THE PRISON SYSTEM

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This being human is a guest house.
 Every morning a new arrival.
 A joy, a depression, a meanness,
 Some momentary awareness comes
 As an unexpected visitor.
 Welcome and entertain them all!
 Even if they're a crowd of sorrows,
 Who violently sweep your house
 Empty of its furniture,
 Still, treat each guest honorably.
 ~ Rumi¹

Introduction

After being placed in a cell with two male inmates, Alexis Giraldo was repeatedly raped.² She informed prison officials of the continued, brutal sexual violence.³ She told them her second cellmate was holding her hostage.⁴ The prison system did not respond to her.⁵ After all, Giraldo should have opted for solitary confinement to protect herself from the general population of a male prison. She should have sat quietly, by herself, for 23 hours out of each day in a cell made for a violent, dangerous criminal. Not because Giraldo was the one perpetuating violence against other inmates, but because she was the victim of such violence ... and because she was a transgender inmate.

The plight of Alexis Giraldo, a transgender male-to-female, is one horror story out of the many suffered by transgender inmates across prison systems in the United States.

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¹ Jalaluddin Rumi, *On Being Human*, available at <http://findmeabluebird.blogspot.com/2006/12/rumi-on-being-human.html>.

² *Giraldo v. Cal. Dep't of Corr. & Rehab.*, 168 Cal. App. 4th 231 (Cal. Ct. App. 2008).

³ *Id.* at 239.

⁴ *Id.*

⁵ *Id.* Giraldo filed a civil suit against the correctional facility for intentional infliction of emotion distress and cruel and unusual punishment under the Eighth Amendment. The appellate courts revived the lawsuit in November 2008, "potentially exposing prison officials to negligence suits if they fail to protect their charges." See Evan Hill, *Calif. Appeals Court Revives Transgender Inmate's Claim Against Prison System*, THE RECORDER (Nov. 18, 2008) available at <http://www.law.com/jsp/article.jsp?id=1202426085079>.

Because transgender individuals do not fall within the conventional “male” or “female” categories in jails or prisons, they suffer a great deal of trauma when introduced into the criminal justice system. The prison system, entrenched in serious social biases and procedural safeguards against change, finds transgender individuals to be vessels for ridicule, jest, and abuse. Correctional officers and inmates participate in the continuous abuse of transgender inmates, providing them with little defense and limited resources from which to demand accountability. Because there is little to no guidance on booking and sentencing transgender persons, these individuals are lost within the prison system. In fact, their very existence is ignored by the social constructs of prison: the “male” or “female” checkbox on the initial booking sheets.

This article addresses one critical issue, of the many, faced by transgender inmates: placement into male or female prisons and holding cells based on genitalia instead of gender identification. Part I will address the definition of transgender under the legal system. Part II reviews the abuse suffered by transgender individuals from the humiliation in the initial booking process to the sexual assaults suffered repeatedly in prisons, based upon genitalia based prison placement. Part III analyzes the possible solutions to the placement problem, including self-identification based placement, administrative segregation, and Category B prisons. Part IV provides a few proposed solutions to provide relatively “quick” relief to transgender inmates while larger policy issues are battled out in this progressive society.

Transgender Identity Under the U.S. Legal System

Defining “transgender”⁶ within legal terminology is a daunting affair. The law draws lines between genders, male and female; transgender persons cross those lines.⁷ Transgender people are those “whose gender identity, their sense of maleness or femaleness, differs from their anatomical sex. This clash of sex and gender may cause a transsexual much emotional pain and they must ultimately deal with this issue in some way,”⁸ such as cross-dressing, hormone treatments, or sex-change operations. The problem with such a definition is that it does not fall within the parameters of legally

⁶ For purposes of this paper, “transgender” will be used to cover a variety of individuals, including “transsexuals, transvestites, cross-dressers, drag queens and rag kings, butch and femme lesbians, feminine gay men, intersexed people, bigendered people,” and others challenging the social constructs of sex and gender. Shannon Minter, *Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion in the Gay Rights Movement*, 17 N.Y.L. SCH. J. HUM. RTS. 589, 621 n. 4 (2000).

⁷ Debra Sherman Tedeschi, *The Predicament of the Transsexual Prisoner*, 5 TEMP. POL. & CIV. RTS. L. REV. 27, (1995). “Perhaps the transsexual prisoners would not pose such a problem to the legal and penal systems if their situations were analyzed from a perspective that takes into account the uniqueness of being a transsexual [person].” *Id.* at 27-29. Judges are generally incapable of looking beyond “gender-specificity” as proscribed by society. In *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring), Justice Bradley made this view of gender widely known, stating, “The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator.”

⁸ Stephen Whittle, *Respect and Equality: Transsexual and Transgender Rights* 3 (Cavendish Publishing 2002) (quoting San Francisco Gender Information Leaflet, 1992).

accepted language. The legal system defines individuals as male or female; when faced with a transgender person courts become frustrated, hammering litigants into one category or another, struggling to define the term “transgender.”⁹

This definitional struggle proves critical, as it highlights both the attitudinal changes towards transgender persons and the legal framework transgender persons exist in. In a 2004 case, *Kantaras v. Kantaras*,¹⁰ the court stated that “[t]he common meaning of male and female, as those terms are used statutorily, ... refer to immutable traits determined at birth.”¹¹ In *Littleton v. Prague*,¹² a Texas court classified transgender individuals as either male or female based on their chromosomal make up.¹³ The court found that a post-operative male-to-female transsexual was correctly classified as a male because her birth certificate classified her as a male and her chromosomes remained the same after surgery.¹⁴ Despite the fact that Littleton adjusted her body to her gender identity and amended her birth certificate, the court stated, “There are some things we cannot will into being. They just are.”¹⁵ In contrast, *In re Estate of Gardiner*,¹⁶ a 2002 Kansas case, rejected the theory that chromosomal makeup alone defines a transgender individual as a male or female. The court reversed the trial court’s determination that a post-operative male-to-female transsexual plaintiff was male because of her chromosomal makeup.¹⁷ The court held that additional factors were to be considered, including “gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity.”¹⁸ In the landmark Supreme Court case, *Farmer v. Brennan*,¹⁹ Justice Souter suffered criticism for providing a medical definition for a transgender individual, as “one who has ‘[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical

⁹ See *Littleton v. Prange*, 9 S.W.3d 223, 225 (Tex. App. 1999). In 1966, Harry Benjamin, an American endocrinologist, first defined transsexualism as a mental syndrome. See Nikko Harada, Comment, *Trans-Literacy Within Eighth Amendment Jurisprudence: De/Fusing Gender and Sex*, 36 N.M. L. REV. 627, 641 n. 150 (2006). Benjamin distinguished pre-operative transgender person, who did not request surgery, from moderate and high intensity “true” transgender person who sought surgery. Harry Benjamin, *The Transsexual Phenomenon*, 22, 30–31 (1966). This categorization remains noteworthy because it first introduced the still prevalent notion that demand for gender-related surgery is a central signifier of a “true” transgender individual. Most activists reject this categorization of transgender individuals as it purports that a transgender identity is a mental disorder rather than a “normal” identity.

¹⁰ 884 So. 2d 155 (Fla. Dist. Ct. App. 2004).

¹¹ *Id.* at 161. See also *Anonymous v. Weiner*, 270 N.Y.S.2d 319, 322 (Sup. Ct. 1966) (upholding Health Department’s denial of trans woman’s request to change the sex designation on her birth certificate given that she was still chromosomally male).

¹² 9 S.W.3d 223 (1999).

¹³ *Id.* at 230.

¹⁴ *Id.* at 231.

¹⁵ *Id.*

¹⁶ 22 P.3d 1086, 1110 (Kan. Ct. App. 2001), *aff’d in part, rev’d in part* 42 P.3d 120 (Kan. 2002), *cert. denied sub nom Gardiner v. Gardiner*, 123 S.Ct. 113 (2002).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 511 U.S. 825 (1994).

sex,' and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change."²⁰

The various definitions of transgender persons under the legal sphere prove nothing more than this: there is no categorical place for a transgender person in a societally motivated common law system.²¹ This lack of a categorical place is the basis for problems faced by transgender individuals in all arenas of life, especially when it comes to the criminal justice system.

Transgender Individuals in the Prison System: The Facts

Let the Abuse Begin: Initial Booking Protocol

Humiliation, abuse, and confusion in the criminal justice system start at the very outset for transgender persons. In 2003, the Transgender Law Center and National Center for Lesbian Rights conducted a survey of 150 transgender persons, finding that 14% of the survey respondents reported experiencing discrimination in jail or prison.²² The discrimination experienced by transgender individuals starts at the booking phase, when individuals are initially housed in jail before being charged or sentenced. Once a transgender individual is brought into a lock up facility, the question becomes: where do we put them? The criminal justice system classifies arrestees as male or female; housing them accordingly. However, there is no set protocol as to where a transgender individual must be housed.²³

In 2006, a 27-year-old Seattle resident divulged that he and his roommate, both pre-operative males transitioning to females, were arrested by Seattle police in 2005 and booked into King County Jail.²⁴ After spending more than 10 hours in a holding cell, a

²⁰ *Id.* at 829, quoting American Medical Association, *Encyclopedia of Medicine* 1006 (1989).

²¹ A critical problem with defining transgender is that it is a modern term, coming into existence in the late 1940s. Whittle, *supra* note 8. The legal system in the United States progresses as society progresses, defining terms as they land in the hands of courts. The lack of intense societal change and pressure, combined with a lack in cases calling for a new legal category, hampers any attempt to clearly define transgender individuals under the legal system. This paper does not attempt to create a definition for "transgender," but instead focuses on the plight of self-identifying transgender individuals in the criminal justice system.

²² Letter from Christopher Daley, Director, Transgender Law Center to National Prison Rape Elimination Commission, 2 (Aug. 15, 2005), available at <http://transgenderlawcenter.org/pdf/prisonrape.pdf>. It must be noted that this number refers to the total number of participants, not only to individuals who reported going to jail or prison. That being said, it is statistically possible that *all* transgender individuals who have experience with the jail or prison system have suffered discrimination based on their gender identity. *Id.* ("[T]his assumption would mean that 100% of survey respondents who went to jail or prison faced discrimination there because they are transgender.") *Id.*

²³ Lornet Turnbull, *County Adopts Guidelines on Transgender Inmates*, *The Seattle Times*, (Dec. 21, 2006), available at

http://www.thetaskforce.org/TF_in_news/07_0103/stories/7_seattletimes_cityadoptsguidelines.pdf.

"Nationally, no state has a comprehensive policy for transgender inmates in prison." *Id.*

²⁴ *Id.*

male nurse told the pair they would have to lower their pants to prove their gender.²⁵ The pair had not initially self-identified as transgender because they did not feel safe enough to do so.²⁶ Their fears were realized when the harassment began. The pair had male genitalia, though they identified themselves as women. Once they were forced to pull their pants down, they were placed in female colored clothes and underwear and repeatedly taunted by the guards.²⁷ In response to this ordeal, King County adopted a policy outlining how transgender men and women should be booked and housed in King County.²⁸ The policy prohibits strip searches to determine an inmate's sex and requires staff to address these inmates by their last names instead of "Mr." or "Ms."²⁹ The policy requires arrestees to self-identify as a transgender individual, failing to address the issue of further harassment after self-identification. The policy also fails to deal with the issues raised by housing a transgender female in a holding cell with male prisoners because "officials need flexibility and [the] assignment of transgender inmates will be 'genitalia driven.'"³⁰

The lack of protocol is hotly debated in the District of Columbia, especially after the treatment of Ruby Corado, a transgender inmate with female genitalia, created a buzz when she was placed in a male jail facility.³¹ After an arrest for "simple assault," Corado faced severe victimization under a legal system ill prepared to handle transgender persons. The marshal taunted her with comments such as "[w]hat do we have under here" because Corado had large breasts.³² She was strip searched in a room full of men and asked to urinate, standing up, in a cup in front of everyone else.³³

These examples highlight the lack of protocol in place for booking transgender individuals at the very beginning of the criminal justice system. After many cases similar to Corado, the D.C. Trans Coalition met with the Department of Corrections (DOC) to discuss this gaping hole in the criminal justice system.³⁴ The Coalition filed an official complaint after a member of the Coalition found a directive entitled "Gender Housing

²⁵ *Id.* A point to be noted is that there is difference between "sex" and "gender." Referring to the individual's "gender" based upon genitalia demonstrates the lack of understanding at most criminal facilities.

²⁶ Turnbull, *supra* note 23.

²⁷ *Id.* One guard "referred to transgender people as freaks, asking why any man want to cut his genitals off." *Id.*

²⁸ *Id.*

²⁹ *Id.* King County General Policy Manual, Department of Adult and Juvenile Detention, Adult Division, Page available at <http://www.transgenderlaw.org/resources/KingCountyTransJailPolicy.pdf>.

³⁰ Turnbull, *supra*, note 23.

³¹ Yusef Najafi, *Uncommon Decency: Transgender Women Prepare to File Lawsuit in Response to Treatment in D.C. Jails*, Metro Weekly (Apr. 3, 2008), available at

<http://www.metroweekly.com/gauge/?ak=3345>. Corado decided to find other transgender individuals who suffered at the hands of the D.C. jail system and filed a suit in 2007. *Id.*

³² *Id.*

³³ *Id.*

³⁴ Najafi, *supra* note 31. See generally Yusef Najafi, *Transforming Corrections: D.C. Trans Coalition Continues Effort to Amend DOC Guidelines on Transgender Inmates*, Metro Weekly (July 10, 2008), available at <http://www.metroweekly.com/gauge/?ak=3628>. The coalition's demands include access to clothing, cosmetics, hormone therapy, and inmate privacy during strip searches. *Id.*

and Classification Memorandum” on the D.C. Inspector General’s website.³⁵ The directive, a combined product of the Office of Human Rights and the DOC, states that the “DOC shall classify an inmate who has male genitals as a male and one who has female genitals as a female, regardless of the individual’s gender expression.”³⁶ As with the King County policy, the DOC directive failed to address the fact that prison placement of transgender individuals based on genitalia does not solve the inherent problems in placement. Corado was only in jail for 2 days, but these matters get increasingly worse the longer one stays.³⁷

Prison Sentences ... More Time, More Violence

Placement within the prison system is central to the safety concerns of transgender individuals.³⁸ While federal prison officials have no formal policy on transgender inmates, the rule of thumb is genitalia specific placement. An individual with a penis will be placed in a male facility and an individual with a vagina will be placed in a female facility. There is no consideration of gender identification,³⁹ non-genital appearance, or the problems that can result.

Dee Farmer was a transgender person who had already gone through several years of hormonal therapy, resulting in substantial feminization, including silicon breast implants and a failed surgical removal of her testicles.⁴⁰ She was placed in a male maximum-security prison.⁴¹ Another case, the first of its kind, dealt with reclassification of gender based on genitalia. Richard Masbruch was convicted in 1993 of brutally raping and torturing a woman.⁴² While in jail, Masbruch castrated himself, was re-classified as a woman, and sent to a woman’s prison.⁴³ An inmate complaint filed against Masbruch indicated Masbruch was a danger to other prisoners at the women’s facility. Since

³⁵ Najafi, *supra* note 31.

³⁶ *Id.* Letter from Charles J. Willoughby Inspector General, District of Columbia, (Apr. 4, 2008), *available at* http://oig.dc.gov/news/view2.asp?url=release08%2FMAR_standard_distribution_letter_transgender.pdf&mode=iande&archived=0&month=20084.

³⁷ Najafi, *supra* note 31.

³⁸ The Sylvia Rivera Law Project, *It’s War in Here: A Report on the Treatment of Transgender and Intersex People in New York State Men’s Prisons*, 18 (2007), *available at* <http://www.srlp.org/files/warinhere.pdf>.

³⁹ Najafi, *supra* note 31.

⁴⁰ *Farmer*, 511 U.S. at 829 (1994). In addition to the lack of funds available for expensive sex-change operations, activists also argue that such operations should not be necessary to recognize the self-chosen gender of an individual. See also Jerry L. Dasti, Note, *Advocating a Broader Understanding of the Necessity of Sex- Reassignment Surgery Under Medicaid*, 77 N.Y.U. L. REV. 1738, 1764 (2002) (“One objection to the classification of sex-reassignment surgery as medically necessary is the implication that transgender identities are disorders requiring treatment.”).

⁴¹ *Farmer*, 511 U.S. at 852 (Blackmun, J., concurring).

⁴² *People v. Masbruch*, 920 P.2d 705, 708 (Cal. 1996).

⁴³ Chris Collins, *Transgender Inmate Faces Complaint: Woman Who Was A Man in Chowchilla Prison For Rape*, Fresno Bee (Dec. 5, 2008), *available at* <http://prisonmovement.wordpress.com/2008/12/06/transgender-inmate-faces-complaint/>.

Masbruch was convicted of rape, a “crime of power,” there remained a serious risk he could potentially rape a woman in the confines of a women’s prison.⁴⁴

Both scenarios demonstrate the arbitrary and potentially harmful outcomes of genitalia-based placement. It does not even take into consideration the fact that most transgender individuals do not have the funds to undergo sex-reassignment surgery, nor the fact that they may not find a surgery necessary to define their gender identity.⁴⁵ As noted by Thomas R. Frieden, New York City’s health commissioner in 2006, “Surgery versus nonsurgery can be arbitrary... Somebody with a beard may have had a breast-implant surgery. It’s the permanence of the transition that matters the most.”⁴⁶ The prison systems, and the judges responsible for sentencing, function in a crude oversimplification of gender identity in deciding transgender placements. At best, the classification denies transgender individuals the right to their own gender identity. At worst, it places them in the barbaric hierarchy of prison systems that subjects the weak to the strong.

The *Farmer* Standard

The somewhat ambiguous Eighth Amendment⁴⁷ prohibition on “cruel and unusual punishments” has birthed much debate and uncertainty throughout American history. The Supreme Court has accordingly acknowledged the difficulty of interpreting the prohibition’s fundamentally subjective terms.⁴⁸ Specifically, for transgender prison issues under the Eighth Amendment,⁴⁹ the Court found prison officials are required to protect prisoners from violence at the hands of other prisoner and correctional officers.⁵⁰

⁴⁴ *Id.*

⁴⁵ Damien Cave, *New York Plans to Make Gender Personal Choice*, N.Y. TIMES, Nov. 7, 2006, available at http://www.nytimes.com/2006/11/07/nyregion/07gender.html?_r=1&ex=1165986000&en=9efbb9dc726fe0c3&ei=5070. In 2006, New York City considered allowing people alter the sex on their birth certificate through self-identification, even without a sex-change operation. While a handful of states “do not require surgery for such birth certificate changes... in some of those cases patients are still not allowed to make the change without showing a physiological shift to the opposite gender.” *Id.* Under the proposed plan, an individual, over 18, can change her sex as she “1) has changed her name; 2) has ‘lived in the acquired gender for at least two years’; and 3) has submitted ‘two affidavits, demonstrating ... full transition to and intended permanence in ... her acquired gender.’” Kenji Yoshino, *Sex and the City: New York City Bungles Transgender Equality*, SLATE (Dec. 11, 2006), available at <http://www.slate.com/id/2155278/pagenum/all/>. The proposal was contested by state institutions, including the jail system, and was eventually withdrawn. *Id.*

⁴⁶ Cave, *supra* note 45.

⁴⁷ The Eight Amendment states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. AMEND VIII.

⁴⁸ See *Furman v. Georgia*, 408 U.S. 238, 258 (1972) (Brennan, J., concurring) (“The Cruel and Unusual Punishments Clause . . . is not susceptible of precise definition.”); *Wilkerson v. Utah*, 99 U.S. 130, 135–36 (1879) (“Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted . . .”). The Supreme Court admitted that its Eighth Amendment jurisprudence does not provide clear guidelines as to what is cruel and unusual. *Trop v. Dulles*, 356 U.S. 86, 99 (1958) (“The exact scope of the constitutional phrase ‘cruel and unusual’ has not been detailed by this Court.”).

⁴⁹ *Supra* note 47.

⁵⁰ *Farmer*, 511 U.S. at 833 (1994).

Prison officials who display “deliberate indifference” to the violence perpetuated upon prisoners do not violate the Eighth Amendment, “unless the official knows of and disregards an excessive risk of inmate health or safety.”⁵¹ In *Farmer*, a male-to-female transgender person was badly beaten and raped by her male cellmate in a maximum-security prison.⁵² The court held that to establish an Eighth Amendment violation an official must have actual, subjective knowledge that the prisoner is at risk of violence and then deliberately fail to act.⁵³ Often, this “actual subjective knowledge” comes too late for transgender inmates.⁵⁴

Rape & Violence – Violence Continues After *Farmer*

The *Farmer* standard allows abused transgender inmates a remedy after the fact. However, the key issue is that such abuse is rampant against transgender individuals in prison because they are perceived to be “weak.” An unreasonable risk of harm is established when the prisoner shows there is a strong likelihood that violence would occur.⁵⁵ In this vein, the entire class of transgender inmates is at risk. Prison officials have “actual subjective knowledge” of the real threat of violence against these inmates as soon as they enter the prison system.⁵⁶ Genitalia-based classification puts transgender prisoners at special risk for sexual violence especially in male prisons where femininity is equated with weakness.

One transgender individual joined a prison gang for her safety. While it afforded some protection, the price was having to perform frequent sex services to her fellow gang members.⁵⁷ One transgender inmate recalls prison officials responding to complaints by saying, “act like a man!”⁵⁸ The inmate, only 123 pounds, was raped on a daily basis, making complaint after complaint, with no success.⁵⁹ In a letter to the Office of Mental Health, the inmate describes another incident in which her face was smashed into a wall by a correctional officer after she asked, politely, that he not touch her; “[He was]

⁵¹ *Id.* at 837.

⁵² *Id.* at 825.

⁵³ *Id.* at 842. See *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1157 (D. Haw. 2006) (the court found deliberate indifference where juvenile facility lacked adequate policies, training or supervision necessary to ensure safety of lesbian, gay, bisexual or transgender individuals).

⁵⁴ See generally *Lucrecia v. Samples*, 1995 WL 630016 (N.D. Cal. 1995) (finding no Eighth Amendment violation where prison officials transferred male-to-female transsexual prisoner, who had developed breasts and had her testicles surgically removed, from female prison to male prison, where she was subjected to constant verbal, physical, and sexual harassment and assault by other prisoners and by prison guards).

⁵⁵ *Farmer*, 511 U.S. at 837 (1994). See Laura K. Langley, *Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities*, 12 TEX. J. C.L. & C.R. 101, 109 (2006) (transgender individuals are seen as weak, and “understood not only as socially deviant [but] their deviations are read as abnormal and unnatural,” creating a mental process in prisons that easily allows their subjugation).

⁵⁶ See *Greene v. Bowles*, 361 F.3d 290, 295 (6th Cir. 2004) (a transsexual prisoner who was attacked by another inmate had raised a triable issue of fact as to deliberate indifference “because of her status as a vulnerable inmate.”).

⁵⁷ Daley, *supra* note 22, at 7.

⁵⁸ The Sylvia Rivera Law Project, *supra* note 38, at 19.

⁵⁹ *Id.* at 19-20.

tugging at my sweater. I'm hurt, cause he's not to put his hands on females, and that being the case why did he put his hands on me? 'I'm a woman.'⁶⁰ In another case, a transgender woman was being held in administrative segregation, pending a federal asylum decision.⁶¹ She was pulled into a cell close to hers and was raped.⁶² An attorney who visited her three days later could still see the bite marks at the top of her breast, right below her collarbone.⁶³

Dominant inmates seek to rape inmates who are young, effeminate, or gay. Victims rarely report these rapes because other prisoners "punish" snitches. Even if they do report the assaults, it would fall on deaf ears of correctional officers often involved in the abuse; the *Farmer* standards rarely come into play, because few rape reports make it out of the cell block. For example, an inmate in a San Francisco jail sued the county in 2002 because a Sheriff's Deputy forced her to perform sex shows for others.⁶⁴ The Deputy then threatened he would "get her once she was released."⁶⁵ Because of this top-down pattern of harassment and abuse it is probable that most imprisoned transgendered women are raped or abused on a regular basis. Yet, despite this actual knowledge, there is rarely an Eighth Amendment violation.

Solutions Debated

A study on rape in California prisons found that 59 percent of transgender individuals in prison reported being sexually assaulted in 2006, a striking number compared to the 4 percent of the general prison population that reported sexual assault.⁶⁶ Even within the gay community, transgender individuals are among the most likely to be "beaten, raped, and killed."⁶⁷ With this information at the tips of prison officials' fingers, it is unclear why corrections officers and officials do not readily expect violence against transgender individuals. Taking these statistics of violence into consideration, there is an argument that simply placing transgender individuals into a general population prison is a violation of the Eighth Amendment as per *Farmer*.⁶⁸ However, the hanging question is: where to house transgender individuals?

⁶⁰ *Id.* at 20. The inmate had a nervous breakdown because her facial hair started growing, due to her smashed face, and she was deprived of a razor and shower facilities.

⁶¹ Letter from Christopher Daley, Director, Transgender Law Center to National Prison Rape Elimination Commission, 7 (Aug. 15, 2005), available at <http://transgenderlawcenter.org/pdf/prisonrape.pdf>.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Daley, *supra* note 60.

⁶⁶ Lewis Wallace, *Transgendered Behind Bars*, In *These Times* (Oct. 31, 2007), available at http://www.inthesetimes.com/article/3372/transgendered_behind_bars/.

⁶⁷ Minter, *supra* note 6, at 592.

⁶⁸ See *infra* Part II. B (1). See e.g., *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) ("[Prison] conditions must not involve the wanton and unnecessary infliction of pain . . .").

Placement Based on Self-Identification

The framework of self-identification generally envisions that an individual should decide for herself whether she identifies as male or female, rather than being forced into a definition by prison officials, judges, and doctors. Prison placement based on self-identified gender would be an ideal resolution for transgender individuals.⁶⁹ Such placement could reduce the risk of sexual assault on those individuals.⁷⁰ However, such self-identified placement has its own consequences including: (1) violence against female-to-male inmates in a male prison; (2) the potential violence perpetuated by male-to-female transgender individuals in women's prisons; and (3) violating the rights of non-transgender inmates.

The first problem is that placing a pre-operative transgender female-to-male in a men's prison would likely result in sexual assault upon the transgender individual. As discussed above, the hierarchy of male prisons is set up to feed off weaker individuals in prison.⁷¹ Pre-operative transgender females will still have a vaginal opening, will likely have some feminine features, and will likely be a target of sexual assault by other male prisoners in the system. In fact, a pre-operative female-to-male may not feel safe in a male prison due to these reasons and may prefer to be housed in a women's prison even though he does not identify as a female.⁷²

The second problem with placement based on self-identification is that pre-operative male-to-female transgender inmates pose a threat to the safety of female inmates. While this may seem unrealistic to transgender individuals,⁷³ it is a critical issue when concerning the placement of a transgender inmate that has been sentenced for a

⁶⁹ See also Kenji Yoshino, *Sex and the City: New York City Bungles Transgender Equality*, SLATE (Dec. 11, 2006) ("We rightly give broad leeway to individuals to declare their sexual orientation, religion, political affiliation, and even...race. Sex is different from these other classifications, because we have historically believed it to turn on a stable, biologically based binary," and this assumption is precisely "what transgender activists are contesting.").

⁷⁰ See generally Tedeschi, *supra* note 7. In Struckman-Johnson's 1996 and 1999 studies it was clear that female inmates perpetrated half of all incidents of sexual abuse upon other female inmates. See The Prison Rape Reduction Act of 2002: Hearing for S. 2619 Before the S. Comm. on the Judiciary, 107th Cong. 13-23 (2002) (statement of Robert W. Dumond, Member, Board of Advisors, Stop Prison Rape, Inc.), available at www.access.gpo.gov/congress/senate/pdf/107hr/87677.pdf. This is similar to the inmate assaults experienced by "weaker" men in prisons.

⁷¹ See *infra* Part II.

⁷² There is an argument here that transgender individuals should be allowed the leeway to choose placement either based on their gender identity *or* where they feel the safest. However, this argument is not sound because it provides for a great amount of subjectivity, which is not allowable in the prison systems.

⁷³ See Letter from American Civil Liberties Union of Delaware to Federal Bureau of Prisons, (Dec. 22, 2006) available at <http://www.aclu-de.org/pdf/Redacted%20ACLU%20Letter%20to%20BOP%20re%20Tanya%20Bowie%2012.22.06.pdf>. The ACLU has noted that when placing male-to-female inmates in a women's prison, "it is important to remember that transgender women do not, because of their gender identity, pose any risk of harm to other females." *Id.* at 2. In fact, "Transgender women are...women and they face the same risk of physical harm and sexual abuse that other women would face if placed in a men's facility." *Id.*

violent sex crime.⁷⁴ As in the case of Masbruch,⁷⁵ placing a violent rapist in a women's prison after he castrated himself.⁷⁶ Prison authorities tend to place sex offenders in the general prison population, failing to take into account the threat they pose to other inmates.⁷⁷ Another example occurred in Quebec where a pre-operative male to female woman, Tania Veilleux, was convicted for sexually assaulting a young girl for four years.⁷⁸ Veilleux was held at a prison for women in Montreal, but the other inmates expressed discomfort being housed with someone who had sexually assaulted another female.⁷⁹ Though the Registrar of Civil Status of Quebec recognized Veilleux as a female, she still had male genitals.⁸⁰ When Veilleux was given the final sentence, she was moved to a men's prison, for safety of the female inmates.⁸¹ This potential for violence against female inmates creates a substantial social barrier against placement based on self-identification.

Another problem with such placement finds basis in legality. Placing a pre-operative transgender individual based on self-identified gender as opposed to sexual organs may violate other inmates' rights in prison. Female inmates may not feel comfortable sharing space with a transgender woman because it deprives them of privacy.⁸² While the court in *Crosby v. Reynolds*⁸³ has held that housing a pre-operative transgender person in a women's prison does *not* violate another female prisoner's privacy rights, the court did not *prevent* or *encourage* such placements.⁸⁴ In fact, the court did not hold that prison authorities had unbridled authority to decide whether to house a transgender inmate in a women's prison.⁸⁵ However, the actual privacy issue was not addressed – the court merely focused on the fact that the officials were not liable because the right to privacy was unclear with regards to such placements.⁸⁶ Consequently, the issue of the other inmates' right to privacy still exists for straight inmates as much as it does for transgender inmates.

These three issues demonstrate both legal and social problems with placing transgender inmates in a jail compatible with their self-identification.

⁷⁴ See, *infra* Part II. (B).

⁷⁵ *People v. Masbruch*, 920 P.2d 705, 708 (Cal. 1996).

⁷⁶ *Id.*

⁷⁷ In *Redman v. County of San Diego*, 942 F.2d 1435, 1437-39 (9th Cir. 1991) an eighteen-year-old boy was placed with another inmate known for being an “aggressive homosexual.” The correctional officers were aware of this reputation, but were not careful in placing another inmate with him. The inmate repeatedly raped the boy during his time in prison.

⁷⁸ Sidhartha Banerjee, *Transsexual Quebec Inmate to Serve Time in Male Prison*, The Canadian Press (Dec. 24, 2008), available at <http://www.paherald.sk.ca/index.cfm?pid=13&cpcat=national&stry=61312030>.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² 763 F. Supp 666, 668 (D. Me. 1991).

⁸³ *Id.* at 666.

⁸⁴ *Id.* at 669.

⁸⁵ *Id.* at 669-70.

⁸⁶ *Id.* at 670.

Administrative Segregation

Another alternative, and currently the most prevalent one, is administrative segregation of transgender inmates.⁸⁷ Some activists argue that transgender inmates should automatically be placed in administrative segregation to protect them from the general population.⁸⁸ However, other activists find that administrative segregation is a polite term for “solitary confinement,” a tool used to regulate more violent and dangerous offenders in prison.⁸⁹

In a 1982 New York case, *Schipski v. Flood*,⁹⁰ the court found that Nassau Correctional Center’s policy of locking down all protective custody inmates for 22 hours per day violated the detainees’ due process rights under the New York State constitution.⁹¹ Despite this ruling, inmates in New York may apply for administrative segregation in a special hearing.⁹² “If granted, the inmate is held in an individual cell for 23 hours a day, just as inmates punished for disciplinary reasons are held.”⁹³ While prison officials find this to be an acceptable way of protecting transgender inmates from the general population, there are many reasons to reject segregation as a long-term solution to genitalia-based prison placement.

One problem is that administrative segregation acts as punishment for transgender individuals who want to be safe. Even in prison, inmates refer to administrative segregation as “prison,” viewing it as “punishment” because it is more restrictive.⁹⁴ In *Meriwether v. Faulkner*,⁹⁵ a pre-operative transgendered woman complained that she was

⁸⁷ *Transsexual Convict Wins*, N.Y. TIMES (Apr. 16, 1983) available at <http://query.nytimes.com/gst/fullpage.html?res=9502E7DA1638F935A25757C0A965948260>. (“A convicted bank robber who is undergoing a sex change has won an injunction to prevent her from being confined with men in any penitentiary. Federal District Judge Raul Ramirez suggested that . . . Ann Marie Mostyn, who was born a man, be placed in “administrative segregation in a hospital setting.””).

⁸⁸ Lornet Turnbull, *Transition to Fairness*, The Seattle Times (Dec. 18, 2006) available at http://seattletimes.nwsourc.com/html/localnews/2003482879_transpolicy18m.html?syndication=rss.

⁸⁹ Emily Alpert, *Transgender Prisoners Face Discrimination, Harassment, and Abuse Above and Beyond That of Traditional Male and Female Prison Population*, In The Fray (Nov. 20, 2005), available at <http://inthe fray.org/content/view/1381/39> (“Many individual confinement pens are intended for short-term punitive stays, or for highly aggressive, violent prisoners.”).

⁹⁰ 88 A.D.2d 197 (N.Y. App. Div. 2d. 1982).

⁹¹ *Id.* at 199-200. The case focused on blanket rules and it is argued that it does not apply to self-chosen segregation as is the case with transgender individuals. See Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41, 49 (2000) (arguing that the Eighth Amendment’s prohibition against cruel and unusual punishments was intended to bar certain modes of punishment).

⁹² Paul von Zielbauer, *New York Set to Close Jail Unit for Gays*, N.Y. TIMES (Dec. 30, 2005) available at http://www.nytimes.com/2005/12/30/nyregion/30jails.html?_r=1.

⁹³ *Id.*

⁹⁴ Alpert, *supra* note 89. Some argue that prison is not meant to be a “pleasant” social existence where everything is readily available for inmates. See, e.g., *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) (“The very object of imprisonment is confinement. Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner.”) However, solitary confinement for 23 hours a day is more restrictive than the rights provided to other prisoners.

⁹⁵ 821 F.2d 408 (7th Cir. 1987).

denied adequate “recreation, living space, educational and occupational rehabilitation opportunities, and associational rights for nonpunitive reasons,” because she was placed in administrative segregation for her own protection.⁹⁶ In 2006, a Delaware court placed a transgender woman in solitary confinement after she was harassed repeatedly.⁹⁷ The inmate’s attorney argued that her crimes – writing two counterfeit checks – did not warrant long-term solitary confinement.⁹⁸

Another issue with this preferred solution to transgender placement is that it shifts the burden of safety onto the transgender individual instead of placing it on the prison system. If a transgender individual wants human interaction, and is assaulted while in the general population, that individual is responsible for the attack perpetuated on him or herself – because, after all, the state supplied them a ready alternative to the dangers of the general population. Administrative segregation reinforces the view that transgender individuals deserve to be punished more harshly than regular inmates, simply because of their decision to cross gender boundaries. Therefore, while protective administrative segregation is a common option in the prison system for transgender individuals, it is not a viable long-term alternative.

Category B Prisons

In 2005, New York shut down the only other option available in the state for transgender individuals – a “Category B” prison in Rikers Island that housed individuals that declared themselves to be homosexuals, “or appear[ed] to be transgender, and ask[ed] to be kept out of Rikers’s main jail.”⁹⁹ The unit, reserved for pre-trial detention, opened in the late 1970s to deal with complaints about abusive treatment of transgender inmates by the New York prison system.¹⁰⁰ The closing of this facility caused an outrage in the transgender community because it took away a viable, relatively safe option for transgender individuals to have some form of human interaction in the prison system without being subjected to repeated violence.¹⁰¹

⁹⁶ *Id.* at 416.

⁹⁷ *Delaware Court Stumped Over Transgender Inmate*, Gay Wired (Nov. 17, 2006), available at <http://www.pinknews.co.uk/news/articles/2005-3026.html>.

⁹⁸ *Id.*

⁹⁹ von Zielbauer, *supra* note 92.

¹⁰⁰ *Jail for Gay, Transgender Inmates to Close*, USA Today (Dec. 19, 2005) available at http://www.usatoday.com/news/nation/2005-12-29-rikers-inmates_x.htm.

¹⁰¹ *Id.* Some activists argue that a segregated prison unit is not the best solution because it does not allow transgender individuals to function in a “normal” societal environment. However, prison systems are not indicative of “normal” societal environments and some concessions will have to be made. Prison officials also argue that prison is not the place for “social interaction,” in fact it is a form of punishment for a crime. *Overton*, 539 U.S. 126, 131 (“An inmate does not retain rights inconsistent with proper incarceration. . . . And, as our cases have established, freedom of association is among the rights least compatible with incarceration.” *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 125–26 (1977) (“Perhaps the most obvious of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison walls.”).

Because it was the only unit where “inmates could choose where they wanted to live,” prison officials argued that the unit was a playground for predators and vulnerable people.¹⁰² Ignoring the fact that the general prison population is a playground for predators, the facility was shut down and no other housing option was provided to transgender inmates, aside from solitary confinement.¹⁰³ Since the closing of Rikers, no New York State prison has opened such a unit, and there are no such units anywhere under the Federal Bureau of Prisons.

Proposed Solutions ... Practical Necessities of Now

An increasing number of international standards recognize transgender individuals as their own category, in addition to “male” and “female.”¹⁰⁴ This lack of specification, combined with the core principle of non-discrimination in the free world, provides for the assumption that transgender individuals deserve the right to preserve their inherent dignity, despite being in the prison system. Like the international world, American correction institutions need to adapt to changing inmate populations. When race became an issue, correctional facilities changed their policies; correctional facilities should now adjust their policies for transgender individuals as well.¹⁰⁵

The role of a lawyer in the transgender fight is two fold: as an advocate, “zealously assert[ing] the client’s position under the rules of the adversary system” and as a negotiator, “seek[ing] a result advantageous to the client but consistent with requirements of honest dealings with others.”¹⁰⁶ Lawyers need to negotiate with societal values as they stand today to make more immediate changes in the prison placement of transgender inmates. While there are wider policy issues,¹⁰⁷ the proposed solutions below deal with short-term solutions in order to provide necessary relief for transgender individuals while larger issues are being debated.

¹⁰² von Zielbauer, *supra* note 92.

¹⁰³ *Supra* note 100.

¹⁰⁴ The United Nations Standard Minimum Rules for the Treatment of Prisoners states that “men and women shall so far as possible be detained in separate institutions.” Human Rights Watch, *Transgender Prisoners, Identity, and Detention: Policy Recommendations*, 8 (Mar. 1, 2006) available at http://www.outcast-films.com/films/cu/transgender_prisoners.pdf. However, there is no specified definition of “men and women.” *Id.* The Basic Principles for the Treatment of Prisoners states that “[a]ll prisoners shall be treated with respect due to their inherent dignity and value as human beings.” *Id.* Internationally, transgender rights were most forcefully affirmed in *Van Kuck v. Germany* where the court said that “the applicant’s freedom to define herself as a female person” was “one of the most basic essentials of self-determination.” *Id.*

¹⁰⁵ Destina Parker, *Transgender Women in Prison: Cruel or Just*, HELIUM, available at <http://www.helium.com/items/631603-transgender-women-in-prison-cruel-or-just>.

¹⁰⁶ Model Code of Prof’l Conduct, preamble (2007).

¹⁰⁷ Dean Spade, *Resisting Medicine, Re/Modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 30 (2003) (“The history of legal struggles for trans rights, of course, has been dominated by judicial decisions which would not recognize gender transition at all.”).

Proposed Solution: Mandatory Training Curriculum for Deputies, Guards, and Officers

Before implementing any policies regarding transgender individuals, it is imperative to address the inherent bias against transgender persons in the social hierarchy of the prison system. If the correctional officers dealing with inmates and arrestees on a daily basis are not socialized *against* verbally harassing and physically abusing transgender inmates, the prisoners will not stop either.

- (1) Bi-yearly training: Prison officers should receive bi-yearly training by qualified outside trainers to increase awareness of transgender issues. After three years of bi-yearly training, the trainings should be lessened to once a year.
- (2) Model curriculum: A written curriculum should be created through the federal prison system in conjunction with transgender activists and psychologists to facilitate the trainings. The curriculum should focus on making the officers more aware of their own prejudices and making them more sensitive to the issues dealt with by transgender inmates.
- (3) Interactive sessions: Each training session should be interactive, forcing officers to work with transgender volunteers brought in by the trainers, while being observed by trained psychologists to evaluate the interactions.

Proposed Solution: Written Policies for Booking Transgender Persons

In conjunction with mandatory training curriculum, new state and federal booking policies need to be developed and implemented to prevent the humiliation faced by transgender individuals at the beginning of the process. The policies should address the following issues:

- (1) Recording a transgender person's legal sex: There are appropriate ways to determine a transgender person's sex on booking forms. One way to make the determination is asking for a government issued ID that should state sex.¹⁰⁸ If

¹⁰⁸ Most, if not all, states that permit a trans individual to amend the sex designation on her birth certificate require that she have undergone gender-related surgery. Therefore, it is unlikely that a transgender individual's driver license will reflect their preferred gender identity if they are pre-operative. However, this simple inquiry may make it easier for transgender individuals who do not wish to self-identify as a transgender individual for fear of discrimination. See, e.g., ALA. CODE § 22-9A-19(d) (2009); ARIZ. REV. STAT. ANN. § 36-337(A)(3) (2009); ARK. CODE ANN. § 20-18-307(d) (2008); CAL. HEALTH & SAFETY CODE §§ 103425, 103430 (West 2009); COL. REV. STAT. § 25-2-115(4) (West 2009); D.C. CODE ANN. § 7-217(d) (2009); GA. CODE ANN. § 31-10-23(e) (2008); HAW. REV. STAT. § 338-17.7(4)(B) (2008); 410 ILL. COMP. STAT. 535/17(1)(d) (2009); LA. REV. STAT. ANN. § 40:62 (2008); MASS. GEN. LAWS ch. 46, § 13(e) (2009); MICH. COMP. LAWS SERV. § 333.2831(c) (West 2009); MO. REV. STAT. § 193.215(9) (2009); N.J. STAT. ANN. 26:8-40.12 (West 2009); N.M. STAT. ANN. § 24-14-25(D) (2009); N.C. GEN. STAT. 130A-118(B)(4) (2009); OR. REV. STAT. § 432.235(4) (2009); VA. CODE ANN. § 32.1-269(E) (2009).

no ID is available, and it is necessary to record the arrestee's legal sex, a strip search may be permitted but transgender individuals should be offered the choice of being searched by a male or female officer. The preference and consent of the transgender arrestee should be documented and signed to ensure that written policies are being followed.

- (2) Placing a transgender person in a gender-appropriate holding cell: If an individual identifies as a transgender, they should be placed in a private holding cell to segregate them from other inmates for safety reasons.

Proposed Solution: Re-Opening Category B Prisons

Aside from making administrative segregation available to transgender inmates, the only other viable solution to prison placement that can be implemented without resolving larger social issues is the re-opening of Category B prisons.¹⁰⁹ While it was not an ideal situation to begin with, it was at worst a segregated community and at best a safer environment for transgender individuals than general population prisons.

The main reason cited for shutting down the unit at Rikers's Island was that it was a playground for sexual predators because the inmates were allowed to self-identify. To prevent such occurrences, Category B prisons should develop policies addressing:

- (1) Special hearings for placement: Many states, including New York, require a special hearing before placing a transgender inmate into administrative segregation. Similarly, self-identifying transgender persons should be required to apply for a Category B placement through a special hearing process, allowing the court to evaluate the request.
- (2) Psychiatric evaluation for placement:¹¹⁰ While many activists are staunchly against referring to transgenderism as a medical illness, a line must be drawn at psychiatric evaluations assessing whether an individual fits under the definition of a transgender person.¹¹¹ To assuage the prison system's fear that

¹⁰⁹ There are long-term issues that need to be parsed out through social and political debate regarding the definition of sex and gender under the legal system. This article is not focused on those broader concepts, focusing instead on more immediate solutions.

¹¹⁰ Spade, *supra* note, 107 at 34 ("The first response that always comes up [in the context of the medical model] . . . is the argument that trans people do not want to be seen as 'disabled.'") While it is *not the ideal solution, it is more easily accessible and immediate* than asking that transgender individuals be placed as per their subjective gender-identification. The Sylvia Rivera Law Project recommends that transgender individuals should be placed based upon their own assessment of where they will be the safest. However, such placements will be hotly contested on a social and legal level. It is a disservice to transgender inmates to stop searching for an accessible short-term solution while fighting for larger changes. *Supra* note 38 at 35.

¹¹¹ See, e.g., Spade, *supra* note 107, at 30 ("[Compromises over the use of medical evidence/evaluations] are necessitated by the fact that most of the successful legal claims for trans equality have come through strategic use of the medical model of transsexuality.") Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in *Transgender Rights* 3, 7–13 (2006) (comparative analysis of two cases involving

sexual predators will self-identify as a transgender person just to be in a mixed Category B unit where they can victimize other inmates, pre-placement psychiatric evaluations are an acceptable and rational compromise. The evaluation will not be used to “treat” transgender inmates, but will function as a tool to make a placement decision. Furthermore, the evaluation must rise above the diagnoses of Gender Identity Disorder (“GID”)¹¹² calling for a more comprehensive understanding of transgender individuals using medical protocol.¹¹³

- (3) More attention to placement of sexual assault convicts: Prison officials need to create policies addressing the placement of violent sexual offenders in the prison system, especially when it comes to placement in Category B prisons. Violent rape and other such sexual offenses are crimes of *power* where one individual overpowers a “weaker” individual. Individuals who have committed such crimes should not be placed in Category B prisons to prevent the victimization of transgender individuals.

Proposed Solution: Accountability in the Prison System

Trainings, policy changes, and Category B prisons will make little difference unless the prison accountability system is reshaped. Prison officials, correction officers, and other prison employees must be made accountable for the mistreatment of transgender individuals (and other inmates).

- (1) Confidential complaint procedures: Prison systems should be accessible to human rights organizations to provide transgender individuals with one-on-one support in which they can quickly and confidentially report abuse in the

student dress code violations; argued that the use of transgender medical evidence likely helped one student’s disability discrimination claim succeed where the other student’s sex discrimination claim failed); *See e.g., Phillips v. Mich. Dep’t of Corr.*, 731 F. Supp. 792, 800 (W.D. Mich. 1990) (holding that GID constitutes a serious medical need and that plaintiff was entitled to preliminary injunction to continue hormone therapy that she had begun pre-incarceration); *Wolfe v. Horn*, 130 F. Supp. 2d 648, 652 (E.D. Pa. 2001) (“Courts have consistently considered transsexualism a ‘serious medical need’ for purposes of the Eighth Amendment.”).

¹¹² According to the American Psychiatric Association, GID is a rare mental condition characterized by “strong and persistent cross-gender identification . . . [accompanied by] persistent discomfort about one’s assigned sex.” AMERICAN PSYCHIATRIC ASS’N, *Diagnostic and Statistical Manual of Mental Disorders* 576–82 (4th ed., text rev. 2000). *See* 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, 731 (2005) (“Because the experiences of many gender nonconforming people do not match the diagnostic criteria of GID . . . the medical model of gender does not serve the vast majority of gender nonconforming people.”); Spade, *supra* note 106, at 25. (“The diagnostic criteria for GID produces a fiction of natural gender in which normal, non-transsexual people grow up with minimal to no gender trouble.”).

¹¹³ Romeo, *supra* note 112, at 732 (“Gender nonconforming people who do not articulate their experiences of gender in a manner that comports with the diagnostic criteria for GID are often refused hormone treatments, surgeries, or other gender-related health care.”).

prison system. Reporting abuse to prison officials has proved, repeatedly, detrimental to the safety of transgender inmates.

- (2) Additional training for officers accused of harassing transgender inmates: Officers accused of harassing transgender inmates should be required to attend additional trainings on handling transgender inmates. The requirement of such trainings should be noted in the officer's personnel file to maintain accurate records.

Conclusion

There are no easy answers to the placement of transgender individuals in the prison system. The prison system is entrenched in social and political stigmas, making legal change difficult. Transgender individuals stand in the middle of this complex system, trying to navigate the maze of human rights, trying to hold on to basic human dignity that is the inherent right of an individual. The potential proposals included in this piece focus on making that maze a little more navigable, while the battle to bring down the maze's walls is being fought outside the prison system.