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## "Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism

Darren Rosenblum

*Elisabeth Haub School of Law at Pace University*

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"TRAPPED" IN SING SING:  
TRANSGENDERED PRISONERS  
CAUGHT IN THE GENDER BINARISM

*Darren Rosenblum\**

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\* Associate, Clifford Chance Rogers & Wells L.L.P. Law Clerk to the Honorable José Antonio Fusté, United States District Court of Puerto Rico, 1996–98; B.A., 1991 & J.D., 1995, University of Pennsylvania. So many people have helped me with this article, I cannot possibly thank them all. Phyllis Randolph Frye, Ray Hill, Dee Farmer, Dr. Barbara Warren, Rosalyne Blumenstein, Riki Wilchins, Melinda Whiteway, and Moe Miller all assisted me with the community research necessary for this Article. Finally I thank those whose encouragement and assistance brought this Article to fruition: Susan Sturm, Regina Austin, Marjorie Rifkin, Frank Valdes, Darren Kowitz, Laura Appleman, Dan Levison, Jami Weinstein, Kristin Taylor and Dhanjai Shivakuman.

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A transgendered woman,<sup>1</sup> who has undergone extensive hormonal therapy and cosmetic surgery, is convicted and imprisoned. Because

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1. 'Transgendered' is a term that includes all people who consider themselves to be of a different sex than their assigned birth or genetic sex. 'Transgendered' has largely replaced 'transsexual' within the community due to its fluidity and lack of emphasis on the operation often referred to as a 'sex change.' See Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 32-33 n.130 (1995); GORDENE OLGA MACKENZIE, *TRANSGENDER NATION* 55-56 (1994). Transgendered women and men are people whose current sex identity does not match that into which they were born or were assigned at birth. The terms "pre-operative" and "post-operative" refer to genital transformation surgery. In describing transgendered people, I will follow the wide use of 'transgendered woman' to indicate someone who is at some stage of transition toward becoming a

she still has a penis, albeit a nonfunctioning one, prison officials categorize her as a male, and place her in a men's prison. "You were born a boy, and you're going to stay a boy," the prison doctor says,<sup>2</sup> rejecting continuation of her long-term estrogen treatment. Her body begins to regain the masculinity she had largely escaped. Bruised by the changes,<sup>3</sup> her body no longer feels like her own, but one imposed on her by the criminal justice system. Her femininity stands out among the male prisoners who repeatedly rape and beat her. Trapped,<sup>4</sup> not only in her body, but in a prison that refuses to recognize and respect her gender<sup>5</sup> identity, she castrates herself with glass and used razors.<sup>6</sup> The prison hospital's hands forced, it finishes the job. Then, to compensate for the lost masculinity, the doctor orders testosterone replacement treatments. After this fails to restore her masculinity, the prison doctors return her to the estrogen treatments that preceded her incarceration.

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woman, and 'transgendered man' to indicate someone 'transitioning' toward becoming a man.

2. Ann Sweeney, Gannett News Service, June 1, 1989 *available in* 1989 WL 4846119 (quoting Dr. Darryl Opicka).
3. Bruising and nausea are common results of withdrawal of estrogen treatment. *See, e.g., Sweeney, supra* note 2.
4. Transgendered people commonly speak of their situation as being "trapped in the wrong body," a prison metaphor that reflects the doubly incarcerated nature of transgendered prisoners' experiences. *See, e.g., Inmate's Transsexual Suit Tossed*, OMAHA WORLD HERALD, Mar. 8, 1994, at 18 (stating that Keith Smith, who prefers to be called Andrea Stevens, claims to be a "woman trapped in a man's body"). However transgendered writer and activist Kate Bornstein criticizes this hackneyed phrase as inaccurate: "I understand that many people may explain their pre-operative transgendered lives in this way, but I'll bet that it's more likely an unfortunate metaphor that conveniently conforms to cultural expectations, rather than an honest reflection of our transgendered feelings." KATE BORNSTEIN, GENDER OUTLAW 66 (1994).
5. "Gender" and "sex" have distinct meanings: "gender" denotes identity and traits related to sex, including the "masculine" and the "feminine." Katherine Franke makes the distinction that "[s]ex is regarded as a product of nature, while gender is understood as a function of culture." Franke, *supra* note 1, at 1. The vast majority of what is understood as an indicator of sex really refers to gender. *See Franke, supra* note 1, at 2. Because I subscribe to Franke's analysis of gender and sex, I will almost exclusively use "gender," a term that reflects the predominance of nonbiological components in one's "sex" identity.
6. *Cf.* Telephone Interview with Dee Farmer (Aug. 5, 1997)[hereinafter Farmer Interview]; Douglas K. Smith, *Transsexualism, Sex Reassignment Surgery and the Law*, 56 CORNELL L. REV. 963, 972 (1971)(quoting a 1945 Swiss court opinion referring to genital self-mutilation by a transgendered person); Frank Green, 'Woman' Inmate Hates Man's Body: Officials Deny Request for Estrogen Treatment, RICHMOND TIMES DISPATCH, July 20, 1997, at C6 (discussing Michelle Stokes' repeated self mutilation, including genital mutilation, as a result of denial of estrogen treatments).

Shockingly, several transgendered women have experienced similar ordeals.<sup>7</sup> This Article will examine this human rights tragedy and explore its vital relevance.<sup>8</sup> Many transgendered prisoners have HIV, are people of color, are lesbian, gay, or bisexual, and/or are incarcerated for property crimes or prostitution related to their quest for transformation. Their condition demonstrates flaws both multiple and fundamental in the hierarchization of gender, sexual orientation, race, class, and deviance. Transgendered prisoners' position both behind bars and at society's bottom rung crystallize such problems into an array of intermingled and overwhelming legal dilemmas.

This Article first summarizes gender, transgendered identity, and legal issues facing transgendered people to contextualize the lives of transgendered prisoners. Parts II and III explore respectively the placement and treatment issues that complicate the incarceration of the transgendered. Corrections authorities, through indifference or incompetence, foster a shockingly inhumane daily existence for transgendered prisoners. In Part V, I examine the plight of transgendered prisoners through the metaphor of the miners' canary.<sup>9</sup> Transgendered

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7. See *Farmer v. Brennan*, 511 U.S. 825, 830 (1994); *Supre v. Ricketts*, 792 F.2d 958, 960 (10th Cir. 1986).
  8. Three law review articles discuss transgendered prisoners. The first, Marjorie Rifkin, *Farmer v. Brennan: Spotlight on an Obvious Risk of Rape in A Hidden World*, 26 COLUM. HUM. RTS. L. REV. 273, 275 (1995), centers on the situation of Dee Farmer, whose case before the Supreme Court drew attention to the problem of transgendered prisoners. The second, Debra Sherman Tedeschi, *The Predicament of the Transsexual Prisoner*, 5 TEMPLE POL. & CIV. RTS. L. REV. 27 (1995), deals with a few prominent cases and briefly suggests solutions to the problems of transgendered prisoners. The third, Anita C. Barnes, *The Sexual Continuum: Transsexual Prisoners*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 599 (1998), discusses transsexual housing and treatment issues, focusing on protective custody, and criticizes definitions of sex used by prisons. This Article attempts to promote the liberal project of addressing transgendered prisoners' needs by systematically examining all their problems and many new potential solutions. The Article also introduces three elements of critical theoretical import of the mistreatment of transgendered prisoners. First, the prison system's difficulty in accommodating transgendered prisoners lies in their adherence to the gender binarism. Second, the experience of transgendered prisoners, through the miner's canary metaphor, points toward the need for a rethinking of all gender constructs. Third, the experience of transgendered prisoners demonstrates the need for the establishment of gender rights. In contrast to the previous articles on this topic, this Article does not focus exclusively on the liberal interpretation of transgendered prisoners' issues, but instead delves into the theoretical issues raised by their situation and identity.
  9. Miners often placed canaries where they labored in order to gauge the toxicity of the mine's gases. The bird's illness or death alerted miners to dangers in the mine. See discussion *infra* Part V.A.

prisoners signal the grave dangers facing all of us in a wide array of social structures, elucidating the apparently intractable problems of gender.<sup>10</sup> This Article simultaneously explores a human rights tragedy and proposes practical solutions while taking a critical perspective on the issues raised.

## I. GENDER, TRANSSEXUALITY AND TRANSGENDERISM

Transgendered identities challenge and provide new direction for inquiry on gender, both advancing and interrogating the feminist critique of the construction of gender.<sup>11</sup> The multiplicity of gender disproves the notion of the male/female binarism. The phenomenon of transsexuality has yielded to a transgender movement, made up of diverse transgendered identities.

### A. *The Gender Spectrum*

The rigid dichotomy of gender identity, what I call the gender binarism, is inconsistent with fundamental biological and psychological realities.

#### 1. The Construction of Sex and the Reality of Gender

Sex, defined as "either of two divisions of organisms distinguished respectively as male or female,"<sup>12</sup> does not exist. Although most people accept that there are two sexes, "male" and "female," these categories actually contain a myriad of genders, formed genetically, biologically and culturally.<sup>13</sup> "Each of the so-called criteria of sexedness is itself a continuum—including chromosomal variables,

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10. The goal of this Article then is to draw lessons from the experiences of transgendered prisoners through a close look at their attempts to improve their lives. *But see*, RIKI ANNE WILCHINS, READ MY LIPS: SEXUAL SUBVERSION AND THE END OF GENDER 22 (1997) [hereinafter WILCHINS, READ MY LIPS] (expressing skepticism about feminist scholarship on transgendered people).

11. Indeed, this argument has been advanced by Marjorie Garber in her noted study of transvestitism. *See generally*, MARJORIE GARBER, VESTED INTERESTS (1992).

12. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1078 (1987).

13. *See* Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, THE SCIENCES, Mar./Apr. 1993, at 20–21.

genital and gonadal variations, reproductive capacities, [and] endocrinological proportions.”<sup>14</sup> Scientists generally agree that there are seven gender traits that constitute one’s gender identity: 1) Chromosomes; 2) Gonads; 3) Hormones; 4) Internal reproductive organs; 5) External genitalia; 6) Secondary sexual characteristics; and 7) Self identity.<sup>15</sup> These seven variables classify the distinct elements of gender identity.<sup>16</sup>

The ubiquity of the categories “male” and “female” cannot prove its veracity as the irreducible essence of gender. Such categories truncate the diversity of gender identity.<sup>17</sup> The psychological component of “self identity” renders the simple male/female dichotomy useless. From the football jock and the trucker to the fey hairdresser and the cyber geek, from the tomboy to the cheerleader, this potpourri of gender identity leaves the categories “male” and “female” wanting. Given such diversity, some would go so far as to argue that there are as many genders as there are people.<sup>18</sup>

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14. JOHN STOLTENBERG, REFUSING TO BE A MAN 28 (1989).

15. These factors are detailed by Douglas K. Smith. See Smith, *supra* note 6. Fifteen years later, the New York Supreme Court of New York County used the exact formulation cited above in *Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995) (holding that a pre-operative transgendered female was protected by New York City’s sex discrimination statute as a member of the class of males).

16. See Fausto-Sterling, *supra* note 13, at 21 (promoting the notion of multiple gender factors).

17. This Article will not directly address the relevance of my theory of the gender binarism to feminist theory. Rather, the multiplicity of gender conforms quite closely to what I interpret as the spirit of contemporary anti-essentialist feminist theory. For a fuller discussion of the relationship between transgender identity and feminist theory, see Terry S. Kogan, *Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled “Other”*, 48 HASTINGS L.J. 1223 (1997).

The purported difference between men and women is as alive as ever as demonstrated by the popularity of John Gray’s *MEN ARE FROM MARS, WOMEN ARE FROM VENUS*. Such pop psychology may appear benign, but contributes to the compulsory participation in the gender binarism. See Daniel P. Levison and Meredith S. Francis, *Compulsory Gendering: The Central Organizing Principle of Sex Discrimination Theory and Practice* 9 (unpublished manuscript on file with author).

18. See STOLTENBERG, *supra* note 14, at 28. The failure to recognize this diversity is a particular failing of this culture. Cultures from Ancient Greece to India, as well as various others around the world, recognized the existence of hermaphrodite, or intersex, individuals and cross-gender identified individuals without forcing them into either of the male or female genders. See LESLIE FEINBERG, *TRANSSEXUAL WARRIORS* 39–47 (1996).

## 2. The Gender Binarism

The discrete categories of "male" and "female" did not always control sexual identity.

Biological theories of sexuality, juridical conceptions of the individual, forms of administrative control in modern nations, led little by little to rejecting the idea of a mixture of the two sexes in a single body, and consequently to limiting the free choice of indeterminate individuals. Henceforth, everybody was to have one and only one sex. Everybody was to have his or her primary, profound, determined and determining sexual identity; as for the elements of the other sex that might appear, they could only be accidental, superficial, or even quite simply illusory.<sup>19</sup>

Presuming a natural and biological foundation of sexual difference, the law obsessively assigns gender identity according to the gender binarism.<sup>20</sup> Legal procedures around interpersonal relationships require the categorization of one's gender, sometimes quite explicitly called a "sexual declaratory judgment hearing."<sup>21</sup> For "inheritance, legitimacy, paternity, succession to title, and eligibility for certain professions to be determined, modern Anglo-Saxon legal systems require that newborns be registered as either male or female."<sup>22</sup> Legal and societal processes assign a gender to individuals in a coercive fashion that rewards conformity to the norm and punishes nonconformity.<sup>23</sup>

The gender binarism so tightly requires the attribution of gender that the power of medicine is employed to transform intersex bodies into categorizable ones: as a matter of course, babies born with an "aberrant" mix of gender traits are quickly "repaired" to, at least physically, comply with the "M" or the "F" box on a birth certificate.<sup>24</sup>

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19. MICHEL FOUCAULT, *HERCULINE BARBIN: BEING THE RECENTLY DISCOVERED MEMOIRS OF A NINETEENTH CENTURY FRENCH HERMAPHRODITE* viii (1980).

20. See Franke, *supra* note 1, at 40.

21. See Franke, *supra* note 1, at 41.

22. Fausto-Sterling, *supra* note 13, at 23.

23. See Levison & Francis, *supra* note 17, at 8.

24. Identifying a baby's gender is the first entry into this gender binarism for most people. See Smith, *supra* note 6, at 967 ("Doctors examine a newborn's external genitalia and make the fateful determination that appears on official birth records.")



This same medical power has also been summoned to physically transform a person from one “sex” to the “other” when that person’s psychological gender identity diverges from the physical.<sup>25</sup> Transgendered people break the confines of the gender binarism to give voice to the real breadth of gender identity.

### *B. Transsexuality and Transgenderism*

Courts have defined ‘transsexualism’ as “a gender identity disorder,” the sufferers of which believe that they are “cruelly imprisoned within a body incompatible with their real gender identity.”<sup>26</sup> For transgendered prisoners, such “double imprisonment” requires that they resort to medical arguments that reflect the established view of transgenderism as a medical phenomenon.<sup>27</sup> Such medical arguments have proven persuasive.<sup>28</sup> Doctors, psychiatrists, and researchers have taken an active role in studying and advancing gender transformative processes.<sup>29</sup> The “illness” has been labelled gender dysphoria,<sup>30</sup> the medical condition of psychological dissonance with one’s physiological gender. For example, Dee Farmer, plaintiff in *Farmer v. Brennan*,<sup>31</sup>

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25. See MACKENZIE, *supra* note 1, at 41.

26. *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) (quoting *Farmer v. Moritsugu*, 163 F.3d 610, 611 (D.C. Cir. 1998) (quoting THE MERCK MANUAL OF MEDICAL INFORMATION 418 (1997))).

27. See Hasan Shafiqullah, *Shape-Shifters, Masqueraders, & Subversives: An Argument for the Liberation of Transgendered Individuals*, 8 HASTINGS WOMEN’S L.J. 195, 215–17 (1997) (discussing the difference between medical and legal determinations of gender identity).

28. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 829–31 (1994); *Meriwether v. Faulkner*, 821 F.2d 408, 410 (7th Cir. 1987).

29. For a strong critique of the medical establishment’s work in male-to-female transsexuality, see generally JANICE G. RAYMOND, *THE TRANSSEXUAL EMPIRE: THE MAKING OF THE SHE-MALE* (1994). For an examination of female-to-male transsexuals, see generally LESLIE MARTIN LOTHSTEIN, *FEMALE-TO-MALE TRANSSEXUALISM: HISTORICAL, CLINICAL AND THEORETICAL ISSUES* (1983). For a social psychologist perspective on transsexuality, see generally BRYAN TULLY, *ACCOUNTING FOR TRANSSEXUALISM AND TRANSHOMOSEXUALITY: THE GENDER IDENTITY CAREERS OF OVER 200 MEN AND WOMEN WHO HAVE PETITIONED FOR SURGICAL REASSIGNMENT OF THEIR SEXUAL IDENTITY* (1992). For a social and medical study, see generally DAVE KING, *THE TRANSVESTITE AND THE TRANSSEXUAL* (1993).

30. See generally, ROBERT J. STOLLER, *SEX AND GENDER* (1968); 2 ROBERT J. STOLLER, *SEX AND GENDER: THE TRANSSEXUAL EXPERIMENT* (1975); ROBERT J. STOLLER, *SPLITTING: A CASE OF FEMALE MASCULINITY* (1973).

31. 511 U.S. 825 (1994).

was described by Justice Souter as "a transsexual, one who has '[a] rare psychiatric disorder [gender dysphoria] in which a person feels persistently uncomfortable about his or her anatomical sex,' and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change."<sup>32</sup> This relatively facile description of transsexuality retains wide currency despite the complexity of transgenderism.

The predominant understanding in the transgendered community is that transgendered identity is not a principally medical condition, although physical and psychological treatments and therapies can aid a transgendered person to arrive at a healthy gender identity.<sup>33</sup> Rather than finding a "cure" for gender dysphoria, a healthy gender identity involves resolving the relationship among the various factors constituting gender, not "fixing" the physical or the psychological to meet the other. The use of the word 'transgender' in place of 'transsexual' reflects this shift away from the historical primacy of medical treatment,<sup>34</sup> toward a growing awareness of the psychological element of gender identity.

Initially, the word 'transgender' was used to describe people who were neither crossdressers nor transsexuals—people whose gender transformation was more than a change of clothes but not quite a change of sex.<sup>35</sup> 'Transgender' grew into a useful umbrella term, including and not subordinating the proliferation of transgendered people who avoid medical treatment. 'Transsexual'<sup>36</sup> refers to 'sex' rather than 'gender,' a biological emphasis that excludes psychological gender identity.<sup>37</sup> 'Transgendered' recognizes the extrabiological nature of gender.<sup>38</sup>

The shift to 'transgender' rather than 'transsexual' reflects some hostility toward the medicalization of cross-gender identity. As one commentator argues "[b]y buying into the medical model's treatment

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32. *Farmer v. Brennan*, 511 U.S. at 829.

33. See *Farmer v. Hawk-Sawyer*, 69 F.Supp.2d 120, 122–23 (D.D.C. 1999).

34. See generally, MACKENZIE, *supra* note 1, at 5–6.

35. See WILCHINS, *READ MY LIPS*, *supra* note 10, at 15–16.

36. The term 'transsexual' was first used by D.O. Cauldwell in *Psychopathia Transsexualis*, 16 *SEXOLOGY* 274, 275 (1949), and was popularized in the widely-used text HENRY BENJAMIN, *THE TRANSSEXUAL PHENOMENON* (1966).

37. See BORNSTEIN, *supra* note 4, at 30–31.

38. See Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *YALE L.J.* 1, 15–16 (1995).

for transsexualism, transsexuals become dependent on medical caretakers throughout their lives for hormones and surgical repairs to the surgery that is offered as a panacea for their suffering.”<sup>39</sup> Others inquire more deeply into the meaning of gender itself, questioning whether surgery is necessary to live life as the ‘other’ sex.<sup>40</sup>

Although some post-operative transsexuals resent those who do not undergo surgery,<sup>41</sup> more transgendered people are recognizing the right of individuals to define their own gender, regardless of the role of medical treatment. Activists such as Leslie Feinberg and Kate Bornstein argue for a transgender movement without regard to individual choices about medical treatment. As Kate Bornstein, transgendered writer and performer, states: “One answer to the question ‘Who is a transsexual?’ might well be ‘Anyone who admits it.’ A more political answer might be, ‘Anyone whose performance of gender calls into question the construct of gender itself.’”<sup>42</sup>

### *C. Categorizing Transgendered People*

Transgendered people include all those whose gender identity departs from the sex determined at birth.<sup>43</sup> It includes those who choose to alter their sex, either temporarily or permanently, through cosmetic medical means. A ‘transgendered person’ is both a man who occasionally wears women’s clothes as well as a woman who, through medical and surgical techniques, acquires male features. Such a broad term includes a myriad of subcategories. No category can perfectly define its members, yet this section attempts an approximate categorization of transgendered people at different degrees of transformation.

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39. Case, *supra* note 38, at 20.

40. See Dallas Denny, *Gordene MacKenzie’s Transgender Nation: A Commentary*, 7 *TRANSISTERS: J. OF TRANSEXUAL FEMINISM* 44 (1995).

41. See BORNSTEIN, *supra* note 4, at 121.

42. BORNSTEIN, *supra* note 4, at 121.

43. *Interview with Rosalyne Blumenstein*, PEOPLE WITH AIDS COALITION NEWSLETTER, Apr. 1996, at 22; see also, BORNSTEIN, *supra* note 4, at 68–69 (outlining different transgendered subcommunities and their negative regard for each other, including post- and pre-operative transsexuals, transgenders, drag queens, transvestites and closet case transvestites).

## 1. The "Post-operative" Transgendered

Post-operative transgendered people undergo a lengthy process to convert from their initial sex to the "other sex." First, candidates for "sex reassignment"<sup>44</sup> undergo regular psychiatric counseling to determine if their gender dysphoria would be genuinely reduced by sex reassignment surgery (SRS).<sup>45</sup> The candidate then must live dressed as her desired gender for one to two years in order to test the appropriateness of SRS.<sup>46</sup> During that period, many transgendered women begin hormonal treatments and cosmetic surgery such as breast augmentation, facial cosmetic surgery, and other procedures such as electrolysis. The amalgam of these procedures generally refers to a fully transformed, "post-operative" transgendered person. There are several forms of SRS for men, the most common of which, vaginoplasty, involves gutting and inverting the penis to create a vagina.<sup>47</sup> Scrotal tissue is used to fashion a clitoris to complete this relatively short and often successful operation.

Transgendered males, who may comprise half of all transsexuals,<sup>48</sup> require phalloplasty, the surgical creation of a penis by clitoral enlargement or rolling skin from another part of the body and attaching it to the body "like a suitcase handle."<sup>49</sup> The latter procedure has a more attractive result but a far lower success rate. Both procedures are far more expensive than vaginoplasty, and thus many more

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44. The widely used term 'reassignment' indicates the degree to which medical terminology dominates discourse concerning transsexuals. The reassignment presumably is performed by the surgeon who fashions the new genitalia. Although I have seen the word 'transformation' used in its place, 'reassignment' is still very much a current term.

45. See, e.g., Christine Beatty, *Toxic Thinking, Part One: Elitism*, 7 *TRANSISTERS: THE JOURNAL OF TRANSEXUAL FEMINISM* 46, 47 (1995) (for use of the term).

46. See Smith, *supra* note 6, at 973 (describing the detailed procedure followed at the Gender Identity Clinic at Johns Hopkins University); see also, Nick Cohen, *The Rose-Tinted Murderer*, *THE OBSERVER*, Sept. 15, 1996, at 3 (describing the SRS process).

47. I rely on Kate Bornstein's description of SRS. Bornstein points out that one doctor sometimes adds a bit of intestinal tubing to provide lubrication, although unlike a vagina, the constructed vagina will lubricate regardless of sexual excitement. See BORNSTEIN, *supra* note 4, at 17.

48. The estimate of half seems common. See, e.g., BORNSTEIN, *supra* note 4, at 16; Emily Yoffe, *Becoming a Man*, *DETAILS*, Nov. 1994, at 56, 58. But see, RAYMOND, *supra* note 29, at xiii (asserting that 85% of all transsexual surgery transforms men into women, because "men, being freer to experiment than women, seek out and submit to the surgery more often").

49. BORNSTEIN, *supra* note 4, at 16; Yoffe, *supra* note 48, at 60.

transgendered males than transgendered females remain pre-operative or non-operative.<sup>50</sup>

## 2. Transgendered People in Transformation

Transgendered people in transformation includes two groups of transgendered people: those who are moving toward SRS and those who are moving toward or are at a level of transformation achieved through medical intervention without SRS. The often-used term “pre-operative” includes transgendered people who have begun the pre-operative transformation, engaging in exclusive crossdressing, hormonal therapy, and cosmetic and other surgery. Many pre-operative transgendered people have undergone several operations except the genital transformative one, making the term “pre-operative” a not very accurate one.

Estrogen significantly feminizes men, softening facial and body features, reducing body and facial hair growth, and shrinking and disabling the penis.<sup>51</sup> Testosterone treatment for transgendered men, which leads to shrinkage of breasts, increased bodily and facial hair growth, and clitoral enlargement, has not been deemed to be as medically safe as estrogen.<sup>52</sup> Breast implantation and removal can also achieve significant transformative effects. Procedures such as electrolysis speed the transformation. Ms. Farmer, the plaintiff in *Farmer v. Brennan*, for example, is a pre-operative transsexual because she had

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50. See MACKENZIE, *supra* note 1, at 20.

51. The extent to which a transgendered woman's penis is nonfunctioning varies from partial or complete incapacity to become erect to shrinkage. Another related issue is whether the transgendered woman still may ejaculate, and if so, whether reproduction may occur. This possibility arises in situations where transgendered women with partially functioning penises are placed with other women who might be impregnated through sexual contact with the transgendered woman. See Phillips v. Michigan Dep't of Corrections, 731 F.Supp. 792, 794 n.4 (W.D. Mich. 1990); BORNSTEIN, *supra* note 4, at 18; Telephone Interview with Dr. Audrey Compton, Director of Corrections Health Programs at the Health and Hospitals Corporation of New York City (July 28, 1997) [hereinafter Compton Interview] (discussing sex between transgendered women and other women).

52. Testosterone treatments for transgendered males is considered by some to be more experimental. The New York City corrections system requires transgendered prisoners to sign a waiver before they may receive treatments since the hormones have not been approved for such use. See Compton Interview, *supra* note 51.

silicone breast implants, regular hormonal treatments, but an unsuccessful testicle-removal operation.<sup>53</sup>

In addition to pre-operative transgendered people, transgendered people in transformation also include men and women who have undergone hormonal treatments and/or cosmetic surgery to modify their bodies but do not plan to undergo SRS.<sup>54</sup> Many transgendered males achieve a high degree of transformation without attempting SRS, recognizing the limits of current phalloplastic techniques. Mastectomies and hysterectomies, for instance, erase some notable elements of a female body.<sup>55</sup>

### 3. Untreated Transgendered People

Untreated transgendered people do not undergo genital surgery or any other medical procedure to further their gender transformation. This group includes people who crossdress either exclusively or infrequently. Transvestites, crossdressers, and drag kings and queens regularly or irregularly present themselves as another gender. Others deconstruct gender lines through their clothing and self-presentation.<sup>56</sup> Their largely impermanent transgendered identity may not require medical accommodation by the prison system.

### 4. Lesbian and Gay Transgendered People

Some transgendered activists estimate that over forty percent of transgendered people are lesbian, gay, or bisexual, a percentage four times higher than that commonly assumed to exist in the broader population.<sup>57</sup> Often, the discrimination faced by transgendered people

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53. See *Farmer v. Brennan*, 511 U.S. at 825, 829 (1994).

54. Transgendered women who do not intend to undergo SRS face the gravest problems in prison because they are classified by the prison system as men despite their feminization.

55. See *TRANSSEXUALISM AND SEX REASSIGNMENT* 113 (Michael Ross & William Walters eds., 1986).

56. See Beatty, *supra* note 45, at 46–47.

57. The International Conference on Transgender Law and Employment Policy, Inc. has performed a study which estimates the percentage of transgendered people who are lesbian or gay to be 40% to 50% (study on file with author). The landmark study of sexuality by Alfred Kinsey indicated that only a small percentage of transvestites are homosexual. See ALFRED KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 680 (1953).

evokes homophobia.<sup>58</sup> One might presume then that for many the subversion of traditional gender identities occurs alongside any veering from compulsory heterosexuality.<sup>59</sup> Although no necessary connection exists between transgendered and gay identities, the separation of such phenomena for legal purposes cannot erase the reality that many transgendered people are lesbian, gay, or bisexual.<sup>60</sup> The intersection of these identities forces transgendered people to confront homophobia, often without the support of lesbian and gay communities that sometimes exclude transgendered perspectives from their agenda.<sup>61</sup>

All transgendered people, from the fully transformed to those who dabble in crossdressing, confront a wide range of legal and social difficulties. The next section addresses these legal issues and argues for a right to gender identity as a solution not only for transgendered people in the free world, but for those in prison.

### 5. A Note Concerning Transgendered Men

Although transgendered men comprise about half of the transgender population, case law generally addresses the concerns of transgendered women. There is a concomitant skewing of scholarship toward this group.<sup>62</sup> Reasons for the lack of emphasis on transgendered men include the fact that most gender clinics were directed at transgendered women rather than men; that phalloplasty is a relatively recent and expensive procedure compared with vaginoplasty; and per-

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58. See Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L. REV. 329, 375 (1999).
  59. Compulsory heterosexuality is the term employed by Adrienne Rich to indicate the multifaceted face of heterosexual ideology and how it requires heterosexuality. See Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in THE LESBIAN AND GAY STUDIES READER 227, 228 (Henry Abelove et al. eds., 1993).
  60. See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995).
  61. See WILCHINS, READ MY LIPS, *supra* note 10, at 44-45. Indeed, the proposed Employment Non-Discrimination Act (ENDA) excludes transgendered people, if for the more prosaic reason that such inclusion would deprive ENDA of twenty votes in Congress. See PAT CALIFIA, SEX CHANGES: THE POLITICS OF TRANSGENDERISM 240 (1997).
  62. See David G. O'Brien, *Jeldness v. Pierce: Will the Requirements of Title IX 'Handcuff' Prison Administrators?*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 73, 87-88 (1996).

haps most importantly, that there is male bias in the perspectives of researchers. Also, social pressures prevent women from self expression of gender and sexual identity.<sup>63</sup> The result is that many transgendered men choose to retain their female genitalia permanently. The gender binarism creates castes of transgendered people, in which the "post-operative" reap the approbation of the legal categorization of their acquired gender, including the right to marry someone of their former gender.<sup>64</sup> Because of the relative difficulty of female-to-male surgery, transgendered men find themselves without the perks of full transformation.

#### *D. The Shape of Transphobia*

Legal problems facing transgendered people in the free world help contextualize the situation of transgendered prisoners. Legal authorities generally presume the existence of only two sexes, creating a wide range of legal problems, such as "identity" problems (arising from the contrast of the previous and present gender in official documents), "category" problems, such as public bathroom use, and problems of discrimination.

##### 1. "Identity" Issues

"A person's sex becomes fixed by operation of a court order, not by virtue of an ambiguous natural order."<sup>65</sup> Even in the free world, various legal complexities accompany the transgendered in their renegotiation of their public identity during and after their transformations. "Identity" problems arise in nearly every area of daily life. The discrepancy between one's official identity, which appears on a license or social security card, and one's present identity may only be rectified through application to the appropriate authorities.<sup>66</sup> The official

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63. See LOTHSTEIN, *supra* note 29, at 6-7, 14, cited in GARBER, *supra* note 11, at 101.

64. See generally, BORNSTEIN, *supra* note 4, at 121.

65. Franke, *supra* note 1, at 52.

66. Generally, one must file an application in a state court for a name change. See, e.g., *In re Eck*, 245 N.J. Super. 220 (1991) (reversing lower court's denial of application for name change by transgendered female); see generally, Aeyal M. Gross, *Rights and Normalization: A Critical Study of European Human Rights Case Law on the Choice and Change of Names*, 9 HARV. HUM. RTS. J. 269, 281 (1996); Sheila Lee Pearson, *In*



sanctioning of gender identity poses a burden on transgendered people. One post-operative transgendered woman moved from Minnesota to Idaho with her new husband. She had licenses for her gun and for driving, which were issued prior to her transformation. The local police learned of her transgendered identity and, early one morning, arrested her for illegal possession of a weapon and for fraudulent marriage.<sup>67</sup> This woman was able to demonstrate her rights only by means of an examination of her genitalia. Essentially, the law criminalized transgendered identity for violating its dualistic conception of gender.<sup>68</sup> Such problems arise incessantly for a pre-operative or non-operative transgendered person, exposing them to permanent victimization by the law's gender binarism that forces people into either the category "male" or "female."

## 2. "Category" Problems

Category problems are those that arise when a transgendered person enters into a space defined for "males" or "females." Many transgendered people, especially those in transition, try to avoid such situations. For example, they might avoid showering at the gym or avoid using public bathrooms.<sup>69</sup> Those with fixed gender identities often object to having a transgendered person use the bathroom of their sex. A pre-operative transgendered female would likely feel more comfortable in a women's bathroom, where she may reapply her makeup and retain privacy by using stalls. However, many women object to, and indeed the law forbids, having a human with a penis in their bathroom.<sup>70</sup> Thus pre-operative transgendered females are often

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*re McIntyre: A Victory for Pre-Operative Transgender Persons*, 8 L. & SEXUALITY 731 (1998) (discussing the controversy over name changing).

67. See Melinda Whiteway, Address at National Lesbian and Gay Lawyers' Association Conference (Nov. 1994).

68. See Shafiqullah, *supra* note 27, at 195.

69. Susan Solomon provides advice on how to cope with bathroom difficulties, suggesting that "the safest approach is to use the facilities designated for the gender that [one is] presenting," and then leave quickly to avoid attention. See SUSAN LYNN SOLOMON, *EXPLORING THE PAPER TRAIL* 57 (1995). Leslie Feinberg presents several poignant vignettes of the painful acts transgendered people do to avoid humiliation and danger in the bathroom situation. LESLIE FEINBERG, *STONE BUTCH BLUES* 183 (1993).

70. See *Doe v. Boeig*, 846 P.2d 531, 533 (Wash. 1993). The law penalizes use of an "inappropriate" public bathroom as lewd and dangerous behavior. See SOLOMON, *supra* note 69, at 56.

forced to use men's rooms, exposing them to potential humiliation. In one example, an older crossdresser, Debra, went to the men's room although she was dressed as a woman.<sup>71</sup> Emerging from a stall, she was blocked and threatened with rape by a drunk man. Debra escaped, but her ordeal indicates how such places, from bathrooms to bars to prisons, are fertile for the abuse of transgendered people.

### 3. Discrimination Issues

Discrimination based on transgendered identity is commonplace; police officers, doctors, landlords, and public officials treat transgendered people with bigotry and hatred. Transgendered people face employment discrimination, against which they have no legal recourse.<sup>72</sup> Transgendered people may be fired for dressing as their target gender during their transformation.<sup>73</sup> Even sex-reassignment surgery for hermaphrodites may be an appropriate basis for discrimination.<sup>74</sup>

Doctors sometimes abuse or take advantage of transgendered people who depend on them for their transformation.<sup>75</sup> Insurance rarely covers medical expenses associated with transgenderism.<sup>76</sup> Finally, family law decisions often deny transgendered people the right

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71. See SOLOMON, *supra* note 69, at 56.

72. Courts have repeatedly denied transgendered people protection from employment discrimination. See Jennifer L. Nevins, *Getting Dirty: A Litigation Strategy for Challenging Sex Discrimination Law by Beginning with Transsexualism*, 24 N.Y.U. REV. L. & SOC. CHANGE 383 (1998).

73. See, e.g., Kirkpatrick v. Seligman & Latz, 636 F.2d 1047 (5th Cir. 1981) (holding that district court appropriately dismissed civil rights action against employer that terminated a pre-operative transgendered female for wearing women's clothing because she was not a woman).

74. See, e.g., Julie Greenberg, *Defining Male and Female: Intersexuality and the Collision between Law and Biology*, 41 ARIZ. L. REV. 265 (1999).

75. Transgendered people are subject to regular mistreatment by doctors. See, e.g., Farmer v. Brennan, 511 U.S. 825, 829 (1994) (describing plaintiff Farmer as having undergone a botched black market testicle removal operation). In her book, *STONE BUTCH BLUES*, Leslie Feinberg describes similar black market procedures. See FEINBERG, *supra* note 69, at 162.

76. Sex-reassignment surgery, for example, is often not covered by medical insurance. The exception, apparently, is Minnesota, which does provide Medicaid funds for sex-change operations. See Joyce Price, *Minnesota Using Medicaid Funding to Pay for Sex-Change Operations*, WASHINGTON TIMES, Feb. 4, 1996, at A4, cited in Maggert v. Hanks, 131 F.3d 670, 672 (1997).

to custody or even to see their children.<sup>77</sup> The European Community is a rare exception to this general rule, specifically banning employment discrimination against transgendered people.<sup>78</sup> Few jurisdictions protect transgendered people under state and local anti-sex discrimination laws.<sup>79</sup> In sum, transgendered people face a wide range of arbitrary treatment in all aspects of their lives.

## II. DOUBLY IMPRISONED: TRANSGENDERED PRISONER PLACEMENT

*"We're trying to not treat him differently than anyone else."*

—Corrections officer about transgendered woman inmate.<sup>80</sup>

### A. *The Cruel, the Unusual, and the Transgendered—Prison Law and Life*

All the above issues confront transgendered people before incarceration. Once imprisoned, transgendered people find fighting for their gender identity a monumental task, as they confront the gender segregation, transphobia, and limited resources of the prison system.

Transgendered prisoners' needs challenge even the most reform-minded institutions in their goal to provide humane treatment. A precise calculation of the transgendered prisoner population appears impossible, because limited statistical studies prevent any accurate population-based estimates. The problem is exacerbated by the likelihood of concentrated transgender populations in certain cities and

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77. See, e.g., *J.L.S. v. D.K.S. n/k/a S.D.S.*, 943 S.W.2d 766 (Mo. Ct. App. 1997) (overturning joint custody award to transgendered father); see also, *Missouri Appeals Court Reverses Custody Grant to Transsexual Father; Remands for Reconsideration of Visitation Order*, LESBIAN & GAY L. NOTES, April 1997, at 41–42; *Cisek v. Cisek*, 1982 WL 6161 (Ohio App.) (denying visitation rights to transgendered woman).

78. The Court of Justice of the European Communities banned employment discrimination against transsexuals. *P. v. S. and Cornwall County Council*, Case C-13/94, [1996] 2 C.M.L.R. 247; see also, LESBIAN & GAY L. NOTES, June 1996, at 82–83 (commenting on case and its ramifications for lesbian and gay employment discrimination law).

79. See, e.g., *Rentos v. Oce-Office Systems*, 1996 WL 737215 (S.D.N.Y. Dec. 24); *Maffei v. Kolaeton Industry, Inc.*, 626 N.Y.S.2d 391 (Sup. Ct., N.Y.Co. 1995); see also, LESBIAN & GAY L. NOTES, Feb. 1996, at 11 (commenting on the *Rentos* case).

80. Kim Alyce Marks, *Transsexual Adjusts to Men's Prison*, DAILY OKLAHOMAN, July 20, 1986, at 7.

areas of the country<sup>81</sup> and the fluidity of transgendered identity.<sup>82</sup> For example, there are seventy prisoners on hormone treatments in New York State prisons and seventeen in the New York City prisons.<sup>83</sup> Based on these figures, a vague estimate that transgendered prisoners number in the low thousands might be the closest possible guess.

The prison authority has the power to place transgendered prisoners either in a virtual torture chamber of incessant sexual humiliation or in a more benign environment.<sup>84</sup> Several placement options exist, each with its own advantages and disadvantages. After describing the legal standards governing prison conditions and prison life generally, this section explores those options.

The legal foundation built by prison reform litigation has established that, although their rights are limited, "[p]rison inmates do not shed all fundamental protections of the Constitution at the prison gates."<sup>85</sup> Courts analyzing prisoners' rights must first assess what right may have been violated. *Turner v. Safley*<sup>86</sup> provided four factors to determine whether a prison regulation is reasonable: 1) the existence of a

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81. Although presuming geographical concentrations of transgendered people might be ill-informed, it seems to be a fair assumption based on the geographical concentration of lesbian and gay people, which appears to be based on the establishment of community institutions and other support networks. For example, in New York, there exists a community support network for the transgender community, such as the Gender Identity Clinic at the Lesbian and Gay Community Center in New York. Interview with Dr. Barbara Warren, Director of Mental Health Services at the Lesbian and Gay Community Services Center, in New York, New York (July 2, 1996) [hereinafter Warren Interview]. Lesbian and gay geographical concentration may point to a similar phenomenon among transgendered people. See MANUEL CASTELLS, *THE CITY AND THE GRASSROOTS: A CROSS-CULTURAL THEORY OF URBAN SOCIAL MOVEMENTS* 138-40 (1982); Barbara Weightman, *Commentary: Towards a Geography of the Gay Community*, 1 J. CULTURAL GEOGRAPHY 106, 107 (1981).

82. See Eric Houston, *Transsexuals Denounce Confinement: Inmates Want to be Treated According to Sexual Preference*, SEATTLE POST-INTELLIGENCER, Sept. 7, 1993, at B1. One corrections official said that no estimate could be made of transgendered people incarcerated in Washington, partially because some claims of transsexuality were questionable.

83. See Dennis Duggan, *Is Treatment for Sex Change a Prison Perk?*, NEWSDAY, Dec. 13, 1994, at A14.

84. It should be noted that placement troubles arise principally with regard to transgendered women. Transgendered men placed in women's prisons generally do not face the abuse that transgendered women face. In women's prisons, women will try to bond with transgendered men for security, protection, and social support. Thus, transgendered men do not face the ostracism and violence that transgendered women suffer.

85. *Powell v. Schriver*, 175 F.3d 107, 112 (2d Cir. 1999).

86. 482 U.S. 79 (1987).

valid and rational connection between the regulation and the legitimate interest purportedly advanced by it; 2) the existence of alternative means for the exercise of the allegedly violated right; 3) the negative consequences to penological interests by the accommodation of the right asserted; and 4) the existence of an alternative to the regulation that meets the prisoners' asserted right with minimal cost to penal interests.<sup>87</sup>

Courts view the principal issues facing transgendered prisoners through the lens of Eighth Amendment protections. When medical and living conditions fall below an allowable standard, they may constitute cruel and unusual punishment. A valid Eighth Amendment claim by a transgendered prisoner must survive the test articulated in *Turner*.<sup>88</sup>

The *Farmer* case redefined the standard of deliberate indifference required to establish an Eighth Amendment violation.<sup>89</sup> In *Farmer*, the Court decided on a subjective proof standard for the prison official's recklessness, requiring that the official know of and ignore an "excessive" risk to inmate health or safety.<sup>90</sup> Specific notice that the inmate-plaintiff may be in danger, or the identity of likely assailants, may not be required.<sup>91</sup> Awareness of widespread inmate rape, for example, renders specific knowledge of who would attack whom irrelevant.<sup>92</sup> Thus, although the standard enunciated by the Supreme Court retreats from the more easily met objective test, the *Farmer* test does not require proof of criminal intent.<sup>93</sup>

Misplacement or mistreatment of transgendered people based on an erroneous understanding of sexual identity is cruel and unusual

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87. See *Turner*, 482 U.S. at 89–91; see also, Sarah Botz & Robert C. Scherer, Project, *Substantive Rights Retained By Prisoners*, 84 GEO. L.J. 1465, 1465 (1996).

88. See *Turner*, 482 U.S. at 89–91.

89. The term was first employed by the United States Supreme Court in *Estelle v. Gamble*, 429 U.S. 97, 104 (1977) which situated the constitutionally unacceptable intentions of the prison officials somewhere between negligence and purpose. See *Farmer v. Brennan*, 511 U.S. 825, 835 (1994).

90. See *Farmer v. Brennan*, 511 U.S. at 835. In part, the basis for this holding was *Wilson v. Seiter*, 501 U.S. 294 (1991), in which the Court held that prison officials would not be liable solely because of the presence of objectively inhumane prison conditions.

91. See *Farmer v. Brennan*, 511 U.S. at 843.

92. See *Farmer v. Brennan*, 511 U.S. at 843 (quotations and citations omitted).

93. For a detailed analysis of the development of the jurisprudence regarding the "deliberate indifference" standard, see Thomas K. Landry, "Punishment" and the Eighth Amendment, 57 OHIO ST. L.J. 1607, 1616–19 (1996).

punishment.<sup>94</sup> However, Eighth Amendment analysis prevents only the most egregious violations of prisoners' rights regarding living conditions and medical treatment, among other situations. Although transgendered prisoners' needs fall into these two areas, the greater issue of the right to gender self determination falls through the cracks of such analysis.

Transgendered prisoners' needs constitute one of many challenges facing correctional authorities who need to balance calls for humane treatment and Constitutional requirements with staffing and budget limitations. The prison reform litigation movement achieved much in eliminating the worst abuses of prison life,<sup>95</sup> and in forcing the professionalization of corrections administration,<sup>96</sup> the provision of basic medical care,<sup>97</sup> and the elevation of general living standards,<sup>98</sup> albeit to a minimal level.<sup>99</sup> Old problems, such as a lack of work training or education,<sup>100</sup> overcrowding,<sup>101</sup> and underbudgeting, continue.<sup>102</sup> The general trend toward justifying abusive situations for prisoners, exemplified by the resurgence of chain-gangs, harsh treatment for adolescent offenders, and privatization of prisons, has led to tighter budgets permitting few ameliorations. In addition, the gateway criminal justice system exacerbates class, race, and ethnicity based inequalities. A transgendered prisoner's first exposure to the trials of prison life occur during pre-incarceration processing.

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94. See David Heffernan, Comment, *America the Cruel and Unusual? An Analysis of the Eighth Amendment Under International Law*, 45 CATH. U. L. REV. 481, 500 (1996).

95. The prison reform litigation movement's successes and failures are brilliantly catalogued and analyzed in Susan Sturm's sister articles, *The Legacy and Future of Corrections Litigation*, 142 U.P.A. L. REV. 639, 660-61 (1993) [hereinafter Sturm, *Corrections Litigation*], and *Lawyers at the Prison Gates: Organizational Structure and Corrections Advocacy*, 27 U. MICH. J.L. REFORM 1 (1993).

96. See Sturm, *Corrections Litigation*, *supra* note 95, at 665-68.

97. See Sturm, *Corrections Litigation*, *supra* note 95, at 671-72.

98. See Sturm, *Corrections Litigation*, *supra* note 95, at 671-72.

99. See Sturm, *Corrections Litigation*, *supra* note 95, at 671, 674.

100. See Sturm, *Corrections Litigation*, *supra* note 95, at 675.

101. See Justin Brooks, *How Can We Sleep While the Beds are Burning?: The Tumultuous Prison Culture of Attica Flourishes in American Prisons Twenty-Five Years Later*, 47 SYRACUSE L. REV. 159, 179-80 (1996).

102. See Brooks, *supra* note 101, at 179-80.

*B. Categorizing Gender: Pre-Incarceration Processing*

Whether in a holding cell or a maximum security institution, detainees and prisoners are segregated into men's and women's facilities or housing areas. The overwhelming majority of prisons segregate men and women, most often by maintaining separate prisons.<sup>103</sup> The obvious conundrum of categorizing the transgendered for placement purposes arises directly from this policy of segregation. This seemingly simple classification is an intractable problem when categorizing a transgendered person. Sex segregation causes and aggravates many ills within the prison system by accentuating sex differences within each segregated environment.

The processing of inmates is therefore an important moment for a transgendered person: will she or he be placed in the "M" or the "F" box? Pre-sentence reports provide sentencing judges with a portrait of the prisoner, and such reports should include a space for the presentencing officer to discuss gender issues more fully than currently permitted. Prisoners should be allowed to present medical, psychological, and even physical evidence to support their assertions of gender identity. This idea of demonstrating one's gender stems from the sexual declaratory hearing, in which a court determines the sex of the person.<sup>104</sup> If the pre-sentencing officer obviously misreports the gender identity of the prisoner, or if a prisoner requests reconsideration of the reporting, judges should intervene to insist that the prisoner is appropriately categorized and treated. Prison authorities should designate a sensitive, knowledgeable, and sympathetic person to deal with transgendered prisoner requests to prevent the arbitrary denial of appropriate treatment. Treatment of transgendered people should be standardized within prison systems to maximize the rationality of the practices assumed.

Speedy and dignified treatment is essential for the sensitive handling of the pre-incarceration processing. In one case, an inmate was isolated for two weeks while prison authorities tried to determine whether she was a man or a woman. In that case, the Chief of Corrections of Chelan County Regional Jail in Washington stated "We isolated her, him. . . . We put her in an infirmary. Or him in an

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103. See O'Brien, *supra* note 62, at 85.

104. See Franke, *supra* note 1, at 41 n.157 (citing *Corbett v. Corbett*, 1971 P. 83 (1970), in which a court determined the meaning of the sex of one of the spouses).

infirmity."<sup>105</sup> The time that passed with the inmate in solitary was used to determine her sex and then to decide where to place her. Instituting policies regarding placement of transgendered prisoners would avert the delay and the indignity of having one's identity scrutinized.

Notably, the right to present such evidence has been denied in one case, albeit in a post-imprisonment setting.<sup>106</sup> In 1986, Lavarita Meriwether sued primarily because prison authorities denied her medical treatment. She claimed that her equal protection rights were violated because, at an evidentiary hearing, she was not allowed to argue that she should be classified as a female and placed in a women's correctional institution. The district court's rejection of this claim was upheld by the Seventh Circuit, which decided that an administrative decision could not give rise to an equal protection claim without evidence of discriminatory intent.<sup>107</sup> The Seventh Circuit refused to deal with the fundamental challenge transgendered people pose to the sex-based system of incarceration.

The above-suggested reforms might prevent claims such as Ms. Meriwether's. In terms of the pre-incarceration period, no serious negative consequences to penal interests result from assigning a gender to a new prisoner and requiring the pre-sentencing officer and the sentencing judge to attend to the issue of gender with more care. Furthermore, the costs to the penal system of adopting such reforms are minimal. Altering forms to provide for more than just a check-box undoubtedly qualifies as a small expense. Instructing the relevant public officials on how to handle transgender issues appropriately in placement would require a more significant investment of resources, including training and the preparation and distribution of materials to ensure adequate compliance with the requirements. Nonetheless, this investment might be considered an "ounce of prevention" to preempt the need for a "pound of cure" later in the suffering and litigation that result from an erroneous placement.

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105. Martha Brockenbrough, *He or She? Big Dilemma for Prison*, NEWS TRIB. (Tacoma Wash.), Sept. 15, 1994, at A1.

106. See *Meriwether v. Faulkner*, 821 F.2d 408 (7th Cir. 1987).

107. See *Meriwether*, 821 F.2d at 415 n.7.



### C. Genitalia-Based Placement

However reasonable the aforementioned adjustments may be, such changes would require the prison system's acceptance that there are indeed more than two genders; this represents a monumental change in a system that still segregates on the basis of traditionally defined gender.

Prison authorities generally place transgendered prisoners, regardless of the extent of their nongenital transformation, based on their genitalia.<sup>108</sup> "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."<sup>109</sup> Post-operative transgendered people have had their genitalia surgically modified to resemble those of their desired gender, so the practice of relying solely on genitalia for placement does not generally pose a problem for them. On the other hand, pre- and non-operative transsexuals face the most serious problems related to placement because they are likely to be placed with their initial gender, regardless of the extent of their nongenital physical transformations.

Abuse often results from the placement of pre-operative transgendered people based on their genitalia. Dee Farmer was placed in the general population of a men's maximum security prison, even though she had already undergone several years of hormonal therapy with significant resulting feminization, including silicone breast implants and a failed surgical removal of her testicles.<sup>110</sup> Another case involved a transgendered woman who had already been castrated and was ordered to wear a brassiere despite her placement in a men's prison.<sup>111</sup> The foolishness of always placing a transgendered woman

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108. See *Farmer v. Brennan*, 511 U.S. 825, 829 (1994); *Farmer v. Haas*, 990 F.2d 319, 320 (7th Cir. 1993). Of all the cases studied for this Article, only *Crosby v. Reynolds*, 763 F.Supp. 666 (D.Me. 1991), indicated that a pre-operative transgendered woman had been placed in a women's prison, and in that case her cellmate sued because of the placement. That this policy is the rule is demonstrated by an example extreme by any measure. A transgendered woman, who had been castrated prior to incarceration, was placed in a men's prison because she was still "anatomically male." In that prison, she was ordered by the authorities to wear a bra. See *Murray v. United States Bureau of Prisons*, No. 95-5204, 1997 WL 34677 (6th Cir. Jan. 10, 1997).

109. Brockenbrough, *supra* note 105 (quoting Ken Hollen, Associate Superintendent, Shelton Corrections Center, Washington).

110. See *Farmer v. Brennan*, 511 U.S. at 829-30.

111. See *Murray*, 1997 WL 34677.

with breasts and feminine features in a men's prison demonstrates the domination of the male/female binarism in prison organization. In one case, where a transgendered woman had undergone hormonal and surgical treatments including castration and her "penile tissue was atrophic"<sup>112</sup> and nonfunctioning, she was denied a request for special treatment because "her presentence report identified her as a 32 year-old caucasian male."<sup>113</sup> Unable and unwilling to allow for more complexity than the two categories of male and female, penal authorities rely on an anatomical aspect that to some people may be a very minor factor in their gender makeup.

The placement of transgendered people is determined by what is crude simplification of their gender identity. Because of such placement by genitalia, a transgendered prisoner who has not undergone genital transformation faces the profound stigma of being the only prisoner who identifies with the sex that the prison excludes. At best, this classification evokes her categorization according to a gender identity that less than fully captures her identity. At worst, it forces the assumption of a past gender identity.

### 1. The Mortal Dangers of Genitalia-Based Placement

Male prisons have an infamous history of creating and reinforcing barbarous hierarchies of economic, social, and sexual subjugation of the weak to the strong, hierarchies that affect and victimize all male prisoners. This hierarchy existed with the support of what the prison authorities dubbed the "trustee system," in which "trustees," or dominant prisoners, would survey and enforce order against the general population of the prison.<sup>114</sup> Prison reform litigation succeeded in a *de jure* ban on the trustee system, but it remains a dominant force in prison life.

Dominant inmates seek to rape inmates who are young, less-streetwise, effeminate, or gay.<sup>115</sup> Transgendered prisoners often find

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112. *Lucrecia v. Samples*, No. C-93-3651, 1995 WL 630016, at \*1 (N.D. Cal. Oct 16, 1995).

113. *Lucrecia*, 1995 WL 630016, at \*2.

114. See Sturm, *Corrections Litigation*, *supra* note 95, at 661.

115. See David M. Siegal, *Rape In Prison and AIDS: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter*, 44 STAN. L. REV. 1541, 1541-47 (1992); see also, Charles M. Sennott, *Prisons Urged to Wrest Assault from the Shadows*, HARRISBURG

themselves forced into the victim role in prison. Victims rarely report such rapes because other prisoners punish snitches, even with death.<sup>116</sup> One study estimated that slightly less than a quarter of all inmates have been raped.<sup>117</sup> Yet prison systems officially deny the existence of any sexual activity justifying their nonprovision of safe-sex instruction and resources.<sup>118</sup> Widespread unsafe rape turns such sexual contact into “death sentences.”<sup>119</sup> Although some prisons, such as the New York City prison system, provide separate housing for gay inmates,<sup>120</sup> such housing may not provide the best solution for non-gay inmate-victims of the sexual hierarchy in male prisons.

Unsurprisingly, the result of placing a transgendered woman in this environment is rape and abuse, endemic in an atmosphere of deliberate indifference.<sup>121</sup> The illegality of rape<sup>122</sup> apparently has not reduced the likelihood of its occurrence.<sup>123</sup> Ms. Farmer’s placement in the general population of a men’s prison led to her violent rape.<sup>124</sup> In

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PATRIOT & EVENING NEWS, June 19, 1994, at G2 (discussing the frequency of gang rapes in a Florida prison).

116. See Siegal, *supra* note 115, at 1545–46.

117. See CARL WEISS & DAVID JAMES FRIAR, TERROR IN THE PRISONS 61 (1974).

118. The failure of prisons to prevent the spread of AIDS has not been demonstrated to be actionable. See Siegal, *supra* note 115, at 1572–74.

119. See Siegal, *supra* note 115, at 1578 (“Placing prisoners at risk of death when they have not been sentenced to death upon a considered and just verdict is cruel and unusual punishment. The threat of death by AIDS as a result of rape creates just such a risk.”) However, this analysis now appears somewhat hyperbolic given the greater control over AIDS symptoms.

120. See Telephone Interview with Thomas Antenen, Director of Public Information, New York City Department of Corrections, May 29, 1997 [hereinafter Antenen Interview].

121. See Sennott, *supra* note 115; see, e.g., David McKay, *Sex Change Surgery Not Allowed for Prisoner*, FT. WORTH STAR-TELEGRAM, Oct. 13, 1991, at 12.

122. “Homosexual rape or other violence among prison inmates serves absolutely no penological purpose.” *Farmer v. Brennan*, 511 U.S. 825, 852 (1994) (Blackmun, J., concurring). The rape suffered by Ms. Farmer was not raised in a Seventh Circuit suit by Ms. Farmer to obtain hormone treatment. “Farmer was put in with male prisoners—but without incident, in happy contrast to *Meriwether v. Faulkner*.” *Farmer v. Haas*, 990 F.2d 319, 320 (7th Cir. 1993).

123. See *Taylor v. Michigan Dep’t of Corrections*, 69 F.3d 76 (6th Cir. 1995) (discussing frequency of prison rape); *Risley v. Hawk*, 918 F. Supp. 18, 21 (D.D.C. 1996) (discussing same).

124. See *Farmer v. Brennan*, 511 U.S. at 830. One exception, *Phillips v. Michigan Dep’t of Corrections*, 731 F. Supp. 792 (W.D. Mich. 1990), indicates that this problem, while shockingly common, is not universal. The plaintiff, Marty Phillips, a thirty-four year-old pre-operative transsexual, had undergone extensive facial and bodily cosmetic surgery, as well as hormonal treatments to alter her appearance. She sued for medical treatment to further complete her gender transformation. The court stated:

another case, a sixty-one year old cross-dressed prisoner testified that she had been raped twice while imprisoned in the general men's population, both times while she was dressed as a woman.<sup>125</sup>

Acts by the guards cross the line from deliberate indifference to acts of hostility and aggression. Not only do authorities turn a blind eye to abuse by prisoners of transgendered inmates, but they permit and occasionally encourage the mistreatment of transgendered inmates by prison employees. For example, one pre-operative transgendered woman testified that she was the victim of "attempted and completed acts of violence and sexual assault"<sup>126</sup> and "harassment by prison officers and [was] forced to strip in front of officers and other inmates."<sup>127</sup>

Another pre-operative transgendered woman who works as a street prostitute was harassed and arrested by the police, even though she was not working at that time, and the officers had not witnessed any work-related behavior.<sup>128</sup> Without any evidence of criminal conduct, the policemen arrested her and took her to jail. They put her in the cell furthest from the guard station with forty-six men. She was finally released eight hours later, after being raped by nearly all of the men in the cell.<sup>129</sup>

In another case, Rosio Melgoza, a transgendered woman, was arrested as a result of a wage dispute.<sup>130</sup> The arresting officers reportedly touched her breasts and genitalia with their hands and a nightstick.<sup>131</sup> Two days after the arrest, she was allegedly strip searched in front of sixty male inmates and then placed in a cell with them, where she was the victim of multiple sexual assaults.<sup>132</sup> The charges against Ms.

"Plaintiff states that she has been treated well on the whole in the male facility. She states that the male inmates are used to her and no longer stare or make her feel uncomfortable. She is also able to use the bathroom and shower privately." *Phillips*, 731 F. Supp. at 793 n.1.

125. See *Long v. Nix*, 877 F. Supp. 1358, 1361 n.3 (S.D. Iowa 1995); see also *Long v. Nix*, 86 F.3d 761 (8th Cir. 1996). Ms. Long testified that the rapes took place when she was in her thirties and forties.

126. *Meriwether v. Faulkner*, 821 F.2d 408, 410 (7th Cir. 1987).

127. *Meriwether*, 821 F.2d at 411.

128. See Telephone Interview with Riki Anne Wilchins, Founder, *Transsexual Menace* (June 15, 1996) [hereinafter *Wilchins Interview*].

129. See WILCHINS, *READ MY LIPS*, *supra* note 10, at 23; *Wilchins Interview*, *supra* note 128.

130. See Karen Nikos, *Transsexual Says Arrest Led to Abuse*, L.A. DAILY NEWS, Aug. 2, 1991, at N6.

131. See Nikos, *supra* note 130.

132. See Nikos, *supra* note 130.

Melgoza were dropped.<sup>133</sup> The offending police officers did not provide the prisoners with condoms, thereby elevating the foreseeable gang rape into a possible HIV infection or reinfection. This was likely the case in the other rapes discussed above, given the general absence of safe-sex practices in prisons.<sup>134</sup> Finally, given the pattern of abuse in the reported cases, it is probable that most imprisoned transgendered women are raped or abused on a regular basis.<sup>135</sup>

In one case, Susan Marie Pollock, a transgendered prisoner, had undergone extensive procedures and developed size 36C breasts. She was denied hormone treatments, and prison guards harassed her.<sup>136</sup> In another case, Michelle Murray claimed that a prison guard assaulted her, and that other guards propositioned and attempted to assault her.<sup>137</sup> Another transgendered woman, arrested for drunk driving in Atlanta, was allegedly groped by an officer.<sup>138</sup> Yet harassment and verbal abuse rarely constitutes a violation of the Eighth Amendment.<sup>139</sup>

## 2. The Failure to Eliminate Genitalia-Based Segregation: The Co-Correctional Experiment

In theory, the most sweeping solution to gender segregation would be the establishment of co-correctional facilities. In the 1970s, prison reform groups saw segregation as the principal limitation for the development of equal treatment of women prisoners.<sup>140</sup> Co-

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133. See Nikos, *supra* note 130.

134. This danger perhaps has led to the high rate of seropositivity in prisons. The danger of infection is not alleviated for those already infected with HIV, as they still may be reinfected with a different strain of HIV. See, e.g., *Farmer v. Hawk*, No. 94-CV-2274, 1996 WL 525321 (D.D.C. Sept. 5, 1996).

135. For example, the plaintiff in *Lucrecia v. Samples*, No. C-93-3651, 1995 WL 630016 (N.D. Cal. Oct. 16, 1995), did not report the rape, but did report repeated strip searches, groping, leering, verbal humiliation and other sexual harassment.

136. See Tom Beyerlein, *Transsexual Longs for Transfer: Inmate's Unhappy as One of the Guys*, DAYTON DAILY NEWS, Mar. 31, 1994, at 1A; *Transsexual Inmate Sues for Rights*, PLAIN DEALER (Cleveland, Ohio), Apr. 1, 1994, at 5B (discussing Ms. Pollock's case).

137. See *U.S. Judge Lets Transsexual Inmate Do Research for Lawsuit*, THE COURIER-JOURNAL (Louisville, Ky.), June 24, 1994, at B3.

138. See Sandra McIntosh, *Atlanta Jail Officer Facing Sex Charge: His Frisk Became a Grope, Contends Transsexual Inmate*, ATLANTA CONST., Dec. 5, 1993, at E4.

139. See *Judge Drops All But One Defendants from Transsexual Prisoner's Suit*, COURIER-JOURNAL (Louisville, Ky.), Nov. 12, 1994, at A13.

140. See Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2204 (1995).

correctional institutions mix men and women prisoners by placing them in the same prison, separated by cell, hall, or cellblock.<sup>141</sup>

Advocates argued that co-correctional prisons would afford prisoners many advantages over life in single-sex prisons. Geographical proximity to their families<sup>142</sup> and access to the same recreational, vocational, and educational opportunities provided to men<sup>143</sup> would improve life. Men would act differently in the context of a co-correctional institution, even with limited interaction with women. For example, scholars of women's prisons point to the construction of "play-families" among women prisoners that reveal "how the power structure within women's prisons may be very different from the power structure within men's prisons where gangs are the most common social grouping."<sup>144</sup> A variant on co-correctional institutions is the "coordinate" model, which creates a women's institution next to a men's institution where resources are shared.<sup>145</sup>

As promising as co-correctional prisons may seem in abolishing gender segregation, general consensus among prisoner's rights advocates is that the experiment was an utter failure.<sup>146</sup> The overwhelmingly male population in co-correctional institutions led to security problems between men and women, which required placing women under higher levels of control and denying them resources.<sup>147</sup> Mixed-sex facilities still exist, but the separation of the sexes within the facility hardly makes them co-correctional, since even recreational and educational programs are segregated.<sup>148</sup>

141. See generally, Rosemary Herbert, *Women's Prisons: An Equal Protection Evaluation*, 94 YALE L. J. 1182, 1184 (1985)

At the federal level, some minimum-security prisons were formerly co-correctional. See Schulhofer, *supra* note 140, at 2204.

At the state level as of June 30, 1991, there were 624 male prisons, 67 female prisons, and 33 co-correctional facilities. See AMERICAN CORRECTIONAL ASSOCIATION, DIRECTORY, JUVENILE & ADULT CORRECTIONAL DEPARTMENTS, INSTITUTIONS, AGENCIES & PAROLING AUTHORITIES, xxii (1992); Lisa Krim, *A Reasonable Woman's Version of Cruel and Unusual Punishment: Cross-Gender, Clothed Body-Searches of Women Prisoners*, 6 UCLA WOMEN'S L.J. 85, 110, 110 n.119 (1985).

142. See Schulhofer, *supra* note 140, at 2204.

143. See Schulhofer, *supra* note 140, at 2204.

144. Krim, *supra* note 141, at 115.

145. See Nicole Hahn Rafter, *Even in Prison, Women are Second-Class Citizens*, HUMAN RIGHTS, Spring 1987, at 31, 51.

146. See generally, Rafter, *supra* note 145 (discussing pooling of resources to aid women inmates).

147. See Rafter, *supra* note 145, at 28.

148. See Rafter, *supra* note 145, at 28.

One might argue that the abolition of gender segregation would benefit transgendered prisoners by lifting the iron curtain between the sexes. Placing a transgendered prisoner in a co-correctional facility would permit the transgendered person to live as she wished, with access to the resources of both men's and women's prisons.

This failure of the co-correctional remedy warns of the difficulty of abolishing the gender binarism's hold on contemporary society, and points to the challenge confronting prisons in placing individuals that do not easily fit into male or female categories.

### 3: Potential Reforms for Genitalia-Based Placement

Given the failure of attempts to end sex segregation, reform of the current system may be the best option for transgendered prisoners. Current placement methods put transgendered people into the general population of prisoners with like genitalia, which may be appropriate for some transgendered prisoners.<sup>149</sup> In cases where security issues arise, prison authorities often force transgendered people into segregation. These two placement options, as discussed above, do not provide sufficiently comfortable or safe environments for a transgendered inmate.

Certain practices could improve these situations. Prison authorities can break the cycle of deliberate indifference to prison rape, and protect transgendered inmates from such trauma. First, prison authorities should commit themselves to prosecuting inter-prisoner violence and rape. Second, they should identify potential or known attackers and put them on notice that violence will be severely punished.<sup>150</sup> Third, prison officials can identify likely targets for aggression and assist them in dealing with sexual pressure, and to encourage them to report rape early to permit the identification and punishment of attackers.<sup>151</sup> Fourth, prison authorities can strictly enforce the rules

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Moreover, the coordinate model, which purportedly addresses the security problems women face in a mixed facility, falls short of its goal, often leaving women with a markedly inferior existence. Notes from Telephone Conversation with Marjorie Rifkin, Staff Attorney, the National Prison Project, June 13, 1997.

149. See Jennifer Gonnerman, *Love Behind Bars: Lipstick, Love Letters and Laundry: Five Men Talk About Their Prison Romances*, VILLAGE VOICE, May 13, 1997, at 46.

150. See Sennott, *supra* note 115.

151. See Sennott, *supra* note 115; Mary Dallao, *Fighting Prison Rape: How to Make Your Facility Safer*, CORRECTIONS TODAY, Dec. 1, 1996, at 100, 101 (discussing a bill pro-

with regard to the treatment of transgendered prisoners by other inmates.

#### 4. Centralization of Placement Resources

Another important reform is the centralization of resources among neighboring states. As one prison official commented, "[a]n inmate could go to California or New York, where the penal system has special units for transsexual offenders."<sup>152</sup> Perhaps the most important argument in favor of centralization is that such a policy would foster a rationalization of prison procedures regarding transgendered inmates. Especially on the state and local levels, prison authorities appear to act in an ad hoc fashion by providing or denying special treatment to transgendered inmates as they see fit at the moment.<sup>153</sup> Although one might ascribe such randomness to disrespect, the fact that there are so few transgendered inmates discourages the creation of set rules for treatment. By combining resources, different jurisdictions that take the lead on provision of appropriate placement and treatment might provide such services for inmates in other states. Differences in state policies, along with the privatization of some prison systems, might make such centralization difficult. Nonetheless such a policy, even if enacted in a limited fashion, might practicably permit serious advances in the humane placement and treatment of transgendered prisoners.

#### *D. Segregation*

One common solution is to place the transgendered person in segregation, generally in a single cell. Segregation may provide greater security to the prisoner, as in Ms. Farmer's case, where she had requested segregation for security and was instead left in the general population. However, such segregation excludes the prisoner from equal participation in prison life. First, separating transgendered

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posed in Illinois to inform new inmates during orientation of the threat of rape in prison).

152. Washington Department of Corrections Secretary Chase Riveland, *quoted in* Brockenbrough, *supra* note 105.

153. *See, e.g.*, Dan Bernstein, *Set Policy on Sex Treatment, Prison Told*, THE SACRAMENTO BEE, July 2, 1991, at B4.



people might not make them safer because their segregation emphasizes their difference to the prison population, exposing them to ridicule. One transgendered woman was segregated in a men's prison to determine whether she would be released into the general population. After she was placed in the general population, she was attacked by another inmate. Prison officials returned her to a segregated cell as the investigation into the attack proceeded.<sup>154</sup> Faced with the choice between segregation and genitalia-based placement, some transgendered people might choose to be placed in the general population, especially prisoners who no longer fear rape because of their age or appearance. For example, one sextagenarian transgendered woman did "not fear sexual attack by inmates as he is 61 years old."<sup>155</sup>

Automatic segregation may provide an improvement in safety, but at a high comfort cost to the transgendered prisoner. Other concerns arise. One pre-operative transgendered woman complained that segregation denied her adequate "recreation, living space, educational and occupational rehabilitation opportunities, and associational rights for nonpunitive reasons."<sup>156</sup> Such differential treatment might leave the prisoner in a worse position than the other prisoners. Segregation should only be used as a protective measure. Rather than punish the transgendered inmate for the general population's intolerance, prison authorities should engage in the above-mentioned actions to improve life in the prison for the transgendered person. Only in two circumstances should a transgendered prisoner be placed in segregation: where she requests the segregation for her own safety or well-being, or where the danger to the prisoner is so patently clear that prison authorities would be exhibiting deliberate indifference to leave her in the general population.

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154. Subsequently, she was placed in segregation as punishment for her refusal to wear a brassiere in a men's prison. In addition, Ms. Farmer was forced into solitary confinement for approximately a year because she was allegedly observed engaging in sexual contact. *See Murray v. United States Bureau of Prisons*, No. 95-5204, 1997 WL 34677, at \*1 (6th Cir. Jan. 10, 1997).

155. *Long v. Nix*, 877 F. Supp. 1358, 1361 (S.D. Iowa 1995).

156. *Meriwether v. Faulkner*, 821 F.2d 408, 416 (7th Cir. 1987).

*E. Placement Based on the Gender Identity of the Prisoner*

Placement based on self-defined gender identity would be ideal for transgendered people, given a sex-dichotomized prison system.<sup>157</sup> One significant advantage to placing transgendered prisoners based on their gender identity is the avoidance of difficult situations with other prisoners.

The principal problem with this solution is the comfort and security of the traditionally-gendered prisoners in the prison in which the transgendered prisoner is placed. In one case, a transgendered man was placed among women, who complained, "there's a man in the tank."<sup>158</sup> Likewise, one police officer, commenting on the incarceration of a transgendered woman "who looked more like a woman than the other women," would not fit in with male inmates.<sup>159</sup> Potential intolerance toward a transgendered person, however, should not be the sole factor in determining the best placement: bigotry does not merit such accommodation. Because prisons principally concern themselves with order, prison officials would likely object to any reform that could cause disruption in the prison environment.

However, even if objections to housing transgendered women in a women's prison stem from homophobia, such objections require consideration. Legitimate objections to housing transgendered inmates according to their self-defined gender identity do exist. First, the prisoner who must share a cell with a transgendered person may object. One example is Juanita Crosby's claim in her case against a Maine county jail.<sup>160</sup> In this case, the jail placed Ms. Cheyenne Lamson, a 6'1" pre-operative transsexual who had undergone estrogen treatments, developed breasts, and lost penile sexual function, in a women's prison. The doctor saw her placement with women as advantageous, especially when compared to living with male inmates, who would have caused Ms. Lamson "physical and psychological

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157. Many transgendered people have requested such housing. *See, e.g.*, Beyerlein, *supra* note 136 (stating that Ms. Pollock, a transgendered woman, had requested transfer to a women's prison); Sweeney, *supra* note 2 (discussing Marty Phillips's desire to be transferred to a women's prison).

158. Houston, *supra* note 82.

159. Commander John Szalda of the Lynnwood, Washington Police Department, *quoted in* Wayne Wurzer, *Inmate Turns Out to Be Someone She's Not*, SEATTLE TIMES, Nov. 30, 1994, at B1.

160. *See Crosby v. Reynolds*, 763 F.Supp. 666 (1991).

harm.”<sup>161</sup> Ms. Crosby, her cell-mate, sued because Ms. Lamson accidentally entered her part of the cell when she was on the toilet,<sup>162</sup> a recurring discomfort. Ms. Crosby refrained from showering<sup>163</sup> to avoid being nude in front of Ms. Lamson. The court determined that, given the lack of alternatives and the lack of established procedures, the authorities could not have understood their actions as violative of the plaintiff’s Constitutional rights.<sup>164</sup> In another case in which a transgendered woman was placed in a women’s prison, prison authorities admitted that the other two female prisoners had difficulties coping with their new cellmate.<sup>165</sup> Women have complained that their cellmate was growing a beard.<sup>166</sup>

Further, a transgendered woman in women’s prisons might have sex with the other women. In the women’s facility on Riker’s Island in New York City, a pre-operative transgendered woman was having sex with other women inmates.<sup>167</sup> This potential sexual activity could make it more difficult for prison authorities to place a transgendered person based on her gender identity.

Another legitimate challenge is that a transgendered woman might be violent against other women. However improbable this may seem, transgendered prisoners convicted of violent sex crimes, like all those convicted of such crimes, should be placed with the greatest care. Prison officials should not carelessly place those convicted of or known for sexual violence against a particular sex with members of that sex. Prison authorities have not shown the greatest sensitivity in dealing with sex offenders, placing them arbitrarily in the general prison population without regard to the dangers they might pose.<sup>168</sup> As with any prison, prison authorities should be conscious of such dangers. In one case, Jean Marie Druley, an advanced pre-operative transgendered woman, was incarcerated for killing her girlfriend.<sup>169</sup>

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161. *Crosby*, 763 F. Supp. at 667.

162. *See Crosby*, 763 F. Supp. at 667.

163. *See Crosby*, 763 F. Supp. at 667.

164. *See Crosby*, 763 F. Supp. at 670.

165. *See Cohen*, *supra* note 46.

166. *See Wurzer*, *supra* note 159.

167. *See Compton Interview*, *supra* note 51.

168. *See Redman v. County of San Diego*, 942 F.2d 1435, 1437–39 (9th Cir. 1991) (in which an eighteen year-old boy was placed with a man known as an “aggressive homosexual,” who repeatedly and violently raped him).

169. *See Marks*, *supra* note 80.

Obviously, such an inmate would be an unsuitable candidate for placement among women.

Yet, placement according to the gender identity might be more feasible if the prison procedures were modified. First, concerns about the discomfort that may result from sharing a cell could be addressed by placing the transgendered inmate in a smaller, single bed cell. Second, to meet the needs of transgendered prisoners and avoid discomfort among the general prison population, prison officials could take a more active role in placement. For example, they could survey prisoners to determine the most tolerant cellmate before placement occurs. Surveying is easier in smaller prisons, where there is more personal contact between the guards and social service providers and the prisoners. In a prison where a transgendered prisoner would be housed, sensitivity training of prisoners and prison officials could ease the integration of the transgendered prisoner into the prison population.<sup>170</sup>

The careful placement of transgendered people could cost the prisons far less than other remedies because it requires little change in prison organization. It also may be less disruptive to penal interests than placing the transgendered inmate among people of her initial sex, which might lead to more violence and disorder than would exist in a placement according to gender identity.

Finally, it must be noted that placing a transgendered woman in a women's prison will not necessarily improve her conditions, because women prisoners receive treatment inferior to that of male prisoners.<sup>171</sup> Because women constitute a far smaller incarcerated population than men, many states incarcerate all women together, regardless of their crime,<sup>172</sup> requiring many women's prisons to follow maximum security procedures,<sup>173</sup> including body searches.<sup>174</sup> Despite faster growth,<sup>175</sup> resources in women's prisons rarely match those in men's prisons,<sup>176</sup> which contain a population over eighteen times that of

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170. For example, sensitivity training regarding rape could address transgendered issues. Cf. Dallao, *supra* note 151.

171. See Herbert, *supra* note 141; Stefanie Fleisher Seldin, *A Strategy for Advocacy on Behalf of Women Offenders*, 5 COLUM. J. GENDER & L. 1 (1995).

172. See Krim, *supra* note 141, 85, 110–11.

173. See Krim, *supra* note 141, at 110–11.

174. See Krim, *supra* note 141, at 110–11. Ms. Krim argues in her article that one effect of such maximum security procedures is the widespread searching of women prisoners.

175. See Telephone Interview with Marjorie Rifkin, July 12, 1997.

176. See Herbert, *supra* note 141, at 1203–05.

women's prisons.<sup>177</sup> Vocational programs, for example, rarely equal those provided for men,<sup>178</sup> often focusing on cosmetology and other "women's professions."<sup>179</sup> The conditions of women's incarceration appropriately has given rise to many equal protection and Title IX suits.<sup>180</sup>

#### *F. Special Wards for Transgendered Prisoners*

Another option for prison authorities charged with the safety and well-being of a transgendered inmate would be to create special wards for transgendered inmates, modeled on the gay wards that exist in some jurisdictions. In preparing this article, I interviewed the public relations officer of the New York City Department of Corrections. In response to my query about whether there was transsexual housing, I was asked, "what's the difference between transsexual and homosexual?"<sup>181</sup> Indeed, upon further investigation, popular reports that a transgendered ward existed on Riker's Island turned out to be false: transgendered women are placed in the ward designed to house gay men.<sup>182</sup> However, this 'gay' ward is thought by many to be a transgendered ward.

The fact that prison authorities conflate transgenderism with homosexuality requires closer attention. Given the high levels of male-to-male sexual contact in prison, what makes a man seek special housing based on sexual orientation? The answer, it would appear, is that some prisoners feel unsafe in the general population because their identity as gay men, as opposed to men who engage in same sex conduct, exposes them to violence. Indeed, it appears that those gay men who seek such protection do so because their femininity, interpreted as weakness in the prison context, places them at risk in the prison population. This prevalence of conflationist attitudes in prisons renders the line between gay men and transgendered women nearly indistinguishable.

Male-male sex in prison can further the conflation of transgendered and gay identities. For example, some inmates in Riker's Island

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177. See O'Brien, *supra* note 62, at 86–88.

178. See Herbert, *supra* note 141, at 1193–95; O'Brien, *supra* note 62, at 87.

179. See Herbert, *supra* note 141, at 1193–95; O'Brien, *supra* note 62, at 88.

180. See O'Brien, *supra* note 62, at 85.

181. Antenen Interview, *supra* note 120.

182. See Antenen Interview, *supra* note 120.

who are effeminate men further their transformation in prison in order to receive more attention and to heighten their attractiveness to presumably heterosexual male inmates.<sup>183</sup> "Jockers," or "pitchers," the dominant partner in a male-male sexual relationship, often encourage their "punks" or "catchers" to be as feminine as possible to disguise the homosexual nature of the relationship.<sup>184</sup> Such inmates call attention to the merging of transgendered and gay identities in the prison context.

Specifically transgendered wards could look to gay housing that exists in the New York City jail system as a model.<sup>185</sup> In that system, prisoners who request such housing, and prisoners deemed to require the protection afforded by such housing, are placed in the gay ward, which has a limited capacity of approximately fifty.<sup>186</sup> Such housing for transgendered people would undoubtedly provide them with a space to express their gender identity freely. Rather than confront a dangerous, and humiliating environment, transgendered inmates would find a supportive, safe environment in which they would be able to freely express their gender and continue to develop healthy attitudes about their gender identity. This solution would cost little more than the dedication of a separate ward to this purpose, a cost that would obviously affect smaller prison systems more than those with numerous transgendered prisoners.

If the transgendered population in a particular jurisdiction were too small to constitute its own ward, states could pool resources with other jurisdictions to provide joint resources.<sup>187</sup> In this manner, one jurisdiction's fair treatment of transgendered prisoners would permit other jurisdictions to do so as well. In addition, by establishing special wards, prisons could provide centralized services for transgendered prisoners. Finally, the costs of such a program would in some sense be lower than either placement of transgendered prisoners among their initial sex or their goal gender identity, because the prison would not have to manage the interaction between the transgendered and the traditionally gendered prisoners.

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183. See Gonnerman, *supra* note 149.

184. See Stephen Donaldson, *The Deal Behind Bars*, HARPER'S MAGAZINE, Aug. 1, 1996, at 17.

185. See Antenen Interview, *supra* note 120.

186. See Antenen Interview, *supra* note 120.

187. See Rafter, *supra* note 145, at 31 (discussing pooling of resources to aid women inmates).

In summary, there are several possibilities for corrections authorities to improve placement options for transgendered prisoners. Transgendered wards and placement based on gender identity would improve upon the current system of genitalia-based placement. Each reform entails particular advantages and costs, but all provide a vast improvement over the dangerous and inhumane status quo placement policy.

### III. GENDER IDENTITY AS ILLNESS: TREATMENT OF TRANSGENDERED PRISONERS

*"If you want to drive someone crazy, tell them they don't qualify for treatment under a policy you don't have . . . That is Kafkaesque, to put it mildly."*

—U.S. Magistrate John F. Moulds<sup>188</sup>

As detailed in Part I, there are many procedures transgendered people undergo to transform their physical appearance. Continuing or maintaining their transformation is of primary importance to incarcerated transgendered people. Yet the medicalization of transgenderism has functioned as a double-edged sword for transgendered prisoners. It gives them the tools with which to further their transformation, but contemporaneously categorizes them as sick. This section first outlines the theoretical problems with medicalization. It then discusses the availability of and problems associated with the medical and nonmedical treatments for transgendered prisoners.

#### *A. The Diseasing of Gender Identity: Medicalization and the Gender Binarism*

Both inside and outside of prison, the classification of transgenderism as a medical phenomenon is currently dominant in both legal consideration and legitimized gender transformation. This section outlines the utility of medical discourse in attaining treatment for transgendered people, including prisoners. This medicalization of transgenderism reifies the notion that those outside of the gender bi-

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188. Bernstein, *supra* note 153.

narism are diseased. In the context of the prison environment, the construction of transgendered people as diseased is compounded by the high incidence of HIV.

### 1. The Usefulness of Medical Discourse

Medical discourse serves two purposes that may be useful in advocating for treatment for gender transformation: 1) to emphasize the lack of choice in transgender identity that permits transgendered people to receive necessary protection and treatment and 2) to categorize transgendered people, especially prisoners, in terms of the treatment they need and deserve. Transgendered people often invoke medical definitions for their own benefit. First, transgendered people who undergo hormonal treatment and sex reassignment surgery (unless they use black market procedures), generally must have psychiatric and medical evaluations. Precisely because of its expediency, transgendered people maintain a strong investment in the continued existence of the medicalization of transgenderism.

Due to financial requirements, the fulfillment of the surgical dream is subject to cultural and class constraints; cosmetic and genital conversion surgery is available primarily to the middle and upper classes. Transsexuals, especially middle-class pre-operative transsexuals, are heavily invested in maintaining their status as "diseased" people. The demedicalization of transsexuality would further limit surgery in this culture, as it would remove the label of "illness" and so prohibit insurance companies from footing the bill.<sup>189</sup>

The medicalization of transgenderism thus permits many to fulfill their needs and goals in terms of their gender identity. Transgendered prisoners especially rely on medicalization to justify the special treatment they sometimes require. Medical discourse often sways courts.<sup>190</sup>

Transgendered people can simultaneously challenge authorities to deal with the broader implications of transgendered people's existence

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189. BORNSTEIN, *supra* note 4, at 119.

190. See *Meriwether v. Faulkner*, 821 F.2d 408 (7th Cir. 1987); *Phillips v. Michigan Dep't of Corrections* 731 F. Supp. 792, 792 (W.D. Mich. 1990); (two cases decided in favor of transgendered prisoners). For further discussion of Marty Phillips's case, see Sweeney, *supra* note 2, and *Transsexual Prisoner Wins*, NAT'L LAW J., Feb. 12, 1990, at 6.



as they employ medical discourse to their advantage as needed. In many of the cases involving transgendered prisoners, the plaintiff challenged legal enforcement of gender dichotomies but used medical language as the basis of her argument.<sup>191</sup> In some cases (mainly non-prison cases), excluding medical arguments might sometimes prove advantageous. But prisoners are provided with so little non-medical assistance that medicalization arguments may provide them with a foothold in a profoundly unfriendly system. The categorization that medical discourse permits has proven useful to prison authorities allocating treatment resources. The occasional crossdresser may not require the same attention to placement and treatment options as a post-operative transgendered woman. Such categories have traditionally hierarchized the transgendered in favor of those who have undergone the most transformative change. Deconstructing the power of medical discourse will thus need to be balanced against the interests of parties who use such discourse to achieve their desired gender identity.

## 2. Gender as Illness

Medicalization, by constructing transgendered identity as an illness, reinforces the gender binarism. The provision of treatment requires a prerequisite disease: gender dysphoria.<sup>192</sup> As one commentator on a cholera epidemic observed, "I insist that 'disease' does not exist. It is therefore illusory to think that one can 'develop beliefs' about it to 'respond' to it. What does exist is not disease but practices."<sup>193</sup> As I argued in Part One, the reality of gender diversity prevents the fair classification of any gender identity as *per se* diseased. Because some conflicting trait combinations render people unable to cope without intervention from skilled outsiders, medical discourse overarchingly dominates all references to transgenderism. Yet, viewing transgendered people as "gender dysphoric," and thus diseased, seems antediluvian given the breadth of gender identity. The multiplicity of gender identities requires no medical attention—people should not be treated as diseased because of their gender identity. The continued

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191. See, e.g., *Meriwether*, 821 F.2d at 411–13.

192. See *Farmer v. Hawk-Sawyer*, 69 F. Supp. 2d 120, 120 (D.D.C. 1999).

193. FRANÇOIS DELAPORTE, *DISEASE AND CIVILIZATION: THE CHOLERA IN PARIS, 1832*, at 6 (Arthur Goldberg trans., 1986), cited in DOUGLAS CRIMP, *AIDS: CULTURAL ANALYSIS/CULTURAL ACTIVISM* 3 (1988).

viability of the gender binarism, so central to the structure of the prison system, requires viewing those outside it as ill.

Not all medical intervention is benevolent, as the checkered history of psychiatry in dealing with transsexuals reveals. Some "cure therapy" focuses on "conformity to cultural sex and gender stereotypes . . . convincing transsexuals to accept gender roles 'congruent' with their biological sex."<sup>194</sup> Such "cure" therapy obviously evokes its parallel in the "treatment of homosexuality," in which psychiatrists constructed a science of homosexuality as illness and attempted to treat or even cure gay men and lesbians of their homosexuality.<sup>195</sup> Indeed, Gordene Olga MacKenzie asserts in her book *Transgender Nation* that the medicalization of transsexualism reinforces gender roles. "[I]n the techno-surgical process of [sex reassignment surgery], not only are genitals amputated, manufactured and sold, but simultaneously, a gender ideology is manufactured, reinforced and transmitted."<sup>196</sup> Although MacKenzie's interpretation has been challenged,<sup>197</sup> the medical discourse used in case law generally relegates transgenderism to the freakish discourse of medical oddities, fit only for the stage of a Jerry Springer show. Rather than conceptualizing gender accurately, courts generally, including the *Farmer v. Brennan* court, have chosen to view transgendered people as victims of a "rare disorder."<sup>198</sup>

Couching language in medical discourse permits courts to avoid dealing with gender identity's complexity in a direct manner, precluding recognition of the fluidity of gender identity. Such medicalization limits the legitimate breadth of transgender identity, so crossdressers who cannot demonstrate sufficient gender dysphoria cannot benefit from legal protection for their transgenderism. Based on this division between those who require medical treatment for transgenderism and those who do not, all non-operative transgendered people would be excluded from medical treatment, and thus from legal categorization, as a transgendered person.

The medicalization of the transgendered classifies a whole people as sick merely because of their nonmajoritarian composite of gender

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194. MACKENZIE, *supra* note 1, at 78-79.

195. See generally, MARTIN DUBERMAN, CURES (1991). The construction of homosexuality as a disease has a long history.

196. MACKENZIE, *supra* note 1, at 64.

197. See Denny, *supra* note 40.

198. *Farmer v. Brennan*, 511 U.S. 825, 829 (1994).

traits. Viewing this medicalization in the confines of illness leaves the transgendered not only needing medical attention, but deserving of opprobrium. This identity leaves transgendered people outside of those of good character, implying that they do not deserve the rights granted to those who are of "healthy" character, deepening the ostracism of prisoners.

*Farmer v. Brennan* demonstrates the degree to which gender transformation has become entangled with medical discourse. Precisely because Justice Souter, adopting the Bureau of Prisons' terminology, defined transsexualism as "[a] rare psychiatric disorder,"<sup>199</sup> the prison's treatment of Ms. Farmer was found to violate the Eighth Amendment's prohibition of cruel and unusual punishment. That condition placed her among vulnerable inmates, such as the young or slight, for whose protection the prison system is responsible. Had her "condition" been viewed as a choice, the harm she suffered might be viewed, albeit erroneously, as her own responsibility. However, because of another reason, Ms. Farmer has been denied the provision of hormone treatment: she is HIV-positive.

### 3. AIDS and Transgendered Prisoners

The notion that physical illness reflects spiritual illness and punishment for depravity became more accepted with the discovery of AIDS. The broadening of the AIDS pandemic to all sectors of society has not erased the notion that AIDS is punishment for diseased lifestyles. As one commentator noted, "[r]eading AIDS as the outward and visible sign of an imagined depravity of will, AIDS commentary deftly returns us to a premodern vision of the body, according to which heresy and sin are held to be scored in the features of their voluntary subjects by punitive and admonitory manifestations of disease."<sup>200</sup> Although HIV is not a venereal disease (since it may be transmitted non-sexually),<sup>201</sup> it evokes the depravity of syphilis, the tortures of which, it was thought, were just dessert.<sup>202</sup>

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199. *Farmer v. Brennan*, 511 U.S. at 829.

200. Simon Watney, *The Spectacle of AIDS*, in *THE LESBIAN AND GAY STUDIES READER*, *supra* note 59, at 202, 204.

201. *See* Watney, *supra* note 200.

202. Susan Sontag asserts that AIDS evokes an even more punitive notion of disease. *See* SUSAN SONTAG, *AIDS AND ITS METAPHORS* 26 (1988). Sontag's analysis of the metaphors AIDS raised received withering criticism from most AIDS activists and cultural

The stigma of gender illness is thus compounded for many prisoners with the undeniable weight of AIDS phobia. Inmates with HIV/AIDS<sup>203</sup> face particular difficulties in their prison life. Prior intravenous drug abuse, unprotected anal intercourse, and needle sharing among prisoners present corrections authorities with a grave health problem.<sup>204</sup> In 1992, the AIDS rate for prisoners was eleven times that of the general population.<sup>205</sup> Furthermore, high numbers of transgendered people have HIV/AIDS as a result of using black market hormonal and surgical procedures and engaging in prostitution to fund those procedures.<sup>206</sup> Many transgendered prisoners must cope with HIV/AIDS in addition to the medical issues that come with transgenderism. Transgendered prisoners with HIV/AIDS may experience particularly humiliating discrimination. Dana DeVilla, a transgendered woman with HIV serving a mandatory sentence because of a second check-forgery offense, was forced to keep her laundry and silverware separate from other inmates and faced bathroom restrictions due to her health status, and guards openly circulated the news of her HIV status and her transgender surgeries.<sup>207</sup> She sued, but died before winning a \$30,000 award.<sup>208</sup> One court

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scholars for its failure to address the political nature of the pandemic, among other points. See, e.g., D.A. Miller, *Sontag's Urbanity*, in *THE GAY AND LESBIAN STUDIES READER*, *supra* note 59, at 212.

203. People who contract HIV experience various forms of opportunistic illnesses as a result of their weakened immune system. Generally a diagnosis of AIDS (Acquired Immune Deficiency Syndrome) coincides with severe weakening of the immune system. See Joseph R. Masci, *Acquired Immunodeficiency Syndrome (AIDS)*, in 2 *ATTORNEYS' TEXTBOOK OF MEDICINE* 46-1, ¶ 46.00 (Roscoe N. Gray & Louise J. Gordy eds., 1988).
204. See Theodore M. Hammett & Saira Moini, *UNITED STATES DEP'T OF JUSTICE, UPDATE ON AIDS IN PRISONS AND JAILS* 1 (1990); James F. Horner, Jr., *Constitutional Issues Surrounding the Mass Testing and Segregation of HIV-Infected Inmates*, 23 *MEMPHIS ST. U. L. REV.* 369, 370 (1993).
205. See THEODORE M. HAMMETT ET AL., *NATIONAL INST. OF JUST., 1992 UPDATE: HIV/AIDS IN CORRECTIONAL FACILITIES* 18 (1994); Deborah Dalrymple-Blackburn, *AIDS, Prisoners, and the Americans with Disabilities Act*, 1995 *UTAH L. REV.* 839.
206. See Interview with Nora Gabriela Molina, *Newsline* 8 (April 1996) [hereinafter *Molina Interview*].
207. See Tom Buckham, *HIV-Infected Inmate Claims Abuse by State Suit by Transsexual at Albion Prison*, *BUFFALO NEWS*, June 6, 1993, available in 1993 WL 6094946 (documenting Ms. DeVilla's suit); Dan Herbeck, *Estate of Transsexual with AIDS Awarded \$30,000 in Prison Suit*, *BUFFALO NEWS*, May 30, 1997, at B7 (documenting award received by estate).
208. See Dan Herbeck, *Estate of Transsexual with AIDS Awarded \$30,000 in Prison Suit*, *BUFFALO NEWS*, May 30, 1997, at B7.

subsequently found such disclosures to be unconstitutional.<sup>209</sup> Dee Farmer, along with many other transgendered prisoners, has been denied the right to work in certain areas of the prison and access to hormones because of her HIV status.<sup>210</sup>

The construction of the illness and its moral dimension keeps traditionally-gendered people from seeing the trials transgendered people face. It is as if a miner, upon viewing a canary stricken by toxic air, were to exclaim relief because the canary's illness stemmed not from any general danger but from its own moral weakness. The construction of transgendered identity as an illness forces transgendered prisoners to present their gender identity as a sick one to qualify for the treatment they deserve. Given that such a presentation of transgenderism as illness may only serve to reinforce the gender binarism's hold, transgendered people may feel especially uncomfortable embracing the label of illness to have their own needs met. Recognizing the limits of medical discourse does not preclude its uses in certain discrete contexts to achieve specific and limited goals, such as insurance coverage and fair treatment by the courts. Nonetheless, the stigma of "gender illness," compounded by that of AIDS phobia, leads to a considerable distortion of the reality of transgendered lives as part of the spectrum of gender diversity. This Part now turns to the specific needs of transgendered prisoners and how those needs may be met or, more often, ignored by prison authorities.

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209. *See Powell v. Schriver*, 175 F.3d 107, 113 (2d Cir. 1999) (holding that prison employees cannot justify disclosing a prisoner's transgendered status).

210. *See Farmer Interview*, *supra* note 6.

*B. Physical Transformations*

## 1. Surgery

*"Someone eager to undergo this mutilation is plainly suffering from a profound psychiatric disorder."*

—Seventh Circuit Chief Judge Posner<sup>211</sup>

Courts generally do not require that a prison conduct any surgery, either genital or nongenital, to further the transformation process.<sup>212</sup> As one prison official stated, "[w]e're not in the sex-change business, per-se."<sup>213</sup> This refusal is consistent with the general unavailability of public monies for transgender surgery.<sup>214</sup> Sex reassignment surgery in many instances would be the obvious next step for transgendered prisoners who are at advanced stages of gender transformation at the time of their incarceration. One prisoner arrived to serve her term already castrated, but was placed in a men's prison because she still had a penis.<sup>215</sup> The prison hospital performed castration in only one case where a transgendered woman, placed in segregation because of her femininity, repeatedly attempted to mutilate her testicles. At one point she succeeded to the extent that the hospital had to finish the job.<sup>216</sup> Another transgendered woman, after requests for sex reassignment surgery, electrolysis, cosmetic surgery, hormonal therapy, cosmetics, and a transfer to a women's prison failed, made four attempts at self-castration using razors, metal, and glass.<sup>217</sup> The vital importance of gender transformation for some

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211. *Maggert v. Hanks*, 131 F.3d 670, 671 (7th Cir. 1997).

212. See, e.g., Marks, *supra* note 80 (discussing a transgendered prisoner who was denied a requested Sex Reassignment Surgery).

213. Washington Department of Corrections Secretary Chase Riveland, *quoted in* Brockenbrough, *supra* note 105.

214. See Seth Jacobs, *The Determination of Medical Necessity: Medicaid Funding for Sex-Reassignment Surgery*, 31 CASE W. RES. L. REV. 179 (1980).

215. Cynthia Chamnes underwent castration at age 20. See *Prisoner Without a Gender Poses Problems for Jailers*, SAN FRANCISCO CHRONICLE, May 21, 1985, at 18.

216. See *Supre v. Ricketts*, 792 F.2d 958, 960 (10th Cir. 1986).

217. See *White v. Farrier*, 849 F.2d 322, 323 (8th Cir. 1988). Ms. White was denied treatment in part because authorities found her claims unconvincing because she continued to wear a mustache. Subsequent to her suit, Ms. White was determined to be a transsexual by four professionals. However, because the prison doctor's report

transgendered people, faced with the refusal of authorities to attend to their gender identity issues, will likely continue to lead them to attempt to further their transformations themselves.

Many transgendered people who enter prison have not yet undergone sex reassignment surgery or other surgery to further their gender transformation. The optimal situation for transgendered people would permit them to undergo the necessary surgery to achieve the transformation needed for their mental health. Such transformation would require the same psychological treatment and support services that it requires outside of prison. Certainly, prisons should not attempt to reverse prisoners' own attempts at surgical transformation.

Though such provisions may be ideal, they would entail great costs to the prison system. Although no penal interests would be harmed by the availability of such surgery, the notion that prisons would pay for surgery such as mastectomy, phalloplasty, vaginoplasty, and cosmetic surgery seems quite far-fetched, given that requests for such expenses from public funds have historically been denied.<sup>218</sup> One transgendered woman in Canada expressed her opposition to the provision of sex reassignment surgery to prisoners, stating "[m]aybe all transsexuals should commit a crime, go to jail, and receive our treatments at the expense of taxpayers."<sup>219</sup> As Judge Posner stated, "[w]e do not want transsexuals committing crimes because it is the only route to obtaining a cure. . . making the treatment a constitutional duty of prisons would give prisoners a degree of medical care that they could not obtain if they obeyed the law."<sup>220</sup>

Despite the fact that nobody would suffer prison life in order to get a sex-change, prisons still need to evaluate how to minimize such costs. First, prison systems could seriously limit the number of transgendered people who have access to such surgery by requiring that the prisoner demonstrate a high degree of transformation before entering prison. Second, strict enforcement of the requirement of long-term psychological care would probably limit the number of candidates. Third, though of far less utility to most prisoners, prisons could require prisoners to contribute to the cost of such surgery, either by

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did not exhibit deliberate indifference to the prisoner's condition, Ms. White lost her suit.

218. See Marks, *supra* note 80.

219. Katie Thomas, *Treatment Unequal*, CALGARY HERALD, Dec. 20, 1996, at A20.

220. *Maggert v. Hanks*, 131 F.3d 670, 672 (7th Cir. 1997).

payment from their families or by garnishing post-release wages. In one case, a prisoner offered to pay for her sex reassignment surgery if she could subsequently be housed in a women's prison, but was denied.<sup>221</sup> Given the lack of financial resources available to most prisoners, most transgendered prisoners would still face the prospect of years of suffering an incomplete transformation.<sup>222</sup>

The slim possibility that any of these reforms, even the last one, would be adopted reflects the extent to which transgendered prisoners' problems emblemize the broader failure of prisons to accommodate the mental and physical health needs of all prisoners. The fact that barbaric autotransformative acts even occur typifies the insouciant attitude of prison authorities to the real health of those under their charge.

## 2. Hormonal Transformation

Transgendered people in transformation need to continue their hormonal treatments in prison. Hormone provision is only available to transgendered women, since hormones for transgendered men still entail questions of medical safety.<sup>223</sup> As the Tenth Circuit noted, the law of most circuits does not require prisons to provide hormones to transgendered prisoners.<sup>224</sup> Nonetheless, the policy of the United States Bureau of Prisons is to provide hormones to transgendered women prisoners in order to maintain, rather than advance or reduce, transgender attributes.<sup>225</sup> However, because the prison has an interest in the maintenance of the gender binarism, men's prisons will deny estrogen to transgendered women in order to keep the men's prison "male."<sup>226</sup> Even if the prison provides hormones, it does not guarantee that they will be provided at the appropriate levels and with the necessary physical and psychological support services. For example, one

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221. See McKay, *supra* note 121.

222. See McKay, *supra* note 121.

223. See Compton Interview, *supra* note 51.

224. See *Brown v. Zavaras*, 63 F.3d 967 (10th Cir. 1995).

225. See *Murray v. United States Bureau of Prisons*, No. 95-5204, 1997 WL 34677, at \*3 (6th Cir. Jan. 10, 1997); *Farmer v. Hawk-Sawyer*, 69 F. Supp. 2d 120 (D.D.C. 1999). Hormones are also provided in Canada, at least in Alberta Province. See Mario Toneguzzi, *Taxpayers Picking Up Cheque for Inmate's Sex Change, MP Says*, EDMONTON J., Dec. 14, 1996, at A3.

226. Richard F. Storrow, *Naming the Grotesque Body in the "Nascent Jurisprudence of Transsexualism,"* 4 MICH. J. GENDER & L. 275, 308-09 (1997).



community mental health provider in New York asserts that, although hormones are freely available in local prisons, adequate medical and psychological supervision is not.<sup>227</sup>

Hormonally-treated transgendered people experience serious health problems with any cessation, reduction, or irregularity of hormonal treatment. Furthermore, after their incarceration hormone therapy requires close monitoring for side effects such as liver damage, as well as counseling to ensure that the transgendered person fully understands and is adapting to the provision of hormones. The provision of hormone therapy thus requires an array of psychological and medical services. Some prisoners may lie about previous hormone therapy,<sup>228</sup> and the common use of black market hormone treatments means that a prisoner's lack of medical records of hormone therapy cannot be taken as conclusive. Prison doctors should perform careful physical examinations, and for prisoners who had not taken hormones before their incarceration, the prisoner should see a psychologist for several months to assess the appropriateness of hormone treatments.

The cost of hormone treatment, while expensive, does not exceed the costs of other routine medical treatments administered to the general prison population. The administration of hormones should be based on need and not a lack of resources. However, in New York, reputedly one of the more liberal states in this country, a backlash has developed against "coddling" transgendered prisoners. Two state representatives separately proposed ending funding of hormone treatments.<sup>229</sup> One stated, "There is an anything-goes approach in our prisons,"<sup>230</sup> objecting to the \$9,000 annual cost of hormone provision per prisoner. This opposition is representative of the potential opposition to hormone and other treatment provision in other states.

The appropriate provision of hormones with the requisite medical and psychological support seems far-fetched for a system that so profoundly ignores the needs of transgendered prisoners. The Federal Bureau of Prisons' seemingly humane policy of maintaining hormone levels is an empty promise for the many transgendered prisoners who

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227. See Warren Interview, *supra* note 81. Dr. Warren pointed out that after leaving prison, some transgendered people have a hard time finding the resources to continue their transformation.

228. See Gonnerman, *supra* note 149, at 48 (describing one transgendered prisoner who lied about prior usage of hormones to obtain hormones in a New York prison).

229. See Duggan, *supra* note 83 (discussing upstate New York legislator Michael Nozzolio's opposition to estrogen treatments).

230. Michael Nozzolio, *quoted in* Duggan, *supra* note 83.

suffer the cruelly irregular provision of indispensable hormones. Many transgendered prisoners who are denied hormone treatment in prison experience grave effects, not only in their physical gender but in their health.<sup>231</sup> In addition to the return of facial hair growth and male pattern baldness, surface fat recedes, creating a markedly changed gender appearance<sup>232</sup> and leaving transgendered prisoners "trapped in a netherworld between manhood and womanhood."<sup>233</sup> The net effect is that the prisoner feels like she is being turned into "a sideshow freak."<sup>234</sup>

Given the shocking effects of ending hormone therapy, prison authorities should at least ensure provision to those who have already begun hormone therapy. In *Murray*, the prisoner had been provided with hormones below the level received before entering prison. The prison doctor, despite notification of the error, refused to increase the dosage. The Court "was reluctant to second-guess that judgment."<sup>235</sup> In another example, a transgendered prisoner experienced severe withdrawal symptoms, and although she had offered to pay for the hormones and to release the Department of Corrections from liability, the prison doctor refused to provide the hormonal therapy.<sup>236</sup> Another transgendered prisoner suffered significant tissue reduction around her breasts, which caused bruising.<sup>237</sup> Lack of estrogen caused periods of vomiting and depression and reversed many of the feminine characteristics she had attained during seventeen years of gender transformation. Wanton irrationality may often rule the prison's treatment of the transgendered prisoner: one prison hospital completed an attempted self-castration, but then ordered testosterone replacement therapy, against the prisoner's will. A court subsequently ordered the prison to provide estrogen treatments.<sup>238</sup>

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231. For example, Michelle Stokes experienced a great deal of physical trauma as a result of the withdrawal of hormone treatment. See Green, *supra* note 6.

232. See, e.g., Sweeney, *supra* note 2 (discussing the physical and emotional changes undergone by Marty Phillips during her incarceration); see also, Farmer Interview, *supra* note 6.

233. Sweeney, *supra* note 2.

234. Sweeney, *supra* note 2.

235. *Murray v. United States Bureau of Prisons*, No. 95-5204, 1997 WL 34677, at \*3 (6th Cir. Jan. 10, 1997).

236. See *Meriwether v. Faulkner*, 821 F.2d 408, 410 (7th Cir. 1987).

237. See *Phillips v. Michigan Dep't of Corrections*, 731 F. Supp. 792, 794 (W.D. Mich. 1990).

238. See *Supre v. Ricketts*, 792 F.2d 958, 960-61 (10th Cir. 1986). Shortly thereafter the plaintiff's sentence was commuted by Colorado's governor, liberating Ms. Supre to pursue her gender identity freely.

The high incidence of HIV among prisoners also complicates the provision of hormones to prisoners.<sup>239</sup> Many prisons do not provide hormones to seropositive transgendered people because of the potential aggravation of HIV-related conditions.<sup>240</sup> Ms. Farmer, for example, currently cannot receive hormones because the Bureau of Prisons has defined her as having AIDS.<sup>241</sup> One counter-example is the New York City Health and Hospitals Corporation, which administers medical care for city jails, provides hormones to all inmates who had been taking hormones prior to their entry into jail, regardless of their HIV status.<sup>242</sup> Given the weak support HIV-positive prisoners receive generally, the humane management of transgendered prisoners' HIV status and their hormone treatments would appear beyond the capacity of many prison systems.<sup>243</sup>

### *C. Nonmedical Gender Transformation*

*Your Vanna White days are over!*

—Prison Guard to Transgendered Woman Prisoner<sup>244</sup>

Cosmetics and clothing are an essential aspect of a transgendered person's mental health.<sup>245</sup> Since such a large part of gendered self-presentation lies in one's clothing and, in the case of transgendered women, cosmetics, the provision or deprivation of such items play a large role in the mental health of a transgendered person. Prisoners should be provided with appropriate undergarments, cosmetics, and clothing, or allowed to procure them from outsiders.<sup>246</sup> The deprivation of appropriate clothing and cosmetics for transgendered people

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239. See Dalrymple-Blackburn, *supra* note 205, at 839.

240. See *Farmer v. Haas*, 990 F.2d 319 (7th Cir. 1993); Molina Interview, *supra* note 206.

241. See Farmer Interview, *supra* note 6.

242. See Compton Interview, *supra* note 51.

243. See Farmer Interview, *supra* note 6.

244. Beyerlein, *supra* note 136; see also, *Transsexual Inmate Sues for Rights*, *supra* note 136 (discussing Ms. Pollock's case further).

245. See, e.g., *Claybrooks v. Tennessee Dep't. of Corrections*, 182 F.3d 916 (6th Cir. 1999); Houston, *supra* note 82 (discussing transgendered woman inmate Shelby Cox's requests for cosmetics).

246. Many prisoners request access to cosmetics and perfume. See, e.g., Beyerlein, *supra* note 244 (stating that Ms. Pollock had requested makeup and perfume).

could disturb the mental well-being of a transgendered inmate by forcing her to appear as her initial gender. Cosmetics and women's clothing already form part of the contraband that circulates in a men's prison.<sup>247</sup> One prisoner needed a brassiere to serve as an undergarment for her breasts.<sup>248</sup> Her doctor, however, "admitted that he denied plaintiff's request for a brassiere, stating 'I do not buy bras.'"<sup>249</sup> Jeanie Marie Druley, an advanced pre-operative transgendered woman, had her padded bras taken away from her upon incarceration.<sup>250</sup> The correctional officer stated that the bras were not men's clothing and insisted that they would treat "him" like "everyone else."<sup>251</sup> In another case, the principal issue concerned cosmetics and clothing: a 61-year-old transgendered woman had been permitted shortly after her incarceration in 1964 to crossdress in prison, with feminine clothing and make-up<sup>252</sup> including the use of three-inch fake fingernails, garter belts, stockings and other undergarments. In 1981, a Parole Board member complained about the prisoner's dress, and prison officials responded by strictly enforcing standard male attire for all prisoners.<sup>253</sup> Nonetheless, she tried to circumvent restrictions, using writing pencils as eye-liner and chalk as rouge and wearing her prison uniform in a feminine manner,<sup>254</sup> all common practices.<sup>255</sup> In both these cases, the transgendered prisoner had requested and been denied women's cosmetics and clothing. While the former case succeeded, the latter failed both at the district and circuit courts.<sup>256</sup> Thus, clothing and cosmetics, like transformative procedures, may be provided only when a medical need has been established. It would seem to be the norm that transgendered people would be denied the accessories necessary for their gender identity.

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247. See Gonnerman, *supra* note 149, at 49 (describing the provision of women's clothing and cosmetics by guards).

248. See *Phillips v. Michigan Dep't. of Corrections*, 731 F. Supp. 792, 794 (W.D. Mich. 1990).

249. *Phillips*, 731 F. Supp. at 794.

250. For a discussion of Ms. Druley's criminal appeal, see *New Sentence Refused in Slaying*, TULSA TRIB. & TULSA WORLD, Aug. 6, 1994, at N15.

251. Marks, *supra* note 80.

252. See *Long v. Nix*, 86 F.3d 761, 763 (8th Cir. 1996).

253. See *Long*, 86 F.3d at 763.

254. See *Long*, 86 F.3d at 763.

255. See Gonnerman, *supra* note 149, at 50 (describing use of Vaseline, Kool-Aid, and pencils as cosmetics in prison); Farmer Interview, *supra* note 6.

256. See *Long*, 86 F.3d at 766; *Phillips v. Michigan Dep't. of Corrections*, 731 F. Supp. 792, 801 (W.D. Mich. 1990).

At most, the cost of such provision is minimal. In prisons where placement arrangements have been made for transgendered inmates, the provision of clothing and cosmetics would cause no disruption. The challenging consideration arises where prisons have made no separate accommodation for transgendered inmates. For transgendered people placed with their initial gender, the provision of appropriately gendered clothing and cosmetics might be seen by prison authorities as potentially disruptive. This sentiment would be difficult to counter, since such authorities often fail to provide other provisions for transgendered people. It may be argued that the strong need of transgendered prisoners outweighs, at least partially, the disorder caused by a lack of gender uniformity in the appearance of the inmates.

Transgendered prisoners, like all transgendered people, may require a great deal of medical, psychological, and other support. It is incumbent upon prison authorities to provide these materials and services to permit transgendered inmates to live in the gender identity they choose.

References to psychological treatment pepper this section for a good reason: psychological support services for transgendered inmates serve a crucial dual function in the prison context. First, such support services assist transgendered people to maintain the mental fortitude required to decide to undergo and to cope with gender transformation,<sup>257</sup> because, as one court noted, it is not uncommon for individuals with gender identity disorder to become depressed, have suicidal tendencies, or attempt autocastration.<sup>258</sup> Although some transgendered people may undergo their transformations without the assistance of psychologists and therapists, access to these services can greatly facilitate the process of transformation. Second, these such services prevent abuses of the provision of gender transformation procedures by prisoners who may not have fully considered their gender transformation. The cost of such services to the prison may be high, given that a psychologist would require some degree of special training to deal with the difficult issues of gender identity in a sensitive manner. Psychologists could serve the role of preventing costs of gender transformations from spiraling out of control by requiring inmates to

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257. See, e.g., Green, *supra* note 6 (discussing self mutilation that resulted from the lack of estrogen treatment).

258. See *Farmer v. Hawk-Sawyer*, 69 F. Supp. 2d 120, 122 (D.D.C. 1999).

make the necessary mental commitment to transformation before undergoing the physical procedures.

In conclusion, treatment issues plague transgendered prisoners nearly as much as, if not more than, placement issues. The two issues reveal the grave nature of the daily lives of transgendered prisoners, and the potential for improving their lives. The lesson offered by transgendered prisoners lies not only in improving their lives but understanding why the problems they face epitomize those faced by all members of society.

#### IV. MINERS' CANARIES AND THE RIGHT TO GENDER IDENTITY

Closely observing the problems facing transgendered prisoners, one might feel confused and daunted by the myriad issues raised. The miners' canary allegory focuses our attention toward the dilemma raised by this article: what does the suffering of transgendered prisoners mean for those outside that dual imprisonment? This Part first explores the significance of this allegory for minority-majority relations. I then argue that the most visible lesson to draw from the experience of transgendered prisoners is the necessity for the establishment of a right to gender identity.

##### *A. Transgendered Prisoners: The Ultimate Miner's Canaries*

A scholar of native American issues applied the miner's canary allegory, stating: "[l]ike the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians . . . reflects the rise and fall in our democratic faith."<sup>259</sup> The allegory of the miner's canary provides us with a useful lens through which to view minority/majority relations.<sup>260</sup>

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259. Felix S. Cohen, *The Erosion of Indian Rights, 1950-53: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).

260. See, e.g., NILES ELDREDGE, *THE MINER'S CANARY: UNRAVELING THE MYSTERIES OF EXTINCTION* (1991) (discussing the miner's canary in the context of widespread disappearance of species); Ann Lewis, *Speaking for Ourselves*, 38 N.Y.L. SCH. L. REV. 125 (1994) (discussing women as the miner's canary of the American economy, first to feel the "ill winds."); Rennard Strickland, *Indian Law and the Miner's Canary: The Signs of Poison Gas*, 39 CLEV. ST. L. REV. 483 (1991).

### 1. Transgendered Prisoners, Multiply Oppressed

Transgendered prisoners' lives reflect the nature of multiply-oppressed identities in which the particularized nature of the oppression commingles with other oppressions to constitute a graver form of victimization. Dee Farmer demonstrates the range of oppressions faced by transgendered prisoners. A 22-year old pre-operative transgendered woman serving a twenty year sentence for credit card fraud, she was transferred by prison officials as a disciplinary measure to the all-male maximum security U.S. Penitentiary in Terre Haute, Indiana. Prison officials did so despite their knowledge of Ms. Farmer's prior segregation for her protection and despite the extremely violent nature of the maximum security prison. Within two weeks, Ms. Farmer claimed she had been brutally raped and beaten.<sup>261</sup> Ms. Farmer sued the prison for cruel and unusual punishment, and convinced the Supreme Court to reverse the Circuit's affirmance of the dismissal of her case.<sup>262</sup> But Ms. Farmer's woes go far beyond the rough treatment recognized by the high court: she has suffered discrimination and mistreatment on many fronts and has persistently attempted to hold prison officials accountable for her troubles.<sup>263</sup> Twice she was successful in her prior suits to obtain estrogen, which prison officials had refused to provide.<sup>264</sup> She sued prison officials for denying her work opportunities due to her infection with HIV.<sup>265</sup> In addition to her suits on these transgender issues, Ms. Farmer sued to challenge disciplinary measures<sup>266</sup> and the fairness of her sentence.<sup>267</sup> Ms. Farmer's

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261. See *Farmer v. Brennan*, 511 U.S. 825, 830 (1994).

262. See *Farmer v. Brennan*, 511 U.S. at 848-51.

263. See Farmer Interview, *supra* note 6.

264. See *Farmer v. Moritsugu*, 163 F.3d 610 (D.C.Cir. 1998); *Farmer v. Haas*, 990 F.2d 319 (7th Cir. 1993); *Farmer v. Haas*, 927 F.2d 607 (7th Cir. 1991); *Farmer v. Hawk-Sawyer*, 69 F.Supp.2d 120, 120 (D.D.C. 1999).

265. See *Farmer v. Moritsugu*, 742 F. Supp. 525 (W.D.Wis. 1990) (challenging work restrictions preventing her from food work because she was HIV positive); see also, *Farmer v. Hawk*, No. 94-CV-2274, 1996 WL 525321 (D.D.C. Sept. 5, 1996) (challenging prison's policy for HIV positive inmates).

266. Ms. Farmer challenged punitive measures taken after she was caught having sex in public in the prison. See *Farmer v. Cowan*, 958 F.2d 374 (7th Cir. 1992).

267. See *Farmer v. Circuit Court of Md. for Baltimore County*, 31 F.3d 219, 221-22 (4th Cir. 1994); *United States v. Farmer* No. 92-6929, 1993 WL 51700, at \*1 (4th Cir. Feb. 22, 1993); *In re Farmer*, 888 F.2d 1385 (4th Cir. 1989); *Farmer v. Brannon*, No. 88-7224, 1988 WL 138724, at \*1 (4th Cir. Dec. 21, 1988); *Farmer v. Meese*, Civ. A.No. 88-206, 1988 WL 9587 (D.D.C. Jan. 29, 1988).

battles suggest the breadth and severity of the problems facing transgendered prisoners.

#### a. Intersectionality and Cosynthesis

Intersectionality, the theory that multiply-subjugated persons who face a more virulent form of oppression often slip through the cracks of antidiscrimination remedies,<sup>268</sup> also informs the position of transgendered prisoners as miners' canaries. As I have argued previously, queer identity, which encompasses people subordinated for their sexual and/or gender identities, is fundamentally intersectional, due to the variegated discriminations most queers face—"as women, as people of color, as poor people, as cross-gendered people, . . . as sexual subversives,"<sup>269</sup> and as HIV-positive people. Transgendered prisoners confront all that and the opprobrium of the criminal justice system.

The multiply-subordinate positions occupied by transgendered people position them as the paradigmatic miners' canaries. First, transgendered people simultaneously subvert the stability of both their original and target genders, exploding the two-sexed assumption. Second, transgendered people, in challenging the meaning of sexual and gender identity, often find their needs conflated with lesbian and gay people. Although many transgendered people are indeed lesbian or gay, the conflation of transgendered identity with these "sexual orientation" categories reveals profound misunderstandings about the nature of and the relationship between sex and gender practice and identity.<sup>270</sup> Consequently, transgendered people often

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268. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140.

269. Darren Rosenblum, Note, *Queer Intersectionality and the Failure of Recent Lesbian and Gay "Victories,"* 4 L. & SEXUALITY 83, 89 (1994).

270. Contemporary Euro-American society conflates sex, gender, and sexual orientation, signifying elements of one into those of another. First, the conflation of sex with gender implies that wherever certain physical traits exist, a certain gender must also exist. As demonstrated above, the physical traits that affect gender identity are quite numerous and the psychosocial elements of gender identity are strong. Second, the conflation merges gender with sexual orientation and equates "queers" (gay men) with "sissies" (effeminate men) and "dykes" (lesbians) with "tomboys" (masculine women). Third, sex is conflated with sexual orientation, so one's sexual orientation is assumed based on the sex identity of oneself and one's partner. The gender binarism incorporates the conflation of sex with gender and the mistaken bifurcation of essen-



face heterosexism regardless of their sexual orientation. Third, many transgendered people have identities that belong to more widely recognized subordinate groups, notably those constructed around race and class. Given the concentration of racial and ethnic minorities in prisons and the extent to which those imprisoned come from poorer backgrounds, these subordinations affect most transgendered prisoners. Fourth, society directs its daily devaluation of “deviants” at transgendered prisoners. Often, their imprisonment stems from crimes related to their gender identity or even from the criminalization of their gender identity.<sup>271</sup> Many must engage in sex work or theft to arrange payment for their gender transformations. In fact, in several cases involving transgendered prisoners, the inmate had been arrested while committing theft<sup>272</sup> or prostitution<sup>273</sup> to acquire money to further their transformation. Finally, the conflation of these subordinate identities in this particular era creates a group with an unusually high incidence of HIV, with the concomitant ostracism, even within the prison, and the peculiar health problems facing transgendered seropositive inmates. Seropositivity in the context of an already highly-medicalized transgendered identity only furthers their categorization as “sick.”

#### b. Cosynthesis

The presence of all these categories in particular individuals calls into question the viability of such discrete categories: transgendered prisoners are stuck in a crisis of category. Far more relevant than this pile of categories is the interconnected functioning of such identities and the discrimination against them. The difficult task of discerning the source of particular wrongs loses its relevance against the pains of

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tially multiple genders. Transgendered people “refuse, in highly pronounced ways, to obey the conflation of sex, gender, and sexual orientation.” Valdes, *supra* note 60, at 273.

271. One commentator demonstrates the extent to which the law has criminalized transgendered identity itself. See Shafiqullah, *supra* note 27, at 201–09, 226–27.

272. See *Prisoner Without a Gender*, *supra* note 215 (detailing the problems facing Cynthia Chamnes, a transgendered prisoner incarcerated for bank robbery that she and her lover committed to further her gender transformation, reminiscent of the Al Pacino film, *DOG DAY AFTERNOON* (Artists Entertainment Complex 1975)).

273. Dee Wakefield worked as a prostitute to earn money for her transformation. She also claims that her imprisonment was related to her transgendered identity, since she was imprisoned for killing a sexually abusive uncle. See Cohen, *supra* note 46.

daily life for transgendered prisoners. Peter Kwan describes the dynamic interconnectedness among such identities as "cosynthesis."<sup>274</sup> Multiply-subjugated identities place their subjects in particular social positions that highlight the connections between progressive change for one subjugated group and another. The amalgam of these identities places transgendered prisoners in a uniquely restraining web of oppressions. Without certain sets of hierarchical and sometimes discriminatory practices, each aspect of their identities—race, class, criminal "deviance," and HIV status—would not impact their lives in the same fashion.

Although an extensive body of literature documents the undeniably profound consequences of each of these identities, a full account of the combination of these identities has yet to be performed. The exposition of the travails of transgendered prisoners presents a snapshot of the contours of such a full accounting. Most notable is the manner in which the set of subordinate identities interacts to worsen the lives of these subjects. Identities interact with each other, constructing a closely-intertwined series of oppressions.

As we have seen, many transgendered people feel a strong urgency to further their transformation. If their class position does not permit them to pursue this change through legitimate processes, their limited economic opportunities may lead them to prostitution or theft to attain their goal. The socioeconomic situation of people of color serves as yet another oppressive aspect of their lives. Without any health insurance, people in these situations may resort to the use of black market hormones and surgery. The prostitution and the black market transformations, the very activity engaged to further their transformation, might lead them to yet another subjugated identity: HIV positivity. In prison, the HIV status itself may prevent their access to continued hormone provision necessary for the maintenance of their transformation. Another connection is that between sexual orientation and transgenderism—those attracted to people of another sex might undertake transformation to become the same sex as the object of their attraction, rendering them gay or lesbian. These connections only suggest further and deeper combinations of oppressions that merit further attention.

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274. See Peter Kwan, *Invention, Inversion and Intervention: The Oriental Woman in The World of Suzie Wong, Madame Butterfly and The Adventures of Priscilla, Queen of the Desert*, 5 *ASIAN L. J.* 99 (1998).

As a miner's canary who lives or dies as evidence of a dangerous atmosphere, transgendered prisoners, with their identity, security, and health, reveal the gender binarist plague that afflicts all. Placed as a test of the viability of an environment, the details of transgendered prisoners' abject victimization *sans cesse* serve as a roadmap of the wages of the gender binarism and of other categorizations. The result of this concoction of scorn and incomprehension yields profoundly disturbing mistreatment. Transgendered prisoners find themselves placed in housing among "men" or "women," subject to violence and sexual abuse based on their deviant status even among the prisoners. This housing decision reflects the gender binarism magnified into a cruel lunacy. Prisons often withhold the treatment required by transgendered people to maintain their gender identity. The lack of treatment reified the gender binarism, denying the transgendered the fruits of a transformation crucial to their mental health.

## 2. The Miners' Canary: A Closer Look

Upon closer examination, three relevant elements of the allegory appear: the act of placement in the cage in the mine; the suffering undergone by the canary subsequent to its placement; and the observation and consequent utility of the canary for the miners. These elements represent the subjugation of the outcast by the empowered, the useful suffering of the outcast, and the understanding stemming from that suffering. Fleshing out the metaphor's three elements further demonstrates how viewing specific problems through the lens of the miners' canary phenomenon reveals a contextualized, multi-perspectival understanding of the subject at hand.

### a. The Miners' Placement of the Canary

Placing the canary required observation of visual and aural alertness: if the miners failed to notice the illness of the bird, they ceased chirping certainly would get the miners' attention. Placing a being in danger to evaluate whether that danger might be mortal is an intentional act. The most tenuous aspect of the allegory is the majority's responsibility for the minority's suffering. The problem is one of agency—those in a majority cannot necessarily be considered to have directly committed the action of placing minority lives in danger.

Rather than transpose the miners' image onto specific personalities, it is more compelling to view the forces of subordination as the miners. Although individuals certainly exercise power in causing the various arbitrary subordinations that plague our society, one must first inquire how the power to subordinate is exercised. The source of such power may be difficult to locate since the sources of institutional power not only reside in the actors participating, but also in the society that legitimizes that institution.<sup>275</sup> Power thus does not merely express itself through the most notable actions of violence, but through the most subtle of exercises as well.

The hazard of such a notion of power, though, is to ascribe such power to individuals rather than structures: That such undeniable subordination exists does not permit one to infer that every individual bears responsibility for the subordination. Simply because collective structures of the empowered place subordinated people into positions of danger, this causation cannot be universalized into intentions on the part of the constituent members of the empowered classes. Violent acts may indicate such individual responsibility, but institutional violence cannot be imputed to all members of particular classes.

Thus, although the miners unquestionably placed canaries in mortal danger for their own benefit, I would not assert that prison authorities always place transgendered prisoners in their particularly toxic positions with intent. Rather, the "deliberate indifference" standard by which courts sanction prison authorities for many Constitutional violations against prisoners<sup>276</sup> actually does approximate the level of intentionality and violence of the miner at times. The study of transgendered prisoners' conditions inculcates the forces

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275. Gilles Deleuze, reading Michel Foucault, provides an unusually cogent perspective on the exercise of power and its distinction from violence:

The relationship of forces singularly exceeds violence, and cannot define itself by it. It is that violence weighs on bodies, objects or determined beings of which it destroys or changes the form, while force has no other object other than other forces, without other being but the relationship: it's 'an action on an action, on eventual actions, or present, future or presented [actions], it is 'an ensemble of actions on possible actions.' One then can conceive a list, necessarily open, of variables expressing a relationship of forces or of power, constituting actions on actions: to incite, to induce, to avert, to make easy or difficult, to expand or limit, to make more or less probable.

GILLES DELEUZE, *FOUCAULT 77* (Les Éditions de Minuit, 1986) (translation mine).

276. See *Farmer v. Brennan*, 511 U.S. 825, 835 (1994).

which control transgendered prisoners' lives rather than the individuals who exercise power over them.

### b. The Canary's Suffering

As the nature of the canary's suffering provides the miner with information, so the minority's suffering and its perspective acquires greater relevance. This perspective is illuminated by a scene in *Gilda*, the 1946 film noir,<sup>277</sup> in which a servant pointedly notes that his view, the worm's eye view, is the ground level truth in all its ugliness. This view approximates that of the canary or the transgendered prisoner.

Epistemologically, such a perspective provides the opportunity to understand the unmitigated effects of exercises of power. A close examination of the horrors of daily life as a transgendered prisoner reveals the process by which the canary is killed, as it were. The "worm's eye view" serves a crucial function: it is only through such a vantage point that the knowledge of such difficulties will be spread and people will be motivated to promote change. Transgendered prisoners face a broad range of deleterious situations, ranging from the potentially fatal to more subtle and quotidian ignominies, and only by understanding such experiences can we promote change. As Susan Sturm points out, "[t]he pressure to respond to concerns of excluded groups disrupts patterns of organizational inertia, and creates an opportunity to take from the margins and rethink the whole."<sup>278</sup> The intent observation of such travails can prove fruitful: the details revealed through such careful attention likely will elaborate the understanding we obtain from the miners' perspective.

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277. In the film, one character alone sees everything that occurs, relishes the knowledge it provides him, and on occasion, imparts wisdom upon the fools around whom the drama swirls. This character is Uncle Pío, the washroom attendant/personal assistant, and one of the few Hispanic characters in this drama of expatriates in a Buenos Aires casino. Uncle Pío brings in Glenn Ford's character's shined shoes and offers to put them on his feet. "For how much," inquires Ford. Replies Pío, kneeling to perform his duty, "The charge is slight because I find this always a revealing vantage point. The worm's eye view is so often the true one." *GILDA*, (Columbia Pictures 1946).

278. Susan P. Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations about Women, the Academy, and the Legal Profession*, 4 *DUKE J. GENDER L. & POL'Y* 119, 126 (1997) [hereinafter Sturm, *Gladiators*].

### c. The Miners' Understanding

The canary's death in the mine is no snuff film: the miner observes the suffering and death not for her own pleasure, but for signs of her own potential demise at the very toxic fumes that killed the canary. Although the miner may not identify with the canary, she does identify with a danger faced by the canary. This most crucial aspect of the miners' canary metaphor reveals the broader implications of particular subordinations. Susan Sturm elaborates on the metaphor with regard to women and other minority groups, commenting that "[w]hen they fail to thrive in particular institutions, their experience is often a signal of a more general or systemic problem that affects a much larger group."<sup>279</sup> Scholarship related to the miners' canary allegory emphasizes in particular the value of the miners' understanding that the troubles of the subordinate people can instruct positive change.<sup>280</sup> The

279. Sturm, *Gladiators*, *supra* note 278, at 126.

280. As Lani Guinier noted, commenting on the ubiquity of standardized tests, "[t]he impact of the testocracy on people of color tells more than a history of racial exclusion. It also functions like a miners' canary, the bird miners brought into the mine to signal the shift from fresh air to poisonous gas. The canary is alerting us to a much larger problem in the distribution of opportunity in higher education." Susan P. Sturm & Lani Guinier, *The Miner's Canary 1* (on file with author); *see also*, Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CALIF. L. REV. 953 (1996).

Lani Guinier has also used the metaphor of the miners' canary to address the issues of democracy in the way that Felix Cohen did: that the lack of democracy for racial and ethnic minorities evidenced a flaw in the overall democratic structure. *See* Lani Guinier, *The Miner's Canary: Race and the Democratic Process*, *DISSENT*, Fall 1995, at 521, 522. Guinier has also used this argument in her article with Gerald Torres, *The Miner's Canary: Race, Representation and the USA Experience: Understanding the Meaning and Uses of Political Synecdoche* (unpublished manuscript on file with author).

Similarly, it has been argued that the blacks serve as miners' canaries in terms of socio-economic developments such as unwed and working mothers, and that white problems follow those affecting blacks, and that black problems thus merit the attention of whites before they overtake whites.

Blacks have often said that we are the canaries in the mine of American society. This was true for drug use which was originally confined to the black community and which has spread throughout our society. It was also true for illegitimate births which are now so prevalent in all races. It is true in terms of married women working outside the home, which was virtually unheard of among whites years ago although it was quite common among blacks. The lifestyles that blacks lead today may be the lifestyles that whites lead tomorrow.

miners' canary's plight is not in vain if the miners observe that a danger threatens them. The miners paid attention to the canary's plight and heeded its warning, fleeing the dangerous gas. Similarly, those indirectly affected by the suffering of the disempowered might not only perceive such suffering but recognize its import for their own well-being. Similarly, if those viewing the shocking mistreatment of transgendered prisoners realize that these very dangers threaten their own well-being, they might take broader action to remedy the problems.

At the beginning of this subsection I raised the specter of the snuff film to highlight the ethical implications of spectatorship presumed here. If the miners' canary metaphor is to be of value, the observation of abject humiliation and suffering must entail the spectator's empathy. The allegory's power is lost if the spectator merely engages in yet another perverse, distanced consumption of another's suffering, regardless of whether the pleasure of such spectatorship is recognized. As the miner, observers of the transgendered prisoners' suffering must create concern for oneself before danger is present. That concern may lead majorities to examine the relevance of minorities' suffering to their own lives.

### *B. The Wide Lens View: Learning From Transgendered Prisoners' Problems*

The problems transgendered prisoners face by themselves merit our attention as shocking systematic violations of basic human rights. Instructed by the miners' canary allegory, drawing the lesson from their problems requires some distillation of the issues raised within the context of profoundly disadvantaged lives. As many and as interconnected as their subordinate identities are, the aspect of transgendered identity that binds them is gender. Their problems, as the miners' canary allegory illustrates, are not merely their own. They signal and demonstrate broader societal failures to cope with gender diversity.

#### 1. Lesson to the Miners: Beware the Gender Binarism

The traumas suffered by transgendered prisoners not only inform but crystallize the gender conflicts that wrack our society. The visibil-

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Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751, 802 n.176.

ity of transgendered inmates within the corrections context can serve to highlight problems that otherwise would not necessarily be visible.<sup>281</sup> The placement dilemmas confronting prison authorities arise in less blatant fashion throughout our lives, where individual's gender identity renders everyday situations disadvantageous or even dangerous. Subordinations based on gender identity define myriad socio-legal problems, including spousal and child abuse, rape, sexual harassment, employment discrimination, and economic inequality, since gender identity is a fundamental aspect of one's identity—perhaps the most fundamental given the legal coercion of individuals into one of the two sexes, "male" or "female." Each of these problems entails elements of the "compulsory gendering"—the forced adherence to the gender binarism discussed in Part One. "[P]articipants in the legal system often overlook the dynamic and synergistic relationship between law and gender and the impact of such a relationship on the individual."<sup>282</sup>

## 2. The Failure of Sex Discrimination Law

Sex discrimination law, centered in the doctrines of Title VII and equal protection, not only fail to recognize gender diversity but reinforce the gender binarism, even as they attempt to institute some form of gender justice. In *United States v. Virginia*, the Supreme Court ruled that the Virginia Military Institute (VMI), an all-male public institution, would have to admit women.<sup>283</sup> In that case, the Court enunciated the current, recently-elevated standard for equal protection based on gender: "[f]ocusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is 'exceedingly persuasive.'<sup>284</sup> The Court's decision in that case built upon the decision in *J.E.B. v. Alabama*, in which the Court decided that jury strikes could not be based solely on gender.<sup>285</sup> Both cases point to our country's "long and

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281. See Sturm, *Gladiators*, *supra* note 278, at 126 ("Other signals of both problem and progress are lacking. Often, problems only become visible when they converge around a particular visible group. The presence of women enables observers to see.").

282. Levison & Francis, *supra* note 23, at 2.

283. See *United States v. Virginia*, 518 U.S. 515, 536 (1996).

284. *Virginia*, 518 U.S. at 532–33. My analysis of VMI relies on the work of Dan Levison and Meredith Francis. See Levison & Francis, *supra* note 23, at 25–42; see also, *J.E.B. v. Alabama*, 511 U.S. 127, 136 (1994) (noting the "gender-based classifications require 'an exceedingly persuasive justification.'" (citation omitted)).

285. See *J.E.B.*, 511 U.S. at 141–42.



unfortunate history of sex discrimination,” including the denial of the right to vote.<sup>286</sup> One must not ignore the conservatism of an institution that grudgingly uses the word ‘gender,’<sup>287</sup> or the Court’s relatively progressive stance in taking gender discrimination more seriously than it has been taken in the past.<sup>288</sup>

However, the Court’s attempts at attending to the social crises arising from gender discord fall quite short of the reality of gender diversity. I quote the Court’s statement in the VMI case because it reflects the predominant liberal notion of gender justice.

‘Inherent differences’ between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity. Sex classifications may be used to compensate women ‘for particular economic disabilities [they have] suffered,’ . . . to advance full development of the talent and capacities of our Nation’s people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.<sup>289</sup>

The full force of the notion of two opposed sexes of ‘men’ and ‘women,’ the former oppressing the latter, is apparent here. The Court views the male/female binarism as a discrete, never-intermingled set of independent categories. The enunciation of the gender binarism points to a reliance on the category of ‘women’ as the unjustly subjugated, ignoring the broader phenomenon of gender, as opposed to biological sex, oppression.

Title VII discussions point to a similar construct of gender identity based in the apparently simple but entirely mistaken notion of the biological truth of two sexes. Title VII cases have generally rejected

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286. *J.E.B.*, 511 U.S. at 136 (citation omitted).

287. Justice Scalia’s dissent in *J.E.B.* sarcastically criticized the use of the word ‘gender’ in the majority’s decision, stating “[t]oday’s opinion is an inspiring demonstration of how thoroughly up-to-date and right-thinking we Justices are in matters pertaining to the sexes (or as the Court would have it, the genders), and how sternly we disapprove the male chauvinist attitudes of our predecessors.” *J.E.B.*, 511 U.S. at 156.

288. One blatant example of prior blindness to women’s issues is *Geduldig v. Aiello*, 417 U.S. 484 (1974), in which the Court viewed pregnant women as a category unto itself, denying them the rights that would be given to them had they been considered to belong to the category “women”.

289. *Virginia*, 518 U.S. at 533–34 (citations omitted).

claims of discrimination against a transgendered person as sex discrimination.<sup>290</sup> Sex discrimination involves a person who has been mistreated based on that person's sex. However, in the hegemony of the gender binarism, this notion of discrimination is reduced to "discrimination against women because of their status as females and discrimination against males because of their status as males."<sup>291</sup> Katherine Franke criticizes the notion that sex discrimination must be centered on the biological.

To conceptualize both sexual identity and sex discrimination in terms of biology at all is to ignore the role that gender stereotypes play in the construction of sexual difference . . . bodies end up meaning less in the fight for equality than the roles, clothing, myths, and stereotypes that transform a vagina into a *she*.<sup>292</sup>

Indeed, it is social position, not biology, that places women in the workplace at risk of sexual harassment, and men against the sometimes-confining expectations of masculinity.<sup>293</sup> Title VII law prohibits sex discrimination, including sexual harassment. However, many have criticized the structure of sex discrimination law, not only for the conflation of sex with gender, but for the construction of women as a "protected" sex, a structure that ignores the relevance and complexity of social positioning.

The widely-hailed *Oncale*<sup>294</sup> case, in which the Supreme Court recognized "same-sex harassment,"<sup>295</sup> fails to escape the gender binarism, with constant references to 'male' and 'female' categories as uncomplicated ones. Justice Scalia reiterated the *Harris v. Forklift*<sup>296</sup> formula that "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not

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290. See Franke, *supra* note 1, at 31–35.

291. *Wood v. C.G. Studios, Inc.*, 660 F. Supp. 176, 177 (E.D. Pa. 1987), *quoted in* Franke, *supra* note 1, at 35.

292. Franke, *supra* note 1, at 39–40.

293. Katherine Franke refers to specific situations in which people may face treatment that would be prohibited under a right to gender equality. See Franke, *supra* note 1, at 8.

294. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

295. *Oncale*, 523 U.S. at 80.

296. See *Harris v. Forklift*, 510 U.S. 17 (1993).

exposed.”<sup>297</sup> Even where the Court fundamentally recognizes that the male/female divide need not be bridged for a qualifying sexual harassment claim, the Court relies on gender stereotypes: “[a] professional football player’s working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field. . . .”<sup>298</sup> Unsurprisingly, in this case involving sexual harassment in the all-male context of an oil rig, the paradigm of a “male” work environment, a football team, not only succumbs to the notion that “men” have “masculine” jobs, but also fails to provide much specific guidance for lower courts requiring guidance for their consideration of more commonplace occupational situations. The reality of men’s lives thankfully lies far from the football field, and the invocation of such stereotypes only serves to enforce compulsory participation in the gender binarism.

*Oncale* represents yet another blow to the theory that expanded rights for lesbian and gay people would *sua sponte* advance thinking on gender rights.<sup>299</sup> It proves the profound reliance on gender stereotypes in legal thinking, even when enunciating a rule inclusive of lesbians and gay men.

Compulsory gendering restricts choice, and expression of that choice, by policing gender identity through the use of stereotypes. These stereotypes are simplified and shared images imbued with special meaning, and are the bases from which conformity and nonconformity to the compulsory gendering scheme is judged. When stereotypes describe the imposition of certain characteristics on the sexes, they act as a tool of compulsory gendering by describing who we are and prescribing how we ought to be.<sup>300</sup>

The stereotyping of gender identity in *Oncale* thus represents another lost opportunity for the Court to move beyond the gender binarism. The law of both equal protection and Title VII enforce a gender-rights doctrine that hews narrowly to a highly-traditional no-

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297. *Oncale*, 523 U.S. at 80 (quoting *Harris*, 510 U.S. at 25).

298. *Oncale*, 523 U.S. at 81.

299. For a notable example of this thinking, see generally, Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 L. & SEXUALITY 9 (1991) (arguing that same-sex marriage would denaturalize the patriarchal gender hierarchy of marriage).

300. Levison & Francis, *supra* note 23, at 9.

tion of gender that relies more on stereotypes of who we are than the realities of our lives. The miners' understanding necessarily points to a remedy, as the miner will not observe the canary's plight without leaving the mine. The observation of the problem thus directs the miner towards the roads to its remedy. As Lani Guinier has stated, "[T]he solution . . . is not merely to fix the canary's respiratory system, to fit the canary with a pint-sized gas mask, or to plead for special canary rights but to clean the atmosphere that is poisoning us all."<sup>301</sup> Of course, cleaning toxic air might be a simpler goal than remedying the flaws of the gender binarism posed by the treatment of transgendered prisoners. However, Guinier's dichotomy between band-aid reformist remedies and progressive broad change describes solutions available in various social problems, including those surrounding the issue of gender identity. Title VII and Equal Protection doctrines might be viewed as "pint-sized gas masks," when what is needed is a thorough cleansing of the air. Given the demonstrated limitation of advocating within the available permutations of the law's gender binarism, we need to look to a different idea for progress on the gender troubles that plague our society, a right to gender identity.

### 3. A Right to Gender Identity

Recall the opening paragraph of this Article in which a transgendered woman suffers the physical and mental torture of losing her gender identity as a result of her incarceration. Currently-accepted Constitutional frameworks such as that set up by *Turner v. Safley*<sup>302</sup> or even *Farmer v. Brennan*<sup>303</sup> attempt to address the needs of these people. Such solutions, however, may prove to be nothing more than canary gas masks in the toxic air of the gender binarism, which permit little accounting of the real situations facing transgendered or traditionally-gendered people. Clearing the air requires evoking a more fundamental level of inquiry regarding gender relations in our society. The right of gender identity is at the core of the issues facing transgendered prisoners and all people who necessarily bear the burden of the archaic gender binarism's grip.

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301. Guinier & Sturm, *The Miners' Canary*, *supra* note 280, at 1-2.

302. 482 U.S. 78 (1987).

303. 511 U.S. 825 (1994).

Rather than accept further articulation of the rights of minorities within the gender binarism, we must look behind current sex discrimination and equal protection law for the lurking fundamental right to gender identity, whose recognition would provide justice and clarity to those laws. Legal analysis of contemporary law on gender reveals the necessity for a recognition of the right to the self-definition of gender identity. A right to gender identity, as a broader interpretation of Fourteenth Amendment anti-discrimination doctrine, would address the claims of people subjected to compulsory gendering, permitting them to define their own gender identity without fear of discrimination in employment, housing, family, or other law. The interpretation of sex discrimination laws must realize the underlying fundamental right to determine gender without regard to sex.<sup>304</sup>

This right asserts that an individual's gender should not be restricted by physiological, genetic, or social gender identity. Many in the transgender movement recognize that gender is essentially fluid:

All human beings carry within themselves an ever-unfolding idea of who they are and what they are capable of achieving. . . . It is fundamental that individuals have the right to define, and to redefine as their lives unfold, their own gender identities, without regard to chromosomal sex, genitalia, assigned birth sex, or initial gender role.<sup>305</sup>

The claim here is for the highest possible liberty in defining one's own gender identity, without regard to the traditionally-determinative factors of biology and culture. This diversity, combined with the fact that gender constitutes such a fundamental part of personal identity, renders the right to gender identity an especially important one.

This notion of a fundamental right to gender identity has been explored in depth by transgender activists, who have devised a set of gender rights that express the full meaning of a right to gender identity. The International Bill of Gender Rights<sup>306</sup> serves as a useful point of reference for analysis of gender legal problems by pointing to po-

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304. See, e.g., Franke, *supra* note 1, at 99.

305. The International Conference on Transgender Law and Employment Policy, Inc., *The International Bill of Gender Rights 1* (adopted on June 17, 1995 in Houston, TX) (visited Oct. 6, 1999) <<http://home.sol.no/~jane/tgbill.html>> [hereinafter THE INTERNATIONAL BILL OF GENDER RIGHTS].

306. THE INTERNATIONAL BILL OF GENDER RIGHTS, *supra* note 305.

rential solutions.<sup>307</sup> The theory of a highly fluid notion of gender underlies the Bill.<sup>308</sup> Gender is not bipolar; there are many genders, perhaps as many as there are people.<sup>309</sup> Although the nine specific rights detailed in the Bill of Gender Rights outline the needs and goals of transgendered people, they also serve as a blueprint for the legal institution of a society free of gender-based oppression for all people. The first and broadest is the right to define gender identity. This provision is the most fundamental departure from the prevailing norm, which relies on biological indications to define gender. Individuals deserve the right to "define their own gender identity regardless of chromosomal sex, genitalia, assigned birth sex, or initial gender role. . ."<sup>310</sup> No human or civil rights should be denied because of someone's self-chosen gender identity.

The subsequently enumerated rights embellish the first right: the choice of one's gender should come with all the commensurate social approval that should follow from full acceptance of gender choice. People should be able to freely express their gender identity, without fear of discriminatory employment practices. Gender choice includes the ability to control and change one's own body, cosmetically, hormonally, or surgically. One should be able to pursue a gender identity with competent medical and professional care, although psychiatric oversight should not be mandatory. The realization that gender is a choice for one to make obviates the need for psychiatric and physical evaluation to determine the merit of gender transformation. The right to define one's gender fundamentally contradicts the "permission granted" medicalization of transgenderism enunciated in dicta by the

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307. The Bill of Gender Rights may be seen to ignore the contextual complexities of transgendered lives in many ways. The inability of the construct of rights to address such complexity has been explored generally by Critical Legal Scholars. *See generally* Mark Tushnet, *An Essay on Rights*, 62 *TEX. L. REV.* 1363 (1984) (arguing that rights inherently fail to achieve their claimed purpose). Transgendered people, like other minorities, place a great deal of faith in the ability of such rights to remedy social and legal inequities. In its scope, the International Bill of Transgender Rights reads more as a plan of action rather than a set of rights to be enacted by a legislature. Whether rights will actually make a difference is questionable given their record for other minorities.

308. One example of this fluidity comes across in Kate Bornstein's discussion of virtual gender: "On some of the 'pay for play' public electronic bulletin boards . . . there can always be found men who are on-line as women. Similarly, I've known a few women who've gone on-line as men." BORNSTEIN, *supra* note 4, at 139.

309. *See generally*, STOLTENBERG, *supra* note 14 (arguing that sexual identity is entirely a political and social construct).

310. THE INTERNATIONAL BILL OF GENDER RIGHTS, *supra* note 305.

Supreme Court's *Farmer* decision, that transsexualism is a medically defined disease. Finally, individuals should be guaranteed the right to sexual expression, and to form committed, loving relationships, to enter into marriage, and to raise children, regardless of gender identity.

#### 4. The Impact of the Right to Gender Identity

These rights clarify some of the directions the law can take to remedy the subordination of and discrimination against transgendered people. They permit us to imagine the appearance of fair treatment of traditionally-gendered and transgendered people in the context of a right to gender identity. The gender binarism would be discarded along with the compulsory stereotyped gender roles it enforces, permitting people to express the multiple aspects of their gender identities without fear of reproach. Men would receive protection for their gender identities even outside of oil rigs and football teams. All aspects of gender choice, from wearing pants to taking maternity leave, would be open to women. Discrimination against lesbians and gay men, often centered in the gender binarism rather than homophobia,<sup>311</sup> would have a new enemy. Legal decision-makers would have a more expansive yet accurate basis for challenging the range of gender-related problems, from domestic abuse to employment discrimination.

Returning to the subject of this study, the right to gender identity would fundamentally ameliorate the rights of transgendered prisoners. This right, as an interpretation of Fourteenth Amendment law, should extend to prisoners under *Turner v. Safely*, easily outpacing current Eighth Amendment analysis that centers on the medicalization of transgendered prisoners. The predominant method of automatically placing transgendered people in prisons using genitalia as a litmus gender test clearly violates the right to define one's gender. However important this right may be in addressing the needs of transgender prisoners, the actualization of such a right in prison is doubtful at best. Prison authorities function precisely to *restrict* choice on the part of the prison population, and this denial of choice would extend to self-definition of gender. A discrete right to gender identity within the guarantee of equal protection would better address the

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311. See *supra* Part I.A.3 (discussing of the conflation of gender and sexual orientation).

concerns of transgendered people in and out of prison. The fundamental right to gender identity, like other rights enjoyed by people in the free world, would necessarily undergo modification for its guarantee to prisoners, but would nonetheless provide a basis for challenging discriminatory placement and treatment practices. Without the right to gender identity, serious change might prove elusive for progressive individual actors in the corrections machine. Attorneys may tinker with the current system of genitalia-based placement and limited treatment to find piecemeal improvements. But the more sweeping change provided by a right to gender identity would indubitably serve the needs of all people, including transgendered prisoners.

The reality is that such a right to gender identity may seem a pipe dream, especially for prisoners governed by institutions designed to deny choice. Yet San Francisco, the oft-harbinger of future legal policy, has included "gender identity" to its set of identities that may not be the legal target of discrimination.<sup>312</sup> The progressively faster pace of gender issues rising through the courts and legislatures will only serve to make the need for a right to gender identity more evident.

Furthermore, examinations of rights victories, both for minorities and for broader populations, have revealed the limitations of a rights structure in guaranteeing progress. Indeed, some have argued that rights are a distracting substitute for true progressive change.<sup>313</sup> Critical race theorists in particular have reassessed presumed victories in light of the failure of courtroom victories to translate into street-level progress.<sup>314</sup> Given the recent reassessment of the value of legal victories for queer communities,<sup>315</sup> advocates for transgender rights might take pause before pursuing an agenda that mimics traditional civil rights structures. In advocating for a right to gender identity, we cannot forget that securing rights requires social, not just legal, change that cleans the toxic air people breathe.

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312. See CITY AND COUNTY OF S.F., CAL. ADMINISTRATIVE CODE Ch. 12; see also, CALIFIA, *supra* note 61, at 238.

313. See Tushnet, *supra* note 307.

314. See, e.g., Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 403-04 (1987).

315. See, e.g., Rosenblum, *supra* note 269, at 94-114.



## CONCLUSION

Today, “[f]rom being an art of unbearable sensations, punishment has become an economy of suspended rights.”<sup>316</sup> This assessment provides a transpicuously insightful presentation of the function of prisons in contemporary society generally. Transgendered prisoners, however, witness their suspended rights converted into the unbearable sensations of their own coerced transmogrification. Transgendered prisoners’ position behind bars, underneath the weight of so much oppression, makes their everyday survival a series of heroic acts, a heroism that defines the transgender movement.

*Mariposas en el Andamio*, or “Butterflies on the Scaffold,”<sup>317</sup> documents the story of a group of transgendered people in La Guinera, a rural Cuban town. Lacking access to the trappings of modern femininity used for cross-dressing, they ingeniously invent these elements with the quotidian objects available. The drag queens confront an atmosphere of utter ostracism, where their private performances have been banned by the police. Despite her disapproval and miscomprehension of transgenderism, Fifi, La Guinera’s Chief of Construction, agrees to let the drag queens perform at the construction workers’ cafeteria. Braving the town’s machista element, they perform, proudly claiming their transgendered identity, and their spiritedness wins the ultimate transformation of the townspeople’s intolerance into support. Fifi confirms the town’s conversion, stating she believes it is essential for children to be exposed to transgendered people to open their minds about who they want to be, and that transvestitism is at the heart of the revolution.<sup>318</sup> These transgendered people helped liberate the town from the gender binarism.

The maze of barricades transgendered people must delve through and surmount, from La Guinera, Cuba to United States prisons, alert us to the urgency of the gender binarism’s crippling constraints on human expression. Yet as the transgendered people of La Guinera inspired the townspeople, envisioning fair treatment of transgendered people directs us toward the liberation of people of all genders. In rallying for the fair treatment of transgendered people, we speed the

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316. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 11 (1977).

317. *MARIPOSAS EN EL ANDAMIO* (Luis Felipe Bernaza & Margaret Gelpin 1995).

318. Fifi, Chief of Construction, La Guinera, *quoted in MARIPOSAS EN EL ANDAMIO*, *supra* note 317.

decline of compulsory gendering as we advance the establishment of gender justice and freedom for all. This is the unimpeachable transgendered ethic, as a family doctor in La Guinera recognized, stating, "the trans[gender] phenomenon is a new era with perspectives for the union of humanity in love and mutual respect between human beings."<sup>319</sup>✿

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319. Dr. Jorge Fidel Moreno, *quoted in* MARIPOSAS EN EL ANDAMIO, *supra* note 317.