

TRANSITIONING OUR PRISONS TOWARD AFFIRMATIVE LAW: EXAMINING THE IMPACT OF GENDER CLASSIFICATION POLICIES ON U.S. TRANSGENDER PRISONERS

By
Richael Faithful*

I. INTRODUCTION

“I’m raped on a daily basis. I’ve made complaint after complaint, but no response. No success. I’m scared to push forward with my complaints against officers for beating me up and raping me. I was in full restraint when the correctional officers assaulted me. Then afterwards they said I assaulted them. All the officers say is ‘I didn’t do it.’ The Inspector General said officers have a right to do that to me. That I’m just a man and shouldn’t be dressing like this...”¹

Bianca is a female-identified prisoner currently incarcerated in the general population of a New York state men’s prison. Bianca’s experience is traumatic, shocking, and real. Every day, transgender people like Bianca face painful choices about their well-being in our society. Transgender people who are in prison have even fewer choices. Our prison system not only punishes them, but it further sentences them to live within their own bodies’ betrayal.

Modern ideas about gender have fast-outpaced the law. Theorists today describe gender identity as a complex reflection of how we see our genotypic, physical, and social selves.² Gender expression is the manifest gender identity usually expressed by “masculine” and “feminine” choices from hair length to clothing.³ Every person possesses a gender identity and expresses this identity; many social scientists call this phenomenon “doing gender.”⁴ An increasing number of scholars and advocates (including lawyers) argue that “both sex and gender are socially constructed and both sex and gender are socially real.”⁵

Conventional notions establish a binary gender classification system: male and female. Transgender people may be considered a third group: their gender identity or expression does not conform to their assigned birth gender, and they may transition from one gender to another.⁶ Sexual orientation, defined by the gender of those to whom a person is sexually attracted, is a distinct identity from a person’s gender. In fact, “transgender people have all sexual orientations.”⁷

Few statistics are available about the transgender population.⁸ Nonetheless, one international transgender study found that 8% of respondents self-identified as a gender other than “male” or “female.”⁹ Among the U.S. population, an estimated .25% to 1% of the population has undergone at least one sex reassignment surgery.¹⁰ Transgender women (male-to-female) are “1.5 to 3 times more prevalent than female-to-male” persons.¹¹

Even fewer data are available for transgender prisoners. A 2005 study shows, however, that transgender people are two or three times more likely to be incarcerated than the general population.¹² Many corrections departments’ policies fail to recognize transgender people despite this disproportionate representation.

Some areas of law enforcement are beginning to recognize gender variant people (non-gender conforming people who may include transgender and intersex people). Even so, law enforcement, particularly prison systems, are quickly discovering that they are unable to adequately respond to the increasing number of transgender-identified and intersex people entering their doors. Bianca and others are subject to the constant threat of physical and sexual violence, creating legally inhumane and morally intolerable conditions. The American prison system has reached a moral crisis regarding transgender rights that impinges on basic constitutional protections¹³—a crisis which must be tackled with policy and law-making that fundamentally changes incarceration practices.

Our prison system not only punishes them, but it further sentences them to live within their own bodies’ betrayal.

This article will trace how sexual violence related judicial and legislative history has framed and impacted transgender prisoners’ rights. I will first explain the prevailing U.S. prisoner classification standard and the policy incongruence that undermines its intended purposes and rationales. Then I will then discuss the District of Columbia’s proposed policy, which promises to be a small step forward for prisons in their treatment of transgender prisoners. Finally, I will share recommendations for the District of Columbia and other jurisdictions wishing to move forward a positive transgender prisoners’ rights law.

II. SEXUAL VIOLENCE LITIGATION AND LEGISLATION CREATE OPENING FOR TRANSGENDER RIGHTS

1. SUPREME COURT DECISION RECOGNIZES FEDERAL LIABILITY FOR EXPOSING TRANSGENDER PRISONERS TO HIGH-RISK ENVIRONMENTS

Transgender prisoners’ rights are a newly recognized area in U.S. jurisprudence. They have been deliberated largely on the state level, in which state prisons have more or less successfully addressed transgender prisoners’ needs through administrative policy-making. Several court cases, however, have intervened to more firmly establish rights that affect transgender prisoners. A particular concern involves the safety of trans-women confined

within male populations, such as their vulnerability to sexual violence. Lower court decisions have variably affirmed transgender prisoners' rights to safer living conditions, but no ruling has definitively objected to the administrative status quo that allows and even promotes genitalia-based classification.

The only U.S. Supreme Court case to touch this issue is a 1994 case, *Farmer v. Brennan*. *Farmer* was a narrow decision holding that a federal official could be liable under the Eighth Amendment by acting with "deliberate indifference" to a prisoner's health or safety, but only if she or he knew that the prisoner faced "substantial risk of serious harm."¹⁴ The petitioner, Dee Farmer, was a trans-woman (male-to-female) who had undergone estrogen therapy, two sex reassignment surgeries, and was diagnosed by the Bureau of Prisons as having gender dysphoria.¹⁵ Farmer was placed with the general male population during a transfer from a state to a federal prison. Within two weeks, her cellmate had brutally attacked and raped her.¹⁶ This ruling opened federal officials to a lawsuit only if two things were true: if they had substantial certainty that a prisoner was at risk and they failed to prevent or minimize the risk.¹⁷ Other authors have examined the case's constitutional elements in depth,¹⁸ so I will only examine its concrete impact on transgender prisoners.

Farmer was a seminal case because it affirmed transgender prisoners' right to humane confinement conditions under the Eighth Amendment's prohibition against "cruel and unusual punishment." At the same time, *Farmer* was an extremely limited holding because of the narrow construction and application of the "deliberate indifference" test. The test requires a liable party to have *actual subjective knowledge* of a risk. This too easily favors an "ignorance" defense, and sets up a high standard for transgender prisoners seeking relief.

"Deliberate indifference" lies between negligence and malice. It is sometimes referred to as recklessness "that is more than ordinary lack of due care for the prisoner's interests or safety"²⁰ but is "something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result."²¹ Such harm must be substantial or be sufficiently serious to be considered a deprivation of rights.²² It is unclear from the opinion whether wrongly classifying a trans-woman *alone* constitutes a sufficiently serious deprivation, and for this reason is it clear how the test may apply to Farmer and other transgender prisoners who may or may not come forward about sexual abuse. Although the Court implies that exposure to targeted sexual violence may constitute a violation of the Eighth Amendment (assuming that the "deliberate indifference" test is met), it will fall to future cases to clarify the test's application on transgender prisoners.

The *Farmer* Court chose not to alter the objective "deliberate indifference" test even though the fact that Farmer was a transgender person should have deserved separate attention. The Court rejected petitioner's request to make deliberate indifference an objective test, finding that "Section 1983 (which provides a cause of action) 'contains no state-of-mind requirement independent of that necessary to state a violation of the underlying

constitutional right.'"²³ By construing a federal statute in this way, prisoner protections are subject to a wide outcome range rendering inconsistent application for members belonging to vulnerable prison communities. A subjective test or modified objective test would have more broadly protected Farmer and other transgender prisoners.

Farmer's counsel made a compelling argument about the adverse implications of a subjective test. The concern was that the absence of an objective test would permit prison officials to ignore danger toward prisoners.²⁴ On first impression, this argument implies a legal-gaming problem, especially given the nature of prison environments whose culture is predicated on dominance and control. The more salient danger may be the confusion of issues due to the pervasiveness of gender myths in our correctional and legal institutions. For example, if a transgender woman is believed to be an effeminate gay man, then the "deliberate indifference" test is not met

The American prison system has reached a . . . crisis which must be tackled with policy and law-making that fundamentally changes incarceration practices.

because an objective prison official might reasonably (though incorrectly) believe that the transgender prisoner is still male-identified. Objective "reasonable" tests invariably fail new, marginalized classes of plaintiffs. They are a weak liability indicator for invisible or marginalized prisoners who are most at risk. A "deliberate indifference" standard becomes even more difficult to reach for transgender prisoners who must *prove* an official had 1) sufficient knowledge about gender identity and gender expression and 2) an adequate appreciation for how a prisoner's gender identity may expose a prisoner to a substantial harm. The likelihood of a transgender prisoner proving "deliberate indifference" appears extremely low.

Lower court decisions have inconsistently protected transgender prisoners from improper classification. In *Crosby v. Reynolds*, in 1991, a female prisoner brought a Fifth Amendment privacy violation suit against prison officials for housing her with a transgender woman.²⁵ The Court stated that "officials here were confronted with a situation that had no perfect answer" and held that prison officials were entitled to qualified immunity for reassigning the transgender woman into the women's facility.²⁶ Four years later, in *Lucrecia v. Samples*, a federal court rejected a transgender woman's numerous constitutional violation claims, including one claiming an Eighth Amendment Due Process violation based on an exception allowing actions for "legitimate penological interests."²⁷ Most recently in 1999, in *Powell v. Schriver*, an HIV-positive transgender woman sued the prison on Fifth and Eighth Amendment grounds when the prison staff informed other prisoners of the plaintiff's gender identity. Although the plaintiff's jury award for privacy violation set aside by the lower court was not reinstated, the plaintiff successfully had her Eighth Amendment claim remanded upon the court's finding that no qualified immunity existed for disclosure of her gender identity.²⁸ The two latter cases (*Lucrecia* and *Powell*), like *Farmer*, involved prisoners who experienced sexual violence resulting from misplacement. These cases suggest that there has been a positive judicial evolution over the years that charts a path for advocates seeking greater legal recognition and protection for transgender prisoners.

2. PRISON RAPE ELIMINATION ACT (“PREA”) ENACTS NATIONAL STANDARDS DESIGNED TO BETTER PROTECT PRISONERS FROM SEXUAL VIOLENCE

Congress is beginning to recognize transgender prisoners’ rights. The Prison Rape Elimination Act of 2003 was the first piece of federal legislation to address prisoner sexual violence. Among its stated purposes, the Act aimed to “(1) establish a zero-tolerance standard for the incidence of rape in prisons in the United States” and “(2) make the prevention of prison rape a top priority in each prison system.”²⁹ To reach its goals, Congress established a bipartisan panel, the National Prison Rape Elimination Commission (“NPREC”), which was charged with making national standard recommendations to the Attorney General.³⁰ NPREC held eight public hearings throughout the country where transgender lawyers and advocates testified about the problems faced by transgender prisoners.³¹

San Francisco-based Transgender Law Center (“TLC”) testified in the California hearing entitled “At-Risk: Sexual Abuse and Vulnerable Groups Behind Bars.”³² TLC shared that in addition to rape and coercion, sexual violence experienced by transgender prisoners may include “unnecessary strip searches, and forced nudity, and harassment.”³³ Most striking was the testimony that “this violence does not exist, and cannot be understood, [for transgender people] in a vacuum,”³⁴ referring to the widespread transgender discrimination outside prison that leads to over-incarceration.³⁵

Since PREA’s passage over five years ago there has been significant scrutiny over the Act’s efficacy.³⁶ There is little evidence that PREA has curbed transgender violence. Of PREA’s national standard recommendations, those that are most relevant to transgender prisoners have yet to be broadly reflected in administrative policies (discussed later in this article). For example, Recommendation CI-2 on Classification Assessment provides:

During the internal classification process, staff assesses every inmate to determine his or her potential to be sexually abused by other inmates and his or her potential to be sexually abusive...Every inmate’s classification assessment is reviewed and updated, as necessary, at regular intervals, following significant incidents, and whenever new and relevant information is available.³⁷

This recommendation does not explicitly enumerate transgender prisoners, but calls for procedures that would better protect them from abuse by advising case-by-case consideration. When given the opportunity, PREA and NPREC failed to challenge genitalia-based classification policies. Instead they chose to draft flexible individualized policies that stop short of addressing transgender prisoners as a class. Although flexible classification policies are better than the current binary male/female system, discretionary policies are unlikely to improve conditions for prisoners whose needs remain deeply misunderstood.

III. FAILURE TO PRESERVE TRANSGENDER PRISONERS’ HUMAN RIGHTS IS ROOTED IN ANTIQUATED GENITALIA-BASED CLASSIFICATION POLICIES

1. GENITALIA SERVES AS THE PREVAILING PRISONER GENDER CLASSIFICATION STANDARD IN U.S. AND FAILS TO TREAT TRANSGENDER PEOPLE FAIRLY

Generally, U.S. jurisdiction classifies prisoners by their perceived anatomical sex (genitalia): male or female.³⁸ As articulated in the Transgender Law Center’s testimony, as long as the inmate possesses internal and external sex organs corresponding with a specific sex, he or she will be housed in accordance with that sex.³⁹ Genitalia-based policies represent a rarefied reality of gender-segregated facilities that have no place for gender variant people. Gender segregation itself may not be the most critical issue; some argue “just as culpable, and possibly more so, are the gendered expectations that this segregation creates.”⁴⁰ Most jurisdictions do not recognize transgender people within procedural policies—classification-based or otherwise—at all.

Some state and local jurisdictions, including California, Illinois, Minnesota, New York, Oregon, and Washington, have established non-discrimination policies, hormone treatment guidelines, and staff training requirements for transgender prisoners.⁴¹ But only one jurisdiction’s youth division, in New York, provides a self-identification classification policy in which transgender prisoners may self-select their placement.⁴²

Many prisons confront this issue with administrative segregation (solitary confinement) as an alternative to placement with the general population,⁴³ believing it to be the best available solution.⁴⁴ In reality, administrative segregation “allows a prisoner minimal interaction with other people, no access to jobs or treatment programs, and greatly restricted privileges The stated purpose of administrative segregation is that people being confined within it are a proven danger to themselves, staff, or other inmates the message is being sent that a person’s gender identity itself is threatening to the institution”⁴⁵ Gender variance has proved to be threatening to prisons that are balancing two imperatives: preserving order and protecting its prisoners and officials from violence and legal issues associated with violence. Nonetheless, transgender prisoners should not be punished for a dilemma that prisons have been unable to resolve.

Legislatures sometimes distinguish between post-operative prisoners and pre-operative prisoners.⁴⁶ Post-operative prisoners, known as transsexuals, are transgender people who have had sex reassignment surgery (“SRS”) that changes a person’s external anatomy from a particular sex to another.⁴⁷ The consequence of differentiating between pre- and post-operative transgender prisoners is significant. Post-operative prisoners are usually able to be classified according to their gender identity. Pre-operative or non-operative prisoners are not. When prisoners are sorted by post-operative or pre-operative status, they are in reality being sorted by economic class. The umbrella term “sex reassignment surgery” is misleadingly simplistic because it refers to a large set of costly medical procedures.⁴⁸ SRS tends to be

. . . this violence does not exist, and cannot be understood, [for transgender people] in a vacuum . . .

prohibitively expensive or otherwise unavailable to most people for a variety of reasons,⁴⁹ ensuring that an overwhelming majority of transgender prisoners are housed within high-risk environments, based primarily by their economic means. Another related problem is the post- and pre-operative distinction is a social and legal fiction. It makes classification results random, disparate, unequal, and unfair.

2. CURRENT POLICIES FAIL TO TREAT TRANSGENDER PEOPLE EQUALLY

The high level of scrutiny directed toward gender variant people's bodies is patently unfair and impracticable. During intake, gender-variant people often undergo a higher level of scrutiny of their bodies than others when prison and medical staff try to place them within the binary system.⁵⁰ Simply envision this scenario for yourself. It may be difficult to imagine being classified, housed, and referred to by a gender with which you do not identify. It may be even harder to conceive being poked, prodded, and examined by several prison and medical staff to determine "which one you are." Such an experience may stretch beyond imagination, but it may happen if your body is perceived to be different from other women or men. Truth is our bodies do not necessarily resemble one sex more than the other. After all, "Some women have wombs, some do not. Some men have facial hair, some do not."⁵¹ At times, our anatomical and sexual characteristics bear greater resemblance across the sexes than within. For instance, where does a prison place a trans-woman who has developed breasts but has testes and a penis? Transgender people who may manifest sexual characteristics from "both" genders cannot be properly classified because no place currently exists for them.

A genitalia-based classification system privileges so-called post-operative prisoners over pre-operative and non-operative prisoners. Existing policies provide drastically different fates for similarly situated people. Transgender prisoners experience extremely inconsistent treatment based on the whims of the staff. Likewise, non-discrimination policies designed to produce policy consistency and accountability are undermined by genitalia classification policies.

3. NON-DISCRIMINATION POLICIES ARE RENDERED INEFFECTIVE BY CLASSIFICATION POLICIES

The overall prevalence of transgender discrimination, such as unequal access to programs or extensive verbal abuse, is unknown. A 2003 survey by the Transgender Law Center and National Center for Lesbian Rights revealed that, from a 150-person sample, 14% of respondents reported experiencing discrimination within prisons.⁵² Such a high report expresses the need for prisons' responsiveness, and is demonstrative of the prisons' failure to address bias against transgender prisoners. Failure to recognize transgender prisoners or their rights is an example of institutional discrimination by the criminal justice system. Until the U.S. prison system can systemically recognize transgender rights, isolated jurisdictional efforts will have a limited impact. Most anomalous, however, is the dual existence of non-discrimination policies protecting transgender prisoners and codified discrimination against them within some jurisdictions.⁵³ When jurisdictions adopt trans-inclusive non-discrimination

policies and yet maintain genitalia-based classification, neither policy is effective.

Prisons and associated agencies undermine their own non-discrimination policy by simultaneously adopting a classification-by-genitalia policy. There are legitimate reasons for each policy, which serve independent functions. Non-discrimination policies are part of a larger prison accountability system that helps protect prisoners from inequity. On the other hand, classification policies are essential for efficient procedural systems. On their face, these systems appear to have distinctive purposes. While a non-discrimination policy requires equal treatment among prisoners, they can also mask the existence of discrimination. If all prisoners are subject to the same procedures, including classification for housing and other purposes, then it may be reasoned that no discrimination is present. The interaction of non-discrimination policies and genitalia-based classification policies in the case of transgender prisoners, however, demonstrates systemic weaknesses.

Systemic weaknesses should be remedied, not ignored. If the criminal justice system incarcerates large numbers of transgender people, it must accept the necessity of reform to accommodate their needs.⁵⁴ Well-intentioned efforts to recognize transgender people are rendered ineffective by antiquated classification policies. To address this moral and practical problem, the District of Columbia is offering an innovative model.

IV. THE DISTRICT OF COLUMBIA PROPOSES A NON-GENITALIA BASED CLASSIFICATION SYSTEM

1. TRANSGENDER PEOPLE ARE THE NEWEST PROTECTED CLASS UNDER D.C.'S NON-DISCRIMINATION LAW

Patti Shaw was involved in a domestic dispute with her husband on October 26, 2003 in the District of Columbia. During booking at the police station, the officers found court records indicating a prior arrest under the name Melvin Lee Hammond. The court system did not have a way to change her name or gender identification without a judge's order, even though Patti had a legal name change and sex re-assignment surgery. She was placed in a male cellblock overnight while awaiting arraignment. The next morning Patti Shaw reported being sexually assaulted by one or more male prisoners. The incident prompted D.C. law enforcement to examine its criminal records system.⁵⁵

Two years later, the D.C. City Council passed the Human Rights Clarification Amendment Act of 2005. The amendment added "gender identity or expression" to its non-discrimination law, the D.C. Human Rights Act of 1977.⁵⁶ The primary impetus for the amendment came from a desire to clarify lawmakers' original intent to protect transgender people. Public testimony on the Act from the Gay and Lesbian Activists Alliance ("GLAA"), D.C.'s major gay and lesbian rights organization, revealed that D.C. had historically protected transgender people against discrimination based on "personal appearance."⁵⁷ GLAA and transgender rights' advocates argued that lawmakers had always intended to protect transgender people even though the statute did not identify "gender identity and expression" as a protected status.⁵⁸

Whatever the act's original intention, transgender D.C. residents needed its protection. Different Avenues, a non-profit

for young adults affected by violence, HIV, and discrimination, reported that 60% of the transgender population surveyed by the D.C. Administration of HIV and AIDS had a yearly income of \$10,000 or less.⁵⁹ The D.C. Council adopted the addition on December 6, 2005.⁶⁰ D.C. residents like Patti Shaw were unambiguously included in the protection of the city's non-discrimination law.

2. D.C.'s DEPARTMENT OF CORRECTIONS PROPOSED NEW POLICY ESTABLISHES DELIBERATIVE BODY FOR GENDER CLASSIFICATION

Led by the D.C. Trans-Coalition ("D.C.T.C."), a transgender political advocacy group, a campaign was launched to enforce the Human Rights Act within the city's Department of Corrections ("D.O.C."). D.C.T.C., along with other local and national advocates and lawyers sought to alter D.O.C.'s policy regarding transgender prisoners, including its classification and hormone therapy procedures.

On January 5, 2009, the D.O.C. issued a new directive revising its classification and housing policies within its operations.⁶¹ The policies' purpose is substantially broad as it seeks to establish procedures appropriate for "transgender, transsexual, inter-sex, and gender variant persons" incarcerated by the D.O.C.⁶² Like the previous May 10, 2008 policy, the directive includes definitions for "gender expression," "inter-sex," "sexual orientation," "transsexual," and "gender variant"; a non-discrimination statement, and initial intake procedures for gender determination. Gender determination has been a routine procedure for all prisoners, but the directive made it more detailed for gender-variant inmates. If staff believes that there is a discrepancy between a prisoner's gender and genitalia after a physical examination, then the policy calls for more extensive protocol including a genitalia examination by medical staff.⁶³

Two significant changes appeared in the new policy. First, transgender prisoners who wish to begin hormone therapy are permitted to do so with medical authorization. Although some other jurisdictions currently permit hormone therapy continuation, very few permit new therapy to begin while in prison. This change is a significant step forward for prisoners' mental and physical well-being (for those who can afford it). More important, however, is the second revision creating a Transgender Committee. The Transgender Committee is an appointed D.O.C. body comprised of a "medical practitioner, mental health clinician, a correctional supervisor, a case manager, and D.O.C. approved volunteer knowledgeable about transgender issues."⁶⁴ It is charged to determine prisoner classification after reviewing a prisoner's records, conducting a prisoner interview, and evaluating a prisoner's vulnerability to abuse within the general prison population. After an initial intake, a prisoner will remain in protective custody (consistent with the prisoner's genitalia) up to 72 hours until classification is determined by the Transgender Committee.⁶⁵ These revisions reflect a sea change that corresponds with increased transgender visibility, advocacy, and understanding.

No other U.S. prison policy provides for a collaborative body for gender classification, and no other peer nation⁶⁶ has an equivalent prison policy. Most similar to this model is the United Kingdom's legal sex change panel process established by the Gender Recognition Act of 2004.⁶⁷ Any person over 18 who

wishes to legally change his or her sex must apply to a regional committee that considers "evidence" from medical professionals confirming that person's gender dysphoria.⁶⁸ An approved application issues a gender recognition certificate that changes a person's legal documentation to reflect his or her "acquired" gender.⁶⁹ There is no comparable federal process within the United States, where birth certificates, driver's licenses, and other legal documents may be changed depending on each state's law. The District of Columbia has adopted the most progressive transgender prisoner classification in the country to date.

V. MOVING TOWARD A POSITIVE TRANSGENDER PRISONER RIGHTS LAW

1. ENHANCING D.C.'s MOST RECENT POLICY PROPOSAL

Representatives from D.C.T.C., the Washington Lawyers' Committee for Civil Rights and Urban Affairs, and Just Detention International submitted several recommendations to D.O.C. about how to improve the new proposed policy previously discussed in the last section.⁷⁰ Concerns evident in these recommendations stress the need for more accountability, particularly as community advocates fear that the Transgender Committee will become a mere formality by declining to take an active role in re-classifying prisoners.

Three recommendations reflect this concern. First, although the Transgender Committee would conduct important work, "further clarification [i]s needed to specify how the Committee will make and document its decisions."⁷¹ Aware that D.O.C. has adopted the most transgender-friendly policy in the country, this recommendation identifies Committee transparency as a key component for gauging its progress. Second, the policy should "explicitly state that the Transgender Committee's recommendation can be appealed."⁷² Any deliberative body without an appeals process lies contrary to current national standards, such as PREA, that recommend periodic review for vulnerable prisoners.⁷³ An appeals process will ensure that transgender prisoners will have more opportunity to protect their rights, especially when a genitalia policy remains the default classification policy. Finally, "in some cases, placing a transgender inmate in collective protective custody with other transgender inmates may be the least restrictive option for maintaining the inmate's safety, and therefore should be included as a possibility."⁷⁴ This recommendation underlines administrative segregation problems and offers an alternative: a transgender housing unit. "Collective protective custody" is perhaps the fairest option compared to general population or segregation, but it runs the risk of prisoner ghettoization.

Flexible self-identification remains the ideal classification policy. Several non-U.S. jurisdictions have adopted some form of this policy. New South Wales, Australia, for example, presumes that "inmates have a right to be placed in the facility of their 'gender identification' unless it is determined, on a case-by-case basis, that they should be placed elsewhere."⁷⁵ Within this system, default classification falls on gender identity, not genitalia. Flexibility is essential for the same reasons discussed in previous sections about the complex relationships among gender identity, expression, and body diversity. A trans-man, for

instance, may be extremely vulnerable in a male population, even though he is male-identified. Most importantly, self-identification policies do not only best serve gender variant prisoners, but are a reasonable management option.⁷⁶

2. TARGETING TRANSGENDER CRIMINALIZATION

Self-identification prison policies affirm prisoners' basic human dignity and preserve their rights under the U.S. Constitution. However, such policies alone will not fully address the issue. Transgender over-incarceration remains the heart of the problem. The criminal justice system cannot understand the increase of this community within prisons walls if it does not examine the reasons underpinning the trend.

Transgender criminalization is part of an insidious continuum of societal discrimination against gender nonconformity. The U.S. imprisoned population has grown 390% in 24 years.⁷⁷ People of color and poor people have been disproportionately affected by this increase, and "transgender and gender non-conforming people are disproportionately poor, homeless, criminalized, and imprisoned."⁷⁸ Entrenched job discrimination, low income levels, and exposure to other risk factors essentially create a prison pipeline. Many transgender people are forced to commit "survival crimes" such as sex work and healthcare supply theft due to narrowed economic access and opportunity; and evidence of police trans-profiling further compounds imprisonment rates.⁷⁹ Opposing workplace discrimination, cracking down on

profiling, and providing community-based, gender-appropriate alternatives to imprisonment are all proactive, systemic legal approaches to transgender over-incarceration recommended by the Sylvia Rivera Project. These suggestions show that the criminal justice system alone cannot combat transgender de-humanization; legislatures and cultural leaders must also contribute to a positive social climate for gender variant people.

VI. CONCLUSION

Moving toward a more affirmative transgender rights jurisprudence is an emerging challenge facing the U.S. prison system. Legal advocates have shown that our current system is not sustainable; functionality or the means by which prisons can prevent physical and sexual violence will be limited if lawmakers are too slow to respond. Even more important, however, is the tragedy that transgender prisoners collectively suffer from discrimination in our society and are perhaps the least among us. Although many Americans may not know that transgender people exist, they do know and likewise react to gender non-conformity. Transgender rights are an indicator by which we can gauge our moral and legal advancement. Our institutional failures implicate our legal system's humane treatment standards. Attention and effort toward improvement, nonetheless, brings us ever closer to moral restoration.

ENDNOTES

* Richael Faithful is a first year law student at Washington College of Law. Prior to WCL she was a community organizer with the Virginia Organizing Project and Board of Director at Equality Virginia. Special thanks to Deb Golden for her guidance on this article.

¹ SYLVIA RIVERA PROJECT, IT'S WAR IN HERE: A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN'S PRISONS 19 (2007), <http://www.srlp.org/files/warinhere.pdf> [hereinafter IT'S WAR IN HERE] (last visited Mar. 6, 2009).

² Sylvia Rivera Law Project, Trans 101, available at <http://www.srlp.org/node/123> (last visited Mar. 6, 2009).

³ See *id.* (summarizing the notion that everyone has gender identity and expresses it in different ways).

⁴ RECONSTRUCTING GENDER: A MULTI-CULTURAL ANTHOLOGY 113 (Estelle Disch ed., McGraw Hill Higher Education 4th ed. 2006).

⁵ *Id.*

⁶ *Id.* (noting that transgender individuals may self-identify as transgender instead of either male or female).

⁷ *Id.* (emphasizing that diversity exists within the transgender community, such as sexual orientation, self-identification; and that gender does not solely exist in a binary system of male and female).

⁸ Human Rights Campaign, Transgender Population and Number of Transgender Employees available at <http://www.hrc.org/issues/9598.htm>. (last visited Mar. 2, 2009).

⁹ See *id.* (referring to the results from the study conducted by T.M. Witten, Executive Director of the TranScience Research Institute).

¹⁰ Human Rights Campaign, *supra* note 8.

¹¹ AMERICAN PSYCHOLOGICAL ASSOCIATION, REPORT OF THE TASK FORCE ON GENDER IDENTITY AND GENDER VARIANCE 30 (2008), <http://www.apa.org/pi/lgbct/transgender/2008TaskForceReport.pdf> (last visited Mar. 2, 2009).

¹² Transgender Law Center, National Prison Rape Elimination Commission testimony before the Commission in San Francisco, CA, http://www.ncrlrights.org/site/DocServer/prison_daley081905.pdf?docID=941 (last visited Mar. 6, 2009).

¹³ To clarify, I do not mean to convey that gender misclassification is the only moral failing of our prison system. Concerns about prison violence, the Prison Industrial Complex, capital punishment, among others are profound moral issues. Instead, here, I only wish to bring attention the legal system's moral failure to protect gender non-conforming people who are very likely to part of other groups marginalized by the prison system and beyond.

¹⁴ *Farmer v. Brennan*, 511 U.S. 826 (1994).

¹⁵ AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 11, at 29. Gender identity disorder "has been included in the DSM since 1980 as a medical condition. Its diagnostic criteria include '(a) a strong or persistent cross-gender identification, (b) persistent discomfort with one's sex or a sense of inappropriateness in the gender role associated with one's sex, and (c) clinically significant distress or impairment in functioning.'"

¹⁶ *Farmer*, 511 U.S. at 830.

¹⁷ *Id.* at 847.

¹⁸ See Nikko Harada, *Trans-Literacy Within Eighth Amendment Jurisprudence: De/fusing Gender and Sex*, 36 N.M. L. REV. 627 (2006).

¹⁹ Shannon Minter, The National Center for Lesbian Rights, Representing Transsexual Clients: Selected Legal Issues available at <http://www.transgenderlaw.org/resources/translaw.htm> (last visited Mar. 2, 2009).

²⁰ *Farmer*, 511 U.S. at 835.

²¹ *Id.*

²² *Id.* at 834.

²³ *Id.* at 841.

²⁴ *Id.*

²⁵ *Crosby v. Reynolds*, 763 F. Supp. 666 (1991).

ENDNOTES CONTINUED

- ²⁶ *Id.* at 669.
- ²⁷ *Lucrecia v. Samples*, 1995 W.L. 630016, at *5 (N.D. Cal. Oct. 16, 1995).
- ²⁸ *Powell v. Schriver*, 175 F.3d. 107 (1999).
- ²⁹ Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, § 3, 117 Stat. 972 (2003).
- ³⁰ *See id.* at § 7.
- ³¹ National Rape Elimination Commission, Public Hearings, *available at* <http://www.nprec.us/proceedings.htm> (last visited Mar. 5, 2009).
- ³² *Id.*
- ³³ Transgender Law Center, *supra* note 12, at 1.
- ³⁴ *Id.*
- ³⁵ *Id.* at 2-4.
- ³⁶ *See Sarah K. Wake, Note, Not Part of the Penalty: The Prison Rape Elimination Act of 2003*, 32 J. LEGIS. 220 (2006).
- ³⁷ National Prison Rape Elimination Commission, Draft Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Adult Prisons and Jails and Supplemental Standards for Facilities with Immigration Detainees, http://www.nprec.us/UpcomingEvents/5.1_MasterAdultPrison_andJail_andImmigrationStandardsClean.pdf at 30.
- ³⁸ National Center for Lesbian Rights, Rights of Transgender Prisoners, *available at* www.nclrights.org (last visited on Mar. 6, 2009) (“Transgender people who have not had genital surgery are generally classified according to their birth sex for purposes of housing, regardless of how long they may have lived as a member of the other gender, and regardless of how much other medical treatment they may have undergone...”).
- ³⁹ Rebecca Mann, *The Treatment of Transgender Prisoners, Not Just An American Problem—A Comparative Analysis of American, Australian, and Canadian Prison Policies Concerning the Treatment of Transgender Prisoners and A ‘Universal’ Recommendation To Improve Treatment*, 15 LAW AND SEXUALITY 91, 105 (2006).
- ⁴⁰ Transgender Law Center, *supra* note 12, at 4.
- ⁴¹ Washington Lawyers’ Committee for Civil Rights and Urban Affairs DC Prisoners’ Project, Transgender-Friendly Policy Resource (Nov. 2008) (on file with author).
- ⁴² New York State Office of Children and Family Services, *Lesbian, Gay, Bisexual, Transgender and Questioning Youth* (Mar. 17, 2008), http://www.srlp.org/files/LGBTQ_Youth_Policy_PPM_3442_00.pdf (last visited on Mar. 6, 2009).
- ⁴³ *Id.*
- ⁴⁴ *Powell v. Schriver*, 175 F.3d. 107, 109 (1999).
- ⁴⁵ Transgender Law Center, *supra* note 12, at 6.
- ⁴⁶ *Supra* notes 24 – 26.
- ⁴⁷ HOLLY DEVOR, FTM: FEMALE-TO-MALE TRANSSEXUALS IN SOCIETY 38 (1997).
- ⁴⁸ *Id.*
- ⁴⁹ IT’S WAR IN HERE, *supra* note 1, at 28.
- ⁵⁰ *See id.* at 21 (“Unnecessary frisks and abusive strip searches are also commonly reported by SRLP’s imprisoned clients.”).
- ⁵¹ Sylvia Rivera Law Project, *supra* note 2, at 3.
- ⁵² Transgender Law Center, *supra* note 12, at 2. (The 2003 cited report, Trans-Realities, relied on self-reports of discrimination because “it is often hard to determine if discrimination is based on any one characteristic...or a combination...”); Transgender Law Center, TRANSREALITIES (2003) *available at* <http://www.transgenderlawcenter.org/tranny/pdfs/Trans%20Realities%20Final%20Final.pdf>.
- ⁵³ Washington Lawyers’ Committee, *supra* note 41.
- ⁵⁴ *See, e.g.* Women’s Prison Association, Trends in Incarceration 1, http://www.wpaonline.org/pdf/Focus_August2003.pdf (last visited Mar. 7, 2009) (An analogous trend can be identified among women prisoners).
- ⁵⁵ Lou Chibbaro Jr., Trans woman reports sexual assault in D.C. male cellblock, WASHINGTON BLADE, Nov. 28, 2003, <http://www.washingtonblade.com/2003/11-28/news/localnews/transabuse.cfm>.
- ⁵⁶ D.C. CODE § 2-1401.01 (2009). Protects against discrimination “for any reason other than of individual merit, including, but not limited to discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, status as a victim of an intrafamily offense, and place of residence or business.”
- ⁵⁷ Gay and Lesbian Activist Alliance, GLAA endorses transgender protections in Human Rights Act, <http://www.glaa.org/archive/2005/glaaonhumanrightsclarificationact1017.shtml> (last visited on Mar. 7, 2009).
- ⁵⁸ *Id.*
- ⁵⁹ *See* Different Avenues, DC Human Rights Clarification Act of 2005 Talking Points, www.differentavenues.org/DCHRA_talking_points_on_introduction_for_our_people.doc (last visited on Mar. 7, 2009) (citing the results of the Washington Transgender Needs Assessment Survey).
- ⁶⁰ D.C. City Council, Seventeenth Legislative Meeting, Linda W. Cropp, Chairman *available at* http://www.octt.dc.gov/services/channel13/December2005/describe_2734.shtml (last visited on Mar. 7, 2009).
- ⁶¹ District of Columbia Department of Corrections Operations Memorandum 4020.3 (Feb. 20, 2009), http://doc.dc.gov/doc/frames.asp?doc=/doc/lib/doc/program_statements/4000/PS4020_3GenderClassificationandHousing022009.pdf (last visited on Mar. 7, 2009).
- ⁶² *Id.* at 1.
- ⁶³ *Id.* at 3.
- ⁶⁴ *Id.* at 2.
- ⁶⁵ *Id.* at 4.
- ⁶⁶ I use the term “peer nation” fairly loosely. It may be understood as a country similar in population, political structure, economic development, and prevalent languages.
- ⁶⁷ Gender Recognition Act of 2004, http://www.opsi.gov.uk/acts/acts2004/pdf/ukpga_20040007_en.pdf (last visited at Mar. 7, 2009).
- ⁶⁸ *Id.* at 2.
- ⁶⁹ *Id.* at 3.
- ⁷⁰ Just Detention International, Washington Lawyers’ Committee for Civil Rights and Urban Affairs, and DC Trans Coalition Joint Letter to D.O.C Director (Jan. 15, 2008) (on file with author).
- ⁷¹ *Id.* at 3.
- ⁷² *Id.*
- ⁷³ National Prison Rape Elimination Commission, *supra* note 37.
- ⁷⁴ *Id.*
- ⁷⁵ Mann, *supra* note 39, at 119.
- ⁷⁶ I should emphasize that I am not particularly concerned with prison management but I felt compelled to include this point because it may be persuasive to the law enforcement community.
- ⁷⁷ IT’S WAR IN HERE, *supra* note 1.
- ⁷⁸ *Id.* at 14.
- ⁷⁹ *Id.* at 15.