

## FREE TO BE ME: INCORPORATING TRANSGENDER VOICES INTO THE DEVELOPMENT OF PRISON POLICIES

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### I. INTRODUCTION

In the summer of 2013, Netflix aired its groundbreaking series about a women's federal penitentiary, *Orange is the New Black*. One of the series' most beloved characters is Sophia, a transgender woman who committed credit card fraud in order to pay for her sex reassignment surgeries.<sup>1</sup> In one of the most poignant scenes of the entire first season, Sophia is in the clinic trying to regain access to the hormones she needs to maintain her physical transformation, and she tells the doctor with tears in her eyes, "I need my dosage. I have given five years, eighty thousand dollars, and my freedom for this. I am finally who I am supposed to be. I can't go back."<sup>2</sup> Sophia is a fictional character, but her story is similar to the thousands of transgender individuals living within the United States prison system.<sup>3</sup> In addition to a severe lack of physical and mental healthcare, many transgender individuals are harassed and assaulted, creating an environment that leads to suicide and self-

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<sup>1</sup> *Orange is the New Black: Lesbian Request Denied* (Netflix streamed July 11, 2013). Transgender actress Laverne Cox plays Sophia on *Orange is the New Black*. Cox's rise to fame has given her a platform to speak about transgender rights in the mainstream media. See Saeed Jones, *Laverne Cox is the Woman We Have Been Waiting For*, BUZZFEED (Mar. 16, 2014), <http://www.buzzfeed.com/saeedjones/laverne-cox-is-the-woman-weve-been-waiting-for>; Logsdon-Breakston, *infra* note 127; Malloy, *infra* note 133.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

mutilation.<sup>4</sup>

The treatment of transgender individuals in the prison system is fundamentally problematic and inhumane. Lack of healthcare, including lack of access to hormone therapy and mental health services, combined with a very high incidence of rape and sexual assault create a profoundly dangerous environment for the transgender inmate. When developing policies that involve transgender people, it is essential for all lawmakers to ensure that they are listening to the voices of the transgender community above all others. The transgender community strongly advocates for the implementation of the following policies: Before a transgender individual is evaluated for placement, strong consideration should be given to where the individual will be safest and able to rehabilitate while serving their time; Once they are placed in prison, all transgender individuals should be provided access to medication and treatment that furthers their gender transformation, as well as access to mental healthcare. Specifically, transgender inmates should be provided with sex re-assignment surgery (SRS) and hormones. By providing transgender inmates with a safe environment, as well as the medical and mental healthcare they need, the government can give these largely non-violent individuals the tools for rehabilitation that are essential to starting a new life outside of the prison system.

This comment will discuss why traditional notions of gender are outdated and perpetuate discrimination against transgender individuals and provide a more accurate definition of gender and transgenderism. Then, it will discuss the atrocities that many transgender inmates face during their incarceration. Next, this comment will give an overview of the case law pertaining to hormone access, housing rights issues, and the legal theories surrounding those decisions. Finally, this comment will propose a solution by looking at two different jurisdictions that have actively incorporated transgender voices into the development of their prison policies. This comment will describe why policies like these can alleviate the abuse and trauma transgender inmates face and begin

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<sup>4</sup> Bill Briggs, *For Transgender Prisoners, Hormones Seen as a Matter of Life and Death*, NBC NEWS: HEALTH (Aug. 23, 2013, 3:56 AM), <http://www.nbcnews.com/health/transgender-prisoners-hormones-seen-matter-life-death-6C10981031> (last visited, Oct. 14, 2013).

the process of rehabilitation.

## II. DEFINITION OF GENDER AND TRANSGENDERISM

Contrary to English common law tradition, gender does not exist within the rigid, binary confines of male and female.<sup>5</sup> Darren Rosenblum defines “Gender Binarism” as the classification of gender into two “discrete categories of male and female.”<sup>6</sup> This strict classification of gender ignores the influence of social and cultural norms on traditional constructions of gender as well as the fact that there are many variations of the xx and xy chromosomes that occur as a result of malfunctions during the fetal development process.<sup>7</sup> The tendency of the common law to adhere to these strict definitions not only over simplifies the concept of gender itself, but it essentially traps the transgender inmate in a second prison.<sup>8</sup> Gender Binarism also works to prevent transgender individuals from having access to the medical treatment required for their transformation and healthcare in general.<sup>9</sup> The term transgender typically describes an individual “whose gender identity (sense of themselves as male or female) or gender expression differs from that usually associated with their birth sex.”<sup>10</sup> In *Farmer v. Brennan*, Justice Souter described the transgender individual “as a transsexual, one who has a rare psychiatric disorder in which a person feels persistently

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<sup>5</sup> Darren Rosenblum, “Trapped” in *Sing Sing: Transgender Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 505 (2000). For the purposes of this paper, “gender binarism” is defined as the process of strict classification of gender in two discrete categories.

<sup>6</sup> *Id.*

<sup>7</sup> See generally Alice H. Eagly, *The Origins of Sex Differences in Human Behavior: Evolved Dispositions Versus Socials Roles*, *American Psychologist*, 408, 409 (1999). “[Under the social structuralist view], sex differences are viewed as accommodations to the differing restrictions and opportunities that a society maintains for its men and women.” *Id.*; Human Chromosome Fact Sheet, GENOME.GOV (Jun. 8, 2012), <http://www.genome.gov/26524120>.

<sup>8</sup> Rosenblum, *supra* note 5, at 516.

<sup>9</sup> Sydney Tarzwell, *The Gender Lines are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. REC. 167, 175-76 (2006).

<sup>10</sup> *Answers to Your Questions about Transgender Individuals and Gender Identity*, AM. PSYCHOL. ASS’N (2006), <http://www.lgbt.ucla.edu/documents/APAGenderIdentity.pdf>.

uncomfortable about his or her anatomical sex and who typically seeks medical treatment, including hormone therapy and surgery to bring about a permanent sex change.”<sup>11</sup> This is the definition many courts use to define transgender individuals.<sup>12</sup> This definition overlooks the complexity of the gender spectrum, and it over-medicalizes a complex and diverse class of people.<sup>13</sup>

Transgender individuals may choose to express their gender in a variety of ways.<sup>14</sup> Typically, they express it in three broad categories: “post-operative,” “in transformation,” and “untreated or non-operative.”<sup>15</sup> Post-operative individuals have undergone “sex reassignment surgery (SRS).”<sup>16</sup> “In transformation” individuals have begun the process of transitioning to the other gender.<sup>17</sup> Many of these individuals are in the process of receiving hormone therapy and have already undergone some form of surgery to begin their transformation.<sup>18</sup> “Untreated transgender” individuals have not received any surgery or hormonal treatment.<sup>19</sup>

The way society views and classifies transgender individuals

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<sup>11</sup> Rosenblum, *supra* note 5, at 507 (quoting *Farmer v. Brennan*, 511 U.S. 825, 829 (1994)).

<sup>12</sup> *Id.* Courts are beginning to address transgender individuals by the correct terms and preferred gender.

<sup>13</sup> See generally *id.* For a discussion about medicalization, see Lee, *infra* note 28.

<sup>14</sup> *Id.* at 507-08.

<sup>15</sup> *Id.* at 509-11.

<sup>16</sup> *Id.* at 507. Sex reassignment surgery indicates that the person’s genitals have been transformed to that of the desired gender. *Id.* at 509. Before undergoing genital surgery, the individual must undergo psychological evaluation and is typically required to live their lives as the desired gender for at least 12 months prior to the date of the surgery. E. Coleman et. al., *Standards of Care for the Health of the Transsexual, Transgender, and Gender Nonconforming People, Version 7*, 13 INTL J. OF TRANSGENDERISM 165, 202 (2011), [http://www.wpath.org/uploaded\\_files/140/files/IJT%20SOC,%20V7.pdf](http://www.wpath.org/uploaded_files/140/files/IJT%20SOC,%20V7.pdf).

<sup>17</sup> Rosenblum, *supra* note 5, at 510. This implies that an individual has undergone cosmetic surgery such as the removal of body hair and the masculinization or feminization of facial features. *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* Un-treated: non-operative “is probably an under-inclusive catch-all.” *Id.* at 509. How an individual chooses to express their gender is unique to that person. *Id.* Additionally, there are many individuals who do not have gender dysphoria who choose to express their gender in non-traditional ways. See American Psychological Association, *supra* note 10 (explaining the fact that the way someone chooses to express their gender is distinctly different from their sexual orientation, and gender can be expressed in a myriad of ways).

throughout their transformation can have a profound impact on their legal rights as well as their psychological well being.<sup>20</sup> In the most recent edition of the Diagnostic and Statistical Manual (DSM-5)<sup>21</sup>, the term “gender identity disorder” was deleted and replaced by the term “gender dysphoria.”<sup>22</sup> The term describes an individual who experiences “mental distress over a marked incongruence between one’s experienced/expressed gender and an assigned gender.”<sup>23</sup> “Gender dysphoria is manifested in a variety of ways, including strong desires to be treated as the other gender, to be rid of one’s sex characteristics, or a strong conviction that one has feelings and reactions typical of the other gender.”<sup>24</sup> The American Psychiatric Association states that the motivation for the change in definition was to “avoid stigma and ensure clinical care for individuals who see and feel themselves to be a different gender than their assigned gender.”<sup>25</sup> There is a strong concern from multiple communities that medical models of transgenderism, like the ones previously mentioned, perpetuate the social stigma that non-gender conforming individuals often face.<sup>26</sup> Additionally, there is a general distrust of the medicalization of transgenderism because “by buying into the

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<sup>20</sup> Christine Peek, *Breaking Out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 SANTA CLARA L. REV. 1211, 1215-1216 (2004). “Frequently, the courts have tried to hammer transgender litigants into one category or the other and have struggled to define the term ‘transsexual’ itself. The terms are important because they can exclude from protection persons who may be in need of it.” *Id.* (citing *Maggert v. Hanks*, 131 F.3d 670, 671 (7th Cir. 1997) and Paisley Currah and Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. & L. 37 (2000)).

<sup>21</sup> The DSM-5 was developed by multiple public health and psychological health organizations, including the American Psychological Association, the American Psychiatric Association, and the World Health Organization. *DSM-5 Overview: The Future Manual*, AM. PSYCHIATRIC ASS’N, <http://www.dsm5.org/about/Pages/DSMVOverview.aspx> (last visited Mar. 16, 2014). The DSM-5 is a manual used by mental healthcare providers to diagnose and treat individuals who have mental health “disorders”. *Id.*

<sup>22</sup> Dani Heffernan, *The APA Removes “Gender Identity Disorder” From Updated Mental Health Guide* (Dec. 3, 2012), <http://www.glaad.org/blog/apa-removes-gender-identity-disorder-updated-mental-health-guide>.

<sup>23</sup> *Id.*

<sup>24</sup> *Gender Dysphoria*, AM. PSYCHIATRIC ASS’N (2013), <http://www.dsm5.org/Documents/Gender%20Dysphoria%20Fact%20Sheet.pdf>.

<sup>25</sup> *Id.*

<sup>26</sup> *Cf. Rosenblum, supra* note 5, at 507-08.

medical model's treatment 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>27</sup> Opponents to medicalization argue that drug companies exploit people by creating new "diseases" that they can profit off of by providing the necessary medication to treat the disease.<sup>28</sup>

These arguments against medicalization are problematic because they ignore the voices of those in the transgender community whose lives have been changed through SRS.<sup>29</sup> There are many people who choose to express their gender outside of the gender binary who do not believe that they have a medical condition; however, many transgender individuals not only want to undergo SRS but that desire itself can be the underlying reason for their incarceration.<sup>30</sup> Furthermore, the "unique aspects of incarceration and prison healthcare justify and indeed compel the use of the medical model when advocating for trans prisoners' right to [SRS]."<sup>31</sup> Those who advocate against the medical model overlook the fact that inmates receive healthcare on the basis of need and not economic wealth.<sup>32</sup>

For these reasons, the argument that treating gender dysphoria as a disease exploits individuals for profit is erroneous because the individual is not paying for the healthcare they receive in prison.<sup>33</sup> The foundation of the argument for inmate access to SRS and hormonal treatment is about medical care; therefore, advocates cannot "abandon the use of medical evidence" for treatment.<sup>34</sup> It is

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<sup>27</sup> *Id.*

<sup>28</sup> See generally Alvin Lee, *Trans Models in Prison: The Medicalization of Gender Identity and The Eighth Amendment Right to Sex Reassignment Therapy*, 31 HARV. J. L. & GENDER 447, 457-60 (2008) (explaining and then refuting the argument that the medical model operates against indigent and poor trans individuals because the process of gender transition is expensive).

<sup>29</sup> See generally Janet Mock, *Chelsea Manning and the Battle for Trans Inclusive Healthcare Without Bias*, JANET MOCK (Aug. 23, 2003), <http://janetmock.com/2013/08/22/chelsea-manning-transgender-healthcare/>.

<sup>30</sup> See *id.* (arguing that hormone and surgical therapy is a necessity for people with gender dysphoria and many of these individuals are incarcerated for non-violent survival crimes).

<sup>31</sup> Lee, *supra* note 28, at 464-65.

<sup>32</sup> *Id.* at 465-66.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 468.

important to note that the opinion on medicalization will vary from individual to individual, and the decision to undergo SRS and hormone therapy will differ. Regardless, all individuals deserve to receive adequate healthcare in spite of a prison sentence.

## II. Problems Faced by Transgender Individuals in Prison

One of the most disturbing facts about the status and treatment of transgender individuals in prison is that many of them are incarcerated for committing non-violent crimes.<sup>35</sup> “The criminalization of prostitution and the ongoing War on Drugs increase the likelihood that transgender individuals engaged in these professions [as a result of lack of access to essential resources] will have contact with the criminal justice system.”<sup>36</sup> Research indicates that police officers have a tendency to stereotype transgender individuals as sex workers, leading “to harassment and solicitation by undercover officers attempting to crack down on prostitution.”<sup>37</sup> Transgender individuals are also arrested for using the “wrong” public restroom.<sup>38</sup> Additionally, because a significant number of individuals living with gender dysphoria are indigent, they are often arrested for “quality of life crimes, such as sleeping in public.”<sup>39</sup> Another large population of the transgender prison community consists of illegal immigrants who fled their home countries “due to horrible abuse and persecution.”<sup>40</sup> They are often arrested based on their status as illegal aliens.<sup>41</sup> These individuals are then faced with the danger and uncertainty of staying and trying to apply for asylum or returning to a country where the chances of danger are even

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<sup>35</sup> See Tarzwell, *supra* note 9, at 175-76.

<sup>36</sup> *Id.*

<sup>37</sup> Christine Peek, *supra* note 20, at 1216, 1218 (citing Alexander L. Lee, *Nowhere to Go But Out: The Collision Between Transgender & Gender-Variant Prisoners and the Gender Binary in America's Prisons* 26-28 (2003), <http://srlp.org/alex%20lees%CCCap2.pdf>).

<sup>38</sup> *Id.* at 1218-19 (citing Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15 (2003)).

<sup>39</sup> *Id.* at 1219.

<sup>40</sup> Letter from Christopher Daley, Director, Transgender Law Center, to Commissioners, National Prison Rape Elimination Commission (Aug. 15, 2005) (on file with Transgender Law Center), <http://transgenderlawcenter.org/issues/prisons/safety-inside>.

<sup>41</sup> *Id.*

higher.<sup>42</sup>

The prison system is responsible for “creating and reinforcing barbarous hierarchies of economic, social, and sexual subjugation of the weak to the strong.”<sup>43</sup> Both prisoners and prison administration perpetuate this system of subjugation.<sup>44</sup> While research in this area is limited, two separate studies conducted in the late eighties and early nineties “concluded that the rate at which male inmates are forcibly penetrated is somewhere around twelve to fourteen percent of the total male inmate population.”<sup>45</sup> Prison guards perpetrated about one-fifth of these assaults.<sup>46</sup> These studies relied on self-reports from prisoners, so there is reason to believe that the actual incidence of rape could be much higher than reported.<sup>47</sup> Because transgender individuals are considered “weak” the incidence of rape and assault for the transgender population may be significantly higher than that of the general male population.<sup>48</sup> Many transgender individuals are

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<sup>42</sup> *Id.* “In one recent case, a woman agreed to return to her country, where anecdotal accounts exist of federal personnel murdering transgender women, because the conditions in the jail where she was awaiting a decision on her asylum application were so deplorable.” *Id.*

<sup>43</sup> Rosenblum, *supra* note 5, at 523.

<sup>44</sup> Letter from Christopher Daley, *supra* note 40, at 7. The testimony describes an incident where a male to female individual held in an all male prison was raped in her own prison cell by another prisoner because a guard “told him to do it.” *Id.*

<sup>45</sup> Peek, *supra* note 20, at 1223.

<sup>46</sup> *Id.*; See also, Cindy Struckman-Johnson, *Sexual Coercion Reported by Men and Women in Prison*, 33 THE J. OF SEX RESEARCH 67, 70 (1996) (discussing statistics of prison sexual coercion).

<sup>47</sup> Human Rights Watch, *No Escape: Male Rape in U.S. Prisons* (2001), [http://www.hrw.org/reports/2001/prison/report.html#\\_1\\_4](http://www.hrw.org/reports/2001/prison/report.html#_1_4). There is a tendency for individuals to underreport their own behavior, even when assured that the results will be confidential. Given that the behavior measured in the study is highly stigmatized, and the subjects were individuals who are systematically trained not to trust other people, there is a high probability that the actual percentage of individuals who were raped is much higher than what was reported. See Lacelle et al., *Sexual Health in Women Reporting a History of Child Sexual Abuse*, 36 CHILD ABUSE & NEGLECT 247, 257 (2012) (discussing the issue of re-call bias in studies about abuse and neglect); Diane R. Follingstad & M. Jill Rogers, *Validity Concerns in the Measurement of Women and Men's Report of Intimate Partner Violence*, 69 SEX ROLES 163 (2013) (whether an individual chooses to self-report sexual abuse depends on many factors including the way in which the information is reported, the terms used (e.g. rape vs. sexual assault), and the gender identity of the person giving the report).

<sup>48</sup> See James E. Robertson, *A Clean Heart and An Empty Head: The Supreme Court and Sexual Terrorism in Prison*. 81 N.C. L. REV. 433, 445-46 (2003).



repeat victims of sexual assault because other inmates often force them into prostitution.<sup>49</sup> When any inmate is the victim of a sexual assault, they have very little recourse.<sup>50</sup> Many prison guards “play a game of willing disbelief, one that appears adequate on paper and fails dismally in practice.”<sup>51</sup> Because prison guards are actively perpetrating the assaults and using rape as a means of control over prisoners, an inmate may not actually have anyone to turn to for help.<sup>52</sup>

All of these factors contribute to an extremely oppressive regime reserved specifically for transgender inmates. Lack of access to healthcare, combined with rape and sexual assault, deprives the incarcerated transgender individual of rehabilitation while incarcerated.

### III. CASE OVERVIEW

The most common legal recourse for the transgender inmate seeking healthcare is to allege a violation of the Eighth Amendment.<sup>53</sup> The Eighth Amendment prohibits cruel and unusual punishment.<sup>54</sup> Eighth Amendment jurisprudence developed over time to recognize that there is an “affirmative right to healthcare while incarcerated” rooted in the prohibition against cruel and unusual punishment.<sup>55</sup> *Estelle v. Gamble* was the first case to establish that inmates have a right to healthcare.<sup>56</sup> Gamble was an inmate who injured his back while he was working at the prison.<sup>57</sup> Gamble was in and out of the

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<sup>49</sup> *Id.* at 464.

<sup>50</sup> *Id.* at 445.

<sup>51</sup> *Id.* at 445-46.

<sup>52</sup> *Id.* at 446. Further complicating matters, the Supreme Court requires an inmate to report the abuse to a prison guard, in order for an inmate to succeed on their Eighth Amendment claims. Robertson, *supra* note 48, at 449-50.

<sup>53</sup> Lee, *supra* note 27, at 448.

<sup>54</sup> U.S. CONST. amend. VIII.

<sup>55</sup> Lee, *supra* note 28, at 462.

<sup>56</sup> *Estelle v. Gamble*, 429 U.S. 97, 97 (1976).

<sup>57</sup> *Id.* at 99.

prison's health clinic with complaints of extreme pain.<sup>58</sup> The prison administration refused to follow the clinic's recommendations for Gamble's treatment, and eventually, the administration forced him to go back to light work.<sup>59</sup> Gamble continued to experience extreme pain, but the administration forced him to work against his will and refused to let him go back to the clinic.<sup>60</sup> Gamble claimed that these actions constituted a violation of the Eighth Amendment and that he was a victim of cruel and unusual punishment.<sup>61</sup> Because inmates are dependent on prison administration for healthcare, and cruel and unusual punishment encompasses the prohibition of physical and mental suffering, the court held that "deliberate indifference to serious medical needs constitutes 'unnecessary and wanton infliction of pain.'"<sup>62</sup> Furthermore, the court found that there is a violation "by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed."<sup>63</sup>

Later Supreme Court decisions interpret *Estelle* to create a two-prong inquiry.<sup>64</sup> There is "an *objective* prong, whereby an Eighth Amendment plaintiff must show that he has an objectively serious medical need, and a *subjective* prong, whereby an Eighth Amendment plaintiff must show that prison officials were aware of such need and nonetheless responded with 'deliberate indifference.'"<sup>65</sup>

"While the Eighth Amendment may be invoked to [address] the most egregious abuses, it often falls short of demanding humane placement and medical treatment for transgender individuals."<sup>66</sup> "The Supreme Court has limited recovery under the Eighth Amendment to those cases in which a prisoner can establish 'deliberate indifference to serious medical needs.'"<sup>67</sup> Establishing that hormone therapy and

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 100.

<sup>60</sup> *Id.* at 101.

<sup>61</sup> *Id.*

<sup>62</sup> *Estelle*, 429 U.S. 97, at 104; *Id.* at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 172 (1976)).

<sup>63</sup> *Id.* at 104-05.

<sup>64</sup> *Lee*, *supra* note 28, at 463.

<sup>65</sup> *Id.* (citing *Helling v. McKinney*, 509 U.S. 25, 35-36 (1993)).

<sup>66</sup> Tarzwell, *supra* note 9, at 181.

<sup>67</sup> *Meriwether v. Faulkner*, 821 F.2d 408, 411 (1987) (quoting *Estelle v. Gamble*, 429 U.S. 97

sex reassignment constitute serious medical need continues to be a difficult burden for transgender inmates to overcome.<sup>68</sup>

The Supreme Court has yet to hear a case that would decide whether gender dysphoria qualifies as a serious medical need,<sup>69</sup> and the holdings of the circuit courts vary broadly.<sup>70</sup> One of the first cases to determine whether gender dysphoria (at the time called “transsexualism”) constitutes a serious medical need was *Meriwether v. Faulkner*.<sup>71</sup> In *Meriwether*, the plaintiff was a pre-operative transgender female diagnosed with gender dysphoria.<sup>72</sup> She was diagnosed with gender dysphoria by a prison medical doctor but placed in an all male prison and denied hormone therapy despite the fact that she received hormone therapy for nine years leading up to her imprisonment.<sup>73</sup> The Seventh Circuit Court of Appeals held that “there is no reason to treat transsexualism differently than any other psychiatric disorder” and that such a disorder presents a “serious medical need.”<sup>74</sup> While this decision was a step in the right direction, “the court found that a transgender prisoner is not guaranteed a particular type of treatment, only some types of treatment.”<sup>75</sup> This standard leaves many individuals without the care they need.<sup>76</sup>

Some circuit courts have left transgender inmates in legal limbo with “conflicting or unclear” standards.<sup>77</sup> One such example is

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(1976)).

<sup>68</sup> See *Id.*

<sup>69</sup> Laura R. Givens, *Why the Courts Should Consider Gender Identity Disorder A Per Se Serious Medical Need For Eighth Amendment Purposes*, 16 J. GENDER RACE & JUST. 579, 587 (2013).

<sup>70</sup> *Id.*

<sup>71</sup> *Meriwether*, *supra* note 67; Rebecca Mann, *Law & Sexuality: Review of Lesbian, Gay, Bisexual, and Transgender Legal Issues*, 15 L. & SEX 91, 110 (2006).

<sup>72</sup> *Id.* at 410.

<sup>73</sup> *Id.*

<sup>74</sup> Mann, *supra* note 67, at 110 (quoting *Meriwether v. Faulkner*, 821 F.2d 408, 409 (1987)).

<sup>75</sup> *Id.* at 111 (quoting *Meriwether v. Faulkner*, 821 F.2d 408, 409 (1987)).

<sup>76</sup> See generally Givens, *supra* note 69, at 601 (discussing the implications of the *Meriwether* opinion) “Given the language of this decision, a transgender inmate who did not have a clear diagnosis might be unable to rely on a standard identical to the one set forth in *Fields*. Additionally, transgender inmates who seek gender-confirming medical care but do not satisfy the current diagnostic criteria for [gender dysphoria] might not be able to rely on the ruling in *Fields*.” *Id.*

<sup>77</sup> *Id.* at 588.

Ophelia De'lonta's long battle with the Fourth Circuit to get access to hormones, gender confirming surgery, as well as recovery for the abuse she suffered while incarcerated.<sup>78</sup> De'lonta's gender dysphoria was well documented within the department of corrections, and in 1993, she began receiving hormone therapy while incarcerated.<sup>79</sup> In 1995, De'lonta was transferred to a different facility where she was denied continuation of her hormone therapy.<sup>80</sup> The cessation of hormone therapy resulted in a myriad of severe side effects: "nausea, uncontrollable itching, and depression."<sup>81</sup> These effects led De'lonta to suffer from "an uncontrollable urge to mutilate her genitals."<sup>82</sup> De'lonta filed suit in 1999 claiming that the denial of "adequate treatment for her [gender dysphoria]" was an infliction of cruel and unusual punishment.<sup>83</sup> The court found that "De'lonta's need for protection against continued self-mutilation constitutes a serious medical need to which prison officials may not be deliberately indifferent."<sup>84</sup> Thus, the Fourth Circuit did not find that gender dysphoria constitutes a serious medical need.<sup>85</sup> Rather, it was the need for protection from self-harm that was the serious medical need, and under this rule, the window for relief is unjustly limited.<sup>86</sup>

The Tenth Circuit's precedent for access to hormone therapy is also foggy.<sup>87</sup> In *Supre v. Ricketts*, the court established that treatment is necessary for gender dysphoria but the denial of hormone therapy

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<sup>78</sup> Dani Heffernan, *Court Dismisses Abuse Allegations by Transgender Inmate* (July 19, 2013), <http://www.glaad.org/blog/court-dismisses-abuse-allegations-transgender-inmate>.

<sup>79</sup> De'lonta v. Angelone, 330 F.3d 630, 632 (2003).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 634.

<sup>85</sup> Givens, *supra* note 69, at 589.

<sup>86</sup> *Id.* An individual seeking medical treatment for gender dysphoria would have several burdens to overcome when establishing a claim under the Fourth Circuit standard: a diagnosis, previous treatment for gender dysphoria, and proof that cessation of hormones resulted in a serious risk of self harm. It is important to note that 15 years after De'lonta filed her first claim she is still fighting for her rights. See Heffernan, *supra* note 78. De'lonta's case for SRS remains tied up in appeals while her claim of abuse by a former corrections officer was recently dismissed. *Id.*

<sup>87</sup> Givens, *supra* note 69, at 590.

does not “constitute deliberate indifference to a serious medical need.”<sup>88</sup> In *Supre*, the inmate-plaintiff was denied estrogen therapy because of the “dangers involved.”<sup>89</sup> The court reasoned that because there was discourse among physicians about the medical side effects of hormone therapy, the prison “made an informed judgment as to the appropriate form of treatment and did not ignore plaintiff’s medical needs.”<sup>90</sup> Nine years later, the Tenth Circuit found that there is a clear need for medical treatment of gender dysphoria, but it failed to clarify what consists of medical treatment.<sup>91</sup>

The Fifth Circuit lacks an explicit precedent altogether.<sup>92</sup> The *Praylor* set of cases involved a transgender inmate who sought hormone therapy under an Eighth Amendment violation.<sup>93</sup> Unlike De’lonta, the plaintiff did not claim that he was in danger due to refusal of hormones.<sup>94</sup> Praylor “did not request any form of treatment other than hormone therapy.”<sup>95</sup> The medical director for the Texas Department of Criminal Justice testified that there was a policy regarding medical care for “transsexuals,” but Praylor did not qualify because there was no “medical necessity for the hormone.”<sup>96</sup> The court did not find that there was a “constitutional right to hormone therapy; rather, the prison facility must afford the transsexual inmate some form of treatment based upon the circumstances of each case.”<sup>97</sup> The Fifth Circuit “later withdrew this decision and substituted it for

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<sup>88</sup> *Supre v. Rickets*, 792 F.2d 958, 963 (1986).

<sup>89</sup> *Id.* at 960.

<sup>90</sup> *Id.* at 963.

<sup>91</sup> *Brown v. Zavaras*, 63 F.3d 967, 970 (1995). The court found that the plaintiff had a claim for a general medical need, but was not entitled to “estrogen . . . or any other particular treatment.” *Id.*

<sup>92</sup> *Givens*, *supra* note 69, at 587.

<sup>93</sup> *Young v. Adams*, 693 F. Supp. 2d 635, 640 (2010) (citing *Praylor*, 423 F.3d 524, and *Praylor v. TDCJ*, 439 F.3d 1208 (2005)).

<sup>94</sup> *Praylor v. TDCJ*, 439 F.3d 524 (2005).

<sup>95</sup> *Praylor v. TDCJ*, 430 F.3d 1208, 1209 (2005).

<sup>96</sup> *Id.* The director also testified that Praylor did not qualify because of the “prison’s inability to perform a sex change operation, the lack of medical necessity . . . and disruption to the all male prison.” *Id.*

<sup>97</sup> *Id.*

the decision in *Praylor II*.<sup>98</sup> *Praylor II* held that “under the assumption that transsexualism does not present a serious medical need, . . . the refusal to provide hormone therapy did not constitute the requisite deliberate indifference.”<sup>99</sup> The court has later interpreted this case to mean that:

“There is no controlling precedent in the fifth circuit as to whether refusing hormone therapy to a person, diagnosed with gender dysphoria, violates the Eighth Amendment prohibition against cruel and unusual punishment. However, the Fifth Circuit does appear to imply that under certain facts the refusal to provide hormone therapy will not constitute deliberate indifference.”<sup>100</sup>

Based on this reasoning, the court held in *Young v. Adams* that the transgender inmate’s Eighth Amendment rights were not violated because the Mental Health Department reasonably determined that “hormone therapy would be counterproductive for the plaintiff, because, as an intact male, plaintiff is still manufacturing testosterone, and there is no medical necessity for hormone treatment.”<sup>101</sup> Additionally, the *Young* court stated that the existence of a prison policy that would allow transgender inmates to receive hormone therapy if they have “a confirmed parole or discharge date of 180 days” and “letters from the patient’s free world physician and psychiatrist/psychologist stating that the patient has been on hormone therapy and that the patient had intended to have [SRS]” was sufficient to refute a claim of deliberate indifference.<sup>102</sup> The Fifth Circuit’s decisions are similar to those of other circuit courts because they are moving forward in the right direction, but there are serious hurdles for a transgender inmate to overcome when seeking hormonal and surgical treatment for gender dysphoria. Given that transgender individuals, particularly those in the prison system, are likely to have had little to no access to adequate mental and physical healthcare throughout their lifetime, it is nonsensical to deny relief

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<sup>98</sup> *Young*, 693 F. Supp. 2d at 640.

<sup>99</sup> *Praylor*, 430 F.3d at 1209.

<sup>100</sup> *Young*, 693 F. Supp. 2d at 640. In *Young*, a transgender inmate filed an Eighth Amendment violation claim for denying her female hormone replacement therapy. *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 641.

without a diagnosis.<sup>103</sup>

In the past few years, transgender individuals trying to get access to hormonal and surgical therapy in prison have won many important and groundbreaking victories.<sup>104</sup> In 2011, the Seventh Circuit struck down the Wisconsin “Inmate Sex Change Prevention Act” which “explicitly denied hormone therapy and sex reassignment surgery.”<sup>105</sup> The court determined that because “the statute applies irrespective of an inmate’s serious medical need or the DOC’s clinical judgment,” the statute violates the Eighth Amendment.<sup>106</sup> That same year, the First Circuit denied deference to the prison’s opinion that providing hormonal therapy to an inmate with gender dysphoria was not feasible due to perceived “[health] dangers, security costs, and other impediments.”<sup>107</sup>

The first case granting a transgender inmate sex reassignment surgery was the Michelle Kosilek case.<sup>108</sup> Michelle Kosilek was convicted of murdering her wife and is currently serving a “life sentence without possibility of parole.”<sup>109</sup> Kosilek was documented as “suffering from intense mental anguish,” which led to multiple castration and suicide attempts.<sup>110</sup> The court acknowledged that

“SRS is for some people medically necessary.”<sup>111</sup> The court stated that, “in this case, to obtain an order to provide sex-reassignment surgery, Kosilek has been required to prove that: (1) he has a serious

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<sup>103</sup> Peek, *supra* note 20, at 1215-16.

<sup>104</sup> Mock, *supra* note 29.

<sup>105</sup> Ryan Dischinger, *Adequate Care for a Serious Medical Need: Kosilek v. Spencer Begins the Path Toward Ensuring Inmates Receive Treatment for Gender Dysphoria*, 22 TUL. J. L. & SEXUALITY 169, 176 (2013).

<sup>106</sup> *Fields v. Smith*, 653 F.3d 550, 559 (2011).

<sup>107</sup> *Battista v. Clarke*, 645 F.3d 449, 454 (2011).

<sup>108</sup> Dischinger, *supra* note 105 at 170.

<sup>109</sup> *Kosilek v. Spencer*, 889 F. Supp.2d 190, 197 (2012).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* The court looked at The Harry Benjamin Standards of Care, *Fields v. Smith*, and a 2010 decision by the United States Tax Court which “held that the costs of feminizing hormones and sex reassignment surgery are for certain individuals tax deductible as forms of necessary ‘medical care’ for a serious, debilitating condition that is sometimes associated with suicide and self-castration, rather than nondeductible expenses for ‘cosmetic treatment.’” *Id.* (quoting *O’Donnabhain v. Comm’r of Int’l Revenue* 134 T.C. 34, 70, 76-77 (U.S.T.C. 2010)).

medical need; (2) sex reassignment surgery is the only adequate treatment for it; (3) the defendant knows that Kosilek is at high risk of serious harm if he does not receive sex reassignment surgery; (4) the defendant has not denied that treatment because of good faith, reasonable security concerns, or for any other legitimate penological purpose; and (5) the defendant's unconstitutional conduct will continue in the future."<sup>112</sup>

Furthermore, the court clarified that "deference does not extend to actions taken in bad faith and for no legitimate purpose."<sup>113</sup> The plaintiff can prove that prison officials were "deliberately indifferent if they deny adequate treatment for a serious medical need that is not rooted in the responsibility to preserve internal order and discipline and maintain institutional security."<sup>114</sup> Additionally, the court stated that reasons for denial of treatment could not be based on political beliefs or worries that the decision would be "unpopular."<sup>115</sup>

The court found that Kosilek met all of these factors.<sup>116</sup> Kosilek had a serious medical need because her history of gender dysphoria was well documented.<sup>117</sup> As a result of her desires to live as the opposite sex, Kosilek was exploited and abused.<sup>118</sup> Hormone therapy helped Kosilek "feel normal for the first time in [her] life."<sup>119</sup> After her incarceration, Kosilek began seeing a physician who recommended that Kosilek see a psychotherapist, undergo hormone therapy, and begin the process of SRS.<sup>120</sup> The Standards of Care and multiple physicians indicated that SRS was the only adequate treatment for Kosilek's medical need.<sup>121</sup> Because the DOC did not agree with these

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<sup>112</sup> *Id.* Note that lack of funds is not enough to justify lack of medical care. *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 705 (1985).

<sup>113</sup> *Kosilek*, 889 F. Supp. 2d at 210. (citing *Whitley* 475 U.S. at 322 (1988)).

<sup>114</sup> *Id.* at 210(citing *Battista*, 645 F.3d at 454-55 and *Fields*, 653 F.3d at 558).

<sup>115</sup> *Id.* at 205. "The right to be free of cruel and unusual punishments, like other guarantees of the Bill of Rights, may not be submitted to vote; it depends on the outcome of no elections." *Id.* at 203 (citing *Furman*, 408 U.S. at 268).

<sup>116</sup> *Id.* at 204.

<sup>117</sup> *Id.* at 200.

<sup>118</sup> *Id.* at 213. Kosilek was abused by his stepfather and exchanged sex for hormone therapy. *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 230, 233. Multiple physicians specializing in the treatment of gender dysphoria



recommendations, they ended the physician's involvement with Kosilek's treatment.<sup>122</sup> Additionally, the DOC was on notice that "Kosilek was at substantial risk of serious harm if she did not receive adequate treatment."<sup>123</sup>

As much as advocates of trans rights may laud the court's decision in *Kosilek*, the decision "does not really break new ground."<sup>124</sup> Like the problems in the aforementioned cases, the social and economic status of most transgender inmates makes it highly unlikely that their gender dysphoria will be well documented. Additionally, Dischinger suggests that "when seeking relief through hormones or surgery, transgender people who do not fit the classic medical 'transsexual' mold must give up the professional assistance with the complexities of their transition in the interest of convincing medical providers that they fit a diagnosis."<sup>125</sup> While this argument is problematic for many of the same reasons that medicalization arguments are problematic, Dischinger does make a salient point that the stringent requirements put forth by the court will leave many transgender inmates without proper and adequate care that is best suited for their individual needs.<sup>126</sup> Additionally, there is concern that prison officials will attempt to put forth the same arguments as those in *Praylor I* and *Praylor II*, and criminal justice systems will continue to cite medical discourse and potential harm to the inmate as good faith reasons for denying treatment.

Two more recent and headline-making cases involving the intersection of the fight for access to hormonal therapy, the placement of transgender individuals in prison, and basic human rights, are the CeCe McDonald and Chelsea Manning cases. In 2011, McDonald was walking with friends when some of the patrons "came out of the bar and started hurling racist and transphobic

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testified that SRS is the only treatment for those with severe gender dysphoria, like Kosilek. *Id.* at 233.

<sup>122</sup> *Id.* at 213-14 (citing *Kosilek v. Maloney*, 221 F. Supp.2d 156, at 173 (D. Mass. 2002)).

<sup>123</sup> *Id.* at 216 (citing *Kosilek*, 221 F. Supp.2d at 173).

<sup>124</sup> Dischinger, *supra* note 105, at 180.

<sup>125</sup> *Id.* at 182. (citing Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 19-20 (2003)).

<sup>126</sup> *Id.*

remarks, and eventually drinks and broken glass."<sup>127</sup> One of the patrons followed McDonald as she left the scene, and McDonald stabbed the patron in the chest with a pair of scissors.<sup>128</sup> McDonald accepted a plea for second-degree manslaughter and surrendered her self-defense plea.<sup>129</sup> There was strong backlash from transgender advocates regarding her placement in a men's prison, access to hormones, and the conviction itself.<sup>130</sup> The case gained a considerable amount of attention in the media and "ignited a national discussion concerning transphobic and racist hate crimes in the United States."<sup>131</sup> "In 2012, CeCe [McDonald] organized a call-in campaign to ensure that she was given her proper hormone dosage, and she quickly won that battle."<sup>132</sup> McDonald was released from prison on January 13, 2014 and is currently collaborating with *Orange is the New Black* actress Laverne Cox on a documentary about transgender inmates rights called *Free CeCe!*<sup>133</sup>

In August 2013, Chelsea Manning (formerly Bradley Manning) announced her gender transition.<sup>134</sup> Manning was previously

<sup>127</sup> Savannah Logsdon-Breakstone, *Laverne Cox and JacGares on Their Documentary, Free CeCe!*, PERSEPHONE MAG.(Dec. 16, 2013) <http://persephonemagazine.com/2013/12/free-cece/>.

<sup>128</sup> Nicole Pasulka, *The Case of CeCe McDonald: Murder--or Self-Defense Against a Hate Crime?*, MOTHER JONES (May 22, 2012, 2:00 AM) <http://www.motherjones.com/politics/2012/05/cece-mcdonald-transgender-hate-crime-murder?page=1>.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* (noting that many people believe that CeCe was defending herself against a hate crime).

<sup>131</sup> See Sarah Karlan, *Why Everyone Should Be Talking about CeCe McDonald*, BUZZFEED (Jan. 10, 2014 2:41 PM) <http://www.buzzfeed.com/skarlan/why-everyone-should-be-talking-about-cece-mcdonald> (encouraging readers to engage in a national discussion about the rights of transgender inmates).

<sup>132</sup> Mock, *supra* note 29.

<sup>133</sup> Parker Marie Malloy, *CeCe McDonald Released from Prison, Greeted by Laverne Cox*, ADVOCATE (Jan 14, 2014 1:21 PM) <http://www.advocate.com/politics/transgender/2014/01/14/cece-mcdonald-released-prison-greeted-laverne-cox>.

<sup>134</sup> Adam Gabbatt, *'I Am Chelsea Manning,' Says Jailed Soldier Formerly Known as Bradley*, THE GUARDIAN (Aug. 22, 2013, 12:35 PM) <http://www.theguardian.com/world/2013/aug/22/bradley-manning-woman-chelsea-gender-reassignment>. To add insult to injury, a popular television show, *Fox & Friends*, played Aerosmith's Dude (Looks Like A Lady) during one of their segments on the Chelsea Manning case. See Madeleine Davies, *Fox and Friends Plays Dude Looks Like a Lady for Chelsea Manning Story*, JEZEBEL (Aug. 27, 2013, 12:00 PM), <http://jezebel.com/fox-friends-plays-dude-looks-like-a-lady-for-chelse-1207933221> (explaining how actions like these are a

convicted and sentenced to 35 years in military prison for violating the Espionage Act.<sup>135</sup> On Tuesday, September 22, 2014, Manning “sued Defense Secretary Chuck Hagel and the Pentagon in federal court for access to hormone therapy, warning that her mental condition is rapidly deteriorating in the face of more than a year of military officials’ delays”.<sup>136</sup> “Manning is seeking a preliminary injunction that will allow her to begin treatment” in the face of a lawsuit that could take several years.<sup>137</sup> On February 5, 2015, the Army made a groundbreaking decision to allow Chelsea Manning to receive hormone therapy in prison.<sup>138</sup> The acknowledgement by the Army that hormone treatment is “medically appropriate and necessary” for a transgender inmate is a major stride forward and is an indication that the winds of change are upon us.<sup>139</sup>

The other battleground for transgender inmates takes place in housing issues. Where an individual is housed during their sentence has a profound effect on their safety.<sup>140</sup> Most prisons adhere to a system of genitalia-based placement.<sup>141</sup> Inmates with housing-based grievances must overcome many of the same hurdles faced by those seeking hormonal treatment, but complainants have less precedent to rely on.<sup>142</sup> Like the hormone therapy cases, courts apply the deliberate indifference framework to housing issue cases.<sup>143</sup> *Farmer v. Brennan* is one of the leading cases on the abuses of transgender individuals in prison and the dangers of genitalia-based placement.<sup>144</sup> *Farmer*

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microcosm of the stigmatization that transgender people face).

<sup>135</sup> *Id.* Manning leaked “hundreds of thousands of classified documents.” *Id.*

<sup>136</sup> Matt Sledge, *Chelsea Manning Sues Pentagon for Hormone Therapy: ‘I Do Not Believe I Will Be Able to Survive’*, HUFFINGTON POST (Sept. 23, 2014, 4:53 PM), [http://www.huffingtonpost.com/2014/09/23/chelsea-manning-lawsuit\\_n\\_5870360.html](http://www.huffingtonpost.com/2014/09/23/chelsea-manning-lawsuit_n_5870360.html).

<sup>137</sup> *Id.*

<sup>138</sup> Tom Vanden Brook, *Military Approves Hormone Therapy for Chelsea Manning*, USA TODAY (Feb. 13, 5:18 AM), <http://www.usatoday.com/story/news/nation/2015/02/12/chelsea-manning-hormone-therapy/23311813/>.

<sup>139</sup> *Id.*

<sup>140</sup> Rosenblum, *supra* note 5, at 516.

<sup>141</sup> *Id.* at 516-20.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Farmer v. Brennan*, 511 U.S. 825, 829-31 (1994).

involves a transgender individual who sued prison officials for transferring her to another facility “despite knowledge that a transsexual who ‘projects feminine characteristics,’ would be particularly vulnerable to sexual attack”.<sup>145</sup> Farmer alleged that while imprisoned she was “beaten and raped by another inmate” in violation of her Eighth Amendment Right.<sup>146</sup> The court held that “prison officials have a duty to protect prisoners from violence at the hands of other prisoners.”<sup>147</sup> While prison officials are not permitted to allow the incidence of rape, a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official “knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”<sup>148</sup> This standard leaves the door wide open for abuse against all vulnerable inmates and provides no basis of relief for an inmate who wishes to transfer to another prison when there is a clear safety risk.

*Murray v. U.S.* illustrates the continued “foolishness of placing a transgender woman with breasts and feminine features in a men’s prison organization.”<sup>149</sup> The prison forced Murray to wear a brassiere while in confinement but at the same time was denied the use of cosmetics.<sup>150</sup> Murray claimed that she was unreasonably placed in confinement, denied the right to use cosmetics, and subjected to physical and verbal harassment.<sup>151</sup> The court denied Murray relief on all of her claims, except for the one regarding abuse.<sup>152</sup> In another case, a transgender woman who went through SRS was denied placement

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<sup>145</sup> *Id.* USP-Terre Haute is the abbreviated for the name of the United States Federal Penitentiary in Terre Haute, Indiana. *Id.* at 829.

<sup>146</sup> *Id.* at 825.

<sup>147</sup> *Id.* at 833.

<sup>148</sup> *Id.* at 837.

<sup>149</sup> Rosenblum, *supra* note 5, at 522. This case is another example of the common law preoccupation with the “gender binary.” *Id.*

<sup>150</sup> *Murray v. U.S. Bureau of Prisons*, 106 F.3d 401 (6th Cir. 1997).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

in a female prison because “her presentence report identified her as [a] 32-year old Caucasian man.”<sup>153</sup> One of the main issues regarding placement of transgender inmates is that the majority of courts continue to defer to the legislatures for the definition of male and female; as long as legislatures continue to adhere to the gender binary, it is likely that the courts will as well.<sup>154</sup> In 2001, a California judge endorsed the placement of “a sixty-six year old transgender” individual in a woman’s prison, even though she still possessed male genitalia.<sup>155</sup> This case is an outlier, and the implementation of the Prison Rape Elimination Act is still too young to determine whether genitalia-based placement will continue to pervade the prison system.<sup>156</sup>

#### IV. SOLUTION

There is a common flaw running throughout all of the literature on transgender rights: the solutions proposed by those closest to the issue are continuously overlooked.<sup>157</sup> In order to end the cycle of harassment and violence that transgender inmates face inside and outside prison walls, courts and lawmakers must listen to their voices.<sup>158</sup> Transgender voices overwhelmingly advocate

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<sup>153</sup> Rosenblum, *supra* note 5 at 522-23 (citing *Lucrecia v. Samples*, No. C-93-3651, 1995 WL 630016 at 1 (N.D. Cal. Oct 16, 1995)). The inmate had breast implants, “atrophic penile tissue”, and had previously been castrated. *Id.*

<sup>154</sup> Peek, *supra* note 22, at 1238-39.

<sup>155</sup> *Id.* at 1219.

<sup>156</sup> *Id.* at 1246-47.

<sup>157</sup> See Dischinger, *supra* note 105, at 169. The author asks how to ensure safety and treatment of transgender inmates without actually addressing what those individuals have actually suggested. See Rena Lindevaldsen, *A State’s Obligation to Fund Hormonal Therapy and Sex-Reassignment Surgery for Prisoners Diagnosed with Gender Identity Disorder*, 7 LIBERTY U. L. REV. 15, 16 (2012). Author’s statement that the “proper course of treatment is to identify the underlying causes of the mental distress and treat those issues-not to humor the patient’s false sense of identity” confuses the nature of gender dysphoria and fails to address the fact that several medical institutions, trans advocates, and transgender individuals themselves state that hormonal and surgical treatment is often the only way to treat gender dysphoria. See Mock, *supra* note 29; Coleman, *supra* note 16.

<sup>158</sup> Incorporating transgender voices into the development of policy geared towards treating transgender individuals is analogous to the development of Disabilities Right Legislation. James I. Charlton, NOTHING ABOUT US, WITHOUT US: DISABILITY OPPRESSION AND

prison placement based on the sex the individual identifies with and where they will be the safest, as opposed to genitalia-based placement.<sup>159</sup> Additionally, these voices all call for “consistent and adequate access to medical care for all prisoners, including hormonal therapy and transition related services.”<sup>160</sup> Most opponents of these policies state that this will reward inmates and are a misuse of taxpayer money.<sup>161</sup> Janet Mock, a transgender woman and activist, refutes this argument perfectly by stating that, “this is not about rewarding prisoners. These surgeries and care are vitally necessary.”<sup>162</sup> Other commentators state that the medical model is inappropriate and hormone treatment can actually harm an individual.<sup>163</sup> These arguments are largely outdated and incorrect.<sup>164</sup> “The continuation of hormone therapy, rather than ‘freezing’ inmates at a particular hormone level, is both in accordance with the Standard of Care and with the generally accepted medical and legal opinions that hormone therapy is necessary to meet a transgender individual’s serious need.”<sup>165</sup> Withdrawal of hormones not only goes against the

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EMPOWERMENT 3-4 (U. of Cal. Press eds., 2nd ed. 2000). The motto “nothing about us, without us” was an integral part of the development of the disabilities rights movement. *Id.* Similarly, in order to develop the best, most effective policies regarding transgender prisoners, we must include the voices of the people whose lives are affected by these policies.

<sup>159</sup> “It’s War in Here”: A Report on the Treatment of Transgender and Intersex People In New York State Men’s Prisons, SYLVIA RIVER L. PROJECT (Apr. 20, 2007), <http://srlp.org/its-war-in-here/>. The Sylvia River Law Project is an organization that works towards social justice for transgender people. *About*, SYLVIA RIVER L. PROJECT, <http://srlp.org/about/> (last visited Mar. 16, 2014).

<sup>160</sup> *Id.*

<sup>161</sup> Lindevaldsen, *supra* note 157, at 15.

<sup>162</sup> Mock, *supra* note 29.

<sup>163</sup> Lindevaldsen, *supra* note 157, at 15. The author believes that the current medical standard of care is based on political beliefs, not scientific evidence; however, this belief itself is not well grounded in evidence. *Id.*

<sup>164</sup> See Lee, *supra* note 28, at 468 (discussing the Standards of Care and refuting arguments against the medicalization of gender dysphoria); Coleman, *supra* note 16. Additionally, the May 2012 American Medical Association statement calls for the “remov[al] of financial barriers to care for transgender patients” and “supports public and private insurance coverage for treatment of gender identity disorder.” *AMA Policies on LGBT Issues: General Policies*, AM. MED. ASS’N, <https://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glb-advisory-committee/ama-policy-regarding-sexual-orientation.page>.

<sup>165</sup> Mann, *supra* note 71 at 129.

Standard of Care, but it opens the door to a myriad of physiological and psychological consequences for the individual.<sup>166</sup>

Rebecca Mann states that the opponents' arguments are "unacceptable" because many transgender individuals "need" their hormones.<sup>167</sup> This argument oversimplifies the complexity of why a transgender individual has a right to receive hormone therapy in prison. Transgender individuals need hormonal and surgical treatment not just for psychological and physiological purposes; providing treatment to these individuals is an essential component of the rehabilitation process that can eventually prevent recidivism.<sup>168</sup> By preventing recidivism, one could conclude that the cost of providing hormones will eventually be negated.

Recidivism has dire costs on individuals and society. People often come out of prison in a much worse position than when they went in, putting them at increased risk of finding themselves in the same situations that landed them in prison in the first place.<sup>169</sup> Stephen Dillon's essay, *The Only Freedom I Can See: Imprisoned Queer Writing and the Politics of the Unimaginable*, details the life of a transgender woman in a men's prison in South Texas.<sup>170</sup> The individual, R, describes being passed around from foster home to foster home during her childhood, so her only outside contact besides

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<sup>166</sup> See generally *id.* at 114.

<sup>167</sup> *Id.*

<sup>168</sup> See generally Lee, *supra* note 28, at 448. "While health professionals generally agree that treatment for GID should consist of psychotherapy, hormones, and gender related surgery, it is important to note that healthcare is not monolithic; thus, there is no magic 'one-size-fits-all' medical regimen that all trans people follow." *Id.* (citing Gianna E. Israel & Donald E. Tarver, *Transgender Hormone Administration*, in *Transgender Care: Recommended Guidelines, Practical Information, and Personal Accounts*, 56, 62-68 (1997) (describing different hormone regimens used to treat different trans individuals); R. Nick Gorton, Jamie Buth & Dean Spade, *Medical Therapy and Health Maintenance for Transgender Men: A Guide for Healthcare Providers*, 33-38 (2005), [http://www.nickgorton.org/Medical%20Therapy%CC20and%CC20HM%CC20for%CC20Transgender%CC20C%20n\\_2005.pdf](http://www.nickgorton.org/Medical%20Therapy%CC20and%CC20HM%CC20for%CC20Transgender%CC20C%20n_2005.pdf) (describing different gender-related surgeries used to treat different trans men).

<sup>169</sup> S. Lambi, *Transforming Carceral Logics: 10 Reasons to Dismantle the Prison Industrial Complex Through Queer/Trans Analysis and Action*, in *CAPTIVE GENDERS* 245 (Eric A. Stanley & Nat Smith ed., 2011).

<sup>170</sup> Stephen Dillon, *The Only Freedom I Can See: Imprisoned Queer Writing and the Politics of the Unimaginable*, in *CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX* 169-84 (Eric A. Stanley & Nat Smith, ed., 2011).

Dillon is a nun who writes her once a year.<sup>171</sup> Once R is released on parole, it is nearly impossible for her to find a job due to a lack of options and resources, as well as discrimination.<sup>172</sup> Additionally, R faces a daily onslaught of harassment.<sup>173</sup> “R eventually ‘[gives] up’ and crosses state lines,” forcing herself back into the prison system because she has no other means of survival.<sup>174</sup> Providing inmates with the medical and mental care that they need provides them with some of the basic building blocks for rehabilitation.

When developing new policies and laws regarding transgender inmates, policy makers should look to prisons on the East and West Coasts. One of the most compelling and thorough policies addressing the needs of transgender inmates is the Washington D.C. Department of Correction’s policy.<sup>175</sup> This policy established the creation of a “Transgender Committee [which includes] a medical practitioner, mental health clinician, correction supervisor, Chief case manager and a ‘DOC-approved volunteer who is a member of the transgender community or an expert in transgender affairs’”.<sup>176</sup> Under the policy, “any inmate who identifies as transgender or intersex upon intake, or at any other time during incarceration, will have their records assessed by the Transgender Committee who will house that individual based on their individual needs and vulnerability in the jail population.”<sup>177</sup> For intake and housing, this method is preferable to the one implemented by the Prison Rape Elimination Act because

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<sup>171</sup> *Id.* at 175.

<sup>172</sup> *Id.* at 176.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> Drake Hagner, *Fighting for our Lives: The D.C. Trans Coalition’s Campaign for Human Treatment of Transgender Inmates in District of Columbia*, 11 GEO. J. GENDER & L. 837, 861 (2010). The Department developed the policy based on suggestions created by the D.C. Trans Coalition, an organization created to address trans issues. *Id.*

<sup>176</sup> *Id.* (citing District of Columbia Department of Corrections, *Program Statement: Gender Classification and Housing*, DIR 4020.3(7)(e) (Feb. 20, 2009), available at [http://doc.dc.gov/doc/lib/doc/progrstatements4000/PS4020\\_3GenderClassificationandHousing022009.pdf](http://doc.dc.gov/doc/lib/doc/progrstatements4000/PS4020_3GenderClassificationandHousing022009.pdf); Letter from Peter J. Nickels, Attorney General, District of Columbia to Deborah M. Golden, Staff Attorney, Washington Lawyer’s Committee for Civil Rights & Urban Affairs. (Feb. 20, 2009)).

<sup>177</sup> *Id.* at 861-62. The policy also “prohibits strip searches or invasive medical examinations of the genitalia [of transgender inmates] in front of other[s] . . . .” *Id.*



it incorporates the opinion of actual transgender individuals and healthcare professionals who have extensive experience with gender dysphoria.<sup>178</sup> Sydney Tarzwell also suggests using this same type of model where each inmate is assessed for gender dysphoria at intake to determine the level of gender confirming healthcare needed.<sup>179</sup> Using a committee composed of experts outside of the prison administration to help develop a “management and treatment plan” for a transgender inmate will help eliminate bias in the treatment process.<sup>180</sup> This committee will include transgender advocates and transgender individuals.<sup>181</sup> Additionally, treatment should not rely on a prior diagnosis of gender dysphoria.<sup>182</sup> Gender-affirming care will be considered as a necessary part of treatment, not elective or cosmetic.<sup>183</sup> Tarzwell derived many of these suggestions from the *Model Protocols on the Treatment of Transgender Persons by San Francisco County Jail* by Murray D. Scheel and Claire Eustace.<sup>184</sup> These protocols were developed to address the violence and discrimination faced by transgender inmates and “based on research by the National Lawyers Guild and the San Francisco Human Rights Commission.”<sup>185</sup> The

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<sup>178</sup> The Prison Rape Elimination Act (PREA) was passed in 2003 and was implemented in May 2012. *LGBT People and the Prison Rape Elimination Act*, NAT'L CTR. FOR TRANSGENDER EQUAL. (Jul. 2012), [http://transequality.org/Resources/PREA\\_July2012.pdf](http://transequality.org/Resources/PREA_July2012.pdf). Facilities are required to screen every individual for the purposes of assessing their risk of sexual victimization. *Id.* Facilities must take into account individual gender identity and their perception of their own risk. *Id.* This Act makes a progressive change, but implementation has taken years. Additionally, it is still unclear how it will be enforced. Furthermore, the D.C. policy is still preferable because it takes a much more holistic approach to placement.

<sup>179</sup> See Tarzwell, *supra* note 9, at 215.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 213.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* Tarzwell laments that this forces inmates with gender dysphoria to “defer to medical authority.” *Id.* at 213. Before all prisoners are guaranteed control over the physical expression of their gender identity, great cultural changes will have to occur. *Id.*; *But see* Lee, *supra* note 27, at 465 (arguing that viewing gender dysphoria as a medical condition is beneficial in several contexts).

<sup>184</sup> Tarzwell, *supra* note 9, at 212-18.

<sup>185</sup> MURRAY D. SCHEEL & CLAIRE EUSTACE, MODEL PROTOCOLS ON THE TREATMENT OF TRANSGENDER PERSONS BY SAN FRANCISCO COUNTY JAIL 2 (Jul. 25, 2002) available at <http://www.transgenderlaw.org/resources/sfprisonguidelines.doc>. “The research incorporated interviews with service providers, members of the transgender community, and staff from the San Francisco Police Department and County Jail. It also included a

protocols developed a holistic approach to identifying issues transgender inmates face and preventing these issues from re-occurring.<sup>186</sup> First, the protocol asks officials to address individuals by their preferred name and gender at all times.<sup>187</sup> Second, if a strip search of the inmate is deemed necessary, the search “will be done by two officers of the gender requested by the transgender inmate”.<sup>188</sup> Third, the protocol calls for placement based on gender identity.<sup>189</sup> For individuals who express confusion about their identity will be evaluated by a social worker to determine where they should be appropriately housed.<sup>190</sup> There is an additional protocol and system of evaluation for individuals who pose a significant risk to themselves or others, which requires prison officials to assess factors like mental illness, the crime the individual has been charged with, and whether or not the inmate perceives that other inmates could seriously harm them.<sup>191</sup> Inmates will have access to clothes, makeup, and other services accessed by inmates of both genders.<sup>192</sup> Finally, the protocols require prison medical staff to “be trained on the evaluation and counseling process used to determine whether hormones are appropriate therapy” so that individuals may begin to have access to hormones or continue to receive hormone therapy throughout their incarceration.<sup>193</sup> All of these protocols are thought to be essential to protecting the safety of transgender inmates and preventing recidivism.<sup>194</sup> The protocols also stress the importance of proper training of prison personnel to ensure that the guidelines are properly and uniformly implemented.<sup>195</sup>

Policies like those in D.C. and San Francisco are costly, but

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review of law journals, legal cases, statutes, and regulations regarding both the transgender community and criminal law.” *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 4.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 4-5.

<sup>190</sup> *Id.* at 5.

<sup>191</sup> *Id.* at 5-6.

<sup>192</sup> *Id.* at 6.

<sup>193</sup> *Id.* at 6-7.

<sup>194</sup> *Id.* at 14.

<sup>195</sup> *Id.* at 15.

development at the legislative level is less expensive than going through litigation.<sup>196</sup> Additionally, development at the legislative level allows for a greater opportunity for transgender voices to be heard.<sup>197</sup> As society continues to expand its view of gender beyond binary constraints, the common law definition and treatment of transgender individuals is also likely to expand, and policies like those in San Francisco and Washington, D.C. might become obsolete. For now, these policies are holistically developed to remedy the broken system.

## V. CONCLUSION

Shows like *Orange is The New Black*, as well as the *Cece McDonald* and *Chelsea Manning* cases, brought newfound attention to transgender rights issues in the mainstream media.<sup>198</sup> The strong adherence to gender binarism by our culture perpetuates a system of inequality for those who deviate from the strict categories of male and female. This system of inequality is embodied by the prison system. Transgender inmates face abuse and harassment, often at the hands of those who are supposed to be protecting them.<sup>199</sup> This hostile and dangerous environment combined with a lack of mental and physical healthcare puts transgender inmates at risk of self-harm.<sup>200</sup> The best way to solve this problem is to listen to the voices of actual transgender people by providing inmates with hormone and sex reassignment surgery and ensuring that they are safely housed.<sup>201</sup> In

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<sup>196</sup> Hagner, *supra* note 175, at 865.

<sup>197</sup> *Id.*

<sup>198</sup> Katy Stein Metz, *The Transgender Tipping Point*, TIME MAGAZINE, May 29, 2014, <http://time.com/135480/transgender-tipping-point/>.

<sup>199</sup> See Rosenblum, *supra* note 5; Robertson, *supra* note 46.

<sup>200</sup> See Tarzwell, *supra* note 9.

<sup>201</sup> In April 2015, “the Department of Justice intervened on Georgia trans woman Ashley Diamond’s behalf, declaring state prison’s continued denial of her hormone therapy a violation of her Eighth Amendment rights. Mitch Kellaway, DOJ Tells State Prisons: Denying Trans Inmates Hormone Therapy is Unconstituional. ADVOCATE.COM. April 8, 2015. This <http://www.advocate.com/politics/transgender/2015/04/08/doj-tells-state-prisons-denying-trans-inmates-hormone-therapy-uncons>. This is a significant victory for trans rights, but several issues remain. It is unclear whether Ashley will be transferred to a women’s prison once she regains access to medical care. If she remains in a men’s facility,

doing so, we can provide these inmates with the tools to escape the cycle of incarceration.

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she will continue to be at a high risk for rape and sexual assault. Furthermore, it remains unclear how this decision will affect trans prisoners who lack documentation of a gender dysphoria diagnosis prior to incarceration.