

NOTE

TRANS-CENDING THE MEDICALIZATION OF GENDER: IMPROVING LEGAL PROTECTIONS FOR PEOPLE WHO ARE TRANSGENDER AND INCARCERATED

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INTRODUCTION.....	127
I. GENDER IDEOLOGY	128
A. <i>The Binary System of Gender</i>	128
B. <i>The Medicalization of the Binary System of Gender</i> ..	131
C. <i>Courts' Reliance on the Medicalized Binary System of Gender</i>	134
D. <i>Toward a Self-Definition Model of Gender</i>	136
II. LEGAL PROTECTIONS FOR PEOPLE WHO ARE TRANSGENDER AND INCARCERATED	137
A. <i>Disproportionate Representation of Transgender People in the Criminal Justice System</i>	137
B. <i>Housing Classifications</i>	138
C. <i>Healthcare</i>	142
D. <i>Sexual Violence</i>	149
E. <i>Solitary Confinement</i>	152
CONCLUSION.....	158

INTRODUCTION

People who are transgender and incarcerated face a unique set of human rights challenges. Courts have made progress protecting transgender people who are incarcerated by relying on the psychiatric diagnosis, Gender Dysphoria (GD), as grounds for legal protections. However, reliance on a medical model of gender has practical limitations and ad-

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verse social consequences. This model fails to protect the most vulnerable people of trans experience and contributes to stigma against the transgender community overall. The social and legal interests of people who are transgender and incarcerated would be better served if their rights were protected on alternate legal grounds.

Part I will offer background on gender theory. First, this Note will critique the binary system of gender. Next, this Note will discuss how the medical establishment has reinforced the binary system of gender by psycho-pathologizing gender transgression. Then, this Note will explain how courts have solidified this medicalized binary system by relying on the flawed assumption that transgender people inherently experience mental illness.¹ Finally, this Note will propose an alternate formulation of gender, which prioritizes self-definition over medicalization.

Part II will apply this gendered framework to issues experienced by transgender people who are incarcerated. First, this Note will describe the disproportionate representation of transgender people in the criminal justice system and offer several explanations for this disparity. Next, this Note will discuss a variety of challenges faced by people who are transgender and incarcerated and describe how the legal system has addressed each issue. This Note will problematize legal reasoning that equates trans experience with mental illness and will explore alternative legal remedies that align with an inclusive and empowering conceptualization of gender.

I. GENDER IDEOLOGY

A. *The Binary System of Gender*

American society predominantly subscribes to a binary system of gender.² The binary system encompasses three main assumptions. First, there are two sexes, male and female, which are dichotomous, mutually exclusive categories.³ Second, there are two genders, man and woman, which flow from the two sexes.⁴ Third, the norms associated with these gender categories, masculinity and femininity, are at least partially the product of biological characteristics, such as hormonal, anatomical, or

¹ This Note does not intend to undermine or discredit important efforts to destigmatize disability and mental illness. Rather, this Note expresses concern regarding misguided medical and legal tactics that pathologize all transgender people by equating trans experience with mental illness.

² Miqqi Alicia Gilbert, *Defeating Bi-genderism*, 24 *HYPATIA* 93, 95 (2009) (“The main thrust of the rules is to establish that there are two and only two genders, and that everyone must be one or the other. This level of bigenderism is its basic form, and is not only a fact of popular perception, but is largely official as well Governments, schools, hospitals, the professions, the arts, and virtually all social institutions rely on basic bigenderism . . .”).

³ Patience W. Crozier, *Forcing Boys to Be Boys: The Persecution of Gender Non-Conforming Youth*, 21 *B.C. THIRD WORLD L.J.* 123, 125 (2001).

⁴ *Id.*

evolutionary differences between men and women.⁵ Within the binary system, people are assigned “male/man” or “female/woman” at birth based on a doctor’s visual assessment of their external genitalia, then socialized to exhibit feminine or masculine behavior in accordance with that assessment.⁶

The binary system of gender is foundational to our society.⁷ Indeed, we organize our medical, legal, educational, religious, and cultural institutions around the notion that gender is a natural, essential component of personhood and the assumption that we can predict another person’s gender based on outward appearance.⁸ Gender norms teach us which feelings to express, how to relate to people of our same or different gender, which hobbies and career paths to pursue, and which romantic partners are appropriate.⁹ From the clothing we wear to the pronouns we use, the binary system of gender permeates nearly every custom and pattern of interaction in daily life.¹⁰ In fact, gender norms and expectations are so imbedded in our schemas and social structures that the binary system often escapes critical analysis, and is instead accepted as scientific fact.¹¹ However, upon deeper examination, the factual and ethical flaws of this system become apparent.

Under the binary system, people are categorized as either “male” or “female” based on anatomical and physiological characteristics. However, the dominant sex code is not simply the product of biology—it is socially constructed, as well. Language itself is a social construct, and by using gendered language to label genitalia, society has ascribed social meanings to physical attributes.¹² Those social meanings are neither es-

⁵ *Id.*

⁶ See Gilbert, *supra* note 2, at 97.

⁷ See *id.* (“[S]ystematic bigenderism permeates every aspect of our lives and controls and dictates every movement, word, and thought.”).

⁸ See *id.*

⁹ *Id.* at 94 (“[Gender] rules instruct us how to behave, including how to walk, talk, and relate to others of the same and of the opposite gender. They delineate what careers and pastimes are correct, what romantic interests are appropriate, what fears, ambitions, and expectations one ought to have. The rules determine who can giggle, who can cry, who will fight, who should play with cars, and who with dolls There are specifications about earning expectations, financial responsibility, familial responsibility, and the consequences of sexual dalliance. The gender rules cover everything we do and say, and they do so without seeming as if we are being coerced or that we are even making choices.”).

¹⁰ *Id.*

¹¹ *Id.* (“The ‘naturalness’ of the gender rules is the foundation of their being unquestioned.”).

¹² See JUDITH BUTLER, *Undiagnosing Gender*, in UNDOING GENDER 274, 284 (2004) (“If the bodily traits indicate sex, then sex is not quite the same as the means by which it is indicated. Sex is made understandable through the signs that indicate how it should be read or understood. These bodily indicators are the cultural means by which the sexed body is read. They are themselves bodily, and they operate as signs, so there is no easy way to distinguish between what is ‘materially’ true and what is ‘culturally true about the sexed body.’”).

sential nor inevitable, and can be subject to social change.¹³ Further, contrary to the assumptions underlying the binary system of gender, there is actually a continuum of sexes, as evidenced by intersex individuals with ambiguous reproductive structures and individuals with vulvas and non-XX chromosome configurations.¹⁴ Indeed, as many as four percent of births result in an intersex infant.¹⁵ However, the medical community's most common reaction to intersex infants is to surgically alter their bodies to facilitate their conformance to one category or the other.¹⁶ This process of "corrective" surgery is highly dependent on arbitrary conceptions of normalcy, and can have adverse long-term psychological impacts.¹⁷ Moreover, the existence of intersex individuals is illustrative of the non-binary nature of sex. Rather than surgically enforce adherence to the binary system, the medical community should accept that the binary system fails to encompass the reality of human biological diversity.

Comparatively, the term "gender" refers to the cultural norms and expectations associated with biological sex.¹⁸ Under the binary system, gendered behavior is assumed to be at least partially the product of physiological forces, such as estrogen in women and testosterone in men.¹⁹ However, like the dominant sex code, the dominant gender code is also socially constructed. No individual or institution exists in a cultural vacuum, so it is inconceivable to distinguish gendered norms and power dynamics that are a product of biology from gendered norms and power dynamics that are a product of socialization.²⁰ Further, femininity and masculinity are not fixed concepts; the meaning and function of gender are historically, geographically, and situationally contextual.²¹ Cross-cultural research indicates that the styles and temperaments men versus women are expected to embody fluctuate throughout time and space.²² In

¹³ *Id.*

¹⁴ See Jennifer L. Nye, *The Gender Box*, 13 BERKELEY WOMEN'S L.J. 226, 229 (1998).

¹⁵ Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, 33 THE SCIENCES 20, 21 (1993).

¹⁶ SUZANNE J. KESSLER, LESSONS FROM THE INTERSEXED 52–76 (2000).

¹⁷ RIKI WILCHINS, QUEER THEORY, GENDER THEORY 129 (2014) (the majority of infants diagnosed as intersex have clitorises larger than two standard deviations from the mean which is an arbitrary measure); see also Fausto-Sterling, *supra* note 15, at 23 (case studies from the 1930s–1960s, before surgical intervention was the automatic response to intersex infants, demonstrate that children allowed to live as intersex were less prone to suicide and psychological distress than those who were assigned a sex at birth).

¹⁸ Jamison Green, *Introduction to Transgender Issues*, in TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS 1, 2 (2012).

¹⁹ Charlize Veritas, *Men vs. Women—Hormones—A Transgender Perspective*, HUFFINGTON POST, Feb. 18, 2016, https://www.huffingtonpost.com/charlize-veritas/men-vs-women-hormones-a-t_b_9234380.html.

²⁰ See Gilbert, *supra* note 2.

²¹ See Nye, *supra* note 14.

²² See John E. Williams & Deborah L. Best, *Cross Cultural Views of Women and Men*, in PSYCHOLOGY AND CULTURE 191, 191–96 (1994).

other words, a trait considered feminine in one period or region may be considered masculine in another.²³ As a basic example, at the turn of the century, boys wore pink and girls wore blue, while today, pink is the “girl” color and blue is the “boy” color.²⁴ More poignantly, stereotypes associated with masculinity vs. femininity, such as strength vs. fragility, dominance vs. passivity, or rationality vs. emotionality, have more to do with patriarchal power than biological realities.²⁵ Despite cultural assumptions regarding the natures of men and women, people across genders have diverse interests, desires, and behaviors, and are not easily categorized into the boxes of feminine and masculine.²⁶ Thus, gender norms are largely a product of social forces, rather than solely biological, physiological, or anatomical ones.

To summarize, hegemonic ideas regarding sex and gender are socially constructed rather than naturally occurring. The binary system of gender oversimplifies the reality of human diversity, and dualistic attempts to define sex and gender have always been met with exceptions.²⁷

B. *The Medicalization of the Binary System of Gender*

Despite its flaws, the binary system of gender remains central to our medical establishment. For instance, the medical system fortifies the gender binary by psycho-pathologizing all transgender people as Gender Dysphoric (formerly referred to as Gender Identity Disorder (GID)).²⁸ Transgender people are individuals whose gender identity or expression does not conform to the social expectations for their assigned sex at birth.²⁹ The Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-5) defines GD as “a difference between one’s experience/expressed gender and assigned gender.”³⁰ Once this condition is diagnosed, it can be treated in a variety of ways, including through psycho-

²³ *Id.*

²⁴ Jeanne Maglaty, *When Did Girls Start Wearing Pink?*, SMITHSONIAN (Apr. 7 2011), <https://www.smithsonianmag.com/arts-culture/when-did-girls-start-wearing-pink-1370097>.

²⁵ Gilbert, *supra* note 2, at 94 (“[Gender] rules, which have evolved over many generations, are exactly those rules that protect the patriarchal framework through which women and sexual and gender minorities have been oppressed and controlled.”).

²⁶ *Id.* at 98 (“Bigenderism and heteronormativity ensure that the world is divided into woman and man, and sexism sees to it that woman is undervalued and man overvalued.”).

²⁷ *See generally*, Fausto-Sterling, *supra* note 15.

²⁸ AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013); Compare with AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3rd ed. 1980).

²⁹ *Sexual Orientation and Gender Identity Definitions*, HUMAN RIGHTS CAMPAIGN (2018) <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions>.

³⁰ *See* AMERICAN PSYCHIATRIC ASSOCIATION *supra* note 28.

logical therapy, hormone treatment, or gender confirmation surgery.³¹ Indeed, some transgender people do require such medical attention.³² However, as a diagnostic category, GD equates trans experience with mental illness, which is both scientifically and morally problematic.

GD can be conceptualized as socially produced rather than a biomedical diagnosis.³³ As previously discussed, the binary system is rooted in simplistic, outmoded assumptions regarding gender and sex.³⁴ Therefore, deviations from the binary system cannot be empirically measured, much less considered suggestive of mental illness. To objectively classify someone as Gender Dysphoric one would need to (1) scientifically classify sex, (2) quantify “normal” gendered development and behavior, and (3) measure the degree to which the two variables “align.” However, there is no standard methodology for differentiating the sexes—whether classified according to hormones, chromosomes, or genital markers, there are always exceptions to the rule.³⁵

Moreover, attempts to classify “normal” gendered behavior are flawed at best, and oppressive at worst. Psychologists do not have an empirically validated neuroanatomic or neurophysiological model to distinguish “healthy” from “pathological” gendered behavior.³⁶ Efforts to design such a model are inevitably problematic, because gender is socially constructed rather than solely biologically based. Therefore, an “unhealthy” amount of deviance from the gender binary cannot be quantified in numerical terms. Further, the very notion that any degree of gender deviance should be conceptualized as “unhealthy” is dubious, and arguably a product of cissexism rather than science.³⁷ In the face of fluctuating gender norms and the absence of a legitimate biomedical model for classifying GD, this diagnostic category remains scientifically suspect.

³¹ LORI GIRSHICK, *TRANSGENER VOICES: BEYOND WOMEN AND MEN* 75–79, 82–88 (2008).

³² *Id.*

³³ See BUTLER, *supra* note 12, at 275 (“The diagnosis can operate in several ways, but one way it can and does operate, especially in the hands of those who are transphobic, is as an instrument of pathologization. To be diagnosed with gender identity disorder is to be found, in some way, to be ill, sick, wrong, out of order, abnormal, and to suffer a certain stigmatization as a consequence of the diagnosis being given at all.”).

³⁴ See Gilbert, *supra* note 2, at 98.

³⁵ See generally, Fausto-Sterling, *supra* note 15.

³⁶ Heino F. Meyer-Bahlburg, *From Mental Disorder to Iatrogenic Hypogonadism: Dilemmas in Conceptualizing Gender Identity Variants as Psychiatric Conditions*, *ARCHIVES OF SEXUAL BEHAVIOR* 461–76 (2010).

³⁷ See BUTLER, *supra* note 12, at 281 (“The diagnosis can (1) instill a sense of mental disorder on those whom it diagnoses, (2) entrench the power of the diagnosis to conceptualize transsexuality as a pathology, and (3) be used as a rationale by those who . . . aim to keep transsexuality within the sphere of mental pathology.”). For a definition of cissexism, see *infra* note 42.

As Judith Butler explains, GD can be an oppressive tool of social control when used to pathologize human diversity.³⁸ Admittedly, psychological distress is associated with transgender status.³⁹ However, GD locates the source of this anguish solely within “mentally ill” transgender individuals.⁴⁰ Consequently, broader causes, such as transphobia and institutional reliance on the binary system, go unchallenged.⁴¹ By assuming that GD is a disease existing on a personal level and requiring medical intervention, this diagnostic category obscures how cissexism⁴² engenders suffering, and lifts the burden from broader society to reevaluate its sex-gender code. Therefore, by pathologizing anyone who transgresses gender norms as mentally ill, GD reaffirms the binary system of gender.

It is important to note that some transgender rights advocates favor the use of GD as a diagnostic category.⁴³ Proponents maintain that being trans in a culture imbedded with the binary system of gender can induce severe emotional distress, and by recognizing this issue, the DSM legitimizes this experience.⁴⁴ Indeed, the unique needs of trans people who experience mental illness should be acknowledged and addressed. However, GD assumes that trans people inherently experience mental illness by virtue of their gender identity, rather than as a product of cissexism. Equating trans experience with mental illness reifies cisnormativity⁴⁵ and stigmatizes the trans population overall.⁴⁶ By intensifying institutional regulation and control of transgender people, this diagnostic category can exacerbate the very suffering it purports to alleviate.⁴⁷ Additionally, proponents maintain that a GD diagnosis is useful in obtaining insurance benefits and other entitlements.⁴⁸ However, this justification exploits the needs of low-income trans people⁴⁹ to justify cisnormativity, and ignores

³⁸ *Id.*

³⁹ See BUTLER, *supra* note 12, at 294.

⁴⁰ *Id.* at 275 (“The diagnosis assumes that certain gender norms have not been properly embodied and that an error and a failure have taken place . . . it assumes the language of correction, adaption, and normalization; it seeks to uphold the gender norms of the world as it is currently constituted and tends to pathologize any effort to produce gender in ways that fail to conform to existing norms.”).

⁴¹ *Id.*

⁴² Cissexism is prejudice or discrimination against transgender people. *Cissexism*, Oxford Dictionary (2015).

⁴³ See Meyer-Bahlburg, *supra* note 34.

⁴⁴ BUTLER, *supra* note 12, at 295 (“[P]art of what the diagnosis offers is a form of social recognition.”).

⁴⁵ Cisnormativity is the assumption that all human beings are cisgender (i.e., have a gender identity which matches the sex they were assigned at birth, unless otherwise specified). *Cisnormativity*, The Queer Dictionary (2014).

⁴⁶ See BUTLER, *supra* note 12, at 275.

⁴⁷ See BUTLER, *supra* note 12, at 295.

⁴⁸ See *id.* at 281.

⁴⁹ See *id.*

how the stigma fortified by diagnosis can cause transgender people to lose rights and liberties, including child custody, employment, and housing.⁵⁰ Therefore, though this diagnostic category may offer potential for immediate benefits or more compassionate treatment on an individual level, its long-term impact is detrimental to the transgender community.⁵¹ Like the removal of “homosexuality” from the DSM in 1973,⁵² challenging GD as a diagnostic category respects the legitimacy, dignity, and autonomy of a marginalized community.⁵³

In sum, the medicalization of gender suffers from technical and ideological shortcomings. The scientific basis for GD is questionable because the definition of this diagnosis relies on the inadequate binary system of gender.⁵⁴ Additionally, pathologizing deviations from the binary system of gender reaffirms the binary itself, which inhibits critical examination of our sex-gender code and stigmatizes transgender people.⁵⁵ In short, transgender people are not sick; trans oppression is the sign of a sick society.

C. Courts’ Reliance on the Medicalized Binary System of Gender

Though the medicalization of the binary system of gender is morally and scientifically suspect, courts are reluctant to validate trans people’s gender identity without mandate from the medical profession.⁵⁶ Courts rely on medical evidence to establish an individual’s transgender status as legitimate, and therefore worthy of recognition under the law.⁵⁷ This reliance on a medical conception of gender has triggered transphobic language in legal decisions. For instance, in writing for the majority in *Farmer v. Brennan*, Justice Souter relied on the definition of “transgender” found in the 1989 Encyclopedia of Medicine: “one who has ‘[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,’ and who typically seeks medical

⁵⁰ See BUTLER, *supra* note 12, at 285.

⁵¹ *Id.* at 275 (“[the diagnosis] continues to pathologize as a mental disorder what ought to be considered instead as one among many human possibilities of determining one’s gender for oneself.”).

⁵² *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015).

⁵³ Some have argued that GID has become an indirect way of diagnosing homosexuality as a gender identity problem. See BUTLER, *supra* note 12, at 277.

⁵⁴ See AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 28.

⁵⁵ See BUTLER, *supra* note 12, at 294.

⁵⁶ See, e.g., *Schwenk v. Hartford*, 204 F.3d 1187, 1193 n.4 (9th Cir. 2000) (noting that Schwenk never received any medical or psychiatric treatment for gender dysphoria).

⁵⁷ See Jerry L. Dasti, *Advocating a Broader Understanding of the Necessity of Sex-Reassignment Surgery Under Medicaid*, 77 N.Y.U. L. REV. 1738, 1758 (2002) (noting that “[t]he explanation of transgender identities in medical . . . terms is common throughout the case law, even in cases that do not deal specifically with gender related medical care or sex designation,” and “it is the transgender party who inserts the medical analysis into the record” as a strategic way to give “legitimacy to a transgender identity.”).

treatment, including hormonal therapy and surgery, to bring about a permanent sex change.”⁵⁸ This stigmatizing definition conflates trans experience with mental illness and excludes trans people who do not seek medical treatment from legal consideration. Similarly, in *Maggert v. Hanks*, Judge Posner rejected the notion that a prisoner not formally diagnosed with GD is entitled to treatment, and superfluously inserted his prejudicial opinion that “someone eager to undergo this mutilation is plainly suffering from a profound psychiatric disorder.”⁵⁹ Not only do such decisions thwart the goals of the transgender plaintiffs, but they also perpetuate negative stereotypes about transgender people and predicate legal rights on the medicalized, binary sex-gender code.

As the cited decisions illustrate, the legal system’s reliance on a medical model of gender prioritizes transgender plaintiffs who have been diagnosed as Gender Dysphoric and have either undergone or are undergoing hormone therapy or surgical treatment. This approach wrongly positions the medical establishment as a gatekeeping institution that polices gender conformity. Further, this approach creates a hierarchy of transgender people and fails to protect vulnerable transgender populations. First, reliance on a medical model of gender excludes people who do not match the diagnostic criteria of medical categories.⁶⁰ There is great diversity of gender identity and expression within the transgender community; many transgender people do not require medical treatment (e.g., a trans woman may conceptualize her penis as a woman’s penis), some choose to embrace gender fluidity or a non-binary identity (e.g., gender-queer and agender individuals), and many prefer non-medical forms of gender expression (e.g., wigs, binding breasts, or cosmetics)⁶¹ Second, reliance on a medical model of gender also excludes many young, low-income, or undocumented people who may want, but do not have access to, legal, trans affirming healthcare.⁶² By predicating legal rights on medical treatment, and relying on medical experts to legitimize a transgender individual’s identity, those who do not need or do not have access

⁵⁸ *Farmer v. Brennan*, 511 U.S. 825, 829 (1994) (quoting THE AMERICAN MEDICAL ASSOCIATION ENCYCLOPEDIA OF MEDICINE 1006 (1989)).

⁵⁹ See *Maggert v. Hanks*, 131 F.3d 670, 671 (7th Cir. 1997) (simultaneously rejecting prisoner’s claim of cruel and unusual punishment for failure to treat gender dysphoria and labeling all transsexuals “profound[ly] . . . disorder[ed].”).

⁶⁰ Abby Lloyd, *Defining the Human: Are Transgender People Strangers to the Law?*, 20 BERKELEY J. GENDER L. & JUST. 150, 185, 194 (2005).

⁶¹ *Id.*

⁶² National Center for Lesbian Rights (NCLR), Rights of Transgender Prisoners, <http://ncflr.convio.net/site/DocServer/RightsOfTransgenderPrisoners.pdf?docID=6381> (last visited Nov. 10, 2017) (“[I]t is often difficult for transsexual prisoners to document a prior prescription for hormones, either because of the practical difficulties and limitations imposed by incarceration, or because many transsexual prisoners are indigent and do not have private physicians willing to advocate for them.”).

to trans affirming healthcare are excluded from legal protections. As such, the legal system effectively coerces transgender people into undergoing medical procedures which can be inaccessible, dangerous, and simply unnecessary.

Further, the legal system's reliance on a medical model of gender contributes to the stigmatization of the transgender community overall.⁶³ Conceptualizing trans experience as a mental illness glorifies normative gendered behavior and delegitimizes trans individuals' attempts to claim self-constructed gender identities.⁶⁴ There is a distinction between the reality of gender and the medicalized gendered framework in which current law operates. This disparity inhibits the creation of legal rules that protect the entire trans community and frustrates the long-term goal of expanding society's sex-gender code.

D. Toward a Self-Definition Model of Gender

Thus far, this Note has argued, (1) the binary system of gender is flawed, (2) the medical establishment reinforces the binary system of gender, and (3) the legal system's reliance on the medicalized, binary system of gender has practical limitations and adverse social consequences. However, this Note has yet to suggest how the legal system should conceptualize gender instead. To protect transgender people from abuse and discrimination, courts must adopt a more flexible and inclusive approach to gender. Courts should move away from the medical model, and instead honor self-identification.

Under a self-definition model of gender, individuals are permitted to construct gender on their own terms, free from the arbitrary, outmoded constraints of the medical establishment.⁶⁵ Within this framework, autonomous control over one's own gender identity is considered fundamental, and difference and variability are accepted without judgment.⁶⁶ Transgender people are not legitimized or afforded rights in accordance with the degree to which they have undergone medical treatment. Instead, this model celebrates the diversity of the transgender community, and acknowledges the intimacy of one's personal experience of gender.

The binary system of gender is socially constructed, which means it is subject to social change. As a powerful institution of socialization, the legal system has a unique capacity to pave the way for the recognition and validation of a multiplicity of genders. By questioning and reformulating popular conceptions of gender, the legal system can radically

⁶³ See BUTLER, *supra* note 12.

⁶⁴ See *id.*

⁶⁵ Christine Peek, *Breaking Out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 SANTA CLARA L. REV. 1211, 1217 (2004).

⁶⁶ See Gilbert, *supra* note 2, at 100.

restructure the range of gendered and sexualized behavior not only accepted, but celebrated in society.

II. LEGAL PROTECTIONS FOR PEOPLE WHO ARE TRANSGENDER AND INCARCERATED

A. *Disproportionate Representation of Transgender People in the Criminal Justice System*

One particularly vulnerable transgender population that requires broader, more effective legal protections is transgender people who are incarcerated. This group requires especial attention because transgender people enter the criminal justice system at disproportionately high rates.⁶⁷ Indeed, “[n]early one in six transgender Americans—and one in two black transgender people—has been to prison.”⁶⁸

Bias and abuse from police may contribute to the transgender prison crisis.⁶⁹ Transgender people report facing disrespect, harassment, discriminatory arrests, and sexual assault by law enforcement officers at very high rates.⁷⁰ Indeed, more than half (58%) of respondents to the National Center for Transgender Equality’s (NCTE) 2015 survey reported facing mistreatment from law enforcement officers in the past year.⁷¹ Consequently, a majority of respondents (57%) said they would be somewhat uncomfortable or very uncomfortable asking for help from the police.⁷² Issues of police profiling, violence, and discriminatory treatment are exacerbated for low-income trans people and trans people of color.⁷³

⁶⁷ LAMBDA LEGAL, *Transgender Incarcerated People in Crisis*, in TRANSGENDER RIGHTS TOOLKIT 5–9 (2016) [hereinafter LAMBDA], http://www.lambdalegal.org/sites/default/files/transgender_booklet_-_incarcerated.pdf, citing NATIONAL GAY AND LESBIAN TASK FORCE AND NATIONAL CENTER FOR TRANSGENDER EQUALITY, *National Transgender Discrimination Survey* (2011), <http://www.endtransdiscrimination.org/Force>.

⁶⁸ *Id.*

⁶⁹ A study of police attitudes toward transgender people revealed that police often profile transgender women as sex workers. Because prostitution is illegal, this stereotype puts transgender women at risk of harassment from police. See Chris Daley et al., *Walking While Transgender: Law Enforcement Harassment of San Francisco’s Transgender/ Transsexual Community* i, ix (2000).

⁷⁰ James S.E. Herman et al., *The Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality (NCTE) 1, 187 (2016).

⁷¹ *Id.*

⁷² *Id.* at 188.

⁷³ *Id.* at 186. People of color, including American Indian (74%), multiracial (71%), Latino/a (66%), and Black (61%) respondents, were more likely to have experienced one or more forms of mistreatment. Respondents who were homeless in the past year (78%), those who were currently unemployed (75%), were also more likely to report one or more of these experiences.

Additionally, transgender people suffer high rates of employment discrimination and isolation from their larger communities.⁷⁴ Consequently, transgender people face disproportionate rates of poverty and homelessness.⁷⁵ This plight can force transgender individuals into underground economies, such as drug sales or sex work.⁷⁶ Impoverished transgender individuals can also face consequences for “quality of life” crimes, such as sleeping in public or loitering for the purpose of prostitution.⁷⁷ Therefore, poverty increases risk of incarceration.⁷⁸ Indeed, NCTE transgender survey respondents who were homeless reported higher rates of incarceration.⁷⁹

Due to pervasive discrimination, over-policing, and poverty, transgender people are disproportionately represented in the criminal justice system.⁸⁰ The transgender prison crisis exemplifies a larger pattern of violence and injustice in US society, which disproportionately impacts poor people, people of color, and those who deviate from the binary system of gender.⁸¹ Incarcerated trans people caught in the intersectional matrix of cissexism, racism, and classism face a unique set of human rights challenges, and require stronger, more comprehensive legal protections than those currently in place.

B. *Housing Classifications*

One challenge that incarcerated transgender people face is contesting incorrect housing designations. Prisons are segregated according to the binary system of gender, and the vast majority of prison administrations employ a medical model in making housing determinations. Though practices are changing in certain localities, most prisons house people according to genital markers (e.g., sex assigned at birth).⁸² To switch facilities, incarcerated transgender people typically need to have

⁷⁴ *Paying an Unfair Price: The Financial Penalty for Being Transgender in America*, CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT (2015), <http://www.lgbtmap.org/file/paying-an-unfair-price-transgender.pdf>.

⁷⁵ Dean Spade, *Compliance Is Gendered: Struggling for Gender Self-Determination in a Hostile Economy*, in *TRANSGENER RIGHTS* 217 (Paisley Currah et al. eds., 2000).

⁷⁶ See NCTE, *supra* note 70.

⁷⁷ Alexander L. Lee, *Gendered Crime and Punishment: Strategies to Protect Transgender, Gender Variant and Intersex People in America's Prisons*, GIC TIP J., at 9 (2004).

⁷⁸ See Karen Dolan, *The Poor Get Prison: The Alarming Spread of the Criminalization of Poverty*, INSTITUTE FOR POLICY STUDIES (2015).

⁷⁹ See NCTE, *supra* note 70, at 190.

⁸⁰ See LAMBDA, *supra* note 67.

⁸¹ See *id.*

⁸² JAILHOUSE LAWYER'S HANDBOOK, CENTER FOR CONSTITUTIONAL RIGHTS, *Issues of Importance to Transgender Prisoners* (2010) [hereinafter JAILHOUSE], <http://jailhouselaw.org/issues-of-importance-to-transgender-prisoners/>.

legally changed their sex.⁸³ In most states, to legally change one's sex, courts require a physician to attest that the person seeking the change sought medical body modification.⁸⁴ Therefore, this legal barrier reifies a medicalized conception of the binary system of gender.

Requiring court-ordered sex change based on physician testimony makes little practical or moral sense. First, these legal barriers are denounced by the medical community itself, because using surgery to measure whether or not someone is transgender assumes that treatment is uniform across the board.⁸⁵ According to the World Professional Association for Transgender Health, "[t]reatment is individualized: What helps one person alleviate Gender Dysphoria might be very different from what helps another person. This process may or may not involve a change in gender expression or body modifications."⁸⁶ Indeed, surgery is not always recommended, desired, or even accessible—particularly for vulnerable transgender populations, including those who are young, poor, or undocumented.⁸⁷ Second, these hurdles infringe on the privacy of transgender individuals by forcing them to disclose medical records.⁸⁸ Third, this policy increases trans individuals' risk of violence and sexual assault;⁸⁹ fails to provide proper privacy for basic activities, such as showering and strip searches;⁹⁰ and increases difficulty in obtaining gender-specific clothing, personal care products, and proper healthcare.⁹¹ Finally, this policy fortifies the misguided assumption that gender nonconformity is a mental illness and disregards how transgender people identify themselves.⁹²

⁸³ *Changing Birth Certificate Sex Designations*, LAMBDA LEGAL (2014), <http://www.lambdalegal.org/publications/changing-birth-certificate-sex-designations-state-by-state-guidelines>.

⁸⁴ *Id.*

⁸⁵ *AMA Calls for Modernizing Birth Certificate Policies*, AMA NEWS ROOM (2014), <http://www.ama-assn.org/ama/pub/news/news/2014/2014-06-09-modernizing-birth-certificate-policies.page>.

⁸⁶ See LAMBDA, *supra* note 67.

⁸⁷ See NCLR, *supra* note 62.

⁸⁸ Eli Coleman et al., *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, 7 THE WORLD PROF'L ASSOC. FOR TRANSGENDER HEALTH 1, 5 (2011), <https://www.wpath.org/media/cms/Documents/Web%20Transfer/SOC/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf>.

⁸⁹ Stephen Donaldson, *A Million Jockers, Punks, and Queens, in PRISON MASCULINITIES* 118, 119 (Don Sabo et al. eds., 2001) ("[Transvestites] are highly desirable as sexual partners because of their willingness to adopt 'feminine' traits, and they are highly visible, but the queens remain submissive to the 'Men' and, in accordance with the prevalent sexism, may not hold positions of power in the prisoner social structure.").

⁹⁰ See *id.*

⁹¹ See *Unjust: How the Broken Criminal Justice System Fails LGBT People*, CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, 93 (2016) [hereinafter UNJUST], <http://www.lgbtmap.org/file/lgbt-criminal-justice.pdf>.

⁹² See *id.*

The judicial system has done little to alleviate this issue. In general, courts have not been receptive to plaintiff's challenges to the system, and have affirmed that prison officials have the power to decide where transgender people should be placed.⁹³ For instance, in *Meriwether v. Faulkner*, a transgender woman brought suit claiming that prison administration violated her Equal Protection rights by placing her in a male facility.⁹⁴ In that case, the plaintiff considered herself to be female, was diagnosed with GD, had undergone nine years of estrogen therapy, had surgically augmented her face, breasts, and hips, and wore makeup and feminine clothing.⁹⁵ Nevertheless, the Seventh Circuit dismissed her claim because she did not present evidence that the prison's decision to place her in a male facility was motivated by an attempt to discriminate against her.⁹⁶ In its decision, the court relied on *Meachum v. Fano*, in which the Supreme Court stated that incarcerated people do not have the right to be placed in any particular facility.⁹⁷

Encouragingly, prison housing policies may be changing in light of conflicts with the Prison Rape Elimination Act (PREA). Passed in 2003 and implemented in 2012, PREA requires prisons to make housing decisions on a case-by-case basis.⁹⁸ Notably, PREA states that agencies "may not simply assign the inmate to a facility based on genital status."⁹⁹ Further, the housing guidelines instruct prison officials to consider both the inmates view of their own gender and their preferences regarding safety.¹⁰⁰ These provisions are a positive step in the right direction because they acknowledge the diversity of the transgender community and move away from a medicalized system of gender and in favor of a self-definition model.

Nevertheless, PREA is subject to several limitations. Namely, PREA does not provide incarcerated people with a private right of ac-

⁹³ See, e.g., *Lucrecia v. Samples*, NO. C-93-3651, 1995 WL 630016 (N.D. Cal. Oct. 16, 1995); *Long v. Nix*, 877 F. Supp. 1358, 1366-67 (S.D. Iowa 1995); *Lamb v. Maschner*, 633 F. Supp. 351 (D. Kan. 1986).

⁹⁴ *Meriwether v. Faulkner*, 821 F.2d 408, 415 (7th Cir. 1987).

⁹⁵ *Id.* at 410.

⁹⁶ See *id.* at 415 ("[A] prison administrative decision may give rise to an equal protection claim only if the plaintiff can establish that state officials had purposefully and intentionally discriminated against him. While complaining that the defendants' decision to classify her as a male was arbitrary and irrational, plaintiff has not alleged any design or intent to discriminate.").

⁹⁷ See *Meachum v. Fano*, 427 U.S. 215, 215 (1976) ("[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution.").

⁹⁸ 28 C.F.R. § 115.42.

⁹⁹ *Id.*

¹⁰⁰ *Does a Policy That Houses Transgender or Intersex Inmates Based Solely on External Genital Anatomy Violate Standard 115.42(c) & (e)?*, NAT'L PREA RESOURCE CTR. (2016), <http://www.prearesourcecenter.org/node/3927>.

tion.¹⁰¹ Instead, PREA carries potential financial penalties for non-compliant prison systems.¹⁰² Monetary penalties, however, are an inadequate form of enforcement because financial losses can result in decreased services to the inmates themselves. Because incarcerated people cannot bring suit alleging PREA violations, actually enforcing PREA is an uphill battle, and its function is more expressive than practical.¹⁰³ Further, compliance with PREA varies throughout the country.¹⁰⁴ Several states, including Idaho, Texas, and Arizona, have publicly refused to comply with PREA, effectively exchanging a portion of federal funding for freedom to craft their own policies.¹⁰⁵ Finally, PREA's instruction to make housing decisions on a "case-by-case basis" is largely vague.¹⁰⁶ The lack of specifics regarding what individualized assessments should entail gives facilities significant discretion in making housing determinations.

Admittedly, housing classification systems that are strongly rooted in self-identification, rather than medicalization, will likely be subject to criticism. Skeptics may fear that such systems afford incarcerated people too much latitude in deciding where to be housed. Specifically, skeptics may worry that in such a system, a cisgender¹⁰⁷ man could pretend to be a trans woman and secure housing in a women's facility for invidious reasons. However, this fear may be overstated, as an increasing number of localities—including Cook County, IL; Cumberland, ME; Denver, CO; and Washington D.C.—have had success with policies that classify people by gender identity rather than sex assigned at birth.¹⁰⁸ Further, case law demonstrates that transgender women can be housed in women's facilities without incident.¹⁰⁹ Certainly, this Note does not propose a housing classification system where prison officials are prohibited from taking medical evidence into consideration when making housing determinations. Rather, this Note advocates a housing classification system

¹⁰¹ See Gabriel Arkles, *Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 801, 821 (2014).

¹⁰² Lena Palacios, *The Prison Rape Elimination Act and the Limits of Liberal Reform*, THE GENDER POLICY REPORT (2017), <http://genderpolicyreport.umn.edu/the-prison-rape-elimination-act-and-the-limits-of-liberal-reform/>.

¹⁰³ See Giovanna Shay, PREA's Elusive Promise: Can DOJ Regulations Protect LGBT Incarcerated People? 15 LOY. J. PUB. INT. L. 343, 353 (2014).

¹⁰⁴ Amanda Hess, *Protecting Trans Prisoners* (2015), http://www.slate.com/articles/double_x/doublex/2015/01/leslieann_manning_lawsuit_a_transgender_woman_sues_the_sullivan_correctional.html.

¹⁰⁵ *Id.*

¹⁰⁶ 28 C.F.R. § 115.42.

¹⁰⁷ "Cisgender" refers to a person whose gender identity corresponds with the sex he or she was assigned at birth. *Cisgender*, MERRIAM-WEBSTER DICTIONARY (2018).

¹⁰⁸ See LAMBDA, *supra* note 67.

¹⁰⁹ *Kosilek v. Spencer*, 889 F. Supp. 2d 190 (D. Mass. 2012), *aff'd*, 740 F.3d 733 (1st Cir. 2014), *rev'd en banc granted, opinion withdrawn* (Feb. 12, 2014), *rev'd en banc*, 774 F.3d 63 (1st Cir. 2014), and *rev'd*, 774 F.3d 63 (1st Cir. 2014) (noting that another transgender woman who was convicted of murder was housed in a female facility without incident).

where due weight is given to each person's self-proclaimed gender identity and safety concerns. Balanced, individualized assessments will provide a more reliable basis for respecting the safety and dignity of transgender people who are incarcerated.

To summarize, most prison housing policies are still informed by a medicalized conception of the binary system of gender.¹¹⁰ However, making housing determinations based on subjective interpretations of outward physical characteristics or medical diagnoses is not a satisfactory basis for respecting the emotional and physical wellbeing of incarcerated transgender people. Such policies endanger transgender people who are incarcerated, and stigmatize transgender people overall. Though PREA presents an example of progress, this Act is subject to several limitations.¹¹¹ To protect the autonomy and security of people who are transgender and incarcerated, courts should require prisons to craft effective housing policies that are rooted in a self-definition model of gender.

C. Healthcare

Another challenge that incarcerated transgender people face is securing access to gender-affirming healthcare. Though healthcare needs vary by individual, some transgender people require medical procedures such as hormone replacement therapy (HRT) or gender confirmation surgery (GCS). The likely result of denying such individuals treatment is suicide or self-mutilation.¹¹² However, prison policies for accessing such care vary widely, are largely discretionary, and are rarely satisfactory. Indeed, the NCTE 2015 report found that nearly one in four trans people undergoing HRT prior to incarceration were denied access to hormones while in prison.¹¹³

Some incarcerated trans people have successfully argued that denying a person access to trans-affirming healthcare violates the Eighth Amendment's¹¹⁴ prohibition of cruel and unusual punishment.¹¹⁵ Indeed, the Eighth Amendment guarantees medical care to prisoners who have

¹¹⁰ See JAILHOUSE, *supra* note 82.

¹¹¹ See, e.g., Arkles *supra* note 101.

¹¹² See Coleman, *supra* note 88.

¹¹³ See NCTE, *supra* note 70.

¹¹⁴ U.S. CONST. amend. VIII.

¹¹⁵ *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 248 (D. Mass. 2012) (invalidating prison's blanket prohibition on certain methods of treatment for gender dysphoria); *Barrett v. Coplan*, 292 F. Supp. 2d 281 (D.N.H. 2003) (finding Eighth Amendment violation when prison official denied trans person an evaluation for treatment for GD); *Kosilek v. Maloney*, 221 F. Supp. 2d 156 (D. Mass. 2002) (directing prison officials to provide adequate physician-recommended treatment which might include HRT or GCS); *Allard v. Gomez*, 9 Fed. Appx. 793, 794 (9th Cir. 2001) (finding a triable question of fact as to whether a trans person was denied HRT based on "an individualized medical evaluation or as a result of a blanket rule, the application of which constituted deliberate indifference to [plaintiff's] medical needs.").

lost the ability to provide for their own healthcare needs.¹¹⁶ As noted in *Estelle v. Gamble*, “an inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such failure may actually produce physical torture.”¹¹⁷ A successful Eighth Amendment claim requires plaintiffs to satisfy two prongs.¹¹⁸ First, the plaintiff must show she has a “serious medical need.”¹¹⁹ Second, the plaintiff must demonstrate that the defendant acted with “deliberate indifference” to that serious medical need.¹²⁰

Courts have consistently recognized GD as “a serious medical need.”¹²¹ Additionally, several courts have held that prisons that do not offer adequate treatment for GD act with “deliberate indifference” to that need.¹²² For instance, in *Fields v. Smith*, several transgender people housed in the Wisconsin Department of Corrections brought suit alleging that the prison’s healthcare policy violated their Eighth Amendment rights.¹²³ The prison’s policy was a blanket provision which prevented medical personnel from providing HRT or GCS to any incarcerated transgender person.¹²⁴ The court concluded that this policy constituted a “deliberate indifference to a serious medical need,”¹²⁵ and was unpersuaded by the defendant’s argument that the policy was justified on safety or cost-saving grounds.¹²⁶ Consequently, the policy was invalidated as an Eighth Amendment violation.¹²⁷

Other courts have held that treatments cannot be denied merely because they are expensive,¹²⁸ nor can they be denied merely because they

¹¹⁶ *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

¹¹⁷ *Id.*

¹¹⁸ *Farmer v. Brennan*, 511 U.S. 825, 834 (U.S. 1994).

¹¹⁹ *Id.*

¹²⁰ *Id.* (“[D]eliberate indifference describes a state of mind more blameworthy than negligence . . . only the former violates the Clause.”).

¹²¹ *See, e.g., Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000) (“[T]ranssexualism constitutes a serious medical need.”); *Brown v. Zavaras*, 63 F.3d 967, 970 (10th Cir. 1995) (prison officials must address the medical needs of “transsexual” prisoner); *Phillips v. Michigan Dep’t of Corrections*, 731 F. Supp. 792, 799 (W.D. Mich. 1990) (blanket prohibition on treatment for GD is grounds an Eighth Amendment claim).

¹²² *See, e.g., Spencer*, 851 F. Supp. 2d at 248.

¹²³ *Fields v. Smith*, 653 F.3d 550, 555–56 (7th Cir. 2011).

¹²⁴ *Id.*

¹²⁵ *Id.* (“[D]efendants did not produce any evidence that another treatment could be an adequate replacement for hormone therapy.”).

¹²⁶ *Id.* (“DOC might actually incur greater costs by refusing to provide hormones, since inmates with GID might require other expensive treatments or enhanced monitoring by prison security.”).

¹²⁷ *Id.*

¹²⁸ *Harris v. Thigpen*, 941 F.2d 1495, 1509 (11th Cir. 1991) (holding that lack of funds will not excuse failure to maintain certain minimum level of medical service necessary to avoid imposition of cruel and unusual punishment).

are controversial.¹²⁹ Further, treatments are to be consistent with accepted medical standards,¹³⁰ and prisoners who were already undergoing HRT at the time of incarceration cannot be abruptly taken off such treatment unless there is a clear medical reason for doing so.¹³¹ Perhaps the most successful transgender Eighth Amendment plaintiff to date is Shiloh Quine, who in January 2017 became the first US inmate to undergo government-funded gender confirmation surgery.¹³²

However, most healthcare related Eighth Amendment claims are not so successful.¹³³ The second prong of Eighth Amendment analysis, “deliberate indifference,” has two parts.¹³⁴ First, the plaintiff must establish that the responsible official is aware of facts from which that official could infer that a substantial risk of serious harm exists, and second, the official must also draw that inference.¹³⁵ For many plaintiffs, satisfying

¹²⁹ *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 182 (D. Mass. 2002) (holding that it is unreasonable for prison officials to fail to provide medical care due to its controversial nature because “it is the primary purpose of the Bill of Rights . . . to protect rights of minorities from the will of the majority.”).

¹³⁰ See *Moore v. Duffy*, 255 F.3d 543, 545 (8th Cir. 2001) (“[M]edical treatment may not so deviate from the applicable standard of care as to evidence a physician’s deliberate indifference”); *Estate of Cole v. Fromm*, 94 F.3d 254, 262 (7th Cir. 1996) (finding an eighth Amendment violation where treatment represents “such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment”); *United States v. DeCologero*, 821 F.2d 39, 43 (1st Cir. 1987) (finding Eighth Amendment guarantees medical care “at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards.”).

¹³¹ See, e.g., *De’Lonta v. Angelone*, 330 F.3d 630, 634–35 (4th Cir. 2003); *Wolfe v. Horn*, 130 F. Supp. 2d 648, 653 (E.D. Pa. 2001); *Phillips*, 731 F. Supp. at 800 (“Taking measures which actually reverse the effects of years of healing medical treatment . . . is measurably worse [than failing to provide such treatment in the first place.]”)

¹³² *Quine v. Beard*, Transgender Law Center (2017), <https://transgenderlawcenter.org/quine-v-beard> (2017). Quine is a transgender woman who was housed in a male facility (CDCR). She filed suit, asserting that GCS and access to commissary items available to female inmates were medically necessary treatment for her gender dysphoria, and denying her access to such treatment constituted cruel and unusual punishment. After extensive litigation, Quine and CDCR reached an agreement, which included Quine undergoing GCS and transferring to a female facility. See *Quine v. Beard*, No. 14-CV-02726-JST, 2017 WL 1540758, at *1 (N.D. Cal. Apr. 28, 2017).

¹³³ See *Cuoco v. Moritsugu*, 222 F.3d 99, 104, 113 (2d Cir. 2000) (finding that prison doctors were entitled to qualified immunity regarding her Eighth Amendment claim after transgender person suffered psychological and physical withdrawal as a result of the termination of HRT where a prison doctor who “knew absolutely nothing about transsexuals” determined she was not a “genuine transsexual”); See *Maggert v. Hanks*, 131 F.3d 670 (7th Cir. 1997) (holding that it is permissible to withhold treatment from transgender prisoners because neither public nor private health insurance programs will pay for GCS); *Long v. Nix*, 86 F.3d 761 (8th Cir. 1996) (holding that prisoner diagnosed with GID had no right to proper clothing options or to HRT); *White v. Farrier*, 849 F.2d 322 (8th Cir. 1988) (holding that transgender prisoner is not entitled to proper clothing, cosmetics, or HRT).

¹³⁴ See *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 248 (D. Mass. 2012).

¹³⁵ *Id.*

both parts of the “deliberate indifference” inquiry proves to be an insurmountable burden.¹³⁶

For example, in 2014, the Court of Appeals for the First Circuit determined that a rigid policy which prohibited prison officials from providing GCS to any transgender inmate did not constitute an Eighth Amendment violation.¹³⁷ In that case, plaintiff Michelle Kosilek sued prison officials for GCS after a decade of incarceration without any form of trans affirming medical or psychological care.¹³⁸ While in prison, Kosilek attempted to kill and castrate herself.¹³⁹ In a landmark decision, the Massachusetts district court found that GCS was the only adequate care to treat Kosilek’s GD, and held that Massachusetts’ failure to provide such surgery constituted cruel and unusual punishment.¹⁴⁰ However, the First Circuit later reversed the district court’s decision, holding that GCS was not medically necessary to treat Kosilek, thus the prison policy did not constitute deliberate indifference to GD.¹⁴¹

In her dissenting opinion, Judge Thompson criticized the majority for employing *de novo* review to the factual issue of “deliberate indifference,” instead of the applicable, deferential, clear error standard.¹⁴² She further stated that the majority opinion “aggrieves an already marginalized community, and enables correctional systems to further postpone their adjustment to the crumbling gender binary.”¹⁴³ Controversy surrounding Kosilek’s care extended beyond the First Circuit panel; Kosilek’s search for relief also incited public outrage and garnered the ridicule of political officials.¹⁴⁴ The indignation surrounding an incarcerated person seeking GCS reflects transphobic cultural attitudes, and the widespread conception that those who challenge the gender binary are sick, societal outsiders, rather than equal members of diverse society entitled to rights, recognition, and respect.

¹³⁶ See, e.g., *Moritsugu*, 222 F.3d at 106.

¹³⁷ *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014).

¹³⁸ *Kosilek v. Spencer*, 889 F. Supp. 2d 190 (D. Mass. 2012), *aff’d*, 740 F.3d 733 (1st Cir. 2014), *rev’d en banc granted, opinion withdrawn* (Feb. 12, 2014), *on rev’d en banc*, 774 F.3d 63 (1st Cir. 2014), and *rev’d*, 774 F.3d 63 (1st Cir. 2014).

¹³⁹ *Kosilek* 2012, 889 F. Supp. at 197.

¹⁴⁰ *Id.*

¹⁴¹ *Kosilek* 2014, 774 F.3d at 94–96 (holding that the District Court erred in its credibility determinations regarding the expert witnesses who testified that GCS is medically necessary and ignored significant contrary evidence regarding the adequacy of alternative treatments for GD).

¹⁴² *Kosilek* 2014, 774 F.3d at 98 (Thompson, J., dissenting).

¹⁴³ *Id.* at 113.

¹⁴⁴ *Kosilek* 2012, 889 F. Supp. 2d at 203 (“The Lieutenant Governor . . . publicly opposed using tax revenues to provide Kosilek sex reassignment surgery. Many members of the state legislature, including one who was close to Dennehy, did the same. In addition, the media regularly ridiculed the idea that a murderer could ever be entitled to such “bizarre” treatment.”).

Moreover, even successful Eighth Amendment claims have been subject to severe limitations. As previously discussed, courts have consistently recognized GD as a serious medical need, and many have required prisons to provide some form of treatment in response to that need. However, such decisions rarely specify the type or level of treatment required.¹⁴⁵ In other words, the Eighth Amendment may guarantee transgender inmates the right to some treatment for GD, but it does not guarantee choice in determining the course of that treatment.¹⁴⁶ As such, psychological therapy may be considered sufficient, even when the individual maintains that HRT or GCS are necessary. Further, even when prisons do provide HRT, there are no legal guarantees that hormones will be provided at the appropriate levels or with necessary physical and psychological support services.¹⁴⁷ Such policies give the prison administration wide discretion in determining when and what treatments are needed, which then positions the medical establishment as the gatekeeper of gender expression and deprioritizes a self-definition model of gender.

Additionally, as previously noted, courts have held that individuals who were already undergoing HRT at the time of incarceration cannot be abruptly taken off such treatment unless there is a clear medical reason for doing so.¹⁴⁸ While such policies protect transgender people who had access to trans affirming healthcare prior to incarceration, such policies fail to protect more vulnerable transgender populations. Incarcerated transgender people are disproportionately indigent, and are thus unlikely to have private physicians who are willing to advocate on their behalf.¹⁴⁹ If a person requires HRT but did not have legal, documented access to it prior to incarceration, she does not come within the scope of such policies.¹⁵⁰ Courts do not consider an inmate's ability to pay for medical treatment prior to incarceration relevant to Eighth Amendment analysis for virtually any other medical condition. Therefore, such policies simultaneously medicalize gender non-conformity, yet deny GD the importance attributed to other medical conditions.

¹⁴⁵ See, e.g., *Briones v. Grannis*, CV 09-08074-VAP(VBK), 2010 WL 3636139, at *6 (C.D. Cal. Sept. 14, 2010) (holding that the Eighth Amendment does not grant a prisoner his or her choice of treatment for GD).

¹⁴⁶ *Id.*

¹⁴⁷ Darren Rosenblum, "Trapped" in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 545 (2000).

¹⁴⁸ See *De'Lonta*, 330 F.3d at 634–35.

¹⁴⁹ NCLR, *supra* note 62.

¹⁵⁰ *Cf. Farmer v. Moritsugu*, 163 F.3d 610, 615–16 (D.C. Cir. 1998) (granting qualified immunity to the Medical Director of the Bureau of Prisons, holding he was not obligated to provide HRT to a transgender person whose request was "completely unsupported by treatment records or recommendations from local medical personnel establishing a need for treatment.").

Further, though courts consider GD to be a “serious medical need,” some trans people have difficulty proving they have GD.¹⁵¹ Again, many transgender people did not have access to trans-friendly healthcare prior to incarceration, and are thus unlikely to have received a formal diagnosis.¹⁵² Further, prison medical staff often lacks experience caring for trans patients, and is not qualified to diagnose individuals as Gender Dysphoric.¹⁵³ Even when qualified staff is present, the psychological evaluation process can be unnecessarily bureaucratic, and inherently privileges the will of the prison staff over the needs of the incarcerated individual.¹⁵⁴ For instance, a person’s access to treatment can be impeded if her behavior does not coincide with the prison psychologist’s conception of “sufficiently” transgender.¹⁵⁵ Indeed, many transgender people do not conform to the exact diagnostic criteria for GD as laid out by the DSM-5, which excludes many gender-nonconforming and non-binary people from its parameters.¹⁵⁶

More fundamentally, any reliance on the Eighth Amendment as grounds for transgender individual’s healthcare rights is subject to ideological limitations because such legal reasoning is based on the medical model of gender transgression. To make a successful Eighth Amendment case, plaintiffs must assert that their gender identity constitutes a “serious medical need.”¹⁵⁷ This argument relies on the assumption that “healthy” gender expression conforms to a binary, and reinforces the belief that deviation from this binary is pathological. While this argument may assist incarcerated transgender people in fulfilling their immediate medical needs, it forces plaintiffs to stigmatize their community as inherently disordered. Instead of conceptualizing trans-affirming healthcare as necessary tools for healthy gender expression, courts give such care reluctant approval to individuals who are seen as ill and out of order.¹⁵⁸ Therefore, an Eighth Amendment approach is problematic because it forces incar-

¹⁵¹ *Cuoco v. Moritsugu*, 222 F.3d 99 (2d Cir. 2000) (transgender inmate suffered psychological and physical withdrawal symptoms as a result of the abrupt termination of her HRT where a prison doctor who “knew absolutely nothing about transsexuals” determined she was not a “genuine transsexual.”).

¹⁵² NCLR, *supra* note 62.

¹⁵³ *Id.*

¹⁵⁴ Harron Walker, *For Trans Prisoners Access to Healthcare Remains Abysmal*, Vice (2017), https://www.vice.com/en_us/article/d7789m/for-trans-prisoners-access-to-healthcare-remains-abysmal.

¹⁵⁵ *See, e.g., Maggert v. Hanks*, 131 F.3d 670 (7th Cir. 1997) (affirming dismissal of claim that denying HRT constituted Eighth Amendment violation because prison psychologist believed that plaintiff’s “sexual identity [was] polymorphous and his sexual aims ambiguous,” but the prison psychologist did not believe that plaintiff “suffer[ed] from gender dysphoria.”).

¹⁵⁶ *See, e.g., Lloyd supra* note 60.

¹⁵⁷ *Farmer v. Brennan*, 511 U.S. 825, 834 (U.S. 1994).

¹⁵⁸ *See BUTLER, supra* note 12.

cerated transgender people to choose between their medical needs and their interest in discussing gender in a way that is empowering.

Critics may argue that requiring prisons to provide HRT and GCS to transgender people would impose unreasonable costs on the state. However, cost-saving arguments may be misplaced. In *Fields v. Smith*, the court noted that the costs of HRT and GCS are comparable to, and often cheaper than, the costs of other drugs and surgeries.¹⁵⁹ The court emphasized that prisons may actually incur greater costs by refusing to provide hormones, since “inmates with GD might require other expensive treatments or enhanced monitoring by prison security.”¹⁶⁰ More importantly, incurred costs are justified because transgender people, advocates, and medical practitioners agree that HRT and GCS are not elective procedures.¹⁶¹ Rather, they are necessary medical care for those transgender individuals who experience physical and emotional distress that is not alleviated by other treatment options alone.¹⁶² Indeed, the likely result of denying individuals such treatment is suicide and self-mutilation.¹⁶³ As the court asserted in *Fields v. Smith*, “just as the legislature cannot outlaw all effective cancer treatments for prison inmates, it cannot outlaw the only effective treatment for a serious condition like GID.”¹⁶⁴ Though conceptualizing trans experience as a mental illness is problematic, providing effective care for members of the trans community who require medical attention is crucial to preventing harm and protecting dignity.

In sum, many transgender people have unique healthcare needs. Some incarcerated transgender people have secured access to trans affirming medical treatment by relying on the Eighth Amendment’s prohibition against cruel and unusual punishment.¹⁶⁵ However, not all plaintiffs are able to satisfy the Eighth Amendment’s requirements.¹⁶⁶ Further, even successful cases are subject to practical and ideological limitations. First, many “improved” prison policies fail to accommodate the diversity of the transgender community, especially vulnerable transgender inmates.¹⁶⁷ Second, Eighth Amendment jurisprudence relies on a medicalized conception of the binary system of gender. The legal community should explore alternate legal grounds that would permit trans

¹⁵⁹ See *Fields v. Smith*, 653 F.3d 550, 555–56 (7th Cir. 2011).

¹⁶⁰ *Id.*

¹⁶¹ See Coleman, *supra* note 88 at 54–55. In 2010, the United States Tax Court held that the costs of HRT and GCS are, for certain individuals, tax deductible as forms of necessary medical care, rather than nondeductible expenses for cosmetic treatment. See O’Donnabhain v. Comm’r of Internal Revenue, 134 T.C. 34, 70, 76–77 (U.S. Tax Ct. 2010).

¹⁶² See Coleman, *supra* note 88, at 54–55.

¹⁶³ *Id.* at 68.

¹⁶⁴ *Fields v. Smith*, 653 F.3d 550, 557 (7th Cir. 2011).

¹⁶⁵ See, e.g., *Spencer*, 774 F.3d 63 (1st Cir. 2014).

¹⁶⁶ See, e.g., *Moritsugu*, 222 F.3d at 106.

¹⁶⁷ See, e.g., NCLR, *supra* note 62.

people to assert an affirmative right to gender expression independent of the right to medical care.

D. *Sexual Violence*

Another issue that incarcerated transgender people face is increased risk of violence. Transgender people are often uniquely vulnerable to physical attacks, harassment, and sexual assault.¹⁶⁸ Indeed, incarcerated transgender people are nine-to-ten times more likely than the general incarcerated population to be sexually assaulted by another inmate, and five to six times more likely to be sexually assaulted by facility staff.¹⁶⁹

There are several explanations for this phenomenon. First, widespread transphobia and subscription to the binary system of gender can subject transgender people to ridicule and abuse outside the prison context.¹⁷⁰ Within prisons, reduced privacy and power dynamics can exacerbate this issue—especially for transgender women housed in male facilities.¹⁷¹ Prison environments of hyper-masculine control and dominance contribute to high rates of sexual assault against feminine, young, and new prisoners.¹⁷² Second, prison employees often lack the proper training required to be aware of the needs of incarcerated transgender individuals.¹⁷³ Worse, staff can contribute to the problem, either by inflicting abuse upon transgender individuals themselves, or ‘looking the other way’ when such violence takes place.¹⁷⁴

Like plaintiffs discussed in the previous section on healthcare, some incarcerated transgender people have successfully addressed sexual violence through reliance on the Eighth Amendment.¹⁷⁵ Specifically, such plaintiffs have argued that staff failure to protect transgender inmates from abuse constitutes cruel and unusual punishment.¹⁷⁶ However, unlike Eighth Amendment violations of indifference to medical need, Eighth Amendment violations of indifference to safety do not require transgender people to conceptualize themselves as disordered. Instead,

¹⁶⁸ See JAILHOUSE, *supra* note 82.

¹⁶⁹ See NCTE, *supra* note 70, at 192.

¹⁷⁰ HUMAN RIGHTS CAMPAIGN, Understanding the Transgender Community (2018) <https://www.hrc.org/resources/understanding-the-transgender-community> (“While the visibility of transgender people is increasing in popular culture and daily life, we still face severe discrimination, stigma and systemic inequality.”).

¹⁷¹ Valerie Jenness et al., Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault (2007), http://ucicorrections.seweb.uci.edu/pdf/FINAL_PREA_REPORT.pdf.

¹⁷² *Id.*

¹⁷³ See JAILHOUSE, *supra* note 82.

¹⁷⁴ *Id.*

¹⁷⁵ See, e.g., Farmer v. Brennan, 511 U.S. 825 (1994).

¹⁷⁶ *Id.*

plaintiffs must first show she faced “substantial risk of serious harm.”¹⁷⁷ Then, plaintiffs must demonstrate that the defendant acted with “deliberate indifference” to that substantial risk.¹⁷⁸

For example, in *Farmer v. Brennan*, a transgender woman successfully argued that prison officials acted with deliberate indifference to a substantial risk of serious harm when they failed to protect her from repeated sexual assaults during her incarceration.¹⁷⁹ In that case, plaintiff Dee Farmer was placed in a men’s facility where she was repeatedly beaten and raped.¹⁸⁰ The court concluded that the prison officials violated Farmer’s Eighth Amendment rights because they knew about the attacks but did not take preventative or punitive action.¹⁸¹

Farmer v. Brennan was significant because it provided incarcerated transgender people precedent to argue that failure to protect them from sexual assault constitutes cruel and unusual punishment. However, not all Eighth Amendment plaintiffs are so successful.¹⁸² This is in part because the standard for establishing that a prison official possessed the requisite knowledge of substantial risk of serious harm varies. Typically, documented history of attack and harassment against an individual are sufficient to establish awareness of a risk.¹⁸³ However, some courts have gone so far as to say mere awareness of plaintiff’s status as transgender is sufficient to put staff on notice that she is at substantial risk of serious harm.¹⁸⁴ Indeed, PREA lists transgender people within the category of “potentially vulnerable prisoners” that deserve special attention and monitoring.¹⁸⁵ However, other courts set the requisite knowledge standard much higher. For instance, in *D.B. v. Orange County*, a Florida district court found that a transgender woman who had undergone surgical procedures altering her appearance and was placed with a male cellmate and raped by him, had not shown that prison officials were aware of the heightened risk of sexual assault against transgender prisoners.¹⁸⁶

¹⁷⁷ *Id.* at 825.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 829.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 841.

¹⁸² *See, e.g., D.B. v. Orange County*, 2014 U.S. Dist. LEXIS 130993, *17 (M.D. Fla. Sept. 18, 2014).

¹⁸³ *See JAILHOUSE, supra* note 82.

¹⁸⁴ *Green v. Hooks*, 6:13-cv-17, 2013 WL 4647493, at *3 (S.D. Ga. Aug 29, 2013) (finding allegations that defendants were aware that transgender plaintiff feared for her life and that “prison is dangerous for transgender inmates” constituted deliberate indifference); *See Lojan v. Crumbsie*, 12 CV. 0320 LAP, 2013 WL 411356, at *4 (S.D.N.Y. Feb. 1, 2013) (holding mere knowledge that plaintiff was transgender was sufficient to put prison officials on notice that she was susceptible to physical attack).

¹⁸⁵ 28 C.F.R. § 115.

¹⁸⁶ *D.B. v. Orange County*, 2014 WL 4674136, at *5 (M.D. Fla. Sept. 18, 2014) (finding insufficient evidence that County was on notice that it needed to take additional measures to

Similarly, there is no clear standard regarding what actions defendants must take to abate serious risks. For instance, if a guard takes any action, like writing up the matter or processing a complaint, the court might say the guard did not disregard the risk to safety.¹⁸⁷ For instance, in *Johnson v. Johnson*, the Fifth Circuit held that an officer who “referred the matter for further investigation” may have done enough to escape liability for a gay individual who was forced into sexual servitude by a prison gang.¹⁸⁸

Additionally, courts vary regarding which forms of gendered abuse constitute “serious harms.” Though protection from rape comes within the scope of the Eighth Amendment, protection from sexual harassment and psychological abuse can be more difficult to litigate. For example, in *Murray v. U.S. Bureau of Prisons*, the Sixth Circuit dismissed a transgender woman’s claim regarding a series of harassing comments about her bodily appearance and presumed sexual orientation.¹⁸⁹ The court concluded that verbal abuse alone does not rise to the level of “unnecessary and wanton infliction of pain” necessary for an Eighth Amendment violation.¹⁹⁰ However, in *Schwenk v. Hartford*, the Ninth Circuit allowed a transgender woman to make an Eighth Amendment claim alleging that a guard grinded his exposed penis into her buttocks after she refused his demand for oral sex.¹⁹¹ Whether an incident of unwanted sexual touching will suffice as a “serious harm” will depend on the circuit, the intensity of the touching, and whether it was a single or repeated incident.¹⁹²

To summarize, incarcerated people of trans experience face an increased risk of sexual violence.¹⁹³ Some courts have addressed this risk by establishing that staff failures to protect transgender individuals from sexual violence constitute an Eighth Amendment violation.¹⁹⁴ Such “indifference to safety” violations are not subject to the same ideological risks that “indifference to medical need” violations are, because “indifference to safety” claims do not require plaintiffs to conceptualize themselves as disordered. Nevertheless, “indifference to safety” jurisprudence is still subject to several limitations, including lack of a clear standard regarding knowledge of risk, disregard of risk, and seriousness of harm.

protect transgender inmates because there was no evidence of other sexual assaults against transgender inmates at Orange County Jail).

¹⁸⁷ See *JAILHOUSE*, *supra* note 82.

¹⁸⁸ *Johnson v. Johnson*, 385 F.3d 503 (5th Cir. 2004).

¹⁸⁹ *Murray v. U.S. Bureau of Prisons*, 106 F.3d 401 (6th Cir. 1997).

¹⁹⁰ *Id.*

¹⁹¹ *Schwenk v. Hartford*, 204 F. 3d 1187 (9th Cir. 2000).

¹⁹² See *JAILHOUSE*, *supra* note 82.

¹⁹³ *Id.*

¹⁹⁴ See, e.g., *Farmer v. Brennan*, 511 U.S. 825 (U.S. 1994).

Such limitations reflect societal disregard for the issues trans people face. Courts should impose a clear, consistent duty on prison officials to protect transgender people from all forms of gendered abuse, including transphobic slurs and sexual harassment. Further, the legal system should acknowledge that such abuse is partially the product of widespread transphobia. Courts have the capacity to play a more proactive role in preventing trans oppression by conceptualizing transgender identities as legitimate, rather than indicative of mental illness.

E. Solitary Confinement

Another issue that incarcerated transgender people face is involuntary placement in solitary confinement. Indeed, 85 percent of LGBTQ people behind bars report spending time in solitary confinement.¹⁹⁵ Often, transgender people are placed in solitary as a form of “protective custody.”¹⁹⁶ Admittedly, trans inmates do face a heightened risk of violence when housed among the general prison population, especially if they are housed in a facility that does not correspond to their gender identity.¹⁹⁷ However, responding to this concern by placing trans people in solitary has perverse consequences in that it punishes victims of violence and deters reporting of abuse.¹⁹⁸ Further, “safety concern” rhetoric can be pretext for transphobia. For instance, trans individuals are often written up for minor infractions—such as failing to conform to prison dress code—and then land in solitary due to staff prejudice.¹⁹⁹

The impact of placing trans individuals in solitary confinement is more punitive than protective. First, segregated individuals face limited access to educational classes, employment opportunities, and other recreational programs.²⁰⁰ Second, segregated housing does nothing to protect individuals from staff abuse.²⁰¹ In fact, segregated housing may increase risk of staff abuse, due to decreased visibility and oversight in isolated units.²⁰² Finally, the devastating psychological effect of solitary confine-

¹⁹⁵ Jason Lydon et al., *Coming Out of Concrete Closets: A Report on Black & Pink’s National LGBTQ Prisoner Survey* at 5 (2015), <http://www.blackandpink.org/wp-content/uploads/Coming-Out-of-Concrete-Closets.-Black-and-Pink.-October-21-2015.pdf>.

¹⁹⁶ Gabriel Akers, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 9 *DUKEMINER AWARDS J.* 343, 374 (2009).

¹⁹⁷ See *JAILHOUSE*, *supra* note 82; see *Jenness*, *supra* note 172.

¹⁹⁸ Faroat Andasheva, *Aren’t I A Woman? Deconstructing Sex Discrimination and Freeing Transgender Women from Solitary Confinement*, 12 *FIU L. REV.* 117, 126 (2016).

¹⁹⁹ See Akers, *supra* note 196.

²⁰⁰ *NCLR*, *supra* note 62.

²⁰¹ See *UNJUST*, *supra* note 92.

²⁰² *Id.*

ment is well-documented.²⁰³ Among other symptoms, individuals in isolation can experience “extreme anxiety, hallucinations, violent fantasies, and hypersensitivity to external stimuli.”²⁰⁴ Consequently, individuals in segregation are more likely to inflict self-harm or attempt suicide.²⁰⁵

Despite the adverse effects of isolation, however, courts do not always view solitary confinement as a form of cruel and unusual punishment.²⁰⁶ Rather, courts have established that in a prison context, even serious deprivations can be permissible when accompanied by adequate disciplinary or safety justifications.²⁰⁷ For instance, in *DiMarco v. Wyoming Dept. of Corrections*, a district court held that a prison did not violate an intersex woman’s Eighth Amendment rights even though she was isolated in the most restrictive setting of the prison for fourteen months.²⁰⁸ DiMarco had the lowest possible security classification, and was isolated only because of her physical characteristics.²⁰⁹ The court explained that it “reluctantly” rejected the Eighth Amendment portion of DiMarco’s claim because the United States Supreme Court set the bar so high for cruel and unusual punishment that the facts of DiMarco’s case did not qualify.²¹⁰ The court noted that despite being housed in a setting typically reserved for the most dangerous inmates for her entire incarceration, DiMarco did not endure cruel and unusual punishment because she was housed in sanitary conditions, received three meals a day, was not deprived of sleep or exercise, and was not physically assaulted.²¹¹ The Tenth Circuit later affirmed the district court’s decision.²¹² In essence, the Eighth Amendment only applies in cases of physical torture of prisoners, extreme deprivations of necessities of life, and deliberate indifference to “serious medical needs” or “substantial risks of serious harm.” As such, it is difficult for individuals to rely on Eighth Amendment protections when challenging the legality of involuntary placement in solitary confinement.

However, incarcerated individuals may be entitled to procedural due process before being placed in solitary confinement. The Fourteenth Amendment provides, “no state shall deprive any person of life, liberty,

²⁰³ Tracy Hresko, *In the Cellars of the Hollow Men: Use of Solitary Confinement in U.S. Prisons and its Implications Under International Laws Against Torture*, 18 PACE INT’L L. REV. 1, 3 (2006).

²⁰⁴ *Id.* at 7.

²⁰⁵ See UNJUST, *supra* note 92, at 92.

²⁰⁶ See Andasheva, *supra* note 199.

²⁰⁷ *Id.*

²⁰⁸ *DiMarco v. Wyoming Dep’t of Corr.*, 300 F. Supp. 2d 1183 (D. Wyo. 2004).

²⁰⁹ *Id.* at 1188.

²¹⁰ *Id.* at 1194.

²¹¹ *Id.*

²¹² *DiMarco v. Wyoming Dep’t of Corr.*, 473 F.3d 1334 (10th Cir. 2007).

or property, without due process of law.”²¹³ The Supreme Court has held that a protected liberty interest may arise from prison placement decisions and conditions of confinement.²¹⁴ To determine whether a protected liberty interest exists, courts evaluate the nature of placement conditions “in relation to the ordinary incidents of prison life.”²¹⁵ If a protected liberty is established, courts determine whether that interest was afforded sufficient due process protection by considering three factors: (1) the private interest affected; (2) both the risk of an erroneous deprivation of that interest through the procedures used, and the probable value of additional procedural safeguards; and (3) the Government’s interest, including the burdens additional safeguards would entail.²¹⁶

Some individuals have brought suit arguing that isolation based on their transgender status constitutes deprivation of a liberty interest without due process. Such arguments have been met with mixed results. Unfortunately, some courts have concluded that inmates do not have a protected liberty interest in being classified a certain way within a facility,²¹⁷ and others have concluded that inmates do have a protected liberty interest, but prison officials are entitled to qualified immunity.²¹⁸

Nevertheless, in *DiMarco v. Wyoming Dept. of Corrections*, the district court concluded that the prison violated DiMarco’s due process rights when she was held in dungeon-like, high-security lock-up without any opportunity for a hearing to challenge that placement.²¹⁹ The court first concluded that she had a liberty interest that required due process protection because DiMarco’s placement in solitary confinement for 438 days constituted an atypical and significant departure from ordinary incidents of prison life.²²⁰ The court reiterated that DiMarco did not violate prison rules—her confinement was only due to physical characteristics which she did not choose.²²¹ The court further concluded that DiMarco did not receive adequate due process protection of this liberty interest

²¹³ U.S. Const. amend. XIV.

²¹⁴ *DiMarco* 2004, 300 F. Supp. at 1340.

²¹⁵ *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005).

²¹⁶ *Id.* at 224–25.

²¹⁷ See *Meachum*, 427 U.S. at 215, see also, *Long v. Nix*, 877 F. Supp. 1358, 1366–67 (S.D. Idaho 1995) *aff’d*, 86 F.3d 761 (8th Cir. 1996) (holding that an incarcerated transgender person had no property or liberty interest in being classified in a particular way or placed in a particular facility); *Meriwether v. Faulkner*, 821 F.2d 408 (7th Cir. 1987) (holding that a transgender woman who challenged placement in administrative segregation did not have a due process claim because no liberty interest was at stake).

²¹⁸ See generally *Farmer v. Kavanaugh*, 494 F. Supp. 2d 345 (D. Md. 2007) (finding that a transgender inmate had a liberty interest in avoiding transfer from a maximum security to a super-max facility, but prison officials were entitled to qualified immunity on the Fourteenth Amendment claim).

²¹⁹ *DiMarco* 2004, 300 F. Supp. 2d at 1192.

²²⁰ *Id.* at 1195.

²²¹ *Id.*

because she was not allowed to voice her thoughts and concerns prior to the prison's final decision to place her in solitary confinement.²²² The court described the prison's decision as "completely arbitrary and capricious and without a rational basis," and emphasized that the prison "had plenty of time to develop other more respectable, less harsh alternatives."²²³

However, the Tenth Circuit later reversed the district court's decision.²²⁴ The court first concluded that DiMarco did not have a liberty interest in her placement and the conditions of her confinement because DiMarco had access to the "ordinary essentials" of prison life, such as medical care.²²⁵ As such, the conditions of her confinement did not impose such atypical and significant hardship as to violate due process right.²²⁶ The court further concluded that even if DiMarco had a protected liberty interest, the prison provided adequate procedural protections to justify its placement decision.²²⁷ The court noted that prison officials consulted doctors and had "legitimate safety concerns" when they made their placement decision,²²⁸ and DiMarco had the chance to be heard as a review of her placement every ninety days.²²⁹

Therefore, like the Eighth Amendment, the Fourteenth Amendment has done little to protect transgender people from arbitrary and unfair placement in solitary confinement. However, a procedural due process approach is worth further exploration because due process claims are consistent with a self-definition model of gender. Through the recognition of a procedural due process right, a transgender person is permitted to assert her own identity, on her own terms, and argue that infringing on her protected liberty interests in a discriminatory way is unconstitutional. Rather than conceptualize their gender identity as a psychological disorder, transgender plaintiffs are thus able to discuss gender in an inclusive and affirming manner. A substantive due process approach is worth exploration as well. Through substantive due process claims, plaintiffs could assert that the right to self-define gender is fundamental. Classifying gender identity as a fundamental right aligns with other due process jurisprudence; among other rights, the Supreme Court considers the right to marry, reproduce, refuse medical treatment, and direct child-rearing as

²²² *Id.*

²²³ *Id.*

²²⁴ *DiMarco* 2007, 473 F.3d at 1334.

²²⁵ *Id.* at 1342.

²²⁶ *Id.* at 1343.

²²⁷ *Id.* at 1344.

²²⁸ *Id.* at 1338 ("institutional safety concerns created by [p]lacing an inmate of the opposite gender in [the facility]. . . mandated separate housing.").

²²⁹ *Id.* 1337.

fundamental.²³⁰ A right to self-define gender fits within this framework of protecting liberty and privacy.

The Equal Protection Clause of the Fourteenth Amendment may also provide protection for transgender individuals placed in solitary confinement. However, lawsuits brought under the Fourteenth Amendment have been largely unsuccessful.²³¹ Courts do not recognize transgender people as a suspect class.²³² Consequently, their claims are analyzed under rational basis review. Under this standard, prisons only need to establish that segregation was “rationally related to a legitimate government interest” to overcome an equal protection challenge.²³³ Prison officials can easily meet this standard by citing security concerns.²³⁴ For instance, in the *DiMarco* case, the district court dismissed DiMarco’s Equal Protection claim because the prison official’s decision was rationally related to the legitimate interest of ensuring the safety of the general prison population.²³⁵

Incarcerated transgender people might have more success pursuing Equal Protection claims if transgender people were recognized as a “suspect” or “quasi-suspect” class because then their claims would be subject to strict or intermediate scrutiny.²³⁶ Transgender plaintiffs have had some success achieving heightened scrutiny outside the prison context. For instance, in *Glenn v. Brumby*, the Eleventh Circuit analyzed employment discrimination against a transgender woman under intermediate scrutiny, holding that discrimination based on gender non-conformity constitutes sex discrimination under the Equal Protection Clause.²³⁷ In its analysis, the court relied on *Price Waterhouse v. Hopkins*, which estab-

²³⁰ See generally *Lawrence v. Texas*, 539 U.S. 558 (2003) (upholding a right to privacy regarding consensual homosexual activity), *Troxel v. Granville*, 530 U.S. 57 (2000) (upholding a right to direct child rearing), *Cruzan v. Dir. Missouri Dep’t of Health*, 497 U.S. 261 (1990) (upholding a right to refuse medical treatment), *Turner v. Safley*, 482 U.S. 78 (1987) (upholding a right to marry in prison settings), *Roe v. Wade*, 410 U.S. 113 (1973) (upholding a right to privacy regarding abortion), *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (upholding a right to family planning and contraceptive choice), *Loving v. Virginia*, 388 U.S. 1 (1967) (upholding a right to marry regarding race), *Griswold v. Connecticut*, 381 U.S. 479 (1965) (upholding a right to marital privacy).

²³¹ See *Lopez v. City of New York*, No. 05 Civ. (NRB) 10321, 2009 WL 229956 (S.D.N.Y. Jan. 30, 2009); *Kaao-Tomaselli v. Butts*, No. 11-00670 LEK/BMK, 2013 U.S. Dist. LEXIS 13280 (D. Haw. Jan. 31, 2013); *Meriwether v. Faulkner*, 821 F.2d 408 (7th Cir. 1987).

²³² See, e.g., *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 667 (9th Cir. 1977).

²³³ *DiMarco* 2007, 473 F.3d at 1338.

²³⁴ See *Lopez*, 2009 WL 229956.

²³⁵ *DiMarco* 2007, 473 F.3d at 1338 (“institutional safety concerns created by [p]lacing an inmate of the opposite gender in [the facility] . . . mandated separate housing.”).

²³⁶ See, e.g., *J.E.B. v. Alabama*, 511 U.S. 127, 152 (1994) (finding that gender is a quasi-suspect class and gender classifications are subject to intermediate scrutiny); see also *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (finding that race is a suspect class and racial classifications are subject to strict scrutiny).

²³⁷ *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011).

lished that discrimination based on gender stereotypes is sex-based discrimination.²³⁸

Sex-discrimination claims are an important source of progress because they are consistent with a self-definition model of gender. Such claims permit plaintiffs to validate their gender identity as legitimate by arguing that discriminating against people whose gender identity does not match their sex assigned at birth is a form of gender discrimination. In short, plaintiffs can argue that transgender discrimination is gender discrimination, effectively asserting a right to self-define gender without implicating transgender identity as a mental disorder. In practice, however, such claims do not have as progressive of a socio-political impact. The popular interpretation of *Price Waterhouse* forces plaintiffs to file claims as a man or woman whose appearance does not match her biological sex, rather than as a transgender person who is facing discrimination for expressing her legitimate gender. In other words, plaintiffs must argue that they are being discriminated against for their “gender nonconforming appearance,” rather than their transgender identity, which disregards a self-definition model of gender.

Another potential source of progress is the PREA guidelines. PREA prevents prison staff from placing individuals in administrative segregation against their will, unless they have found—within the first twenty-four hours of involuntary segregation—that there is no other way to keep the individual safe.²³⁹ Positively, these guidelines are designed to reduce the arbitrary and discriminatory use of solitary confinement against trans people.²⁴⁰ However, as previously noted, using solitary to address safety concerns has perverse effects, such as punishing victims and deterring reporting of abuse.²⁴¹ Further, as discussed in the earlier section on housing classifications, PREA’s function is more expressive than practical because it does not provide individuals with a private right of action.²⁴²

To summarize, incarcerated transgender people are often placed in solitary confinement against their will, either for protective or punitive purposes.²⁴³ Solitary confinement has an adverse impact on human physical, emotional, and psychological wellbeing.²⁴⁴ Transgender people have contested discriminatory use of solitary confinement by relying on the Eighth Amendment, Due Process Clause, and Equal Protection clause, but have had difficulty securing adequate legal protection on any

²³⁸ See generally *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

²³⁹ 28 C.F.R. § 115.

²⁴⁰ See Shay, *supra* note 104 (“PREA represents an unprecedented national reformist effort in corrections regulation.”).

²⁴¹ See Andasheva, *supra* note 199.

²⁴² See Arkles, *supra* note 102.

²⁴³ See Lydon, *supra* note 196.

²⁴⁴ See Hresko, *supra* note 204.

of the three grounds. To address this issue effectively, courts and prisons must punish perpetrators of inmate abuse rather than victims, and take seriously the devastating impact of solitary confinement. Moreover, courts and prisons must acknowledge the importance of respecting a self-definition model of gender in designing housing classification systems.

CONCLUSION

As well as the issues faced by all human beings caught in the matrix of the prison-industrial complex, incarcerated transgender people endure myriad additional struggles. These struggles include incorrect housing designations, limited healthcare access, sexual violence, and discriminatory use of solitary confinement. Although there are some legal protections for people who are transgender and incarcerated, much of the limited progress that has been made relies on stigmatizing, misguided assumptions regarding sex and gender. To effectively and comprehensively protect the rights of people who are transgender and incarcerated, courts and prisons must move beyond transphobia and cisnormativity, and instead honor the dignity and autonomy of people of all genders.

Eradicating cissexism from the prison system mandates social and legal reformulation of our conceptualization of gender. We must question gender categories themselves if we are to fully respect the rights and interests of all people. To ensure that transgender people will be treated fairly in society and in the courtroom, we must make space for people to construct their gender identity on their own terms, and recognize all genders as healthy, legitimate, and worthy of recognition and respect.