Equal - But Not for Everyone - Protection? Disparate Transgender Rights in Prisons across the U.S. and the Subsequent Effect on Mental Health

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I. INTRODUCTION

The Equal Rights Amendment (the “ERA”) “is a simple concept: enshrining the idea that women and men should not receive different treatment under the law.”1 However, what happens when the distinction of “man” or “woman” is unclear in the eyes of the law?2 For example, Katrina is a male-to-female pre-operation (“pre-op”) transgender female who was sentenced and assigned to an all-male prison.3 Due to her feminine features, Katrina was not only sexually and physically assaulted while incarcerated, but she was also extorted for sex at the hands of other male prisoners.4 After she reported this abuse, Katrina was subsequently placed into protective custody.5 However, the safety protective custody purports to advance is far

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1 See Gayle Lemmon, Now’s the Time to Ratify the Equal Rights Amendment, CNN (Nov. 24, 2018, 7:18 PM), https://www.cnn.com/2018/11/24/opinions/time-to-ratify-the-equal-rights-amendment-lemmon/index.html [https://perma.cc/NJV8-UZ4E] (discussing ratification of Equal Rights Amendment). However, this article highlights that the ERA only mentions that women and men “possess” the right to equal treatment. Id. It fails to mention the treatment of transgender or otherwise identified sexual communities. Id.

2 See id. (indicating gap of protection available to trans and non-binary citizens).


4 See Katrina, supra note 3 (claiming her feminine physical features were triggers for abuse).

5 See Katrina, supra note 3 (describing ineffectiveness of protective custody); see also STEPHEN MICHAEL SHEPPARD, PROTECTIVE CUSTODY OF A PRISONER, BOUVIER LAW DICTIONARY (Wolters Kluwer Bouvier Dictionary eds., 2012) (defining protective custody within prisons). Protective custody “is a form of incarceration that isolates a prisoner from the general prison population.” Sheppard, supra note 5. Protective custody is designed in the interest of safety, not punishment, and treatment within protective custody should be no different than that of the general population. Sheppard, supra note 5.
from safe; the corrections officers responsible for Katrina's protection subjected her to even more abuse while she was in protective custody.\(^6\) Moreover, protective custody also houses high-risk and violent prisoners, due to either their criminal nature or an event that occurred while incarcerated.\(^7\) With little to no management or order over the general prison population, there is a clear need for separate, protective custody units in the interest of safety for inmates like Katrina.\(^8\) Rather than protecting Katrina, the prison guards instead turned a blind eye after she was assaulted by another inmate housed in the same protective custody unit.\(^9\) With no apparent relief in sight, Katrina felt no safer in protective custody than she did in the general prison population.\(^10\)

Similarly, Dwayne Denegal (preferred to be known as Fatima Shabazz, and recognized hereinafter as such in respect of her gender preference) is a male-to-female transgender prisoner who has suffered a lifetime of "gender dysphoria and [mental] distress from the incongruence between her male anatomy and female gender identity."\(^11\) While incarcerated, Fatima was denied fair medical treatment despite her repeated requests for better conditions to treat her gender dysphoria while she transitioned.\(^12\) Fatima faced multiple obstacles surrounding her gender identity and transition, including that she first receive a gender dysphoria diagnosis from facility professionals before she could receive hormone treatment or mental health treatment specifically for transgender prisoners.\(^13\) The prison denied Fatima's sexual reassignment surgery, which

\(^6\) See Katrina, supra note 3 (describing abuse corrections officers inflicted upon inmates).
\(^8\) See Katrina, supra note 3 (discussing account in protective custody).
\(^9\) See id. (explaining Katrina's experience and effects of abuse).
\(^10\) See Katrina, supra note 3 and accompanying text (noting Katrina's failed attempts to get help).
\(^12\) See id. at *6–8 (describing complexities of treatment process for trans prisoners while incarcerated). After Shabazz was diagnosed with gender dysphoria, she was denied feminizing hormones for several months due to the process required to obtain them. Id. at *7. The lengthy process was created because inmates who had previously demanded treatment, then ultimately decided against it, which cost the state money. Id.
\(^13\) See id. at *7–10 (showing effect of treatment denial); see also Denegal v. Farrell, 1:15-cv-01251-LJO-MJS(PC), 2015 U.S. Dist. LEXIS 122326, at *3–7 (E.D. Cal. Sept. 11, 2015) (discussing loosely followed procedures within facility). This was the original case in which Shabazz argued that she faced disparate treatment within the facility. Denegal, 2015 U.S. Dist. LEXIS 122326, at *3–7. Her original claim was denied and accepted in part. Id.
consequently harmed her mental well-being.\textsuperscript{14} Despite the several obstacles she faced, the court ultimately held that Fatima’s treatment was handled properly.\textsuperscript{15}

Katrina’s experience raises several questions of just how much disparate treatment is too much and what can be done to address the well-established prison custom of turning a blind eye to the violence and poor medical treatment transgender inmates face while incarcerated.\textsuperscript{16} Similarly, Fatima’s struggle to complete her transition without prejudice from the prison system begs the question: will she ever be allowed to be her true self or will she continually be punished, not only for her criminal wrongdoing, but also because she is an incarcerated transgender woman?\textsuperscript{17} This Note will explore the progression of the LGBTQ community as well as the parallel developments within prison facilities surrounding LGBTQ prisoners.\textsuperscript{18} Part II will discuss mental disorders, mental health, and the transgender community.\textsuperscript{19} Part III will outline the acceptable vocabulary in addressing the various aspects of the LGBTQ community, current policies in place, and how adaptation of certain policies could change the future of disparate treatment.\textsuperscript{20} Part IV will analyze mental health generally, as it relates to both transgender and cisgender prisoners, and how social media has not only created a new landscape of social acceptance, but has also started the conversation towards change.\textsuperscript{21} Part V will focus on Massachusetts and its current policies, or lack thereof, to protect LGBTQ prisoners.\textsuperscript{22} Finally, Part V will conclude with a brief summary of the overall strengths and weaknesses of LGBTQ protections for inmates and suggestions for improvement to our current correctional system.\textsuperscript{23}

\textsuperscript{14} See Denegal, 2016 U.S. Dist. LEXIS 88937, at *6–10 (discussing mental hardship Fatima suffered during her incarceration).

\textsuperscript{15} See id. at *17 (highlighting standard of care).

\textsuperscript{16} See Katrina, supra note 3 and accompanying text (summarizing objectives of sharing inmate stories).

\textsuperscript{17} See Denegal, 2016 U.S. Dist. LEXIS 88937, at *10 (presenting plaintiff’s argument that she was denied medical care in violation of Eighth Amendment).

\textsuperscript{18} See infra Part II, III, IV, V (discussing difficulties LGBTQ prisoners face).

\textsuperscript{19} See infra Part II (observing historical shift in gender norms and differences between society and prison facilities).

\textsuperscript{20} See infra Part III (discussing mental health, policies, and deliberate indifference toward transgender individuals).

\textsuperscript{21} See infra Part III (observing popular and influential social media celebrities as well as their impact on LGBTQ community).

\textsuperscript{22} See infra Part IV at subsection f (outlining strengths and weaknesses of Massachusetts policies for transgender inmates).

\textsuperscript{23} See infra Part V (suggesting potential remedies for issues transgender inmates face across country).
II. HISTORY

Harm inflicted upon transgender inmates, both physical and sexual, exceeds "any legitimate penological interest, order maintenance, and safety concerns within facility walls." In response to concerns surrounding safety and risk of harm, Congress enacted the Prison Litigation Reform Act of 1995 ("PLRA") to address sexual assault within corrections facilities and to provide some relief for inmates. Since PLRA's inception, physical protection and access to healthcare for inmates have become paramount issues, specifically healthcare designed for sexual assault victims and medical treatment for those with sexual identities that do not mirror the socially accepted norm. In particular, quandaries surrounding gender dysphoria within the courtroom can be summarized as follows:

No matter how a transgender plaintiff argues his or her case, he or she is likely to be met with harsher criticism by the court, experience a lack of basic legal protections due to the ambiguity concerning their transgender status, and be dismissed due to his or her gender nonconformity.

However, PLRA fails to account for individuals who do not perfectly fit into the social normative definitions of gender and sexual identity. Additionally, a transgender individual is further victimized because they must obtain a mental health diagnosis of gender dysphoria in

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26 See Routh, supra note 24, at 1 (discussing issues surrounding prison inmates). The article highlights that "[t]ransgender inmates are particularly vulnerable to both physical and mental health care shortcomings in corrections." Id. at 1–2.

27 See id. at 3 (examining legal protections and complications within legal system). Routh also discusses that the binary (male or female only) definition within gender classification is inadequate, as it conforms to medical conceptions without considering mental health and psychological conceptions. Id. at 3–4.

28 See id. at 4 (discussing restrictions of present gender classifications); see also Gender Binary, SEX INFO ONLINE, http://www.soc.ucsb.edu/sexinfo/article/gender-binary (last updated June 4, 2017) [https://perma.cc/85GN-SCMY] (discussing binary gender conceptions and outdated use of language). This article discusses that "since there are only two legally recognized genders in most societies around the world (man or woman), there is an outstanding issue with gender and the law. People who cross certain gender boundaries cannot 'exist' in a legal and social sense without denying or hiding fundamental parts of themselves." Gender Binary, supra note 28.
order to legally seek any protection. Consequently, this diagnosis comes with the stigma of "mental health issues," the hush-hush mentality surrounding it, and the classification of "sexuality" as a diagnosis or disease. With a gender dysphoria diagnosis comes the ever-awkward construction of mental health stigma and fewer protections afforded within our legal system.

To receive the right to medical care and mental health treatment within the U.S. healthcare system, a person must first have a serious, diagnosed mental health disorder. Critically, prior to 1998, cases involving either "transsexuals" or gender identity disorder in prisons were not common, and often left room for ambiguity in the jurisprudence. Precedent suggests that prisoners must first prove their gender identity disorder to establish the initial basis for a claim against prison facilities. However, progress has been made within the courts for inmates claiming adverse treatment after this required diagnosis has been made—although not without some additional barriers. The Seventh Circuit Court of Appeals made a critical ruling when it deemed the gender identity of a prisoner—who had been denied medical treatment for a gender identity disorder—a serious medical need. Following that ruling, the Wisconsin legislature passed a law prohibiting hormonal treatment and sex reassignment surgery ("SRS") for prisoners with gender identity disorder, claiming prohibitive costs to taxpayers. A 2017 California case set a new standard for SRS by granting

29 See Routh, supra note 24, at 4 (noting mental health diagnosis is required to claim legal protection).
30 See id. (describing struggle of gender dysphoria diagnosis).
31 See id. (observing that mental health issues are typically unspoken in society).
33 See id. at 431 (discussing cases in which gender identity disorder was not accepted). The author discusses that prior to the recent shift in legal recourse, states varied in their interpretations surrounding gender dysphoria and claims brought under the Equal Rights Amendment. Id. The courts general approach to decisions involving hormonal treatment for prisoners before they are incarcerated relies on addressing the prisoner's need for treatment post-incarceration under the state's available budget. Id. 
34 See Alexander, supra note 32, at 431-33 (discussing hormone treatment for prisoners and legal obstacles that accompany medical requests). Contentions arise around the point at which a medical diagnosis must be made in order to have an established case. Id.
35 See id. at 432 (discussing legal strategies beginning to succeed in court).
36 See Meriwether v. Faulkner, 821 F.2d 408, 413 (7th Cir. 1987) (holding that transgender prisoners were entitled to protection under their serious medical need).
37 See Alexander, supra note 31, at 32 (describing Wisconsin law limiting rights of transgender inmates); see also Fields v. Smith, 653 F.3d 550, 556–57 (7th Cir. 2011) (citing arguments from various states wanting avoidance of taxpayers’ responsibility for treatment). The District Court,
the first state-funded, sexual reassignment surgery.\textsuperscript{38} Paving the way for change within the prison system, this case also “prompted a federal magistrate to require California to provide transgender female inmates housed in men’s facilities with more female-oriented items like nightgowns, scarves and necklaces.”\textsuperscript{39} Moreover, the U.S. District Court for the District of Massachusetts held that not only did the denial of an inmate’s sexual reassignment surgery constitute deliberate indifference, but it also invalidated the “security concerns” defense.\textsuperscript{40} As explored, “[b]ecause there is little education and training around the issues faced by transgender people, the prison system, much like the free community, is ill-prepared to accommodate the needs of transgender inmates.”\textsuperscript{41}

Mental health discussion amongst inmates has been a rarely addressed taboo in the corrections system, let alone the LGBTQ community within prison facilities.\textsuperscript{42} “Guided by the minority stress model, [the American Journal of Public Health] evaluated associations between stigma and mental health and tested whether indicators of resilience (family support, peer support, identity pride) moderated these associations.”\textsuperscript{43} From a sample

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\item \textsuperscript{39} See id. (discussing major holdings of case). Cases like these set precedent and milestones that will hopefully spread across the U.S., even though uniformity across the U.S. prison system has not yet been reached. \textit{Id.}
\item \textsuperscript{40} See Alexander, supra note 32, at 433 (discussing denial of SRS case); see also Kosilek v. Spencer, 889 F. Supp. 2d. 190, 197 (D. Mass. 2012) (opining case in article reference); Travis Andersen, \textit{State Appealing Federal Ruling Granting Sex Change for Inmate Michelle Kosilek, BOSTON.COM} (Sept. 26, 2012, 5:37 PM), https://www.boston.com/uncategorized/primarytagmatch/2012/09/26/state-appealing-federal-ruling-granting-sex-change-for-inmate-michelle-kosilek [https://perma.cc/DQ47-6BFH] (discussing potential SRS grant to inmate). A recent Virginia case, although settled outside of court, suggests that sex reassignment surgery, in addition to hormone therapy and counseling, could be required or at least added to remedies under interpretation of the Gender Identity Disorder Treatment Guidelines. Andersen, supra note 40.
\item \textsuperscript{41} See Routh, supra note 24, at 5 (detailing current statutes and policies for transgender inmates).
\item \textsuperscript{43} See Jennifer M. Reingle et al., \textit{Mental Health of Prisoners: Identifying Barriers to Mental Health Treatment and Medication Continuity}, 104 AM. J. OF PUB. HEALTH 12, 12 (2014) (outlining results of study focusing on mental health and prisoners). This study featured transgender individuals in society and not those in the prison system, as they are harder to find and are less likely to be reported. \textit{Id.}
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of 1,093 individuals: respondents had a high prevalence of clinical depression (44.1%), anxiety (33.2%), and somatization (27.5%). Current findings are relatively silent on specific statistics regarding transgender inmates, as recent studies suggest that transgender inmates practice a hush-hush approach to mental health in prisons. One article suggests that gender issues “become magnified in prison settings and contribute to heightened resistance in psychotherapy and other forms of mental health treatment.”

As there is little research specifically addressing transgender individuals’ mental health within prisons, this article’s suggestion focuses more on binary reasons for stigma. In addressing mental health within prisons:

More than 10 million people are imprisoned worldwide, and the prevalence of all investigated mental disorders is higher in prisoners than in the general population. Although the extent to which prison increases the incidence of mental disorders is uncertain, considerable evidence suggests low rates of identification and treatment of psychiatric disorders. Prisoners are also at increased risk of all-cause mortality, suicide, self-harm, violence, and victimization, and research has outlined some modifiable risk factors.

A recent study by the California Department of Corrections and Rehabilitation (“CDCR”) suggests that of the inmates surveyed, over 300 were transgender and 66.9% reported experiencing mental health problems since being incarcerated.
III. FACTS

When discussing gender and sexual identity, it is important to understand that it comes with its own vocabulary. Gender identity can be defined as how individuals perceive themselves and call themselves. Additionally, transgender is defined as “[a]n umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth.” Being transgender does not imply any specific sexual orientation, and “[t]herefore, transgender people may identify as straight, gay, lesbian, bisexual, etc.” Gender dysphoria, on the other hand, is defined as “[c]linically significant distress caused when a person’s assigned birth gender is not the same as the one with which they identify.” Recently, the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (“DSM-V”) listed gender dysphoria as a recognized mental disorder. A gender dysphoria diagnosis is critical to the booking process of inmates as it affects whether transgender inmates will receive mental health treatment within prison facilities.

“The issue of transgender inmates is a complex one, with courts having provided limited guidance until recently, and the Supreme Court having only tangentially dealt with the specific issues relevant to transgender inmates and their constitutional rights.” Even though policies and statutory


52 See id. (defining “transgender”).

53 See id. (providing explanation of sexual identification); see also Definitions, TRANS STUDENT EDUC. RES., http://www.transstudent.org/definitions/ (last visited Jan. 15, 2019) [https://perma.cc/8SBV-L4CC] (providing further helpful definitions). Some articles refer to the term “cisgender” individual as “someone who exclusively identifies as their sex assigned at birth. The term cisgender is not indicative of gender expression, sexual orientation, hormonal makeup, physical anatomy, or how one is perceived in daily life.” Definitions, supra note 53.

54 See Sexual Orientation and Gender Identity Definitions, supra note 51 (identifying “gender dysphoria” as replacement for term “gender identity disorder”).

55 See id. (classifying gender dysphoria as mental disorder).

56 See id. (describing gender dysphoria); see also Hicklin v. Precynthe, No. 4:16-cv-01357-NCC, 2018 U.S. Dist. LEXIS 21516, at *48 (E.D. Minn. Feb. 9, 2018) (granting preliminary injunction and forcing defendants to provide transgender plaintiff with “medically necessary treatment for her gender dysphoria”).

57 See Routh, supra note 24, at 10 (observing health care shortcomings for transgender inmates in correctional facilities).
guidelines are available for transgender inmates, a number of states still lag behind. See id. (discussing incongruence across states).

This is especially true regarding the medical issues transgender inmates face while in prison. See id. at 1 (criticizing varied implementation of policies). "State legislatures and corrections administrators have been left to sort out the requirements, based on their interpretations of court rulings and the mandates of PREA [Prison Rape Elimination Act]." Id. at 10.

"Transgender inmates are particularly vulnerable to both physical and mental health care shortcomings in corrections." See id. at 1-2 (discussing need to address health care deficits in corrections). "The need to recognize and treat inmates with mental and psychological problems has further added to the health care deficits in corrections." Id. at 1.

For example, one study suggests that:

[T]he law and the criminal justice system further victimize transgender people by forcing them to conform to sexual identities that are at odds with, or in stark contrast with, their self-identified and preferred gender identity. This is especially true when transgender people are open, or forced to be open, about being transgender. The law fails to account for individuals who do not fit perfectly into the social normative definitions . . . .

With insufficient education and training on transgender issues, correctional facilities are ill-prepared to accommodate their needs and treat them accordingly. See id. at 4 (outlining major issues between legal system and correctional facilities for transgender inmates).

Consequently, these issues can primarily be categorized as classification, victimization, and a lack of appropriate medical treatment.

The PLRA established specific conditions required for inmates to bring a suit against correctional facilities, which in turn created difficulty for inmates to effectively bring suit. See Routh, supra note 24, at 5 (discussing hardships faced by transgender inmates).

However, the PLRA was beneficial in helping states record sexual assault cases within their prisons and jails. See Routh, supra note 24, at 9-11 (observing progress of applicable laws and policies to correctional facilities); see also The Prison Litigation Reform Act (PLRA), supra note 25 (providing guidelines to inmates before bringing suit).

Implemented fully in 2012, The National Prison Elimination Act ("PREA") regulates detention rules for all local state and federal public correctional institutions, including jails, prisons, detention, and community confinement.
facilities. PREA standards for correctional facilities include: “preventative processes, investigative procedures, data collection and auditing, and compliance.” Consequently, if the state’s correctional facilities do not follow PREA regulations, they risk a 5% forfeiture of federal funding. Not only have a majority of states enacted “some form” of policy that conforms with PREA standards for transgender inmates, but thirty-nine states have also attempted to address the “the unique situation that transgender inmates pose for the correctional system.” Correctional facilities must provide for transgender inmates’ specific needs, such as the type of medical treatment, counseling, and housing they will receive. With the growing societal

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66 See id. (introducing PREA and difficulties associated with uniform implementation of policies); see also Prison Rape Elimination Act, Nat’l Prison Rape Elimination Act Resource Ctr., https://www.prearesourcecenter.org/about/prison-rape-elimination-act-prea (last visited Nov. 18, 2018) [https://perma.cc/TR5Z-5NWG] (outlining Act’s goals and criteria of Act).

The Prison Rape Elimination Act (PREA) was passed in 2003 with unanimous support from both parties in Congress. The purpose of the act was to “provide for the analysis of the incidence and effects of prison rape in Federal, State, and local institutions and to provide information, resources, recommendations and funding to protect individuals from prison rape.” In addition to creating a mandate for significant research from the Bureau of Justice Statistics and through the National Institute of Justice, funding through the Bureau of Justice Assistance and the National Institute of Corrections supported major efforts in many state correctional, juvenile detention, community corrections, and jail systems.

Prison Rape Elimination Act, supra note 66 (citations omitted).

67 See Routh, supra note 24, at 9 (discussing PREA standards and risk of forfeiture for states in noncompliance).

Noncompliance forfeiture does not apply to private correctional facilities. At the time of this writing in 2015, all but 4 states (Alaska, Arkansas, Idaho and Utah) are either fully compliant (10 states) or are actively seeking compliance ... PREA includes provisions limiting residential assignment based exclusively on anatomical classifications. Instead, a facility must act in good faith to consider the inmate’s gender identification and view of risk when making assignments.

Id. at 10 (citations omitted).

68 See id. (outlining risks associated with failure to comply).

69 See id. at 12–17 (discussing breakdown of each states policies regarding transgender inmates within different facilities through table). While treatment is the largest variant within these policies— with some focusing on protections and few on mental health treatment— nevertheless, each inmate is intended to receive some plan for treatment. Id. at 12. In ten states, it is unknown how correctional facilities handle hormone treatment. Id. at 18. Additionally, as few as seven states allow for sexual reassignment surgery. Id.

70 See id. at 19 (finding prisons must acknowledge transgender inmates “unique needs” and “vulnerabilities”).
sensitivity towards transgender individuals’ needs, it is paramount that prisons create and enforce policies to protect their transgender inmates.71

IV. ANALYSIS

A. Deliberate Indifference

Ashley Diamond ("Diamond") suffered disparate treatment similar to the experience of the aforementioned Katrina.72 Diamond was an incarcerated transgender woman with gender dysphoria who was sexually and physically abused at the hands of both her fellow inmates and guards during her stay in prison.73 Diamond’s complaint specifically attacked the Georgia Department of Corrections’ Standard Operating Procedure on the Management of Transsexuals (the “Transgender SOP”).74 Diamond claimed that although the Transgender SOP recognized gender dysphoria as a serious medical need requiring special medical evaluations and appropriate treatment, it nevertheless limited treatment to inmates who were identified as transgender during their intake screenings.75

Although already established and classified as a serious medical condition, the court held that the prison’s deliberate indifference to Diamond’s gender dysphoria caused and perpetuated the psychological and physical harm she endured.76 The court stated that the Eighth Amendment requires that prison officials have a duty to take reasonable measures for inmate safety, regardless of gender.77 In particular, the court in Diamond

71 See id. (discussing issues with variations in states' policies). The lack of uniformity between states has become a paramount issue for transgender inmates. Id. In most states, there is no policy in place; and if there is, it is a lenient one at best and denies the same protections to inmates. Id.

72 See Diamond v. Owens, 131 F. Supp. 3d 1346, 1353 (M.D. Ga. 2015) (discussing Diamond’s allegations regarding treatment she received while incarcerated). Claiming an Eighth Amendment violation, Diamond brought suit and cited insufficient protection and treatment while incarcerated at a Georgia prison. Id.; see also Katrina, supra note 3 (analogizing similar stories of mistreatment for reference).

73 See Diamond, 131 F. Supp. 3d at 1353 (outlining Diamond’s case against prison officials for mistreatment and abuse).

74 See id. (presenting Diamond’s complaint that four separate prisons violated her constitutional rights).

75 See id. (describing procedure that failed Diamond and allowed for abuse at correctional facility). The treatment received by inmates identified as transgender during their intakes was limited only to “maintenance.” Id.

76 See id. at 1372–74 (detailing holdings of case).

77 See id. at 1376 (describing Eighth Amendment protections and thresholds for inmates).

"A prison official violates the Eighth Amendment when a substantial risk of serious harm, of which the official is subjectively aware, exists [and] the official does not respond reasonably to the risk,
found that she stated a claim after the prison officials failed to take any
action, "despite being aware of the risk of sexual assault and despite having
the authority and obligation to take reasonable safety measures after each
incident." 78

Constitutionally, inmates must be granted certain protections. 79 There is a clear disconnect in societal changes concerning those protections,
however, as they tend to create a more unequal rather than fully equal
treatment. 80 Currently, there is a pending case that addresses the denial of
asexual reassignment surgery for Serenity Izabel Williams. 81 In her
complaint, Serenity alleged that there was no "legitimate penological
reasoning" for denying her surgery and that she was treated differently from
a "similarly situated non-transgender woman in need of medically necessary
surgery." 82 The court held that treatment protections are designed to be
equal; however, when inmates change their gender identity, such protections
become a grey area and inmates may subsequently lose those protections. 83

B. Policy Based Change

Policies may be analyzed through observation of health care, staff
training, and institutional procedures. 84 With protections in place, it is
important to look at correctional facility policies and how effective they are
in substantially preventing abuse or mistreatment of prisoners. 85 Although it

78 See Diamond, 131 F. Supp. 3d at 1379 (finding Diamond stated "plausible failure-to-protect
claim" against prison officials).

79 See Routh, supra note 24, at 11 (discussing applicable statutes).

80 See id. (discussing applicable statutes and lack of uniformity amongst them). This study
found that while more states are providing either statutory or policy guidelines for transgender
inmates, a number of states are lagging behind. Id. at 11–12. As such, there is a shortage of
guidance for transgender specific solutions to deal with the medical issues. Id. at 12.

81 See Williams v. Kelly, No. 17-12993 SECTION: "R"(1), 2018 U.S. Dist. LEXIS 158119, at
*2 (E.D. La. Aug. 27, 2018) (alleging in complaint that correctional facility was "deliberately
indifferent" to Serenity's medical treatment needs).

82 See id. at *4–5 (outlining Serenity's argument against correctional facility).

83 See id. at *24–27 (outlining Serenity's argument against correctional facility).

84 See Elliot Oberholtzer, The Dismal State of Transgender Incarceration Policies, PRISON
[https://perma.cc/VB6A-28ZR] (describing current policies and procedures for transgender
individuals in correctional facilities).

85 See id. (describing current policies for inmate protection and poor enforcement). "[They]
evaluated the current transgender and gender non-conforming policies of 21 states in terms of
has ultimately fallen short in its elimination efforts, the PREA is often the baseline for most facilities concerning inmate protection.\textsuperscript{86} Despite efforts by the World Professional Association for Transgender Health ("WPATH") to further develop the standards of care, the U.S. corrections system fails to enforce them.\textsuperscript{87} Given the extreme psychological stress transgender people experience, access to psychotherapy and treatment is a significant concern that needs to be revisited in hopes of preventing any mental health damage for transgender inmates.\textsuperscript{88}

\textbf{C. Staff Training and Enforcement}

With policies and procedures that are rarely enforced, corrections facilities have become hostile environments that foster violence and intimidation.\textsuperscript{89} According to a 2015 survey of transgender inmates, twenty

\begin{quote}
PREA standards, World Professional Association for Transgender Health (WPATH) Standards of Care, and correctional staff training and treatment of transgender individuals. All but one [Pennsylvania] come up short." \textit{Id.}
\end{quote}

\textsuperscript{86} \textit{See id.} at "PREA Requirements" (outlining PREA's bare minimum requirements). Although the PREA standards do not address many of the issues most salient to incarcerated transgender people, such as access to medical care, they provide a minimum standard for protection and respect. \textit{Id.; see also Prison Rape Elimination Act, supra note 66 (providing concise breakdown and goals of PREA).}

\textsuperscript{87} \textit{See} Oberholtzer, \textit{supra} note 84, at "Health Care" (examining standards and lack of enforcement).

The WPATH Standards of Care do not mandate any particular "transition" process, order, or script. Instead, they outline therapeutic approaches and treatments that have been shown to alleviate gender dysphoria and to improve quality of life for trans people, with the overall guidance that the number and combination of these approaches will be unique to each individual.

\textit{Id.}

\textsuperscript{88} \textit{See id.} (discussing small percentage of states that adhere to standards for access to health care).

\textsuperscript{89} \textit{See} Oberholtzer, \textit{supra} note 84, at "Staff Training and Respect" (referencing staff harassment of incarcerated transgender inmates); \textit{see also Police, Jails & Prisons, NAT'L CTR. FOR TRANSGENDER EQUALITY, https://transequality.org/issues/police-jails-prisons (last visited Apr. 19, 2020) [https://perma.cc/UMU9-Q89L] (discussing mistreatment and lack of adversaries for transgender inmates).

Transgender people in prison are exposed to horrific rates of abuse by both staff and their fellow inmates, facing physical and sexual assault at much higher rates than their counterparts. As the USTS found, transgender people are ten times as likely to be sexually assaulted by their fellow inmates and five times as likely to be sexually assaulted by staff. Transgender prisoners also face numerous other challenges behind bars, including denials of medical care and lengthy stays in solitary confinement.

\textit{Police, Jails & Prisons, supra note 89.}
percent of respondents said they had experienced either physical or sexual assault from staff that are there to "protect them." The mistreatment transgender inmates receive from all aspects of prison life will only be remedied with changes in state policies. The lack of uniformity among states, however, creates an additional obstacle towards reaching that change. With the lack of policy enforcement, it is unsurprising that "most states' policies do not even acknowledge the vital role that staff play in determining a facility's attitude towards transgender individuals," which could be paramount in protecting transgender inmates and preventing long-term damage.

D. Mental Health

It is clear that treatment for transgender inmates is not equal to those of their cisgender counterparts. Yet, there has been little effort to protect inmates as a whole and courts are struggling to consider the mental health implications regardless of the overwhelming impact. The National Alliance of Mental Health ("NAMI") has compiled statistics highlighting that millions of Americans struggle with varying mental health conditions every year. Those statistics shed light on the issue that "approximately 1

90 See Oberholtzer, supra note 84 at "Staff Training and Respect" (highlighting high rates of abusive staff behavior); see also Diamond v. Owens, 131 F. Supp. 3d 1346, 1377 (M.D. Ga. 2015) (illuminating issue with authoritative figures and targeted abuse). Transgender people are too frequently targeted for violence and abuse because of their gender identity or gender expression. Diamond, 131 F. Supp. 3d. at 1377. Some of the violence and abuse incurred by transgender inmates is inflicted by those entrusted with their safety. Id.

91 See Oberholtzer, supra note 84, at "Further Research" (identifying policy changes as possible remedy for mistreatment of transgender inmates).

92 See id. at "PREA Compliance by State" (highlighting lack of uniformity of prison policies designed to protect inmates).

93 See id. at "Staff Training and Respect" (analyzing key issue to targeted abuse and harassment with suggestion of solution). "The state of transgender incarceration policies is one of ignorance, inadequacy, and absence. Research and policy groups concerned with transgender rights should focus seriously on transgender incarceration policies at both the state and local level." Id. at "Further Research."


95 See id. (discussing civil liberties issues surrounding inmate protection). "[T]he recent fiscal crisis and years of falling crime rates have combined to create the best opportunity in decades to challenge our nation’s addiction to [mass] incarceration." Id.

96 See Mental Health by the Numbers, NAT'L ALLIANCE OF MENTAL HEALTH, https://www.nami.org/learn-more/mental-health-by-the-numbers (last visited Jan. 10, 2018) [https://perma.cc/4UBT-38VJ] (illustrating number of individuals suffering from mental conditions). NAMI is the
in 5 adults in the U.S.—43.8 million, or 18.5%—experiences mental illness in a given year.97 Further, NAMI cites that “approximately 20% of state prisoners and 21% of local jail prisoners have a recent history of a mental health condition.”98

With these startling statistics, studies do not specifically show how these rates are affecting transgender inmates, but inferences may be drawn.99 Further, studies have shown that transgender individuals have an overall higher rate of suicide compared to the rest of the population, finding a forty-one percent rate of suicide for transgender individuals versus a two percent rate for the rest of the population.100 It is an understated but crucial fact that

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99 See James, supra note 98, at 3 (recognizing effect transgender inmates versus rest of population). Few studies draw on the psychological effects of being transgender in prison. Id. at 2. One can only assume that there is a mental weight that is difficult to describe, if one makes it out alive. Id.

100 See Natalie Kaufman, Predictors of Attitudes Toward Transgender Men and Women, https://scholarworks.unl.edu/rcapitol/2017/all/9 (last visited Apr. 19, 2020) [https://perma.cc/HNG7-E5LC] (examining empathetic factors on improving suicide rates of transgender individuals).

In this study, we investigated whether inducing empathy would improve attitudes toward transgender men vs. women. 242 participants read one of four vignettes (i.e., a definition of “transgender,” a personal story of a transgender female or male, or a control story), rated their empathy and attitudes toward transgender individuals, and completed demographic and personality measures.

Id.
transgender inmates and individuals alike have unique physical and mental health needs.\[^{101}\]

E. Media Influence

Modern trends and developments coupled with celebrity exposure and media portrayals are removing the stigma for transgender inmates.\[^{102}\] Notably, Netflix’s “Orange is the New Black” was one of the first to employ a transgender actress, Laverne Cox, and highlight the mental and physical hardship transgender inmates face while incarcerated.\[^{103}\] With the heavy usage of social media outlets by adolescents and adults alike, it is unsurprising that the start of societal acceptance, support, and understanding of transgender individuals can best be attributed to social media in this transition.\[^{104}\]

Similarly, influential celebrities in the media are openly embracing and talking about their sexuality and gender identity—most notably Caitlyn Jenner.\[^{105}\] Her breakout image after transitioning was seen more than three billion times and drew mass amounts of media attention.\[^{106}\] With the positive influence Caitlyn has had, she not only started the conversation, but also began to remove the taboo feeling of discussing transgender individuals in society.\[^{107}\] It is, however, important to note that:

\[^{101}\] See Daphna Stroumsa, The State of Transgender Health Care: Policy, Law, and Medical Frameworks, 104 AM. J. PUB. HEALTH 31, 38 (2014) (reviewing heightened needs of transgender persons). Her argument centers around amendments needed to further policies and protections for transgender individuals. Id.


\[^{104}\] See Adkins, supra note 102, at S44, S140 (conducting study of social media’s powerful influence in aiding transgender adolescents).


\[^{106}\] See id. (discussing her “coming out” and media coverage of her every move).

\[^{107}\] See id. (speaking of intense media exposure and scrutiny received by Caitlyn during transition).
Both Laverne and Caitlyn have had a major impact, among many others, on how society views the transgender community. But... there is an unrealistic expectation placed on the community at large. Laverne and Caitlyn have had the means to have the transition they wanted and the freedom to express the gender norms they feel most comfortable with. However, not everyone in the transgender community wants to express themselves according to these gender norms nor do they have the freedom to do so. Many do not have access to resources that would provide the type of transition Caitlyn and Laverne had.108

Despite the positive influence both Laverne and Caitlyn have had, there still exists a prominent imbalance between celebrities, who have the access and means to health care and treatment, and transgender inmates, who do not have the means or cannot readily access the same treatment.109 Massachusetts is primarily a pioneer in transgender societal acceptance and support.110 In 2016, Massachusetts passed a law “banning discrimination against transgender people in public restrooms and other public buildings.”111 However, a Massachusetts case was asked to be dismissed arguably due to the plaintiff being transgender.112 The court’s opinion stated that the plaintiff’s argument was not based on her gender dysphoria, but rather, on her lack of treatment and unlawful confinement

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109 See id. (highlighting differences and how that could be point of contention).


111 See Malone, supra note 110 (citing Massachusetts law for transgender protection).

112 See id. (discussing terms for dismissal of case).
As such, access to treatment andremedying confinement conditions should be a focal point in Massachusetts’ correctional facilities.114

V. CONCLUSION

Clearly most laws, public policy opinions, and even societal opinions are lacking—if not silent—on protections designed for the transgender community in prisons. Transgender inmates require equal protection, which should apply at the early stages of booking and processing. The prisons and jails must then continue to extend equal protection to transgender inmates by appropriately designating inmates to the facilities they feel most comfortable and safe in. With the arrival process at prison facilities, officers must receive the necessary training to properly address and understand the needs of transgender inmates. At what point, however, are inmates considered to be their identified gender? This is an important question that a transgender inmate seeking protection and safety must answer.

The lack of uniformity and enforcement in the laws designed for transgender inmates should vastly be improved. Enforceable statewide protocols or Federal laws designed for uniformity would allow transgender inmates the security in their mental and physical well-beings that they are not currently afforded. Additionally, access to appropriate medications, treatment, and mental health sources is vital to a sustainable and safe environment for transgender individuals. In general, inmates seem to prioritize mental health last due to lack of resources and the taboo nature of the topic. Coupled with correctional facilities’ complete lack of understanding for the importance of mental health, inmates struggling with sexual identity feel the effects the most. Overall, the sexual and gender identity taboo is solidified when the correctional system becomes involved. Only once this taboo is abolished, will the door open to true equality within the United States.

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113 See id. (explaining court opinion). The state argued in court papers, “[p]laintiff’s complaint fails to plead any facts, and cannot demonstrate, that she was excluded from or denied a benefit or service by reason of her gender dysphoria.” Id. “Instead, the complaint focuses on alleged unlawful conditions of her confinement.” Id. The lawsuit has been considered one of the first of its kind and draws attention to the matter; however, it begs the question if there is unequal protection between transgender inmates in the eyes of Massachusetts courts. Id.

114 See id. (articulating that denial of claims needs to have less controversial rationale).