

2021

A Comparative Analysis of the Treatment of Transgender Prisoners: What the United States Can Learn from Canada and the United Kingdom

Stephanie Saran Rudolph

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/eilr>

Recommended Citation

Stephanie S. Rudolph, *A Comparative Analysis of the Treatment of Transgender Prisoners: What the United States Can Learn from Canada and the United Kingdom*, 35 Emory Int'l L. Rev. 95 (2021).
Available at: <https://scholarlycommons.law.emory.edu/eilr/vol35/iss1/4>

This Comment is brought to you for free and open access by the Journals at Emory Law Scholarly Commons. It has been accepted for inclusion in Emory International Law Review by an authorized editor of Emory Law Scholarly Commons. For more information, please contact law-scholarly-commons@emory.edu.

A COMPARATIVE ANALYSIS OF THE TREATMENT OF TRANSGENDER PRISONERS: WHAT THE UNITED STATES CAN LEARN FROM CANADA AND THE UNITED KINGDOM

INTRODUCTION

On September 29, 2015, in the early evening, 27-year-old transgender inmate Adree Edmo composes a note.¹ “I do not want to die, but I am a woman and women do not have these.”² She wants to be clear that she is not attempting suicide and leaves the note in her prison cell.³ She opens a disposable razor and boils it to disinfect it; she scrubs her hands.⁴ Then, “she takes the razor and slices into her right testicle with the blade.”⁵ This is only the first of Adree’s self-castration attempts, and while there is too much blood and she does not succeed, she will try again.⁶ “Self-castration is incredibly dangerous and eventually becomes central to her case against the state of Idaho.”⁷ Adree brought suit against the state of Idaho, arguing in front of the Ninth Circuit Court of Appeals that she needs gender confirmation surgery to treat her gender dysphoria, and wins.⁸ Once she undergoes the procedure, she will be the first transgender woman in the United States to receive gender confirmation surgery by court order while incarcerated.⁹

Adree’s case creates a circuit split within the United States regarding the medically necessary treatment a state is legally required to provide an inmate with gender dysphoria.¹⁰ However, Adree’s story is not unique; the rights of transgender inmates are a global issue and are treated differently across the world depending on political and societal structures.¹¹ There are practices and policies which perpetuate the mistreatment of transgender prisoners.¹² This

¹ Amanda Peacher & Lacey Daley, *Episode 1: “I’m Not a Monster Like Most People Think”*, BOISE STATE PUB. RADIO NEWS: LOCKED (July 8, 2019) [hereinafter *Locked, Episode 1*].

² *Court to Rule on Sex Reassignment Surgery for Idaho Inmate*, MORNING EDITION, NPR (May 16, 2019), <https://www.npr.org/transcripts/723583909>.

³ *Locked, Episode 1, supra* note 1.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Edmo v. Corizon, Inc.*, 935 F.3d 757, 794 (9th Cir. 2019).

⁹ *Court to Rule on Sex Reassignment Surgery for Idaho Inmate, supra* note 2.

¹⁰ *See Edmo*, 935 F.3d at 794 (citing *Gibson v. Collier*, 920 F.3d 212, 215 (5th Cir. 2019)).

¹¹ *See generally* INTERNATIONAL BAR ASSOCIATION LGBTI LAW COMMITTEE, *Mr & Ms X: The Rights of Transgender Persons Globally* 1, 13, 17, 26, 28 (June 15, 2015).

¹² *See generally* Jacqueline Beard, *Transgender Prisoners*, Research Briefing Paper House of Commons Library 3 (Sept. 19, 2018); MINISTRY OF JUSTICE, PRISONER TRANSGENDER STATISTICS 2 (Nov. 9, 2016),

Comment addresses several questions with which American society is currently grappling. For instance, what is gender dysphoria and how do you treat it? What is the extent of a government's responsibility to provide for the physical, mental, and emotional health needs of offenders? And, should that role be extended?

This Comment examines the legal and policy approaches of the United Kingdom and Canada to inform the current circuit split and provide suggestions for improvements that could be made in the United States.¹³ Through exploration and comparison, this Comment proposes changes in policy and practice for housing transgender inmates, providing consultation with medical professionals, and treating transgender inmates in daily life. The United States should employ a more gender-affirming approach when providing healthcare to transgender inmates by adopting policies and regulations in accordance with the medical community's most recent recommendations. Data collection systems able to capture an accurate prison population are required to ensure the needs of vulnerable populations, including transgender inmates, are met. Additionally, the United States should implement housing solutions that keep inmates out of solitary confinement and in safe environments. The United States should also create uniform policies that align with gender-affirming language and practices.

This Comment proceeds as follows. Part I begins with definitions, background information, and statistics on community-dwelling transgender people and gender dysphoria; next, it discusses the cycle of poverty, which leads to higher rates of incarceration among transgender people; finally, it concludes with statistics about the rate of transgender people in prison in the United States, the United Kingdom, and Canada. Part II explores the legal recognition of sex/gender identity and how these policies impact the likelihood that a transgender inmate is held in a facility that is consistent with their self-identified gender. Part III examines housing for transgender inmates through a discussion of sex-segregation and safety. Part III Section A examines the United States' current approach to housing, explores an alternative model for housing, and discusses the safety of transgender inmates. Part III Section B turns to the United Kingdom for a discussion of another alternative housing option for transgender

[hereinafter PRISONER TRANSGENDER STATISTICS]; *LGBTQ People Behind Bars: A Guide to Understanding the Issues Facing Transgender Prisoners and Their Legal Rights*, NAT'L CTR. FOR TRANSGENDER EQUAL. 5 (2018) [hereinafter LGBTQ PEOPLE BEHIND BARS].

¹³ The United Kingdom and Canada were selected for comparison because they are both democracies that have recently faced legal challenges and made policy changes concerning the treatment of transgender prisoners. See Beard, *supra* note 12, at 4; Kathleen Harris, *Canada's Prison System Overhauls Transgender Inmate Policy*, CBC (Jan. 31, 2018), <https://www.cbc.ca/news/politics/transgender-inmates-csc-policy-1.4512510>. These countries serve as an example providing possible approaches the United States could employ to inform the current circuit split.

inmates and arguments surrounding the safety of other inmates. Part III Section C discusses a recent case and arguments about the safety of transgender inmates in Canada. Part IV explores healthcare issues for transgender prisoners including access to gender-affirming care and gender confirmation surgery. Next, Part V discusses common social and public policy critiques surrounding the policies that impact transgender inmates. Finally, this Comment concludes with a set of recommendations based on the evidence provided throughout the analysis.

I. BACKGROUND

When a person is born, they are assigned a sex—male or female—according to the appearance of their external genitalia.¹⁴ For most people, the way they express gender and their gender identity is consistent with the sex assigned to them at birth.¹⁵ However, for transsexual,¹⁶ transgender, and gender-nonconforming individuals,¹⁷ gender identity and expression do not align with the sex they are assigned at birth.¹⁸ The focus of this Comment is on transgender individuals. For the purposes of this Comment, transgender is an “[a]djective to describe a diverse group of individuals who cross or transcend culturally defined categories of gender.”¹⁹

Various studies in recent years have attempted to estimate the size of the transgender population in the United States.²⁰ A 2016 study reported that about 1.4 million, or 0.6% of adults in the United States, identify as transgender, which

¹⁴ WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 97 (7th ed. 2012) [hereinafter WPATH SOC]. “When the external genitalia are ambiguous, other components of sex (internal genitalia, chromosomal and hormonal sex) are considered in order to assign sex.” *Id.* (citations omitted).

¹⁵ *Id.* at 96. Gender expression is a term used to describe how a person outwardly expresses their gender through “[c]haracteristics in personality, appearance, and behavior that in a given culture and historical period are designated as masculine or feminine (that is, more typical of the male or female social role).” *Id.* Gender identity is “[a] person’s intrinsic sense of being male (a boy or a man), female (a girl or a woman), or an alternative gender (e.g., boygirl, girlboy, transgender, genderqueer, eunuch).” *Id.* (citations omitted).

¹⁶ Transsexual is an “[a]djective (often applied by the medical profession) to describe individuals who seek to change or who have changed their primary and/or secondary sex characteristics through feminizing or masculinizing medical interventions (hormones and/or surgery), typically accompanied by a permanent change in gender role.” *Id.* at 97.

¹⁷ Gender-nonconforming is an “[a]djective to describe individuals whose gender identity, role, or expression differs from what is normative for their assigned sex in a given culture and historical period.” *Id.* at 96 (citations omitted).

¹⁸ *Id.* at 97 (citations omitted).

¹⁹ *Id.* “The gender identity of transgender people differs to varying degrees from the sex they were assigned at birth.” *Id.*

²⁰ See ANDREW R. FLORES ET AL., THE WILLIAMS INST., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 3 (2016); GLAAD, ACCELERATING ACCEPTANCE: A HARRIS POLL SURVEY OF AMERICANS’ ACCEPTANCE OF LGBTQ PEOPLE 3 (2017).

is nearly double the estimate from 2011.²¹ The study attributes a portion of the sharp increase to “a perceived increase in visibility and social acceptance of transgender people” and thus a willingness for individuals to openly identify and be counted as transgender.²² Younger adults are more likely than older adults to identify as transgender.²³ Over the past twenty years, in an attempt to create equity among marginalized communities, there has been an increase in research concerning transgender people—resulting in the development of more trans-affirmative practice in health disciplines involved in the care of transgender people.²⁴ Trans-affirmative practice is the delivery of care to patients in a way that is “respectful, aware, and supportive of the identities and life experiences of [transgender] people.”²⁵

Some transgender individuals experience “discomfort or distress that is caused by a discrepancy between a person’s gender identity and that person’s sex assigned at birth”²⁶ In 2013, the American Psychiatric Association (APA) adopted the term “gender dysphoria” as a diagnosis characterized by “a marked incongruence between” an individual’s gender identity and sex assigned at birth.²⁷ However, not every transgender person has gender dysphoria and “[t]ranssexual, transgender, and gender-nonconforming individuals are not inherently disordered.”²⁸

The APA has set forth two conditions that must be met to diagnose a person with gender dysphoria.²⁹ First, there must be a “marked incongruence between

²¹ The sharp rise in those identifying as transgender is likely attributable to increased data collection sources as well as an increase in public awareness and acceptance of the label “transgender.” FLORES ET AL., *supra* note 20, at 3.

²² *Id.* at 6.

²³ *Id.* at 5.

²⁴ Am. Psychol. Ass’n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCHOL. 832, 832–33 (2015) [hereinafter APA, *Guidelines*].

²⁵ *Id.* at 832(citations omitted).

²⁶ See WPATH SOC, *supra* note 14, at 2 (citations omitted).

²⁷ AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS 452 (5th ed. 2013) [hereinafter APA, DIAGNOSTIC MANUAL]; APA, *Guidelines*, *supra* note 24, at 861. “The term ‘gender identity’ disorder has recently been replaced with the term ‘gender dysphoria’ in the medical community.” See *Kosilek v. Spencer*, 774 F.3d 63, 68 n.1 (1st Cir. 2014).

²⁸ WPATH SOC, *supra* note 14, at 6. “A disorder is a description of something with which a person might struggle, not a description of the person or the person’s identity.” *Id.* at 5.

²⁹ The APA has currently only set forth guidelines and not standards. The APA describes the difference as follows:

[s]tandards are mandates to which all psychologists must adhere, whereas guidelines are aspirational. . . . Psychologists are encouraged to use these *Guidelines* in tandem with the *Ethical Principles of Psychologists and Code of Conduct*, and should be aware that state and federal laws may override these *Guidelines*. . . . [The *Guidelines* are] intended to complement treatment

one's experienced/expressed gender and assigned gender, of at least 6 months' duration."³⁰ This marked incongruence can be manifested in a variety of ways, including "a strong desire to be rid of one's primary and/or secondary sex characteristics,"³¹ which include a person's breasts or chest, external and/or internal genitalia, facial features, body hair, and voice.³² Second, the condition must be "associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning."³³

There is currently a lack of data to indicate the prevalence of gender dysphoria among all transgender people. However, research suggests that 1 in 10,000 to 1 in 12,000 community-dwelling adults in Western countries have gender dysphoria.³⁴ A handful of state and prison level studies have been conducted which indicate that in the United States, the prevalence of gender dysphoria is significantly higher among male prisoners than among the general population.³⁵ For example, it is estimated that somewhere between 1 in 350 to 1 in 440 inmates in California have gender dysphoria.³⁶

Although there is disagreement among medical professionals, the World Professional Association for Transgender Health (WPATH), in their Standards of Care (WPATH SOC), recognizes several psychological and medical treatment options for patients with gender dysphoria including non-medical treatment such as "changes in gender expression and role."³⁷ For example, many individuals with gender dysphoria are able to cope with their diagnosis by living part or full time in a gender role consistent with their gender identity.³⁸ WPATH

guidelines for . . . people seeking mental health services, such as those set forth by the World Professional Association for Transgender Health Standards of Care and the Endocrine Society.

APA, *Guidelines*, *supra* note 24, at 833 (citations omitted).

³⁰ APA, DIAGNOSTIC MANUAL, *supra* note 27, at 452.

³¹ The APA requires that the marked incongruence must be manifested by at least two of the following: "a marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics"; "a strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender"; "a strong desire for the primary and/or secondary sex characteristics of the other gender"; "a strong desire to be of the other gender"; "a strong desire to be treated as the other gender"; or "a strong conviction that one has the typical feelings and reactions of the other gender." *Id.*

³² WPATH SOC, *supra* note 14, at 9.

³³ APA, DIAGNOSTIC MANUAL, *supra* note 27, at 453.

³⁴ This estimate only includes individuals who wished to transition from male to female. Cynthia S. Osborne & Anne A. Lawrence, *Male Prison Inmates With Gender Dysphoria: When Is Sex Reassignment Surgery Appropriate?* 45 ARCHIVES SEXUAL BEHAV. 1649, 1649 (2016).

³⁵ *Id.*

³⁶ *Id.* at 1650.

³⁷ WPATH SOC, *supra* note 14, at 9.

³⁸ *Id.*

also recommends numerous medical options for the treatment of gender dysphoria.³⁹ Non-invasive treatment options include psychotherapy,⁴⁰ while other interventions include hormone therapy and surgery.⁴¹ Surgical interventions to treat gender dysphoria are known by a variety of names, including: sex reassignment surgery, gender affirmation surgery, and gender confirmation surgery (GCS).⁴² Each of these terms refers to a “surgery to change primary and/or secondary sex characteristics to affirm a person’s gender identity. Sex reassignment surgery can be an important part of [the] medically necessary treatment to alleviate gender dysphoria.”⁴³

Although not all persons with gender dysphoria seek all of these treatments, for some individuals with gender dysphoria all of these treatments may be necessary to effectively treat the patient.⁴⁴ Interventions to treat gender dysphoria are important because if left untreated, it can lead to “debilitating distress, depression, impairment of function, substance use, self-surgery [or mutilation] to alter one’s genitals or secondary sex characteristics, self-injurious behaviors, and even suicide.”⁴⁵

Transgender people, particularly those who are low-income, “are disproportionately likely to come into contact with the criminal justice system.”⁴⁶ Research suggests that, on average, transgender people have disproportionately lower incomes compared to the general population.⁴⁷ The low income rates among transgender people are likely a result of multiple causes including a lack of familial and social supports, difficulty obtaining housing, healthcare, employment, and appropriate identity documentation.⁴⁸

³⁹ *Id.* at 10.

⁴⁰ Psychotherapy treatments include “(individual, couple, family, or group) for purposes such as exploring gender identity, role, and expression; addressing the negative impact of gender dysphoria and stigma on mental health; alleviating internalized transphobia; enhancing social and peer support; improving body image; or promoting resilience.” *Id.*

⁴¹ *Id.* at 9–10.

⁴² Different courts and medical professionals often use these three phrases interchangeably to refer to surgical intervention as a treatment for gender dysphoria. *See, e.g.,* *Edmo v. Corizon, Inc.*, 935 F.3d at 768, 795 (9th Cir. 2019); *De’Lonta v. Johnson*, 708 F.3d 520, 522 (4th Cir. 2013).

⁴³ WPATH SOC, *supra* note 14, at 97. Examples of changes to sex characteristics include surgery to “breasts/chest, external and/or internal genitalia, facial features, body contouring.” *Id.* at 10.

⁴⁴ *Id.* at 9.

⁴⁵ *Edmo*, 935 F.3d at 769.

⁴⁶ LGBTQ PEOPLE BEHIND BARS, *supra* note 12, at 5.

⁴⁷ Pooja S. Gehi & Gabriel Arkles, *Unraveling Injustice: Race and Class Impact of Medicaid Exclusions of Transition-Related Health Care for Transgender People*, 4 SEXUALITY RES. & SOC. POL’Y J. NAT’L SEXUALITY RES. CTR. 7, 10 (2007).

⁴⁸ *Id.* at 11; Osborne & Lawrence, *supra* note 34, at 1659.

Due to the marginalization, discrimination, and violence transgender people face, many engage in prostitution and commit survival crimes.⁴⁹ Additionally, many transgender people look to criminalized sources for medication, including buying hormones from the black market.⁵⁰ Often those who commit survival crimes of this nature “are far more likely to experience police harassment, arrest, and incarceration.”⁵¹ Lack of alternatives to incarceration may also bolster the rates of imprisonment among transgender people.⁵² For example, non-profit drug treatment programs may refuse transgender applicants under the guise that they are incapable of serving this population.⁵³ As a result of these compounding variables, transgender people are overrepresented in the criminal justice system around the world, and while incarcerated, transgender people report being subjected to high levels of discrimination, sexual assault, and violence.⁵⁴

There is a notable absence of meaningful data on the number of transgender people that have been involved with the criminal justice system.⁵⁵ However, “it is estimated that about 16% of transgender people (21% of transgender women) have been incarcerated in their lifetime, compared to estimates ranging from 2.8% to 6.6% of the general U.S. population.”⁵⁶ Although “societal stigma across cultures and heightened stigma due to affiliation with multiple marginalities” has resulted in the overrepresentation of transgender people in prisons, there are many examples of positive changes countries have made to remedy this issue.⁵⁷

⁴⁹ LGBTQ PEOPLE BEHIND BARS, *supra* note 12, at 5; Gehi & Arkles, *supra* note 47, at 11. Survival crimes are illegal acts often associated with homelessness. The concept of survival crimes is that people who are homeless “commit ‘survival crimes’ in order to provide for themselves while living on the street.” Most survival crimes associated with LGBTQ youth are non-violent and include prostitution, pimping, and theft. RANDI FEINSTEIN, ANDREA GREENBLATT, LAUREN HASS, SALLY KOHN & JULIANNE RANA, JUSTICE FOR ALL? A REPORT ON LESBIAN, GAY, BISEXUAL AND TRANSGENDERED YOUTH IN THE NEW YORK JUVENILE JUSTICE SYSTEM 18–19 (2001). Some transgender women who are not engaged in prostitution may still face cultural stereotyping and police profiling which may elevate the rates of transgender imprisonment. Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 757 (2007).

⁵⁰ Gehi & Arkles, *supra* note 47, at 11.

⁵¹ *Id.*

⁵² See Spade, *supra* note 49, at 757.

⁵³ *Id.*

⁵⁴ Annette Brömdal et al., Guest Editorial, *Whole-Incarceration-Setting Approaches to Supporting and Upholding the Rights and Health of Incarcerated Transgender People*, INT’L J. TRANSGENDERISM 343 (Aug. 16, 2019); LGBTQ PEOPLE BEHIND BARS, *supra* note 12, at 5.

⁵⁵ FED. BUREAU OF PRISONS, *Inmate Statistics*, https://www.bop.gov/about/statistics/statistics_inmate_age.jsp (last updated Feb. 1, 2020).

⁵⁶ Kristy A. Clark, Jaelyn M. White Hughto, John E. Pachankis, “*What’s the Right Thing To Do?*” *Correctional Healthcare Providers’ Knowledge, Attitudes and Experiences Caring for Transgender Inmates*, 193 SOC. SCI. & MED. 80, 80 (2017) (citations omitted).

⁵⁷ Brömdal et al., *supra* note 54.

Data from 2018 estimate that of the 66.4 million people living in the United Kingdom, there are between 200,000–500,000 (0.45%–0.75%) transgender people.⁵⁸ The population of transgender prisoners in the United Kingdom is relatively small compared to the general population.⁵⁹ In November 2016, the Ministry of Justice published the first annual official statistics on transgender prisoners.⁶⁰ The 2016 report showed that seventy transgender prisoners were housed in thirty-three of the 123 public and private prisons in both England and Wales.⁶¹ Despite the relatively small percentage of transgender prisoners, there has been an increase in the number of transgender prisoners in the United Kingdom every year, and in 2018 there were 139 transgender prisoners in the United Kingdom.⁶² The Ministry of Justice acknowledges that these figures likely underestimate the true number of prisoners who are transgender.⁶³

There are multiple surveys and studies which estimate that the transgender population in Canada is 0.6%—similar to both the United States and the United Kingdom.⁶⁴ However, due to the small sample size and inconsistent surveys and studies, there is a lack of concrete data to confirm these estimates.⁶⁵ Although there is currently no public information available about the number of transgender inmates in Canadian federal prisons, there are reports from several provinces.⁶⁶ For example, Ontario reported sixty-three inmates self-identified as transgender during intakes between April 2014 and March 2015, however, the province only reported housing twelve transgender inmates in November

⁵⁸ See Government Equalities Office, *Trans People in the UK 1* (2018); Off. for Nat'l Stat., *Overview of the UK Population*, STAT. BULLETIN (2019), <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/mid2018#toc>.

⁵⁹ See MINISTRY OF JUSTICE, HER MAJESTY'S PRISON AND PROBATION SERVICE OFFENDER EQUALITIES ANNUAL REPORT (Nov. 29, 2018) [hereinafter MINISTRY OF JUSTICE, ANNUAL REPORT].

⁶⁰ Beard, *supra* note 12, at 3.

⁶¹ *Id.* at 4.

⁶² “This was an increase on the figure of 125 recorded in 2017.” 111 of these offenders reported their legal gender as male, 23 as female, and 5 chose not to state their legal gender. MINISTRY OF JUSTICE, ANNUAL REPORT, *supra* note 59, at 16.

⁶³ “[T]hese estimated figures are likely to underestimate the true number of transgender prisoners [because] there may be some transgender prisoners who have not declared that they are transgender or had a local transgender case board, and some who have a Gender Recognition Certificate.” Beard, *supra* note 12, at 5 (citing MINISTRY OF JUSTICE, ANNUAL REPORT, *supra* note 59, at 16).

⁶⁴ Sean Waite & Nicole Denier, *A Research Note on Canada's LGBT Data Landscape: Where We Are and What the Future Holds*, 56 CANADIAN REV. SOC. 93, 95 (2019).

⁶⁵ See *id.* at 95–96; see also Melanie Green, *Critical Data is Still Missing on Transgender and Non-binary Canadians: StatsCan*, STAR (May 31, 2018), <https://www.thestar.com/vancouver/2018/05/31/no-national-data-for-trans-people-advocates.html>.

⁶⁶ See Travis Lupick, *Living Nightmare for Transgender Inmate at All-Male Prison*, STAR (Dec. 13, 2015), <https://www.thestar.com/news/canada/2015/12/13/living-nightmare-for-transgender-inmate-at-all-male-prison.html>.

2015.⁶⁷ In November 2015, Alberta reported holding sixteen transgender inmates and Saskatchewan stated that it only housed one transgender inmate.⁶⁸ In 2015, multiple provincial jurisdictions (including British Columbia, Manitoba, and Quebec) reported that they either did not have any transgender prisoners or that they did not keep a record.⁶⁹

II. LEGAL RECOGNITION OF SEX/GENDER IDENTITY⁷⁰

From birth, most government documents recognize only an individual's sex based on genitalia.⁷¹ Official documents are generally binary, identifying a person as either male or female.⁷² Only since the 1990s, has there been an effort to address the issue of binary identification in Western countries.⁷³ Activities such as getting a new job, applying for public benefits, traveling, securing housing, and in some places voting, all require an identification (ID) card that most likely requires a gender specification.⁷⁴ Therefore, it is crucial that government documents reflect the preferred gender. Misidentification is not just a problem for transgender individuals while incarcerated, but can in fact lead to increased rates of incarceration.⁷⁵ Because the United Kingdom and the United States differ in gender recognition legislation and policies, transgender people in the United Kingdom are more likely to be held in a facility that is consistent with their self-identification than in the United States.⁷⁶

A. *United States*

The United States employs a variety of policies for the sex/gender recognition of transgender people.⁷⁷ Criteria for legal recognition of sex/gender

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *See id.*

⁷⁰ Sex and gender are referred to interchangeably in this Comment because both the United States and the United Kingdom have different and inconsistent legal terminology that is used to refer to a person's sex/gender for classification purposes, such as a birth certificate or driver's license.

⁷¹ For example, a birth certificate is granted identifying a person as either male or female based on their genitalia at birth, documented by a parent, guardian, or medical professional. There is no legal recognition of a person's gender identity at birth. Sarah Pemberton, *Enforcing Gender: The Constitution of Sex and Gender in Prison Regimes*, 39 SIGNS: J. WOMEN CULTURE & SOC'Y 151, 163 (2013).

⁷² *See generally* Gehi & Arkles, *supra* note 47, at 16.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *See id.* at 11.

⁷⁶ Pemberton, *supra* note 71, at 159.

⁷⁷ Gehi & Arkles, *supra* note 47, at 16.

varies across different federal, state, and local governments.⁷⁸ Government records and identity documents including “[s]ocial [s]ecurity cards, state ID or driver’s licenses, birth certificates, passports, green cards, employment authorization documents, and benefits cards all reflect a gender for the holder.”⁷⁹

Since the passage of the REAL ID Act of 2005, state ID documents are increasingly required to show a gender for federal recognition purposes.⁸⁰ This has had the effect of increasing the number of government documents that identify people by gender.⁸¹ When a transgender person presents a form of ID that lists a gender they do not identify with or display outwardly, they are often subjected to denial of services, harassment, and violence.⁸² When deciding whether to make an arrest, “police sometimes request ID . . . and people without valid ID are more likely to be arrested.”⁸³ Additionally, “once arrested, people without proper ID are more likely to be held and processed rather than released with a summons or desk appearance ticket.”⁸⁴ As a result of these compounding factors, transgender people without proper ID are often overrepresented in the criminal justice system.⁸⁵

There are inconsistent standards for when gender may be changed on records and ID, but virtually all standards require medical evidence, which can be difficult to obtain for transgender people.⁸⁶ Some researchers have suggested that potential legislative solutions can be gleaned from the foundation set by the United Kingdom when it passed the Gender Recognition Act.⁸⁷ However, even if legislation were adopted that allowed transgender people to change their sex/gender on government records, ID, and documents, it is unclear if this would

⁷⁸ Pemberton, *supra* note 71, at 160.

⁷⁹ Gehi & Arkles, *supra* note 47, at 16. Although U.S. Passports and state driver licenses require gender identification, there are some exceptions. Eight states, New York City, and Washington D.C. have all allowed for a non-binary or “X” designation on identification documents. See Jessica A. Clarke, *They, Them, and Theirs*, 132 HAR. L. REV. 894, 897 (2019). For instance, California allows for an “X” mark in lieu of male or female on identification documents, while the State Department does not. Compare Gender Recognition Act., 2017 Bill Text Cal. S.B. 179, with U.S. Dep’t of State, *Change of Sex Marker*, <https://travel.state.gov/content/travel/en/passports/need-passport/change-of-sex-marker.html> (Feb. 9, 2019).

⁸⁰ REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231 (2005).

⁸¹ Gehi & Arkles, *supra* note 47, at 16.

⁸² *Id.*

⁸³ *Id.* at 11 (citations omitted).

⁸⁴ *Id.*

⁸⁵ LGBTQ PEOPLE BEHIND BARS, *supra* note 12, at 5.

⁸⁶ Gehi & Arkles, *supra* note 47, at 17; Jason Allen, *A Quest for Acceptance: The Real ID Act and the Need for Comprehensive Gender Recognition Legislation in the United States*, 14 MICH. J. GENDER & L. 169, 170 (2008).

⁸⁷ See Allen, *supra* note 86, at 171.

positively impact transgender prisoners.⁸⁸ In part, identification would not remedy the issues presented here because it would not change binary societal establishments or reduce stigmas and biases. However, it is necessary to understand how identification policies lead to the overrepresentation of transgender people in the criminal justice system.

B. *United Kingdom*

In 2004, the United Kingdom passed the Gender Recognition Act which governs the classification of transgender people.⁸⁹ The Gender Recognition Act creates an official process for transgender people to gain legal recognition of a change in their binary sex/gender identity, resulting in the issuing of a certificate.⁹⁰ Transgender people over the age of eighteen may apply for a gender recognition certificate if they are “living in the other gender,” or “if they have “changed [their] gender. . . outside the United Kingdom.”⁹¹ Applications are reviewed and approved by a Gender Recognition Panel composed of medical practitioners and lawyers.⁹²

In order to receive a gender recognition certificate, an applicant must meet four criteria.⁹³ First, the applicant must have the diagnosis of gender dysphoria.⁹⁴ Second, the applicant must live “in the acquired gender throughout the period of two years ending with the date on which the application is made.”⁹⁵ Third, the applicant must “intend[] to continue to live in the acquired gender until death.”⁹⁶ Fourth, the applicant must establish a set of evidence criteria including documentation from two medical professionals detailing the diagnosis and treatment of the applicant’s gender dysphoria.⁹⁷

⁸⁸ See Pemberton, *supra* note 71, at 170.

⁸⁹ Gender Recognition Act 2004, c.7 (UK). The legislation creates policies and practices for all transgender citizens who wish to change their legal gender and does not specifically mention transgender prisoners. See generally *id.*; Pemberton, *supra* note 71, at 159–60.

⁹⁰ Gender Recognition Act 2004, c.7 (UK) § 1. The certificate permits individuals to change their legal sex/gender identity from male to female, or from female to male, but does not allow for an identity that is gender non-conforming. See *id.*

⁹¹ *Id.*

⁹² *Id.*; Pemberton, *supra* note 71, at 160.

⁹³ Gender Recognition Act 2004, c.7 (UK) § 2.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* The medical professionals must include at least one practitioner who is either a registered psychologist or registered medical practitioner practicing in the field of gender dysphoria. *Id.* The act also requires a set of compliance procedures if the applicant is married. See *id.* §§ 2, 3.

While the Gender Recognition Act represents a significant step forward in the legal recognition of transgender people, critics note several problems with the legislation.⁹⁸ One problem with the legislation is that it views transgender people as disordered.⁹⁹ There is a large emphasis placed on the need for treatment of gender dysphoria, which has the effect of prohibiting transgender people who do not have gender dysphoria from legally changing their gender.¹⁰⁰ This type of legislation perpetuates “a mental illness model for comprehending transgender experiences.”¹⁰¹ Another issue with the Gender Recognition Act is that it only recognizes a binary change in gender for legal purposes.¹⁰² It fails to allow any person who does not identify as either male or female to obtain identification consistent with their gender identity, therefore perpetuating binary gender norms.¹⁰³ Additionally, the legislation does not protect transgender people in the workplace or help to reduce stigma or barriers related with access to public services.¹⁰⁴ In this manner, it only helps transgender people legally transition to an identified gender—male or female—instead of recognizing their unique status.

The gender recognition certificate mandates that government institutions recognize an individual’s self-identified gender—either male or female—as long as they follow certain steps, including medical diagnosis.¹⁰⁵ People convicted of crimes are sentenced and housed according to their legal gender/sex, and therefore, the Gender Recognition Act has impacted transgender prisoners.¹⁰⁶

Easing the process to change legal recognition of sex/gender may help transgender people access public services they would not have otherwise accessed.¹⁰⁷ However, it is necessary to view such a policy change through a critical lens. “The process for legally changing one’s sex/gender usually requires

⁹⁸ See, e.g., Andrew N. Sharpe, *A Critique of the Gender Recognition Act 2004*, 4 J. BIOETHICAL INQUIRY 33, 38–41 (2007).

⁹⁹ *Id.* at 41.

¹⁰⁰ Pemberton, *supra* note 71, at 162.

¹⁰¹ Sharpe, *supra* note 98, at 38 (citation omitted).

¹⁰² *Id.* at 36, 39. The Gender Recognition Act and similar legislation would only permit a person to petition to change their legal status from male to female or female to male. *Id.* at 36; Pemberton, *supra* note 71, at 161–62.

¹⁰³ Pemberton, *supra* note 71, at 162.

¹⁰⁴ See generally Ben Hunte, *Gender Recognition Act: LGBT political group anger at trans law ‘changes’*, BBC (June 20, 2020), <https://www.bbc.com/news/uk-53101071>. *But see* Pemberton, *supra* note 71, at 161.

¹⁰⁵ See Pemberton, *supra* note 71, at 161. There are some exceptions, including competitive sports. Sharpe, *supra* note 98, at 39–40.

¹⁰⁶ See generally Beard, *supra* note 12, at 5, 9 (citations omitted).

¹⁰⁷ Allen, *supra* note 86, at 186–87.

some form of medical documentation and may require the completion of a specific form of treatment, so gender recognition and health care are often interrelated.”¹⁰⁸ The Gender Recognition Act leaves the appropriate treatment for gender dysphoria open to the judgment of the panel.¹⁰⁹ “It is therefore unclear whether gender-confirming surgery is necessary to obtain a certificate,” whether other forms of treatment are sufficient, or if “a certificate could be granted without any bodily interventions.”¹¹⁰ The need for medical intervention in the form of a diagnosis and treatment from two doctors fails to address the problem that many transgender people with and without gender dysphoria live happy and successful lives without obtaining medical interventions.¹¹¹

Viewing the legislation as an achievement for transgender rights, it is important to note that legislation is not passed in a vacuum. Just as some in the U.K. Parliament support transgender rights, there are others who vehemently oppose them.¹¹² Like all legislation, the passage of the Gender Recognition Act was the product of political maneuvering.¹¹³

In addition to legislation creating a process to change the legal sex/gender of a person,¹¹⁴ there are a number of policies implemented by prison officials that have the ability to impact the way transgender prisoners are treated while incarcerated.¹¹⁵ In practice, the regulations concerning transgender prisoners have been implemented through the U.K. Prison Service Instructions.¹¹⁶ The 2017 policy guidelines outlined in the Prison Service Instruction state that “all transgender prisoners (irrespective of prison location) must be allowed to express the gender with which they identify.”¹¹⁷ This is a regulatory achievement based on the direction of the Gender Recognition Act, and thus, although the

¹⁰⁸ Pemberton, *supra* note 71, at 159.

¹⁰⁹ *Id.* at 160–61.

¹¹⁰ *Id.* at 161.

¹¹¹ *See* Beard, *supra* note 12, at 3, 9 (citations omitted). *See generally* Gender Recognition Act 2004, c.7, §§ 2, 3 (UK).

¹¹² *See* 657 Parl Deb HL (2004) col. 1GC (UK).

¹¹³ *Id.* For instance, over one hundred amendments were proposed to the Gender Recognition Act, some of which were adopted, before it was passed. *Id.* There is support in Hansard that all in Parliament did not intend for the Gender Recognition Act to fundamentally change established societal institutions or alter the status quo for transgender people in other parts of public life. *See generally* 657 Parl Deb HL (2004) col. 1GC-134GC (UK).

¹¹⁴ *See generally* Gender Recognition Act 2004, c.7 (UK) § 1.

¹¹⁵ Beard, *supra* note 12, at 3; PRISONER TRANSGENDER STATISTICS, *supra* note 12, at 2.

¹¹⁶ *Id.*

¹¹⁷ Beard, *supra* note 12, at 3 (citations omitted). The guidelines further instruct prison officials to allow transgender prisoners to dress according to their desired gender and make other modifications to prison guidelines so long as prison health and safety rules are maintained. *See id.*; PRISONER TRANSGENDER STATISTICS, *supra* note 12, at 3.

Act has a number of shortcomings, it does leave room for administrative agencies to act.

C. *Canada*

In June 2019, the Canadian national government allowed all Canadians to use an “X” gender identifier instead of male or female for ID documents, such as passports and permanent resident cards.¹¹⁸ Additionally, some provincial governments in Canada allow for non-binary government ID documents.¹¹⁹ While government acceptance and accommodation could help the transgender community and would conceivably reduce crimes associated with lack of access or prejudice, this policy does not help those who are already incarcerated. Additionally, it adds a layer of confusion as the national government recognizes an “X” gender, but the Canadian prison system is still categorized by gender, without dedicated cell blocks to transgender inmates.¹²⁰

The legal classification of people on official documents is critical to understanding how identification policies may lead to the overrepresentation of transgender people in the criminal justice system.¹²¹ The approaches which the United Kingdom and Canada have adopted each have various advantages and disadvantages. There is no perfect system that eliminates the challenging questions of how to classify individuals who do not fit into traditional binary gender categories, and regardless of the legal classification on official documents, there remains a critical concern: where to house a person once they are incarcerated.

III. HOUSING: SEX-SEGREGATION AND SAFETY

Discussions surrounding the housing of transgender prisoners take on two major themes: sex-segregation and safety concerns. The contemporary prison, as reconceived over the past few hundred years, separates sexes for housing.¹²² In the past, prisons were primarily formed for men, however, on the rare occasions a woman was sentenced to prison, she would be housed at a men’s

¹¹⁸ See Alexandra Burza, *New Gender ‘X’ Option on Canadian ID a Mixed Blessing, Say Advocates*, CBC NEWS (June 4, 2019), <https://www.cbc.ca/news/canada/kitchener-waterloo/x-gender-indicator-1.5162376>; see also *Canadians Can Now Identify as Gender ‘X’ on Their Passports* (June 4, 2019), <https://www.canada.ca/en/immigration-refugees-citizenship/news/notices/gender-x-documents.html>.

¹¹⁹ Burza, *supra* note 118.

¹²⁰ See Harris, *supra* note 13.

¹²¹ See generally Clarke, *supra* note 79, at 903.

¹²² See NICOLE HAHN RAFTER, *PARTIAL JUSTICE* xx (1985).

facility.¹²³ This non-sex-segregated system was quickly abandoned because of incidents of sexual assault toward female prisoners.¹²⁴ Additionally, the non-sex-segregated system was abandoned under the idea that the goals of rehabilitation were different for male and female prisoners.¹²⁵ Although sex-segregation in society was at one time the norm, in the modern era, sex segregation in prisons “contrasts with the absence of sex segregation in most schools, universities, workplaces, and many medical facilities.”¹²⁶

A basic necessity of incarceration is the states’ responsibility for housing and providing care for the well-being of inmates.¹²⁷ Sex-segregation policies mean that prisoners sleep, eat, undress, bathe, work, and primarily interact with other inmates who have the same genitals.¹²⁸ Prisons are generally binary, meaning they are either men’s or women’s prisons, although some larger men’s prisons contain an entirely distinct women’s block.¹²⁹ “Transgender people problematize the . . . status of sex-segregated detention facilities as a routine policy commitment and operational practice because their gender identity and/or gender expression do not align with the sex they were assigned at birth.”¹³⁰

Safety concerns are often cited as the reason why prisoners are denied housing and services congruent with their gender identity.¹³¹ There are two distinct groups whose safety is the subject of concern in the prison—transgender inmates and others. First, as discussed further in Part III Section A, prisons which house transgender inmates have a responsibility for their safety. Data collected by the Bureau of Justice Statistics “found that almost 40% of transgender prisoners experienced sexual victimization while incarcerated compared to 4% of all prisoners.”¹³² Transgender inmates are more likely to be

¹²³ *Id.*

¹²⁴ *See generally id.* at xxiv.

¹²⁵ *See generally id.* at xxvi.

¹²⁶ Pemberton, *supra* note 71, at 153.

¹²⁷ Jae Sevelius & Valerie Jenness, *Challenges and Opportunities for Gender-Affirming Healthcare for Transgender Women in Prison*, 13 INT’L J. PRISONER HEALTH 32, 34 (2017).

¹²⁸ *See generally* NATIONAL CENTER FOR TRANSGENDER EQUALITY, POLICIES TO INCREASE SAFETY AND RESPECT FOR TRANSGENDER PRISONERS: A GUIDE FOR AGENCIES AND ADVOCATES, 4–5, 30, 38 (Oct. 2018) [hereinafter NATIONAL CENTER FOR TRANSGENDER EQUALITY, AGENCY GUIDE]; Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 14 (2011).

¹²⁹ Pemberton, *supra* note 71, at 153.

¹³⁰ Sevelius & Jenness, *supra* note 127, at 32.

¹³¹ *See, e.g.,* Beard, *supra* note 12, at 10 (citation omitted) (noting that the majority of cases where assigning someone to a male or female prison which is not congruent to their gender identity “are likely to concern transgender people convicted of serious [offenses], where both public protection and the best interests of the person themselves may not be compatible with the general presumptions” of accommodation).

¹³² Sevelius & Jenness, *supra* note 127, at 33 (citation omitted).

raped or suffer from other forms of physical and non-physical violence, which has in some instances resulted in death.¹³³

Second, as discussed in greater depth in Part III Section B, the safety of other inmates is frequently cited as a safety concern when determining the most appropriate housing option for a transgender inmate. Additionally, an analysis of the arguments about safety decisions for housing a post-operative inmate who has undergone GCS is in Part IV Section B of this Comment.

A. *United States*

“Prisons are among the most restrictive institutions in the United States and commonly use gender recognition policies based on genitalia.”¹³⁴ As a result of genitalia based placement and binary categorizations, transgender prisoners are often placed in housing which conflicts with their self-identification.¹³⁵ Although legislative changes to promote legal sex/gender identification could help transgender people in the United States, it is unclear how it would impact both transgender people who are currently in prison and people who do not change their sex/gender until they are incarcerated.

Beginning in the early 2000s, individuals across the United States have challenged the continued existence of gender binary institutions and re-examined their values.¹³⁶ There have been debates about traditionally gender-segregated spaces—largely bathrooms—which have played out in academic communities, among politicians,¹³⁷ and in the media.¹³⁸ Although there has not been a universal adoption of gender-neutral institutions, many facilities no longer abide by traditional gender-based categorization.¹³⁹ The prison system is

¹³³ Brooke Acevedo, *The Constitutionality and Future of Sex Reassignment Surgery in United States Prisons*, 28 HASTINGS WOMEN'S L. J. 81, 83–84 (2017).

¹³⁴ Pemberton, *supra* note 71, at 160.

¹³⁵ See, e.g., Gehi & Arkles, *supra* note 47, at 16; Pemberton, *supra* note 71, at 160; see also Michelle O'Toole, *Ministry of Justice Declines to Intervene After Trans Woman Sent to Male Prison*, PINKNEWS (Oct. 27, 2015), <https://www.pinknews.co.uk/2015/10/27/ministry-of-justice-declines-to-intervene-after-trans-woman-sent-to-male-prison/>.

¹³⁶ See Clarke, *supra* note 79, at 981–83.

¹³⁷ “From 2013 to 2016, at least 24 states considered ‘bathroom bills,’ or legislation that would restrict access to multiuser restrooms, locker rooms, and other sex-segregated facilities on the basis of a definition of sex or gender consistent with sex assigned at birth or ‘biological sex.’” However, North Carolina is the only to pass, and later repeal, any “bathroom bill.” Joellen Kralik, “Bathroom Bill” Legislative Tracking, NCSL (Oct. 24, 2019), <https://www.ncsl.org/research/education/school-bathroom-access-for-transgender-students.aspx>.

¹³⁸ See, e.g., Mary Anne Case, *Why Not Abolish Laws of Urinary Segregation?*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING*, 211, 220–25 (Harvey Molotch & Laura Norén eds., 2010); Terry S. Kogan, *Public Restrooms and the Distorting of Transgender Identity*, 95 N.C. L. REV. 1205, 1234–38 (2017).

¹³⁹ See Kylie Ora Lobell, *The Benefits of Offering Gender Neutral Bathrooms in the Workplace*, SOC'Y

one of the few remaining institutions in the United States that uniformly remains categorized by gender.¹⁴⁰ There are still several hurdles, largely as a result of binary understandings of gender, that exist for transgender people who are incarcerated.¹⁴¹

Although there has not been a widespread acceptance of alternative housing models for prisons in the United States, there have been some prisons and jails¹⁴² that have experimented with innovative housing options.¹⁴³ In the 1970s, some minimum security prisons housed men and women together with separate living units.¹⁴⁴ Research on these prisons yielded mixed results, but were ultimately closed because “[i]n the eyes of conservative politicians, these minimum-security facilities were . . . coed country clubs.”¹⁴⁵ Although there were legitimate policy reasons to establish gender-separated prisons, it might be time to examine whether gender-based prison categorization remains the best option in the 21st century. However, the issue of gender-based categorization deserves its own Comment, and thus it will not be explored in depth here.

In the United States, there are nearly 25,000 reports of sexual assault for a prison population of over 2,000,000.¹⁴⁶ Although prison sexual assault is not restricted to either gender, male facilities have more documented cases of prison sexual assault, and male facilities rely more heavily on the power structures that

HUM. RES. MGMT. (Dec. 6, 2019); National Association Independent Schools & Gender Spectrum, *Transgender Students and School Bathrooms* 2; Pemberton, *supra* note 71, at 159.

¹⁴⁰ Pemberton, *supra* note 71, at 159.

¹⁴¹ *Id.* at 170.

¹⁴² In this Comment, most of the discussion addresses federal policies about prisons. However, the discussion and use of local examples, including the discussion in Part III Section A, discusses jails in an effort to examine a variety of policy options that could be implemented at the federal level. It is important to note the distinction between jails and prisons:

In corrections, prisons and jails serve distinct purposes. Prisons provide long-term housing, typically for sentenced offenders serving terms of longer than one year, although the precise cut-off can vary by state. Jails only hold sentenced prisoners serving short terms, typically less than one year. In addition, jails house individuals awaiting trial but denied bail, convicted offenders awaiting sentencing, and prisoners sent from state or federal prison to serve as witnesses in trials, whether their own or those of others.

Dolovich, *supra* note 128, at 4 n.14 (citing Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1579 n.76 (2003)).

¹⁴³ See Clarke, *supra* note 79, at 984; Dolovich, *supra* note 128, at 1.

¹⁴⁴ Clarke, *supra* note 79, at 984 (citing MICHAEL WELCH, CORRECTIONS: A CRITICAL APPROACH 195 (3d ed. 2011)).

¹⁴⁵ Clarke, *supra* note 79, at 984 (quotations omitted).

¹⁴⁶ JESSICA STROOP, U.S. DEP’T OF JUSTICE PROGRAMS, PREA DATA COLLECTION ACTIVITIES (June 29, 2018).

fuel sexual assaults in prison.¹⁴⁷ LGBTQ prisoners in California men's facilities have a fifteen times higher rate of sexual assault compared to their non-LGBTQ counterparts.¹⁴⁸ The victimization of LGBTQ prisoners is in part due to the prison power dynamic which perpetuates hypermasculinity and punishes "trans women [who] are regarded as female *by definition* and are thus automatic targets for sexual assault."¹⁴⁹ Given the culture, power dynamics, and reported rates of assault, prison officials should be hesitant to move prisoners with female genitalia to men's prisons, as there is a higher likelihood that they would be the victims of sexual assault.

Another example of an innovative housing model takes place in the Los Angeles County Jail—the largest jail system in the United States.¹⁵⁰ UCLA Professor of Law Sharon Dolovich researches and writes extensively on the K6G unit of the LA County Jail, which houses gay men and transgender women in a separate unit from the general population.¹⁵¹

K6G and similar housing models provide an alternative that could keep transgender inmates safer and reduce the prevalence of sexual assault.¹⁵² Although reporting is far from perfect, inmates feel, and likely are, safer in the K6G than in the general population.¹⁵³ In addition to the relative safety from prison gangs and sexual assault, the K6G has a unique culture that is more like a family than the general population.¹⁵⁴

Since the K6G's inception in 1985, inmates are classified as eligible for the K6G unit based on a two-part screening process.¹⁵⁵ The process includes a physical strip search and a series of conversations which allows an inmate to self-identify as gay or transgender and provides an opportunity for prison officials to conduct "detective work" to confirm or deny the need to house the inmate in the K6G unit.¹⁵⁶

¹⁴⁷ Maurice Chammah, *Rape in the American Prison*, ATLANTIC (Feb. 25, 2015), <https://www.theatlantic.com/politics/archive/2015/02/rape-in-the-american-prison/385550/>.

¹⁴⁸ Dolovich, *supra* note 128, at 2.

¹⁴⁹ *Id.* at 18.

¹⁵⁰ The system houses "more than 19,000 people in 8 facilities, with 166,000 people on average cycling through each year." Dolovich, *supra* note 128, at 19.

¹⁵¹ General population includes minimum, medium, and maximum security housing designations. *Id.* at 4, 20.

¹⁵² *See id.* at 44.

¹⁵³ *Id.*

¹⁵⁴ *See SoCal Connected: Life Behind Bars for GBT Inmates at the K6G* (KCET television broadcast), <https://www.kcet.org/shows/socal-connected/life-behind-bars-for-gbt-inmates-at-the-k6g-0>.

¹⁵⁵ Dolovich, *supra* note 128, at 20, 27.

¹⁵⁶ *Id.* at 27.

The K6G model has faced a number of objections and has disadvantages.¹⁵⁷ The unit is based on segregation which some critics argue is “demoralizing and dangerous.”¹⁵⁸ Another disadvantage of the model is that it employs underinclusive classification standards.¹⁵⁹ The underinclusive identification issue is less problematic for transgender women than it is for gay men because the latter “generally can be classified into the unit at only a glance.”¹⁶⁰ However, this will only be the case when a transgender woman chooses to identify herself as transgender or displays an outwardly female appearance through changes in her body, hair, attire, and mannerisms. The unit has a maximum capacity and some gay men and transgender women will not be admitted to the unit.¹⁶¹ Additionally, many people “although neither gay nor trans[gender], are nonetheless liable to victimization in the [general population]” and will not be admitted to the K6G unit.¹⁶²

Prisoners who want to live in the unit are subject to classification by imperfect gatekeepers—the prison officials—who administer the interviews for entry in the unit and conduct the “detective work” to determine admission to the K6G unit.¹⁶³ The officers who conduct entrance interviews try to “go beyond the obvious stereotypes of the gay man in order to identify” who should enter the unit; however, the officers will inevitably “have to rely to some extent on socially constructed and culturally legible markers of sexual orientation.”¹⁶⁴ These imperfect gatekeepers may not be a large problem because “to some extent, there will be an overlap between those who demonstrate some of the cultural markers of gay identity and those who would be judged as gay” within the general population, and therefore subject to victimization at a higher rate.¹⁶⁵

However, as Professor Dolovich argues, the advantages of K6G or similar segregation-based models—if “done right”—outweigh the criticism and are worth exploring for duplication.¹⁶⁶ Although the K6G unit is not perfect, an alternative housing option should be available even if only “as a tool in the

¹⁵⁷ *See id.* at 20.

¹⁵⁸ *Id.* at 54.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 30.

¹⁶¹ *See generally id.* at 25.

¹⁶² *Id.* at 7.

¹⁶³ *Id.* at 34, 71.

¹⁶⁴ *Id.* at 71.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 91.

toolkits of officials seeking to reduce the incidence of victimization in their facilities.”¹⁶⁷

In 2003, Congress passed the Prison Rape Elimination Act (PREA) which has been a useful data collection tool; however, it has been heavily criticized for failing to protect vulnerable populations because of its relaxed compliance standards.¹⁶⁸ The Department of Justice (DOJ) promulgated rules nine years after the passage of this Act, which established enforcement guidelines, including “incorporat[ing] unique vulnerabilities of lesbian, gay, bisexual, transgender, intersex and gender nonconforming inmates into training and screening protocols.”¹⁶⁹ One problem with the PREA rules is that the DOJ does not audit all facilities to assure compliance.¹⁷⁰ Rather, states can simply “provide written assurances they will spend DOJ funds to make progress towards compliance with PREA standards though they have not yet complied with them.”¹⁷¹ While it is notable that the DOJ is paying attention to a vulnerable group, these enforcement mechanisms have not been effective, as evidenced by the rise in prison sexual assault.¹⁷² Although some LGBTQ advocates remain hopeful that PREA will help transgender inmates, it remains unclear if any changes will be made to strengthen PREA.¹⁷³ Several states have passed legislation to grant more rights to transgender prisoners; however, PREA remains the only national legislation addressing the needs of transgender prisoners.¹⁷⁴

B. *United Kingdom*

The approach the United Kingdom has adopted takes the type of offense committed by the offender into consideration when determining housing for

¹⁶⁷ *Id.* at 7.

¹⁶⁸ Acevedo, *supra* note 133, at 85.

¹⁶⁹ Press Release, U.S. Dep’t of Justice, Justice Department Releases Final Rule to Prevent, Detect and Respond to Prison Rape (May 17, 2012), <https://www.justice.gov/opa/pr/justice-department-releases-final-rule-prevent-detect-and-respond-prison-rape>.

¹⁷⁰ See Acevedo, *supra* note 133, at 85.

¹⁷¹ *Id.* at 85 (citations omitted).

¹⁷² See Alysia Santo, *Prison Rape Allegations Are on the Rise*, MARSHALL PROJECT (July 25, 2018, 8:00 AM), <https://www.themarshallproject.org/2018/07/25/prison-rape-allegations-are-on-the-rise>.

¹⁷³ Although PREA does not create a private right of action or affirmative defense, it has helped some transgender inmates in court. See Gabriel Arkles, *Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 801, 802 (2014). For example, “Sandy Brown, a transgender prisoner in Maryland was routinely taunted, harassed, and placed in solitary confinement while serving a five-year sentence. She sued the prison under PREA and was awarded \$5,000 in compensation.” Acevedo, *supra* note 133, at 85 (citations omitted).

¹⁷⁴ See Victoria Law, *How a New California Bill Aims to Protect Trans People Behind Bars*, REWIRE.NEWS (July 2, 2019, 8:51 AM), <https://rewire.news/article/2019/07/02/trans-jail-prison-sb-132/>.

prisoners.¹⁷⁵ The first unit exclusively for transgender prisoners opened in 2019 in the United Kingdom to ensure the proper safety of transgender inmates.¹⁷⁶ However, individuals must still apply to a prison board and undergo a general risk assessment.¹⁷⁷ Although the new unit is innovative in the United Kingdom, it reinforces the idea that segregation is the best way to address marginalized communities such as transgender inmates.

The United Kingdom outlines uniform policies for its staff and professionals in terms of allowing transgender inmates to be addressed by their preferred pronouns and dress according to their gender identity.¹⁷⁸ Although policies in the United Kingdom seek to provide greater mobility, there exists a number of exceptions surrounding risk concerns.¹⁷⁹ These concerns are based on the notion that prisoners assigned male at birth pose a greater risk of harm to prisoners than prisoners assigned female at birth.¹⁸⁰ The “greater risk of harm” is usually associated with the type of crime for which the inmate is incarcerated.¹⁸¹ For example, crimes such as rape of a woman pose a greater potential for harm to the general population in a women’s facility than an inmate who is incarcerated for tax fraud. The other factor that is considered when determining the risk of harm is the capacity of the male prison facility.¹⁸² “[T]he male estate has greater capacity to manage prisoners who pose an exceptionally high risk to others.”¹⁸³ In practice, the “greater risk of harm” argument means that transgender prisoners transitioning from female to male can obtain a change in housing—to placement in a male facility—but prisoners transitioning from male to female will have a more difficult time obtaining a change in housing, as they may be governed by an exception found in the policy.¹⁸⁴

In the United Kingdom, the Gender Recognition Act provides for a gender recognition certificate for those who are approved by a Gender Recognition Panel, however, it is unclear whether it requires an inmate to undergo GCS.¹⁸⁵

¹⁷⁵ Beard, *supra* note 12, at 10.

¹⁷⁶ *First UK Transgender Prison Unit to Open*, BBC (Mar. 3, 2019), <https://www.bbc.com/news/uk-47434730>.

¹⁷⁷ See Charles Hymas, *One in 50 Prisoners Identifies as Transgender Amid Concerns Inmates are Attempting to Secure Prison Perks*, TELEGRAPH (July 9, 2019, 7:31 PM), <https://www.telegraph.co.uk/news/2019/07/09/one-50-prisoners-identify-transsexual-first-figures-show-amid/>.

¹⁷⁸ Beard, *supra* note 12, at 3.

¹⁷⁹ *Id.* at 10.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 11.

¹⁸² *See id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See Gender Recognition Act 2004, c.7, (UK) §§ 2, 3.

In practice, this policy has allowed for a female prisoner with male genitalia to be transferred to a women's facility.¹⁸⁶ The scenario described is what happened in the case of Karen White, a transgender woman convicted of sex offenses, who was able to transfer to a women's facility and sexually assaulted four female inmates.¹⁸⁷ However, as discussed further in Part V, Karen White's case should not be seen as the standard, but rather an exceptional case caused by the failure of the U.K. Prison Service to recognize that she was a threat to other prisoners.¹⁸⁸

C. Canada

Most people who are incarcerated in the Canadian justice system are held in facilities controlled by the national government and administered by the Correctional Service of Canada (CSC).¹⁸⁹ Although there are some local prisons, governed by provincial governments for criminals with a less than two-year prison sentence, the majority of prisoners are under the control of the CSC.¹⁹⁰ Canada has taken significant steps that have assisted transgender prisoners.¹⁹¹ For example, in the provinces of Ontario and British Columbia, prisons place pre-operation inmates in gender-segregated facilities based on their gender identity.¹⁹² In addition, Canada recently changed its federal prison policy to allow transgender inmates to be housed according to their gender identity.¹⁹³

Canada's legal protections for transgender individuals comes from the Canadian Human Rights Act 2017 amendments, which added "gender identity or expression" to the list of prohibited types of discrimination.¹⁹⁴ Through the amended language of the Human Rights Act, the CSC subsequently promulgated a number of rules and the CSC Commissioner issued directives to address the new language.¹⁹⁵ The new rules were issued to ensure that the CSC's practices are consistent with the amended statute. While the rules mandate that the

¹⁸⁶ See Amanda Woods, *Transgender Woman Accused of Sexually Assaulting Inmates*, NEW YORK POST (Sept. 7, 2018), <https://nypost.com/2018/09/07/transgender-woman-accused-of-sexually-assaulting-inmates/>.

¹⁸⁷ *Id.*

¹⁸⁸ See *infra* notes 321-25.

¹⁸⁹ JAMIL MALAKIEH, MINISTER OF INDUS., CAN. CTR. FOR JUSTICE STATISTICS, Catalogue no. 85-002-X, ADULT AND YOUTH CORRECTIONAL STATISTICS IN CANADA, 2016/2017 (2018).

¹⁹⁰ *Id.*

¹⁹¹ See Lupick, *supra* note 66.

¹⁹² *Id.*

¹⁹³ Lars Hagberg, *Transgender Inmates in Federal Prison to be Housed According to Gender Identity*, GLOBE & MAIL (Jan. 31, 2018), <https://www.theglobeandmail.com/news/national/federal-transgender-inmates-to-be-housed-addressed-according-to-gender-identity/article37802623/>.

¹⁹⁴ CORR. SERV. OF CAN., INTERIM POLICY BULLETIN 584, BILL C-16 (GENDER IDENTITY OR EXPRESSION) (2017).

¹⁹⁵ *Id.*

placement of prisoners should be based on their gender identity, they include language which allows for exceptions to transfer based on “overriding health or safety concerns.”¹⁹⁶

A 2019 case heard by a federal court in Canada tested the limits of both the Canadian Human Rights Act transgender recognition amendments and the CSC’s directives based on the amended statute.¹⁹⁷ A milestone was set for prisoner’s rights through Justice Sebastian Grammond’s order in *Boulachanis v. Canada*, which overruled the CSC’s decision to deny a transgender prisoner the ability to transfer from a men’s prison to a women’s prison.¹⁹⁸ In his ruling, Justice Grammond stated that the CSC’s decision to refuse the transfer constituted “*prima facie* discrimination based on gender identity or expression.”¹⁹⁹

While the Justice ruled narrowly on the interlocutory injunction before the Court and did not order any general corrective action by the CSC outside of the specific situation of Ms. Boulachanis, it would seem that the CSC’s overriding health and safety exceptions to transfer might not stand up against the statutory language of the Canadian Human Rights Act.²⁰⁰ This is especially true when the CSC does not provide details about their health and safety assessments.²⁰¹

Canada reports a much lower frequency of prison sexual assault than the United States, however, the picture of sexual assault is “murkier in Canada” than it is in the United States.²⁰² Sexual assault is one of the most underreported crimes in prison because of the potential label of “snitch” or the fear of “violent reprisals” an inmate may face for reporting.²⁰³ In 2018 the CSC, which oversees about 14,000 inmates, reported a five year high in prison sexual assaults with only seventeen investigations taking place.²⁰⁴ Three features of the Canadian system “may reduce sexual violence: smaller correctional facilities, shorter

¹⁹⁶ *Id.* What would constitute as “overriding health or safety concerns” are not specified in the policy. *Id.*

¹⁹⁷ *See generally* *Boulachanis v. Canada* (Attorney General), (2019) F.C. 456 (Can. Fed. Ct.).

¹⁹⁸ Amy Matychuk, *Boulachanis v. Canada: Transgender Inmate Moved to Women’s Prison*, ABLAWG (July 15, 2019), http://ablawg.ca/wp-content/uploads/2019/07/Blog_AM_Boulachanis.pdf (citing *Boulachanis v. Canada* (Attorney General), (2019) F.C. 456).

¹⁹⁹ *Boulachanis v. Canada* (Attorney General), (2019) F.C. 456, para. 3.

²⁰⁰ Matychuk, *supra* note 198, at 2.

²⁰¹ *See id.* at 3 (citing *Boulachanis*, F.C. 456, para. 13).

²⁰² *See* Jonny Wakefield, *Alberta Prisoners Made 67 Allegations of Sexual Assault in the Last Five Fiscal Years; Only One Resulted in a Criminal Charge*, EDMONTON J. (Nov. 7, 2018), <https://edmontonjournal.com/news/insight/violent-and-coercive-sexual-assault-behind-bars-is-a-taboo-topic-but-statistics-tell-only-part-of-the-story>.

²⁰³ *Id.*

²⁰⁴ *Id.*

sentences, and sex offender segregation.”²⁰⁵ Canada may have lower rates of sexual assaults because they run their prisons more safely than the United States.²⁰⁶ However, it is also possible that Canada faces an underreporting problem that would fail to protect vulnerable populations in prisons.

As *Boulachanis* demonstrates, Canadian courts reject the notion that a non-specific claim of health and safety will stand up to judicial review and justify the refusal to transfer facilities.²⁰⁷ It is not clear if the low reports of sexual assault in Canada are an accurate portrayal of the prevalence of violence or the result of underinclusive reporting. However, with respect to safety, the Canadian system lags behind the United States in the identification and reporting on sexual violence of vulnerable populations, such as transgender inmates.

IV. HEALTHCARE

The different healthcare structures in Canada, the United Kingdom, and the United States pose a potential hurdle for the success of a policy change concerning healthcare for transgender people.²⁰⁸ The British National Health Service (NHS) and Canada’s healthcare system provide universal healthcare to citizens that “is free at the point of use” and as a result does not exclude poor or unemployed people.²⁰⁹ However, instead of a universal system, the U.S. healthcare system is composed of individual payers, private insurers, and public insurers, which includes Medicare and Medicaid.²¹⁰ Medicaid, the health insurance regime that provides healthcare access to over 70 million low-income and disabled individuals, is jointly funded through federal and state dollars but has its coverage criteria set by state law.²¹¹ As a result of state control, two individuals covered by Medicaid living in different states could have substantially different coverage.²¹² For instance, in Maryland, transition-related services for transgender people are covered by Medicaid, whereas in Georgia transgender health coverage is explicitly excluded.²¹³

²⁰⁵ *Id.*

²⁰⁶ *See id.*

²⁰⁷ *See Boulachanis*, F.C. 456 at para. 3.

²⁰⁸ Pemberton, *supra* note 71, at 164.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *See* January 2020 Medicaid & CHIP Enrollment Data Highlights, MEDICAID.GOV (Apr. 23, 2020), <https://www.medicaid.gov/medicaid/program-information/medicaid-and-chip-enrollment-data/report-highlights/index.html>.

²¹² *Healthcare Laws and Policies: Medicaid Coverage for Transition-Related Care*, MOVEMENT ADVANCEMENT PROJECT 1 (2019).

²¹³ Canada has a similar system; however, the stratification is more extreme in the United States than it is

In the United States, Medicaid exclusions can exacerbate race and class inequality.²¹⁴ Low-income transgender people may be placed “in a perpetual state of illegitimacy” because they are “required to show proof of medical care for legal recognition of their identit[y] but denied that care by Medicaid.”²¹⁵ However, a universal healthcare system does not guarantee that transgender people will have better or more frequent access to high-quality healthcare.²¹⁶ For instance, NHS has been criticized for wait times of over two years for individuals trying to access certain health services including hormone treatment and GCS.²¹⁷ Overarching healthcare structures pose a significant hurdle in the implementation of legislation that requires medical consultation, treatment, or intervention to obtain a change of gender/sex on government documents.²¹⁸

A. Access to Gender-Affirming Care

Transgender inmates commonly face restrictions in accessing personal items and medical care.²¹⁹ Institutional-level policies have a large effect on the day to day lives of transgender inmates.²²⁰ Some policies, specifically those requiring inmates “to conform to masculine gender norms by removing hairstyles, clothes, and accessories perceived to be feminine,” have major consequences for inmates.²²¹ These policies have resulted in the denial of access to gender-affirming care which may have a negative impact on the ability for inmates to live according to their desired gender (a qualification for GCS set by the WPATH SOC).²²² These policies have also reportedly caused some inmates to discontinue their hormone use.²²³ In addition to those inmates who decided to stop taking their hormones, “[s]eventeen percent of transgender inmates report

in Canada. *Id.*

²¹⁴ Gehi & Arkles, *supra* note 47, at 8.

²¹⁵ *Id.* at 8.

²¹⁶ Pemberton, *supra* note 71, at 164.

²¹⁷ See Nicola Davis, *Trans Patients in England Face ‘Soul Destroying’ Wait for Treatment*, GUARDIAN (Feb. 26, 2019), <https://www.theguardian.com/society/2019/feb/26/trans-patients-in-england-face-soul-destroying-wait-for-treatment>; Laura Donnelly, *Two Year Waiting Times for NHS Gender Identity Clinics, Amid Unprecedented Demand*, TELEGRAPH (Aug. 23, 2019), <https://www.telegraph.co.uk/news/2019/08/23/two-year-waiting-times-nhs-gender-identity-clinics-amid-unprecedented/>. There are other limitations that transgender people face in the United Kingdom including uninformed or unqualified doctors and the need for referral to a small number of specialists. Pemberton, *supra* note 71, at 164.

²¹⁸ See Allen, *supra* note 86, at 187; Gehi & Arkles, *supra* note 47, at 8; Beard, *supra* note 12, at 5.

²¹⁹ Acevedo, *supra* note 133, at 85.

²²⁰ See Jaelyn M. White Hughto et al., *Creating, Reinforcing, and Resisting the Gender Binary: A Qualitative Study of Transgender Women’s Healthcare Experiences in Sex-Segregated Jails and Prisons*, 14 INT’L J. PRISON HEALTH 69 (2018) (manuscript at 13–14).

²²¹ *Id.* at 14.

²²² *Id.*; WPATH SOC, *supra* note 14, at 60.

²²³ See Hughto et al., *supra* note 220, at 14.

being denied hormones and twelve percent report ‘denial of routine medical care because of bias.’”²²⁴ Cultural competency trainings for all staff, but specifically for technicians, nurses, and doctors providing transgender inmates with daily medical care, are not the norm in most prisons and should be implemented to improve healthcare for transgender inmates.²²⁵

Some health professionals and lawyers, in an attempt to place gender dysphoria within the confines of previously existing mental health standards, argue that GCS is medically necessary to prevent or treat other psychiatric conditions, such as depression or suicidality.²²⁶ The argument that GCS can treat psychiatric conditions other than gender dysphoria, according to researchers at Johns Hopkins and the University of Lethbridge in Canada, is not medically accurate and “could establish an unhelpful precedent, with suicidal threats or gestures becoming *de facto* prerequisites for GCS.”²²⁷

Access to the appropriate transition-related care is critical because the rate of suicide attempts is incredibly high for transgender people who were not able to access transition-related care.²²⁸ Studies have reported suicidal tendencies in twenty percent of transgender people with gender dysphoria before they have access to transition-related care.²²⁹ “Research has also shown that transition-related health care is an effective treatment for ameliorating these suicidal tendencies.”²³⁰

The WPATH SOC have “been widely adopted by physicians and mental health professionals who treat community-dwelling persons with [gender dysphoria], and they have been regarded as authoritative by U.S. courts in cases involving prisoners with [gender dysphoria].”²³¹ However, it was not until 2011 that the WPATH SOC clarified that it “was applicable to all persons in prisons

²²⁴ Acevedo, *supra* note 133, at 85–86 (citations omitted).

²²⁵ Hughto et al., *supra* note 220, at 17.

²²⁶ See, e.g., *Kosilek v. Spencer*, 774 F.3d 63, 94 (1st Cir. 2014) (holding that “[a]lthough the district court determined that, in this case, Kosilek’s risk for suicidal ideation was very real, this finding does not invalidate the DOC’s reasonable belief that providing SRS might lead to proliferation of false threats among other prisoners”); see also Osborne & Lawrence, *supra* note 34, at 1653.

²²⁷ Osborne & Lawrence, *supra* note 34, at 1653. The dissenters in *Kosilek* did not find the government’s security argument compelling, noting that “the DOC does not want to be inundated with a hypothetical influx of false suicide threats hardly seems a valid reason to deny a prisoner care deemed medically necessary.” *Kosilek*, 774 F.3d at 111 (Thompson, J., dissenting).

²²⁸ Gehi & Arkles, *supra* note 47, at 13.

²²⁹ *Id.*

²³⁰ *Id.* “One study found suicide attempts among 12% of trans[gender] women and 21% of trans[gender] men who had not begun transition-related treatment and no suicide attempts among the same patients after having begun treatment.” *Id.*

²³¹ Osborne & Lawrence, *supra* note 34, at 1650.

and other institutions.”²³² The WPATH SOC are “not without controversy” and “were not developed based on extensive clinical experience with incarcerated persons, many of whom have histories, characteristics, and vulnerabilities that differ substantially from community-dwelling persons with [gender dysphoria].”²³³ Although the WPATH SOC provide a useful clinical basis for the treatment of transgender people suffering from gender dysphoria, they are not a diagnostic rulebook prescribing a set of steps that must be followed exactly in every case for the diagnosis and treatment of gender dysphoria.²³⁴ Rather, it is crucial that all medical treatment provided to inmates consider the unique circumstances surrounding incarceration and that all individuals providing treatment to transgender prisoners exercise professional judgment.²³⁵

B. Gender Confirmation Surgery (GCS)

Although there is no universal treatment requirement for gender dysphoria, WPATH outlines recommendations for criteria a person should satisfy to qualify for genital surgery.²³⁶ The WPATH SOC require:

- two referrals;
- “[p]ersistent, well-documented gender dysphoria”;
- the “[c]apacity to make a fully informed decision and to consent for treatment”;
- be the “[a]ge of majority in given country”;
- “[i]f significant medical or mental health concerns are present, they must be well controlled”;
- and the patient must have twelve “continuous months of hormone therapy as appropriate to the patient’s gender goals (unless hormones are not clinically indicated for the individual).”²³⁷

Additionally, for certain procedures, the WPATH SOC require twelve “continuous months of living in a gender role that is congruent with their gender identity.”²³⁸ Transgender people with gender dysphoria have different medical

²³² *Id.* at 1651.

²³³ *Id.* at 1651–52.

²³⁴ *See id.*

²³⁵ The unique circumstances of incarceration may cause a physician to provide different treatment to an inmate than they would to the same individual if they were community-dwelling. *See id.*

²³⁶ *See* WPATH SOC, *supra* note 14, at 59–60.

²³⁷ *Id.*

²³⁸ The WPATH SOC note that while it is “not an explicit criterion, it is recommended that these patients also have regular visits with a mental health or other medical professional.” The additional criterion of twelve continuous months of living in a gender role congruent with gender identity is required for metoidioplasty or phalloplasty in Female to Male patients and for a vaginoplasty in Male to Female patients. *Id.*

needs, and many do not require or seek hormone therapy or gender-affirming surgeries.²³⁹ When determining whether a person satisfies the WPATH SOC, the recent rise in self-identification,²⁴⁰ social understanding,²⁴¹ and medical care for transgender people should be taken into consideration.²⁴²

Accessing GCS in prison poses a unique set of obstacles not present for transgender persons suffering from gender dysphoria who are not incarcerated.²⁴³ As a result of these unique circumstances, some scholars argue for the loosening of certain standards, such as living continuously in the desired gender for twelve months, set forth by WPATH as preconditions for GCS.²⁴⁴ For the purposes of classification in the legal context, gender dysphoria is “a serious but treatable medical condition.”²⁴⁵

The ongoing debate in the United States is largely centered around Eighth Amendment claims. However, in Canada and the United Kingdom, prisoners are entitled to the same general healthcare services that anyone outside of the prison would have access to.²⁴⁶ Access to these services means that inmates would not need to pursue litigation to obtain access to gender-affirming healthcare. In Canada “gender dysphoria is a recognized medical condition that, left untreated can result in high levels of anxiety and depression, which can lead to suicidal thoughts.”²⁴⁷ As of 2016, all medically necessary gender-confirming surgeries are insured procedures in all Canadian provinces.²⁴⁸

²³⁹ It is important to note that an individual may choose to not undergo medical interventions for a variety of health or personal reasons. Taking hormones and surgery are medical decisions that may have side effects. A transgender person who does not choose to undergo any medical procedure is still transgender. Sevelius & Jenness, *supra* note 127, at 36.

²⁴⁰ See GLAAD, *supra* note 20, at 3.

²⁴¹ See FLORES ET AL., *supra* note 20, at 6.

²⁴² The Circuit Court notes the District Court’s rejection of the notion that a prisoner could not “satisfy the WPATH criteria because she has not presented as female outside of the prison setting.” The Circuit Court reinforced this point noting that “there is no requirement in the WPATH Standards of Care that a patient live for twelve months in his or her gender role outside of prison before becoming eligible for” gender confirmation surgery. *Edmo v. Corizon, Inc.*, 935 F.3d 757, 780-81 (9th Cir. 2019).

²⁴³ See NATIONAL CENTER FOR TRANSGENDER EQUALITY, AGENCY GUIDE, *supra* note 128, at 48.

²⁴⁴ Osborne & Lawrence, *supra* note 34, at 1654-57.

²⁴⁵ *Edmo*, 935 F.3d at 769.

²⁴⁶ See UK Government, *Prison Life: Healthcare in Prison* (last visited Feb. 9, 2020), <https://www.gov.uk/life-in-prison/healthcare-in-prison>; Fiona Kouyoumdjian et al., *Health Status of Prisoners in Canada: Narrative Review* 62 CAN. FAMILY PHYSICIAN 215, 216 (Mar. 2016). However, in practice Canada does not meet this obligation. *Id.*

²⁴⁷ Daniel McHardie, *New Brunswick Will Now Cover Gender-Confirming Surgeries*, CBC (June 3, 2016), <https://www.cbc.ca/news/canada/new-brunswick/gender-confirming-surgeries-1.3614766>.

²⁴⁸ However, some procedures which would not be covered for Canadians who do not have gender dysphoria, including laser hair removal is still not insured. *Id.*

In the United States the situation with respect to GCS is very different than in the United Kingdom or Canada and has been the center of litigation.²⁴⁹ Although only one inmate in the United States has undergone GCS while incarcerated,²⁵⁰ prisons are increasingly recognizing gender dysphoria as a diagnosis and providing psychological evaluations and some treatment to transgender prisoners.²⁵¹ Currently, GCS is not offered as a standard medical treatment in prison for gender dysphoria unless the prisoner pursues litigation against the government for violating the Eighth Amendment.²⁵²

Eighth Amendment litigation in this context is based on the principle that whenever someone is incarcerated, “society takes from prisoners the means to provide for their own needs” making prisoners “dependent on the State for food, clothing, and necessary medical care.”²⁵³ As a result of depriving inmates of rights such as medical care, Eighth Amendment jurisprudence establishes standards that must be met.²⁵⁴ In *Estelle v. Gamble*, the Supreme Court held that “deliberate indifference to serious medical needs of prisoners . . . constitutes ‘unnecessary and wanton infliction of pain,’ proscribed by the Eighth Amendment.”²⁵⁵ The Court established that deliberate indifference exists “whether the indifference is manifested by prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care.”²⁵⁶

To succeed with an Eighth Amendment claim, a plaintiff must satisfy two elements: (1) “[the individual] must show a serious medical need,” and (2) “[the

²⁴⁹ See discussions *infra* Part IV Section B.

²⁵⁰ Although the Ninth Circuit’s holding in *Edmo* permits the plaintiff to undergo GCS, the state plans to appeal the ruling of the court. In October 2019, Adree Edmo received presurgical procedures but has not yet undergone the procedure. “If Edmo received the surgery, she would be only the second person in the country to undergo the process while in prison, and the first in Idaho.” Tommy Simmons, *Idaho Transgender Inmate to Receive Presurgical Procedures After Court Ruling*, IDAHO PRESS (Oct. 11, 2019); *Edmo*, 935 F.3d at 785-86. Only one inmate has ever been provided GCS. “After a lengthy legal battle, a California transgender woman became the first inmate in the United States to receive a government-funded gender-reassignment surgery.” Kristine Phillips, *A Convicted Killer Became the First U.S. Inmate to Get State-funded Gender Reassignment Surgery*, WASH. POST (Jan. 10, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/01/10/a-transgender-inmate-became-first-to-get-state-funded-surgery-advocates-say-fight-is-far-from-over/>. California provided GCS to this inmate, “pursuant to the settlement of a federal lawsuit.” *Gibson v. Collier*, 920 F.3d 212, 227 (5th Cir. 2019) (citing *Quine v. Beard*, 2017 U.S. Dist. LEXIS 65276, at *2 (N.D. Cal. Apr. 28, 2017) (“Under the Agreement, [the California Department of Corrections and Rehabilitation] agreed to provide sex reassignment surgery to Plaintiff.”)).

²⁵¹ Osborne & Lawrence, *supra* note 34, at 1650.

²⁵² *Id.*

²⁵³ *Brown v. Plata*, 563 U.S. 493, 510 (2011).

²⁵⁴ *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

individual] must prove the defendant's purposeful indifference thereto."²⁵⁷ Generally, courts agree that gender dysphoria is a serious medical condition.²⁵⁸ However, courts disagree about the medical necessity of hormone therapy and GCS based on the WPATH SOC.²⁵⁹ The medical necessity of a treatment plan for any diagnosis is unique to that person, and different medical professionals can have varying professional opinions.²⁶⁰ Multiple courts have stressed the point that a doctor must assess the unique needs of a particular prisoner's medical care and that blanket standards either permitting or banning treatment options, including GCS, would violate the Eighth Amendment.²⁶¹

The ruling by the Ninth Circuit Court of Appeals in *Edmo v. Corizon* creates a circuit split within the United States regarding the medically necessary treatment a state is legally required to provide an inmate with gender dysphoria.²⁶² The Ninth Circuit's opinion in *Edmo*, which allows a transgender inmate access to GCS, is "in tension" with the Fifth Circuit's decision in *Gibson v. Collier*, which denied a transgender inmate's request for GCS.²⁶³ The split highlights the ongoing debate in the legal community about what responsibility the government has to provide certain types of healthcare to transgender inmates.²⁶⁴ The disagreement between courts also creates a disparity in transgender prisoners' access to healthcare, including GCS, depending on where they reside in the United States. Although the Supreme Court refused to hear an

²⁵⁷ The first showing requires the court to conduct an objective analysis, while the second is a subjective showing. *Sires v. Berman*, 834 F.2d 9, 12 (1st Cir. 1987). The Eighth Amendment cruel and unusual clause is incorporated to apply to states through the Fourteenth Amendment. *See Robinson v. California*, 370 U.S. 660, 667 (1962).

²⁵⁸ *Edmo v. Corizon, Inc.*, 935 F.3d 757, 785 (9th Cir. 2019); *Kosilek v. Spencer*, 774 F.3d 63, 86 (1st Cir. 2014).

²⁵⁹ *Compare Gibson v. Collier*, 920 F.3d 212, 221 (5th Cir. 2019) (arguing that "the WPATH Standards of Care reflect not consensus, but merely one side in a sharply contested medical debate over [GCS]" *with Edmo*, 935 F.3d at 769 (concluding that the WPATH SOC "are the internationally recognized guidelines for the treatment of individuals with gender dysphoria").

²⁶⁰ *See Locked, Episode 1*, *supra* note 1.

²⁶¹ *Edmo*, 935 F.3d at 797; *Roe v. Elyea*, 631 F.3d 843, 862-63 (7th Cir. 2011).

²⁶² *See Edmo*, 935 F.3d at 794.

²⁶³ *See id.* (citing *Gibson*, 920 F.3d at 215) (noting that the decision reached in *Edmo* is "in tension with" the Fifth Circuit's decision in *Gibson*).

²⁶⁴ *See Transgender Prisoners Have Fundamental Right to Appropriate Care*, AM. MED. ASS'N (May 17, 2019), <https://www.ama-assn.org/delivering-care/population-care/transgender-prisoners-have-fundamental-right-appropriate-care>.

appeal in *Gibson*,²⁶⁵ there is a possibility that this issue will rise to the Court in the near future.²⁶⁶

In both the *Edmo* and *Gibson* holdings, the Ninth and Fifth Circuit Courts rely heavily on the First Circuit Court's holding and reasoning in a 2014 case, *Kosilek v. Spencer*,²⁶⁷ and come to different conclusions about whether an inmate who is denied GCS has suffered an Eighth Amendment violation.²⁶⁸ All three cases are about transgender prisoners with gender dysphoria who requested and were denied GCS and claim that this denial violates the Eighth Amendment.²⁶⁹

Sitting *en banc* in *Kosilek*, the First Circuit Court of Appeals applied a “fact-based approach to evaluate a gender dysphoric prisoner’s Eighth Amendment claim seeking GCS.”²⁷⁰ In *Kosilek*, expert witnesses disagreed about the medical necessity of GCS and whether the prisoner’s treatment plan had “led to a significant stabilization in her mental state.”²⁷¹ Additionally, the state argued that the Massachusetts Department of Corrections (DOC) faced valid security concerns if the prisoner was entitled to GCS.²⁷² The DOC’s argument focused mainly on security and safety issues concerning the inmate’s post-operative housing.²⁷³ The DOC noted “that approximately twenty-five percent of male offenders in the Massachusetts prison system are classified as sex offenders” and concluded that the inmate would be “a target for assault and victimization in a male prison.”²⁷⁴ Because of these concerns, the DOC argued that it was infeasible to consider housing the inmate in the general population and that the only alternatives would require long-term isolation, which could have a negative effect on the inmate’s health.²⁷⁵

²⁶⁵ Reuters, *Supreme Court Rejects Inmate’s Bid for Sex Reassignment Surgery*, NBC NEWS (Dec. 10, 2019), https://www.nbcnews.com/feature/nbc-out/supreme-court-rejects-inmate-s-bid-sex-reassignment-surgery-n1098901?cid=sm_npd_nn_tw_ma.

²⁶⁶ See Amanda Peacher & James Dawson, *Court Says Idaho Must Provide Gender Confirmation Surgery to Transgender Inmate*, DELAWARE PUBLIC MEDIA (Aug. 26, 2019), <https://www.delawarepublic.org/post/court-says-idaho-must-provide-gender-confirmation-surgery-transgender-inmate>.

²⁶⁷ See *Kosilek v. Spencer*, 774 F.3d 63, 96 (1st Cir. 2014).

²⁶⁸ See *Edmo*, 935 F.3d at 795–97; *Gibson*, 920 F.3d at 225.

²⁶⁹ See generally *Edmo*, 935 F.3d at 794; *Kosilek*, 774 F.3d at 89–92; *Gibson*, 920 F.3d at 215.

²⁷⁰ *Edmo*, 935 F.3d at 794 (citing *Kosilek*, 774 F.3d at 68).

²⁷¹ *Kosilek*, 774 F.3d at 89–92.

²⁷² *Id.* at 91–95.

²⁷³ *Id.* at 74.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

The majority ultimately sided with the DOC because they felt that the inmate's current treatment plan, which did not involve GCS, was sufficient.²⁷⁶ A 3-2 majority of the court held that the DOC's decision to not provide GCS did not amount to an Eighth Amendment violation.²⁷⁷ The majority reasoned that: "[g]iven the positive effects of Kosilek's current regimen of care, and the DOC's plan to treat suicidal ideation should it arise, the DOC's decision not to provide [GCS] does not illustrate severe obstinacy or disregard of Kosilek's medical needs."²⁷⁸

In the dissent, Judge Thompson vehemently disagreed with the majority's decision, noting:

[p]rejudice and fear of the unfamiliar have undoubtedly played a role in this matter's protraction [The majority's opinion] paves the way for unprincipled grants of *en banc* relief, decimates the deference paid to a trial judge following a bench trial, aggrieves an already marginalized community, and enables correctional systems to further postpone their adjustment to the crumbling gender binary.²⁷⁹

Judge Kayatta's dissent mimics the view of Judge Thompson's dissent and additionally stresses the importance of allowing "trial judges to resolve factual issues when the evidence supports a finding either way."²⁸⁰ Further, Judge Kayatta notes that while "some [judges] will get it wrong; most will get it right," and over time, "the arc of decision-making. . . will bend towards the latter."²⁸¹

Five years later, after a significant amount of progress was made in both the understanding and treatment of gender dysphoria, a *pro se* plaintiff seeking GCS as treatment for diagnosed gender dysphoria appealed to the Fifth Circuit Court.²⁸² In *Gibson v. Collier*, the Fifth Circuit held, in a 2-1 majority of the panel, that "[a] state does not inflict cruel and unusual punishment by declining to provide [GCS] to a transgender inmate."²⁸³ The court ruled on a "sparse record" which included only the WPATH SOC and was devoid of any "witness testimony or evidence from professionals in the field demonstrating that the

²⁷⁶ *Id.* at 96.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 113 (Thompson, J., dissenting).

²⁸⁰ *Id.* at 115 (Kayatta, J., dissenting).

²⁸¹ *Id.*

²⁸² *Gibson v. Collier*, 920 F.3d 212, 218 (5th Cir. 2019).

²⁸³ *Id.* at 215.

WPATH-suggested treatment option of [GCS]” for gender dysphoria was widely accepted.²⁸⁴

The majority adopted the reasoning and words of the expert witnesses from four years earlier in *Kosilek* to determine that “this on-going medical debate dooms Gibson’s claim.”²⁸⁵ The majority noted that there was insufficient consensus within the medical community over GCS as an appropriate treatment for gender dysphoria.²⁸⁶ The court held that Gibson’s claim could not prevail in the absence of medical consensus on GCS.²⁸⁷ The majority rejected the dissent’s argument, which “suggests that a blanket ban is unconstitutional—and that an individualized assessment is required.”²⁸⁸ Instead, the court held that a “blanket ban” on providing GCS would not be unconstitutional and characterized the *Kosilek* opinion as “effectively allow[ing] a blanket ban on [GCS].”²⁸⁹

In August 2019, months after the Fifth Circuit’s decision in *Gibson*,²⁹⁰ the Ninth Circuit issued a ruling in *Edmo*, ordering the state of Idaho to pay for a transgender inmate’s GCS.²⁹¹ The *Edmo* decision marks the first time a Circuit Court has held that prison officials can be found in violation of the Eighth Amendment for failing to provide GCS to a prisoner with gender dysphoria who meets the qualifications for surgical intervention.²⁹² The court found that the WPATH SOC “are the internationally recognized guidelines for the treatment of individuals with gender dysphoria” and when the conditions set forth by WPATH are met, “[t]he weight of opinion in the medical and mental health communities agrees that GCS is safe, effective, and medically necessary”²⁹³

The Ninth Circuit Court noted that the approach they took to decide the merits of the claim mirrors the First Circuit’s approach in *Kosilek*, but key factual differences yielded different outcomes.²⁹⁴ The Ninth Circuit explained

²⁸⁴ *Id.* at 220–21.

²⁸⁵ *Id.* at 221.

²⁸⁶ *Id.* at 223 (noting that “[t]here is no medical consensus that [GCS] is a necessary or even effective treatment for gender dysphoria”).

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 216.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 215.

²⁹¹ *Edmo v. Corizon, Inc.*, 935 F.3d 757, 803 (9th Cir. 2019).

²⁹² *Id.* at 767.

²⁹³ The court noted that while the Fifth Circuit disagreed with this conclusion in *Gibson*, most courts and many of the major medical and mental health groups agree that the WPATH SOC represent the consensus of the medical and mental health communities regarding the appropriate treatment for transgender and gender dysphoric individuals. *Id.* at 769-71 (citations omitted).

²⁹⁴ *Id.* at 794.

their disagreement with the First Circuit's holding and reasoning in *Gibson* by noting “*Gibson* relies on an incorrect, or at best outdated, premise: ‘[t]here is no medical consensus that [GCS] is a necessary or even effective treatment for gender dysphoria.’”²⁹⁵ The Ninth Circuit also elaborated that the medical opinions the *Gibson* court relied on from *Kosilek* were outdated and incomplete.²⁹⁶

After the ruling, the defendants, including the Idaho Department of Corrections, filed a petition for rehearing arguing Edmo's prior treatment was medically acceptable.²⁹⁷ In October 2019, the Ninth Circuit granted a motion to partially lift the stay, allowing Edmo to proceed with pre-surgery procedures.²⁹⁸ On February 10, 2020, the court denied the defendants' request for a rehearing.²⁹⁹ However, ten judges on the twenty-nine judge court dissented.³⁰⁰ Judge Patrick Bumatay wrote a dissent from denial of rehearing en banc arguing the Eighth Amendment needs to be interpreted and applied using originalism and thus is not applicable in Edmo's case.³⁰¹

The response to the decision in *Edmo* has been mixed. Shortly after the Ninth Circuit's decision in August 2019, Idaho Governor Brad Little commented that he planned to appeal the decision and expressed his disappointment in the decision reached by the Ninth Circuit.³⁰² Governor Little's response to the *Edmo* decision is largely based on anecdotes about cost and fairness to taxpayers.³⁰³

²⁹⁵ *Id.* at 795 (9th Cir. 2019) (citing *Gibson v. Collier*, 920 F.3d 212, 223 (5th Cir. 2019)).

²⁹⁶ *Edmo*, 935 F.3d at 795.

²⁹⁷ *Simmons*, *supra* note 250.

²⁹⁸ *Id.*

²⁹⁹ Bob Egelko, *In a First, Court Says a State Must Provide Gender-Confirmation Surgery to Inmate*, S.F. CHRON. (Feb. 10, 2020), <https://www.sfchronicle.com/nation/article/In-a-first-court-says-a-state-must-provide-15045830.php>.

³⁰⁰ *Id.*

³⁰¹ Josh Blackman, *Judge Bumatay's Originalist Eighth Amendment Dissent from Denial of Rehearing en banc*, VOLOKH CONSPIRACY (Feb. 10, 2020, 6:36 PM), <https://reason.com/2020/02/10/judge-bumatays-originalist-eighth-amendment-dissent-from-denial-of-rehearing-en-banc/>.

³⁰² Press Release, Governor Little Comments on Court's Decision in Transgender Inmate's Gender Reassignment Surgery Case, Office of the Governor of Idaho (Aug. 23, 2019), <https://gov.idaho.gov/pressrelease/governor-little-comments-on-courts-decision-in-transgender-inmates-gender-reassignment-surgery-case/>. In May 2020, the Supreme Court denied a request from Idaho to delay Edmo's surgery date, allowing her pre-surgical appointments to move forward as scheduled. See Tommy Simmons, *Surgery for Transgender Idaho Inmate Will Take Place Thanks to US Supreme Court's Choice*, IDAHO PRESS (May 23, 2020), https://www.idahostatejournal.com/news/local/surgery-for-transgender-idaho-inmate-will-take-place-thanks-to-us-supreme-courts-choice/article_c20c34a8-a89a-53a4-8893-c7f03a68d3e4.html; Adam Liptak, *Justices Allow Surgery For Transgender Inmate*, N.Y. TIMES (May 21, 2020), <https://www.nytimes.com/2020/05/21/us/supreme-court-surgery-transgender-inmate.html>.

³⁰³ In response to the Ninth Circuit's holding in *Edmo*, Governor Little stated: “this is another example of an activist court getting in the middle of something and creating a precedent, it's gonna be expensive for the

The cost of GCS varies by health care provider and largely depends on the type of insurance an individual has.³⁰⁴ Typical price estimates for GCS, if paid for out of pocket, range from \$19,000 to \$25,000, although some hospitals have charged insurance companies up to \$100,000 for the procedure.³⁰⁵ Although the cost of surgery is not insignificant when compared to the cost of litigation, it is negligible. In Adree Edmo's case alone, the state of Idaho has already spent more than \$300,000 to appeal the case in court, and there is no indication that Corizon Health—Idaho's private prison healthcare provider—would not cover the costs of Edmo's surgery.³⁰⁶ In response to Governor Little's comments, one of Edmo's attorneys noted the comments invoked transphobic prejudice and were false because the contract Idaho had with Corizon covered necessary medical care.³⁰⁷

V. SOCIAL AND PUBLIC POLICY CRITIQUES

The common arguments against the government providing GCS are largely colloquial and while some opponents have been vocal, this is largely driven by political motivations and is not evidence-based.³⁰⁸ For instance, the argument that providing GCS is not sound because transgender people might change their mind is unfounded with scientific studies showing individuals who regret undergoing GCS is in the range of one to two percent.³⁰⁹

taxpayers of Idaho, and potentially all the taxpayers of United States." KTVB Staff, *Gov. Little Goes on Fox News, Blasts Transgender Inmate Surgery Ruling*, ASSOCIATED PRESS (Aug. 28, 2019), <https://www.ktvb.com/article/news/politics/gov-little-goes-on-fox-news-blasts-transgender-inmate-surgery-ruling/277-66ae4893-d4a2-4318-bc86-f86729849a2f>.

³⁰⁴ See Emmarie Huetteman, *Bill Of The Month: A Plan For Affordable Gender-Confirmation Surgery Goes Awry*, ALL THINGS CONSIDERED, NPR (July 26, 2018), <https://www.npr.org/sections/health-shots/2018/07/26/630619038/bill-of-the-month-a-plan-for-affordable-gender-confirmation-surgery-goes-awry>.

³⁰⁵ See *id.*

³⁰⁶ Lateshia Beachum, *Idaho Must Pay for an Inmate's Gender Confirmation Surgery, a Court Says. The Governor is Fighting it*, WASH. POST (Aug. 27, 2019), <https://www.washingtonpost.com/dc-md-va/2019/08/27/idaho-must-pay-an-inmates-gender-confirmation-surgery-court-says-governor-is-fighting-it/>. The state of public and private prison healthcare is the subject of much research and is not discussed at length in this Comment because it does not impact the analysis or the proposition that GCS is covered under the Idaho prison's current healthcare plan. See, e.g., Jordan Andrews, *The Current State of Public and Private Prison Healthcare*, WHARTON: UNIV. PENNSYLVANIA PUB. POL'Y INITIATIVE (Feb. 24, 2017), https://publicpolicy.wharton.upenn.edu/live/news/1736-the-current-state-of-public-and-private-prison-for-students/blog/news.php#_edn1.

³⁰⁷ Beachum, *supra* note 306.

³⁰⁸ Amanda Peacher & Frankie Barnhill, *Episode 4: Cruel and Unusual?*, BOISE STATE PUB. RADIO NEWS: LOCKED (July 8, 2019), <https://www.npr.org/podcasts/724345591/l-o-c-k-e-d>. [hereinafter *Locked, Episode 4*].

³⁰⁹ Osborne & Lawrence, *supra* note 34, at 1660.

Media attention has sensationalized many of the issues regarding housing, access to healthcare, and health and safety for transgender prisoners.³¹⁰ In 2015, a series of cases in the United Kingdom sparked a review of policy guidance.³¹¹ In 2015, the British media reported the story of “Tara Hudson, a transgender woman who was first sent to Bristol, a male prison, but, after a public petition and remarks from the judge at her appeal against the sentence, was later transferred to a women’s prison.”³¹² When the prison minister was asked why it had taken so long to transfer Tara Hudson to a women’s prison, he responded “the guidelines allow some room for discretion” but noted “more generally, prisoners who are in transition to their acquired gender are entitled to live in that gender.”³¹³ Just a month later, in November 2015, the British media reported the case of Vicky Thomson, a transgender woman found dead in a male prison.³¹⁴ The following month, in December 2015, the media reported the death of another transgender woman, Joanne Latham, who was housed and found dead in a male jail.³¹⁵

Shortly after these media stories, in January 2016, the parliamentary Women and Equalities Committee published a report on transgender equality.³¹⁶ The commission noted the deaths of Vicky Thompson and Joanne Latham while in custody “underlined the overwhelming challenges faced by trans[gender] prisoners and the prison service itself.”³¹⁷ The report noted the “clear risk or harm” to transgender prisoners when they are not located in a prison “appropriate to their acquired/affirmed gender.”³¹⁸ In response to the report, the Ministry of Justice reviewed its policy and published a Review on the Care and Management of Transgender Offenders in November 2016.³¹⁹ The review

³¹⁰ See Beard, *supra* note 12, at 7; *Locked, Episode 4*, *supra* note 308.

³¹¹ See Beard, *supra* note 12, at 7 (discussing the cases of Tara Hudson, Vicky Thompson, and Joanne Latham).

³¹² Tara Hudson was later transferred to a women’s prison and she was ultimately released early. Beard, *supra* note 12, at 7.; O’Toole, *supra* note 135; *Transgender Woman Tara Hudson Moved to Female Prison*, BBC (Oct. 30, 2015), <https://www.bbc.com/news/uk-england-34675778>.

³¹³ Beard, *supra* note 12, at 6 (citations omitted).

³¹⁴ *Transgender Woman Vikki Thompson Found Dead at Armley Jail*, BBC (Nov. 19, 2015), <https://www.bbc.com/news/uk-england-leeds-34869620>.

³¹⁵ Eric Allison & Helen Pidd, *Second Transgender Prisoner Found Dead in Male Jail*, *GUARDIAN* (Dec. 1, 2015), <https://www.theguardian.com/society/2015/dec/01/second-trans-prisoner-joanne-latham-apparently-takes-own-life-in-male-jail>.

³¹⁶ Beard, *supra* note 12, at 8; WOMEN AND EQUALITIES COMMITTEE, *TRANSGENER EQUALITY*, 2015–16, HC 390, ¶ 5 (UK).

³¹⁷ WOMEN AND EQUALITIES COMMITTEE, *supra* note 316, ¶ 300. Additionally, the commission praised past reform as a “significant achievement” but noted that there was “significant inconsistency in the actual application” of guidance. *Id.* ¶ 306.

³¹⁸ *Id.* ¶ 320.

³¹⁹ Beard, *supra* note 12, at 9 (citations omitted).

revealed that the treatment of transgender offenders had not kept up with social values and contained a major shift in policy, allowing for greater accommodations for transgender prisoners even if they are not seeking medical interventions or a gender recognition certificate.³²⁰

Although media attention ultimately led to a review and a change in policies, it can also refuel discriminatory debates and negatively impact public perception of transgender people.³²¹ For instance, in 2018, there was renewed attention to the issue of housing when the media reported that a transgender woman, Karen White, had sexually assaulted other prisoners after being transferred to a women's facility.³²² Over a year later, in 2019, the controversy led to the opening of a ward for transgender prisoners in London; however, the media attention has largely been negative and critical of a system that could allow prisoners to secure "perks"—such as not having to share a cell and showering alone—by falsely claiming they are transgender.³²³ Transgender activists fear that the media attention on Karen White is harmful because it overemphasizes situations where offenders—in particular sexual predators—take advantage of local case boards, which in practice is extremely rare.³²⁴ The media attention on Karen White highlights the ongoing debate over the best way to approach the housing of transgender inmates and the potential downside to flexibility in housing for prisoners who have not transitioned.³²⁵

CONCLUSION

Although Adree Edmo has begun pre-surgical procedures for GCS, other transgender inmates throughout the United States³²⁶ have been consistently denied access to the same care as Edmo.³²⁷ It is unclear if the Supreme Court

³²⁰ *Id.*

³²¹ *Id.*

³²² Alexandra Topping, *Sexual Assaults in Women's Prison Reignite Debate Over Transgender Inmates*, GUARDIAN (Sept. 9, 2018), <https://www.theguardian.com/uk-news/2018/sep/09/sexual-assaults-in-womens-prison-reignite-debate-over-transgender-inmates-karen-white>.

³²³ Hymas, *supra* note 177.

³²⁴ Nazia Parveen, *Karen White: How 'Manipulative' Transgender Inmate Attacked Again*, GUARDIAN (Oct. 11, 2018), <https://www.theguardian.com/society/2018/oct/11/karen-white-how-manipulative-and-controlling-offender-attacked-again-transgender-prison>.

³²⁵ The debate in this instance is in regard to prisoners who have not undergone GCS, and most often is in regard to Male to Female prisoners who have male genitalia. *See id.*; Beard, *supra* note 12, at 11.

³²⁶ Including Vanessa Lynn Gibson, the inmate who sued in *Gibson v. Collier*, 920 F.3d 212, 216 (5th Cir. 2019).

³²⁷ James Dawson, *Supreme Court Rejects Transgender Inmate Case. What Does That Mean for Adree Edmo?*, BOISE STATE PUB. RADIO (Dec. 11, 2019), <https://www.boisestatepublicradio.org/post/supreme-court-rejects-transgender-inmate-case-what-does-mean-adree-edmo#stream/0>.

will take up this issue in the near future.³²⁸ What is clear is that the facts of each case are crucial to the medical necessity of GCS and cases testing the limits and applicability of the *Edmo* decision are beginning to be brought throughout the country.³²⁹

The United States is at a critical point in time where it can and should adopt policies and practices that improve the health and safety of all inmates, especially those who are vulnerable to mistreatment. The exploration of ID documents, housing, training, healthcare, and prison policies in the United Kingdom and Canada provides a more holistic picture of the treatment of transgender inmates. The following recommendations should be considered in the United States.

The United States should amend the process and create consistent standards to change legal recognition of sex/gender on federal government documents. Additionally, the federal government should allow flexibility for states to allow either no gender marking or alternative gender markings for transgender people on ID. These changes have the ability to help transgender people access public services they would not have otherwise and reduce arrests related to inconsistencies between a person's legal gender and the gender they outwardly display.

PREA makes a meaningful effort to identify and protect vulnerable populations through data collection and funding. Data collection systems should continue to be evaluated for effectiveness and improved based on any weaknesses. For instance, PREA should be amended to include a more extensive auditing system to ensure compliance and deter underreporting.

A complete overhaul of the housing structure that exists in the United States is not a realistic suggestion. Rather, to the extent possible, prisons should offer alternative housing options for transgender inmates that provide them with safety. If a separate facility or unit is not available, transgender inmates "should be housed in the least restrictive environment possible"; prison officials should avoid isolating or segregating prisoners unless safety issues dictate such actions.³³⁰

³²⁸ *See id.*

³²⁹ *See, e.g.,* Santiago v. Gage, 2019 U.S. Dist. LEXIS 199718 (W.D. Wash. Sep. 12, 2019) (dismissed in part, 2019 U.S. Dist. LEXIS 198693 (W.D. Wash. Nov. 15, 2019) because the defendants qualify for immunity from suit); Avilez v. Barr, 2020 U.S. Dist. LEXIS 19214 (N.D. Cal. Feb. 5, 2020) (denied because the plaintiff failed to demonstrate a likelihood of success on the merits of the claim because Immigration and Customs Enforcement took steps to provide hormone therapy).

³³⁰ Sevelius & Jenness, *supra* note 127, at 37.

Models including the transgender unit in London and the K6G unit in the Los Angeles County Jail are examples of innovative housing models that could be duplicated. To some extent, any system that categorizes individuals based on flexible criteria will involve individual gatekeepers who must make judgment calls. The value of housing options similar to the K6G unit should not be discounted on this basis. Instead, prisons should implement clear criteria that gatekeepers can use to determine eligibility for special housing. Additionally, when adopting a housing option similar to the K6G unit, the facility should have physical resources, such as appropriate bathing, sleeping, eating, recreational, and legal facilities to accommodate the population. An additional consideration of what makes the K6G unit successful is the staff. A gender-affirming approach should be adopted by all prison staff.

The United States should follow the example of the United Kingdom and amend its prison policies to allow for transgender inmates to express themselves in a manner consistent with their gender identity so long as it does not pose a security threat. All facilities that house transgender inmates should ensure that staff, including officers and medical professionals, are adequately trained to address the unique needs of the subpopulation. Inmates should have access to consultations and care with healthcare providers who are trained in issues affecting the transgender population. Additionally, when providing healthcare to transgender inmates, prisons should adopt policies and regulations that are consistent with the medical community's most recent recommendations.

The United States has an opportunity to learn from the choices of other modern democracies such as the United Kingdom and Canada when determining what policies can best serve transgender inmates. The United States should examine policies that impact the treatment of community-dwelling transgender individuals and help keep that population safe and out of prison. However, if transgender people are imprisoned, the United States has a responsibility to ensure their safety and the safety of other inmates. As awareness and prevalence of the transgender community grows, the United States' policies should change to improve the lives of both community-dwelling and incarcerated transgender people.

STEPHANIE SARAN RUDOLPH*

* Editor-in-Chief, *Emory International Law Review*, Volume 35; Juris Doctor Candidate, Emory University School of Law (2021); Master of Science in Educational Policy, University of Rochester (2016); Bachelor of Arts, *magna cum laude*, in Political Science, University of Rochester (2015). The author would like to thank her advisor, Professor Alexander "Sasha" Volokh, for his help and guidance with writing this Comment. The author would also like to thank Kevin for his patience and support during the writing process, throughout

all of law school, and in life. Stephanie would also like to thank her friends and family for their encouragement, and the Staff and Executive Board of the *Emory International Law Review* for their time and efforts.