BREAKING OUT OF THE PRISON HIERARCHY: TRANSGENDER PRISONERS, RAPE, AND THE EIGHTH AMENDMENT

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I. INTRODUCTION

On December 17, 2002, Kelly McAllister filed a claim against Sacramento County, its district attorney, and the sheriff's department, alleging threats and slurs based on her transgender[1] status, battery, and an assault that culminated in rape.[2] McAllister is a five-foot seven-inch, 135-pound pre-operative transsexual in her mid-thirties, who has lived as a woman for several years.[3] She was arrested in connection

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1. This comment will use the word "transgender" as an umbrella term encompassing a variety of individuals, "including transsexuals, transvestites, cross-dressers, drag queens and drag kings, butch and femme lesbians, feminine gay men, intersexed people, bigendered people, and others who . . . 'challenge the boundaries of sex and gender.'" Shannon Minter, *Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion in the Gay Rights Movement*, 17 N.Y.L. SCH. J. HUM. RTS. 589, 589-90 n.4 (2000) (quoting LESLIE FEINBERG, TRANSGENDER WARRIORS: MAKING HISTORY FROM JOAN OF ARC TO RUPAUL x (1996)). The term "transsexual" will refer more specifically to persons who "believe they belong to, want to be, and function as the 'other' sex." JASON CROMWELL, TRANSMEN & FTMS 20-21 (1999). In general, the word "sex" will be used to refer to biology or anatomy, and "gender" will refer to "the collection of characteristics that are culturally associated with maleness or femaleness." Jamison Green, *Introduction* to PAISLEY CURRAH & SHANNON MINTER, POLICY INST. OF THE NAT'L GAY & LESBIAN TASK FORCE & NAT'L CTR. FOR LESBIAN RIGHTS, TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS 1, 2 (2000), *available at* http://www.ngltf.org/library/index.cfm. Finally, "'[g]ender identity' refers to a person's internal, deeply felt sense of being either male or female or something other or in between." *Id.* at 3.

2. *See* Press Release, National Transgender Advocacy Coalition, Transgendered Woman Raped in Sacramento Jail Files Claim (Dec. 18, 2002), *available at* http://www.ntac.org/pr/release.asp?did=59.

3. *See id.*

with a reported public disturbance.[4] After McAllister's court appearance, she was placed in a cell with a larger male inmate who brutally raped her.[5] Her attorney claims that the sheriff's department knew of McAllister's transgender status, but still placed her in a cell with a man.[6]

McAllister's ordeal typifies the risk faced by male-to-female (MTF) transgender persons incarcerated in jails and prisons across the country.[7] The common practice of classifying transgender prisoners based on their genitalia alone creates a substantial risk of rape and prolonged sexual abuse at the hands of more aggressive prisoners.[8] Although 42 U.S.C. § 1983[9] provides a civil remedy for constitutional violations of prisoners' civil rights,[10] case law interpreting the civil rights statute as applied to Eighth Amendment violations has placed several barriers before prisoner plaintiffs seeking damages or injunctive relief.[11] Often, advocates for prisoners' civil rights must fight against the stereotype that prisoners' claims are frivolous and do not belong in federal court.[12] This comment will examine the phenomenon of prison rape with emphasis on the transgender prisoner's perspective,[13] discuss the current legal standard for civil rights claims,[14] and offer suggestions for reducing violence.[15]

Part II will provide background information on how

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4. *See id.*
5. *See id.*
6. *See id.*
7. *See infra* Part II.B.1 (discussing genitalia-based placement). This comment will focus on sexual violence directed at male-to-female (MTF) transgender prisoners housed in men's prisons. Though genitalia-based placement also creates problems for MTF and female-to-male (FTM) prisoners housed in women's prisons, experiences of transgender prisoners in women's prisons have not been well documented. Alexander L. Lee, *Nowhere to Go But Out: The Collision Between Transgender & Gender-Variant Prisoners and the Gender Binary in America's Prisons* 26-28 (2003), *at* http://srlp.org/alex%20lees%20paper2.pdf.
8. *See* Darren Rosenblum, *"Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 522-23 (2000).
9. 42 U.S.C. § 1983 (West 1994).
10. *See infra* Part II.D.1-2 (discussing claims for civil rights violations).
11. *See infra* Part II.D.2.
12. *See* ROGER A. HANSON & HENRY W.K. DALEY, U.S. DEP'T OF JUSTICE, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS 3 (1995) (discussing popular images of prisoner litigation).
13. *See infra* Part II.B-C.
14. *See infra* Part II.D.
15. *See infra* Part V.

courts have dealt with transgender and transsexual persons generally, in terms of how such individuals are defined and how they define themselves.[16] It will present information on how the prison system classifies transgender inmates, and how this compares with attempts to classify transgender persons in civil cases.[17] Part II will also discuss the prevalence of rape in prison, the nature of the prison hierarchy, and complications presented by AIDS.[18] Finally, the background section will explain the standard for § 1983 claims based on Eighth Amendment violations, and identify areas of difficulty for plaintiffs.[19]

Part III will describe how the existing legal standards and prison administrative policies combine to disadvantage transgender inmates.[20] Part IV will analyze how the policy of genitalia-based placement, the subjective prong of the deliberate indifference test, and exhaustion requirements work together to put transgender prisoners at risk and simultaneously cut off avenues for relief.[21] Part V proposes a strategy for encouraging changes to genitalia-based placement policies.[22]

II. BACKGROUND

A. The Struggle to Claim a Transgender Identity

The first difficulty in any case involving a transgender litigant often lies in determining the extent to which the court will give the person's subjective gender identity legal significance.[23] In cases involving transsexual litigants, courts often have begun this inquiry by establishing whether or not the person is a "genuine" transsexual.[24] But, as one commentator

16. *See infra* Part II.A.
17. *See infra* Part II.B.
18. *See infra* Part II.C.
19. *See infra* Part II.D.
20. *See infra* Part III.
21. *See infra* Part IV.A-C.
22. *See infra* Part V.
23. *See* Debra Sherman Tedeschi, *The Predicament of the Transsexual Prisoner*, 5 TEMP. POL. & CIV. RTS. L. REV. 27, 28-29 (1995).
24. *See* Littleton v. Prange, 9 S.W.3d 223, 225 (Tex. App. 1999) ("Christie was diagnosed psychologically and psychiatrically as a genuine male to female transsexual."); Maggert v. Hanks, 131 F.3d 670, 671 (7th Cir. 1997) (asking whether prisons had a duty to administer the standard cure (estrogen therapy) "to a prisoner who unlike Maggert is diagnosed as a *genuine* transsexual") (em-

has noted: "Any time we try to draw a clear boundary around gender we end up cutting somebody's flesh."[25] This sentiment resonates strongly with respect to legal definitions.[26] Debra Tedeschi has observed, "[W]hile the law draws lines, a transsexual crosses lines,"[27] and indeed, the attempt to devise a formula for classifying transgender persons as either male or female has frustrated courts and the transgender community alike.[28] Frequently, courts have tried to hammer transgender litigants into one category or the other,[29] and have struggled to define the term "transsexual" itself.[30] The definitions used are important, because they can exclude from protection persons who may be in need of it.[31]

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phasis added).

25. Emi Koyama, *A Fest in Distress*, BITCH, Summer 2002, at 71 (Koyama contributes to a discussion of questions raised by the inclusion of trans women in the Michigan Womyn's Music Festival.).

26. *See* Tedeschi, *supra* note 23, at 28-29. "Perhaps transsexual prisoners would not pose such a problem to the legal and penal systems if their situations were analyzed from a perspective that takes into account the uniqueness of being a transsexual." *Id.* at 28-29.

27. *Id.* at 27.

28. *See Littleton*, 9 S.W.3d at 230-31. The court held that Christie Lee Littleton, a post-operative male-to-female transsexual, was correctly classified as male because her chromosomes remained the same after surgery and her original birth certificate stated she was male. *Id.* Therefore, she could not legally be married to another male and could not bring a cause of action as his surviving spouse. *Id.* Even though Littleton underwent surgery to bring her body into congruence with her gender identity and amended her birth certificate to reflect her gender identity, the court was not persuaded, and summarily declared: "There are some things we cannot will into being. They just are." *Id.* at 231. *See also In re* Estate of Gardiner, 22 P.3d 1086, 1110 (Kan. Ct. App. 2001) (reversing the trial court's determination that the post-operative male-to-female transsexual plaintiff was male and her marriage therefore void and remanding with the order that the trial court consider the following factors in addition to the her chromosomal makeup in determining her gender: "gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity"), *aff'd in part and rev'd in part*, 42 P.3d 120 (Kan. 2002), *cert. denied sub nom* Gardiner v. Gardiner, 123 S. Ct. 113 (2002).

29. *See Littleton*, 9 S.W.3d at 230-31; *Gardiner*, 22 P.3d at 1110.

30. *See infra* Part II.A.1 (discussing various definitions of the term "transsexual").

31. *See* Maggert v. Hanks, 131 F.3d 670, 671 (7th Cir. 1997) (distinguishing between an individual whose "sexual identity is polymorphous" and an individual diagnosed with gender dysphoria). *See generally* Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37 (2000) (outlining the advantages and disadvantages of different strategies in drafting transgender-specific protective legislation).

1. Terminology in the Courts

Courts and legal scholars have applied a variety of definitions of the term "transsexual."[32] Writing for the majority in *Farmer v. Brennan*,[33] Justice Souter adopted the often criticized[34] medical definition found in the 1989 Encyclopedia of Medicine: "one who has '[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,' and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change."[35] Another court defined "transsexualism" as a gender identity disorder in which people believe themselves to be "cruelly imprisoned within a body incompatible with their real gender identity."[36] Courts have also begun their analysis "by stating what a transsexual is not."[37] After distinguishing transsexuals from homosexuals and transvestites, the court in *In re Estate of Gardiner* went on to say: "A transsexual is one who experiences himself or herself as being of the opposite sex, despite having some biological characteristics of one sex, or one whose sex has been changed externally by surgery and hormones."[38] Finally, some courts seem to conflate transsexuality with transgenderism in their attempt to define the former,[39] even though the two are generally recognized as distinct, but not mutually exclusive.[40]

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32. *See* discussion *infra* Part II.A.1.

33. Farmer v. Brennan, 511 U.S. 825 (1994).

34. *See* Rosenblum, *supra* note 8, at 506-07; CROMWELL, *supra* note 1, at 11, 19.

35. *Farmer*, 511 U.S. at 829 (quoting AMERICAN MEDICAL ASSOCIATION, ENCYCLOPEDIA OF MEDICINE 1006 (1989)).

36. *See* Rosenblum, *supra* note 8, at 506 (quoting Powell v. Shriver, 175 F.3d 107, 111 (2d Cir. 1999)).

37. *Gardiner*, 22 P.3d at 1093.

38. *Id.*; s*ee also* CROMWELL, *supra* note 1, at 20 ("'Transsexual' is used in two ways: first, to describe someone who is in the process of becoming (transitioning) a man (and vice versa); and second, to describe someone who has completed sex reassignment surgery.").

39. Littleton v. Prange, 9 S.W.3d 223, 226 (Tex. App. 1999) ("'Transgenderism describes people who experience a separation between their gender and their biological/anatomical sex'") (quoting Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN'S L.J. 219, 237 (1998)).

40. *See* CROMWELL, *supra* note 1, at 22-23.

> Within [the transvestite and transsexual] community, [the term "transgender"] is used in two ways. First, it designates individuals who do not fit into the categories of transvestite and transsexual. Transgendered identification offers a more specific reference to people who

2. Medicalization

On one hand, the practice of defining transsexuals in medical terms, combined with the availability of hormones and surgery, made a "politicized transgender movement" possible.[41] As the courts have used them, however, medical definitions more often have perpetuated negative stereotypes about transsexual people without helping them to achieve their goals in court.[42] Rejecting the notion that a prisoner not formally diagnosed with "gender dysphoria" was entitled to treatment, Judge Posner gratuitously inserted the following opinion on transsexuals: "Someone eager to undergo this mutilation is plainly suffering from a profound psychiatric disorder."[43] Posner's blanket characterization of transsexuals as "disordered" has been widely disputed by the transgender community: "Such language, touted as being 'scientific and neutral' or merely descriptive, is stigmatizing and seldom descriptive (e.g., gender dysphoria, 'wrong body,' and 'afflicted'

> live as social men or as social women but neither desire nor have sex reassignment surgery. . . . Second, "transgender" is used as an encompassing term for transvestites and transsexuals as well as for those who do not fit neatly into either category.

Id. at 23; s*ee also* Minter, *supra* note 1, at 589-90 n.4.

41. Minter, *supra* note 1, at 608. Minter also points out that the medical profession has defined transsexualism in "rigid, heterosexist terms." *Id.* at 609.

> [O]nly transsexual people who conformed to stereotypical gender norms and who were deemed capable of "passing" in their new sex were able to obtain treatment. More generally, the ability of transsexual people to gain access to medical services, and to legal recognition and protection has depended on how successfully they could hide their transsexual status and approximate a "normal" heterosexual life, with the result that those who are unable or unwilling to comply with these oppressive standards have little or no protection at all.

Id.

42. *See* Maggert v. Hanks, 131 F.3d 670, 671 (7th Cir. 1997) (simultaneously rejecting prisoner's claim of cruel and unusual punishment for failure to treat gender dysphoria and labeling all transsexuals "profound[ly] . . . disorder[ed]"); *see also* Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15 (2003) (discussing the disadvantages of relying on gender identity disorder to argue on behalf of transgender litigants); *cf.* Murray v. United States Bureau of Prisons, No. 95-5204, 1997 WL 34677 (6th Cir. Jan. 28, 1997). On the rationale that transsexualism was recognized as a medical disorder, the *Murray* court held that a "complete refusal by prison officials to provide a transsexual with any treatment at all would state an Eighth Amendment claim for deliberate indifference to medical needs." *See id.* at 3. Nevertheless, the court refused to second-guess the prison physician's allegedly mistaken assessment of the level of hormones required to prevent the plaintiff from regressing in the development of feminine characteristics. *See id.*

43. *Maggert*, 131 F.3d at 671.

or 'suffering' transsexuals)."[44] Nonetheless, courts seem reluctant to recognize transsexuals as such without some kind of mandate from a medical professional.[45]

3. Self-definition

Apart from medical definitions, definitions based on individual perception of identity have arisen in the transgender community.[46] Kate Bornstein's is one of the most inclusive: "Anyone whose performance of gender calls into question the construct of gender itself."[47] Bornstein also delineates three categories of transsexuals: pre-operative, post-operative, and non-operative.[48] The last category describes those who live in society as their opposite gender, but who do not wish to change their biological sex, either because they feel the surgery is too expensive or too risky, or because they are happy with their bodies the way they are.[49] Others in the transgender community feel that a transgender person with no intention of having surgery would not view him or herself as a transsexual.[50] Furthermore, because many transsexual people spend a significant period of time in transition, they may not fit neatly into any of these categories at any given point in time.[51] Finally, the transgender community is so diverse and the experience of gender so personal that some prefer broad definitions[52] over narrow ones.[53] In a nutshell: "There is no

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44. CROMWELL, *supra* note 1, at 19.

45. *See* Schwenk v. Hartford, 204 F.3d 1187, 1193, 1193 n.4 (9th Cir. 2000) (commenting that Schwenk never received any medical or psychiatric treatment for gender dysphoria, but referencing with approval Schwenk's submission of the affidavit of Karil Klingbeil, a Clinical Associate Professor of Social Work and Adjunct Professor of Psychiatry and Behavioral sciences at the University of Washington, in which Klingbeil confirmed that Schwenk's behavior was in no way "inconsistent with gender dysphoria"); *Littleton*, 9 S.W.3d at 224-25 (acknowledging Littleton as a "genuine male to female transsexual" according to a psychological and psychiatric diagnosis based on guidelines established by the Johns Hopkins Group).

46. *See supra* notes 1, 41, 43.

47. KATE BORNSTEIN, GENDER OUTLAW 121 (1995).

48. *Id.*

49. *See* CURRAH & MINTER, *supra* note 1, at 40 (advising that language in anti-discrimination statutes should recognize that transgender identities can manifest themselves in many different ways).

50. *See* CROMWELL, *supra* note 1, at 22.

51. *See id.* at 23 (questioning whether an FTM or transman who has chest reconstruction and nothing more is appropriately classed as "pre-op" or "post-op").

52. *See* Green, *supra* note 1, at 3-4 ("In its broadest sense, transgender en-

one way to be 'trans'."[54]

B. Making Transgender People Fit

> Gender non-conforming people have consistently been among the most visible and vulnerable members of gay communities—among the most likely to be beaten, raped, and killed; among the most likely to be criminalized and labeled deviant; among the most likely to end up in psychiatric hospitals and prisons; among the most likely to be denied housing, employment, and medical care; among the most likely to be rejected and harassed as young people, and; among the most likely to be separated from their own children.[55]

Not surprisingly, prison merely exacerbates the prejudice transgender persons already face.[56] Because little formal research on transgender prisoners exists, [57] it is difficult to assess how many people are put in harm's way as a result of genitalia-based placement. Author Darren Rosenblum has estimated that transgender prisoners number in the low thousands nationwide.[58] More significant than raw numbers is the disproportionate rate at which transgender persons enter the criminal justice system.[59] A study of police attitudes towards transgender individuals in the San Francisco Bay Area revealed that transgender women are often stereotyped as sex workers.[60] This in turns leads to harassment and solicitation by undercover officers attempting to crack down on prostitution.[61] In addition, transgender persons often spend

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compasses anyone whose identity or behavior falls outside stereotypical norms.").

53. *See id.* at 8.

54. *Id.*

55. Minter, *supra* note 1, at 592.

56. *See* Rosenblum, *supra* note 8, at 516 ("Once imprisoned, transgendered people find fighting for their gender identity a monumental task, as they confront the gender segregation, transphobia, and limited resources of the prison system.").

57. *See* Alexander L. Lee, *supra* note 7, at 5.

58. Rosenblum, *supra* note 8, at 517.

59. *See* Lee, *supra* note 7, at 10 (citing results of a February 18, 1998 study by the San Francisco Department of Public Health). Of the 155 individuals surveyed, "65% of [male-to-female] respondents had been incarcerated over one night in a jail or prison, while 29% of [female-to-male] respondents had been." *Id.*

60. *See* Lee, *supra* note 7, at 8.

61. *See id.*

time in jail following false arrests for entering the "wrong" bathroom or for failure to produce "proper" identity documents.[62] Finally, because transgender people are disproportionately low-income,[63] they often face consequences for "quality-of-life" crimes such as sleeping in public.[64]

1. Prison Placement Policies

On May 4, 2001, a federal judge recommended that Patricia McGrath, a sixty-six-year-old transgender inmate convicted of armed bank robbery, be placed in a women's prison upon her discharge from a federal medical center.[65] Although prison authorities are not required to follow the judge's recommendation, they often do.[66] While federal prison officials had no formal policy on transgender inmates as of 2001, "usually, a defendant with a penis is placed in a male prison, and a defendant with a vagina is placed in a female prison."[67] Commenting on McGrath's gender identity prior to sentencing, Judge DuBois noted that from McGrath's outward appearance, she obviously viewed herself as a woman.[68] McGrath had been living as a female for the past thirty years.[69]

Genital surgery alone usually determines whether a transsexual or transgender prisoner will be classified as male or female, for the purposes of prison housing.[70] Individuals who have not opted for this surgery are housed according to their biological sex, even if they identify differently and have had other surgeries in order to appear more masculine or

62. *See, e.g.*, Spade, *supra* note 42, at 17, 17 n.5.

63. *Id.* at 36.

64. *See* Lee, *supra* note 7, at 9.

65. *See* Timothy Cwiek, *Judge Rules on Trans Inmate*, PHILA. GAY NEWS, May 25-31, 2001 (copy on file with Philadelphia Gay News).

66. *See id.* When federal prison officials decline to follow a judge's recommendations, they must notify the judge in writing. *See* Federal Bureau of Prisons Policy Statement, P.S. 5070.10, at 4 (June 30, 1997), http://www.bop.gov/progstat/5070_010.pdf ("When the court's recommendation regarding an institution and/or geographic location is not followed, the Regional Director shall write a letter to the court explaining the reason(s) for this decision within five working days after designation.").

67. *See* Cwiek, *supra* note 65.

68. *Id.*

69. *See id.*

70. *See* NAT'L CENTER FOR LESBIAN RIGHTS, TRANSSEXUAL PRISONERS (Dec. 2001) [hereinafter TRANSSEXUAL PRISONERS], www.nclrights.org/publications/pubs/tsprison.pdf.

feminine, as the case may be.[71] Courts have not been receptive to plaintiff's challenges to the system.[72] In *Meriwether v. Faulkner*, the court concluded that an administrative decision to place the plaintiff in a men's prison did not violate equal protection, without evidence that the classification was motivated by an intent to discriminate against her.[73] Genitalia-based classification puts MTF transgender prisoners at special risk for physical injury, sexual harassment, sexual battery, rape, and death,[74] because the prison hierarchy subjugates the weak to the strong[75] and equates femininity with weakness.[76]

New York, a state that tends to house greater numbers of transgender prisoners, attempted to reduce this risk by creating a ward to house gay prisoners and placing transgender prisoners with them.[77] Often, prison officials resort to segregating transgender prisoners from other prisoners,[78] simultaneously cutting off recreational, educational, and occupational opportunities, and associational rights.[79] Faced with the possibility of prolonged isolation, boredom and loneliness, some transgender prisoners may prefer the general population.[80]

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71. *See id. See generally* Rosenblum, *supra* note 8, at 520-36 (discussing genitalia-based placement and alternatives).

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

73. *See id.*

74. *See* Rosenblum, *supra* note 8, at 522-26 (discussing the risks transgender people face in prison).

75. *See id.* at 523.

76. *See* Terry A. Kupers, *Rape and the Prison Code*, *in* PRISON MASCULINITIES 111, 115 (Don Sabo et al. eds., 2001) ("Of course, the hierarchy does not begin or end with prisoners. The security officers wield power over the prisoners; the warden dominates the security officers; and at the other end of the hierarchy, more than a few prisoners have been known to rape women or beat them and their children."); Stephen Donaldson, *A Million Jockers, Punks, and Queens*, *in* PRISON MASCULINITIES, 118, 119 (Don Sabo et al. eds., 2001) ("[Transvestites] are highly desirable as sexual partners because of their willingness to adopt 'feminine' traits, and they are highly visible, but the queens remain submissive to the 'Men' and, in accordance with the prevalent sexism, may not hold positions of power in the prisoner social structure.").

77. *See* Rosenblum, *supra* note 8, at 534. New York had seventy prisoners on hormone treatments in its state prisons and seventeen in its city prisons at the time Rosenblum wrote his article. *See id.* at 517.

78. *See id.* at 529.

79. *See* TRANSSEXUAL PRISONERS, *supra* note 70; Rosenblum, *supra* note 8, at 530.

80. *See* Rosenblum, *supra* note 8, at 530.

2. Determining Sex in Civil Litigation

By comparison, in many civil cases, even the decision to undergo genital surgery has no effect on the status of transgender litigants.[81] The outcome of the *Gardiner* case on appeal to the Kansas Supreme Court illustrates the typical manner in which courts deny post-operative transsexuals with genital surgery legal recognition of their reassigned sex.[82] The case involved a dispute over the probate of the plaintiff's father's will.[83] In 1998, Marshall G. Gardiner married J'Noel Gardiner, a male to female transsexual.[84] When Marshall died his son Joe, from whom Marshall had been estranged, filed a petition for letters of administration, claiming that he was the sole heir to Marshall's estate because J'Noel was born a man, and therefore her marriage to his father was void.[85]

The district court entered summary judgment in Joe's favor on the issue of the validity of the marriage, relying on *Littleton v. Prange* to conclude that J'Noel was male as a matter of law, because her chromosomes remained the same even after the many surgeries and other forms of treatment she had undergone.[86] Reversing and remanding for further consideration on the issue of J'Noel's sex, the court of appeals directed the trial court to consider "factors in addition to chromosome makeup, including: gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity."[87] Further, the court of appeals indicated that the trial court should consider whether an individual was male or female at the time the marriage license issued, not at the

81. *See* Littleton v. Prange, 9 S.W.3d 223, 230-31 (Tex. App. 1999); *In re* Estate of Gardiner, 42 P.3d 120, 136-37 (Kan. 2002) (reversing on the issue of whether the trial court must determine the transsexual litigant's gender status by a multi-factor test, and holding that absent a clear indication from the legislature to change the public policy of Kansas to include transsexuals within the definition of "opposite sex," a transsexual person will be considered his or her original sex for the purposes of the state marriage statute) [hereinafter *Gardiner II*].

82. *See Gardiner II*, 42 P.3d at 136-37.

83. *See id.* at 121.

84. *See id.* at 123.

85. *See id.*

86. *See id.* at 124.

87. *See In re* Estate of Gardiner, 22 P.3d 1086, 1110 (Kan. Ct. App. 2001).

time of birth.[88]

The supreme court disagreed, on the ground that the state legislature had intended the words "opposite sex" in the narrow and traditional sense when it wrote the state's marriage statute.[89] Without a clear indication from the legislature that it intended to include transsexuals, J'Noel could not be considered the "opposite sex" of Marshall for the purposes of the marriage statute.[90] After refusing to recognize J'Noel as a female, the Kansas Supreme Court went on to say:

> We are not blind to the stress and pain experienced by one who is born a male but perceives oneself as a female. We recognize that there are people who do not fit neatly into the commonly recognized category of male or female, and to many life becomes an ordeal. However, the validity of J'Noel's marriage to Marshall is a question of public policy to be addressed by the legislature and not by this court.[91]

The United States Supreme Court declined to grant certiorari.[92]

C. Rape and Coercive Sex in Prison

"*A million jockers, punks, and queens demand an explanation, and their numbers continue to soar with every year.*"[93]

1. How Prevalent Is Prison Rape?

Although prison rape between males entered relatively recently into the general public's awareness,[94] its prevalence

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88. *See id.*

89. *See Gardiner II*, 42 P.3d at 136-37 (citing Ulane v. E. Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984)).

90. *See id.* at 136-37.

91. *Id.* at 137.

92. *See* Gardiner v. Gardiner, 123 S. Ct. 113, 113 (2002). Subsequent cases involving the legality of transgender marriages include Kantaras v. Kantaras, No. 98-5375CA, (Fla. Cir. Ct. Feb. 21, 2003), http://www.courttv.com/archive/trials/kantaras/docs/opinion.pdf (holding that the marriage of a transsexual man, Michael Kantaras was a legal marriage), and *In re* Marriage of Simmons, in which an Illinois trial court held that Sterling Simmons, a transgender husband and father, was not legally male and therefore not legally married or a father. National Center for Lesbian Rights, *In re Marriage of Simmons*, at http://www.nclrights.org/cases/simmons.htm (case summary). Both cases have been appealed.

93. *See* Donaldson, *supra* note 76, at 126.

94. *See* Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most "Open" Secret*, 18 YALE L. & POL'Y REV. 195, 197 (1999).

no longer comes as a surprise to most Americans.[95] The phenomenon has been recorded in popular songs such as "Date Rape," by Sublime,[96] and in movies, such as *The Shawshank Redemption*.[97] Studies vary as to the estimated frequency of prison rapes.[98] In 1974, Carl Weiss and David James Friar wrote that of the forty-six million Americans who would be arrested at some point in their lives, ten million of them would be raped in prison.[99] In 1992, the Federal Bureau of Prisons estimated that between nine and twenty percent of prisoners had been sexually assaulted.[100] Two studies, one in 1982 by Wayne S. Wooden and Jay Parker, and another in 1996 by Cindy Struckman-Johnson, concluded that the rate at which inmates are forcibly penetrated is somewhere around twelve to fourteen percent of the total male inmate population.[101] In addition, Struckman-Johnson's study ob-

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95. *See* Daniel Brook, *The Problem of Prison Rape*, LEGAL AFF., Mar.-Apr. 2004, at 29 (noting that jokes about prison rape have become more common in popular culture).

96. SUBLIME, *Date Rape*, *on* 40 OZ. TO FREEDOM (Gasoline Alley/MCA Records, 1992).

> One night in jail it was getting late.
> He was butt-raped by a large inmate
> And he screamed,
> But the guards paid no attention to his cries.

Id. "Date Rape" became the most requested song ever at KROQ, a modern rock radio station in L.A. Zack Stenz, *Sublime Time: Band's Success Far from Ridiculous*, THE SONOMA INDEPENDENT, May 16-22, 1996, http://www.metroactive.com/papers/sonoma/05.16.96/music-9620.html.

97. THE SHAWSHANK REDEMPTION (Castle Rock Entertainment/Time Warner, Inc. 1994). Hundreds of web pages around the world are devoted to this film. Stephen Schurr, *Shawshank's Redemption: How a Movie Found an Afterlife*, WALL ST. J., Apr. 30, 1999, at B1, B4, http://www.vzavenue.net/~speedtech/index2.html (on file with the Santa Clara Law Review).

98. Bell et al., *supra* note 94, at 198.

99. CARL WEISS & DAVID JAMES FRIAR, TERROR IN THE PRISONS: HOMOSEXUAL RAPE AND WHY SOCIETY CONDONES IT 61 (1974). Though the term "homosexual rape" has often been used in reference to male prison rape, *e.g.*, Farmer v. Brennan, 511 U.S. 825, 852 (1994) (Blackmun, J., concurring), the idea that "predatory homosexuals" lurk in prisons is a myth. Brook, *supra* note 95, at 28; Donaldson, *supra* note 76, at 125 ("For the majority of prisoners, penetrative sex with a punk or queen remains a psychologically heterosexual and, in the circumstances of confinement, normal act . . . .").

100. Kupers, *supra* note 76, at 111.

101. Bell et al., *supra* note 94, at 198. Furthermore, Struckman-Johnson found that prison guards were responsible for approximately one-fifth, or eighteen percent, of all sexual victimizations. *Id.* at 198 n.15. Struckman-Johnson performed another study in 2000, which revealed rates of sexual aggression of twenty and twenty-one percent in seven midwestern prisons. James Robertson,

served that twenty-two percent of male inmates had been coerced or persuaded into some form of sexual contact in prison, close to the twenty-three percent finding of Daniel Lockwood's 1986 study of a maximum security New York state prison.[102] In contrast, a 1994 study by Christine Saum reported much lower results.[103] Saum anonymously surveyed 101 inmates in a medium security drug treatment program, but only five participants reported having ever been victimized, and none of them admitted they had been raped in the year prior to the study.[104]

The lack of consensus in the studies has several explanations.[105] First, the results often depend on how broadly or narrowly rape is defined.[106] Some studies, such as Struckman-Johnson's, define "rape" broadly as any unwanted sexual contact.[107] Others, like Saum's, define it narrowly as unwanted oral or anal sex.[108] Furthermore, prison rape experts do not agree on whether some sexual experiences in prison might be considered consensual.[109] Writers like Terry Kupers challenge studies that do not take into account the inherently coercive atmosphere in prison:[110]

> [T]hese figures do not include the huge number of men who "consent" to having sex with a tougher con or consent to having sex with many other prisoners only because they are very afraid that, if they do not, they will be repeatedly beaten and perhaps killed. In my view, this kind of coerced sex also constitutes rape.[111]

Second, prison rape experts often find official prison records of inmate rape unreliable.[112] In 1968, after investigating 156 cases of rape over a two-year period, and interviewing over 3000 inmates and guards, Philadelphia chief assistant

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A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison, 81 N.C. L. REV. 433, 442 n.47 (2003).

102. Bell et al., *supra* note 94, at 198.

103. *Id.*

104. *Id.* at 198-99.

105. *See id.* at 199.

106. *See id.*

107. *Id.*

108. Bell et al., *supra* note 94, at 199.

109. *See id.*

110. Kupers, *supra* note 76, at 111.

111. *Id.* In addition, Kupers acknowledges that consensual sex sometimes occurs in prison, distinguishing it from coercive sex or rape. *Id.* at 115.

112. *See* Bell et al., *supra* note 94, at 199.

district attorney Alan J. Davis concluded that the reported rapes were "the tip of the iceberg" and that the actual number of rapes in this time period was closer to 2000.[113] Of those, only ninety-six were reported by the victims; sixty-four had been written up in prison records; forty of the offenders had been disciplined; and twenty-six cases had been passed on to the police for prosecution.[114]

Third, many inmates do not report rape for fear of being labeled a "snitch," which would place their lives at risk.[115] Finally, the outcome of the study may depend on what kind of prisoner is examined.[116] Prison rape tends to be more prevalent in state and city institutions, which house greater numbers of inmates convicted of crimes of violence, than in federal institutions.[117]

Combined with lack of reporting, the relative absence of reliable studies on prison rape frustrates efforts to make prisons safer.[118] To further the goal of preventing prison rape, Congress enacted the Prison Rape Elimination Act of 2003,[119] which calls for the Bureau of Justice Statistics of the Department of Justice to conduct a yearly "review and analysis of the incidence and effects of prison rape."[120] Among other things, the Act directs that the Bureau shall review and analyze common characteristics of victims and perpetrators of rape.[121] The Act also creates a National Prison Rape Commission to study the effects of prison rape and make recommen-

113. SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 264-65 (1975).

114. *Id.* at 265.

115. *E.g.*, Kupers, *supra* note 76, at 112. "According to the code, snitching is the worst offense, . . . punishable by repeated beatings, rapes, or even death." *Id.*

116. *See* Bell, et. al., *supra* note 94, at 199 (noting that Saum questioned inmates who were in a drug treatment program in a medium security setting, and admitted that the prison conditions may have affected the prevalence of rape); HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS 138 (2001) (noting significant differences in victimization rates among prison systems).

117. BROWNMILLER, *supra* note 113, at 260.

118. *See* HUMAN RIGHTS WATCH, *supra* note 116, at 144-45 (noting that prison authorities' failure to collect data can indicate that they do not take the issue of prison rape seriously); *infra* Part II.D.3 (noting that underreporting creates opportunities for prison authorities to argue they did not know of the risk of rape).

119. Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. §§ 972-87 (2003).

120. 42 U.S.C. § 15603(a) (2003).

121. *Id.* § (a)(1)(A).

dations to the Attorney General regarding national standards for prevention.[122] States that fail to adopt the national standards will receive a five percent reduction in federal funding for programs covered by the Act.[123]

2. Masculinity and the Prison Hierarchy

Prison rapes do not occur in a vacuum.[124] In order to understand the phenomenon of rape between inmates, one must place it in the context of the prison hierarchy, the "ranking of prisoners by their fighting ability and manliness."[125] Often referred to informally as the prison "code,"[126] the set of rules governing interaction between prisoners requires that men "act tough, lift weights, and be willing to fight to settle grudges,"[127] or risk being labeled weak and subjected to beatings and rape.[128] At the top of the hierarchy, dominant men[129] subjugate weaker men through physical violence or manipulation.[130] In general, sexually dominant inmates consider themselves heterosexual and view their role as different from the passive/receptive role forced upon their victims.[131]

The bottom of the hierarchy is "defined in terms of the feminine."[132] At the lowest level are "punks," usually heterosexual inmates who have been forced into a sexually submissive role, often by gang rape, but also by other coercive tactics.[133] A "punk" can also be a homosexual or bisexual who

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122. 42 U.S.C. § 15606(a), (e). The Commission's power to make recommendations is limited by subsection (e)(3), which states: "The Commission shall not propose a recommended standard that would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities." *Id.* § e)(3).

123. 42 U.S.C. § 15607(b)

124. *See* Kupers, *supra* note 76, at 113.

125. *Id.*

126. *Id.* at 113-14.

127. *Id.* at 114.

128. *See id.*

129. Colloquial terms for dominant prisoners include "wolves," "daddies," "jockers," and "pimps." INEZ CARDOZO-FREEMAN, THE JOINT: LANGUAGE AND CULTURE IN A MAXIMUM SECURITY PRISON, 370-94 (1984) (using the terms "wolf," "daddy," and "pimp"); Donaldson, *supra* note 76, at 118 (explaining the term "jocker"). This comment uses these terms because they appear frequently in anecdotal reports of prison rape. The reader should nonetheless be aware that colloquial expressions change rapidly and vary from region to region.

130. *See* Kupers, *supra* note 76, at 115.

131. *See* Donaldson, *supra* note 76, at 125.

132. Kupers, *supra* note 76, at 115.

133. Donaldson, *supra* note 76, at 119.

rejected the "queen" role described below, but was forced into a sexually submissive role ("turned out") anyway.[134] Young or inexperienced prisoners often find themselves preyed upon by "wolves" offering loans, cigarettes, or other luxuries, and later demanding sexual repayment of the debts.[135] Sexual harassment usually precedes victimization, and can take the form of statements that feminize the target, overt sexual propositions, sexual extortion, or physical overtures.[136] The number of punks tends to increase with the security level of the institution, although big city jails and juvenile institutions are also thought to house them in high numbers.[137]

Another smaller class of inmates termed "queens" consists mainly of transgender and effeminate homosexual inmates who are assigned female roles and referred to as females generally.[138] Queens and other submissive inmates take on stereotypically feminine tasks: doing laundry, cleaning the cell, straightening the bunks, and making and serving coffee.[139] Queens are forbidden to hold overt positions of power and are often used for prostitution,[140] with their earnings going to the pimp responsible for their protection.[141] Because they are often scapegoated and viewed with contempt by prison staff, queens are frequently given the least desirable jobs, kept under surveillance, and harassed by homophobic guards.[142] In institutions that segregate queens from other prisoners, they are often denied privileges afforded the general population, including "recreation hall attendance, exercise and fresh air in the yard, library visits, chapel atten-

134. *Id.* at 119; CARDOZO-FREEMAN, *supra* note 129, at 370-71 (using the phrase "turned out" in context).

135. BROWNMILLER, *supra* note 113, at 266-67 (quoting Alan J. Davis, *Sexual Assaults in the Philadelphia Prison System*, *in* THE SEXUAL SCENE 107-24 (Gagnon & Simon eds., 1970)).

136. James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1, 9-15 (1999).

137. Donaldson, *supra* note 76, at 119-20.

138. *Id.* at 119.

139. *See id.* at 120; Brook, *supra* note 95, at 28.

140. Donaldson, *supra* note 76 at 119; HUMAN RIGHTS WATCH, *supra* note 116, at 179-80 (2001) (anecdotal account of prostitution).

141. *See* CARDOZO-FREEMAN, *supra* note 129, at 385.

142. Donaldson, *supra* note 76, at 119; *see also* CARDOZO-FREEMAN, *supra* note 129, at 386 ("Some heterosexuals despise the homosexuals, but in general, the prison population is more tolerant of true *queens* than the prison guards.").

dance, and hot food."[143] They nonetheless enjoy a marginally higher status in the hierarchy than punks, probably because they are considered desirable sexual partners,[144] and because punks are condemned for lacking the courage to defend themselves and their masculinity.[145]

Nevertheless, the "benefits" of being classed as a queen have little practical significance.[146] Queens do not have the power to say "yes" or "no" to sex without the approval of the "pimp" or "daddy" who is protecting them at the time.[147] Anecdotal accounts tell of queens or punks being sold to pay debts:

> Well, naturally, I didn't like the idea of being pimped off and all that stuff. But O.K.; when the guy was getting short, he sold me to somebody for two hundred dollars. . . . Well, if he'd a waited for a little bit longer, he'd a got five hundred bucks cause the guy was fixin to offer five hundred.[148]

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143. Donaldson, *supra* note 76, at 119.

144. *See id.*

145. *See* CARDOZO-FREEMAN, *supra* note 129, at 371. Ironically, homosexual male and transgender inmates are accorded (only slightly) higher status because they act in conformity with the stereotypical feminine role, but heterosexual "punks" are given lower status because they could not or would not fight to preserve their masculinity. *See id.*

146. *See* Donaldson, *supra* note 76, at 119 (describing the negative aspects of being classed as a "queen").

147. *See* CARDOZO-FREEMAN, *supra* note 129, at 386. "Pimping is a safe business in prison. The girls are respected that work for a pimp and behave themselves; they're not sluts. If they do screw around, they get their butts kicked. They flirt but just to get business." *Id.*

148. *See id.* at 390 (quoting Sandy, a transvestite prisoner); *see also The Story of a Black Punk*, *in* PRISON MASCULINITIES 127, 129 (Don Sabo et al. eds., 2001) (describing a punk's experience being sold).

> I got raped a few more times until a Black Brother offered to be my man, which I accepted right away to avoid getting killed. He wasn't too bad but he got into heavy debt and 'sold' me to this other Black dude for swag to get him off the hot seat.

Id.

There is at least one documented example of organized resistance to the practice of buying and selling queens. *See* Daniel Burton-Rose, *The Anti-exploits of Men Against Sexism, 1977-78*, 224, *in* PRISON MASCULINITIES (Don Sabo et al. eds., 2001). In the mid-1970s, prisoners Ed Mead and Danny Atteberry founded Men Against Sexism (MAS), an organization of gay and bisexual prisoners dedicated to disrupting the system of sexual exploitation at the maximum-security penitentiary in Walla Walla, Washington. *Id.* at 224-25. They created the concept of "safe cells," purchased from other prisoners as they transferred out. *Id.* at 226. MAS members would intercept likely targets for prison rape as they stepped off the bus, explain the situation, and offer them a safe cell. *Id.* The

Thus, because of the nature of the prison hierarchy, an entering transgender inmate can either choose to act submissive or be beaten into submission, and more often than not, sex is coercive for them on some level.[149] Despite this reality, all prisoners can be disciplined for engaging in any sex that they are not physically forced to perform.[150] Further, prisons do not often provide condoms, on the rationale that prisoners are not supposed to be engaging in sex at all.[151]

3. The Consequences of AIDS

"*Rapes occur at night, no condoms used. Sometimes I can prevent rape by telling the person that I have HIV and that it could be passed on to them.*"[152]

Although the effect of the AIDS crisis on the prison population has yet to be fully documented,[153] HIV and AIDS are prevalent among those incarcerated.[154] In 1993, Stephen Donaldson observed of federal prisons that "homophobia has risen . . . the status of queens has fallen; virgin heterosexuals are more highly prized; fewer jockers are hooking up; and

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organization also prevented other prisoners from claiming effeminate gay men as their property. *Id.* at 228. MAS was unofficially disbanded when its leaders were transferred to other state and federal institutions, following a foiled escape attempt. *Id.* at 228-29.

149. *See* CARDOZO-FREEMAN *supra* note 129, at 390. A transgender prisoner explains how she viewed the situation when she first arrived: "I knew ahead of time that I was goin to come here, that I wasn't goin to have no alternative but to be what I really was. I came here wearin tight pants cause I knew I was goin to have to give it up to somebody." *Id.*

150. *See* Donaldson, *supra* note 76, at 123 (noting that disciplinary codes in United States confinement institutions outlaw all sexual activity).

151. *See* Richard D. Vetstein, *Rape and AIDS in Prison: On a Collision Course to a New Death Penalty*, 30 SUFFOLK U. L. REV. 863, 877 (1997); *see also* Donaldson, *supra* note 76, at 123 (noting that prison administrators refuse to allow condoms because to do so would be condoning homosexuality, "something they apparently consider worse than the death of prisoners").

152. *Male-to-Female Transsexuals and Transgendered People in Prisons: HIV/AIDS Issues and Strategies*, 4 CANADIAN HIV/AIDS POL. & L. NEWSL., Spring 1999, *available at* http://www.aidslaw.ca/Maincontent/otherdocs/Newsletter/spring99/prisons.htm#2 (quoting an anonymous transsexual and transgender prisoner).

153. *See* Donaldson, *supra* note 76, at 123.

154. *See* Vetstein, *supra* note 151, at 874-76. Although a comprehensive analysis of HIV and rape in the prison system is beyond the scope of this paper, Vetstein's article discusses rape and HIV in the context of recent Eighth Amendment decisions. *See id.*

much of the sexual behavior has become more covert."[155] While prostitution also decreased, Donaldson predicted that rape would increase under such circumstances.[156] Although most inmates become infected outside of prison,[157] a transgender inmate has increased risk of exposure while incarcerated, because of the high risk of rape, coerced sex, and coerced prostitution.[158]

D. Civil Remedies for Victims of Prison Rape

1. The Hands-off Doctrine

Prior to the enactment of 42 U.S.C. § 1983[159] in the mid-1960s, the judiciary took a "hands-off" approach to any issues of cruel or unusual punishment that might arise from the conditions of confinement.[160] Concern for the separation of powers justified the hands-off doctrine; the belief ran that intervention by the judiciary would constitute an encroachment on a function of the executive branch.[161] The federal judiciary was also reluctant to encroach on state sovereignty by intruding into state prison policies.[162] In 1976, however, the Supreme Court departed from this doctrine and recognized that post-sentencing conditions of confinement could violate the

155. Donaldson, *supra* note 76, at 123.

156. *See id.* In transsexual inmate Dee Farmer's case, discussed *infra* Part II.D.2, the possibility that Farmer might have been HIV positive apparently did not deter her attacker, and in fact, she was HIV positive when the other inmate beat and raped her. *See* United States v. Farmer, No. 95-7414, 1997 U.S. App. LEXIS 9699, at 1-2 (4th Cir. 1997) (regarding Farmer's AIDS status at the time of her sentencing); Farmer v. Brennan, 511 U.S. 825, 830 (1994) (regarding Farmer's allegations of rape).

157. *See* Vetstein, *supra* note 151, at 876.

158. *See* discussion *supra* Part II.C.2 (discussing the risks facing transgender prisoners).

159. 42 U.S.C. § 1983 (West 1994).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

160. Jason D. Sanabria, Farmer v. Brennan*: Do Prisoners Have Any Rights Left Under the Eighth Amendment?*, 16 WHITTIER L. REV. 1113, 1134-35 (1995).

161. *Id.* at 1134.

162. *Id.*

Eighth Amendment's prohibition on cruel and unusual punishment.[163]

2. Modern Eighth Amendment Jurisprudence: Farmer v. Brennan *and "Deliberate Indifference"*

Section 1983 gives prisoners the opportunity to pursue civil remedies for violations of federal constitutional rights.[164] To state a claim under § 1983, prisoners who have been raped while incarcerated usually allege a violation of the Eighth Amendment, on the theory that the conditions of their confinement were objectively severe and that prison authorities were indifferent to them.[165] When a prisoner sues federal prison authorities, the suit is called a *Bivens* action.[166] In addition to suits for damages, prisoners may also file for injunctive relief, if it appears that prison authorities are "knowingly and unreasonably disregarding an objectively intolerable risk of harm" and will continue to do so.[167] In *Helling v. McKinney*,[168] the Court expanded its definition of the objective component by holding that the Eighth Amendment protected prisoners from unreasonable risks of damage to their *future* health.[169] Thus, prisoners need not wait until serious injury happens before seeking relief in the courts.[170]

In the case that established the current legal standard for Eighth Amendment complaints based on conditions of confinement, the plaintiff Dee Farmer brought a *Bivens* complaint against a number of prison authorities for transferring or placing her in general population at a federal penitentiary, despite knowledge that she was a transsexual and would be particularly vulnerable to sexual attack in that environ-

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163. *Id.* at 1136-37 (citing Estelle v. Gamble, 429 U.S. 97 (1976)). The first use of the term "deliberate indifference" in the context of the Eighth Amendment can be traced back to *Estelle*. *Id.* at 1136.

164. HANSON & DALEY, *supra* note 12, at 1.

165. Vetstein, *supra* note 151, at 883, 891.

166. *See* BLACK'S LAW DICTIONARY 162 (7th ed. 1999). "A lawsuit brought to redress a federal official's violation of a constitutional right. . . . A *Bivens* action allows federal officials to be sued in a manner similar to that set forth at 42 USCA § 1983 for state officials who violate a person's constitutional rights under color of state law." *Id.* (citation omitted).

167. Farmer v. Brennan, 511 U.S. 825, 845-46 (1994).

168. 509 U.S. 25 (1993).

169. *Id.* at 35.

170. *See id.*

ment.[171] Farmer wore women's clothing, took estrogen, and had silicon breast implants, but the surgery to remove her testicles was unsuccessful.[172] Because federal prison authorities typically place MTF transsexuals without genital surgery with male prisoners, Farmer was housed accordingly, usually in segregation.[173] Within two weeks of her transfer to the United States Penitentiary in Terre Haute, another inmate sexually assaulted Farmer in her cell.[174] Brandishing a homemade knife, he tore off her clothes, held her down, and forcibly raped her.[175]

a. The Standard Before Farmer

A summary of the pre-*Farmer* standard will help the reader understand the significance of the *Farmer* decision. In *Wilson v. Seiter*,[176] the United States Supreme Court determined that the "deliberate indifference" standard would apply to all Eighth Amendment claims challenging conditions of confinement in prisons.[177] Under *Wilson*, prisoners cannot state an Eighth Amendment claim for harms not formally identified as "punishment" by the statute or sentencing judge, unless they demonstrate that the offending prison official subjectively intended the harm as punishment.[178] Thus, all Eighth Amendment claims must satisfy a two-prong test for "deliberate indifference": an objective component relating to the seriousness of the prisoner's deprivation and a subjective component relating to the prison official's state of mind.[179] The *Wilson* court reasoned that the subjective requirement followed from the principle that "only the unnecessary and wanton infliction of pain implicates the Eighth Amendment."[180] Concurring, Justice White wrote that the subjective

171. *Farmer*, 511 U.S. at 830-31.
172. *Id.* at 831.
173. *Id.* at 829-30. Although Farmer had sometimes been segregated for violating prison rules, in at least one penitentiary she was segregated out of concern for her safety. *Id.* at 830.
174. *Id.*
175. John Boston et al., Farmer v. Brennan*: Defining Deliberate Indifference Under the Eighth Amendment*, ST. LOUIS U. PUB. L. REV. 83, 85 (1994) (citing Farmer's declaration).
176. 501 U.S. 294 (1991).
177. *Id.* at 303.
178. *Id.* at 300.
179. *See id.* at 298, 300; *Farmer*, 511. U.S. at 834.
180. *See Wilson*, 501 U.S. at 296-97.

requirement was inconsistent with the idea that the conditions of confinement are themselves part of the punishment, even if they are not specified as such by the sentencing judge.[181]

b. "Deliberate Indifference" Under Farmer

In evaluating § 1983 claims, the Seventh Circuit interpreted the subjective prong of the deliberate indifference test to require proof that (1) the prison official actually knew of impending harm that was easily preventable, and (2) the official exposed the plaintiff to the risk because of this knowledge, rather than in spite of it.[182] When the Seventh Circuit affirmed the dismissal of Farmer's claim on summary judgment, Farmer appealed, and the Supreme Court granted certiorari to determine what level of culpability the deliberate indifference test should require.[183] Farmer argued that, under *Canton v. Harris*,[184] the plaintiff should only have to show that the risk was so obvious that a reasonable person should have known of it, a standard comparable to civil law recklessness.[185] The Court rejected this argument[186] and held instead:

> [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both *be aware of facts from which the inference could be drawn that a substantial risk of harm exists, and he must also draw the inference*.[187]

Although *Farmer* repudiated much of the Seventh Circuit's language that favored the officials,[188] it retained the

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181. *Id.* at 306 (White, J., concurring).

182. *See* Boston, *supra* note 175, at 95 (quoting Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992); McGill v. Duckworth, 944 F.2d 244, 350 (7th Cir. 1991)).

183. *See Farmer*, 511 U.S. at 832.

184. 489 U.S. 378 (1989) (holding that municipality could be liable for failure to train its employees if the need for more or different training was so obvious, and the inadequacy so likely to result in the violation of constitutional rights that policymakers can reasonably be said to have been deliberately indifferent to the need), *quoted in Farmer*, 511 U.S. at 840-41.

185. *See Farmer*, 511 U.S. at 836-37.

186. *See id.* at 837.

187. *Id.* (emphasis added).

188. *See* Boston, *supra* note 175, at 95.

subjective prong, fashioning a standard more akin to criminal recklessness.[189] The Court softened the effect of this harsher standard by allowing plaintiffs to prove through circumstantial evidence that officials knew a substantial risk existed.[190] Thus, if the plaintiff can show a risk "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk," this could be enough to permit an inference by the trier of fact that the official did have actual knowledge.[191] The Court also expressly stated that officials could not escape liability simply by failing to verify facts strongly suspected to be true or declining to confirm inferences strongly suspected to exist.[192]

c. Defenses Under Farmer

Farmer left four main defenses available to prison officials seeking to escape liability.[193] First, prison officials may claim that they had no knowledge of the facts underlying the risk of harm, or that they knew of the facts but believed the risk was insignificant.[194] Second, they may assert that they "responded reasonably to the risk, even if the harm was not averted."[195] Third, they may claim qualified immunity;[196] however, the Ninth Circuit has stated that under *Farmer*, "the shield that qualified immunity provides is limited to those officials who are either unaware of the risk or who take reasonable measures to counter it."[197] Furthermore, it is not available when the guards themselves are responsible for the

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189. *See Farmer*, 511 U.S. at 836-37.

> The civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known. The criminal law, however, generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware.

Id. (citations omitted).

190. *See id.* at 842.

191. *Id.* at 842-43.

192. *Farmer*, 511 U.S. at 843, 843 n.8.

193. Marjorie Rifkin, *Farmer v. Brennan: Spotlight on an Obvious Risk of Rape in a Hidden World*, 26 COLUM. HUM. RTS. L. REV. 273, 302 (1995).

194. *Farmer*, 511 U.S. at 844.

195. *Id.*

196. Rifkin, *supra* note 193, at 304.

197. Schwenk v. Hartford, 204 F.3d 1187, 1197 (9th Cir. 2000).

abuse.[198] Finally, in the case of injunctive relief, prison officials may argue that the claim is moot, because at some point during the litigation, they took remedial steps and ceased "unreasonably disregarding an objectively intolerable risk of harm . . . ."[199]

From an evidentiary standpoint, prisoner plaintiffs often have a difficult time refuting the first defense, because prison records that may help prove their case are not under their control and because violence in the prison system is underreported.[200] In similar cases involving women prisoners, class action suits have proved effective in overcoming this barrier and obtaining injunctive relief by increasing the plaintiffs' credibility and allowing the court to view the threat of violence in the context of the sexualized prison environment, rather than as a series of isolated occurrences.[201] Transgender prisoners have also attempted to use class actions as a tool for obtaining relief, sometimes even filing pro se.[202] When prison rape is systemic throughout a particular institution, class actions may prove effective in attacking polices and procedures (or the lack thereof) that facilitate rape.[203]

3. Farmer on Remand

Once Farmer's case returned to the trial court on remand, she continued to encounter difficulty gathering evidence necessary to support her assertion that the prison officials knew she was a transsexual and that she would be at

198. *See id.*

199. *Farmer*, 511 U.S. at 846 n.9.

200. *See* Farmer v. Brennan, 81 F.3d 1444, 1446-49 (7th Cir. 1996) (discussing Farmer's difficulty in obtaining her prison records) [hereinafter *Farmer II*]; Amy Laderberg, Note, *The "Dirty Little Secret": Why Class Actions Have Emerged as the Only Viable Option for Women's Inmates Attempting to Satisfy the Subjective Prong of the Eighth Amendment in Suits for Custodial Sexual Abuse*, 40 WM. & MARY L. REV. 323, 360 (1998) (noting the problem of underreporting).

201. *See* Laderberg, *supra* note 200, at 326-28, 356.

202. Interview with Dean Spade, staff attorney, Silvia Rivera Law Project (Apr. 16, 2004). The Prison Litigation Reform Act of 1995 imposes limitations on attorney's fees in § 1983 cases, which may explain why inmates are filing pro se. 42 U.S.C. § 1997e(d); *see also* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1654-55 (2003) (discussing fee limitations and noting that "[s]ome portion of the cases that once would have been counseled are now either not being filed at all, or more likely, are litigated pro se").

203. Interview with Dean Spade, *supra* note 202.

risk at Terre Haute.[204] A series of delays in response to Farmer's document requests and unfavorable rulings on her discovery motions caused the district court to find that the defendants did not have knowledge of underlying facts from which they could have inferred that she was at substantial risk.[205] Accordingly, the court granted summary judgment in favor of the officials a second time.[206]

Reversing, the Seventh Circuit chastised the district court for its "refusal to allow Farmer's lawyer to develop the record on the defendants' summary judgment motion so that an informed decision on the existence of genuinely disputed facts . . . would be possible."[207] It also noted that the court's tolerance of defendants' delays "resulted in the destruction of evidence that might have been helpful to Farmer['s case,]"[208] specifically, "records of all administrative remedies filed with the Bureau of Prisons by inmates at USP-Terre Haute that 'allege assaultive behavior, *sexual misconduct, sexual proposals or threats*, . . . transfer for danger or protection filed during . . . the time leading up to and just after her alleged rape and assault.'"[209]

Farmer's continuing difficulties may implicate the general sentiment among some in the legal community that prisoners' claims lack merit and waste the courts' time.[210] Inmate petitions have been blamed for increasing the number of federal judges and the size of clerks' office staff, and for the resulting costs to the federal government.[211] Restrictive deci-

204. *Farmer II*, 81 F.3d at 1446-49.
205. *Id.*
206. *Id.*
207. *Id.* at 1449.
208. *Id.* at 145.
209. *Id.* at 1451-52.
210. *See Farmer II*, 81 F.3d at 1450-51 (concluding that the district court abused its discretion in denying Farmer's Rule 56(f) motion and noting that it failed to explain why it found some discovery requests relevant and others irrelevant); Robert G. Doumar, *Prisoner Grievances: Prisoner Cases: Feeding the Monster in the Judicial Closet*, 14 ST. LOUIS U. PUB. L. REV. 21, 21 (1994) ("The cost to the federal government of this bureaucratic monster is staggering, especially considering that the vast majority of these prisoner civil rights complaints are small claims complaints at best, and completely groundless and frivolous at worst."). Although Farmer's lawsuits have been referred to as "numerous and diverse," it is also significant that "she has raised colorable constitutional claims at every facility at which she has been incarcerated. *See* Tedeschi, *supra* note 23, at 42.
211. *See* Doumar, *supra* note 210, at 21.

sions, partial filing fees, and exhaustion requirements serve to reduce the number of prisoner civil rights cases.[212] In 1996, Congress amended 42 U.S.C. § 1997e[213] to require exhaustion of state administrative remedies before prisoners may file § 1983 claims.[214] Prior to the amendment, the Civil Rights of Institutionalized Persons Act (CRIPA) had required exhaustion only when the administrative remedy system had been certified as "plain, speedy, and effective."[215] The *Farmer* court reiterated the exhaustion requirement with respect to claims for injunctive relief.[216] The circuits are split on whether § 1997e applies to claims for money damages when administrative procedures do not provide for monetary compensation.[217]

III. IDENTIFICATION OF THE PROBLEM

As long as the Bureau of Prisons and state prison administrators maintain the practice of genitalia-based placement, the likelihood of sexual assault upon transgender prisoners is extremely high.[218] Consequently, the likelihood that such

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212. *See id.* at 31-33.

213. Prison Litigation Reform Act, Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321, 1321-66 to –77 (Apr. 26, 1996) (amending 42 U.S.C. 1997e).

> (a) Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a).

214. 42 U.S.C. § 1997e(a).

215. Schlanger, *supra* note 202, at 1695-96 (quoting 42 U.S.C.A. § 1997e(b)(1)).

216. *See* Farmer v. Brennan, 511 U.S. 825, 847 (1994) ("When a prison inmate seeks injunctive relief, a court need not ignore the inmate's failure to take advantage of adequate prison procedures, and an inmate who needlessly bypasses such procedures may properly be compelled to pursue them.").

217. *See* Noguera v. Hasty, 99 Civ. 8786 (KMW) (AJP), 2000 U.S. Dist. LEXIS 11956, at *31-33, 32 n.21 (S.D.N.Y. 2000) (noting the split and an unpublished Second Circuit decision stating exhaustion was not required because the Bureau of Prisons Administrative Remedy Program does not provide financial compensation). The *Noguera* court concluded that the plaintiff had exhausted the administrative remedies even if they were required. *Id.* at 41.

218. *See* Edward S. David, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma*, 7 CONN. L. REV. 288, 298 (1975) ("The preoperative patient who has been on hormonal therapy is almost as likely to be subjected to sexual abuse in prison as the postoperative patient."), *quoted in* Tedeschi, *supra* note 23, at 35.

prisoners will be able to raise colorable § 1983 claims is also high.[219] It is fundamentally unfair for the practices of one branch of the government to create a safety risk for a particular class of people, for which other branches of the government have made obtaining relief difficult, on the ground that too many prisoners file civil rights claims. The need to stem the tide of prisoner litigation must give way to concern for safety when certain prisoners face a heightened risk of rape or coercion because of the institution's placement policies. Genitalia-based placement, exhaustion requirements, and the subjective prong of the deliberate indifference analysis reinforce the prison hierarchy's subjugation of MTF transgender prisoners based on their feminine characteristics.[220]

IV. ANALYSIS

A. The Problem of Genitalia-Based Placement

Genitalia-based placement draws an arbitrary line over the complex issue of gender identity.[221] Although it offers prison officials the short-term benefit of not having to deal with the question of what makes someone male or female, in the long run, it creates serious safety issues and increases the prison's liability.[222] As long as genitalia-based placement continues, the government has adopted a de facto policy of putting transgender people at risk of physical harm.[223]

Unfortunately, most civil case law involving transgender litigants provides little help to prison authorities in formulating a better system of classification.[224] The ultimate outcomes in the *Littleton* and *Gardiner* cases represent bad precedent in terms of the deference courts have given to transgender

219. *See* Tedeschi, *supra* note 23, at 34 ("The cases then begin where this 'practice' leaves off—once a pre-operative, male-to-female transsexual is placed in an all-male prison population, problems ensue and constitutional claims are raised.").

220. *See* discussion *infra* Part IV.

221. *See generally* Rosenblum, *supra* note 8 (discussing the difficulties inherent in a system that recognizes only two genders).

222. *See id.* at 522-26 (discussing the dangers of genitalia-based placement).

223. *See generally* Tedeschi, *supra* note 23. "The problems encountered by these prisoners stem from the insistence of the prison system on defining their sex by their pre-operative state rather than accepting their psychological gender identity as the factor determinative of sex." *Id.* at 47.

224. *See infra* Part II.B.2.

persons' subjective gender identities.[225] Both courts came to the conclusion that they could not call a transsexual woman a "woman" for the purposes of marriage unless the legislature explicitly gave them permission.[226] Similarly, the courts have been reluctant to require that prison authorities change their system of classification in the interests of prisoner safety.[227] Just as the courts have professed deference to the legislature in transgender marriage cases, they have shown deference to the executive branch where prison placement policies are concerned.[228] Nevertheless, alternatives to genitalia-based placement exist, and will be explored in this section. Such alternatives would reduce the risks that the prison system currently allocates to transgender prisoners as a class.

1. Segregation of Transgender Inmates

a. Administrative Segregation

Although segregation of all transgender inmates may reduce the risk of sexual assault, there are many reasons to reject segregation as a long-term solution to the problems created by genitalia-based classification.[229] Often, conditions in protective custody units do not differ significantly from those in disciplinary segregation units.[230] For nonpunitive reasons, segregation denies transgender inmates the privileges afforded the general population[231] and shifts responsibility for the attacks onto them.[232] Furthermore, even if segregation effectively prevented attacks by other prisoners, it does nothing

225. *See* discussion *infra* Part II.B.2.

226. *See In re* Estate of Gardiner, 42 P.3d 120, 137 (Kan. 2002); Littleton v. Prange, 9 S.W.3d 223, 230 (Tex. App. 1999).

227. *See supra* Part II.B.1 (discussing Meriwether v. Faulkner, 821 F.2d 408, 415 n.7 (7th Cir. 1987)).

228. *See Gardiner II*, 42 P.3d at 137; *Littleton*, 9 S.W.3d at 230; *Meriwether*, 821 F.2d at 415 n.7.

229. *See* Rosenblum, *supra* note 8, at 529-31. Although it may seem paradoxical to argue simultaneously (1) that perpetual administrative segregation of transgender inmates is inappropriate, and (2) that placing transgender prisoners in the general population subjects them to an unreasonable risk of harm, it is conceivable that "under certain circumstances, [both situations] may amount to an unconstitutional infliction of cruel and unusual punishment for the transsexual prisoner." Tedeschi, *supra* note 23, at 44.

230. *See* HUMAN RIGHTS WATCH, *supra* note 116, at 11.

231. *See* Rosenblum, *supra* note 8, at 530.

232. *See id.* (noting that segregation punishes transgender inmates for the general populations' intolerance).

to prevent attacks and harassment by guards, a significant source of the violence perpetrated on transgender prisoners.[233] Segregation reinforces the view that transgender prisoners should face special consequences or restrictions because of their gender non-conformity. Ironically, segregation often burdens the victims more than the aggressors.[234]

b. Transgender-only Wards

Some commentators have suggested that transgender prisoners be housed in their own special wards, modeled after the "gay" wards that already exist in some institutions.[235] Such a solution would doubtless impose greater financial hardship upon smaller institutions with fewer transgender prisoners.[236] Rosenblum counters this argument by suggesting that if the transgender population in a given jurisdiction were too small, "the state could pool resources with other jurisdictions."[237]

Although such an approach would likely reduce the risk of sexual assault and avoid problems of isolation associated with administrative segregation, it is uncertain who would qualify for placement in such wards. Rosenblum also notes that gay and transgender prisoners were lumped together in the New York prison system, and prison authorities often con-

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233. *See* Schwenk v. Hartford, 204 F.3d 1187, 1192 (9th Cir. 2000) (transsexual plaintiff alleged attempted rape by a Washington state prison guard); Rosenblum, *supra* note 8, at 525 (citing *Meriwether*, 821 F.2d at 410). Many prison officials consider gay inmates legitimate targets for sexual violence. *See* Robertson, *supra* note 101, at 446. Because transsexuality and homosexuality are often conflated, officials may also consider transgender inmates appropriate targets.

234. *See* HUMAN RIGHTS WATCH, *supra* note 116, at 11.

> In nearly every instance Human Rights Watch has encountered, the authorities have imposed light disciplinary sanctions against the perpetrator—perhaps thirty days in disciplinary segregation—if that. Often rapists are simply transferred to another facility, or are not moved at all. Their victims, in contrast, may end up spending the rest of their prison terms in protective custody units whose conditions are often similar to those in disciplinary segregation: twenty-three hours per day in a cell, restricted privileges, and no educational or vocational opportunities.

Id.

235. Rosenblum, *supra* note 8, at 535; *see also* Tedeschi, *supra* note 23, at 44 ("A 'gender dysphoric' wing . . . would reduce the risk of sexual assault that is especially high for transsexual prisoners.").

236. Rosenblum, *supra* note 8, at 535.

237. *Id.*

flated transgenderism and homosexuality.[238] Given the prevalence of such attitudes[239] and the scarcity of prison resources, it seems unlikely that "transgender-only" wards would remain "transgender-only" for long. Further, it is unclear whether such a solution would be as cost-effective as placing prisoners according to their subjective gender identity.[240]

2. Placement According to Subjective Gender Identity

As an alternative to segregation, prison administrators could place transgender prisoners according to their subjective gender identity.[241] Such placement would reduce the risk of sexual assault and thereby reduce the prison's potential liability for § 1983 claims resulting from male prisoners' violence against transgender prisoners.[242]

However, even if subjective gender identity were allowed to determine placement, advocates for transgender prisoners still face the problem of having to rely on increasingly disfavored medical definitions of transsexuality to demonstrate that their client's gender identity is "genuine."[243] Without this threshold determination, courts may not even entertain the notion that the prisoners' subjective gender identity should be credited.[244] Further, such definitions may be used to exclude non-transsexual transgender inmates from consideration for placement based on gender identity.

Notwithstanding the difficulty in determining who would qualify for placement according to subjective gender identity, such placements would also pose other problems. For example, women's prisons often lack resources to deal with prisoners' basic needs.[245] As a result, a MTF transgender prisoner

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238. *Id.* at 534.

239. *Id.*

240. *But see id.* at 535. Rosenblum asserts that transgender-only wards would be more cost-effective than either genitalia-based placement or placement according to subjective gender identity, because "the prison would not have to manage the interaction between the transgendered and traditionally gendered prisoners." *Id.* But since placement according to gender identity is currently rare, the costs associated with managing prisoners have yet to be determined. Thus, it is difficult to estimate those costs, or compare them with the costs of other solutions that have yet to be attempted.

241. *See* Tedeschi, *supra* note 23, at 44-46.

242. *See id.* at 45.

243. *See supra* Part II.A.2.

244. *See supra* Part II.A.2.

245. *See* Katherine A. Parker, *Female Inmates Living in Fear: Sexual Abuse*

may be forced to choose between a facility with higher risk and more resources, and one with lower risk and fewer resources. Although placing MTF transgender prisoners in women's prisons may reduce the risk of sexual assault, such placement would not necessarily eliminate the risk.[246] In Struckman-Johnson's 1996 and 1999 studies, other female inmates perpetrated half of all incidents of sexual abuse upon female inmates.[247]

In addition, the fear that a MTF transgender inmate might have sex (consensual or non-consensual) with female inmates could create additional problems,[248] regardless of whether those fears have any basis in reality. These fears parallel the prejudices transgender women face outside the prison context with regard to sex-segregated bathrooms. When attempting to use women's restrooms, transgender women often face irrational fear from others who view them as a threat to the safety of non-transgender women.[249] Based on false notions that transgender people are somehow inherently predatory or voyeuristic,[250] this fear fuels the argument in favor of sex-segregated facilities.[251]

Similarly, prison officials may argue that their failure to house MTF transgender inmates in accordance with their gender identity is justified by the threat they pose to the safety of female inmates.[252] In an attempt to dispel concerns about sexual assault, some commentators have noted that if prison authorities administer hormones in appropriate

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by Correctional Officers in the District of Columbia, 10 AM. U.J. GENDER SOC. POL'Y & L. 443, 447-51 (2002) (discussing poor conditions in women's prisons in the District of Columbia).

246. *See The Prison Rape Reduction Act of 2002: Hearing for S. 2619 Before the S. Comm. on the Judiciary*, 107th Cong. (2002) (statement of Robert W. Dumond, Member, Board of Advisors, Stop Prison Rape, Inc.), 2002 WL 25098227.

247. *See id.*

248. *See* Rosenblum, *supra* note 8, at 531-33 (discussing problems with placement of transgender inmates in women's prisons).

249. *See* CURRAH & MINTER, *supra* note 49, at 58. "[T]he bathroom objection tends to be voiced in gender-specific terms—the fear that transgender inclusive laws will lead to 'men in dresses' invading the women's bathrooms and posing a threat to the security of the women using them." *Id.*

250. *See id.* at 58-59.

251. *See id.* For more information on problems created by sex-segregated bathrooms, see the web site of People in Search of Safe Restrooms at http://www.pissr.org.

252. *See* Rosenblum, *supra* note 8, at 531.

amounts, a pre-operative transsexual woman's penis would not be functional.[253] However, whether or not a transgender inmate's penis is functional should not be the determinative factor. MTF transgender prisoners should not be presumed dangerous or violent simply because they have not had genital surgery or hormone treatment.

In a similar vein, transgender women may face prejudice from women who do not wish to share a cell or other prison facilities with a transgender woman.[254] These prisoners may argue that placement according to gender identity violates their privacy rights.[255] Courts have been relatively generous towards women prisoners' privacy claims.[256] Such conflicts may not prove fatal to a policy of placement according to gender-identity, however.[257] In at least one case, *Crosby v. Reynolds*, the court declined to hold that housing a pre-operative transsexual in a women's prison violated another female prisoner's privacy rights.[258] However, the court did not hold that prison authorities had unquestionable authority to house a transgender inmate with female prisoners or that transgender inmates had a right to be housed where they felt safest; it merely found the officials not liable because the contours of the right to privacy were unclear as regarded housing of transsexuals.[259] Thus, the question of whether housing a MTF transgender prisoner in a women's prison might violate the privacy rights of female prisoners remains open. In addressing this question, courts should give great weight to the idea that personal discomfort based on bias against transgender people is not a valid basis for determining where transgender prisoners should be housed.[260] Rather, legitimate concern for transgender prisoners' safety ought to trump

253. *See id.* at 531 (noting that a transgender inmate had undergone hormone treatment and lost penile function); Tedeschi, *supra* note 23, at 45 (noting that the use of estrogen chemically castrates men).

254. *See* Rosenblum, *supra* note 8, at 531-33.

255. *E.g.*, Crosby v. Reynolds, 763 F. Supp. 666 (D. Me. 1991).

256. *See* Bell et al., *supra* note 94, at 216 (describing the outcome of class action suits against male guards). *See generally* Rebecca Jurado, *The Essence of Her Womanhood: Defining the Privacy Rights of Women Prisoners and the Employment Rights of Women Guards*, 7 AM. U. J. GENDER SOC. POL'Y & L. 1 (1999).

257. *See Crosby*, 763 F. Supp. at 666-70.

258. *Id.* at 670.

259. *See id.* at 669-70.

260. Interview with Dean Spade, *supra* note 202.

complaints grounded in personal prejudice.[261] Consequently, advocates for transgender prisoners have suggested that transgender prisoners be housed "according to their gender identity, or wherever they feel safest."[262]

B. Problems with the Subjective Prong of the Deliberate Indifference Test

The requirement that the plaintiff show the officials had knowledge of a substantial risk to his or her safety burdens plaintiffs with the problems inherent in the prison hierarchy.[263] By virtue of their feminine appearance, transgender prisoners face an increased risk of sexual assault.[264] Writing a formal complaint in response to such an assault labels the speaker a "snitch," putting his or her life at risk.[265] Studies like that by Alan Davis suggest that rape is drastically underreported.[266] Courts nonetheless require that prisoner plaintiffs present evidence indicating officials knew of facts underlying a substantial risk, even though such evidence may not be in their control, or may be destroyed by the time prison authorities finally decide to produce it.[267]

The fact that plaintiffs bear this burden creates an incentive for guards to ignore problems.[268] If guards do not know specific details, incidents of sexual assault and exploitation cannot be documented. If they are not documented, guards and higher prison authorities have a stronger argument that they were unaware of the risk. Even if a guard could be held liable for failure to investigate facts underlying a substantial

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261. *Id.*

262. *Id.* For example, a FTM transgender inmate may prefer to be housed in a women's prison even though he does not identify as female, because he feels unsafe in a men's prison. *Id.*

263. *See supra* Part II.C.2 (discussing the effect of the prison hierarchy on feminine inmates); *see also* Robertson, *supra* note 101, at 452 (arguing that the victim of prison rape does not assume the risk of a prison environment that constructs some inmates as surrogate women, and therefore should not be held to the deliberate indifference test).

264. *See supra* Part II.C.2.

265. Kupers, *supra* note 76, at 112.

266. *See* BROWNMILLER, *supra* note 113, at 264-65.

267. *See* Laderberg, *supra* note 200, at 359 (noting the difficulty of collecting documentary proof that would constitute circumstantial evidence of deliberate indifference); *supra* Part II.D.3 (discussing Farmer's difficulties in conducting discovery).

268. *See* HUMAN RIGHTS WATCH, *supra* note 116, at 11.

risk, as Justice Souter seems to suggest,[269] higher prison officials would still be insulated on the ground that they had no knowledge of the omission.[270] Because the deliberate indifference analysis focuses on the defendant's state of mind, higher-level officials can argue that they lacked first-hand knowledge of the underlying facts.[271]

Although the subjective prong of the deliberate indifference test may succeed in reducing the amounts of prisoner civil rights claims, it also eliminates the possibility of adjudicating some meritorious claims.[272] Prison authorities tend to receive the benefit of the doubt on issues of credibility.[273] In other contexts, class action suits have helped to overcome this problem,[274] and have made prisoner litigation more cost-effective. The cumulative effect of the class members' complaints undercuts the potential defense that prison authorities had no knowledge of multiple rapes or threats of rape within their prison.[275] However, class action suits may not be a viable option for transgender prisoners if the attack were an isolated incident or not enough plaintiffs existed to certify a class.

C. Exhaustion Requirements

Farmer's approval of the exhaustion requirement in rape cases denies the realities of prison rape.[276] First, internal grievance processes are too slow to deal with the immediate threat to safety rape or the threat of rape poses.[277] Once sex-

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269. *See* Farmer v. Brennan, 511 U.S. 825, 843 n.8 (1994).

270. *See* James J. Park, *Redefining Eighth Amendment Punishments: A New Standard for Determining the Liability of Prison Officials for Failing to Protect Inmates from Serious Harm*, 20 QUINNIPAC L. REV. 407, 413-14 (2001).

271. *Id.* at 452-53. There is no respondeat superior liability for supervisors under § 1983 or in *Bivens* actions. *See Gossmeyer v. McDonald,* 128 F.3d 481, 495 (7th Cir.1997) (regarding § 1983 claims); Noll v. Petrovsky, 828 F.2d 461, 462 (8th Cir. 1987) (regarding *Bivens* actions).

272. *See* HUMAN RIGHTS WATCH, *supra* note 116, at 54.

273. *See* Laderberg, *supra* note 200, at 327 (noting that class actions increase inmate credibility).

274. *See generally id.*

275. *See* Laderberg, *supra* note 200, at 356 (describing the outcome of Women Prisoners v. District of Columbia, 877 F. Supp. 634 (D.D.C. 1994), *vacated in part*, *modified in part*, 899 F. Supp. 659 (D.D.C. 1995), *remanded by* 93 F.3d 910 (D.C. Cir. 1996), *cert. denied*, 117 S. Ct. 1552 (1997)).

276. *See* Vetstein, *supra* note 151, at 898.

277. *See* Boston, *supra* note 175, at 98.

ual harassment begins, sexual assault is not far behind.[278] The Federal Bureau of Prisons' Administrative Remedy Program (ARP) can take up to 160 days to finalize the appeals process on a claim.[279] Furthermore, the first step in the procedure is known in prison slang as a "cop out," implicating the previously discussed rule against snitching.[280] In many grievance systems, inmates serve in clerical or administrative capacities, making it highly unlikely that complaints about other inmates would remain confidential.[281]

Without an effective administrative remedy system, exhaustion requirements impose an obligatory period of continued victimization with no guarantee of resolving the problem.[282] At worst, they extend the period of victimization indefinitely because of the risks attendant to being labeled a snitch.[283] The failure to report also contributes to the difficulty of obtaining documentary evidence that officials knew of the risk, creating a vicious cycle that grinds away at the rights protected by the Eighth Amendment.[284] Exhaustion requirements have been criticized particularly where the plaintiff fears he or she will contract AIDS after being threatened with rape by someone who is or who claims to be HIV positive.[285]

D. The Potential for Change in the Handling of Prisoner Rape Claims

Despite heavy criticism of exhaustion requirements and the deliberate indifference standard, neither the PLRA nor the *Farmer* decision are likely to be abandoned anytime soon.[286] The studies and grants authorized by the Prison Rape

278. *See* Robertson, *supra* note 136, at 14-15.

279. *See* Noguera v. Hasty, 99 Civ. 8786 (KMW) (AJP), 2000 U.S. Dist. LEXIS 11956, at *34-36, 32 n.21 (S.D.N.Y. 2000) (describing the Administrative Remedies Program).

280. *See id.* at 34.

281. *See* Boston, *supra* note 175, at 98.

282. *Cf.* Schlanger, *supra* note 202, at 1653-54 (predicting that cases that would have succeeded in court before the PLRA will now be dismissed for failure to exhaust), 1695-96 (opining that a good administrative remedy system "can serve simultaneously to educate upper level officials about what is happening on the agency front lines and to resolve some disputes").

283. *See supra* Part II.C.1 (noting the rule against snitching).

284. *See id.* (discussing underreporting).

285. *See* Vetstein, *supra* note 151, at 897-98.

286. Schlanger, *supra* note 202, at 1697 (asserting that the current political

Elimination Act focus on prevention and investigation rather than on increasing injured prisoners' access to the courts.[287] If future efforts to address the issue of prison rape will center on rape prevention and creation of more effective administrative remedies, those charged with drafting national standards for reducing prison rape must consider the risks posed by genitalia-based placement. The National Prison Rape Reduction Commission ("Commission") has the opportunity to reduce the risk of sexual assault by condemning genitalia-based placement policies.

V. PROPOSAL

Rather than viewing transgender inmates as "troublemakers," and segregating them,[288] prison officials must end the practice of genitalia-based classification. Prison officials should classify transgender inmates in accordance with their gender identity, or wherever they feel safest.[289] In their review of existing federal, state, and local government policies regarding prison rape, the members of the Commission should devote attention to the risks to personal safety imposed by genitalia-based placement.[290] In accordance with its authority to recommend national standards,[291] it should recommend that the practice of genitalia-based placement be abolished, and such recommendation should be adopted as the final rule pursuant to 42 U.S.C. § 15607(a)(1). Institutions failing to adopt this standard should be sanctioned with a reduction in federal funding, as provided for in

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makes it unlikely that Congress will revisit the PLRA); *see* 42 U.S.C. § 15601(13) (2003) (incorporating the *Farmer* standard into the congressional findings for the Prison Rape Elimination Act).

287. *See* 42 U.S.C. § 15605(a) (authorizing grants for the purpose of providing "funds for personnel, training, technical assistance, data collection, and equipment to prevent and prosecute prison rape"); *Id.* § 15606(d)(2)(N) (requiring that the National Prison Rape Reduction Commission assess existing systems for reporting incidents of prison rape).

288. *See* Donaldson, *supra* note 76, at 119 (noting that "queens" are often scapegoated and harassed).

289. Interview with Dean Spade, *supra* note 202; *see also supra* Part IV.A.

290. *Cf.* 42 U.S.C. § 15606(d)(2)(F) (directing that the Commission's study shall include "an assessment of the characteristics of inmates most likely to be victims of prison rape and the effectiveness of various types of treatment or programs to reduce such likelihood").

291. 42 U.S.C. § 15606(e)(A) requires the Commission to draft standards relating to the classification and assignment of prisoners.

§ 15607(b)(2). Placement policies should privilege the safety of inmates if Justice Souter's assertion that "gratuitously allowing the beating and rape of one prisoner by another serves 'no legitimate penological objectiv[e]'"[292] is to have any practical meaning.

VI. CONCLUSION

There is no easy answer to the question of how to protect transgender inmates. By virtue of their feminine appearance and the nature of the prison hierarchy, MTF transgender inmates housed in men's prisons are disproportionately targeted for rape and other violence.[293] Many of them may be able to raise colorable § 1983 claims under *Farmer*. Yet, the government has limited resources to devote to processing inmate's complaints, and has chosen to address this problem by limiting prisoner-plaintiffs' access to the courts and burdening them with legal standards that are difficult to meet.[294]

The solution cannot be that we simply obstruct the means of obtaining relief in order to avoid the consequences of our classification system. The suggestion offered in this comment attacks the problem by changing the system of genitalia-based placement to reduce the risk of harm. MTF transgender prisoners enter the prison system at a significant disadvantage. The government's classification system should not reinforce this disadvantage; rather, it should take steps to mitigate the risk.

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292. Farmer v. Brennan, 511 U.S. 825, 834 (1994) (quoting Hudson v. Palmer, 468 U.S. 517, 548 (1984)).

293. *See supra* Part II.C.2.

294. *See supra* Part II.D.