NEW MEXICO LAW REVIEW

Volume 36
Issue 3 *Summer*

Summer 2006

Trans-Literacy within Eighth Amendment Jurisprudence: De/Fusing Gender and Sex

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TRANS-LITERACY WITHIN EIGHTH AMENDMENT JURISPRUDENCE: DE/FUSING GENDER AND SEX

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I. INTRODUCTION

> Different though the sexes are, they intermix. In every human being a vacillation from one sex to the other takes place, and often it is only the clothes that keep the male or female likeness, while underneath the sex is the very opposite of what is above.[1]

One of the constant struggles in modern constitutional law is the search for an appropriate balance between the need to protect individual autonomy while allowing states to regulate in furtherance of legitimate societal interests. This Comment discusses the legal position of the transgender prisoner within the Eighth Amendment context, the implications of individual autonomy, and the needed recognition of an essential right to gender identity.[2] This Comment argues for a broader conception of gender within a continuum, with an attendant recognition of broader gender-identity rights. It recognizes "that each time there is a movement to confer rights on some new 'entity,' the proposal is bound to sound odd or frightening... [because] one consequence of this broader reconfiguration of rights...is to give voice to those people or things which, by virtue of their object relation...historically have no voice."[3]

The fundamental problem facing transgender[4] prisoners is not the high showing required to state an Eighth Amendment claim nor the various tests deployed by the courts to test that claim. The problem is the utilization and assumption of gender-binarism within the law itself. This problem results in potential harm to transgender prisoners due to their classification in prison, disparate prison conditions, denial of equal protection of the laws, and ultimately a denial of transgender prisoners' rights to their gender identity as part of their essential personhood. This Comment asserts that transgender prisoners should have an essential right not only to their gender identities but also the ability to gain recognition of that right through the Eighth Amendment and other legal contexts. Part II discusses the Eighth Amendment claims made by transgender prisoners. It explains the general contours of the Eighth Amendment and then examines the only U.S. Supreme Court decision involving a transgender prisoner and its progeny. Part III discusses the limits on the Eighth Amendment's usefulness as a basis for a transgender prisoners' claim. It notes the

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* Class of 2007, University of New Mexico School of Law. I would like to thank Professor Michael M. Browde for his invaluable guidance and input on this Comment. Additionally, I am grateful for the help of Professors James W. Ellis, Ron Wheeler, and Mark Chaiken and Judge Joseph Alarid. I am especially indebted to Nathan Fox for his support and critique. Special thanks to Denise Chanez and Jaime Fontaine. This Comment could not have been written without the advice and support of my family, partner, and friends: Stan, Suki, and Kiichi Harada; Stephen M. Sandoval; and Kate Girard and Erin O'Connell.

1. VIRGINIA WOOLFE, ORLANDO 189 (1928).

2. "It is never clear...how to draw the line between one broad, vague, morally laden constitutional textual provision as applied to situation X and another one (or perhaps the same one) as applied to situation Y." Abner S. Greene, *Theories of Taking the Constitution Seriously Outside the Courts*, 73 FORDHAM L. REV. 1401, 1406 (2005).

3. Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 425–26 (1987).

4. *See infra* Part III.A.

difference between sex and gender and problems with reliance upon experts to define transgender prisoners' gender identity. It explains the possibility for psychological harm, as well as the difficulties the high showing of deliberate indifference places on transgender prisoners. In addition, it notes the implications for privacy of transgender status as a result of the Eighth Amendment requirements. Part IV explores other potential bases for claims by transgender prisoners other than the Eighth Amendment, including Equal Protection and Procedural Due Process, as well as the potential development of that jurisprudence in the future.[5]

II. THE EIGHTH AMENDMENT

The Eighth Amendment prohibits, inter alia, the infliction of cruel and unusual punishments.[6] It applies to persons who have already been convicted of and sentenced for crimes.[7] It has been applied to claims arising under different contexts including medical and psychiatric care, prison conditions, and the use of force against prisoners.[8] Historically, the willingness of the courts to intervene on behalf of prisoners has varied.[9]

However, the bedrock principle underlying the Eighth Amendment is recognition of evolving standards of decency.[10] Although the Eighth Amendment applies generally to prisoners' claims, this Part examines its application to transgender prisoners' claims.

The cases construing alleged Eighth Amendment violations involving transgender prisoners challenge the outer boundaries of that evolving standard of decency. There

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5. For the purpose of this Comment, I will use the term "transgender" because it includes individuals who have not undergone surgical transition. In addition, since almost all of the caselaw involved in this area discuss only biological male-to-female (MTF) individuals, the term "transgender," in the context of this Comment, is limited to those persons. *See infra* Part II.B. *But see infra* notes 65–79 and accompanying text. Transgender can include anyone who interrogates and "transgresses" gender and sex identities, including biological female-to-male persons and intersex persons. *See generally* KATE BORNSTEIN, GENDER OUTLAW: ON MEN, WOMEN, AND THE REST OF US (1995). An analysis of why all the cases involve MTF individuals is beyond the scope of this Comment. For a possible explanation, see generally PHYLLIS BURKE, GENDER SHOCK, EXPLODING THE MYTHS OF MALE AND FEMALE (1996) (arguing that GID diagnosis is more prevalent in males than in females and may reflect a greater social concern over male gender role than female). *See also infra* note 157. The term "biological" means the sex assigned at birth to an individual. David Seil, *The Diagnosis and Treatment of Transgendered Patients, in* TRANSGENDER SUBJECTIVITIES: A CLINICIAN'S GUIDE 99 (Ubaldo Leli & Jack Dreschler eds., 2004). This Comment will not address sexual orientation or sexual identity of transgender individuals.

6. U.S. CONST. amend. VIII.

7. LYNN S. BRANHAM, THE LAW OF SENTENCING, CORRECTIONS, AND PRISONERS' RIGHTS 602 (6th ed. 2002).

8. *Id.* at 602–54.

9. *Id.* at 332. In the 1800s, prisoners were viewed as "slaves of the state" and were not considered to have any rights at all. *Id.* at 333–34. In the 1900s, the courts gradually began to recognize the constitutional rights of prisoners but followed the "hands-off doctrine" either because of separation of powers concerns—the judiciary would be usurping legislative and executive branches charged with the supervision and operation of prisons; or federalism—the judiciary would be encroaching on state's police powers for punishment of criminals violating state law. *Id.* at 335. During the 1960s and 1970s, some courts began to refuse to apply the "hands-off doctrine." *Id.* at 337. This was especially true of the Warren Court, which expansively interpreted the rights of criminal defendants in other areas. *Id.* (citing Miranda v. Arizona, 384 U.S. 436 (1966)). The modern U.S. Supreme Court has varied in its approach to prisoners' rights. The Court recognizes constitutional rights of prisoners in areas such as the First Amendment but refuses to recognize a Fourth Amendment right of prisoners to have their cells free from unreasonable searches. *Id.* at 339 (citing Hudson v. Palmer, 486 U.S. 517 (1984)).

10. Trop v. Dulles, 356 U.S. 86, 101 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

has been only one Eighth Amendment claim made by a transgender prisoner that has been examined by the U.S. Supreme Court.[11] This Part will discuss the clarification of the Eighth Amendment deliberate indifference standard announced by that case, *Farmer v. Brennan*.[12] This Part will also examine how some lower courts have subsequently attempted to implement *Farmer* in other transgender prisoner Eighth Amendment claims.[13]

A. Farmer v. Brennan

In 1994, the U.S. Supreme Court granted certiorari in a case involving a transgender prisoner's Eighth Amendment claim based upon the failure of prison officials to prevent harm to her as a result of her placement into the general population.[14] The Court decided to hear the case because the federal courts of appeal "had adopted inconsistent tests for 'deliberate indifference'" for prisoners' claims.[15]

Farmer was described by the U.S. Supreme Court as "diagnosed by medical personnel of the federal Bureau of Prisons (BOP) as a transsexual, one who has a rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex."[16] The Court also described in some detail Farmer's gender history.[17] The practice of the BOP at that time was to "incarcerate preoperative transsexuals with prisoners of like biological sex," and Farmer herself was housed sometimes in general male population but more often in segregation.[18] It was undisputed that at least once Farmer was segregated because of safety concerns.[19]

Farmer was transferred for disciplinary reasons from a correctional facility to a penitentiary (USP-Terre Haute).[20] Within the penitentiary, Farmer was initially

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11. *See* Farmer v. Brennan, 511 U.S. 825 (1994).

12. *See infra* notes 32–56 and accompanying text.

13. *See infra* Part II.B.

14. *Farmer*, 511 U.S. 825. For analysis of the *Farmer v. Brennan* decision, see Marjorie Rifkin, Farmer v. Brennan*: Spotlight on an Obvious Risk of Rape in a Hidden World*, 26 COLUM. HUM. RTS. L. REV. 273 (1995). Rifkin co-authored Farmer's brief to the U.S. Supreme Court and was second chair at the oral argument of the case. There are various tiers of confinement within the U.S. prison systems, both state and federal. *See generally* Anita Barnes, *The Sexual Continuum: Transsexual Prisoners*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 599 (1998); Darren Rosenblum, *"Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499 (2000); Christine Peek, Comment, *Breaking out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 SANTA CLARA L. REV. 1211, 1247 (2004). For an example of California's classification system, see *infra* note 261.

15. *Farmer*, 511 U.S. at 832.

16. *Id.* at 829 (relying on the AMA ENCYCLOPEDIA OF MEDICINE and APA DSM III) (internal citations omitted).

17. The Court called Farmer "a biological male, [who] wore women's clothing...underwent estrogen therapy, received silicon breast implants, and submitted to unsuccessful 'black market' testicle-removal surgery." *Id.* (citing the lower court decision of *Farmer v. Haas*, 990 F.2d 319, 320 (7th Cir. 1993)). While Farmer's "precise appearance in prison" was unclear from the record, she claimed to continue hormone treatment in prison "by using drugs smuggled into prison, and apparently [wore] clothing in a feminine manner, as by displaying a shirt off one shoulder." *Id.* The parties agreed that Farmer "project[ed] feminine characteristics" but it is unclear from the opinion what characteristics are considered "feminine." *Id.*; *see infra* Part III.A.

18. *Farmer*, 511 U.S. at 829–30; *see infra* note 261.

19. *Farmer*, 511 U.S. at 830.

20. *Id.* The precise security designations of the two facilities were unclear, but generally, penitentiaries are higher security facilities and house "more troublesome prisoners than federal correctional institutes." *Id.*

placed in administrative segregation and then moved to the general population.[21] She voiced no objection to any prison official about the transfer and placement in general population.[22] Within two weeks of her placement in general population, she was beaten and raped by another inmate in her cell.[23] Several days later she reported the attack to prison officials who responded by placing her in segregation.[24] The prison officials claimed they put her into segregation to await a hearing regarding her HIV status.[25]

Farmer filed a pro se Eighth Amendment claim alleging a failure to prevent harm by the prison and its officials.[26] She alleged that either transfer or placement of her within the general population violated the Eighth Amendment where, "despite knowledge that the penitentiary had a violent environment and a history of inmate assaults,...[Farmer] as a transsexual who 'projects feminine characteristics' would be particularly vulnerable to sexual attacks by some USP-Terre Haute inmates."[27]

The prison officials moved for summary judgment.[28] The district court denied Farmer's request to stay the proceeding pending discovery and granted summary judgment, concluding there was no deliberate indifference where the prison officials were not "reckless in a criminal sense, meaning that they had actual knowledge of a potential danger."[29] That court found it dispositive that Farmer had never expressed any concern for her safety.[30] The Seventh Circuit affirmed without opinion.[31] The U.S. Supreme Court subsequently granted certiorari.

The U.S. Supreme Court recognized that prison officials have an affirmative duty to prevent harm to prisoners at the hands of other prisoners.[32] According to the Court, "Prison conditions may be 'restrictive and even harsh,' but gratuitously allowing the beating or rape of one prisoner by another serves no 'legitimate penological objective[ ].'"[33] However, not "every injury suffered by one prisoner at the hands of another...translates into constitutional liability for prison officials responsible for the victim's safety."[34]

Eighth Amendment claims of the type brought by Farmer must satisfy a two-prong test.[35] The first prong requires that the "deprivation alleged must be,

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21. *Id.*
22. *Id.*
23. *Id.* at 830.
24. *Id.*
25. *Id.*
26. *Id.* at 830–31.
27. *Id.* at 831.
28. *Id.* Farmer responded by asking the district court to delay ruling until the prison officials had complied with pending discovery requests. *Id.* Farmer had mistakenly put the same date for defendants' responses to production as the date for the response to defendants' motion for summary judgment. Farmer v. Brennan, 81 F.3d 1444, 1447 (7th Cir. 1996) (explaining the procedural history of the case). The trial court decided her FED. R. CIV. P. 56(f) motion would not help, because any responses to her requests for production would be untimely to help her respond to defendants' summary judgment motion. *Id.*
29. *Farmer*, 511 U.S. at 831.
30. *Id.* at 832.
31. *Id.*
32. *Id.* at 833.
33. *Id.* (citation omitted) (brackets in original).
34. *Id.* at 834.
35. *Id.*

objectively, 'sufficiently serious.'"[36] To satisfy this prong a prisoner must show she "is incarcerated under conditions posing a substantial risk of serious harm."[37] The second prong is based upon the principle that the Eighth Amendment only protects against "unnecessary and wanton infliction of pain."[38] This means that prison officials charged with violating the Eighth Amendment must have sufficiently culpable states of mind.[39] As such, the prison official must have had a deliberately indifferent state of mind.[40] The *Farmer* decision sought to define and clarify the meaning of deliberate indifference.

Farmer argued for a civil recklessness standard,[41] which the Court rejected and instead decided that an Eighth Amendment violation requires "consciousness of a risk" by the prison officials.[42] Additionally, the Court stated that use of the word "deliberate" to describe the culpable state of mind "arguably requires nothing more than an act (or omission) of indifference to a serious risk that is voluntary, not accidental."[43] In other words, the Court held that a prisoner must demonstrate that the official "knows of and disregards an excessive risk to inmate health or safety."[44] "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."[45] In responding to concerns raised by Farmer,[46] the Court broadened possible bases for satisfying the deliberate indifference standard and elaborated on potential defenses for prisons.

The Court was not convinced that a subjective standard would allow prison officials to ignore obvious dangers to prisoners, as argued by Farmer.[47] A prisoner is not required to show a prison official acted or failed to act, believing "harm would actually befall an inmate."[48] "[I]t is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm."[49] The Court also left open the possibility to impute knowledge to a prison official where there was a showing of "longstanding, pervasive, well-documented, or expressly noted"[50] substantial risk of inmate attacks in the past and the official must have been exposed to the information concerning the risk and therefore must have known about it.[51] The key to the subjective deliberate indifference standard is that it is from the prison official's point of view.

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36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. The recklessness standard means that "a prison official is deliberately indifferent if he knew facts which rendered an unreasonable risk obvious...the defendant should have known of the risk and will be charged with such knowledge as a matter of law." *Id.* at 837 n.5 (citing Petitioner's Reply Brief at 5).
42. *Id.* at 840.
43. *Id.*
44. *Id.* at 837.
45. *Id.*
46. *Id.* at 843–48.
47. *Id.* at 842.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*

The Court determined that Farmer's concern that prison officials would escape liability by arguing that they did not know the precise identity of the attacker was unfounded.[52] A prisoner can establish deliberate indifference by showing that she belongs to "an identifiable group of prisoners who are frequently singled out for violent attack by other inmates."[53] Thus, "[i]t does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk."[54]

However, in deciding *Farmer*, the Court also created defenses for prison officials. Prison officials can assert that they were unaware of the risk because they were unacquainted with underlying facts that would allow a factfinder to impute knowledge to them.[55] They can also assert that "they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent."[56] Prison officials who actually knew of a substantial risk may not be liable if they responded reasonably to the risk, even if harm was not ultimately averted.[57]

The U.S. Supreme Court held that the deliberate indifference standard is subjective[58] and that the lower court erred in finding that advanced notice on the part of the prison officials is a necessary element of an Eighth Amendment failure to prevent harm case.[59] In remanding for further proceedings consistent with the newly articulated deliberate indifference standard,[60] the Court relied upon statements in the pleadings that tended to corroborate that Farmer, as a "non-violent transsexual who, because of...youth and feminine appearance [was] likely to experience a great deal of sexual pressure in prison."[61]

Justice Blackmun joined the majority because "it create[d] no new obstacles for prison inmates to overcome, and sen[t] a clear message to prison officials that their affirmative duty...to provide for the safety of inmates [wa]s not to be taken lightly."[62] Justice Thomas also wrote a concurring opinion but did not join.[63]

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52. *Id.* at 844.
53. *Id.* at 843 (citing Brief of Respondents at 15).
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *See supra* notes 32–56 and accompanying text.
59. *Farmer*, 511 U.S. at 849.
60. *Id.* at 851.
61. *Id.* at 849.
62. *Id.* at 852 (Blackmun, J., concurring). However, Justice Blackmun's concurrence disagreed that "barbaric prison conditions may be beyond the reach of the Eighth Amendment if no prison official can be deemed individually culpable." *Id.* at 851. He argued that "[w]hether the Constitution has been violated 'should turn on the character of the punishment rather than the motivation of the individual who inflicted it.'" *Id.* (citing Estelle v. Gamble, 429 U.S. 97, 116 (1976) (Stevens, J., dissenting)). Justice Blackmun interpreted the majority opinion as holding that "prison officials may be held liable for failure to remedy a risk so obvious and substantial that the officials must have known about it...and prisoners need not await a tragic event...before obtaining relief." *Id.* at 852.

Notably, Justice Blackmun summarized the gender history of Farmer in a slightly different way, noting that "[d]espite his overtly feminine characteristics, and his previous segregation at a different federal prison because of safety concerns, prison officials...housed him in the general population." *Id.* (citation omitted). He emphasized that rape and other violence among prison inmates serves no penological purpose. *Id.* He criticized the majority,

Since *Farmer* was decided, courts have continued to struggle with how to adjudicate transgender prisoner claims. The following Part discusses some of the decisions that attempt to implement the *Farmer* Eighth Amendment analysis. The first subpart discusses cases that were decided by the first prong of the *Farmer* test while the second subpart discusses cases turning upon the second prong of that same test.

*B. Post-*Farmer *Transgender Prisoner Claims*

1. Cases Decided on the First Prong, Determining Whether the Harm Alleged Is a Sufficiently Serious Deprivation or Violation

a. *DiMarco v. Wyoming Department of Corrections*

Miki Ann DiMarco was "born intersexual (or as a hermaphrodite)."[64] The court relied upon expert testimony[65] to find that DiMarco's "gender ambiguity was congenital in nature and the result of a disruption in her gonadal development resulting in non-typical hormone production."[66] The court determined that "a person is intersexual if they have both male and female characteristics, including in varying degrees reproductive organs, secondary sexual characteristics, and sexual behavior."[67] The court found that DiMarco "is closer to being a hermaphrodite than either a male or female. [She] has a nearly complete set of male reproductive organs however does not have testicles. [She] has no female reproductive organs."[68] The court referred to DiMarco with the feminine pronoun throughout its decision.[69]

DiMarco was housed in a women's correctional facility in general population until it was discovered that she had a penis,[70] at which point she was put into solitary isolation with attendant severely limited privileges.[71] This meant she was placed in

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stating that its "unduly narrow definition of punishment blinds it to the reality of prison life." *Id.* at 855. He also noted that "[a] punishment is simply no less cruel or unusual because its harm is unintended." *Id.* "The Framers...were also familiar with the cruelty that came from bureaucratic indifference to the conditions of confinement. [They] understood that cruel and unusual punishment can be administered by a failure of those in charge to give heed to the impact of their actions on those within their care." *Id.* (citing Jordan v. Gardner, 986 F.2d 1521, 1544 (9th Cir. 1993)).

63. *Id.* at 858 (Thomas, J., concurring). He argued that conditions of confinement can never be punishments unless imposed as part of a sentence. *Id.* at 859. He found Farmer's case "easy" since "the unfortunate attack that befell petitioner was not part of his sentence, it did not constitute 'punishment' under the Eighth Amendment." *Id.* Justice Thomas determined that the remand decision of the majority did not mean the lower courts reached a wrong result, but rather

> as a cautionary measure undertaken merely to give the Court of Appeals an opportunity to decide in the first instance whether the District Court erroneously gave dispositive weight to petitioner's failure to complain to prison officials that he believed himself at risk of sexual assault in the general prison population.

Id. at 862 n.2.

64. DiMarco v. Wyo. Dep't of Corr., 300 F. Supp. 2d 1183, 1187 (D. Wyo. 2004); *see infra* note 148 and accompanying text.

65. *See infra* Part III.A.

66. *DiMarco*, 300 F. Supp. 2d at 1187.

67. *Id.* at 1186.

68. *Id.* at 1186–87; *see supra* Part III.A.

69. *See DiMarco*, 300 F. Supp. 2d at 1186 n.1 (citing Brown v. Zavaras, 63 F.3d 967, 968 n.1 (10th Cir. 1995)) (noting that DiMarco had chosen to live her life and functioned throughout her life as a female, despite the prison officials' representations that their medical staff had determined DiMarco was anatomically and biologically male).

70. *Id.* at 1187.

71. *Id.* at 1191; *see infra* note 261.

the maximum security wing and segregated from the general population.[72] Prior to her transfer to segregated isolation, there were no reported incidents, and DiMarco "got along just fine with the other female inmates."[73]

The Tenth Circuit did not find an Eighth Amendment violation involving DiMarco because she was provided with "the basic necessities of food, shelter, clothing and medical treatment."[74] Although the court did not find a sufficient deprivation to prove an Eighth Amendment violation, it questioned "whether or not less harsh alternatives" were available to the prison officials.[75]

The court also noted that the Tenth Circuit has recognized psychological pain as a possible Eighth Amendment violation.[76] However, it did not find psychological harm to DiMarco since she was provided with "basic necessities,"[77] despite fourteen months spent in segregated confinement and "astonishing differences between the almost dormitory style housing quarters for the general population...and the stark, almost dungeon-like housing quarters" in which DiMarco was housed.[78]

b. *Perkins v. Kansas Department of Corrections*

In *Perkins*, the prison had forced Perkins to wear a face mask covering his entire head simply for being HIV positive.[79] The Tenth Circuit began its analysis from the position that "the Eighth Amendment forbids the state to punish people for a physical condition, as distinct from acts."[80] In that case, the Tenth Circuit held that the trial court had erroneously dismissed Perkins' case.[81] Similarly, transgender prisoners who are automatically placed in restrictive confinement solely based upon their physical status as transgender may violate the Eighth Amendment where that placement could result in "constant humiliation" and "extreme mental anguish."[82]

Transgender prisoners may be placed into isolation for disciplinary purposes as well as protective ones. The next case describes a transgendered prisoner who was placed into isolation for both.

c. *Murray v. Bureau of Prisons*

Michelle Murray was described by the Sixth Circuit as "both a biologically male transsexual and a federal prisoner."[83] Like the U.S. Supreme Court in *Farmer*, the Sixth Circuit also described Murray's gender history. "Although she has undergone extensive hormone therapy, has had breast implants, and has been castrated, she

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72. *DiMarco*, 300 F. Supp. 2d at 1187.
73. *Id.*
74. *Id.* at 1194.
75. *Id.* at 1192.
76. *Id.* (citing Perkins v. Kan. Dep't of Corr., 165 F.3d 803, 810 (10th Cir. 1999) (stating Tenth Circuit examples of potential Eighth Amendment violations like disseminating humiliating but peneologically irrelevant details of medical history or making HIV-positive prisoners wear signs that say "I AM AN AIDS CARRIER!")).
77. *Id.*
78. *Id.* at 1194.
79. Perkins v. Kan. Dep't of Corr., 165 F.3d 803, 811 (10th Cir. 1999).
80. *Id.* at 810.
81. *Id.* at 811.
82. *Id.*
83. Murray v. Bureau of Prisons, No. 95-5204, 1997 WL 34677, at *1 (6th Cir. Jan. 28, 1997).

remains anatomically male."[84] The Sixth Circuit followed Murray's feminine pronoun usage despite the fact that the government used the masculine pronoun to refer to her.[85]

The BOP placed Murray into isolation on several occasions.[86] Some of these occasions were allegedly to protect Murray from assaults by other inmates.[87] Other times she was put into segregated confinement as penalties for her refusal to wear a bra.[88] The Sixth Circuit held that the deprivations were not serious enough to trigger Eighth Amendment violations under the first prong because the "deprivation alleged must be objectively sufficiently serious."[89] The court held that the prison officials could have "subjected themselves to an Eighth Amendment claim" if they had failed to place Murray into segregated confinement for safety.[90] The court noted that defendants' concerns about Murray's safety were fulfilled by the fact that Murray was attacked after her release from segregated confinement.[91] The court reasoned that defendants' placement of Murray into segregated confinement following this attack related to risk from retaliation for reporting the attack and attempts to dissuade her from testifying at a disciplinary hearing against her attacker.[92]

The court also found that placing Murray in segregated confinement as a penalty for refusing to wear a bra was not sufficiently serious to show an Eighth Amendment violation.[93] The court noted that "an inmate is not entitled to clothing of his choice, and prison officials do not violate the Constitution simply because the clothing may be not be aesthetically pleasing or may be ill fitting."[94] Orders mandating Murray wear a bra are "reasonable efforts to maintain institutional order"[95] and were not "an exaggerated response."[96]

Murray's Eighth Amendment claims related to denial of hair and skin products necessary to maintain her feminine appearance were also denied.[97] The court held that "[c]osmetic products are not among the minimal civilized measure of life's necessities."[98]

Murray's allegations of verbal harassment were also not sufficient to state a claim although the court did not condone the statements, "the Eighth Amendment does not afford [it] the power to correct every action, statement, or attitude of a prison official

84. *Id.* (footnote omitted); *see infra* Part III.A.
85. *Murray*, 1997 WL 34677, at *5 n.1.
86. *Id.* at *2
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* (citing Farmer v. Brennan, 511 U.S. 825, 834 (1994)).
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* (citing Knop v. Johnson, 667 F. Supp. 467 (W.D. Mich. 1987)).
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*

with which we might disagree."[99] Ultimately the court affirmed summary judgment against Murray for all of her claims.[100]

Psychological harm may be a sufficiently serious deprivation to satisfy the first prong in the Tenth Circuit, but most courts do not consider anything short of actual physical attack serious enough to demonstrate an Eighth Amendment violation. Transgender prisoners' assertions of claims based on isolation, humiliation, retaliation, and sexual harassment have not been considered sufficiently serious deprivations.[101] Moreover, even if transgender prisoners are able to state a claim as to the first prong, they still must overcome the second prong, mandating the culpable state of mind for prison officials, to prove an Eighth Amendment violation.

2. Cases Decided upon the Second Prong—Required Culpable State of Mind by Prison Officials, Deliberate Indifference Standard

a. *DiMarco v. Wyoming Department of Corrections*

In analyzing whether the prison officials were deliberately indifferent to DiMarco, the court held that prison officials "had a legitimate reason to believe there was a potential, substantial risk of serious harm to either other...inmates or [DiMarco] due [to her] physical characteristics."[102] The court compared DiMarco's situation to that of *Farmer*,[103] noting "[t]he gender and physical characteristics [of *Farmer*] present a similar situation to the case at hand and was ignored by prison officials with unfortunate, but predictable results."[104]

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99. *Id.* at *3. Murray also claimed physical abuse by prison officials on at least three occasions. *Id.* The magistrate judge held that two of the three claims did not state a constitutional claim, and the Sixth Circuit agreed, so it did not discuss those claims. *Id.* In the claim that survived, Murray alleged that a prison officer named Caudill and another unidentified officer approached her in the prison cafeteria. *Id.* She alleged that Caudill made an insulting comment about her breasts and that the other officer subjected her to a pat-down search, during which time he unnecessarily touched her breasts. *Id.* She sued only Caudill. *Id.*

The Sixth Circuit noted that while a non-supervisory officer may be liable under certain circumstances for failure to intervene in stopping the improper actions of another officer, Caudill was not liable under these circumstances. *Id.* Since Murray failed to allege that the pat-down search itself was improper or that Caudill directed the unidentified officer to touch her breasts or that the touch lasted long enough for Caudill to stop it, there was no liability. *Id.* Murray additionally alleged that a correctional officer isolated her in a bathroom, removed her clothing, and repeatedly touched her breasts and buttocks. *Id.*

100. *Id.* Murray also made a claim for deliberate indifference to medical need for failure to provide her with the appropriate dosage of estrogen. *Id.* at *4. The court recognized that, "since transsexualism is a recognized medical disorder, and transsexuals often have a serious medical need for some sort of treatment, a complete refusal by prison officials to provide a transsexual with any treatment at all" would be an Eighth Amendment violation. *Id.* However, where Murray was receiving some sort of treatment, the court was "reluctant to second-guess" the judgment of a physician. *Id.* Moreover, the court reiterated that Murray does not have a right to a particular form of treatment, especially given the array of treatments for GID and the controversial nature of some of those treatments. *Id.* It held that, in the transgender treatment area specifically, "a federal court should defer to the informed judgment of prison officials as to the appropriate form of medical treatment." *Id. See generally* Maggert v. Hanks, 131 F.3d 670 (7th Cir. 1997) (holding that transgender prisoner not entitled to sex reassignment surgery); Brown v. Zavaras, 63 F.3d 967 (10th Cir. 1995) (holding that transgender prisoner had a right to some treatment, but not estrogen); Meriwether v. Faulkner, 821 F.2d 408, 413 (7th Cir. 1987) (reversing dismissal of transgender prisoner's Eighth Amendment medical need claim where she claimed no treatment given at all); Supre v. Ricketts, 792 F.2d 958 (10th Cir. 1986) (holding no Eighth Amendment failure to provide medical treatment violation where transgender prison denied hormones).

101. *See infra* note 196 and accompanying text.

102. DiMarco v. Wyo. Dep't of Corr., 300 F. Supp. 2d 1183, 1193 (D. Wyo. 2004).

103. *See supra* Part II.A.

104. *DiMarco*, 300 F. Supp. 2d at 1193.

The court in *DiMarco* additionally reasoned that "placing an inmate of opposite gender in a facility like [a women's prison], where it was reported that ninety percent of its female inmates had been raped, abused, or molested by males, mandated separate housing."[105] It held that the prison officials were not deliberately indifferent and acted in "good faith" when determining where to house DiMarco.[106] The last sentence of the opinion states, "this court also impresses upon the [prison facilities] the need to develop a plan and procedures to handle future administrative segregation based upon non-disciplinary issues such as those presented in the case at hand."[107]

Perils may still befall transgender prisoners even if they are placed in protective custody. As the next case illustrates, the assumption that a transgender prisoner will be safe if she is removed from general population is questionable.

b. *Greene v. Bowles*

Traci Greene was described by the court as "a male-to-female transsexual...pre-operative, but still display[ing] female characteristics, including developed breasts and a feminine demeanor, and was undergoing hormone therapy."[108] She was placed in protective custody because of her "feminine appearance."[109] While in protective custody, she was assaulted by another inmate, Hiawatha Frezzell, who was described by the warden as a "predatory inmate."[110] Greene was severely attacked with a mop handle and with a fifty-pound fire extinguisher.[111] Frezzell had been placed in protective custody because of testimony against other prisoners about a prison riot.[112] After the attack, Frezzell was transferred to segregation, and Greene filed an Eighth Amendment claim against the prison.[113] Summary judgment was granted in favor of the prison warden and a jury found for all remaining defendants.[114]

The trial court granted the warden summary judgment based upon its opinion that Greene failed to produce evidence from which a reasonable trier of fact could deduce that the warden knew of a substantial risk to her because Frezzell's attack against her was not sexual.[115] The trial court specifically held that, because the attack

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105. *Id.* at 1194.

106. *Id.* Although damages in unconstitutional confinement cases are usually based upon the difference between the harsh conditions of isolated confinement and the conditions in general population, the prison had a rational concern for safety and security of DiMarco and other inmates. *Id.* at 1198. DiMarco also failed to show "lasting or physical damages" resulting from the jail's unconstitutional violation of DiMarco's due process rights, where her own expert testified that she suffered from personality disorders prior to incarceration and there was no noticeable damage as a result of her incarceration. *Id.* As such, the court ordered payment of her attorney's fees, court costs, and expert costs but granted damages to DiMarco in the amount of only $1,000.00 for violation of her Fourteenth Amendment Due Process rights. *Id.*

107. *Id.* at 1198.

108. Greene v. Bowles, 361 F.3d 290, 292 (6th Cir. 2004); *see infra* notes 175–200 and accompanying text.

109. *Greene*, 361 F.2d at 292.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 293.

114. *Id.*

115. *Id.*

was not sexual, Greene's transgender status was "irrelevant to the determination of a substantial risk."[116]

The Sixth Circuit rejected this reasoning, finding that there was sufficient evidence that Greene was vulnerable not only to sexual assault, but physical assault such that her presence in protective custody with other inmates without segregation or other protective measures was a substantial risk to her safety.[117] It also found that there was sufficient evidence presented for a trier of fact to conclude the warden was aware of the substantial risk that Frezzell posed to any inmate.[118] Therefore, the Sixth Circuit held that a material question of fact existed regarding the warden's knowledge of substantial risk of harm to Greene, finding the lower court erred in granting summary judgment to the warden.[119]

The Sixth Circuit reversed and remanded the case for further factfinding.[120] It found that there was sufficient circumstantial evidence to impute knowledge of the substantial risk to the warden,[121] thus satisfying the deliberate indifference standard. The deliberate indifference standard was satisfied for the warden for the following reasons: (1) he noted Greene's physical status as the reason for her placement in protective custody;[122] (2) he admitted, during his deposition, that "transgendered inmates are often placed in protective custody because of the greater likelihood of their being attacked by their fellow inmates";[123] and (3) Frezzell had a predatory nature.[124] The dissent disagreed with the majority's holding because "[d]eliberate indifference means that the prison official had actual knowledge of a substantial risk to inmate health or safety and ignored that risk or proceeded in the face of it."[125]

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116. *Id.*
117. *Id.*
118. *Id.* at 294.
119. *Id.* at 295.
120. *Id.*
121. *Id.* at 294.
122. *Id.*
123. *Id.*
124. *Id.* at 294–95.
125. *Id.* at 296 (Rogers, J., dissenting). It is unclear if this would ever be possible for prisoners to demonstrate or how they would do so. The court noted that when imputing knowledge under deliberate indifference, the warden must not only be aware of the facts from which knowledge may be imputed but that there must be sufficient evidence that the warden actually made the inference of risk. *Id.* (citing Farmer v. Brennan, 511 U.S. 825, 835 (1994)). It found that the only evidence supporting an inference of knowledge was the admission that the warden made that some harms may "befall protective custody inmates." *Id.* "At most, this admission is a concession that prison life is inherently dangerous, and particularly so for transgendered inmates." *Id.* Although the dissent recognized that at times a particular perpetrator or victim need not be known, "general recognition of some risks is not enough." *Id.*; *see Farmer*, 511 U.S. at 844. The dissent argued that the majority imposed an objective standard of deliberate indifference that was expressly rejected by *Farmer*. *Greene*, 361 F.2d at 297 (Rogers, J., dissenting). The dissent concluded by stating:

> Moreover, the majority takes a position that will make it more difficult for prison officials to deal with the complicated issues involved in incarcerating pre-operative transsexual inmates. These inmates may not be well-suited to the general populations of either men's or women's institutions, and protective custody may be a warden's best alternative to provide for the safety and security of transsexual inmates. The majority's broad position that protective custody poses *obvious harms* to transsexual inmates could impel correctional officials to avoid liability for harms to these inmates by either placing all transsexual inmates in individual isolation or by building prisons solely for transsexuals. The Eighth Amendment cannot be read to compel such a result.

Id.

c. *Long v. Nix*

Although this Comment does not discuss deliberate indifference to medical need, this case presents a situation where the deliberate indifference standard was applied when a transgender prisoner asserted various claims based upon her status as transgender.[126]

Merlin C. Long was serving a life sentence at a state penitentiary.[127] The Eighth Circuit referred to Long in male pronouns throughout the opinion.[128] Long initially arrived at the penitentiary in "full drag,"[129] and at first prison officials refused to let her[130] wear women's clothing.[131] After a hunger strike, Long was allowed to wear women's clothing and make-up on a regular basis until a member of the Parole Board complained and the "privilege" was revoked.[132]

Long brought a claim against prison officials for conditions of confinement and deliberate indifference to medical need because the officials denied her[133] the right to dress in women's clothing while incarcerated.[134] However, the Eighth Circuit focused upon Long's claim of deliberate indifference to alleged medical need and did not examine her claim of deliberate indifference regarding conditions of her confinement.[135]

The Eighth Circuit decided that, because the medical experts who testified at trial could not come to agreement on whether Long suffered from Gender Identity Disorder (GID)[136] or cross-dressed for sexual stimulation,[137] Long was not a transsexual according to the court.[138] The experts also disagreed about what was the appropriate medical treatment for Long.[139] The Eighth Circuit held that "[p]rison officials do not violate the Eighth Amendment when, in the exercise of their professional judgment, they refuse to implement a prisoner's requested course of treatment."[140]

In addition to disregarding Long's Eighth Amendment conditions of confinement claim, the court also refused to accept Long's contention that she be provided a "sensitive psychotherapist trained in gender-identity issues."[141] The court found no

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126. Long v. Nix, 86 F.3d 761 (8th Cir. 1996). Although this case arose within the context of deliberate indifference to medical need rather than failure to prevent harm in the Eighth Amendment context, it is presented here to demonstrate the effect experts have on litigation by transgender prisoners within the Eighth Amendment context.

127. *Id.* at 762.

128. *Id.* at 761.

129. *Id.* at 763.

130. Although the court refused to recognize Long's transgender status because the experts could not agree, this Comment refers to Long in the female pronoun.

131. *Long*, 86 F.3d at 763.

132. *Id.*

133. *See infra* Part III.A.

134. *Long*, 86 F.3d at 761.

135. *Id.*

136. *Id.* at 764; *see infra* notes 154–159 and accompanying text.

137. *Long*, 86 F.3d at 764.

138. *Id.*; *see infra* Part III.A.

139. *Long*, 86 F.3d at 765.

140. *Id.*

141. *Id.* at 766.

Eighth Amendment violation.[142] Thus, the Eighth Circuit affirmed that Long failed to prove that the prison officials were deliberately indifferent to her gender identity disorder because Long had "no apparent interest in overcoming his gender-identity disorder, [which] frustrated the attempts of prison doctors to treat that disorder by his consistent refusal of psychological evaluation over the past twenty years."[143]

As the above cases demonstrate, since the *Farmer* decision, courts have struggled not only with the implementation of the deliberate indifference standard but also with how to describe and define the transgender prisoners themselves. It is important to understand the different meanings of sex and gender to recognize why the courts have struggled in attempting to classify and adjudicate transgender prisoner claims.[144] The Eighth Amendment's failure to distinguish meaningfully between sex and gender is why its protections to transgender prisoners are limited.

III. LIMITATIONS OF THE EIGHTH AMENDMENT AS A BASIS FOR TRANSGENDER PRISONER CLAIMS

A. Problems with Sex Versus Gender and Reliance upon Medical Experts

The nature of the United States' penal system informs the treatment of not only transgender prisoners but prisoners in general. Michel Foucault argued that, when public executions were abolished, penal punishment became more ephemeral.[145]

> From being an art of unbearable sensations punishment has become an economy of suspended rights. If it is still necessary for the law to reach and manipulate the body of the convict, it will be at a distance in the proper way, according to strict rules, and with a much "higher" aim.[146]

As punishments have become more attenuated, the need for experts has increased. "Recourse to psycho-pharmacology and to various physiological 'disconnectors,' even if it is temporary, is a logical consequence of this 'non-corporal' penality."[147] This is especially acute where experts are relied upon to establish meanings of terms like "sex" and "gender" for the courts in transgender prisoner cases.

The terms "sex" and "gender" are presumed to have fixed meanings. However, many of the meanings ascribed to these terms are a combination of both medical and social construction. "Sex" as a term usually refers to physical characteristics such

142. *See id.* at 766.
143. *Id.*
144. *See infra* Part III.A.
145. *See generally* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).
146. *Id.* at 11.
147. *Id.*

as anatomy.[148] Gender, by contrast, usually refers to a social role as distinguished from biological sex.[149]

The perceived conflict between sex and gender observed by the medical field resulted in additional terms, such as transsexual.[150] Whether the terms transsexual or transgender are used implicates whether a medical or social meaning is being promulgated. There is a stigmatizing effect of the medical community's labeling of non-gender conformity as a psychological disorder.[151]

Courts have relied upon the American Psychiatric Association's *Diagnosis and Statistical Manual of Mental Disorders*[152] in attempting to define transgender inmate status.[153] In order for a person to be diagnosed with GID, two components must be present:[154] (1) "evidence of a strong and persistent cross-gender identification,"[155] and (2)"evidence of a persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex."[156] A person cannot be diagnosed

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148. *See, e.g.*, Milton Diamond, *Sex and Gender Are Different: Sexual Identity and Gender Identity Are Different*, 7 CLINICAL CHILD PSYCHOL. & PSYCHIATRY 320, 321 (2002); Sana Loue, *Transsexualism in Medicolegal Limine: An Examination and a Proposal for Change*, 15 J. PSYCHIATRY & L. 27 (1996). "Sex" can be further broken down into various components such as chromosomal sex and gonadal sex. *See* ERWIN K. KORANYI, TRANSSEXUALITY IN THE MALE, THE SPECTRUM OF GENDER DYSPHORIA 8 (1980). Chromosomal sex refers to typical male (XY) and typical female (XX); however, various mixtures can coexist in a single individual, which generally results in an intersex condition. *Id.* at 9 (using the older term "hermaphrodite"). For a description of various intersex manifestations, see generally BURKE, *supra* note 5. Gonadal sex is defined by external and internal genitalia. KORANYI, *supra*, at 8; *see supra* notes 64–78 and accompanying text.

149. *See* Seil, *supra* note 5, at 100–01 (distinguishing biological sex assigned at birth from genetic or anatomic gender used to designate anatomic characteristics assumed to conform to chromosomal sex). Gender itself can further be subdivided into gender role and gender identity. Gender role means behavior patterns expected, learned, or acted according to social expectation. Diamond, *supra* note 148, at 322. Gender identity is "the subjective sense of the gender one feels one is, regardless of what genitals a person has." Seil, *supra* note 5, at 101.

150. Transsexualism was originally defined by Harry Benjamin in 1966 as a mental syndrome. Dallas Denny, *Changing Models of Transsexualism*, *in* TRANSGENDER SUBJECTIVITIES: A CLINICIAN'S GUIDE 25, 26 (Ubaldo Leli & Jack Dreschler eds., 2004). Benjamin, along with Christian Hamburger, also are credited with developing the phrase "trapped in wrong body." *See* GORDENE OLGA MACKENZIE, TRANSGENDER NATION 72–76 (1994). Benjamin stated, "Since it is evident, therefore, that the mind of the transsexual cannot be adjusted to the body, it is logical and justifiable...to attempt the opposite, to adjust the body to the mind." *Id.* at 21. The first dictionary definition of the word "transsexual" was "a person having a strong desire to assume the physical characteristics and gender role of the opposite sex" and "a person who has undergone hormone treatment and surgery to attain the physical characteristics of the opposite sex." *Id.* at 12 (citing RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 2012–13 (2d ed. 1987)). "Transgender" was originally coined by Virginia Prince and meant individuals living as their non-biological gender identity without surgical intervention, but the term has been broadened beyond that to include anyone who transgresses or questions gender boundaries. MACKENZIE, *supra* note 150, at 2; Denny, *supra* note 150, at 30. *See generally* BORNSTEIN, *supra* note 5 (arguing that transgender as a term has a broad meaning that encompasses anyone transgressing gender boundaries). Transgender as an identity can also be viewed as "a political positioning that draws from postmodern notions of fluidity (for both bodies and genders)." Katrina Roen, *"Either/Or" and "Both/Neither": Discursive Tensions in Transgender Politics*, 27 SIGNS 501 (2002).

151. *See infra* notes 154–159 and accompanying text.

152. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) [hereinafter DSM IV].

153. *See* Farmer v. Brennan, 511 U.S. 825, 829 (1994) (relying upon AM. MED. ASS'N, ENCYCLOPEDIA OF MEDICINE (1989) and AM. PSYCHIATRIC ASS'N, DIAGNOSIS AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d rev. ed. 1987) [hereinafter DSM III]); Meriwether v. Faulkner, 821 F.2d 408, 412 (7th Cir. 1987) (citing DSM III).

154. DSM IV, *supra* note 152, at 532, 538. In all GID diagnoses, intersexed individuals are explicitly excluded.

155. *Id.* at 532.

156. *Id.* at 533.

with GID if it is "merely...a desire for any perceived cultural advantages of being the other sex."[157]

Many transgender community members oppose the medicalization of transgenderism. Because the DSM IV identifies transgenderism as a psychological disorder, it demonstrates that our culture has decided to view transsexualism as an illness, and therefore pathological and abnormal, rather than reexamining our own concepts of role and identity.[158] "[W]e must seriously question whether transsexualism is a 'disease' requiring medical intervention or whether it is a cultural symptom of the *dis-ease* evoked by challenging the traditional Western sex and gender code."[159] However, others note that the transsexual model provides the framework necessary to allow transsexuals to obtain medical treatment "but at a price: the treatment it prescribed—sex reassignment—was predicated on the notion that there were but two genders, and was thus relatively inflexible."[160] The transsexual model effectively replaces the "opposite-sex" binary with a different binary of diagnosed versus undiagnosed persons.[161] The male/female binary becomes diagnosed/undiagnosed.[162]

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157. *Id.* The DSM IV also distinguishes between children, adolescents, and adults with GID. *Id.* at 532–38.

Although the transgender inmates involved in the case law discussed in this Comment are adults, some examination of the criteria for children who are diagnosed with GID is essential for understanding the problematic nature of the DSM IV. In biological boys, GID "is manifested by a marked preoccupation with traditionally feminine activities," including preference for "dressing in girls' or women's clothes" or improvising with items such as towels, aprons, and scarves to approximate hair or skirts; playing house; playing with Barbie; avoidance of "rough and tumble play"; and watching television or video of female characters. *Id.* at 533. "They may also express a wish to be a girl and assert they will grow up to be a woman." *Id.* Sometimes biological boys pretend not to have a penis, state they wish to have a vagina, or find their penis or testes disgusting and want to remove them. *Id.* The DSM IV carefully delineates activities it presupposes are objectively female and therefore inappropriate for biological boys.

The DSM IV states that adults with GID "are preoccupied with their wish to live as a member of the other sex," which may manifest itself either as "an intense desire to adopt the social role of the other sex or to acquire the physical appearance of the other sex through hormonal or surgical manipulation." *Id.* at 533. It also acknowledges that adults, "[t]o varying degrees...adopt the behavior, dress, and mannerisms of the other sex." *Id.* The DSM IV also excludes "simple nonconformity to stereotypical sex role behavior" by measuring "extent and pervasiveness of the cross-gender wishes" and excludes transvestic fetishism, wherein the adult is cross-dressing "for the purpose of sexual excitement." *Id.* at 536; *see supra* notes 128–145 and accompanying text.

When the DSM IV was promulgated, the primary controversy within the American Psychiatric Association (APA) was whether transvestic fetishism should be a separate diagnosis from GID. 4 AM. PSYCHIATRIC ASS'N, DSM IV, SOURCEBOOK 1134–37 (1996). There was no discussion of whether GID as a psychological diagnosis was appropriate. *Id.* at 1134–35. In addition, because the APA explicitly excluded intersexed individuals, GID does not address the presumptions of sex/gender differences inherent in the diagnosis criteria. DSM IV, *supra* note 152, at 532. *But see supra* notes 65–79 and accompanying text. GID primarily addresses gender roles, which "are those behaviors imposed overtly or covertly by society." Diamond, *supra* note 148, at 323. "*Gender* and *gender role* refer to society's idea of how boys and girls or men and women are expected to behave and should be treated." Diamond argues these would be better described as sex-typical behaviors, because "[g]ender roles are those behaviors imposed overtly or covertly by society." *Id.*

The GID diagnosis is further complicated by the fact that the APA does not distinguish between private and public performance of gender roles. "Gender identity is the private experience of gender role; and gender role is the public manifestation of gender identity." *Id.* Although arguably in an incarceration setting, public and private spheres may be more conflated than outside that setting.

158. Loue, *supra* note 148, at 33.

159. MACKENZIE, *supra* note 150, at 60.

160. Denny, *supra* note 150, at 28.

161. *See infra* notes 166–192 and accompanying text; *see also* FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, PROGRAM STATEMENT 43 (Jan. 15, 2005) (on file with author) ("Inmates who have undergone treatment for gender identity disorder will be maintained at the level of change which existed when they were incarcerated in the Bureau" and "medical Director must approve, in writing, hormone use for the maintenance of secondary sex

Moreover, the U.S. Supreme Court has already acknowledged the problematic nature of "scientific" evidence in other contexts, stating "arguably, there are no certainties in science."[163] Yet, courts rely on testimony of medical experts and medical literature to analyze issues involving transgender persons.[164] "The adjective 'scientific' implies a grounding in the methods and procedures of science."[165] Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation.[166] Sex designation as ratified by medical and scientific judgment appears to carry the weight of certainty.

Despite the fact that sex is assigned upon birth by a human being,[167] sex is assumed to be a biological and immutable characteristic.[168] "Sex is usually assigned when an infant is born by looking to see whether it has a penis. If it does, it's a boy; if it doesn't it's a girl."[169] This embedded assumption is what allows the characterization of non-conforming gender role performance as a disorder.[170] Courts addressing transgender inmate issues spend much of their opinions cataloging the genetalia and physical characteristics of the inmate.[171] This physical cataloguing emphasizes an artificial sense of sex and gender, suggesting that, by tallying up the body parts of a person, she can be relegated to one gender or another. However, the term transgender also has problematic implications. The use of the term "transgender" in and of itself does not resolve the general assumption by society and by the courts that gender is properly defined within a binary model.

For transgender prisoners, the necessity for experts is heightened given the lack of knowledge on the part of the courts[172] and disagreement among the medical community as to proper treatment for GID.[173] In addition, transgender prisoners often must rely upon prison medical personnel to ratify their claim of transgender

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characteristics in writing."). *See generally* MACKENZIE, *supra* note 150.

162. *See infra* notes 200–214 and accompanying text. *See generally* MACKENZIE, *supra* note 150; Denny, *supra* note 150.

163. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 591 (1993). However, note that in determining admissibility of expert testimony under Federal Rule of Evidence 702, the court may take into account different factors, and the primary principle driving admissibility of expert testimony is its ability to assist the trier of fact. It may be argued that judges unfamiliar with transgender persons would be assisted by scientific testimony regarding transgender persons.

164. *See* Farmer v. Brennan, 511 U.S. 825, 829 (1994) (relying on AM. MED. ASS'N, ENCYCLOPEDIA OF MEDICINE and DSM III); Schwenk v. Hartford, 204 F.3d 1187, 1193 (9th Cir. 2000) (citing testimony of a Clinical Associate Professor of Social Work, Psychiatry, and Behavioral Sciences); Long v. Nix, 86 F.3d 761, 763–64 (8th Cir. 1996) (noting that experts agree that plaintiff was not a transsexual because they could not agree whether Long "primarily want[ed] to wear clothing to achieve sexual arousal or to satisfy his desire to be a woman"); Meriwether v. Faulkner, 821 F.2d 408, 412 (7th Cir. 1987) (citing DSM III and an article on tranvestism from J. OF SEX & MARITAL THERAPY); DiMarco v. Wyo. Dep't of Corr., 300 F. Supp. 2d 1183, 1187 (D. Wyo. 2004) (relying upon the testimony of a doctor).

165. *Daubert*, 509 U.S. at 591.

166. *Id.*

167. *See, e.g.*, Ruth Hubbard, *Gender and Genitals, Constructs of Sex and Gender*, *in* CURRENT CONCEPTS IN TRANSGENDER IDENTITY 45, 46 (Dallas Denny ed., 1998).

168. *See* Frontiero v. Richardson, 411 U.S. 677, 688 (1973).

169. Hubbard, *supra* note 167.

170. *See supra* notes 154–159 and accompanying text.

171. *See infra* notes 176–190 and accompanying text.

172. *See, e.g.*, Maggert v. Hanks, 131 F.3d 670, 671 (7th Cir. 1997) (discussing sex reassignment surgery by noting that "[s]omeone eager to undergo this mutilation is plainly suffering from a profound psychiatric disorder").

173. Long v. Nix, 86 F.3d 761, 764 (8th Cir. 1996).

identity.[174] GID is still classified as a psychological disorder in the paraphilia grouping, which can be stigmatizing.[175]

In *Farmer v. Brennan*, the Court first referred to Farmer as transsexual[176] and then as "preoperative transsexual[]."[177] In a more recent case, *DiMarco v. Wyoming Department of Corrections*,[178] the plaintiff is referred to as "intersexual (or as a hermaphrodite)."[179] There, the court explained that the prison medical staff determined DiMarco "anatomically and biologically a male,"[180] but noted she had lived her entire life and functioned as a female.[181] However, the courts generally use the term "transsexual."[182] Only one court has used the term "transgender."[183] Other courts refer to the plaintiff more specifically as pre-operative male-to-female transsexual[184] or "diagnosed transsexual."[185] In another case, the court refused to recognize the prisoner as transgender where the experts were in disagreement as to whether she cross-dressed for sexual pleasure or as part of GID.[186]

The courts also usually engage in cataloguing of body parts of the transgender prisoner before analyzing the Eighth Amendment claim.[187] In addition, most courts refer to the transgender prisoners as "feminine" without defining precisely what is meant by that term.[188] The very presumption that transgendered persons are ambiguously gendered presupposes a static gender model in and of itself. Arguably,

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174. *See, e.g., id.* at 763; Farmer v. Brennan, 81 F.3d 1444, 1445 (7th Cir. 1996); Meriwether v. Faulkner, 821 F.2d 408, 410 (7th Cir. 1987); Lamb v. Maschner, 633 F. Supp. 351, 353 (D. Kan. 1986).

175. *See* DSM IV, *supra* note 152, at 493 (including other diagnoses such as sexual sadism, pedophilia, and voyeurism); *see also supra* notes 154–159 and accompanying text.

176. Farmer v. Brennan, 511 U.S. 825, 830 (1994).

177. *Id.*

178. 300 F. Supp. 2d 1183 (D. Wyo. 2004).

179. *Id.* at 1186.

180. *Id.*

181. *Id.* at 1187 (finding plaintiff's "gender ambiguity was congenital in nature and the result of a disruption in her gonadal development resulting in non-typical hormone production").

182. *See* Claybrooks v. Tenn. Dep't of Corr., No. 98-6271, 1999 WL 503457, at *1 (6th Cir. July 6, 1999) ("self-described transsexual"); Schwenk v. Hartford, 204 F.3d 1187, 1193 (9th Cir. 2000); Doe v. Reno, No. 98-1252, 1999 WL 89030, at *1 (10th Cir. Feb. 23, 1999); Murray v. U.S. Bureau of Prisons, No. 95-5204, 1997 WL 34677, at *1 (6th Cir. Jan. 28, 1997) (describing plaintiff as "biologically male transsexual"); Long v. Nix, 86 F.3d 761,764 (8th Cir. 1996) (experts agreed plaintiff was not a transsexual); Gomez v. Maass, No. 90-35390, 1990 WL 177776, at *2 (9th Cir. Nov. 16, 1990); Meriwether v. Faulkner, 821 F.2d 408, 410 (7th Cir. 1987); Whittington-Barrett v. Johnson, No. E2000-00700-COA-23-CV, 2000 WL 1661527, at *1 (Tenn. Ct. App. Nov. 26, 2000) (plaintiff identified herself in the complaint as transsexual); Star v. Gramley, 815 F. Supp. 276, 278 (C.D. Ill 1993) (warden denied that plaintiff was transsexual because she had no "medically documented need to wear women's clothing"); Pollack v. Brigano, 720 N.E.2d 571, 573 (Ohio App. 1998) (Appellant referred to herself as a "transsexual suffering from gender dysphoria.").

183. *See* Tates v. Blanas, No. S-00-2539 OMP P, 2003 WL 23864868, at *1 (E.D. Cal. Mar. 11, 2003).

184. *See* Greene v. Bowles, 361 F.3d 290 (6th Cir. 2004).

185. *See* Farmer v. Carlson, 685 F. Supp. 1335, 1337 (M.D. Pa. 1988).

186. *Long*, 86 F.3d at 764.

187. *See Greene*, 361 F.3d at 292 (noting "developed breasts" but "preoperative"); DiMarco v. Wyo. Dep't of Corr., 300 F. Supp. 2d 1183, 1186–87 (D. Wyo. 2004) (noting that "plaintiff bore a penis" and "has a nearly complete set of male reproductive organs however does not have testicles...[and] has no female reproductive organs"); *Tates*, 2003 WL 23864868, at *1 (noting "breasts sufficiently enlarged" to require a bra); *Schwenk*, 204 F.3d at 1192 (noting that prisoner "has shoulder-length hair"); *Murray*, 1997 WL 34677, at *1 (noting that prisoner had "breast implants" and "has been castrated, [but] she remains anatomically male").

188. *See Greene*, 361 F.3d at 292 (stating that prisoner "displayed female characteristics" and had a "feminine appearance"); Farmer v. Brennan, 511 U.S. 825, 829 (1994) (stating that "parties agree that [Farmer] projects feminine characteristics"). *But see Schwenk*, 204 F.3d at 1193 (describing prisoner as "extremely soft-spoken and feminine, cries easily, and uses make-up and other female grooming products when possible").

the courts are attempting to grapple with the complexities of ambiguous gender identity by acknowledging the various prisoners' characteristics and using the pronouns consistent with the prisoners' self-identity assertions.[189] The courts' apparent failure to even know how to describe the prisoners highlights their reliance upon experts to define the transgender prisoners' identities. As aptly explained by Ruth Colker, "a legal system without categories is impossible...[but] the legal system is overly reliant on *bipolar* categories....We can break down this needless bipolarity by adding more individualized decisionmaking to the legal system while not entirely displacing the use of categories."[190]

B. Psychological Harm

The potential for psychological harm resulting from automatic classification based on transgender status could improve adjudication of transgender prisoner Eighth Amendment claims. The automatic placement of transgender prisoners, even if based on a proffered safety purpose, could violate the Eighth Amendment if it unnecessarily discloses their transgender status or results in extreme psychological harm.[191] However, in *DiMarco*, the court found that the placement of the prisoner in administrative segregation was necessary for her safety, and, as such, was not punishment based solely on her physical characteristics per se, despite potential availability of less drastic means to the prison.[192] In *Tates v. Blanas*, the automatic classification of transgender prisoners based solely on physical characteristics was discriminatory.[193] Scholar Darren Rosenblum relates, inter alia, Dee Farmer's description of her imprisonment:

> A transgendered woman who has undergone extensive hormonal therapy and cosmetic surgery, is convicted and imprisoned. Because she still has a penis, albeit a nonfunctioning one, prison officials categorize her as a male, and place her in a men's prison. "You were born a boy, and you're going to stay a boy," the prison doctor says, rejecting a continuation of her long-term estrogen treatment. Her body begins to regain the masculinity she had largely escaped. Bruised by the changes, her body no longer feels like her own, but one imposed on her by the criminal justice system. Her femininity stands out among the male prisoners who repeatedly rape and beat her. Trapped, not only in her body, but in a prison that refuses to recognize and respect her gender identity, she castrates herself with glass and used razors.[194]

While Rosenblum's description is largely based upon placement in the general prison population and lack of medical treatment, the psychological impact of the prison's refusal to recognize transgender identity is a psychological harm in and of itself. Although the physical harm attendant to placement in the general population

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189. *See infra* Part V.

190. RUTH COLKER, HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW 233 (1996).

191. *See, e.g.*, Powell v. Schriver, 175 F.3d 107 (2d Cir. 1999); Perkins v. Kan. Dep't of Corr., 165 F.3d 803 (10th Cir. 1999); *see also infra* Part III.D.

192. *See DiMarco*, 309 F. Supp. 2d at 1192.

193. Tates v. Blanas, No. S-00-2539 OMP P, 2003 WL 23864868 (E.D. Cal. Mar. 11, 2003).

194. Rosenblum, *supra* note 14, at 500 nn.1–6.

may be mitigated by placement in protective custody or administrative segregation, the denial of interaction with other human beings and extreme isolation may bring their own psychological harms. This may be especially acute for the transgender prisoner where that isolation is a result of transgender status alone. Despite the fact that psychological harm can be a sufficiently serious deprivation to satisfy the first prong, at least in the Tenth Circuit, it does not appear that courts have considered anything short of actual physical attack serious enough to demonstrate an Eighth Amendment violation.[195]

Several scholars have noted the problems transgender prisoners face.[196] Various solutions have been proposed, most aimed at the prisons and their problems. The suggestions by scholars include administrative segregation[197] and transgender-only wards.[198] Most scholars argue that placement of transgender prisoners should be based upon gender identity rather than genitalia inventory.[199] At the same time, some have concerns about gender-identity-based classification, such as other prisoners not wanting to share a cell with a transgender prisoner,[200] transgender prisoners engaging in sex with female inmates if housed within a women's facility,[201] and transgender prisoners being violent against other inmates.[202]

C. The Showing Required to Satisfy the Deliberate Indifference Standard

The subjective deliberate indifference standard established by *Farmer*[203] places a high burden on transgender litigants to establish liability for prisons. The *Farmer* standard[204] requires that the prison official either actually know of the risk of harm to a transgender prisoner or the risk of harm is so obvious that knowledge may be imputed.[205] However, in imputing knowledge, the transgender litigant must demonstrate not only that the risk was obvious, but that enough facts exist to establish that a prison official drew the inference of harm from those facts.[206] "The fact that plaintiffs bear this burden creates an incentive for guards to ignore problems....Even if a guard could be held liable for failure to investigate facts

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195. *See supra* Part II.B.1.

196. *See generally* Barnes, *supra* note 14; Richard Edney, *To Keep Me Safe From Harm? Transgender Prisoners and the Experience of Imprisonment*, 9 DEAKIN L. REV. 327 (2004); Peek, *supra* note 14; Rosenblum, *supra* note 14.

197. *See* Barnes, *supra* note 14, at 638 (arguing that segregation should only be used for short periods of time, where it is not voluntary, heightened standards should attach, and the conditions should mirror general population); Peek, *supra* note 14, at 1239–40 (noting segregation results in more limited privileges for transgender prisoners and "often burdens the victims more than the aggressors" while failing to protect against attacks by guards).

198. *See* Peek, *supra* note 14, at 1240 (noting that prisons would have problems deciding who would qualify for placement and the problems in New York's prison system where transgender persons and homosexuals are often amalgamated); Rosenblum, *supra* note 14, at 534 (noting same problem with conflagration of transgenderism and homosexuality, but arguing that transgender persons would be freer to express their gender identity and smaller prisons could offset costs by states pooling resources to provide centralized services).

199. *See* Barnes, *supra* note 14, at 645–46; Edney, *supra* note 196, at 337; Peek, *supra* note 14, at 1241; Rosenblum, *supra* note 14, at 531.

200. *See* Crosby v. Reynolds, 763 F. Supp. 666 (D. Me. 1991); Rosenblum, *supra* note 14 at 531–32.

201. *See* Rosenblum, *supra* note 14, at 532. *But see Crosby*, 763 F. Supp. at 667.

202. *See* Greene v. Bowles, 361 F.3d 293 (6th Cir. 2004); Rosenblum, *supra* note 14, at 532.

203. 511 U.S. 825 (1994).

204. *See supra* notes 37–42 and accompanying text.

205. *Farmer*, 511 U.S. at 843.

206. *Id.*

underlying a substantial risk...higher prison officials would still be insulated on the ground that they had no knowledge of the omission."[207] Although this high standard applies to any prisoner's claim, it is especially troublesome for a transgender litigant who must prove her transgender status as part of her claim, as well as knowledge of her status by prison officials. The disclosure of her transgender status can have implications for her right to have her transgender status private.

D. Privacy of Transgender Status

Although prisons now have an affirmative duty to protect transgender prisoners from the violence of other inmates in the general population after *Farmer*,[208] prisons may also risk liability if they disclose a prisoner's transgender status during the course of protecting her.[209] For example, a transgender prisoner sued a guard for violating her constitutional right to privacy by disclosing her transgender status in the presence of other inmates and prison staff.[210] In that case, *Powell v. Schriver*,[211] the court stated that "[t]he excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate."[212] The court held "that individuals who are transsexuals are among those who possess a constitutional right to maintain medical confidentiality."[213] However, that privacy right is subject to waiver if the transgender prisoner enters into some sort of agreement, such as a settlement, that makes the matter public record.[214] Unless the disclosure serves a legitimate penological purpose,[215] it is a constitutional violation.[216] The court found it hard to imagine a circumstance in which a disclosure of transgender status would further such a purpose, especially in light of the fact that "such disclosure may lead to inmate-on-inmate violence."[217]

Female inmates learned of a transgender prisoner's status in *Crosby v. Reynolds*,[218] although the record is unclear as to how. In that case, a female inmate complained that her constitutional privacy rights were violated when a transgender prisoner, Cheyenne Lamson,[219] was placed into the same cell as her.[220] The female inmate believed her privacy right had been violated because Lamson allegedly repeatedly came into the inmate's cell while she was on the toilet (although Lamson immediately left upon "learning of the plaintiff's position")[221] and the inmate

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207. Peek, *supra* note 14, at 1244.

208. *See, e.g.*, DiMarco v. Wyo. Dep't of Corr., 300 F. Supp. 2d 1183, 1193 (D. Wyo. 204); Tates v. Blanas, No. S-00-2539 OMP P, 2003 WL 23864868, at *9 (E.D. Cal. Mar. 11, 2003); *see also supra* Part II.A.

209. Powell v. Schriver, 175 F.3d 107 (2d Cir. 1999).

210. *Id.* at 109.

211. *Id.* at 111.

212. *Id.* at 112.

213. *Id.* at 111.

214. *Id.* at 111 n.1.

215. *Id.* at 112.

216. *Id.*

217. *Id.* at 113. (citing Farmer v. Brennan, 511 U.S. 825, 829 (1994)).

218. 763 F. Supp. 666 (D. Me. 1991).

219. *Id.* at 667 (stating that Lamson was "a/k/a Cheyenne Deneuve a/k/a Roger Miles...a 6'1 preoperative male transsexual").

220. *Id.* at 666–67.

221. *Id.* at 667.

decided not to take a shower when Lamson entered the common room and would not leave.[222]

The court determined that a female inmate's constitutional right to privacy was not clearly established enough to state a claim[223] when a transgender prisoner would be in "severe jeopardy"[224] if placed in a general male prison population. In addition, it noted that "segregation...was not an ideal situation"[225] and placement with the female population best satisfied the transgender prisoner's needs.[226] The court also noted that that transgender prisoner was no threat to the female inmates because, although her male genetalia was anatomically intact,[227] she had virtually no sexual capacity as a male.[228] However, the court was careful to note that it was not "called upon to decide whether a right to privacy would be clearly invaded if males and females generally were housed together."[229]

The automatic placement of transgender prisoners into either protective custody or segregated confinement could be seen as a disclosure of the prisoners' status because usually prisoners do not receive higher classifications unless they are a "snitch" or a disciplinary problem.[230] Moreover, placement of a transgender prisoner within her target identity facility could still create issues if her status is disclosed.[231]

E. Summary of Eighth Amendment Considerations

The lower courts have analyzed transgender prisoners' Eighth Amendment claims in very different ways depending on the type of violation involved and the nature of the prisoner herself. In dictum, the *Farmer* decision[232] suggested other alternatives for prison liability on Eighth Amendment grounds. For example, if there were a pattern and practice of deprivations against transgender prisoners, that could be sufficient for prison liability.[233] It also seemed to open a basis for class-suits, noting that "a prisoner can establish exposure to a sufficiently serious risk of harm by showing that he belongs to an identifiable group of prisoners who are frequently singled out for violent attack by other inmates."[234] Furthermore, "it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk."[235] Although this claim is specifically based within Eighth Amendment jurisprudence, it could be read as a type of equal protection challenge for transgender persons as a class.

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222. *Id.*
223. *Id.* at 669.
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.* at 667.
228. *Id.*
229. *Id.* at 670 (noting that state law standards for jails would preclude such integrated housing).
230. *See* Greene v. Bowles, 361 F.3d 290, 292 (6th Cir. 2004); DiMarco v. Wyo. Dep't of Corr., 300 F. Supp. 2d 1183, 1995 (D. Wyo. 2004).
231. Crosby v. Reynolds, 763 F. Supp. 666 (D. Me. 1991).
232. *See supra* Part II.A.
233. Farmer v. Brennan, 511 U.S. 825, 843 (1994).
234. *Id.*
235. *Id.*

Although the courts have expanded beyond the traditional gender binary in some contexts, such as employment law and sex discrimination,[236] some are less willing to recognize a gender continuum in the prison context.[237] The next section begins with examination of transgender prisoner claims within the legal contexts outside of the Eighth Amendment[238] involving prisoners but utilizing different legal bases to evaluate those claims. It discusses ramifications for recognition of transgender group identity rights[239] as well as other avenues for individual transgender prisoner claims.[240]

IV. POTENTIAL LEGAL BASES FOR TRANSGENDER PRISONER CLAIMS OTHER THAN THE EIGHTH AMENDMENT

Not all of the courts' decisions involving transgender prisoners have utilized *Farmer v. Brennan* to analyze claims arising in the Eighth Amendment context. The following section discusses some transgender prisoner claims that open possibilities to other legal avenues for transgender prisoners.

A. Equal Protection

The U.S. District Court for the Eastern District of California examined an Eighth Amendment claim using a discrimination-based analysis.[241] Ultimately, the court gave the jail officials a time by which they must provide the court with a proposed plan for correcting the deficiencies the court identified.[242] There has been no further action on the matter.

Tates was described as "a pre-operative transgender, male to female, pretrial detainee."[243] He was self-described as a "36-year old biological male who has self-identified as female for at least the past 18 years."[244] Tates asked the court to refer to him using masculine pronouns "because he is in a men's jail."[245] He weighed approximately 125 pounds upon arrival at the jail, and about 154 pounds at the time of trial.[246] He described himself as a "very effeminate transgender,"[247] and the court found that "[h]is voice, appearance, and demeanor are consistent with his self-identified gender."[248] His breasts were sufficiently enlarged for the jail medical staff to issue him a bra.[249] When Tates was not incarcerated he wore women's clothing, but while incarcerated wore men's clothing except for the bra.[250]

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236. *See generally* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
237. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 547 (1979) (holding that segregation of the sexes in prisons is a rational purpose).
238. *See infra* Part IV.
239. *See infra* Parts IV.A–B.
240. *See infra* Part IV.C.
241. Tates v. Blanas, No. S-00-2539 OMP P, 2003 WL 23864868 (E.D. Cal. Mar. 11, 2003).
242. *Id.* at *10.
243. *Id.* at *1.
244. *Id.*
245. *Id.* at *1 n.2.
246. *Id.* at *1.
247. *Id.*; *see supra* note 5.
248. *Tates*, 2003 WL 23864868, at *1.
249. *Id.*
250. *Id.*

The court also described the exact conditions Tates was subject to in total separation, which included shackling and manacling when transported to court and while moving within the jail or while in holding cells;[251] restricted access to religious services;[252] restricted access to the dayroom where showers and telephones are available;[253] less sanitary cells;[254] and decreased access to showers than other prisoners.[255] Tates also alleged being subjected to ridicule and abuse including derogatory language, threats of rape, forced meals on the floor, and unprovoked general threats of violence.[256]

The court described in detail California's prisoner classification system.[257] The California State Prison system has various tiers of confinement.[258] The highest level of classification is called "total separation," which is the most restrictive type of classification within that system.[259] The jail automatically classified all transgender inmates into total separation "regardless of their behavior, criminal history, whether they pose a danger to others, or any other characteristic."[260]

The court found most of the abuse "originated with other inmates, including trustees."[261] The court found that despite some diversity training for jail deputies, there was no training specifically concerning transgender prisoners, and no reasonable attempts had been made to train trustees and guards to stop transgender harassment.[262]

The court did not deploy the *Farmer* test[263] to examine Tates' claims, despite the fact that Tates was allegedly placed in total separation out of concern for his safety and potential liability if he were given a less restrictive classification.[264] Although the court acknowledged that prison officials may have a duty to treat transgender prisoners differently to "protect them from violence at the hands of other

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251. *Id.* at *4.

252. *Id.* (noting that this may be due to the fact that prisoners classified as total separation must have a guard present at all times when the chaplain meets with them, despite the fact that the chaplain expressed no fear of Tates nor requested a guard be present).

253. *Id.* at *5–6 (noting that this might be attributable to the requirement that guards be present and not enough guards are available and the "unusual hours" that Tates was given access to the phone (for example: between 11:00 P.M. and 4:00 A.M.) would make it difficult for Tates to call friends, family, or attorneys).

254. *Id.* at *7.

255. *Id.*

256. *Id.* at *8.

257. *Id.* at *1–4.

258. *Id.*

259. *Id.* at *3.

> Upon arrival at the Jail, each inmate is "classified" by a Classifications Officer. Most inmates are classified as "general population." Inmates believed to require special protection (e.g., those particularly susceptible to victimization by other inmates, or likely to be the target of an attack) are housed in "protective custody" (aka "P.C."). Inmates who violate rules can be punished by placement in a special disciplinary category with very restricted privileges. The final classification mentioned in the record is "total separation," usually abbreviated as "T-sep."

Id. (citations omitted).

260. *Id.*

261. *Id.* at *8.

262. *Id.*

263. *See supra* notes 37–42 and accompanying text.

264. *Tates*, 2003 WL 23864868, at **3–4.

prisoners,"[265] complete segregation of all transgender prisoners is not always required.[266]

The court proposed a number of factors that should be considered by prison officials when determining whether segregation of transgender prisoners is appropriate.[267] The court held that there was "serious discrimination...at this jail against transgenders" resulting from "failure of [the jail officials] to promulgate rules and discipline to protect transgenders from discrimination."[268] There was no analysis of whether the deprivations resulting from differential conditions resulted in an Eighth Amendment violation nor whether the prison official's institutional stance in classification of transgender prisoners was deliberately indifferent. Instead, the court announced that transgender inmates must be similarly treated as other prisoners, while at the same time acknowledging that not every transgender prisoner must be treated in an identical manner.[269]

The court also noted that despite the fact that the jail did not house "a large number of transgender inmates"[270] it was "not a unique circumstance"[271] where the jail, at that time, housed at least two other transgender inmates and there were references to at least four during the course of the litigation.[272] The court also heard testimony about transgender inmates at other correctional facilities.[273] The court held that, given those facts, it was likely that at any given time the jail would house at least some transgender inmates.[274] As such, issues regarding transgender inmates would be a concern even after Tates himself moved on, especially since the record indicated that other transgender inmates shared Tates' concerns.[275] The court emphasized that the classification of transgender prisoners into total separation must be "based upon facts, not phobias."[276] One way for meaningful classification to happen is to allow the transgender prisoner herself a voice in the classification process.

1. Problems with Line-Drawing to Create a Class

The potential problem with an equal protection challenge for transgender prisoners is precisely how that group would be defined.[277] The transgender model

265. *Id.* at *9 (citing Farmer v. Brennan, 511 U.S. 825, 833 (1994)).

266. *Id.*

267. They included "the design of the facility, whether it is adequately staffed and not overpopulated, the number of transgender inmates at the facility, and the characteristics of the general inmate population (e.g., whether the pod houses exclusively non-violent offenders)." *Id.*

268. *Id.*

269. *Id.* at *10.

270. *Id.* at *3.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.* The jail offered an expert who noted that many jails do not segregate transgender inmates in the same manner practiced by this jail. *Id.* at *8. His opinion was that the segregation was necessary because of the jail design. *Id.* However, he also conceded that placing Tates in solitary confinement for several years without any review of his classification would be unconstitutional. *Id.*

276. *Id.*

277. *See supra* Part III.A.

still assumes a unified community of gender outlaws.[278] "[T]he transgender model tends to render transsexuals invisible. While many transgender people are comfortable fitting somewhere in the space between the two commonly acknowledged genders, transsexuals have no doubts about the gender to which they belong. They unambiguously identify with the non-natural gender."[279] Forcing identification of transgender on an individual can also have constitutional implications.[280] Transgender, as a model, also impacts legal protections.[281] Moreover, there are schisms within the community about whether one should be "out" about a transgender identity.[282] "Postmodern articulations of the question, to pass or not to pass, are central to current transgender/transsexual dialogues. According to some transgenderists, passing as the 'other sex' is the ultimate sell-out."[283] In essence, presumption of monolithic transgender identity establishes hierarchies:

> Transgenderism (the both/neither stance) exalts outness, fluidity, and transgression. Therefore, who counts (as a gender outlaw) depends on how possible it is to be out. Who counts as transsexual (in the sense of the either/or stance) rests on who can pass, which depends partially on who has access to reassignment technologies, and is therefore influenced by class, race, education, and so on. This suggests that the both/neither position and the either/or position are problematic in terms of exclusivity and their failure to account for socio-economic factors.[284]

Since transgenderism is not monolithic, it makes courts faced with the issue of classifying transgender inmates weigh in on the authenticity of an inmate's gender identity.[285] Where a court privileges one iteration of a gender identity as valid, it may create a bright line rule that excludes individuals who are transgender.[286] However, at the present time, courts generally do not use the term transgender, and rely upon the term transsexual and a medicalized model of gender identity.[287]

Although many in the transgender community reject a medicalized identity,[288] that medicalized definition of gender identity has been used by some transgender persons for litigation based on disability discrimination.[289] Furthermore, the

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278. *See generally* BORNSTEIN, *supra* note 5; MACKENZIE, *supra* note 150.

279. Denny, *supra* note 150, at 32.

280. *See infra* Part IV.B.

281. Denny, *supra* note 150, at 26 (noting that, "if a political entity offers protection from discrimination based on a perceived disability (transsexualism), what happens when that disability is destabilized?"); *see* Loue, *supra* note 148, at 15 (noting that some states allow sex reassignment surgery to be paid for under medical insurance if transsexuality is viewed as a disability); *see also infra* Part IV.B.

282. *See generally* Roen, *supra* note 150, at 501.

283. *Id.*

284. *Id.* at 511.

285. *See, e.g.*, Long v. Nix, 86 F.3d 761 (8th Cir. 1996).

286. *See supra* notes 166–192 and accompanying text.

287. *See supra* notes 166–192 and accompanying text.

288. *See supra* notes 160–177 and accompanying text.

289. *See, e.g.*, *In re* Doe, 754 N.Y.S.2d 846 (N.Y. 2003).

> Nevertheless, a reliance on a medical model of transsexuality, despite its disempowering potential, is often deemed necessary for the provision of public and private medical insurance benefits for transsexuals, adequate treatment in prison, relief from arrest, and other benefits as well as a justification for the gender reassignment surgery sought by transsexuals.

assertion of a gender continuum in place of a gender binary would reject the line-drawing necessary to create a legal group.[290] Kate Bornstein, a transgender activist, writes:

> I think that a transgender identity and, indeed a transgender movement both have a built-in obsolescence. If in fact we're setting about to dismantle the binary of gender, the system against which we're transgressing; and if in fact everyone is transgendered...then there's going to come a time when more people admit it than don't....When that happens, there won't be any value to the term 'transgender,' and a new challenge will have risen up, new political identities will raise their heads, and the transgender movement will be shown to its proper place as some historical oddity, back in the days when people thought there were only two genders.[291]

2. Potential Levels of Judicial Review

Transgender prisoners' attempts to establish an equal protection claim, at least on quasi-suspect class basis, have been rejected.[292] Strict scrutiny has been applied to other statutory regimes based upon gender,[293] but intermediate scrutiny is usually used for classifications based upon sex or gender.[294]

The Court held that having gender-based differential grooming standards for male and female inmates did not violate equal protection.[295] If the proffered reason given the prison system is safety, the courts will likely find that a compelling reason. However, if the proffered reason is something akin to administrative convenience, that will likely trigger higher scrutiny of the classification regime.[296]

Susan Etta Keller, *Crisis of Authority: Medical Rhetoric and Transsexual Identity*, 11 YALE J.L. & FEMINISM 51, 59 (1999).

290. *See supra* Part III.A.

291. KATE BORNSTEIN, MY GENDER WORKBOOK 280–81 (1998).

292. DiMarco v. Wyo. Dep't of Corr., 300 F. Supp. 2d 1183, 1197 (D. Wyo. 2004).

293. *See* Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality) (arguing that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny" where the proffered reason for the discrimination is "administrative convenience").

294. Craig v. Boren, 428 U.S. 190, 198 (1976) (rejecting administrative ease and convenience as sufficiently important objectives to justify gender-based classifications (citing *Frontiero*, 411 U.S. at 690)).

295. *Id.*

296. *See* DiMarco v. Wyo. Dep't of Corr, 300 F. Supp. 2d 1183, 1194–96 (D. Wyo. 2004). Although it is outside the scope of this Comment, it may be possible to argue for a heightened rational basis scrutiny because of animus toward transgender prisoners. *See* Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000). In *Schwenk*, a defendant-guard argued that a transgender prisoner was not included within the meaning of the Gender Motivated Violence Act because of being male. *Id.* at 1200. The court held that Schwenk was included under the protection of the Act. *Id.* at 1200–02 (relying in part on gender employment discrimination claims such as *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and noting that for the purposes of both Title VII and the Gender Motivated Violence Act "sex and gender have become interchangeable"). The court held that the "animus" requirement of the Gender Motivated Violence Act "can be met not just by acts that are maliciously motivated, but also by acts arising out of assertedly benign or even affectionate (though objectively harmful) impulses. In essence, what animus demands is simply a strong emotion, such as is present in cases involving 'sex-based intent.'" *Id.* at 1202. It held that "rape *by definition* occurs at least in part because of gender-based animus." *Id.* at 1203 n.14 (noting that "young, slight, physically weak male inmates, particularly those with 'feminine' physical characteristics, are routinely raped, often by groups of men" (citing *Farmer*, 511 U.S. 825, 852–53 (1994) (Blackmun, J., concurring))). One could argue that *Schwenk* demonstrates that some animus exists towards transgender prisoners as a group.

3. Immutability

Older equal protection cases also require immutability as a characteristic for class creation.[297] Immutability as a class requirement is particularly inappropriate because of the requirement that the sex characteristic be "an immutable characteristic determined solely by the accident of birth."[298] Transgendered status would not be considered immutable, except perhaps for intersexed persons.[299] This is especially true where gender discrimination, at least in the employment law context, has been read to apply specifically to biological women.[300] In other contexts outside of Eighth Amendment and Fourteenth Amendment jurisprudence, gender identity has been recognized as an immutable characteristic.[301]

Many scholars have argued either for a broader based definition of gender identity[302] which is generally self-assigned[303] or at the very least abolishment of genetalia-based placement and classification according to gender identity.[304] Some other countries have recognized problems with transgender prisoner placement.[305]

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297. Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . ."

Frontiero, 411 U.S. at 686 (quoting Weber v. Aetna Cas. & Surety Co., 406 U.S. 164, 175 (1972)).

298. *Id.*

299. *But see supra* notes 65–79 and accompanying text.

300. *See Frontiero*, 411 U.S. at 688 ("Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena."); Rosenblum, *supra* note 14, at 562 (arguing that sex discrimination law has failed to acknowledge oppression of transgender persons where "the enunciation of the gender binarism points to a reliance on the category of 'women' as the unjustly subjugated, ignoring the broader phenomenon of gender, as opposed to biological sex, oppression").

301. *See* Reyes-Reyes v. Ashcroft, 384 F.3d 782, 785 n.1 (9th Cir. 2004) (recognizing transgender petitioner's sexual orientation and sexual identity as immutable in petition for asylum case where he alleged he would be raped and beaten if returned to El Salvador); Hernandez-Montiel v. INS, 225 F.3d 1084, 1095 n.7, 1096 (9th Cir. 2000) (recognizing transgender petitioner's female sexual identity was immutable in application for asylum case, but declining to consider whether transsexuals constitute a particular social group, despite the fact that the petitioner "manifests his sexual orientation by adopting gender traits characteristically associated with women").

302. *See* Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 312 (2005) ("One way in which to define gender identity inclusively is: gender identity includes a person's identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with a person's gender assigned at birth." (internal quotation marks omitted)).

303. *See* Edney, *supra* note 196, at 337 ("Self identification of transgender prisoners has not been accorded the appropriate degree of importance in the classification, treatment, and placement of transgender prisoners.").

304. *See* Barnes, *supra* note 14, at 645 (arguing that transgender prisoners should be placed according to gender identity); Peek, *supra* note 14, at 1247 (2004).

305. A comparative analysis of other countries' policies regarding transgender prisoners is outside the scope of this Comment. However, an international survey of correctional policies regarding transgender prisoners in Australia, Canada, and the United States found only twenty percent of the sixty-four correctional departments' studies had any kind of formal policy regarding transgender prisoners. Maxine Petersen et al., *Transsexuals Within the Prison System: An International Survey of Correctional Services Policies*, 14 BEHAV. SCI. & L. 219, 224 (1996). Twenty percent reported informal policies. *Id.* Only thirty-two percent clearly stated that post-operative transgender women would be automatically housed in or transferred to a women's prison. *Id.* at 225. Most would make a decision on a case-by-case basis, but at least two institutions stated they would not place post-operative transgender women in a women's prison. *Id.* Eighty-five percent of the institutions surveyed either did not consider physical or sexual assault a significant issue, or felt that increased risk of physical or sexual assault on transgender inmates was unknown or had never been evaluated. *Id.* at 226. Despite the apparent dearth of policies regarding transgender prisoner placement even among the international community, other countries increasingly have been alarmed at the

Only one scholar has argued that gender identity should be recognized as a fundamental right.[306] That scholar also argues that equal protection under the Fourteenth Amendment is more viable for claims by transgender prisoners.[307] This approach seems to abandon possibilities for further adjudication of transgender persons' rights under the Eighth Amendment.

a. *DiMarco v. Wyoming Department of Corrections*

DiMarco's equal protection claim was denied.[308] DiMarco alleged that "individuals born with ambiguous gender are members of a quasi-suspect class."[309] However, the court disagreed that DiMarco fit a quasi-suspect class where she did not demonstrate being "saddled with a disability"; membership of a group "subjected to a history of purposeful unequal treatment"; or "in such a position of political powerlessness to command extraordinary protection."[310]

b. *Deblasio v. Johnson*

It could be argued that recognition of transgender prisoner claims for equal protection could lead to frivolous lawsuits. In one case, a group of biologically male prisoners brought a claim that alleged that grooming standards for male prisoners violated equal protection where there was difference between the male prisoner grooming standards and female prisoner grooming standards.[311] In that case, the

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treatment and placement of transgender prisoners.

In 2003, a Canadian appellate court heard a case regarding the placement of transgender prisoners. Attorney Gen. of Can. v. Can. Human Rights Comm'n, [2003] F.C. 89. There, a transgender inmate initiated a complaint to the Canadian Human Rights Commission alleging discrimination on the basis of sex and disability for her transgenderism. *Id.* at 4. The Correctional Service of Canada (CSC) had a long-standing policy that, "unless sexual reassignment surgery had been completed, male inmates shall be held in male institutions." *Id.* at 5.

The Human Rights Commission declared the policy regarding transgender prisoners discriminatory. *Id.* at 8. However, the Human Rights Commission also found that placement of transgender prisoners within women's facilities was not possible. *Id.* The transgender inmate appealed, arguing that the Human Rights Commission erred in holding transgender prisoners could not be placed in women's facilities where there was no evidence CSC seriously considered housing transgender inmates in any other institution other than those reflecting their biological sex. *Id.* The appellate court upheld the Commission's decision finding that the presentation of evidence regarding the risk transgender women would pose to biological women in female institutions was sufficient to make placement of transgender women in those facilities impossible. *Id.* at 11. It affirmed the Commission's finding that CSC must develop formalized policies, where its treatment of transgender prisoners had been ad hoc and inconsistent, and CSC staff had no formalized, requisite training for dealing with transgender prisoners. *Id.* at 10.

However, a comparative analysis of the United States' treatment of transgender prisoners with that in other constitutional nations would only be useful with a larger base of case law for comparison. If this Canadian case is not an anomaly, it could suggest that in other constitutional nations the notion of decency includes recognition of the gender identity rights of transgender prisoners, requiring non-discriminatory penal classification policies. *See also Transsexuals Can Choose jails*, NEWS 24.COM, May 3, 2006, http://www.news24.com/News24/World/News/0,,2-10-1462_1892464,00.html (noting that Spain is considering a policy whereby transgender prisoner would be able to ask to serve their sentences in prisons corresponding to their new gender and prison authorities also would address them by their preferred name).

306. *See* Rosenblum, *supra* note 14, at 565–69 (arguing for a fundamental right to gender identity, but also recognizing that securing rights requires social change as well as legal recognition).

307. *Id.* at 567–69.

308. DiMarco v. Wyo. Dep't of Corr., 300 F. Supp. 2d 1183, 1197 (D. Wyo. 2004).

309. *Id.*

310. *Id.*; *see supra* Part IV.A.2.

311. Deblasio v. Johnson, 128 F. Supp. 2d 315, 319–20 (E.D. Va. 2000) (noting that policy required male prisoners not have hair more than 1" thickness or depth whereas female inmates' hair cannot be longer than shoulder

court noted that the U.S. Supreme Court has not addressed the issue of gender-based class distinction in state prison regulations, but determined that both the eastern and western districts of Virginia apply an intermediate scrutiny.[312] Under that tier of scrutiny, the state must show that (1) the challenged classification serves important governmental objectives and (2) the discriminatory means employed are substantially related to the achievement of those objectives.[313] The court found the proffered purpose of prison security is not only important, but compelling.[314] It also considered the discriminatory stringent hair length requirements on male inmates was justified because male inmates are more violent than female inmates and pose a greater security threat.[315]

> Specifically, if male inmates are more prone to violence than female inmates, contraband in the hands (or hair) of such inmates poses a greater security threat. Thus, in order to promote security, requiring male inmates to maintain shorter hair is a discriminatory imposition that is substantially related to that objective.[316]

Although *Deblasio* appears to be a frivolous lawsuit, the court's reasoning appears to rely upon sex and gender stereotypes. The court does not question the essential meaning of the terms male nor female in its analysis and as a result does not interrogate the assumption that males are more violent than females.[317]

B. Potential Problems with Equal Protection Claims by Transgender Prisoners

If litigants abandon the *Farmer* standard[318] and Eighth Amendment claims and only attempt to adjudicate rights under an equal protection claim, the transgender prisoner's vindication of individualized rights will be subsumed under an equal protection class-formation analysis. Although at least one court seemed to apply a discrimination standard to a transgender prisoner's Eighth Amendment claim,[319] most continue to follow some variation of the *Farmer* standard.[320] While the *Farmer* standard affords at least some protection to transgender prisoners it still fails to recognize the legitimacy of transgendered prisoners' gender identities.

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length).

312. *Id.* at 328.
313. *Id.* at 327.
314. *Id.* at 328.
315. *Id.*
316. *Id.*
317. *See supra* Part III.A; *see also* Miss. Univ. for Women v. Hogan 458 U.S. 718, 724–25 (1982). Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.

Id.

318. *See supra* notes 32–56 and accompanying text.
319. Tates v. Blanas, No. S-00-2539 OMP P, 2003 WL 23864868 (E.D. Cal. Mar. 11, 2003).
320. *See supra* notes 32–56 and accompanying text.

C. *Procedural Due Process Claims under the Fourteenth Amendment*

At least one case opens up a different possibility not considered by scholars. In *DiMarco v. Wyoming Department of Corrections*,[321] the court analyzed DiMarco's procedural due process claim, finding it analytically essential that DiMarco was not being placed in administrative segregation as a result of disciplinary problems but rather only for safety reasons.[322] DiMarco was denied a hearing on her housing reclassification, which the court found concerning and alarming.[323]

> [DiMarco], unlike those involved in a mandatory disciplinary hearing, did not violate prison rules but simply arrived at the [prison] with certain physical characteristics that she did not choose. [She] should have been allowed to at least let her thoughts and concerns be heard prior to the [prison's] final decision to place [her] in solitary confinement.[324]

The duration of DiMarco's segregated confinement for 438 days was "a sufficient departure from the ordinary incidents of prison life" and thus atypical, triggering due process protection.[325]

Under state law, decisions by prison officials to place an inmate in segregated confinement do not implicate a due process claim unless it is "atypical and significant."[326] Atypical and significant in this context would be where the placement "exceeds the punishment of similarly situated inmates in duration or degree of restriction."[327]

The court reiterated that DiMarco's segregated confinement was only due to "a genetically created ambiguous gender" and that the prison had "plenty of time to develop other more respectable, less harsh alternatives."[328] The court found the prison's actions a violation of DiMarco's due process rights, because the prison's decision was "completely arbitrary and capricious and without a rational basis."[329]

Although this finding does not compel prisons to classify a transgender prisoner in a certain manner, it does compel a prison to allow a prisoner a voice in her own classification. The very nature of the legal system is one of mediated identities. A litigant rarely speaks on her own behalf, usually speaking through an attorney as advocate. In the context of transgender prisoners, those litigants are also precluded from asserting a self-defined gender identity where the courts rely upon experts to ratify a litigant's identity.[330]

At least through the recognition of a procedural due process right, a transgender prisoner's own self-recognized gender identity can be voiced, although not necessarily heard. This may be a pyrrhic victory, but the silencing of transgender

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321. 300 F. Supp. 2d 1183 (D. Wyo. 2004).
322. *Id.*
323. *Id.*
324. *Id.* at 1194–95.
325. *Id.* at 1195.
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.*
330. *See supra* Part III.A.

prisoners within the classification system is a violation of procedural due process, at least within the Tenth Circuit.[331]

V. IMPLICATIONS AND POTENTIAL LEGAL TRAJECTORIES

The lower courts struggle with transgender prisoner claims because these claims present complex issues involving medicine and psychiatry and how the basic definitions of sex and gender inform a person's identity within the context of our evolving society. In addition, the overdependence of the courts upon medical and psychological experts, especially the prisons' own medical personnel, disempowers transgender prisoners to assert an essential right to gender identity where it is not endorsed by the medical community.

Although there are no easy solutions to the problems transgender prisoners face within the penal system, at the very least a recognition of their identity and voice breaks the silencing of that identity within the system. Gayatri Spivak famously asked the question "Can the subaltern speak?"[332] She wrote:

> Between patriarchy and imperialism, subject-constitution and object-formation, the figure of the woman disappears, not into a pristine nothingness, but into a violent shuttling which is the displaced figuration of the "third-world woman" caught between tradition and modernization...[T]his opposition between subject (law) and object-of-knowledge (repression)...mark[s] the place of "disappearance" with something other than silence and nonexistence, a violent aporia between subject and object status.[333]

Similarly, the transgender prisoner vacillates between subject and object in the Eighth Amendment context. She has no voice except through the assertion of a procedural due process right to participate in her classification hearings. Even where this procedural due process right is recognized, there is no assurance her voice will be heard.

In addition, although classification based on self-identity would be ideal, it may be viewed as unworkable by the courts. The assertion of a fundamental right to gender identity may fall into the trap of prior rights-assertion movements. However,

> laws define how we are "allowed to act" in the form of "rights." If we now examine the relationship of this schema to the inner experience of the alienated individual...we can discover how the schema is intended to "legalize" this

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331. *See* DiMarco v. Wyo. Dep't of Corr., 300 F. Supp. 2d 1183 (D. Wyo. 2004). However, the litigant would still have to satisfy the *Mathews* test to prove a violation of her procedural due process rights. *See* Mathews v. Eldridge, 424 U.S. 319, 321 (1976).

332. *See* Gayatri Spivak, *Can the Subaltern Speak?*, *in* MARXISM AND THE INTERPRETATION OF CULTURE 271 (Cary Nelson & Lawrence Grossberg eds., 1988) (discussing post-colonial power structures and the practice of widow-sacrifice in Hindu law). Although Spivak originally wrote this piece around widow sacrifice, she spawned an entire critical movement of subaltern studies that includes diverse fields such as feminism, cultural studies, semiotics, deconstruction, and historiography. *See generally* Gayatri Chakravorty Spivak, http://www.english.emory.edu/Bahri/Spivak.html (last visited Nov. 14, 2006).

333. Spivak, *supra* note 332, at 306.

> experience and in so doing make the reproduction of alienation a condition of group membership.[334]

The courts will invariably require indicia of self-identity. Such indicia could include changing of driver's license, birth certificate, letters from medical experts, and living as the self-identified gender as objective criteria to adjudicate transgender prisoners claims. But this outward indicia of gender identity still fails to recognize the individual right to define self. In addition, the requirement of outward indicia will inevitably lead to internal struggles within the transgender community where there is disparate access to medical care and varying levels of difficulty within states to acquire such things as a birth certificate or make changes to a driver's license.[335]

The Eighth Amendment promises an evolving standard of decency in a civilized society but fails to recognize the multiplicity of gender identities.[336] Other legal bases may provide the flexibility necessary to truly recognize transgender prisoners' claims of gender identity. Equal Protection could provide better recognition of gender identity because transgender prisoners might be able to collectively assert a right to that identity. However, the assertion of a collective right would necessarily require the drawing of lines to create a class that excludes people. Transgender persons, as a group, may be too amorphous to draw meaningful legal distinctions because those distinctions might still be based upon medical definitions of sex and gender.

Procedural due process would provide a transgender prisoner a voice in her classification process. Since procedural due process recognizes individualization, it may be the best place for a transgender prisoner to assert her own self-identified gender. However, there is no guarantee that her assertion will be given weight. Although it affords her a voice in the process, it does not mean that her voice will be heard and her identity meaningfully taken into account during classification.

There is a constant and consistent tension between the assertion of an individual right and the impact on collective group identities.[337] The response, then, to those who are concerned with the right-assertion theory is deciding "the task...not to disregard rights, but to see through or past them so they reflect a larger definition of privacy...so that privacy is turned from exclusion based on self-regard, into regard for another's fragile, mysterious autonomy...."[338] There has been recognition of individual autonomy rights within the sphere of privacy and liberty jurisprudence. "Liberty presumes an autonomy of self that includes freedom of thought, belief,

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334. Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1574 (1984).

335. *See* Loue, *supra* note 148.

336. Trop v. Dulles, 356 U.S. 86, 101 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

337. [T]he "mechanisms" of reciprocal denial that alienation itself produces make it very difficult for...movements to arise (for they amount to betrayals of the pact of the withdrawn selves), and the fact that alienation "enforces itself" in part through the reproduction of hierarchical differences virtually assures that such a movement will not arise the way it ought to—as a universal response to our common predicament.

Gabel, *supra* note 334, at 1587

338. Williams, *supra* note 3, at 432.

expression, and certain intimate conduct."[339] Although assertion of a privacy or liberty right, or even assertion of individual autonomy may seem anathema in a prison context, the U.S. Supreme Court has recognized that

> [a]n individual in prison does not lose "the right to have rights." A prisoner retains, for example, the constitutional rights to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a "person" for purposes of due process of law and the equal protection of the laws.[340]

An essential component of personhood is one's gender identity.

The suggestions by scholars directed at prisons fail to address how courts should deal with claims by transgender prisoners.[341] Although ultimately the prison system must change to accommodate and recognize the transgender prisoner and her particular circumstance within the prison, if the court system does not also jettison a gender binary logic, civil rights claims aimed at prison reform will fail. If the transgender prisoner's rights do not have appropriate recourse through the judicial system, the prisons themselves will have no impetus to recognize transgender rights. However, the present adjudication model for transgender prisoner rights is failing them.

Above all, legal binaries are not meaningful within the transgender prison context. Indeed, transgender prisoners must have an essential right to their gender identities, and must be given the ability to gain recognition of that right through the Eighth Amendment and the other protections of the Bill of Rights. A right to self-identified gender should be interpreted as part of the essential right to autonomous personhood, an inherent civil right to define one's self.

339. Lawrence v. Texas, 539 U.S. 558, 562 (2003).
340. Furman v. Georgia, 408 U.S. 238, 290 (1972) (Brennan, J., concurring).
341. *See supra* notes 198–204 and accompanying text.