

BEING TRANSGENDER BEHIND BARS IN THE ERA OF CHELSEA MANNING: HOW TRANSGENDER PRISONERS' RIGHTS ARE CHANGING

Note

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I. OBJECTIVE

This article will examine the status of transgender prisoners' rights, focusing on the changes in their treatment in the legal system over time, and will offer some suggestions on how to create more humane conditions for these prisoners.

II. OVERALL STATUS OF LGBT RIGHTS

In recent years the Lesbian, Gay, Bisexual, and Transgender (LGBT) community has made significant inroads toward gaining societal acceptance¹ and legal protections. The tide of public opinion has turned on

1. See *A Survey of LGBT: Americans Attitudes, Experiences and Values in Changing Times*, PEW RESEARCH CENTER (June 13, 2013), <http://www.pewsocialtrends.org/2013/06/13/a-survey-of-lgbt-americans/> (finding that 92 percent of LGBT adults say that society is more accepting of people who are LGBT than it was a decade ago).

issues like the acceptance of homosexuality and marriage equality.² The most striking example of this trend is the Supreme Court's ruling that the 14th Amendment guarantees gay couples the right to marry.³ However, even before the Supreme Court's landmark gay marriage ruling, polls had showed, for the first time, that a majority of Americans supported marriage equality, and the level of support for agreements (such as civil unions) that give the same rights but not the title of marriage was even higher.⁴ Employment protections are also on the rise, with eighteen states and the District of Columbia providing protection based on sexual orientation and gender identity and another three states providing protections for sexual orientation, but not for gender identity.⁵ Despite this progress, the LGBT community still faces many challenges.⁶ The challenges for transgender

2. See *In Gay Marriage Debate, Both Supporters and Opponents See Legal Recognition as 'Inevitable'*, PEW RESEARCH CENTER (June 6, 2013), <http://www.people-press.org/2013/06/06/in-gay-marriage-debate-both-supporters-and-opponents-see-legal-recognition-as-inevitable/> (showing, among other things, increases in: the number of people who have close gay friends or family; support for accepting homosexuality; support for legal agreements between gay couples that would afford them the same rights as marriage; support for gay marriage; and favorable views of gays and lesbians).

3. See Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015) (stating that “[t]hese considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”).

4. Drew Desilver, *Supreme Court's DOMA Ruling Comes as Majority Now Supports Same-Sex Marriage*, PEW RESEARCH CENTER (June 26, 2013), <http://www.pewresearch.org/fact-tank/2013/06/26/supreme-courts-dom-a-ruling-comes-as-majority-now-supports-same-sex-marriage/>. The level of support for gay marriage was 51% in a Pew Research Center poll conducted in May of 2013. *Id.* The level of support for legal agreements that give the rights of marriage while not giving the title was measured at 67%. *Id.*

5. *Statewide Employment Laws and Policies*, HUMAN RIGHTS CAMPAIGN, http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/state_wide_employment_10-2014.pdf (last updated October 9, 2014). California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Nevada, Oregon, Rhode Island, Vermont, and Washington provide employment discrimination protection for sexual orientation and gender identity. *Id.* New Hampshire, New York, and Wisconsin provide employment discrimination protection for sexual orientation. *Id.*

6. See *A Survey of LGBT Americans: Attitudes, Experiences and Values in Changing Times*, *supra* note 1 (“[A] new nationally representative survey of . . .

individuals, who face a stigma that is even stronger than that associated with homosexuality and bisexuality, are particularly acute.⁷

III. BEING TRANSGENDER

Gay and transgender people are often referred to in the same breath.⁸ However, being transgender is about gender identity, specifically having a gender identity or expression different than the sex assigned at birth, rather than sexual orientation.⁹ A transgender person may experience their sexual orientation as straight, gay, bisexual, asexual, etc.¹⁰ Being transgender

LGBT adults offers testimony to the many ways they feel they have been stigmatized by society. About four-in-ten (39%) say that at some point in their lives they were rejected by a family member or close friend because of their sexual orientation or gender identity; 30% say they have been physically attacked or threatened; 29% say they have been made to feel unwelcome in a place of worship; and 21% say they have been treated unfairly by an employer. About six-in-ten say they've been the target of slurs or jokes.”).

7. See Aaron T. Norton & Gregory M. Herek, *Heterosexuals' Attitudes Toward Transgender People: Findings from a National Probability Sample of U.S. Adults*, UNIVERSITY OF CALIFORNIA, DAVIS(Jan. 10, 2012), <http://psychology.ucdavis.edu/Labs/PWT/Image/Experimetrics/file/papers%20added%20Nov%202013/Herek%20hetero%20attitude%20transgender%201012.pdf> (“U.S. heterosexual adults' feeling thermometer ratings for *transgender people* were strongly correlated with their thermometer scores for gay, lesbian, and bisexual targets, although it is noteworthy that attitudes toward transgender people were significantly more negative than attitudes toward sexual minorities.”).

8. One need look no further than the label of LGBT to see how the concepts become so closely associated.

9. *Transgender FAQ*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/transgender-faq> (last visited Jan. 8, 2015) (explaining that “[b]eing transgender is about an individual's gender identity, while being gay is about an individual's sexual orientation, which is our attraction to people of the same gender, different genders or both. Gender identity and sexual orientation are two different things.”).

10. Jaime M. Grant, Lisa A. Mottet, Justin Tannis, Jack Harrison, Jody L. Herman & Mara Keisling, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, NATIONAL LGBTQ TASK FORCE (2011), p. 28, http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf (“The sexual orientation of the sample demonstrates a diverse spectrum of sexual orientations among transgender and gender non-conforming people. Among respondents, 23% reported a lesbian or gay sexual orientation (or attraction to the same gender); 24% identified as bisexual; 23% reported a queer orientation; 23%

should also be differentiated from cross-dressing—those who cross-dress may or may not actually feel that their gender identity is different than their sex, whereas transgender individuals feel that their gender identity is different than their sex regardless of whether they choose to express this conflict by cross-dressing.¹¹

Although being transgender was once thought of as a mental disorder, the American Psychiatric Association (APA) is now moving away from that position in its latest Diagnostic and Statistical Manual of Mental Disorders (DSM-V).¹² The APA has reclassified gender identity disorder¹³ as gender dysphoria.¹⁴ The APA has also made clear that gender nonconformity, unless accompanied by significant distress related to the nonconformity, is not a mental disorder.¹⁵ This approach more accurately distinguishes between transgender people who are psychologically healthy and the subset of transgender people whose gender identity causes a sufficient level of distress to result in the need for psychological treatment.

For some transgender people, the conflict they feel between their anatomical sex and their experienced gender will be strong enough that they choose to transition to a physical state and/or lifestyle that more accurately reflects their gender identity.¹⁶ This process may include medical procedures such as hormone therapy and sex reassignment surgery.¹⁷ However, not all transgender people pursue medical treatment to alter their bodies either because they cannot afford the treatment or they simply don't

reported a heterosexual or opposite-gender sexual orientation, 4% describe themselves as asexual and 2% wrote in other answers.”).

11. *Transgender FAQ*, *supra* note 9.

12. American Psychiatric Publishing, *Gender Dysphoria*, AMERICAN PSYCHIATRIC ASSOCIATION, <http://www.dsm5.org/Documents/Gender%20Dysphoria%20Fact%20Sheet.pdf> (last visited Feb. 15, 2015).

13. Throughout this note, the term Gender Identity Disorder, when used by courts or commentators, has been replaced by the term Gender Dysphoria to avoid the use of the stigmatizing term ‘disorder’. This use of terminology is based on the assumption that those individuals discussed in this note who were diagnosed with gender identity disorder would also be diagnosed with gender dysphoria and that the reclassification would not affect the legal analysis.

14. American Psychiatric Publishing, *Gender Dysphoria*, AMERICAN PSYCHIATRIC ASSOCIATION, <http://www.dsm5.org/Documents/Gender%20Dysphoria%20Fact%20Sheet.pdf> (last visited Feb. 15, 2015).

15. *Id.*

16. *Transgender FAQ*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resource/s/entry/transgender-faq> (last visited Jan. 8, 2015).

17. *Id.*

desire medical intervention.¹⁸

Being transgender also means a virtual guarantee of experiencing the harsh and pervasive effects of discrimination.¹⁹ Transgender people are vulnerable to poverty, unemployment, employment discrimination, harassment in the educational system, homelessness, and rejection by family members.²⁰ Insult is heaped onto injury for transgender people by societal attitudes that blame the individual for the discrimination they face because they fail to conform to sex-based stereotypes.²¹

IV. CHELSEA MANNING: THE POSTER CHILD FOR TRANSGENDER PRISONERS

The high-profile trial and conviction of Chelsea Manning²² has focused attention on the issue of the treatment of transgender people, especially those who find themselves in the penal system. In July of 2013, Chelsea Manning was convicted by a military judge of, among other things, violating the Espionage Act and theft for perpetrating the largest leak of classified documents up to that point in U.S. history.²³ The charges stemmed from Manning providing thousands of diplomatic cables and other classified documents to the website Wikileaks.²⁴ Manning's struggle with gender dysphoria had been disclosed prior to the trial and played a

18. *Id.*

19. See generally Jaime M. Grant, Lisa A. Mottet, Justin Tannis, Jack Harrison, Jody L. Herman & Mara Keisling, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, NATIONAL LGBTQ TASK FORCE (2011), http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf (providing a thorough examination of the discrimination faced by transgender people).

20. *Id.*

21. *Id.* at 8.

22. This note will refer to the person previously known as Pfc. Bradley Manning as Chelsea Manning and will use the feminine pronoun, in accordance with her request to that effect. For the sake of simplicity, all other individuals transgender individuals discussed in this note will also be referred to by their preferred pronouns, where ascertainable.

23. Eyder Peralta, *Bradley Manning Not Guilty of 'Aiding The Enemy'*, NPR (July 30, 2013 12:15 PM), <http://www.npr.org/blogs/thetwo-way/2013/07/30/206976757/verdict-watch-manning-arrives-in-court-supporters-line-fort-meade>.

24. *Id.*

prominent role in her defense.²⁵ However, after being sentenced to 35 years in a military prison, Manning made her situation clear to the general public by releasing the following statement to NBC's Today show: "I am Chelsea Manning. I am a female. Given the way that I feel, and have felt since childhood, I want to begin hormone therapy as soon as possible."²⁶

After her conviction, Manning's lawyer, David Coombs, had said that he hoped the military would "do the right thing" so that Manning would not have to file a lawsuit for an injunction.²⁷ Coombs also announced Manning's willingness to pay for the estrogen treatment she had requested, that she did not want gender reassignment surgery (at that time), and that she expected to be housed with male inmates while in prison.²⁸

Subsequently, Manning did resort to litigation to obtain the hormone therapy that she had requested.²⁹ After the filing of this lawsuit, Colonel Erica Nelson, the commandant of the military prison where Manning is being detained, announced that Manning's request for hormone therapy had been approved.³⁰ Manning's situation has drawn attention to how she is being treated in prison, but also to the larger question of what rights transgender prisoners, especially those with gender dysphoria, have and what rights they should be afforded. This is particularly true in regard to the availability of medical treatment, such as hormone therapy, and the appropriate housing of transgender prisoners.

V. HORMONE THERAPY

Transgender prisoners who have sought and been denied medical treatments such as sex reassignment surgery or hormone therapy have challenged these decisions based on the Eighth Amendment's prohibition

25. Mark Memmott, *Bradley Manning: 'I Am A Female,' Call Me Chelsea*, NPR (Aug. 22, 2013 8:56 AM), <http://www.npr.org/blogs/thetwo-way/2013/08/22/214440560/bradley-manning-i-am-a-female-call-me-chelsea>.

26. *Id.*

27. Mark Memmott, *Manning Would Pay For Hormone Treatment, Lawyer Says*, NPR (Aug. 27, 2013 11:14 AM), <http://www.npr.org/blogs/thetwo-way/2013/08/27/216084/400/manning-would-pay-for-hormone-treatment-lawyer-says>.

28. *Id.*

29. Complaint for Declaratory and Injunctive Relief, Manning v. Hagel, No. 1:14-cv-01609 (D.D.C. Sept. 23, 2014).

30. Tom Vanden Brook, *Military Approves Hormone Therapy for Chelsea Manning*, USA TODAY (Feb. 13, 2015, 5:18 AM), <http://www.usatoday.com/story/news/nation/2015/02/12/chelsea-manning-hormone-therapy/23311813/>.

on cruel and unusual punishment.³¹ Plaintiffs often cite a diagnosis of gender dysphoria (formerly gender identity disorder) and Supreme Court precedent, which has interpreted the Eighth Amendment's ban on cruel and unusual punishment to prohibit the government from intentionally ignoring the medical needs of prisoners.³² In *Estelle v. Gamble*, the Supreme Court stated the rule that "deliberate indifference to [the] serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' . . . proscribed by the Eighth Amendment."³³ Courts hearing Eighth Amendment challenges to the denial of medical treatment for transgender prisoners initially ruled consistently in favor of the government.³⁴ However, just as society has become more accepting of gender nonconformity, the courts have also become more receptive to arguments that, at least in some circumstances, transgender prisoners have a right to medical care to aid or continue their gender transition.³⁵

A. Fields v. Smith

Some jurisdictions chose to take a categorical approach to the medical treatment of prisoners with gender dysphoria. This was the approach taken by the State of Wisconsin.³⁶ The Wisconsin Legislature passed a statute forbidding prison officials from spending money or using resources to provide hormone therapy or sex reassignment surgery to prisoners.³⁷ The statute's pertinent provision stated that:

1. "Hormonal therapy" means the use of hormones to stimulate the development or alteration of a person's sexual characteristics in order to alter the person's

31. KAREN MOULDING & THE LESBIAN, GAY, BISEXUAL & TRANSGENDER (LGBT) COMMITTEE OF THE NATIONAL LAWYERS GUILD, 1 Sexual Orientation and the Law § 10:26 (West 2014); *see also* Complaint for Declaratory and Injunctive Relief at 16, Manning v. Hagel, No. 1:14-CV-01609 (D.D.C. Sept. 23, 2014) (relying on the Eighth Amendment's prohibition on cruel and unusual punishment as the basis for Manning's lawsuit).

32. Silpa Maruri, Note, *Hormone Therapy for Inmates: A Metonym for Transgender Rights*, 20 CORNELL J.L. & PUB. POL'Y 807, 807-19 (2011).

33. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

34. MOULDING, *supra* note 31.

35. *See id.* (outlining cases which demonstrate the change in the attitudes of courts toward transgender prisoners).

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

37. *Id.* at 552-53; Wis. Stat. Ann. § 302.386(5m)(a), *invalidated by* *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011).

physical appearance so that the person appears more like the opposite gender.

2. “Sexual reassignment surgery” means surgical procedures to alter a person’s physical appearance so that the person appears more like the opposite gender.

(b) The department may not authorize the payment of any funds or the use of any resources of this state or the payment of any federal funds passing through the state treasury to provide or to facilitate the provision of hormonal therapy or sexual reassignment surgery for a resident or patient specified in sub. (1).³⁸

The defendants appealed from a judgment by the district court that the act violated the Eighth Amendment’s Cruel and Unusual Punishment Clause and the Fourteenth Amendment’s Equal Protection Clause.³⁹ The trial court found—and the defendants did not challenge on appeal—that the plaintiffs’ gender dysphoria amounted to a serious medical condition.⁴⁰ In fact, the medical staff at the Wisconsin Department of Corrections had made a determination that the plaintiffs suffered from gender dysphoria and prescribed hormone therapy as the appropriate medical treatment.⁴¹

Instead of challenging whether plaintiffs had serious medical conditions, the defendants argued, among other things, that the state had the power to eliminate some treatment options where other treatments existed.⁴² The court took note of district court findings that the cost to the state for the hormone therapy per prisoner was actually lower than the cost per prisoner for a common antipsychotic drug used by the state to treat many prisoners.⁴³ More importantly, however, the court found that the defendants did not provide evidence that there are alternative treatments for prisoners with gender dysphoria that are able to effectively treat their condition.⁴⁴ The court even went so far as to make a comparison to the treatment of prisoners with cancer, saying: “[H]ad the . . . legislature passed a law that . . . inmates with cancer must be treated only with therapy and pain killers, this court would have no trouble concluding that the law was unconstitutional.

38. Wis. Stat. Ann. § 302.386(5m)(a), invalidated by *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011).

39. *Fields*, 653 F.3d at 554-55.

40. *Id.* at 555.

41. *Id.* at 553-54.

42. *Id.*

43. *Id.* at 555.

44. *Id.* at 556.

Refusing to provide effective treatment for a serious medical condition serves no valid penological purpose and amounts to torture.”⁴⁵ Therefore, the judgment of the district court that the statute was invalid both facially and as applied to the plaintiffs was affirmed.⁴⁶

B. De'Lonta v. Angelone

In *De'Lonta v. Angelone* the Fourth Circuit addressed the issue of whether a transgender prisoner is entitled to continue hormone therapy while in prison.⁴⁷ The plaintiff appealed from a dismissal of her complaint by the district court for failure to state a claim.⁴⁸ The plaintiff claimed that her Eighth Amendment rights had been violated in the process of prison officials abruptly discontinuing her hormone treatment.⁴⁹ Prior to this, the plaintiff had been on estrogen therapy to suppress hair growth and develop breasts.⁵⁰ The plaintiff had also taken other steps to assume a more feminine appearance.⁵¹ Since the beginning of her confinement, the plaintiff had been consistently diagnosed as having gender dysphoria and had been allowed hormone therapy.⁵² However, when she was transferred to a different prison unit the hormone therapy was stopped pursuant to a departmental policy.⁵³

Rather than being tapered off of hormone therapy, as the policy mandated, prison officials abruptly stopped providing estrogen.⁵⁴ The plaintiff suffered physical reactions from the sudden withdrawal and became depressed.⁵⁵ The plaintiff also began to compulsively mutilate her male genitalia by cutting or stabbing it on over twenty occasions.⁵⁶ Despite these effects, and repeated requests by plaintiff that she be allowed to resume hormone therapy, prison officials refused to restart the therapy.⁵⁷ The court found that the prisoner had a serious medical need to be protected from further self-mutilation and that prison officials could not be

45. *Id.*

46. *Id.* at 559.

47. *De'Lonta v. Angelone*, 330 F.3d 630 (4th Cir. 2003).

48. *Id.* at 631.

49. *Id.* at 631-32.

50. *Id.*

51. *Id.*

52. *Id.* at 632.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

“deliberately indifferent” to that need.⁵⁸ While the court did not decide how the prison should be required to attend to the prisoner’s need for protection from self-mutilation, it did reverse the dismissal of the complaint and remanded to the district court for further proceedings.⁵⁹

C. Gammett v. Idaho State Board of Corrections

Some courts have been willing to go even further by actually ordering prison officials to provide hormone therapy as the method of treatment.⁶⁰ The District Court for the District of Idaho did just that in *Gammett v. Idaho State Bd. of Corrections*.⁶¹ The suit was initiated by a prisoner who claimed to have gender dysphoria.⁶² Prison officials denied that the plaintiff had gender dysphoria.⁶³ The prison had, instead, at various times diagnosed the plaintiff with a variety of mental disorders—from unspecified sexual disorders to bipolar disorder.⁶⁴ The plaintiff made roughly seventy-five requests to prison officials to be treated for gender dysphoria.⁶⁵ However, these requests were refused; prison staff apparently believed that the plaintiff was trying to obtain some kind of secondary gain, such as alternative housing.⁶⁶ When the plaintiff learned that the physicians at the prison did not believe that she had gender dysphoria, she attempted suicide.⁶⁷ After the failed suicide attempt, the plaintiff took control of her medical treatment by castrating herself.⁶⁸

The court recognized gender dysphoria as a serious medical condition in its own right but also considered at length the health effects of the

58. *Id.* at 634.

59. *Id.* at 635.

60. *Gammett v. Idaho State Bd. Of Corr.*, No.CV05-257-S-MHW, 2007 WL 2186896, at *18 (D. Idaho 2007). *But see Praylor v. Texas Dep’t of Criminal Justice*, 430 F.3d 1208, 1209 (5th Cir. 2005) (holding, without specifying or analyzing whether the prisoner had gender dysphoria, that denying a transgender prisoner hormone therapy did not amount to deliberate indifference to a serious medical need).

61. *Gammett v. Idaho State Bd. Of Corr.*, No.CV05-257-S-MHW, 2007 WL 2186896, at *18 (D. Idaho 2007).

62. *Id.* at *1.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at *4.

67. *Id.* at *5-6.

68. *Id.* at *6.

hypogonadism⁶⁹ caused by the plaintiff's self-castration.⁷⁰ Ultimately the court concluded that the appropriate remedy was the administration of estrogen to the plaintiff.⁷¹ Accordingly, the court issued a preliminary injunction requiring the prison to provide treatment.⁷²

VI. HOUSING AND SAFETY

Another important issue for transgender prisoners is how they are housed while in prison. Transgender people are more susceptible to societal ills such as homelessness and employment discrimination when not in prison, and this pattern of victimization can continue once they are incarcerated.⁷³ In particular, transgender prisoners are at a greater risk of physical and sexual abuse by fellow inmates and/or guards.⁷⁴

It has been a common practice for prison officials to make housing determinations based solely on the genitalia that a prisoner possesses.⁷⁵ This approach fails to take account of the wide physical differences that can exist among transgender prisoners who are at different points in their transition. This approach, in addition to carrying the potential for causing unnecessary anxiety or humiliation for the prisoner, can also put them at risk of abuse by other prisoners.⁷⁶ This is particularly true of male-to-female transgender prisoners who are subjected to physical attacks, sexual assaults, and rape based on the perception held by the prison population that those who appear feminine are weak and should be subjugated.⁷⁷

69. Hypogonadism is defined as the “functional incompetence of the gonads especially in the male with subnormal or impaired production of hormones and germ cells[.]” *Hypogonadism*, MERRIAM-WEBSTER, http://www.merriam-webster.com/medline_plus/hypogonadism (last visited Feb. 15, 2015).

70. Gammett v. Idaho State Bd. of Corr., No.CV05-257-S-MHW, 2007 WL 2186896, at *3-7 (D. Idaho July 27, 2007).

71. *Id.* at *17-18.

72. *Id.*

73. Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 523 (2009).

74. Angela Okamura, *Equality Behind Bars: Improving the Legal Protections of Transgender Inmates in the California Prison System*, 8 HASTINGS RACE & POVERTY L. J. 109, 116 (2011).

75. Christine Peek, *Breaking Out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 SANTA CLARA L. REV. 1211, 1212 (2004).

76. *Id.*

77. *Id.* at 1220.

A. Farmer v. Brennan

The Supreme Court addressed the issue of appropriate housing for transgender prisoners in *Farmer v. Brennan*.⁷⁸ This was a Bivens action brought by a transgender male-to-female prisoner who had, prior to incarceration, presented as female and had received medical treatments including hormone therapy, breast implants, and what the Court referred to as “unsuccessful ‘black market’ testicle-removal surgery.”⁷⁹ The plaintiff had been at times placed in the general population and at other times placed in segregated housing (both for rule violations and because of safety concerns).⁸⁰ After being transferred to a new prison, the plaintiff was placed in the general population and allegedly beaten and raped by another prisoner.⁸¹

The plaintiff subsequently filed suit alleging that her Eighth Amendment rights had been violated by prison officials who placed her in the general population despite knowing of the violent nature of this particular prison and plaintiff’s heightened susceptibility to attack based on her projection of feminine characteristics.⁸² The district court entered judgment for the defendants, and the Court of Appeals for the Seventh Circuit affirmed.⁸³ The Supreme Court granted certiorari to resolve a split on the meaning of deliberate indifference.⁸⁴ The Court explained that:

The Constitution ‘does not mandate comfortable prisons,’... but neither does it permit inhumane ones...The [Eighth] Amendment...imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must ‘take reasonable measures to guarantee the safety of the inmates.’⁸⁵

This includes a requirement for prison officials to protect prisoners

78. 511 U.S. 825 (1994).

79. *Id.* at 829.

80. *Id.* at 829-31.

81. *Id.* at 830.

82. *Id.*

83. *Id.* at 832.

84. *Id.*

85. *Id.* at 832 (internal citations omitted).

from their fellow inmates.⁸⁶ In order for liability to attach to prison officials for violence perpetrated by one prisoner on another there must be a “sufficiently serious” deprivation and a “sufficiently culpable state of mind,” one of “‘deliberate indifference’ to inmate health or safety. . .”⁸⁷

The Court went on to hold that the test for deliberate indifference is a subjective one and that a prison official must know of and disregard “an excessive risk to inmate health or safety” in order to be liable for a violation of the Eighth Amendment.⁸⁸ The Court found that, under this standard, the district court’s grant of summary judgment for the defendants was premature, and the Court vacated and remanded.⁸⁹ Although it did not address the ultimate issue of liability, this case represents an important milestone for transgender prisoners. This is because the Court recognized that it is possible for a transgender prisoner to state a claim that, by disregarding the risks associated with housing, prison officials violated his or her Eighth Amendment rights.

B. Prison Rape Elimination Act

Another important milestone for transgender prisoners in regard to housing occurred when the Prison Rape Elimination Act (PREA)⁹⁰ was passed. The text of PREA itself did not directly address transgender housing concerns.⁹¹ However, the regulations subsequently adopted by the Department of Justice do specifically contemplate the concerns of transgender prisoners.⁹² A key provision of the regulations requires, among other things, that: decisions about the housing of transgender prisoners be made on a case by case basis; the prisoner’s own views on their housing are given “serious consideration”; and transgender prisoners are afforded the

86. *Id.*

87. *Id.* at 834 (internal citations omitted). The court goes on to explain that “deliberate indifference” means something more than ordinary negligence. *Id.*

88. *Id.* at 837.

89. *Id.* at 851.

90. Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601-15609 (2012).

91. *See id.* (failing to specifically mention transgender prisoners).

92. *See, e.g.*, 28 C.F.R. § 115.42 (2014). This provision and all other regulations related to PREA discussed hereafter are those provisions relevant to adult prisons and jails. The regulations relevant to other facilities, including juvenile facilities, are not discussed.

opportunity to shower separately from other prisoners.⁹³ Other provisions place limits on searches of transgender prisoners and require training for prison officials on how to effectively communicate with LGBT prisoners.⁹⁴

VII. CONCLUSION AND RECOMMENDATIONS

As discussed above, there have been improvements over the years for transgender prisoners seeking hormone therapy or appropriate housing, even if that progress has been uneven and halting. In regard to housing, the Department of Justice's regulations implementing PREA offer an example of a major step forward in how transgender prisoners are treated. One of the key innovations of the PREA regulations is that they focus on screening of transgender prisoners and training of prison officials on the front end, rather than attempting to find a solution after a problem has arisen.⁹⁵ However, the regulations fall short in some areas, such as limiting training specifically related to transgender prisoners to effective communication,⁹⁶ rather than training staff more completely on the unique circumstances and needs of transgender prisoners.⁹⁷ Furthermore, at just a few years old, these

93. *Id.* This provision of the regulations also prevents, with some exceptions, transgender prisoners from being placed in separate units based solely on their status as transgender. *Id.*

94. See 28 C.F.R. § 115.15 (2014) ("The facility shall not search or physically examine a transgender . . . inmate for the sole purpose of determining the inmate's genital status. . . . The agency shall train security staff in how to conduct . . . searches of transgender . . . inmates, in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs."); 28 C.F.R. § 115.31 (2014) ("The agency shall train all employees who may have contact with inmates on . . . [h]ow to communicate effectively and professionally with inmates, including lesbian, gay, bisexual, transgender, intersex, or gender nonconforming inmates . . .").

95. See 28 C.F.R. § 115.41 (2014) (requiring screening to determine if a prisoner is transgender, but allowing prisoners to opt not to respond); 28 C.F.R. § 115.42 (2014) (providing protections and allowing some input for prisoners determined by the screening to be transgender); 28 C.F.R. § 115.31 (2014) (requiring training of certain prison staff on how to communicate with transgender prisoners).

96. See 28 C.F.R. § 115.31 (2014) (requiring various forms of training regarding sexual abuse/harassment, but mentioning transgender prisoners specifically only once in a provision requiring training on communication with "lesbian, gay, bisexual, transgender, intersex, or gender nonconforming inmates").

97. At least part of this shortcoming of the regulations is understandable, given the scope of PREA and its implementing regulations, which are centered on

regulations are still fairly new, and only time will tell if they actually make a difference in the attitudes of prison officials and the treatment of individual prisoners.

A more comprehensive approach is needed to effectively improve conditions for transgender prisoners, and a key component of this approach must be training for all prison officials who come in contact with prisoners, make decisions about the housing of prisoners, or make treatment decisions for prisoners with gender dysphoria. This training should not be limited to how to communicate with transgender inmates but should also: inform prison staff of what it means to be transgender; eliminate common misperceptions about transgender people; provide an understanding of the societal pressures and discrimination experienced by transgender people both in and out of prison; and educate prison staff of the medical and housing concerns that are unique to transgender prisoners.

At the same time, prisons need to abandon one-size-fits-all approaches to the medical treatment of prisoners with gender dysphoria. This is particularly true of policies which single out certain treatment options for automatic exclusion. Rather, treatment should be determined on a case by case basis and should be based on treatment plans developed by qualified medical professionals. On occasion it may still be necessary for nonmedical prison staff to provide input on the treatment of prisoners with gender dysphoria in order to address security concerns. However, such occasions should be the exception rather than the rule and should be based on concrete, rather than concocted, security concerns.

Ultimately, any changes to policies regarding the treatment of transgender prisoners should have at their center tolerance and a measure of compassion. It is true that ultimately transgender prisoners are like the rest of the prison population in that they have violated the law and harmed society. However, transgender prisoners have already faced discrimination and stigmatization on a scale, and at an intensity, unknown to most other segments of the population. As a society, we have an obligation to end this discrimination both outside and inside the prison walls so that transgender prisoners are punished only for their crimes and not singled out for additional punishment because they fail to conform to gender stereotypes.

preventing rape, not specifically on improving the overall conditions for transgender prisoners.