

“We Have Tolled the Bell for Him”: An Analysis of the Prison Rape Elimination Act and California’s Compliance as It Applies to Transgender Inmates

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A transgender individual is someone who does not identify with, or present him- or herself as, the sex he or she was born with. Transgender individuals face a unique and complex set of social challenges in society, and those challenges are exacerbated in the prison context, subjecting transgender inmates to a high possibility of sexual assault and victimization. Recognizing the high rates of sexual abuse in prisons nationwide, Congress passed the Prison Rape Elimination Act (PREA) in an effort to stop prison rape and ensure every prisoner’s right to safety, dignity, and justice. In response, California enacted its own legislation to bring the state into compliance with the federal standard. This Article addresses the right to transgender inmate safety in light of PREA and the corresponding California law, whether the federal standard adequately addresses the unique challenges of transgender inmates and their heightened risk for sexual assault, and whether California has fully complied with PREA’s requirements. Addressing the inadequacies of PREA and the California legislation will increase efforts to improve the safety of transgender inmates and reduce the risk of rape to this unique subpopulation.

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I. INTRODUCTION

The United States Supreme Court unanimously held in the case of *Farmer v. Brennan* that “[b]eing violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society.”¹ Congress reemphasized the Court’s holding and brought the pervasiveness of prison rape to the national forefront with the introduction, and bipartisan approval of, the Prison Rape Elimination Act.² The Act addresses prison rape and the transgender subpopulation, recognizes that transgender inmates have an increased likelihood of becoming victims, and sets forth national standards to eliminate sexual violence in our country’s prisons.³ “Prison rape not only threatens the lives of those who fall prey to their aggressors, but is potentially devastating to the human spirit. Shame, depression, and a shattering loss of self-esteem accompany the perpetual terror the victim thereafter must endure.”⁴ As a leader in human rights, the United States cannot allow

1. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

2. Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (codified at 42 U.S.C. § 15601 (2006)).

3. *Id.*

4. *Farmer*, 511 U.S. at 853 (Blackmun, J., concurring) (citing David M. Siegal, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter*, 44 STAN. L. REV. 1541, 1545 (1992)).

sexual abuse of prisoners in the government's custody, as it is "totally incompatible with American values."⁵

This Article explores what measures our nation and California have taken to reduce and eliminate prison rape of transgender inmates and argues that the current policies are inadequate to fully address and remedy the prevalence of transgender sexual victimization in prison. Part II.A of this Article begins with a discussion of how to define transgender identity and the debate as to whether it should be treated and referred to as a psychiatric condition. Parts II.B and II.C discuss the specific challenges facing the transgender community, both inside and outside of the prison walls. I consider various social factors that disproportionately lead transgender inmates down a path of crime, and the dysfunctional subculture of correctional facilities that places transgender inmates at an extremely high risk of sexual victimization. In Part III, I review the Supreme Court's decision in *Farmer*, a cornerstone case in transgender prisoner rights. Finally, in Part IV, I discuss the Prison Rape Elimination Act (PREA), the specific sections of the Act that address the treatment of transgender inmates, and California's efforts to comply with PREA. With this background, I critique the federal and state standards and implementation in Part IV, and I offer recommendations to improve the safety and maintain the dignity of incarcerated transgender individuals.

II. SOCIAL AND SAFETY CHALLENGES FACING TRANSGENDER INDIVIDUALS AND INMATES

Transgender individuals face a multiplicity of barriers to living in a safe and supportive environment. This is true for life inside and outside of prison. Challenges for this community begin with how to define "transgender," and carry over into how transgender individuals function in a gender-normative society. Additionally, if a transgender individual is incarcerated, the challenges of living in a safe environment are exacerbated due to the subculture of hypermasculinity perpetuated by other prisoners, prison staff, and prison policies.

A. *Defining "Transgender"*

The classification of "transgender" is broad and encompasses individuals "whose identity or lived experience do not conform to the identity or experiences typically associated with the sex assigned to that

5. *National Prison Rape Elimination Commission Report, Executive Summary*, 1 (June 2009), <http://www.ncjrs.gov/pdffiles1/226680.pdf> [hereinafter PREA Executive Summary].

person at birth.”⁶ This applies to both males and females,⁷ and includes transsexuals,⁸ cross-dressers, and other gender-variant people regardless of whether they have decided to alter their bodies hormonally or surgically.⁹ The American Medical Association defines a transsexual individual as one who has a “rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,” thus shifting the focus away from a transgender individual’s identity to classifying it as a psychiatric condition.¹⁰ Writing for the United States Supreme Court in the seminal case of *Farmer*,¹¹ Justice Souter adopts this definition for transsexualism, as does the Bureau of Prisons, reemphasizing the psychiatric element to identifying as transgender.¹²

Transgender individuals argue that the medical definitions and classification of transgender identification as a psychiatric disorder is extremely problematic and inaccurate.¹³ The definitions directly imply that transgender individuals are mentally ill and do not accurately address sexual or gender identity incongruencies.¹⁴ Instead, they “reinforce false, negative stereotypes of gender variant people and at the same time fail to legitimize the medical necessity of sex reassignment surgeries,” and have an overall dehumanizing effect on this unique population.¹⁵

Although categorizing those who identify as transgender is problematic from a stigmatic viewpoint, there have also been benefits

6. Franklin H. Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 713 n.1 (2005).

7. In this Article, I am limiting my discussion to male-to-female (MTF) transgender inmates. While there is a female-to-male inmate population, their prison experience does not mirror or present the same unique challenge as MTF prisoners. Therefore, this limitation will allow a more in-depth discussion of the MTF population.

8. The classification of transsexual is much more specific and narrow than transgender. An individual who identifies as transsexual falls under the umbrella term of transgender, but the reverse is not always true. The term transsexual is frequently used to “describe people who have undergone, or desire to undergo, gender-related medical care such as hormone therapy or gender-related surgeries.” Romeo, *supra* note 6. The United States Supreme Court, in *Farmer* only used the more specific term, transsexual, in its opinion. See generally *Farmer*, 511 U.S. 825. The Court’s use of this term was appropriate for Farmer’s situation due to her anatomical and hormonal state. However, Farmer’s experience is not unique to only transsexual inmates but is a shared experience between all transgender inmates regardless of anatomical changes.

9. GLAAD, MEDIA REFERENCE GUIDE 8 (8th ed. 2010), <http://www.glaad.org/files/MediaReferenceGuide2010.pdf>.

10. AMERICAN MEDICAL ASSOCIATION ENCYCLOPEDIA OF MEDICINE 1006 (Charles B. Clayman ed., 1989).

11. *Farmer*, 511 U.S. at 829.

12. *Id.*

13. Judith Butler, *Undiagnosing Gender*, in TRANSGENDER RIGHTS 274-75 (Paisley Currah et al. eds., 2006).

14. *Id.*

15. GID REFORM ADVOCATES, <http://www.gidreform.org> (last visited Nov. 29, 2011).

from this classification. The American Psychiatric Association publishes the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV), which categorizes transsexuality as a “Gender Identity Disorder.”¹⁶ This classification has provided the basis for many prisoners to successfully argue their right to receive hormone therapy while incarcerated.¹⁷ For example, the United States Court of Appeals for the Seventh Circuit found that the “treatment of a psychiatric or psychological condition,” presents a “serious medical need” and that “[t]here is no reason to treat transsexualism differently than any other psychiatric disorder.”¹⁸ Thus, while in theory the psychiatric classification may be problematic, in practice, it provides the grounds for successful and compelling legal claims.

B. Social Challenges That Channel Transgender Individuals into Crime

We live in a gender-normative environment with strict gender roles, where “people are socialized to understand that there are two distinct genders,” which requires individuals to associate with one of two categories: male or female.¹⁹ Our society emphasizes the “distinction between acceptable and unacceptable sexual/gendered identities,”²⁰ with “identity function[ing] as a form of cultural currency.”²¹ Gender variance is rarely accepted and understood by individuals and institutions, and society still largely operates under the notion that because there are two sexes, there are only two genders.²²

16. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV-TR 576-82 (4th ed. text rev. 2000).

17. See, e.g., De'Lonta v. Angelone, 330 F.3d 630 (4th Cir. 2003); Meriwether v. Faulkner, 821 F.2d 408 (7th Cir. 1987); Barrett v. Coplan, 292 F. Supp. 2d 281 (D.N.H. 2003); Brooks v. Berg, 270 F. Supp. 2d 302 (N.D.N.Y. 2003), vacated in part, 289 F. Supp. 2d 286 (N.D.N.Y. 2003); Kosilek v. Maloney, 221 F. Supp. 2d 156 (D. Mass. 2002); Phillips v. Mich. Dep't of Corr., 731 F. Supp. 792 (W.D. Mich. 1990). See generally Silpa Maruri, *Hormone Therapy for Inmates: A Metonym for Transgender Rights*, 20 CORNELL J.L. & PUB. POL'Y 807, 819-22 (2011).

18. Meriwether v. Faulkner, 821 F.2d 408, 413 (7th Cir. 1987).

19. Megan Bell, Comment, *Transsexuals and the Law*, 98 NW. U. L. REV. 1709, 1715 (2004).

20. KAREN LOVAAS & MERCILLE M. JENKINS, SEXUALITIES AND COMMUNICATIONS IN EVERYDAY LIFE: A READER 98 (2006).

21. Bell, *supra* note 19.

22. *Id.*

Due to this dichotomy, transgender individuals face narrowing opportunities early in their lives.²³ Many transgender youth do not live in a typical home environment because they frequently choose to run away or are thrown out because their parents do not accept what they believe to be a choice to live a particular lifestyle.²⁴ Economic barriers also exist as the traditional U.S. workplace emphasizes and requires compliance with gender-normative behavior and expression.²⁵ As a result, transgender individuals are disproportionately more likely to live in poverty and turn to sex work²⁶ and the illegal drug trade to earn money.²⁷ This partly explains the high rate of contact transgender individuals have with the criminal justice system, as approximately 65% of transgender inmates have been incarcerated on at least one prior occasion.²⁸

C. *Safety Challenges Facing Transgender Inmates*

All prisoners face significant challenges in adjusting to a substantially different environment and securing their safety in prison. Prison poses drastic lifestyle changes that are difficult to adjust to, strip inmates of their individuality, and emphasizes the need for safety through unconventional means.²⁹ For transgender inmates, the social issues and

23. Sydney Tarzwell, Note, *The Gender Lines Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 171 (2006).

24. *Id.*

25. *Id.* at 172.

26. Approximately 40% of California transgender inmates housed in a men's facility have participated in sex work. LORI SEXTON, VALERIE JENNESS & JENNIFER SUMNER, CA DEP'T CORR. & REHAB, WHERE THE MARGINS MEET: A DEMOGRAPHIC ASSESSMENT OF TRANSGENDER INMATES IN MEN'S PRISONS 17 (2009), <http://ucicorrections.seweb.uci.edu/pubs> (follow "where the Margins Meet" hyperlink under "Journal Articles") [hereinafter *Where Margins Meet*].

27. Tarzwell, *supra* note 23, at 175.

28. Ally Windsor Howell, *A Comparison of the Treatment of Transgender Persons in the Criminal Justice Systems of Ontario, Canada, New York, and California*, 28 BUFF. PUB. INT. L.J. 133, 182 (2009).

29. At a California State Prison approximately 6000 miles north of Los Angeles, once inmates arrive it is routine for them to listen to a "well-rehearsed orientation speech" that typically goes as follows:

Just some friendly advice, men. Whites, Brothers, Northerners, Southerners, Paisas, listen up. The Bulldogs are bombing on you. They don't care—three on one, four on one, it doesn't matter to them. So keep your eyes open. You don't have any problems with the cops here. You got problems with the dogs. Now I'm not giving you a green light to go and retaliate, but go talk to your peoples and see what's up.

Philip Goodman, *"It's Just Black, White, or Hispanic": An Observational Study of Racializing Moves in California's Segregated Prison Reception Centers*, 42 LAW & SOC'Y REV. 735, 747 (2008).

stigmatization present in society translate into prison culture and pose significant and serious safety concerns for this subpopulation.³⁰

1. Housing Policies

Most states do not have individual prison facilities for transgender inmates due to cost, lack of space, and the small percentage³¹ the transgender subpopulation represents in relation to the whole prison population.³² While most states do not have individual housing for transgender prisoners, most also do not have written policies as to how to manage and house transgender inmates.³³ Sydney Tarzwell found that of the forty-four states she analyzed, only seven have written policies that specifically address how to manage transgender inmates.³⁴ Eleven states that do not have formal guidelines shared their internal unwritten policies about their classification process with her, and twenty-six states were unwilling or unable to share their policies about how to house transgender inmates.³⁵ For the states without formal written policies, a variety of problems present themselves, one being that general housing decisions are insensitive to the heightened risk of abuse to this subpopulation, leaving transgender prisoners open to harassment and violence.³⁶ Additionally, staff are provided “unfettered discretion,” and can place each inmate where they feel the inmate is most fit without having to consult or follow institutional guidelines, which may in some instances “contribute to their systematic victimization.”³⁷ The greatest concern underlies all these issues: “The anecdotal evidence of prison practices in those states without policies demonstrates that without written policies in place, transgender prisoners will continue to face insensitive and dangerous placements.”³⁸

Many states with unwritten policies³⁹ used genitalia-based classification when determining whether to house a transgender inmate

30. Tarzwell, *supra* note 23, at 176-77.

31. In California, it is estimated that less than 1% of the prison population identifies as transgender. *Where Margins Meet*, *supra* note 26, at 37.

32. Rebecca Mann, *The Treatment of Transgender Prisoners, Not Just an American Problem—A Comparative Analysis of American, Australian, and Canadian Prison Policies Concerning the Treatment of Transgender Prisoners and a “Universal” Recommendation To Improve Treatment*, 15 TUL. J.L. & SEXUALITY 91, 109-10 (2006).

33. Tarzwell, *supra* note 23, at 190-92.

34. *Id.*

35. *Id.* at 192.

36. *Id.* at 195.

37. *Id.*

38. *Id.* at 192.

39. *Id.*

in a male or female facility.⁴⁰ While some inmates who identify as transgender may enter prison without ever having medical treatment through surgery or hormone treatment to change their physical appearance, many do. However, if an individual has undergone hormone therapy and grown breasts, has breast implants, or portrays effeminate features, she will still be classified as a male and placed in a male institution if she has not had genitalia-reassignment surgery.⁴¹ Further, once incarcerated, the gender classification is likely permanent as a transgender inmate is highly unlikely to receive genitalia-reassignment surgery in prison, as most states perceive the surgery as not medically necessary.⁴²

2. Subculture of Hypermasculinity

Once a prisoner is classified into either a male or female prison, in states where no transgender management policies exist, almost universally⁴³ “transgender prisoners [are placed] in the general population until a security problem arises, at which point the prisoner may be transferred to administrative segregation.”⁴⁴ In the general population, there are a variety of safety concerns facing all prisoners, but for transgender inmates, these issues are exacerbated. The greatest safety issue is prison violence, which is largely attributed to the pervasive subculture of “hypermasculinity” in men’s prisons.⁴⁵ The subculture is one that requires male prisoners to behave in an exaggerated manner that emulates traditional masculine behavior and “work hard at seeming tough and avoiding any word or act that might suggest weakness or vulnerability.”⁴⁶ Masculinity is measured not only by an inmate’s

40. *Id.* Federal prisons also use genitalia-based classification when determining whether to house an individual in a male or female institution, and house “preoperative transsexuals with prisoners of like biological sex.” *Farmer v. Brennan*, 511 U.S. 825, 829 (1994).

41. Tarzwell, *supra* note 23, at 193.

42. *Id.* at 195.

43. California’s housing practice differs as the California Department of Corrections and Rehabilitation places any prisoner who self-identifies as transgender into the California Department of Mental Health facility in Vacaville, CA. There are general population and administrative segregation housing for prisoners. *Id.* at n.123. Placing transgender prisoners into this facility that focuses on mental health rehabilitation may be preferable for safety concerns, but also is problematic as it reinforces the stigma that identifying as transgender is a psychiatric condition. See discussion *infra* at 3-4.

44. *Id.* at 194.

45. Sharon Dolovich, Foreword, *Incarceration American-Style*, 3 HARV. L. & POL’Y REV. 237, 250 (2009).

46. *Id.*

physical stature, reputation, and aggressiveness, but more generally “by their ability to dominate and to avoid being dominated.”⁴⁷

Many negative effects result from this subculture,⁴⁸ one being “the source of the greatest damage done by incarceration in American Prisons: the direct link between the culture of hypermasculinity and the fear of rape.”⁴⁹ Within prison walls functions a complex social system, where inmates endlessly seek to gain power over other prisoners and secure their place in the prison hierarchy through exploitation of the weak.⁵⁰ The understood continuous possibility of rape generates a scale of respect where the more masculine an inmate is perceived, the greater amount of respect he receives, which translates into greater protection from victimization as other inmates will be less likely to attempt to sexually assault him.⁵¹

A study conducted by Human Rights Watch on the pervasiveness of male rape in U.S. prisons found that prisoners who display or fit any of the following characteristics are more likely to be targets of sexual assault: “young, small size, and physical weakness; being white, gay,⁵² or a first offender; possessing ‘feminine’ characteristics such as long hair or a high voice; being unassertive, unaggressive, shy, intellectual, not street-smart, or ‘passive.’”⁵³ Prisoners who identify with more than one of these characteristics are much more likely to be the target for sexual abuse,⁵⁴ and “once raped, an inmate is likely to be marked as a victim and abused repeatedly.”⁵⁵ For transgender male-to-female inmates, the feminine characteristics they display automatically heighten their chances for

47. *Id.*; Tarzwell, *supra* note 23, at 179.

48. Maintaining a constant demeanor of hypermasculinity has corrosive effects on inmates, such as difficulties in forging meaningful relationships, creation of emotional barriers, a lack of self-control, an inability to admit error or back-down from confrontation, and belligerent behavior. Dolovich, *supra* note 45, at 250-51.

49. *Id.* at 251.

50. James E. Robertson, “*Fight or F. . .*” and *Constitutional Liberty: An Inmate’s Right to Self-Defense When Targeted By Aggressors*, 29 IND. L. REV. 339, 358-59 (1995) (quoting PAUL KENE, PRISON LIFE AND HUMAN WORK 47 (1974)); Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 14 (2011).

51. Dolovich, *supra* note 45, at 251.

52. The Bureau of Justice Statistics found that “sexual orientation was the single most predictive characteristic of who was targeted for sexual assault.” *A Call for Change: Protecting the Rights of LGBTQ Detainees*, JUST DETENTION INT’L, Feb. 2009, <http://www.justdetention.org/pdf/CFCLGBTQJan09.pdf>.

53. *No Escape: Male Rape in United States Prisons*, HUMAN RIGHTS WATCH, Apr. 1, 2001, <http://www.hrw.org/reports/2001/prison/report4.html>.

54. *Id.*

55. *PREA Update*, STOP PRISONER RAPE 6 (2008), available at http://www.justdetention.org/pdf/PREA_Update_June_2008.pdf.

sexual abuse. This leaves these inmates much more vulnerable to sexual victimization at a rate of 13.4 times higher than the general population.⁵⁶

3. Poorly Trained Prison Guards and Staff

When California Department of Corrections and Rehabilitation (CDCR) spokesman and prison official Russ Heinmerich was asked about institutional problems facing transgender housing choices in light of harrowing reports of inmate-on-inmate sexual violence, he simply responded that there was no such dilemma.⁵⁷ Mr. Heinmerich's response highlights both the ignorance and indifference to the specific issues by prison guards and staff surrounding transgender inmates.

Transgender inmates are frequently victims of prison staff abuse and humiliation as they are subjected to frivolous strip searches, verbally harassed, and not addressed by their preferred pronouns, adding to the inmate's humiliation and risk of victimization.⁵⁸ Prison staff do not always take transgender sexual assault complaints seriously, potentially because they are uneducated about being transgender and conflate identifying as transgender with being gay.⁵⁹ Without the support of prison staff to ensure their safety, transgender inmates are left to protect themselves.

4. Protective Pairings

Many transgender inmates believe that they cannot rely on prison guards to provide them adequate safety from other inmates. Therefore, they seek protection elsewhere and employ the help of another inmate by forming relationships known as "protective pairings."⁶⁰ However, the safety received does not come without a substantial cost.

A protective pairing is a relationship between one inmate who is considered "powerful" by others and is not in fear for his own safety, and an inmate⁶¹ who is not accepted by the hypermasculinity culture and is at

56. Valerie Jenness & Cheryl Maxon, *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* 42 (2007), http://ucicorrections.seweb.uci.edu/pdf/Executive_Summary_of_Val_s_PREA_report.pdf.

57. Oliver Libaw, *Prisons Face Dilemma with Transgender Inmates*, ABCNEWS, Jan. 22, 2010, <http://abcnews.go.com/US/story?id=90919&page=1>.

58. Emily Alpert, *Gender Outlaws*, IN FRAY MAG. (Nov. 20, 2005), <http://inthe fray.org/content/view/1381/39/>.

59. *Id.*; *Where Margins Meet*, *supra* note 26, at 8.

60. Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 527 (2009).

61. Although far less common, this relationship may also be between a guard and an inmate. In 1998, California prisoner Tanya Smith entered into a guard-inmate protective pairing

great risk of being a victim of physical or sexual violence.⁶² The powerful inmate, most commonly known as a “jockey,” provides protection from physical violence and rape to the other inmate, most commonly known as a “punk,” who he “owns,” in exchange for sexual and other services such as cleaning, cooking, and other “wifely” duties.⁶³ This relationship formed is not voluntary, but instead is one based on the fundamental need for protection, as “the alternatives are frightful, and it is motivated above all by the need to survive in a place where the punk has been marked as a perpetual target for gang-rape and other forms of abuse.”⁶⁴ The relationship is purely “survival-driven” from the punk’s perspective, and should not be treated as consensual sexual activity,⁶⁵ but as a form of coerced rape and sexual victimization.⁶⁶

5. Administrative Segregation

Although most transgender prisoners are initially housed in general population, most of the prisoners will find themselves placed in “protective” housing, also known as administrative segregation,⁶⁷ for the purpose of protection.⁶⁸ Administrative segregation is the practice of separating the inmate from the general population by placing her into a specific segregated housing unit.⁶⁹ Although this housing arrangement is intended for the transgender inmate’s safety, in practice this “solution” can perpetuate sexual violence, has the effect of punishment, and negatively impacts the inmate’s mental health.⁷⁰

as a “way of survival.” In exchange for sex, the guard provided her protection, kept her out of administrative segregation, and ensured that she received her medication. Alpert, *supra* note 58.

62. Arkles, *supra* note 60, at 527; *see also* Dolovich, *supra* note 45, at 251.

63. Arkles, *supra* note 60, at 527; Dolovich, *supra* note 45, at 251; Stephen Donaldson, *Hooking Up: Protective Pairing for Punks*, JUST DETENTION INT’L, http://www.justdetention.org/en/ps_hookingup.aspx (last visited Nov. 14, 2010).

64. Donaldson, *supra* note 63.

65. Allen Beck & Paige M. Harrison, *Sexual Victimization in State and Federal Prisons Reported By Inmates*, BUREAU OF JUST. STATS. (Dec. 16, 2007), <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1149>.

66. Donaldson, *supra* note 63.

67. “The phrase ‘administrative segregation’ . . . appears to be something of a catchall: it may be used to protect the prisoner’s safety, to protect other inmates from a particular prisoner, to break up potentially disruptive groups of inmates, or simply to await later classification or transfer.” *Hewitt v. Helms*, 459 U.S. 460, 468 (1983).

68. Richard Edney, *To Keep Me Safe from Harm? Transgender Prisoners and the Experience of Imprisonment*, 9 DEAKIN L. REV. 327, 333-34 (2004).

69. Laurel Anderson, Comment, *Punishing the Innocent: How the Classification of Male-to-Female Transgender Individuals in Immigration Detention Constitutes Illegal Punishment Under the Fifth Amendment*, 25 BERKELEY J. GENDER L. & JUST. 1, 8 (2010).

70. Edney, *supra* note 68, at 334.

Inmates who are removed from the general population for protective reasons and inmates who need separate housing because they have been deemed the most violent are at times housed together.⁷¹ In prisons where space is an issue, the lack of separate facilities based on security classifications is common, and leaves the most vulnerable prisoners to share cells with the most aggressive.⁷² This dangerous housing arrangement is likely to result in the victimization of the transgender cellmate.

In addition to the inmate-on-inmate sexual violence in administrative segregation, abuse by prison staff is also more likely.⁷³ The nature of administrative segregation removes other inmates who would typically be present in general population, leaving the segregated inmate open to abuse.⁷⁴ The staff member can reach the inmate out of the view of any surveillance cameras or potential witnesses.⁷⁵

Another effect of not differentiating between classification risks in administrative segregation housing is that there are restricted privileges that apply to all inmates housed there.⁷⁶ The restricted or eliminated privileges include phone calls, showers, hormone therapy medications,⁷⁷ group religious worship, visitations, and being permitted to leave the cell at most an hour each day.⁷⁸ It is highly unlikely that the inmate will be able to take part in any programs, and even if some are allowed, transgender inmates may not participate because “[p]eople in segregation are often required to endure a strip search any time they enter or leave their cell,” therefore compelling transgender inmates to choose

71. Arkles, *supra* note 60, at 540; Anderson, *supra* note 69, at 8.

72. Arkles, *supra* note 60, at 540.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 541.

77. Receiving proper hormone therapy and healthcare for transgender inmates is an extremely serious issue that is pervasive throughout our nation's prisons. While detailing the issue is outside the scope of this Article, it is important to note that courts have recognized the unique medical needs of transgender inmates, and that they are entitled to some form of medical treatment, which may include hormone therapy. See *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987) (recognizing that the plaintiff does not have the right to a particular type of treatment, but she is constitutionally entitled to some type of medical care under the Eighth Amendment); *Brooks v. Berg*, 270 F. Supp. 2d 302, 310-12 (N.D.N.Y. 2003), *vacated in part*, 289 F. Supp. 2d 286 (N.D.N.Y. 2003) (recognizing plaintiff's Gender Identity Disorder constituted a serious medical condition that required medical attention); *Fields v. Smith*, 712 F. Supp. 2d 830, 866-67 (E.D. Wis. 2010) (finding the Wisconsin statute prohibiting prison doctors from treating transgender inmates with hormone therapy or sex-reassignment surgery was unconstitutional).

78. Arkles, *supra* note 60, at 541; Alex Coolman et al., *Still in Danger: The Ongoing Threat of Sexual Violence Against Transgender Prisoners*, STOP PRISONER RAPE, ACLU NATIONAL PRISON PROJECT 4-5 (2005), <http://www.justdetention.org/pdf/stillindanger.pdf>.

nonparticipation over potential humiliation and/or victimization.⁷⁹ Transgender prisoners report that the strip search is not to check for weapons or contraband, but instead provides perverted entertainment for guards, who “gawk[] at their genitals and humiliate[] them.”⁸⁰ Strip searches are also understood as a “frequent substitute for, or precursor to, sexual violence or coercion.”⁸¹

Both circumstances result in a decrease of the inmate’s chance for successful reentry,⁸² and the restriction from program participation or a choice to not participate may lengthen the inmate’s prison time as “participation in certain programs can be mandatory to make parole or an early release date,” and periods of time housed in segregation may “result in loss of good time.”⁸³ Therefore, although the intent of placing transgender inmates in administrative segregation is to benefit and provide greater safety to the inmate, the effects are punitive.

This extent of isolation and minimal interaction with others “is profoundly psychologically damaging,” with consequences such as hypersensitivity to external stimuli, violent fantasies, psychotic behavior, and suicidal behavior.⁸⁴ For these reasons, many transgender inmates would prefer to remain in general population as the alternative protective housing may result in *de facto* punishment and be more dangerous.⁸⁵

III. *FARMER V. BRENNAN*

The Supreme Court heard the case of *Farmer* on January 12, 1994. The plaintiff, Dee Farmer, was a transsexual inmate who had experienced sexual assault while serving her sentence in an Indiana state prison.⁸⁶ *Farmer* serves as a cornerstone case not only for transgender prisoners,

79. Arkles, *supra* note 60, at 540.

80. Z. Gabriel Arkles, *Testimony Before the National Prison Rape Elimination Commission*, SYLVIA RIVERA L. PROJECT 2 (Aug. 15, 2005), http://srlp.org/files/documents/NPREC_testimony_Arkles.pdf.

81. Christopher Daley, *Testimony Before the National Prison Rape Elimination Commission*, TRANSGENDER L. CTR. 7 (Aug. 15, 2005), <http://transgenderlawcenter.org/pdf/prisonrape.pdf>.

82. Arkles, *supra* note 60, at 542.

83. *Id.*

84. *Id.* at 538-39.

85. *Id.* at 539; Darren Rosenblum, “*Trapped*” in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 530 (2000); Robertson, *supra* note 50, at 344-45; Edney, *supra* note 68, at 333-34.

86. The named respondents to the matter were: “[T]he warden of USP-Terre Haute and the Director of the Bureau of Prisons (only sued in their official capacities); the warden of FCI-Oxford and a case manager there; and the Director of the Bureau of Prisons North Central Region Office and an official in that office (sued in their official and personal capacities).” *Farmer v. Brennan*, 511 U.S. 825, 829-30 (1994).

but for all prisoners. Farmer's case was the first time the Court heard any matter specific to a transgender or transsexual party, and it was the first time the Court directly addressed prison rape, affirming that "[b]eing violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society."⁸⁷

Dee Farmer, who began serving her⁸⁸ federal sentence for credit card fraud in 1986, self-identified and was diagnosed by medical personnel of the Bureau of Prisons as transsexual.⁸⁹ Farmer began her gender reassignment process when she began estrogen therapy at the age of fourteen.⁹⁰ She later had breast implant surgery and underwent an unsuccessful "black market" operation to remove her male organs.⁹¹ Five years following the unsuccessful operation, she was imprisoned for the federal offense.⁹² Even though Farmer had represented herself as a female from a young age when she began hormone therapy, and wore women's clothing throughout the trial, she served her time in various male prison facilities because the federal prison authority's housing practice "is to incarcerate persons who have completed sexual reassignment with prisoners of the transsexual's new gender, but to incarcerate persons who have not completed it with prisoners of the transsexual's original gender."⁹³

In 1989 authorities transferred Farmer to the United States Penitentiary (UPS-Terre-Haute) in Terre Haute, Indiana, where she was placed in general population following time spent in administrative segregation.⁹⁴ After only nine days in general population, another prisoner approached Farmer in her cell and demanded she have sexual intercourse with him.⁹⁵ When Farmer refused, her attacker repeatedly assaulted her by punching her in the face, pushing her, kicking her, and revealing a knife hidden in his shoe.⁹⁶ Farmer's attacker tore off her clothing, held her down on the bed, and raped her.⁹⁷

87. *Id.* at 834 (internal quotation marks omitted).

88. This Article uses feminine pronouns to refer to Farmer because she identifies as a female. However, it should be noted that Justice Souter, writing for the Court, and the concurring Justices' opinions avoid using any pronouns to refer to Farmer. *See generally Farmer*, 511 U.S. 825.

89. *Id.* at 829.

90. *Farmer v. Haas*, 990 F.2d 319, 320 (7th Cir. 1993).

91. *Id.*

92. *Id.*

93. *Id.*

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

95. Brief of Petitioner at 3 & n.9, *Farmer v. Brennan*, 511 U.S. 825 (1994) (No. 92-7247).

96. *Id.*

97. *Id.*

After reporting the rape to prison officials, Farmer brought a *Bivens*⁹⁸ complaint alleging a violation of the Eighth Amendment against the Warden for acting with “deliberate indifference” to her safety, as respondents placed Farmer in the facility’s general population “despite knowledge that the penitentiary had a violent environment and a history of inmate assaults, and despite knowledge that [Farmer], a transsexual who projects feminine characteristics, would be particularly vulnerable to sexual attack by some USP-Terre Haute inmates.”⁹⁹

The Supreme Court unanimously held that prison officials have a duty under the Eighth Amendment¹⁰⁰ to refrain from indifference as to prisoners’ safety with regard to violence and assault by other prisoners.¹⁰¹ The Court emphasized that “having stripped [prisoners] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course”¹⁰² and “gratuitously allowing the beating or rape of one prisoner by another serves no legitimate penological objective.”¹⁰³

The case also presented the issue of what test was appropriate for the “deliberate indifference” standard. The Court assessed whether the criminal or civil model of “recklessness” typified the standard; in other words, whether the prison staff should be held to a subjective or objective test.¹⁰⁴ The Court rejected Farmer’s position that the standard should adopt an objective test, and instead found that “a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official *knows* of and disregards an excessive risk to inmate health or safety.”¹⁰⁵ Adopting a subjective test, the Court stated that the prison “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.”¹⁰⁶

98. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1980) (finding that there is an implied federal cause of action for violation of a constitutional right).

99. *Farmer*, 511 U.S. at 831 (internal quotations omitted).

100. The Eighth Amendment states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

101. *Farmer*, 511 U.S. at 833.

102. *Id.* (citing *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199-200 (1989)).

103. *Id.* (citing *Hudson v. Palmer*, 468 U.S. 517, 548 (1984) (internal quotation marks omitted)).

104. Marjorie Rifkin, *Farmer v. Brennan: Spotlight on an Obvious Risk of Rape in a Hidden World*, 26 COLUM. HUM. RTS. L. REV. 273, 287-88 (1995).

105. *Farmer*, 511 U.S. at 837 (emphasis added).

106. *Id.*

Part of the Court's reasoning for adopting a subjective reckless test to prove the defendant's "deliberate indifference" rested on the notion that it would be unfair to impose liability on prison officials "solely because of the presence of objectively inhumane prison conditions" that they were unaware of, and that they have previously held that these type of "cases mandate inquiry into a prison official's state of mind."¹⁰⁷ The official's state of mind is what presents the greatest barrier to ensuring safe conditions. Although a prisoner may use circumstantial evidence to prove an official's knowledge, the test allows prison officials to simply defend themselves by maintaining they were ignorant of the risk and abuse.¹⁰⁸ The objective inquiry creates a "perverse incentive for corrections officials to remain ignorant of danger behind bars" because their entire defense rests on one premise: the less knowledge, the better the defense.¹⁰⁹ Therefore, "[d]ue in part to this incentive, many forms of institutional confusion and callousness toward the situation of transgender prisoners continues to be a reality."¹¹⁰

IV. THE PRISON RAPE ELIMINATION ACT AND CALIFORNIA'S RESPONSE

In 2003, Congress unanimously passed the Prison Rape Elimination Act (PREA).¹¹¹ This was the first federally enacted law that acknowledged and set forth a remedy to decrease and hopefully eliminate the pervasiveness of prison rape. Congress recognized that prisoners "have the same fundamental rights to safety, dignity and justice as individuals living at liberty in the community," and it was essential to take action because "[t]olerance of sexual abuse of prisoners in the government's custody is totally incompatible with American values."¹¹² The Act created the National Prison Rape Elimination Commission to study the causes and consequences of sexual abuse in prison and to develop nationwide standards to begin the process of eliminating prison rape.¹¹³

107. *Id.* at 838 (citing *Wilson v. Seiter*, 501 U.S. 294, 299-302 (1991)).

108. Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for "Deliberate Indifference,"* 92 J. CRIM. L. & CRIMINOLOGY 127, 137 (2002).

109. Alex Coolman et al., *supra* note 78, at 2 (internal quotation marks omitted).

110. *Id.*

111. The Prison Rape Elimination Act of 2003, Pub. L. 108-79, 117 Stat. 972 (codified at 42 U.S.C. § 15601 (2006)).

112. PREA Executive Summary, *supra* note 5.

113. Carrie Johnson, *Panel Sets Guidelines for Fighting Prison Rape*, WASH. POST, June 23, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/22/AR2009062202975.html>.

The Bureau of Justice Statistics (BJS) conducted an initial survey under PREA to produce national incidence rates of sexual abuse by directly surveying prisoners, providing the “most comprehensive snapshot of sexual abuse in prisons and jails to date.”¹¹⁴ BJS assessed the survey results and concluded nine findings. Specific to transgender inmates, the results concluded that protecting prisoners from sexual abuse remains a challenge in correctional facilities across the country, certain individuals are more at risk of sexual abuse than others, few correctional officers are subject to the kind of rigorous internal monitoring and external oversight that would reveal why abuse occurs and how to prevent it, many victims cannot safely and easily report sexual abuse, and those who speak out often do so to no avail.¹¹⁵

From these findings, the Commission developed a detailed guideline for prison officials addressing prevention, detection, response planning, and monitoring. Each standard contains mandatory requirements that each prison facility must enact to comply with PREA, a discussion and commentary as to why the requirements are important, and suggestions as to how each facility can best implement the requirements.¹¹⁶

The Commission’s guidelines for how prison facilities can remedy the prevalence of prison rape, however, are only binding with Attorney General Eric Holder’s approval and adoption. The statutory deadline for this adoption was one year after the issuance of the final report.¹¹⁷ On June 22, 2010, Attorney General Holder wrote a letter addressing Congress stating that his office “will not be able to promulgate regulations within one year of issuance.”¹¹⁸ Holder’s reason for not meeting the deadline was that he needed additional time to assess the cost of imposing the proposed national standard on federal and state prison authorities.¹¹⁹ Therefore, as it stands currently, the “mandatory” national standards are not binding on any prison authorities; however, states stand to lose a five percent reduction of their federal criminal justice funding each year their facility is in noncompliance.¹²⁰

114. PREA Executive Summary, *supra* note 5, at 4.

115. *Id.* at 3-24.

116. *Id.* at 1-2.

117. The Prison Rape Elimination Act of 2003, Pub. L. 108-79, 117 Stat. 972 (codified at 42 U.S.C. § 15601 (2006)).

118. Letter from Eric Holder, U.S. Att’y Gen., to The Hon. Frank R. Wolf, U.S. H.R., and The Hon. Bobby Scot, U.S. H.R. (June 22, 2010), *available at* <http://big.assets.huffingtonpost.com/prea/letter.pdf>.

119. *Id.*

120. Carrie Johnson, *Panel Sets Guidelines for Fighting Prison Rape*, WASH. POST, June 23, 2009, <http://www.washingtonpost.com/pdyn/content/article/2009/06/22/AR2009062202975.html>;

Almost immediately after PREA's passage in 2004, California began taking steps in an effort to bring the California Department of Corrections and Rehabilitation's (CDCR) facilities into compliance with the federal standards. On September 22, 2005, Governor Schwarzenegger signed into law Assembly Bill 550, the Sexual Abuse in Detention Elimination Act (SADEA). The act's purpose is "to protect all inmates and wards from sexual abuse while held in institutions operated by the Department of Corrections and Rehabilitation."¹²¹ Shortly thereafter, the CDCR amended chapter five of its internal Operations Manual to include article 44, the Prison Rape Elimination Policy, effective as of January 19, 2006.¹²² The purpose of the policy is to "provide guidelines for the prevention, detection, response, investigation, and tracking of offender sexual assaults and sexual misconduct between offenders and/or staff and offenders," and to ensure compliance with the federal Prison Rape Elimination Act of 2003 and California's Sexual Abuse in Detention Elimination Act passed in 2005.¹²³

V. DISCUSSION AND RECOMMENDATION

While the PREA Commission's guidelines will impact all prisoners, there are three sections that specifically address transgender inmates: limits to cross-gender viewing and searches, screening for risk of sexual victimization and abusiveness, and the use of screening information.¹²⁴ Below is a discussion of the three distinct sections addressing transgender inmates, California's implementation of each standard and recommendation, and an overall critique of whether PREA's requirements sufficiently address sexual violence against the transgender subpopulation.

Constitution Project, *Improve Transparency in Correctional Institutions*, SMART ON CRIME: RECOMMENDATIONS FOR THE NEXT ADMIN. & CONG., Oct. 29, 2008, http://2009transition.org/criminaljustice/index.php?option=com_content&view=article&id=29&Itemid=112.

121. Sexual Abuse in Detention Elimination Act, Assemb. 550, 2005 Leg. (Cal. 2005).

122. CAL. DEP'T OF CORR. & REHAB., OPERATIONS MANUAL: PRISON RAPE ELIMINATION POLICY ch. 5, art. 44 (2006).

123. *Id.* § 54040.2.

124. NAT'L PRISON RAPE ELIMINATION COMM'N, STANDARDS FOR THE PREVENTION, DESERTION RESPONSE, AND MONITORING OF SEXUAL ABUSE ON ADULT PRISONERS AND JAILS, 7-21 (2009), <http://www.ncjrs.gov/pdffiles1/226682.pdf> [hereinafter PREA STANDARDS].

A. *Limits to Cross-Gender Viewing and Searches*

1. The Federal Standard

Under the prevention and response planning section, the Commission guidelines address the proper approach to cross-gender strip and visual body cavity searches.¹²⁵ For transgender inmates, it mandates, “[M]edical practitioners conduct examinations of transgender individuals to determine their genital status only in [a] private setting[] and only when an individual’s genital status is unknown.”¹²⁶ In some facilities, genital status is determined not by medical personnel, but by employees through strip or body cavity searches.¹²⁷ The Commission recognizes that, frequently, these invasive examinations are unnecessary, as the inmate has likely already gone through the initial medical screening where medical personnel verify genitalia status.¹²⁸ Therefore, to ensure the privacy and dignity of transgender inmates, PREA requires that only medical staff may conduct genitalia verification, the verification must occur in a private space, and only when the inmate’s genital status is unknown.¹²⁹

2. California’s Implementation

California’s CDCR Operations Manual provides no policy or guidelines as to how prison staff should verify a transgender inmate’s genitalia. There are guidelines for cross-gender, unclothed, body inspections and searches that limit this type of searching to qualified medical staff except in emergency situations, but guidelines on how to appropriately search transgender inmates are absent.¹³⁰

3. Recommendation

The lack of any specific guidelines on how the CDCR should verify a transgender inmate’s genitalia is extremely problematic as it allows each institution to develop its own internal policies and manage transgender inmates during intake the best way they deem fit. As discussed *infra* Part I.C.3, prison staff do not have the necessary training as to how to properly and respectfully handle these inmates, and prison

125. *Id.* at 11.

126. *Id.*

127. *Id.* at 12.

128. *Id.*

129. *Id.* at 11-13.

130. CAL. DEP’T OF CORR. & REHAB., OPERATIONS MANUAL: ADULT CUSTODY AND SECURING OPERATIONS ch. 5, art. 19, § 52050.16.4: Searching Inmates: Housing Unit (2009).

staff are not properly educated about their unique needs. Therefore, they are not in an appropriate position to determine how to best handle genitalia verification.

Even if California had fulfilled the PREA guideline, which requires medical staff to verify an inmate's genitalia, there would still be inadequacies in the PREA standards. Undoubtedly, the requirement addressing the appropriate manner to verify an inmate's genitalia is necessary and ensures greater privacy and dignity. However, this mandate is limited to the intake process, and does not provide additional regulations on prison staff searching transgender inmates at any other point during their time spent in incarceration even though the Commission's concerns about staff conduct directly translate into all transgender searches. As discussed *infra* Parts I.C.3 and I.C.5, prison staff play a significant role in the victimization of transgender inmates. Many times their motive for searching a transgender inmate is to humiliate and demoralize the individual, rather than to fulfill a legitimate penological objective. Additionally, many transgender inmates find themselves in administrative segregation for safety purposes. While the nature of this housing does not provide transgender prisoners a safer and healthier environment, the routine body-searching policies also increase the potential of victimization.

To ensure safe and dignified cavity searches of transgender inmates, appropriate search procedures must be developed and enforced at all times from intake to release. While it is preferable that only medical staff conduct cavity searches of transgender inmates, this requirement would be unreasonable as medical staff can barely care for the ill prisoners, let alone conduct these searches.¹³¹ Therefore, this requirement would likely result in inmates being afforded fewer privileges that require cavity searches before participation. Moreover, the prison staff would have more opportunities to manipulate inappropriate control over these inmates. Guards would be the only means to notify medical staff that a search of a transgender inmate was needed. They could easily decide to not make the request, or prolong the amount of time before initiating the search request to purposefully restrict the inmate from participating or, at best, make her late for the activity or program.

With these considerations, an appropriate cavity searching policy would be to require the presence of two staff members, one female and one male, during the search. The male staff member would conduct the

131. See *Plata v. Schwarzenegger*, No. C01-1351 TEH, 2005 WL 2932253, at *1 (N.D. Cal. Oct. 3, 2005).

inmate's body search in the presence of a female staff member, except in emergency situations. This policy would maintain the penological safety interest of the administrative searching policies while providing a necessary exigency exception. The presence of two staff members would encourage and result in greater staff professionalism, as each would be responsible to the other for their actions, with an overall effect of increased security and comfort to the transgender inmate during this invasive process.

B. Screening for Risk of Victimization and Abusiveness

1. The Federal Standard

Under the section detailing how to properly screen and identify inmates who are at risk for victimization, the Commission requires that, at intake, the facility note a variety of potentially relevant characteristics,¹³² including whether the inmate is gender nonconforming, such as transgender or intersex identity.¹³³ When asking the questions about an inmate's sexuality or gender identity, the Commission warns, "Employees should carefully consider and endeavor to respect the views of gay, bisexual, transgender, and intersex inmates who request or do not want heightened protection."¹³⁴ Further, it is left to each facility to determine how to best weigh each enumerated characteristic to tailor their assessment to the specific facility's culture, makeup, geographic region, and collected data.¹³⁵

2. California's Implementation

The Detection section in the CDCR Operations Manual outlines a very broad overview of how to handle screening for appropriate placement of inmates who are at risk of victimization.¹³⁶ Title 15 of California Code of Regulations, Crime Prevention and Corrections, specifically addresses how prison administrators should evaluate and assign inmate housing.¹³⁷ It requires that each facility "implement a written classification plan designed to properly assign inmates to housing units and activities according to . . . sex, age, criminal sophistication,

132. Other enumerated characteristics that apply to the transgender community and prison experience include: slight build, prior sexual victimization, and prior acts of sexual abuse. PREA standards, *supra* note 124, at 28.

133. *Id.* at 27-28.

134. *Id.* at 29.

135. *Id.*

136. CAL. DEP'T OF CORR. & REHAB., *supra* note 122, ch. 5, art. 44, § 54040.5.

137. CAL. CODE REGS. tit. 15, § 1050 (2009).

seriousness of crime charged, physical or mental health needs, assaultive/non-assaultive behavior and *other criteria* which will provide for the safety of the inmates and staff.”¹³⁸ The California legislature has determined that this is inadequate and does not fully comply with PREA, specifically because there is no listed consideration of whether the inmate is transgender. Assembly member Tom Ammiano led the legislature in remedying this through two bills that would amend the Sexual Abuse in Detention Elimination Act of 2005: AB 382 and AB 633, both titled the LGBT Prison Safety Act.¹³⁹

AB 382 and AB 633 required the CDCR to take into account additional factors during the intake process, including being transgender, by simply adding sexual orientation and gender identity to a list of criteria that CDCR must consider when classifying and housing prisoners. Both bills passed through the full Assembly and the Senate, but were then vetoed by Governor Schwarzenegger with the rationale that the “bill is unnecessary because [the] CDCR already considers [sexual orientation and gender identity] when determining where to house inmates.”¹⁴⁰ However, because PREA mandates that specific criteria be listed on the intake forms, California’s mere consideration of an inmate identifying as transgender is insufficient to meet the federal requirement.

3. Recommendation

If the Governor had not vetoed either of the two bills, then identifying as transgender would be a specified characteristic at intake. This would have allowed for better tracking and overall data collection of previous and current transgender inmates, as the CDCR currently does not maintain that information.¹⁴¹ However, assuming the CDCR were to include transgender as an enumerated characteristic to screen for at intake, this begs the question: what impact would this have on the

138. *Id.* § 1050(a) (emphasis added).

139. The Lesbian, Gay, Bisexual and Transgender Prisoner Safety Act, Assemb. 382, 2009-10 Leg. Sess. (Cal. 2009), *available at* http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0351-0400/ab_382_bill_20090911_enrolled.pdf; The Lesbian, Gay, Bisexual and Transgender Prisoner Safety Act, Assemb. 633, 2009-10 Leg. Sess. (Cal. 2010), *available at* http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0601-0650/ab_633_bill_20100903_enrolled.pdf.

140. Letter from Arnold Schwarzenegger, Governor of Cal., to the Members of the Cal. State Assemb. (Oct. 11, 2009), *available at* <http://www.assembly.ca.gov/clerk/billslegislature/srchframe.htm>; Letter from Arnold Schwarzenegger, Governor of Cal., to the Members of the Cal. State Assemb., (Sept. 24, 2010), *available at* <http://www.assembly.ca.gov/clerk/billslegislature/srchframe.htm>.

141. E-mail from Oleg Shambra, CDCR Management Technician Services, Offender Information Services Branch, to author (Oct. 13, 2010, 8:12 PST).

identified inmate? Other than addressing genitalia verification, PREA does not mandate any further actions be taken in the housing or placement of transgender inmates upon identifying that they are transgender.

In addition to providing the CDCR more accurate data, noting that the inmate identifies as transgender could be potentially useful in the event that the particular inmate files an Eighth Amendment claim against the prison facility and/or guard. As discussed *infra* Part II, the Supreme Court adopted a subjective test for the “deliberate indifference” standard. The plaintiff must demonstrate that the staff member knew the inmate faced a substantial risk of serious harm, and the plaintiff can use circumstantial evidence to meet her burden of proof. The intake form that the staff member may have seen or accessed with the notation that the inmate identified as transgender will provide additional evidence to aid the plaintiff in proving her claim. Further, this information, in conjunction with PREA, mandating that staff receive education and training about how to recognize likely victims of sexual assault can greatly bolster the inmate’s claim.

Therefore, while this requirement does not directly or immediately impact transgender safety, it is a significant starting point. It will provide accurate data collection on the transgender inmate population and put staff on notice that the inmate identifies as transgender. In effect, this will hopefully trigger safety considerations when determining the inmate’s housing placement.

C. Use of Screening Information

1. The Federal Standard

Once each inmate has passed through the facility’s intake process, the facility can use the information to make informed housing, bed, work, education, and program assignments for each individual.¹⁴² The facility must make individualized determinations about each inmate’s safety risk, and must not place “lesbian, gay, bisexual, transgender, and other gender-nonconforming inmates” in “particular facilities, units, or wings solely because of their sexual orientation, genital status, or gender identity.”¹⁴³ Inmates determined to be at high risk for victimization may be placed in segregated housing only as a “last resort,” and should remain there only until alternative safe housing is arranged.¹⁴⁴ The Commission’s

142. PREA standards, *supra* note 124, at 30.

143. *Id.*

144. *Id.*

discussion of this Part emphasizes that for the collected screening information to be significant, the facilities must use it when making housing, bed, work, education, and program assignments for each inmate.¹⁴⁵ In making housing decisions in particular, the Commission recognizes that “many corrections officials are particularly perplexed about how to house transgender inmates safely and properly.”¹⁴⁶ For this reason, the Commission “strongly urges agencies to give careful thought and consideration to the placement of each transgender inmate and not to automatically place transgender individuals in male or female housing based on their birth gender or current genital status.”¹⁴⁷

2. California’s Implementation

PREA “strongly urges,” but does not mandate, correctional facilities to deviate from their strict genitalia-based housing policies. California, like the majority of states, classifies inmates based on genital-status,¹⁴⁸ but differs in that it houses any prisoner self-identifying as transgender at the California Department of Mental Health, the CDCR’s mental hospital.¹⁴⁹ For inmates who do not self-identify, genitalia is determinative of whether they will be housed in a male or female facility.¹⁵⁰ This approach takes notice of PREA’s suggestion, but does not go as far as to classify inmates based on gender-identity.

3. Recommendation

One may assume that concentrating the at-risk transgender population in one facility would decrease the rate of sexual victimization and rape. In California, this has not proven successful.¹⁵¹ The Bureau of Justice Statistics conducted the second national inmate study on sexual victimization in state and federal prisons and jails between October 2008 and December 2009.¹⁵² The study reported that the California Medical Center in Vacaville, the prison where self-identifying transgender inmates are housed, has one of the highest rates of inmate-to-inmate sexual violence of 5.8 percent, more than three times the national average of 1.9

145. *Id.*

146. *Id.* at 30-31.

147. *Id.* at 31.

148. Libaw, *supra* note 57.

149. Tarzwell, *supra* note 23, at n.123.

150. CAL. CODE REGS. tit. 15, § 1050(a) (2009).

151. See Allen J. Beck & Paige M. Harrison, *Sexual Victimization in Prisons and Jails Reported By Inmates 2008-09*, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST. (2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjri0809.pdf>.

152. *Id.* at 6.

percent, ranking seventh nationwide.¹⁵³ Additionally, an empirical study focusing on transgender inmates in California's prisons looked to various factors such as the size of the facility, the concentrated population of transgender inmates, and the age of the prison to see whether there was a correlation between any of the identified factors and incidents of sexual assault.¹⁵⁴ The study's outcome did not demonstrate that any one factor was determinative or overwhelmingly significant.¹⁵⁵

With this considered, the best immediate solution to reduce the rate of victimization of transgender inmates would be to adopt a model similar to San Francisco's jail model where inmates' gender-identity is a primary factor in housing assignments, not genitalia.¹⁵⁶ In conjunction with the National Lawyers Guild and the San Francisco Human Rights Commission, the City assessed the best housing practices for transgender inmates and developed their "Model Protocols on the Treatment of Transgender Persons."¹⁵⁷ The model provides three categories of housing: male units, vulnerable male units,¹⁵⁸ and female units.¹⁵⁹ The model favors housing anatomically male inmates who adopt female gender identities in the female units as it is the safest housing option.¹⁶⁰ While there are obvious differences between a county jail and state prison facility in terms of population, resources, and inmate demographics, San Francisco's model provides a great starting point for the CDCR.

However, implementing this housing approach will not completely resolve the pervasive issue. Systematic change must begin with the staff, who must all be educated about sexual victimization to allow them to fundamentally understand prison rape, transgender inmates, and the subpopulation's unique needs. This would provide inmates with an ally in their continuous fight against sexual victimization regardless of where

153. *Id.* at 8.

154. Valerie Jenness, *Transgender Inmates in California's Prisons: An Empirical Study of a Vulnerable Population*, NAT'L INST. OF CORR. sec. 4, slide no. 74-76 (July 16, 2009), <http://uci.corrections.seweb.uci.edu/sites/ucicorrections.seweb.uci.edu/files/Transgender%20Inmates%20in%20CAs%20Prisons%20-%20An%20Empirical%20Study%20of%20a%20Vulnerable%20Population.pdf>.

155. *Id.*

156. MURRAY D. SCHEEL & CLAIRE EUSTALE, NAT'L LAW. GUILD, MODEL PROTOCOLS ON THE TREATMENT OF TRANSGENDER PERSONS BY SAN FRANCISCO COUNTY JAIL 2 (2002), <http://www.transgenderlaw.org/resources/index.htm#criminal> (follow "San Francisco County Jail" hyperlink).

157. *Id.*

158. The housing model determined that females who are pre-operative but adopt a male gender identity are more safely housed in the vulnerable male unit rather than with other females or in a mainstream male housing unit. *Id.* at 12-13.

159. *Id.*

160. *Id.*

they are housed, and will slowly begin to change the current perception that prison rape is inevitable.¹⁶¹

VI. CONCLUSION

As the country with the largest prison population in the world and the leader in human rights, the Prison Rape Elimination Act serves as recognition that we are aware of the unacceptable pervasiveness of sexual abuse in America's prisons and jails, and we are taking bold and affirmative steps to eradicate sexual victimization.¹⁶² However, further considerations are necessary in addressing the unique safety needs of transgender inmates.

As prison rape survivor T.J. Parsell eloquently stated in his testimony to the National Prison Rape Elimination Commission, "Sexual violence in prison consists not only in direct victimization, but also in the daily knowledge that it's happening."¹⁶³ As long as we are aware that sexual violence is occurring in our nation's prisons, it is our duty to push forward and demand safer institutional environments, as it is "society's responsibility to protect the life and health of its prisoners," and when we sentence an individual to confinement in our prisons, it "is our act. We have tolled the bell for him. And whether we like it or not, we have made him our collective responsibility. We are free to do something about him; he is not."¹⁶⁴

161. See Editorial, *Rape in Prison*, N.Y. TIMES, June 23, 2009, <http://www.nytimes.com/2009/06/24/opinion/24wed3.html>.

162. See Roy Walmsley, *World Prison Population List (8th ed.)*, KING'S C. LONDON INT'L CENTRE FOR PRISON STUD. (2009), <http://nicic.gov/Library/022140>.

163. *Survivor Testimony of T.J. Parsell*, JUST DETENTION INT'L (Aug. 19, 2005), <http://www.justdetention.org/en/NPREC/tjparsell.aspx>.

164. *United States v. Bailey*, 444 U.S. 394, 423 (1980) (Blackmun, J., dissenting).