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## Note

### Behind the Binary Bars: A Critique of Prison Placement Policies for Transgender, Non-Binary, and Gender Non-Conforming Prisoners

Jessica Szuminski\*

#### INTRODUCTION

After police responded to a domestic dispute, arrestee Zack was held at Riverside Correctional Facility in Philadelphia.<sup>1</sup> When Zack arrived, he was forced to submit to an intrusive genital examination that was alleged to confirm his gender<sup>2</sup> identity, was abused by correctional officers who taunted him for having a beard and then refused to give him his shoes, and—after he filed numerous complaints about the abuses he had been subjected to during his two months in custody—was told by guards to stop filing complaints.<sup>3</sup> When he refused to sign a document clearing the guards of wrongdoing, he was sentenced to

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1. Pranshu Verma, *Trans Prisoner Was Pepper-Sprayed and Says He Was Invasively Searched at Philly's Female Jail*, PHILA. INQUIRER (Oct. 23, 2019), <https://www.inquirer.com/news/transgender-pepperspray-genital-searches-philadelphia-jails-20191023.html> [<https://perma.cc/7MQA-LPFG>]. Zack did not want the published story to include his last name. *Id.*

2. Because gender describes one's internal sense of identity, it cannot be confirmed via a physical examination. *See infra* Part I.A. A physical examination of this type can only reveal an individual's current external sexual organs. *Cf.* Melonyce McAfee, *Am I Not a Woman?*, SLATE (Aug. 19, 2009), <https://slate.com/news-and-politics/2009/08/how-to-perform-a-gender-test.html> [<https://perma.cc/TFE6-SZN9>] (“You can't tell for sure if [someone] is a man or a woman just by glancing at his or her genitalia.”). Part I.A of this Note will provide a more thorough explanation of sex versus gender and other important distinctions.

3. Verma, *supra* note 1 (noting that the genital strip search that Zack was subjected to violates federal law and the prison's policy).

fifteen days in solitary confinement.<sup>4</sup> Zack was handcuffed while he was forced to change into the special solitary confinement jumpsuit, and because he verbally protested being put into solitary, he was pepper-sprayed by the correctional officers.<sup>5</sup> Zack was the victim of this brutal treatment because he was a transgender man housed in a women's jail.<sup>6</sup>

Sonia Doe, a transgender woman, was housed in New Jersey male prisons for seventeen months.<sup>7</sup> While there, she reported that a "staff member fondled her breasts under the guise of a pat-down security search in a room without surveillance cameras."<sup>8</sup> Once she threatened to file a grievance report, three male staff members assaulted her, resulting in numerous bruises and a black eye.<sup>9</sup> After Sonia was attacked, the prison found her guilty of disciplinary offenses and placed her in solitary confinement.<sup>10</sup>

Bakari, a gender non-conforming individual,<sup>11</sup> was housed in a women's prison in southern California.<sup>12</sup> S/he<sup>13</sup> was forced by prison officials to live as a woman and was subjected to "the psychological violence of being forced to inhabit a gender identity that s/he had rejected as a fundamental part of their sense of selfhood."<sup>14</sup> Bakari served their prison sentence under threat of violence from the correctional officers if s/he failed to submit to the prisoner's forced binary.<sup>15</sup>

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4. *Id.*

5. *Id.*

6. *See id.*

7. Anna Orso, *After Keeping Her in a Men's Prison for 17 Months, N.J. Will Move Transgender Inmate to Women's Facility*, PHILA. INQUIRER (Aug. 29, 2019), <https://www.inquirer.com/news/nj-move-transgender-prisoner-to-womens-facility-after-lawsuit-aclu-20190829.html> [<https://perma.cc/GRN7-J8WT>]. Sonia Doe is a pseudonym. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Noteworthy, gender non-conforming, though related to gender expression and identity, is not synonymous with transgender. *See infra* note 43 and accompanying text for a more precise definition. Bakari specifically identified as "genderqueer, an identity that rejects classification into either male or female gender categories." Julia C. Oparah, *Feminism and the (Trans)gender Entrapment of Gender Nonconforming Prisoners*, 18 UCLA WOMEN'S L.J. 239, 240 (2012).

12. *Id.*

13. Bakari uses s/he as a subject pronoun to "embrace[] the presence of both male and female elements" in their gender identity. *Id.* at 240 n.3. "Their" is a common gender-neutral possessive pronoun used by non-binary and gender non-conforming individuals. *Id.*

14. *Id.* at 241.

15. *See id.*

Zack, Sonia, and Bakari's incarceration experiences are unnervingly common, especially considering that the American prison system is riddled with injustices and abuses; these injustices include racial disparities,<sup>16</sup> high incarceration rates,<sup>17</sup> and problematic living conditions.<sup>18</sup> With a history like this, it is unsurprising that the system fails to accommodate a basic need for a significant portion of its population<sup>19</sup>: safe housing that respects the gender identities of individuals who are non-binary and transgender. The stories of Zack, Sonia, and Bakari represent the dangers that exist when transgender and non-binary people are forced into a binary system, a system which already has limited capacity to provide individualized accommodations.<sup>20</sup> Gender exists on a spectrum,<sup>21</sup> but most of the American prison system continues to exist within a stark binary that only allows for male and female identities.<sup>22</sup>

Because jail and prison populations segregate male and female prisoners by their gender, non-binary, gender non-conforming, and intersex people are often left out of the equation since there is no capacity to accommodate them.<sup>23</sup> Various jurisdictions across the

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16. See RICHARD P. SEITER, *CORRECTIONS: AN INTRODUCTION* 147 (4th ed. 2014) (“[T]he makeup of prison inmates was . . . 38.9 percent white, 42.6 percent [B]lack, 15.5 percent Hispanic, and 3.0 percent other minority . . .”); Rebecca C. Hetey & Jennifer L. Eberhardt, *The Numbers Don't Speak for Themselves: Racial Disparities and the Persistence of Inequality in the Criminal Justice System*, 27 *CURRENT DIRECTIONS PSYCH. SCI.* 183, 183–84 (2018) (“African Americans are 5.1 times more likely than Whites to be incarcerated.”).

17. See WENDY SAWYER & PETER WAGNER, *PRISON POL'Y INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2019* (2019), <http://law.loyno.edu/sites/law.loyno.edu/files/images/Class%20%20US%20Mass%20Incarceration%20PPI%202019.pdf> [<https://perma.cc/WN5G-F6RW>] (stating that the U.S. has the “highest incarceration rate in the world”).

18. See Sharon Dolovich, *Prison Conditions*, in 4 *REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE* 261, 262–68 (Erik Luna ed., 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3143837](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3143837) (“[T]he American carceral system is failing daily to ensure safe and humane conditions for the people who live inside.”).

19. See Josh Manson, *Layleen Polanco's Death Proves the Cruelty of Solitary Confinement*, *THEM* (July 17, 2019), <https://www.them.us/story/trans-incarceration-crisis> [<https://perma.cc/94CZ-2SDX>] (“16 percent of transgender people—and 47 percent of Black transgender people— . . . have spent time behind bars. According to a survey by the National Center for Transgender Equality, in 2014, Black transgender women were incarcerated at a rate ten times that of the general American population.”); *infra* Part I.C.2.

20. See *infra* Part I.C.

21. See *infra* Part I.A.

22. See *infra* Part I.C.

23. See *infra* Part I.C.4.b.

United States, such as Minnesota's Department of Corrections, have implemented solutions that allow transgender men and women to be classified based on their gender identity rather than their birth sex or current genitalia,<sup>24</sup> but these policies still revolve around binary options that non-binary, gender non-conforming, and intersex people do not fit into.<sup>25</sup> This is problematic because misclassification of gender results in significant risks to personal safety<sup>26</sup> and mental health problems<sup>27</sup> that cis-gendered prisoners do not face,<sup>28</sup> implicating Eighth Amendment violations uniquely experienced by transgender, non-binary, gender non-conforming, and intersex prisoners.<sup>29</sup> To address this lack of housing options outside of the binary, prisons in both the federal and state systems must take a cue from international examples<sup>30</sup> and establish new wings within existing prisons that provide

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24. See MINN. DEP'T CORR., POLICY 202.045, MANAGEMENT OF TRANSGENDER/GENDER NON-CONFORMING/INTERSEX OFFENDERS (2018) [hereinafter POL'Y 202.045] [http://www.doc.state.mn.us/DocPolicy2/html/DPW\\_Display\\_TOC.asp?Opt=202.045.htm](http://www.doc.state.mn.us/DocPolicy2/html/DPW_Display_TOC.asp?Opt=202.045.htm) [<https://perma.cc/4H5J-Q9Q5>] (requiring a case-by-case placement determination focused on gender identity); *Transgender Prison Housing Assessed*, 24 CITY L. 53 (2018) (describing New York City's placement policy as based on gender identity); *New Federal Guidance: Prisons and Jails Cannot House Transgender Prisoners by Anatomy*, NAT'L CTR. FOR TRANSGENDER EQUAL. (Mar. 24, 2016), <https://transequality.org/press/releases/new-federal-guidance-prisons-and-jails-cannot-house-transgender-prisoners-by-anatomy> [<https://perma.cc/ZN46-WXES>] (explaining how the Obama administration implemented a new policy that placed federal prisoners based on gender identity). *But see* FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., NO. 5200.4 CN-1, TRANSGENDER OFFENDER MANUAL §§ 5, 7 (2018) [hereinafter TRANSGENDER OFFENDER MANUAL], <https://www.bop.gov/policy/progstat/5200-04-cn-1.pdf> [<https://perma.cc/AF93-844A>] (repealing the Obama administration policy and reverting back to a classification system based on biological sex).

25. Current transgender placement policies only have two options for placement: man/male housing and woman/female housing. *See, e.g.*, sources cited *supra* note 24. By definition, non-binary, gender non-conforming, and intersex people do not fall into the categories of man or woman. *See infra* Part I.A for an explanation of the differences between these identities.

26. *See, e.g.*, JASON LYDON, KAMARIA CARRINGTON, HANA LOW, REED MILLER & MAHSA YAZDY, COMING OUT OF CONCRETE CLOSETS: A REPORT ON BLACK & PINK'S NATIONAL LGBTQ PRISONER SURVEY 5 (2015), <https://www.issueab.org/resources/23129/23129.pdf> [<https://perma.cc/P6B3-QD7Q>] (“[LGBTQ r]espondents were over 6 times more likely to be sexually assaulted than the general prison population. . . . The vast majority of respondents experienced discrimination and verbal harassment by prison staff and more than a third were physically assaulted by prison staff.”).

27. *See, e.g., id.* at 4 (“78% of transgender, nonbinary gender, and Two-Spirit respondents experienced emotional pain from hiding their gender identity during incarceration/throughout their interactions with the criminal legal system.”).

28. *See, e.g., id.* at 4–5.

29. *See infra* Part II.A.

30. *See infra* Part III.A.1.

housing exclusively for gender- and sex-diverse offenders. Placement in these wings must depend on a case-by-case determination for each transgender, non-binary, gender non-conforming, and intersex prisoner, and this determination *must* account for their personal views regarding the housing options.

Part I of this Note will explore the history of transgender people incarcerated in U.S. prisons. It will develop a narrative of the emerging prevalence of non-binary and gender non-conforming identities and how they fit within the prison system, using Minnesota as an example of progressive placement efforts and the federal system as an example of regressive policies. Part II will explain how, despite significant progress, the current classification systems and placement options within American prisons (including those in progressive systems like Minnesota) fail to acknowledge non-binary identities. Part II will also demonstrate that the failure of the prison system to enforce procedures that appropriately consider gender identities violates the Eighth Amendment and that change is needed. Part III proposes an example of such a remedy: creating separate wings within existing prisons that are designated solely for transgender and non-binary people. This solution considers the shortcomings of what is possible given the current infrastructure and high population of American prisons<sup>31</sup> and acknowledges the limitations for implementing more revolutionary ideas such as prison abolition, while emphasizing that it is the most feasible solution that can be instituted in our current prison system.

#### I. CLASSIFICATIONS OF GENDER IDENTITY IN AMERICAN VERNACULAR, CIVIL LAW, AND PRISON SYSTEMS

This Part will begin by explaining the differences between sex and gender and describing the range of identities that exist on the gender spectrum. Then this Part will discuss the increasing prevalence of transgender and non-binary identities within society and preview the ways in which states are beginning to legally recognize these identities. Finally, this Part will evaluate the history of transgender and non-binary people in United States prisons and preview the classification, treatment, and abuses of trans and non-binary inmates that carry Eighth Amendment implications.

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31. In 2018, U.S. prisons were operating at 103.9 % capacity. Niall McCarthy, *The World's Most Overcrowded Prison Systems [Infographic]*, FORBES (Jan. 26, 2018), <https://www.forbes.com/sites/niallmccarthy/2018/01/26/the-worlds-most-overcrowded-prison-systems-infographic/#53239ccf1372> [https://perma.cc/7336-L5FT].

## A. DEFINING IDENTITIES BEYOND MAN AND WOMAN

Despite the way the terms have been used interchangeably, both historically and in everyday life, sex and gender are not synonyms.<sup>32</sup> Sex refers to the biological differences between males and females; the designation is assigned at birth and is generally distinguishable by genitalia or chromosomes.<sup>33</sup> Gender identity refers to a person's internal sense of whether they identify as a man, a woman, neither, or some combination of the two.<sup>34</sup> There is also a difference between gender identity and gender expression—the latter refers to “[e]xternal manifestations of gender, expressed through a person's name, pronouns, clothing, haircut, behavior, voice, and/or body characteristics.”<sup>35</sup> A commonly referenced distinction between gender and sex is to identify that gender, but not sex, is a social construct.<sup>36</sup> A social

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32. Carolyn E. Coffey, *Battling Gender Orthodoxy: Prohibiting Discrimination on the Basis of Gender Identity and Expression in the Courts and in the Legislatures*, 7 N.Y. CITY L. REV. 161, 162 (2004).

33. GLAAD, GLAAD MEDIA REFERENCE GUIDE 10 (10th ed. 2016), <http://www.glaad.org/sites/default/files/GLAAD-Media-Reference-Guide-Tenth-Edition.pdf> [<https://perma.cc/3NP6-GZ3M>] (defining sex as “[t]he classification of a person as male or female. At birth, infants are assigned a sex, usually based on the appearance of their external anatomy. . . . A person's sex, however, is actually a combination of bodily characteristics including: chromosomes, hormones, internal and external reproductive organs, and secondary sex characteristics.”); Shelby Hanssen, Note, *Beyond Male or Female: Using Nonbinary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law*, 96 OR. L. REV. 283, 284 (2017).

34. See GLAAD, *supra* note 33 (defining gender identity as “[a] person's internal, deeply held sense of their gender. For transgender people, their own internal gender identity does not match the sex they were assigned at birth. Most people have a gender identity of man or woman (or boy or girl). For some people, their gender identity does not fit neatly into one of those two choices . . . . [G]ender identity is not visible to others.”). Significantly, gender identity is also separate from sexual orientation. See *id.* at 6. GLAAD defines sexual orientation as “an individual's enduring physical, romantic and/or emotional attraction to members of the same and/or [different] sex.” *Id.* Just as there is a variety of gender identities, there is a wide range of sexual orientations, and one can have diverse identities within the different spectrums. See Sam Killermann, *Genderbread Person v4.0*, GENDERBREAD PERSON (2017), <https://www.genderbread.org/resource/genderbread-person-v4-0> [<https://perma.cc/LR83-7JUD>] for a fun depiction of the various spectrums that exist within gender identity, gender expression, anatomical sex, and sexual orientation. The Genderbread Person was originally created to provide “an inclusive, adorable, easy to understand depiction” of these spectrums and has been updated since its creation in order to adapt to developing understandings of the spectrums. Sam Killermann, *Genderbread Person v1*, GENDERBREAD PERSON, <https://www.genderbread.org/resource/genderbread-person-v1> [<https://perma.cc/HQ6A-V6PB>].

35. GLAAD, *supra* note 33.

36. Cf. SIMONE DE BEAUVOIR, *THE SECOND SEX* 267 (H.M. Parshley ed. & trans., Alfred A. Knopf, Inc. 1964) (1949) (“One is not born, but rather becomes, a woman.”). There

construct is “an idea that has been created and accepted by the people in a society.”<sup>37</sup> Dividing people into the categories of man and woman helps society create a “predictable division of labor” and enforce gender stereotypes by assigning men and women different roles and responsibilities.<sup>38</sup> To say that gender is a social construct is not to say that it does not exist; rather, it acknowledges that “gender is a product of society,” and that societal norms dictate what makes one masculine or feminine.<sup>39</sup>

People who identify as transgender have gender identities and/or expressions that do not align with the sex that was assigned to them at birth.<sup>40</sup> While non-binary identities often fall under the larger umbrella of transgender identities, a person who is non-binary has a different relationship with gender than a transgender man or

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is, however, rising support for the notion that sex is also a social construct, especially given the existence of intersex identities and chromosomal compositions other than XX (female) and XY (male). See Allison Nobles, *The Social Construction of Gender and Sex*, SOC’Y PAGES (Nov. 26, 2018), <https://thesocietypages.org/trot/2018/11/26/the-social-construction-of-gender-and-sex> [<https://perma.cc/2UYD-4R7T>] (“Just as gender is not a binary, neither is sex. The biological components of sex do not always align solely with ‘male’ or ‘female.’ An individual may have XY chromosomes and an outward female appearance, including breasts and a vagina. Another might have XX chromosomes and high levels of testosterone.”); Sally Raskoff, *The Social Construction of Sex: Intersex as Evidence*, EVERYDAY SOCIO. BLOG (Aug. 31, 2009), <https://www.everydaysociologyblog.com/2009/08/the-social-construction-of-sex-intersex-as-evidence.html> [<https://perma.cc/U42R-74VZ>] (defending the notion that sex is a social construct by discussing how male and female identities are not the clear cut, mutually exclusive categories that society believes them to be); *Biological Sex Is a Social Construct*, GROWING UP TRANSGENDER (Nov. 1, 2018), <https://growinguptransgender.com/2018/11/01/biological-sex-is-a-social-construct> [<https://perma.cc/79Q9-K2QQ>] (defining social construct as putting “artificial boundaries around groupings that are really more complex and messy” and concluding that “[b]iological sex is certainly a social construct” since the existence of intersex individuals contradicts the social construction of sex as being only male or female).

37. *Social Construct*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/social%20construct> [<https://perma.cc/GUR8-8XD3>].

38. Judith Lorber, “*Night to His Day*”: *The Social Construction of Gender*, in RACE, CLASS, AND GENDER IN THE UNITED STATES: AN INTEGRATED STUDY 54, 54–62 (6th ed. 2004) (analyzing the impact of gender as a social construct and how gender is a tool used to divide society). “If gender differences were genetic, physiological, or hormonal, gender bending and gender ambiguity would occur only in hermaphrodites . . . . Since gender differences are socially constructed, all men and all women can enact the behavior of the other, because they know the other’s social script . . . .” *Id.* at 59.

39. Cf. Michael Mascolo, *Time to Move Beyond “Gender Is Socially Constructed,”* PSYCH. TODAY (July 31, 2019), <https://www.psychologytoday.com/us/blog/old-school-parenting-modern-day-families/201907/time-move-beyond-gender-is-socially-constructed> [<https://perma.cc/RA4V-PRPT>] (summarizing a common argument for why gender is a social construct).

40. See GLAAD, *supra* note 33 (defining transgender).



transgender woman.<sup>41</sup> People who identify as non-binary “experience their gender identity and/or gender expression as falling outside the categories of man and woman,” but this can mean something different for each individual who identifies as non-binary.<sup>42</sup> When a person’s “gender expression is different from conventional expectations of masculinity and femininity,” they can be described as gender non-conforming.<sup>43</sup> Non-binary and gender non-conforming identities also shouldn’t be confused with intersex traits. Intersex people have “unique variations in reproductive or sex anatomy,” which “may appear in a person’s chromosomes, genitals, or internal organs like testes or ovaries.”<sup>44</sup> People with intersex variations can fall anywhere within or outside the gender spectrum, as their gender identity is distinct from their intersex variations.<sup>45</sup>

Another important concept is gender dysphoria, which involves a psychiatric diagnosis based on the criteria in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-V).<sup>46</sup> Gender dysphoria is defined as “a conflict between a person’s physical or assigned gender and the gender with which he/she/they identify,”<sup>47</sup> and though the need for a psychiatric diagnosis is still controversial, its inclusion in the

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41. See Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 897–98 (2019) (explaining that some non-binary people identify under the umbrella of transgender, but others do not).

42. GLAAD, *supra* note 33, at 11. There are a variety of terms people use to more accurately reflect their individual gender identities, including genderqueer, agender, bi-gender, gender fluid, and the Native American term two-spirit. These people also vary in their preferred pronouns, though an increasingly popular choice is using they/them/theirs as single-person, gender-neutral pronouns. See Clarke, *supra* note 41, at 896.

43. GLAAD, *supra* note 33, at 11 (“Please note that not all gender non-conforming people identify as transgender; nor are all transgender people gender non-conforming.”).

44. *Intersex Definitions*, INTERACT, <https://interactadvocates.org/intersex-definitions> [<https://perma.cc/2VRG-CFFG>] (last updated May 18, 2020).

45. See Clarke, *supra* note 41, at 898.

46. *What Is Gender Dysphoria?*, AM. PSYCHIATRIC ASS’N (Feb. 2016), <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> [<https://perma.cc/KX33-TZT8>] (“[Gender dysphoria] lasts at least six months and is shown by at least two of the following: 1. A marked incongruence between one’s experienced/expressed gender and primary and/or secondary sex characteristics[;] 2. A strong desire to be rid of one’s primary and/or secondary sex characteristics[;] 3. A strong desire for the primary and/or secondary sex characteristics of the other gender[;] 4. A strong desire to be of the other gender[;] 5. A strong desire to be treated as the other gender[;] 6. A strong conviction that one has the typical feelings and reactions of the other gender.”).

47. *Id.*

DSM-V is considered necessary by some transgender advocates to receive health insurance coverage for trans health treatments.<sup>48</sup>

To acknowledge that there are important distinctions between transgender, non-binary, gender non-conforming, and intersex people, this Note will avoid using umbrella terms like “trans” or “transgender” when referring to a range of identities and will instead use the abbreviation TNGI when referencing transgender, non-binary, gender non-conforming, and intersex people as a whole.

#### B. THE INCREASING PREVALENCE OF TNGI PEOPLE IN AMERICAN SOCIETY AND HOW THE LAW ACCOMMODATES THEM

While non-binary and gender non-conforming identities have existed for centuries,<sup>49</sup> the designated terminology and widespread recognition is a much more recent phenomenon.<sup>50</sup>

Even though increasing numbers of Americans identify as non-binary and gender non-conforming,<sup>51</sup> the legal system has largely fallen behind and often fails to recognize non-male or female gender identities.<sup>52</sup> Some countries have now established laws that create a national rule allowing for non-binary gender designations,<sup>53</sup> but in the

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48. GLAAD, *supra* note 33, at 11.

49. See Clarke, *supra* note 41, at 898 n.17 (“For centuries the existence of people who did not fit the sex/gender categories male and female have been known but typically dismissed from reports of certain non-Western societies, while in the Western European tradition they have been marginalized, stigmatized and persecuted.”) (quoting Gilbert Herdt, *Preface*, in *THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY* 11, 11 (Gilbert Herdt ed., 1996)).

50. See Daniel Bergner, *The Struggles of Rejecting the Gender Binary*, N.Y. TIMES MAG. (June 4, 2019), <https://www.nytimes.com/2019/06/04/magazine/gender-nonbinary.html> [<https://perma.cc/G7DX-L9V7>].

51. See Arielle Webb, Emmie Matsuno, Stephanie Budge, Mira Krishnan & Kimberly Balsam, *Non-Binary Gender Identities Fact Sheet*, APA Div. 44 (2015) <https://www.apadivisions.org/division-44/resources/advocacy/non-binary-facts.pdf> [<https://perma.cc/C7PZ-KBZP>] (“Because there is limited research on individuals with non-binary gender identities, it is difficult to estimate the exact number of people who identify as non-binary. . . . From the limited research that has done this, it is estimated nonbinary individuals make up 25-35% or more of *transgender* populations.”).

52. Hanssen, *supra* note 33, at 288 (“The current legal landscape, by and large, does not provide identity options for non-normative gender identities.”).

53. Tom Warnke, *Lambda Legal to Tenth Circuit: Affirm Ruling for Nonbinary Intersex Veteran Seeking an Accurate U.S. Passport*, LAMBDA LEGAL (May 9, 2019), [https://www.lambdalegal.org/news/co\\_20190509\\_affirm-ruling-nonbinary-intersex-veteran-passport](https://www.lambdalegal.org/news/co_20190509_affirm-ruling-nonbinary-intersex-veteran-passport) [<https://perma.cc/C2CY-NPXV>] (“At least eleven countries issue passports with gender markers other than ‘F’ (female) or ‘M’ (male), including Australia, Bangladesh, Canada, Denmark, Germany, India, Malta, Nepal, New Zealand and Pakistan.”); see Theodore Bennett, *No Man’s Land’: Non-Binary Sex Identification in Australian Law and Policy*, 37 U.N.S.W. L.J. 847, 847 (2014) (“In the recent case of *New*

United States, these changes have only occurred at the state level, and only in a small number of states.<sup>54</sup> Oregon is regarded as the first state to legally recognize a non-binary identity,<sup>55</sup> followed shortly by California.<sup>56</sup> Minnesota recently joined the list of over a dozen states that have passed legislation or policies that allow for an “X”<sup>57</sup> gender

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*South Wales Registrar of Births, Deaths and Marriages v. Norrie*, the [Australian] High Court held that the New South Wales (‘NSW’) Registrar has the power to record the sex of a person in the Register as ‘nonspecific’ rather than ‘male’ or ‘female.’” (footnote omitted)); Mary Emily O’Hara, *Judge Grants Oregon Resident the Right to Be Genderless*, NBC NEWS (Mar. 23, 2017), <https://www.nbcnews.com/feature/nbc-out/judge-grants-oregon-resident-right-be-genderless-n736971> [<https://perma.cc/62B3-JE9J>] (“Countries including Australia, Canada and India have third gender options on varying documents from birth certificates to passports—typically marked with an ‘X’ rather than ‘M’ or ‘F.’”). These “X” designations have varying legal significance depending on the country.

54. See *infra* notes 55–59 and accompanying text. Though a bill has been introduced by Democrats in the U.S. House of Representatives that would require the State Department to allow an “X” gender marker, it is unlikely that this bill will pass in a Republican-controlled Senate or be signed by President Trump. Samantha Schmidt, *U.S. Passports Offer Only ‘M’ or ‘F’ Gender Categories. A New Bill Would Require a Gender-Neutral ‘X,’ Too.*, WASH. POST (Feb. 24, 2020), <https://www.washingtonpost.com/dc-md-va/2020/02/24/passports-gender-neutral-x-marker/> [<https://perma.cc/6AMD-UCXR>]. The State Department argued that allowing for an “X” gender marker “would require an overhaul of information systems, which it estimated would take two years and cost about \$11 million.” *Id.*

55. See Tuck Woodstock, *Male? Female? Jamie Shupe Battles for a Third Option*, PORTLAND MONTHLY (Feb. 20, 2017), <https://www.pdxmonthly.com/articles/2017/2/20/male-female-jamie-shupe-battles-for-a-third-option> [<https://perma.cc/7EA9-NPRP>]. Oregon also became the first state to legally recognize an agender identity by allowing a person to have no legal gender. O’Hara, *supra* note 53.

56. See Mary Emily O’Hara, *Californian Becomes Second US Citizen Granted “Non-Binary” Gender Status*, NBC NEWS (Sept. 26, 2016), <https://www.nbcnews.com/feature/nbc-out/californian-becomes-second-us-citizen-granted-non-binary-gender-status-n654611> [<https://perma.cc/VW8Z-JCF8>].

57. The “X” designation generally means that the person is considered “gender diverse” in the states and countries that have adopted its usage. See *Changing Your Gender Identity on Your Passport*, N.Z. DEP’T INTERNAL AFFS., <https://www.passports.govt.nz/what-you-need-to-renew-or-apply-for-a-passport/information> [<https://perma.cc/VA3V-N8BN>] (last updated May 18, 2020). The “X” does not necessarily represent one specific type of non-binary identity, but rather any identity that does not fit easily into the “M” or “F” categories. Ragini Gupta, *‘Nonbinary Genders Are Valid’: Washington State Begins Issuing Licenses with Gender Marker ‘X’*, CROSSCUT (Nov. 14, 2019), <https://crosscut.com/2019/11/nonbinary-genders-are-valid-washington-state-begins-issuing-licenses-gender-marker-x> [<https://perma.cc/ECT4-NWQD>] (“The aim is to create an option relevant for anyone who doesn’t identify as exclusively male or female.”); see Ben Christopher, *Gender X? California May Be the First State to Create Broad ‘Nonbinary’ Option*, DAVIS ENTER., <https://www.davisenterprise.com/local-news/gender-x-california-may-be-the-first-state-to-create-broad-nonbinary-option> [<https://perma.cc/ZM97-VDDQ>] (last modified May 4, 2018).

marker on IDs, drivers licenses, and birth certificates, in addition to the traditional options of “M” or “F.”<sup>58</sup> Minnesota’s 2018 law allows people to self-identify their gender on drivers licenses.<sup>59</sup> The recent increase in states that recognize a legal gender marker of “X” is encouraging, though given the current federal administration’s social policies, this is unlikely to change at the federal level until a new administration takes over.<sup>60</sup>

58. States that currently allow for “X” gender markers include Oregon, California, Washington, Maine, Minnesota, Arkansas, Indiana, Colorado, Maryland, Massachusetts, Utah, Vermont, Nevada, New Hampshire, Hawaii, Pennsylvania, New Mexico, Virginia, and New Jersey, as well as Washington, D.C., and New York City. *E.g.*, MEREDITH BRENTON & KATHRYN EVANS, AN UPDATE ON NONBINARY GENDER DESIGNATIONS IN THE WORKPLACE 2 (2020), <https://www.fisherphillips.com/pp/newsletterarticle-an-update-on-nonbinary-gender-designations-in.pdf?> [<https://perma.cc/LZ2K-GP3V>]; see Kristin Lam, *More Than 7,000 Americans Have Gender X IDs, a Victory for Transgender Rights. Is It a Safety Risk, Too?*, USA TODAY (Aug. 8, 2019), <https://www.usatoday.com/story/news/nation/2019/08/08/nonbinary-gender-ids-momentum-intersex-state-driver-licenses/1802059001> [<https://perma.cc/8BK4-SAKZ>]; Hollie Silverman, *2 More States Will Offer a 3rd Gender Option on Driver’s Licenses*, CNN HEALTH (Aug. 1, 2019), <https://www.cnn.com/2019/08/01/health/washington-pennsylvania-gender-x-id/index.html> [<https://perma.cc/JVY6-NVV5>]; Douglas Hook, *Non-Binary Gender Option Now Available on Massachusetts Driver’s Licenses, State ID Cards*, MASSLIVE (Nov. 13, 2019), <https://www.masslive.com/news/2019/11/non-binary-gender-option-now-available-on-massachusetts-drivers-licenses-state-id-cards.html> [<https://perma.cc/4WSW-BFPS>]. Illinois has passed legislation to allow for a gender-neutral marker in 2019, but it may take several years for this to be implemented. See Governor Pritzker Signs Law Allowing for Gender-Neutral Markers on Driver’s Licenses, ID Cards, WSPYNEWS (Dec. 28, 2019), [http://www.wspynews.com/news/local/governor-pritzker-signs-law-allowing-for-gender-neutral-markers-on/article\\_a12c9e7c-298e-11ea-9a48-bb35df6a2de8.html](http://www.wspynews.com/news/local/governor-pritzker-signs-law-allowing-for-gender-neutral-markers-on/article_a12c9e7c-298e-11ea-9a48-bb35df6a2de8.html) [<https://perma.cc/AZW9-83FX>].

59. *Minnesotan to Receive First Gender Non-Binary Driver’s License*, FOX 9 (Oct. 2, 2018), <https://www.fox9.com/news/minnesotan-to-receive-first-gender-non-binary-drivers-license> [<https://perma.cc/VDS3-G4WU>].

60. See *The Discrimination Administration: Trump’s Record of Action Against Transgender People*, NAT’L CTR. FOR TRANSGENDER EQUAL. (2020), <https://transequality.org/the-discrimination-administration> [<https://perma.cc/YCF6-CZ8R>] (cataloging the Trump administration’s anti-transgender and anti-LGBTQ actions); *Donald Trump*, GLAAD (2020), <https://www.glaad.org/tap/donald-trump> [<https://perma.cc/M9PL-P79B>] (cataloging the anti-LGBTQ statements and actions of Donald Trump); Chase Strangio, *Trump’s Fight to Make Transgender Discrimination Legal May Make All Sex Discrimination Legal Again*, NBC NEWS (Aug. 19, 2019), <https://www.nbcnews.com/think/opinion/trump-s-fight-make-transgender-discrimination-legal-may-make-sex-ncna1044026> [<https://perma.cc/F2JQ-RY9K>] (“It is almost as if the Trump administration is arguing that if trans people might get protected from employment discrimination, then it is best that there be no protections for anyone.”); Adam Rogers & Megan Molteni, *Trump’s Plan to Redefine Gender Makes No Scientific Sense*, WIRED (Oct. 24, 2018), <https://www.wired.com/story/trumps-plan-to-redefine-gender-makes-no-scientific-sense/> [<https://perma.cc/NL66-HSVG>] (“[T]he Trump Administration . . . has for two years been trying to define gender identity out of civil rights protections.”).

There are limits to the use of “X” gender markers as well; just because an individual may be able to self-identify their gender as “X” on their driver’s license, this does not mean any of their other identifying documents will automatically be updated. In some cases, such as U.S. passports, other methods of identification do not currently allow for an “X” gender marker.<sup>61</sup> Complications can arise when gender markers do not match up between drivers licenses and passports,<sup>62</sup> so many advocates are pushing for the U.S. State Department to recognize a gender neutral marker on passports.<sup>63</sup>

With an increasing number of states recognizing non-binary identities, more people are able to freely express their gender identity and feel comfortable with their legal gender. This is especially important because of the severe mental (and physical) toll that gender dysphoria and unwilling participation in the binary has on people.<sup>64</sup>

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61. Corinne Segal, *The Complications of ID for Non-Binary People—and How It Could Change Soon*, PBS NEWSHOUR (Aug. 21, 2016), <https://www.pbs.org/newshour/nation/ids-nonbinary-people> [<https://perma.cc/Y6PC-Z6GW>]. Though the United States does not currently offer a gender-neutral marker on U.S. passports, the U.S. does recognize X markers on passports from other countries. *Id.*

62. Because all major U.S. airlines are soon going to allow passengers to choose “X” or “U” as a gender-neutral marker when purchasing plane tickets, non-binary people who have inaccurate passport information could encounter complications and potentially be prevented from traveling. Warnke, *supra* note 53.

63. See David, *One Colorado Statement on 10th Circuit Court Oral Arguments for Zzyym vs. Pompeo*, ONE COLO. (Jan. 22, 2020), <https://one-colorado.org/new/one-colorado-statement-on-10th-circuit-court-oral-arguments-for-zzyym-vs-pompeo> [<https://perma.cc/QKW3-72PA>] (urging the Tenth Circuit to endorse the district court’s ruling in favor of Zzyym). The Tenth Circuit recently heard and decided *Zzyym v. Pompeo*, a case where an intersex plaintiff sued the State Department because they were denied a passport for not designating male or female on their application. *Zzyym v. Pompeo*, 958 F.3d 1014 (10th Cir. 2020). The Tenth Circuit ruled that the State Department acted within its statutory authority but was arbitrary and capricious in its execution of that authority. *Id.* at 1018. As a result, the case was remanded to the State Department to “reconsider Zzyym’s application for an intersex passport.” *Id.* at 1034–35.

Some advocates argue even further that identification documents do not need to have gender markers at all. See Dave Roos, *Do We Need Gender on Government IDs?*, HOWSTUFFWORKS (Sept. 8, 2017), <https://people.howstuffworks.com/gender-government-ids.htm> [<https://perma.cc/Y8Y3-TTUC>].

64. See Woodstock, *supra* note 55 (describing non-binary activist Jamie Shupe’s deteriorating mental health prior to identifying as non-binary and legally changing their gender to “X”); cf. Julie Mack, *Michigan Secretary of State Makes It Easier for Transgender People to Change Sex on State IDs*, MLIVE (Nov. 18, 2019), <https://www.mlive.com/news/2019/11/michigan-secretary-of-state-makes-it-easier-for-transgender-people-to-change-sex-on-state-ids.html> [<https://perma.cc/A4TX-HRGM>] (“[H]aving a state identification that reflects how we see ourselves reduces

Not being able to comfortably express one's gender, living with the fear of being misgendered, and not having legal classifications that adhere to your gender identity can have severe consequences. Therapist Jan Tate, reflecting on the experiences of some of her non-binary clients and the mental anguish that they suffer, related how one client, whose family had yet to accept their identity, seemed to be "in an 'abyss,' undergoing a torture that was the emotional equivalent of 'taking a saw blade and cutting into the skin of an arm.'"<sup>65</sup> Another client of Tate's actually did cut themselves, leaving "scars on scars on scars" across their shoulders because they struggled to accept their own non-binary identity.<sup>66</sup> The increase in X gender markers has already had a positive impact on the TNGI community. "I've suffered much less overt discrimination since the gender marker X has made it into the national press," reports one person with an X gender marker.<sup>67</sup> Another reflects that even though "[i]t's a small victory; it was beneficial in that it simply made me feel seen, and that's all that really mattered."<sup>68</sup> When the law creates avenues for individuals to represent their identities and have documentation that corresponds to their identities, their quality of life improves, as these examples demonstrate. Non-binary-friendly policies are important so that TNGI folks are respected and feel safe in every aspect of their lives, whether at home, at work,<sup>69</sup> at school, or in public.<sup>70</sup> The more that people

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trauma and stress when having to show your ID. . . . It validates who we are, especially in a world where people and systems constantly devalue our identity.").

65. Bergner, *supra* note 50 (recounting how Tate worried about this client's "fear that their experience was inexpressible, incomprehensible").

66. *Id.*

67. Leila Ettachfani, *7 Non-Binary People on What It's Like to Have an "X" Gender Marker*, VICE (Sept. 4, 2019), [https://www.vice.com/en\\_us/article/j5ypkg/what-its-like-to-have-gender-marker-x-non-binary](https://www.vice.com/en_us/article/j5ypkg/what-its-like-to-have-gender-marker-x-non-binary) [<https://perma.cc/DRE2-3V57>].

68. *Id.*

69. Thankfully, the Supreme Court recently decided in *Bostock v. Clayton County* that Title VII of the Civil Rights Act of 1964 protects against employment discrimination based on sexual orientation and gender identity. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1747 (2020). The decision authored by Justice Gorsuch, however, did not "delve into the nuances of gender identity," so future litigation to clarify its application to non-binary individuals is entirely possible. Vin Gurrieri, *Questions About "Nonbinary" Bias Linger After LGBT Ruling*, LAW360 (June 19, 2020), <https://www.law360.com/articles/1284955/questions-about-nonbinary-bias-linger-after-lgbt-ruling>. Nevertheless, many legal experts are confident that any subsequent litigation will confirm that non-binary and gender non-conforming employees are also protected under Title VII and *Bostock*. *Id.*

70. See *Understanding Non-Binary People: How to Be Respectful and Supportive*, NAT'L CTR. FOR TRANSGENDER EQUAL. (Oct. 5, 2018), <https://transequality.org/issues/resources/understanding-non-binary-people-how-to-be-respectful-and-supportive> [<https://perma.cc/HS48-7M2J>].

publicly identify with TNGI identities, the more important it is for society to acknowledge and accommodate those identities.

### C. HISTORY AND OVERVIEW OF TNGI PEOPLE IN U.S. PRISON SYSTEMS

Scholars have established that the United States prison system is plagued with many injustices.<sup>71</sup> TNGI prisoners are not exempted from these injustices; one of the often highlighted issues is the racial disparities in inmate population versus the entire population,<sup>72</sup> and these racial disparities are also reflected among gender minorities.<sup>73</sup> This Section first explores these injustices in the national context. Next, it describes the prevalence of TNGI offenders in prisons nationwide, and then it transitions to a discussion of the biggest concerns that these offenders have while imprisoned. Finally, this Section concludes with a summary of the current TNGI housing.

#### 1. Overview of U.S. Prison Systems

This Note focuses solely on prisons and appropriate long-term housing accommodations,<sup>74</sup> so it is important to understand the context of prisons in the United States before considering TNGI individuals within that system. One of the defining features, and a grave source of injustice, in the U.S. prison system is mass incarceration.<sup>75</sup> The United States has the highest rate of incarceration worldwide.<sup>76</sup> In 2018, the U.S. prison population rate<sup>77</sup> was 655 per 100,000, whereas the estimated world prison population rate was 145 per 100,000.<sup>78</sup>

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71. See *supra* notes 16–18 and accompanying text.

72. See generally Hetey & Eberhardt, *supra* note 16. Hetey and Eberhardt emphasize the importance of contextualizing why these racial disparities exist. *Id.* at 185.

73. See Manson, *supra* note 19.

74. See *infra* note 129 for an explanation of prisons versus jails.

75. See generally WENDY SAWYER & PETER WAGNER, PRISON POL'Y INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2020 (2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/MXH8-PMNE>] (offering “some much needed clarity [about mass incarceration in the United States] by piecing together this country’s disparate systems of confinement”).

76. See ROY WALMSLEY, INST. FOR CRIM. POL'Y RSCH., WORLD PRISON POPULATION LIST, at 2 (12th ed. 2018), [https://www.prisonstudies.org/sites/default/files/resources/downloads/wpppl\\_12.pdf](https://www.prisonstudies.org/sites/default/files/resources/downloads/wpppl_12.pdf) [<https://perma.cc/G373-XK7E>]; SENT'G PROJECT, TRENDS IN U.S. CORRECTIONS 2 (2020), <https://www.sentencingproject.org/wp-content/uploads/2020/08/Trends-in-US-Corrections.pdf> [<https://perma.cc/UDK3-UJU6>] (“The United States is the world’s leader in incarceration with 2.2 million people currently in the nation’s prisons and jails—a 500% increase over the last forty years.”).

77. Prison population rate is defined as “the number of prisoners per 100,000 of the national population.” WALMSLEY, *supra* note 76.

78. *Id.*

And this rate has only increased over time; in 1980 the United States' rate of imprisonment was 139 per 100,000, but by 2009 it was 502 per 100,000.<sup>79</sup> With a population this large, it is unsurprising that there are significant material costs of incarceration and that the American system is plagued with further injustices, such as racial disparities and problematic living conditions.<sup>80</sup>

Mass incarceration is expensive. The Bureau of Justice Statistics estimates that the United States spends at least \$80 billion annually to incarcerate their large prison and jail populations.<sup>81</sup> Other experts indicate that this figure vastly underestimates the true cost of imprisonment, since it fails to account for many hidden costs that families of those incarcerated and the prisoners themselves shoulder instead of the government.<sup>82</sup> These estimates place the true number somewhere around \$182 billion in costs each year for the government and families of those in the justice system.<sup>83</sup> In terms of costs per inmate nationwide, the annual cost in state prisons averaged \$33,274 per inmate in 2015.<sup>84</sup>

Racial disparities run rampant in U.S. prisons.<sup>85</sup> Reports state that Black men are up to "six times as likely to be incarcerated as white men" and Hispanic men are up to "2.7 times as likely."<sup>86</sup> In 2009, racial demographics stated that 38.9 percent of prisoners were white, 42.6

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79. SEITER, *supra* note 16, at 7–8.

80. See, e.g., Jess Rodgers, Nicole Asquith & Angela Dwyer, *Cisnormativity, Criminalisation, Vulnerability: Transgender People in Prisons*, 2017 TAS. INST. L. ENF'T STUD. BRIEFING PAPER NO. 12, at 1.

81. Nicole Lewis & Beatrix Lockwood, *The Hidden Cost of Incarceration*, MARSHALL PROJECT (Dec. 17, 2019), <https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration> [<https://perma.cc/3Z3U-Q3TV>]; *Mass Incarceration Costs \$182 Billion Every Year, Without Adding Much to Public Safety*, EQUAL JUST. INITIATIVE (Feb. 6, 2017) [hereinafter *Mass Incarceration Costs*], <https://ej.org/news/mass-incarceration-costs-182-billion-annually/> [<https://perma.cc/3P4R-KNRX>].

82. Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html> [<https://perma.cc/BZN9-V3SD>] (discussing the \$2.9 billion spent on commissary items and telephone services by inmates and families annually); Lewis & Lockwood, *supra* note 81.

83. Wagner & Rabuy, *supra* note 82.

84. *Prison Spending in 2015*, VERA (2020), <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending> [<https://perma.cc/86QW-EPUZ>] (providing data for average annual cost per inmate in forty-five states, which ranged from a low of \$14,780 in Alabama to a high of \$69,355 in New York).

85. See Hetey & Eberhardt, *supra* note 16, at 183–84.

86. SENT'G PROJECT, *supra* note 76, at 5.



percent were [B]lack, and 15.5 percent were Hispanic.<sup>87</sup> These proportions are in stark contrast to nationwide racial demographics: according to the 2010 Census, 72.4 percent of the American population was white, and 12.6 percent was Black.<sup>88</sup> Scholars often cite sentencing policies from the War on Drugs<sup>89</sup> and tough on crime policies that involve long prison sentences as reasons for the over incarceration of racial minorities,<sup>90</sup> though others point out that these factors do not represent the whole picture.<sup>91</sup> Systemic racial bias throughout the criminal justice system results in the over-policing and overrepresentation of Black people.<sup>92</sup>

Another commonly decried shortcoming of the American prison system is unsafe and inhumane living conditions.<sup>93</sup> Overcrowding, hypermasculine performance, and gang activity all contribute as threats to personal, physical safety that many inmates endure.<sup>94</sup> The use of

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87. SEITER, *supra* note 16.

88. *Summary of Modified Race and Census 2010 Race Distributions for the United States*, U.S. CENSUS BUREAU (July 2012), <https://www.census.gov/data/datasets/2010/demo/popest/modified-race-data-2010.html> [<https://perma.cc/82PM-JUWF>]. These nationwide demographics are better represented in the racial breakdown of correctional officers: in 2002, a survey found that “70.4 percent [of correctional officers] were white, and 21.2 percent [B]lack.” SEITER, *supra* note 16, at 372.

89. The War on Drugs was a campaign started by President Nixon in the 1970s “that aims to stop illegal drug use, distribution and trade by dramatically increasing prison sentences for both drug dealers and users.” *War on Drugs*, HISTORY (Dec. 17, 2019), <https://www.history.com/topics/crime/the-war-on-drugs> [<https://perma.cc/3E7N-2HJ5>]. The so-called “drug war” persists through today, with contrasting responses that either support the tough on crime attitude or condemn the movement for promoting racist agendas and furthering racial disparities in our prison system. *Id.*; see Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” was a “War on Blacks,”* 6 J. GENDER, RACE & JUST. 381 (2002); Cigdem V. Sirin, *From Nixon’s War on Drugs to Obama’s Drug Policies Today: Presidential Progress in Addressing Racial Injustices and Disparities*, 18 RACE, GENDER & CLASS 82 (2011).

90. See, e.g., SENT’G PROJECT, *supra* note 76, at 3.

91. See, e.g., JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 51–52 (2017) (“Indeed, after the ‘war on drugs,’ the most prominent part of the Standard Story has been its emphasis on the amount of time people serve in prison . . . . The impact of time served, however, is not really as important as the Standard Story claims.”); SAWYER & WAGNER, *supra* note 75 (arguing that pretrial detention is a major contributing factor to net jail growth).

92. See Hetey & Eberhardt, *supra* note 16, at 184. See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (arguing that modern incarceration practices are simply an extension of Jim Crow era laws).

93. See Dolovich, *supra* note 18, at 262.

94. *Id.* at 267.

solitary confinement is overabundant and has devastating psychological effects on those subjected to it.<sup>95</sup>

Some of the harshest and most radical critics of the criminal justice system recognize that these deep-seeded injustices within prisons cannot be addressed through mere reformation; rather, a thorough dismantlement through abolition is needed.<sup>96</sup> Granted, prison abolition can have different practical meanings for different supporters, such as how complete the elimination of the criminal justice system should be.<sup>97</sup> Abolitionists agree that the prison industrial complex must be abolished because it “both feeds on and maintains oppression and inequalities through punishment, violence, and controls millions of people.”<sup>98</sup> Leaders of the abolition movement like Angela Davis and Ruth Wilson Gilmore acknowledge that abolition is “a long game” and that their goals of decarceration will not be met tomorrow.<sup>99</sup> Because the long term goals of abolition are unlikely to be achieved in the immediate future, this Note frames its solution in Section III around the need to address the present issues that permeate throughout the prison system and find more direct answers to these concerns.

Of course, the concerns identified in this section do not exhaustively cover the wide range of problems that affect prisoners in U.S. prisons, but as the next section will describe, the systemic issues of high incarceration rates, racial disparities, and problematic living conditions are particularly prevalent within TNGI prison populations.

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95. See Part I.C.3 for an overview of how horrible solitary confinement is, and see Part II.B.2 for an in-depth analysis of how solitary confinement affects TNGI prisoners.

96. Gabriella Paiella, *How Would Prison Abolition Actually Work?*, GQ (June 11, 2020), <https://www.gq.com/story/what-is-prison-abolition> [<https://perma.cc/MLB4-KQCA>]; Ruth Wilson Gilmore & James Kilgore, *The Case for Abolition*, MARSHALL PROJECT (June 19, 2019), <https://www.themarshallproject.org/2019/06/19/the-case-for-abolition> [<https://perma.cc/8AFQ-ZUAT>]; see Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1156 (2015). See generally ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003) (advocating for an end to prisons as the next necessary abolition movement in American history).

97. Bill Keller, *What Do Abolitionists Really Want?*, MARSHALL PROJECT (June 13, 2019), <https://www.themarshallproject.org/2019/06/13/what-do-abolitionists-really-want> [<https://perma.cc/V4SK-ZWQH>].

98. See, e.g., *What Is the PIC? What Is Abolition?*, CRITICAL RESISTANCE (2020), <http://criticalresistance.org/about/not-so-common-language> [<https://perma.cc/LU8M-ZSCN>] (“The prison industrial complex (PIC) is a term we use to describe the overlapping interests of government and industry that use surveillance, policing, and imprisonment as solutions to economic, social and political problems.”).

99. Gilmore & Kilgore, *supra* note 96; see Angela Y. Davis & Dylan Rodriguez, *The Challenge of Prison Abolition: A Conversation*, HIST. IS WEAPON, <https://www.historyisaweapon.com/defcon1/davisinterview.html> [<https://perma.cc/M3DK-ZUPC>] (“Prison abolition, like the abolition of slavery, is a long-range goal.”).

## 2. A Significant Portion of the Population

Transgender people are more likely to be incarcerated than cis-gendered people; in fact, 16% of all transgender people have been incarcerated in their lifetime, as have nearly half of Black transgender people.<sup>100</sup> These rates are significantly higher than the general population because researchers estimate that all Americans have a 6% chance of being incarcerated during their lifetime.<sup>101</sup>

Though the National Inmate Survey estimated that there were around 3,209 transgender inmates in state and federal prisons from 2011 to 2012,<sup>102</sup> this number likely underestimates the current TNGI inmate population,<sup>103</sup> especially considering there are currently “1,200 inmates who identify as transgender, gender-nonconforming or intersex” in California state prisons alone.<sup>104</sup> It is extremely difficult to calculate exactly how many TNGI people are actually imprisoned in the U.S. for a few reasons. First, a person’s legal sex does not always match their gender identity, and except for in the minority of states that allow for “X” gender markers, most states do not even have legal designations that allow for everyone’s legal gender to match their gender identity.<sup>105</sup> Additionally, there is varied recognition of using a person’s actual, current name over their “deadname” (the name that

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100. NAT’L CTR. FOR TRANSGENDER EQUAL., A BLUEPRINT FOR EQUALITY: FEDERAL AGENDA FOR TRANSGENDER PEOPLE 41, 42 (2015), [https://transequality.org/sites/default/files/docs/resources/NCTE\\_Blueprint\\_2015\\_Prisons.pdf](https://transequality.org/sites/default/files/docs/resources/NCTE_Blueprint_2015_Prisons.pdf) [<https://perma.cc/47WH-SU59>].

101. Peter Wagner, *Lifetime Chance of Being Sent to Prison at Current U.S. Incarceration Rates*, PRISON POL’Y INITIATIVE (2003), <https://www.prisonpolicy.org/graphs/lifetimechance.html> [<https://perma.cc/DL9Y-HU9P>].

102. ALLEN J. BECK, U.S. DEP’T OF JUST., SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES tbl.1 (2014), [https://www.bjs.gov/content/pub/pdf/svpjri1112\\_st.pdf](https://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf) [<https://perma.cc/9QR6-7SZJ>].

103. Allen Beck’s report was published in 2014 and did not account for non-binary or other gender non-conforming identities. *See id.* This is unsurprising given that non-binary identities have “been slowly seeping into societal consciousness” for only the last few years. Bergner, *supra* note 50.

104. Miranda Leitsinger, *Transgender Prisoners Say They ‘Never Feel Safe.’ Could a Proposed Law Help?*, KQED NEWS (Jan. 8, 2020), <https://www.kqed.org/news/11794221/could-changing-how-transgender-inmates-are-housed-make-prison-safer-for-them> [<https://perma.cc/79YY-NQKX>]. In 2018, California state prisons housed only 127,417 of the nation’s 1,414,162 prisoners between all state and federal prisons. *State-by-State Data*, SENT’G PROJECT (2020), <https://www.sentencingproject.org/the-facts/#map?dataset-option=SIR> [<https://perma.cc/8X5J-RFEP>]. If California’s TNGI population were indicative of the proportion of the nation’s prison population that identifies as TNGI, then there would be approximately 13,318 TNGI prisoners nationwide.

105. *Supra* Part I.B.

appears on their original birth certificate and is not their current name, whether it has been legally changed or not).<sup>106</sup> Finally, and most significantly, many TNGI prisoners fear coming out in prison with their true gender identities because they know that it will open them up to discrimination, retaliation, and abuse.<sup>107</sup> Thus, while TNGI prisoners constitute a significant portion of the U.S. prison population, it is difficult to know the true percentage.

### 3. Health and Safety Concerns for TNGI Prisoners

One significant issue that affects many incarcerated TNGI prisoners is the lack of access to trans healthcare in prison, which is unsurprising given the overall struggle to ensure that prisons are providing appropriate medical care to all prisoners.<sup>108</sup> Many scholars have discussed the constitutional implications that spring from the denial of healthcare to TNGI prisoners,<sup>109</sup> and many courts have recognized the right to trans healthcare.<sup>110</sup> Even though this is an important aspect of

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106. See Bergner, *supra* note 50. Merriam-Webster defines a “deadname” as “the name that a transgender person was given at birth and no longer uses upon transitioning” and indicates that its usage likely starting in 2012. *Deadname*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/deadname> [https://perma.cc/6LLC-ZXLY]. The term comes from the joining of “dead” and “name” to indicate that the person’s originally given name is now “dead” to the original bearer and has no use or meaning anymore. *Deadname*, DICTIONARY.COM: POP CULTURE DICTIONARY, <https://www.dictionary.com/e/pop-culture/deadname> [https://perma.cc/RL5Q-3944]. Deadnaming (the term is both a noun and a verb) is harmful because it can feel invalidating and disrespectful to the affected TNGI person. KC Clements, *What Is Deadnaming?*, HEALTHLINE (Sept. 18, 2018), <https://www.healthline.com/health/transgender/deadnaming> [https://perma.cc/3YW8-7R5T]. It can also signal to others that an individual is TNGI, which is especially harmful if this person is not comfortable revealing their gender identity, and it can subject that person to other discrimination or harassment. *Id.*

107. Mia Harris, *British Prisons Must Now Recognise Gender Fluid and Non-Binary Inmates*, CONVERSATION (Nov. 16, 2016), <https://theconversation.com/british-prisons-must-now-recognise-gender-fluid-and-non-binary-inmates-63132> [https://perma.cc/AM5G-4JBK] (describing inmates who felt unable to disclose their gender identities with prison officials because they were afraid of the ridicule and physical abuse that they would be subjected to).

108. See Hana Church, *Prisoner Denied Sex Reassignment Surgery: The First Circuit Ignores Medical Consensus in Kosilek v. Spencer*, 57 B.C. L. REV. 17 (Issue 6 E. Supp. 2016).

109. See *id.*; Tammi S. Etheridge, *Safety v. Surgery: Sex Reassignment Surgery and the Housing of Transgender Inmates*, 15 GEO. J. GENDER & L. 585, 589–93 (2014).

110. See, e.g., *O'Donnabhain v. Comm'r*, 134 T.C. 34, 70 (2010) (holding that gender affirming surgeries and hormone treatments constitute necessary medical care that are tax deductible); *Fields v. Smith*, 653 F.3d 550, 556 (7th Cir. 2011) (holding that statutes prohibiting gender affirming surgery and hormone treatments violate the Eighth Amendment because “[s]urely, had the Wisconsin legislature passed a law that DOC inmates with cancer must be treated only with therapy and pain killers, this court

describing the TNGI experience in prison, the constitutional need for trans healthcare will not be the focus of this Note.

Another issue TNGI inmates face is the significant risk of physical harm at the hands of both correctional officers and other inmates.<sup>111</sup> Transgender inmates experience sexual assault at a rate significantly higher than the general population.<sup>112</sup> Though, of course, not every interaction that a TNGI inmate has with a non-TNGI inmate results in violence,<sup>113</sup> one study focusing on the experiences of transgender prisoners demonstrated that they “were five to six times more likely than the general incarcerated population to be sexually assaulted by facility staff, and nine to ten times more likely to be sexually assaulted by another inmate.”<sup>114</sup> One of the goals of the Prison Rape Elimination Act of 2003 (PREA) was to protect transgender inmates given their increased chances of sexual victimization.<sup>115</sup> It outlined procedures and policies that prisons should adopt in order to protect the rights of their inmates, such as conducting classification evaluations on a case-by-case basis,<sup>116</sup> but many states still have policies and practices that do not comply with PREA standards.<sup>117</sup> Many transgender activists

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would have no trouble concluding that the law was unconstitutional. Refusing to provide effective treatment for a serious medical condition serves no valid penological purpose and amounts to torture.”).

111. See Kate Sosin, *How a Women's Facility Gave This Trans Prisoner a Future*, THEM (July 3, 2019), <https://www.them.us/story/jai-diamond-trans-women-prison> [<https://perma.cc/8Y39-SXSH>] (“Inmates and guards physically brutalized the trans women she was incarcerated with [in a male prison].”).

112. Rodgers et al., *supra* note 80, at 5 (citing research that 59% of transgender prisoners experienced sexual assault while imprisoned compared to 4.4 percent of the general population).

113. See Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & C.R.L. REV. 515, 527–31 (2009) (describing communities of solidarity between cis-gendered and TNGI prisoners).

114. SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET, & MA'AYAN ANAFI, NAT'L CTR. FOR TRANSGENDER EQUAL, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 192 (2016), <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.pdf> [<https://perma.cc/C4TK-FB32>].

115. See Prison Rape Elimination Act of 2003, Pub. L. 108–79, 117 Stat. 972 (Sept. 4, 2003); *LGBT People and the Prison Rape Elimination Act*, NAT'L CTR. FOR TRANSGENDER EQUAL (July 1, 2012), [https://transequality.org/sites/default/files/docs/resources/PREA\\_July2012.pdf](https://transequality.org/sites/default/files/docs/resources/PREA_July2012.pdf) [<https://perma.cc/XUJ6-6MHL>].

116. *Id.*

117. Derek Gilna, *Five Years After Implementation, PREA Standards Remain Inadequate*, PRISON LEGAL NEWS (Nov. 8, 2017), <https://www.prisonlegalnews.org/news/2017/nov/8/five-years-after-implementation-prea-standards-remain-inadequate> [<https://perma.cc/2LFA-YL5C>] (“40 states had not complied with PREA standards as of 2016.”).

criticize PREA as failing to actually protect their health and safety.<sup>118</sup> Critics state that PREA is “virtually toothless,” as exemplified by the small number of states that have actually complied with its requirements given the lack of enforcement and penalties that actually incentivize compliance.<sup>119</sup>

Yet another imprisonment concern that disproportionately affects TNGI prisoners is the use of “administrative segregation,” or solitary confinement, both as a “protective” measure, and as a disciplinary measure.<sup>120</sup> Trans prisoners are more likely to end up in solitary confinement than the general population.<sup>121</sup> The devastating

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118. See Elliot Oberholtzer, *The Dismal State of Transgender Incarceration Policies*, PRISON POL’Y INITIATIVE (Nov. 8, 2017), <https://www.prisonpolicy.org/blog/2017/11/08/transgender> [<https://perma.cc/3FDG-QEVK>]; Gilna, *supra* note 117 (explaining general criticisms of PREA and its shortcomings). PREA also fails the TNGI prisoners it aims to protect because “it is only legally binding on federal detention centers, meaning . . . it only covers about 10% of the total adult prison population.” Morgan Mason, Note, *Breaking the Binary: How Shifts in Eighth Amendment Jurisprudence Can Help Ensure Safe Housing and Proper Medical Care for Inmates with Gender Dysphoria*, 71 VAND. L. REV. EN BANC 157, 167–68 (2018). It also has ineffective incentives for state compliance and “does not give prisoners the right to sue for violations of its standards.” *Id.* at 168.

119. Gilna, *supra* note 117; Mason, *supra* note 118, at 168.

120. LYDON ET AL., *supra* note 26, at 34–35.

121. See *Chapter Three: Classification and Housing of Transgender Inmates in American Prisons*, 127 HARV. L. REV. 1746, 1746 (2014) [hereinafter *Classification and Housing*] (“[I]n many institutions or circumstances transgender inmates are automatically placed in some form of administrative segregation or protective custody (also known as solitary confinement).”). Compare LYDON ET AL., *supra* note 26 (“85% of respondents have been in solitary confinement at some point during their sentence; approximately half have spent 2 or more years there.”), with BUREAU OF JUST. STAT., USE OF RESTRICTIVE HOUSING IN U.S. PRISONS AND JAILS, 2011–2012 (2015), [https://www.bjs.gov/content/pub/pdf/urhuspj1112\\_sum.pdf](https://www.bjs.gov/content/pub/pdf/urhuspj1112_sum.pdf) [<https://perma.cc/P8GV-SJTY>] (explaining that “nearly 20% of prison inmates” had spent time in restrictive housing in the last year, and only “10% of all prison inmates” spent “30 days or longer in restrictive housing”).

A particularly high-profile example of a transgender prisoner being subjected to prolonged solitary confinement is WikiLeaks whistleblower Chelsea Manning. In 2010, Manning was originally sentenced to thirty-five years (which was later commuted by President Obama after seven years) for sharing numerous government documents with WikiLeaks that exposed war crimes and other atrocities from the United States’ involvement with the Iraqi War. See Mary Meisenzahl, *Solitary Confinement Is Torture, and Whistleblowers Don’t Belong in Prison: Free Chelsea Manning*, WELLESLEY NEWS (Apr. 17, 2019), <https://thewellesleynews.com/2019/04/17/solitary-confinement-is-torture-and-whistleblowers-dont-belong-in-prison-free-chelsea-manning> [<https://perma.cc/3N6H-F8D5>]. More recently, in 2019 Manning was imprisoned for refusing to testify before a grand jury for WikiLeaks and its founder, and she was controversially held in solitary confinement for 28 days because of this refusal to testify. See *id.* (calling for Manning’s release and arguing that solitary confinement is

psychological damage that solitary confinement inflicts upon a person is severe, and its regular use has been compared to torture.<sup>122</sup> In fact, the United Nations Special Rapporteur on Torture has called for an end to the use of solitary confinement as a punishment, particularly indefinite and prolonged solitary confinement, because it is deemed to be “torture or cruel, inhuman or degrading treatment.”<sup>123</sup> When TNGI individuals are forcefully segregated from the general population, even if the correctional officers are claiming to do so for the inmate’s safety, their agency is stripped from them and they lose the protection of any community they have formed in the general population.<sup>124</sup> In solitary confinement, prisoners are left to the mercy of abusive correctional staff, who have uninterrupted and unmonitored access to the TNGI individuals.<sup>125</sup> Forcing TNGI prisoners into solitary confinement for their “safety” is based on a flawed premise that fails to account for a variety of factors.<sup>126</sup> These factors include the individual’s agency in assessing their safest living situation, the need to have contact with their community within and outside of the prison, and the harm that comes from being called out as transgender and labeled

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inhumane and should be prohibited); Julia Conley, *‘Torture, Plain and Simple’: Chelsea Manning’s Supporters Demand Her Release from Solitary Confinement*, COMMON DREAMS (Mar. 25, 2019), <https://www.commondreams.org/news/2019/03/25/torture-plain-and-simple-chelsea-mannings-supporters-demand-her-release-solitary> [<https://perma.cc/LR6P-ANHB>] (explaining how supporters of Manning had been calling for her release after she had been held in isolation for seventeen consecutive days); Zack Budryk, *Chelsea Manning Removed from Solitary Confinement: Report*, HILL (Apr. 4, 2019), <https://thehill.com/homenews/437454-chelsea-manning-removed-from-solitary-confinement-report> [<https://perma.cc/HQ2L-74AZ>] (reporting that Manning spent twenty-eight days in solitary confinement before being released). The UN considers any solitary confinement in excess of fifteen days to be tantamount to torture and believes isolated segregated for more than fifteen days should be prohibited under any circumstance. *Solitary Confinement Should Be Banned in Most Cases*, UN Expert Says, UN NEWS (Oct. 18, 2011) [hereinafter *Solitary Confinement*], <https://news.un.org/en/story/2011/10/392012-solitary-confinement-should-be-banned-most-cases-un-expert-says> [<https://perma.cc/Y5H9-6UQA>].

122. See generally Tracy Hresko, Note, *In the Cellars of the Hollow Men: Use of Solitary Confinement in U.S. Prisons and Its Implications Under International Laws Against Torture*, 18 PACE INT’L L. REV. 1 (2006) (describing the harrowing effects of extended solitary confinement and evaluating how the current implementation of it violates the international Convention Against Torture).

123. *Solitary Confinement*, *supra* note 121.

124. See generally Arkles, *supra* note 113, at 518 (arguing that “[i]nvoluntary segregation from other people in detention is . . . one of the greatest threats to the safety of [TNGI] people in these systems”).

125. *Id.* at 540.

126. *Id.* at 542.

as a “victim” once the general population finds out why they were segregated.<sup>127</sup>

Overall, TNGI prisoners face a number of health and safety concerns while imprisoned, particularly lack of access to trans healthcare, increased risk of physical harm, and disproportionate use of administrative segregation. In order to address and hopefully minimize these concerns, correctional institutions have implemented a variety of housing approaches. The next Section of this Note will explore these differing methods.

#### 4. Institutional Attempts to Accommodate LGB/TNGI Inmates

Different correctional institutions have taken different approaches to the task of providing housing accommodations for TNGI and LGBTQ inmates. The first part of this Section will describe two specific examples of correctional facilities that have implemented segregated housing. The second part will focus on current placement policies in U.S. prisons and explain the general approaches that prisons utilize.

##### *a. Examples of Separate Wings in U.S. Correctional Facilities*

Two examples demonstrate attempts to separate prisoners based on their perceived gender identity and sexuality.<sup>128</sup> Though this Note does not focus on jails<sup>129</sup> or sexual orientation,<sup>130</sup> there is a worthwhile comparison of a separate wing within the Los Angeles County Jail. The LA County Jail has been segregating gay men and trans women prisoners into a special unit within the male jail since 1985, in what is now called the K6G unit.<sup>131</sup> Currently, the unit operates as

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127. See *id.* at 539–41. See Part II.B.2 for a more detailed discussion and analysis of how harmful solitary confinement is for TNGI prisoners.

128. It is worth noting that these examples largely focus on separating lesbian, gay, and bisexual inmates from the heterosexual population, whereas this Note does not include sexual orientation in its proposal for placement based on gender identity. See *supra* note 34 for a discussion about how gender identity and sexual orientation are not the same and exist on different spectrums.

129. This Note focuses on prisons, which house inmates who have been convicted of felonies and have imprisonment sentences that are longer than one year. *What Is the Difference Between Jails and Prisons?*, BUREAU OF JUST. STAT., <https://www.bjs.gov/index.cfm?ty=qa&iid=322> [<https://perma.cc/X6AF-9WS6>]. Jails are more local, shorter-term facilities that house inmates convicted of misdemeanors and have sentences of less than one year, or those who are still awaiting trial or sentencing. *Id.*

130. See *supra* note 128.

131. *Life Behind Bars for GBT Inmates at the K6G*, KCET: SOCIAL CONNECTED [hereinafter *Life Behind Bars*], <https://www.kcet.org/shows/social-connected/life-behind-bars-for-gbt-inmates-at-the-k6g-0> [<https://perma.cc/XF6E-KZTH>] (interviewing



open dormitory style housing with limited to no opportunities for privacy.<sup>132</sup> The purpose of this segregation is to protect the inmates who are housed there from the harms that would normally befall them in general population, namely sexual assault.<sup>133</sup> Some scholarship has praised the K6G unit for its prioritization of inmate safety,<sup>134</sup> and there are news reports that depict positive community dynamics.<sup>135</sup> Meanwhile, others have criticized it for having problematic placement policies and accommodations and not actually protecting the safety interests it claims to serve.<sup>136</sup> One major concern with the K6G unit is that, at least initially, placement was determined by two heterosexual guards who evaluated each inmate, which could be done based on whether the inmate was publicly out and known to be gay, or based on the guards' determination that the inmate "looked" gay or transgender.<sup>137</sup>

However, not all separation tactics have had admirable aims. A women's prison came under fire for its practice of forcefully segregating prisoners who appeared to be lesbian.<sup>138</sup> In 2009, the Fluvanna Correctional Center for Women in Virginia ran what the staff and

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inmates in the K6G unit and revealing that they love the safety and community in the unit, but struggle to find privacy in an open dormitory setting).

132. *Id.*

133. See Michael Boucai, *Sexual Epistemology and Bisexual Exclusion: A Response to Russell Robinson's "Masculinity as Prison: Race, Sexual Identity, And Incarceration,"* 2 CALIF. L. REV. 104, 104 (2011). See generally *supra* Part I.C.3 (discussing high percentages of TNGI inmates victimized by sexual assault).

134. See Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1 (2011) (addressing both the benefits and shortcomings of the K6G model).

135. *Life Behind Bars*, *supra* note 131.

136. See Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309 (2011).

137. See Dean Spade, *The Only Way to End Racialized Gender Violence in Prisons Is to End Prisons: A Response to Russell Robinson's "Masculinity as Prison,"* 3 CALIF. L. REV. CIR. 182, 182-83 (2012) (describing the screening procedure). Today, the screening is still based on the prison staff's assumptions of an inmate's sexuality and gender identity based on physical appearance. Mia Fischer, *Under the Ban-Optic Gaze: Chelsea Manning and the State's Surveillance of Transgender Bodies*, in EXPANDING THE GAZE: GENDER AND THE POLITICS OF SURVEILLANCE 185, 200 (Emily van der Meulen & Robert Heynen eds., 2016).

138. See Arkles, *supra* note 113, at 546; *Va. Women's Prison Segregated Lesbians, Others*, NBCNEWS (June 10, 2009) [hereinafter *Va. Women's Prison*], [http://www.nbcnews.com/id/31209719/ns/us\\_news-crime\\_and\\_courts/t/va-womens-prison-segregated-lesbians-others/#.X1bRHGdKg1i](http://www.nbcnews.com/id/31209719/ns/us_news-crime_and_courts/t/va-womens-prison-segregated-lesbians-others/#.X1bRHGdKg1i) [https://perma.cc/RAG3-2XEC]; *Warden at Virginia Women's Prison to Retire Amid Allegations*, NEWS & ADVANCE (Apr. 24, 2019) [hereinafter *Warden*], [https://www.newsadvance.com/archives/warden-at-virginia-women-s-prison-to-retire-amid-allegations/article\\_a3c34b0b-d823-5955-8a34-1f4baa97254e.html](https://www.newsadvance.com/archives/warden-at-virginia-women-s-prison-to-retire-amid-allegations/article_a3c34b0b-d823-5955-8a34-1f4baa97254e.html) [https://perma.cc/X5NV-39FD].

inmates called a “little boys” or “butch” wing, where they placed prisoners who did not match feminine gender norms.<sup>139</sup> Placement into this wing was not voluntary, was solely based on the prison staff’s perception of the prisoner’s appearance, and separated those who appeared more masculine, wore loose-fitting clothes, or had short hair.<sup>140</sup> In other words, the prisoners were isolated for “looking gay,” with the purported purpose of preventing sexual activity.<sup>141</sup> Within this segregated housing, the inmates lost vocational and educational opportunities, were subjected to harsher punishments, and were subjected to verbal harassment based on their gender expression.<sup>142</sup> This wing is no longer in operation, as it faced harsh backlash due to the prison’s unconstitutional discrimination.<sup>143</sup> The backlash ultimately resulted in the warden stepping down from her position.<sup>144</sup> Critics of segregated transgender housing note concerns that separation from the general population “can stigmatize them, cut them off from work opportunities, privileges and resources, and actually encourage violence by staff,”<sup>145</sup> all of which were evident in Fluvanna’s “butch” wing.<sup>146</sup> The Fluvanna wing exemplifies the harms that come from a lack of prisoner input during classification procedures and highlights the need to ensure equal opportunities to all prisoners, no matter what wing they are housed in.

An important theme between these two examples is the sole reliance on physical appearance as the basis for segregation. Because gender expression does not equate with gender identity or sexual orientation,<sup>147</sup> these systems relied on faulty presumptions and policies. The next section describes how similarly problematic presumptions have influenced other prison placement policies for TNGI inmates.

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139. Arkles, *supra* note 113, at 546.

140. *Va. Women’s Prison*, *supra* note 138.

141. *Id.*

142. Arkles, *supra* note 113, at 546. See Parts III.A.2 and III.B.2 for discussions about how separate TNGI wings can be implemented without subjecting prisoners to the harsh and abusive conditions endured by the inmates in the Fluvanna Correctional Center “butch wing.”

143. *Warden*, *supra* note 138.

144. *Id.*

145. *FAQ: Answers to Common Questions About Mistreatment of TGNC Incarcerated People*, LAMBDA LEGAL [hereinafter *FAQ*], <http://lambdalegal.org/know-your-rights/article/trans-in-prison-faq> [<https://perma.cc/Q3ZR-SWXB>]; see *infra* Part III.C (addressing the issues stemming from separated housing and explaining the steps needed to counteract these concerns).

146. See Arkles, *supra* note 113, at 546.

147. See *supra* Part I.A.

b. *The Range of Gender Classification Methods in Prisons*

Currently in United States prisons, the only options for placement are male prisons or female prisons, and many prisoners are classified based on the sex they were assigned at birth or based on their current genitalia.<sup>148</sup> Because this problematically excludes people who do not identify with their birth sex or do not have genitalia that align with their gender identity, some prisons are shifting to classification methods based on an individual's gender identity and not based on whether they have had any gender affirming surgeries.<sup>149</sup> Systems that separate based on identity generally take one of two approaches: (1) a diagnosis-based classification system,<sup>150</sup> or (2) an individualized, committee-based review system.<sup>151</sup> The diagnosis-based classification systems require the prisoner to have a diagnosis of gender dysphoria before they can be specially placed according to their gender identity.<sup>152</sup> The committee-based approach varies between jurisdictions, but generally involves a weighing of various safety risks and other vulnerability factors to determine the best course of action for each individual TNGI prisoner.<sup>153</sup> Although some states are adopting more progressive placement policies, in one study that asked LGBT people about their experiences during incarceration, "the majority (60%) of [transgender and gender non-conforming] respondents who had been in jail or prison reported being placed in a single-gender section of that jail or prison that did not match their gender identity."<sup>154</sup>

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148. *FAQ*, *supra* note 145.

149. *See Classification and Housing*, *supra* note 121, at 1747.

150. *See Victory! Federal Court Strikes Unlawful Policy That Denied Health Care to Incarcerated Missouri Transgender Woman*, LAMBDA LEGAL (May 23, 2018) [hereinafter *Victory!*], [https://www.lambdalegal.org/blog/20180523\\_victory-incarcerated-transgender-woman](https://www.lambdalegal.org/blog/20180523_victory-incarcerated-transgender-woman) [<https://perma.cc/GR5J-5YNM>] (describing a correctional policy based on a diagnosis-based approach that was struck down by a federal district court).

151. *See, e.g.*, H.R. Res. 18-1007 (Colo. 2018), [https://leg.colorado.gov/sites/default/files/documents/2018A/bills/2018a\\_hr1007\\_enr.pdf](https://leg.colorado.gov/sites/default/files/documents/2018A/bills/2018a_hr1007_enr.pdf) [<https://perma.cc/Y6JT-UGKE>].

152. *See Victory!*, *supra* note 150. Some states allow for this diagnosis to occur after entering the prison system, while others implement a "freeze-frame" policy, where the prisoner's diagnosis and treatment remains stagnant once they enter correctional housing. *See id.*

153. *See, e.g.*, H.R. Res. 18-1007 (Colo. 2018), [https://leg.colorado.gov/sites/default/files/documents/2018A/bills/2018a\\_hr1007\\_enr.pdf](https://leg.colorado.gov/sites/default/files/documents/2018A/bills/2018a_hr1007_enr.pdf) [<https://perma.cc/Y6JT-UGKE>].

154. *Protected and Served?: Jails and Prisons*, LAMBDA LEGAL, <https://www.lambdalegal.org/protected-and-served/jails-and-prisons> [<https://perma.cc/QRV5-WFVN>].

Because PREA mandated that prisons conduct classification evaluations on a case-by-case basis, states are encouraged to develop systems that allow for individualized plans that begin by placing people based on their gender identity, with exceptions made when the individual has a specific desire to be placed with a certain population.<sup>155</sup> This encouraged structure describes the classification system that was adopted for the federal prison system under the Obama administration,<sup>156</sup> but in 2017, the Trump administration removed these protective measures for transgender prisoners by reverting the policy back to classifying prisoners based on their biological sex,<sup>157</sup> providing no justification for doing so.<sup>158</sup> This change reflects a step backwards in time and only increases the risk of danger to TNGI inmates in the federal prison system. Similar to the current federal transgender placement policy, many states' policies are non-compliant with the PREA.

Minnesota has implemented a gender classification system that largely complies with PREA standards.<sup>159</sup> In Minnesota, a specially designated transgender committee aids in the placement process, and each person identified as transgender, gender non-conforming, or intersex will go through the placement evaluation process that will determine an individualized plan to best accommodate the person's needs and safety, specifying that no placements can be made without the consent of the person.<sup>160</sup> However, despite individualized approaches like Minnesota's that consider the needs of the individual, when the only two options for placement are male or female, there are still people requiring placement in prison housing that do not have any options reflecting their gender identity.<sup>161</sup> As a result, their

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155. *Id.*

156. *See generally* TRANSGENDER OFFENDER MANUAL, *supra* note 24.

157. *Id.* at 6–8.

158. *See* Jenny Gathright, *The Guidelines for Protection of Transgender Prisoners Just Got Rewritten*, NPR (May 12, 2018), <https://www.npr.org/sections/thetwo-way/2018/05/12/610692321/the-guidelines-for-protection-of-transgender-prisoners-just-got-rewritten> [<https://perma.cc/3UH6-VXUN>]; *Southern Poverty Law Center & Lambda Legal Sue DOJ and BOP for Records on Rollback of Protections for Incarcerated Trans People*, LAMBDA LEGAL (Nov. 20, 2018), [https://www.lambdalegal.org/blog/20181120\\_splc-ll-sue-doj-and-bop-for-records-on-trans-people-in-prison](https://www.lambdalegal.org/blog/20181120_splc-ll-sue-doj-and-bop-for-records-on-trans-people-in-prison) [<https://perma.cc/DUX8-X33G>] (“There is no penological reason that could justify the BOP’s decision to roll back protections for transgender people in the federal prison system.”).

159. *See* Oberholtzer, *supra* note 118 (depicting a table that identifies Minnesota as being in compliance with six out of eight PREA policies related to the incarceration of transgendered prisoners).

160. POL’Y 202.045, *supra* note 24.

161. *See* Etheridge, *supra* note 109, at 597.

constitutional rights are being violated, which will be further developed in the next Part of this Note.

## II. THE FAILURES OF CURRENT TNGI PLACEMENT POLICIES

In order to deal with all of the abuses and civil liberty violations discussed in Part I that TNGI inmates suffer, legal protocols or policies that grant these individuals the ability to improve their situation need to be established. While courts have created the tools that TNGI prisoners can theoretically use to litigate the conditions of their confinement, the standards are so high and unattainable that they provide only an illusion of relief. Even more unfortunately, the current policies in place to determine the placement of each TNGI person subjected to confinement also fail to adequately support the needs of these individuals. Section A will describe how TNGI inmates can raise Eighth Amendment claims and why courts should be more lenient when hearing these claims. Section B critiques the current prison policies in place for housing TNGI prisoners and reveals their shortcomings. Section C provides a side-by-side evaluation of two contrasting TNGI placement policies.

### A. EIGHTH AMENDMENT CLAIMS

In 1994, the Supreme Court recognized that the Eighth Amendment protection against cruel and unusual punishment encompasses transgender rights in the prison context.<sup>162</sup> In *Farmer v. Brennan*, the court created a two-part test to evaluate transgender inmates' Eighth Amendment claims.<sup>163</sup> This test requires both a showing that the transgender inmate was "incarcerated under conditions that posed a substantial risk of serious harm (objective prong)," and that "the [prison official(s)] acted with deliberate indifference . . . (subjective prong)."<sup>164</sup> In order to show that an official acted with deliberate indifference, the prisoner must show "that the official actually inferred that there was a substantial risk to the inmate's health or safety, but disregarded that risk."<sup>165</sup> Deliberate indifference is often equated with subjective recklessness; it requires more blameworthiness than a negligence standard and more than an "ordinary lack of due care for the

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162. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (holding that prison officials may be held liable for violating a transgendered prisoner's Eighth Amendment rights if officials demonstrated "deliberate indifference" to a substantial risk of serious harm through disregarding such a risk of which they were subjectively aware of).

163. *Id.* at 839-42.

164. Mason, *supra* note 118, at 177.

165. *Id.*

prisoner's interests or safety," but something less than conduct with the purpose or knowledge of the resulting harm.<sup>166</sup> Proving deliberate indifference is difficult because it places the burden of proving an officer's subjective belief on the prisoner.<sup>167</sup> If the applicable standard were strictly objective, relief under the *Farmer* test would be much more attainable.<sup>168</sup> Because of the difficulty in demonstrating a subjective deliberate indifference, proving these claims is an immensely high burden for transgender individuals and limits their ability to hold the prisons accountable for prisoner wellbeing.<sup>169</sup>

Despite the difficult standard that TNGI individuals must overcome thanks to *Farmer*, TNGI inmates have sometimes been successful in pursuing Eighth Amendment claims to ensure their access to trans healthcare,<sup>170</sup> and TNGI prisoners could use this standard to argue that denying them access to safe housing is also in violation of the Eighth Amendment. In a healthcare claim, the objective *Farmer* requirement for a substantial risk of serious harm is met when the prisoner can show that they have a serious medical need that requires treatment.<sup>171</sup> The assessment "rests on the idea that inmates rely on prison officials to treat them when they get sick, and that failing to do so causes unnecessary suffering."<sup>172</sup> This rationale can be mapped onto the need for appropriate placement policies because prisoners are at the mercy of the correctional system's housing determination, and failure to provide appropriate TNGI housing causes unnecessary

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166. *Farmer*, 511 U.S. at 835–36.

167. Mason, *supra* note 118, at 179.

168. *Farmer*, 511 U.S. at 841–42 (rejecting the argument that a prison official who was unaware of a substantial risk of harm to an inmate should still be held liable under the Eighth Amendment based on an objective assessment that the risk was obvious and a reasonable prison official would have noticed it).

169. See Mason, *supra* note 118, at 179.

170. See *Fields v. Smith*, 653 F.3d 550, 556–59 (7th Cir. 2011) (finding an Eighth Amendment violation when a state statute prohibited hormone therapy and gender confirmation surgery for prisoners); *Hicklin v. Precynthe*, No. 4:16-CV-01357-NCC, 2018 WL 806764, at \*14 (E.D. Mo. Feb. 9, 2018) (providing injunctive relief for a transgender woman so that the prison is required to provide her with "medically necessary treatment for her gender dysphoria, including hormone therapy, access to permanent body hair removal, and access to 'gender-affirming' canteen items").

171. See *Kosilek v. Spencer*, 774 F.3d 63, 82 (1st Cir. 2014) (discussing potential Eighth Amendment violations in regard to prison healthcare); *Roe v. Elyea*, 631 F.3d 843, 857 (7th Cir. 2011) (noting that a medical need is considered sufficiently serious if the condition was "diagnosed by a physician as mandating treatment or . . . is so obvious that even a lay person would perceive the need for a doctor's attention") (quoting *Greeno v. Daley*, 414 F.3d 645, 653 (7th Cir. 2005)).

172. Dan Schneider, Comment, *Decency, Evolved: The Eighth Amendment Right to Transition in Prison*, 2016 WIS. L. REV. 835, 856.

suffering.<sup>173</sup> The application to placement policies is further supported by the “evolving standards of decency” doctrine that permits a “non-static interpretation of the Eighth Amendment.”<sup>174</sup> Just as standards of decency have evolved to reflect the need for access to medically necessary trans healthcare in prison,<sup>175</sup> they have also evolved to reflect that being forced to live in housing that does not align with one’s gender identity is cruel and unusual.<sup>176</sup> Courts need to acknowledge this evolved standard when hearing Eighth Amendment claims against prison placement policies. If it violates the Eighth Amendment to deny TNGI prisoners access to healthcare that allows them to transition or stay healthy in their gender identity, then it should be against the Eighth Amendment to deny them access to safe housing where they can be comfortable in their TNGI identity.<sup>177</sup>

Granted, it is doubtful that this argument would be successful if brought before a judge, as the *Farmer* standard is so difficult to meet as is.<sup>178</sup> Though the Eighth Amendment is unlikely to provide a

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173. *Id.* at 843 (discussing the “untenable safety risk” faced by inmates placed in housing incongruent with their gender identity); *see supra* Parts I.C.2 and I.C.3 (describing examples of how inappropriate housing determinations cause suffering to TNGI prisoners).

174. Matthew C. Matusiak, Michael S. Vaughn & Rolando V. del Carmen, *The Progression of “Evolving Standards of Decency” in U.S. Supreme Court Decisions*, 39 CRIM. JUST. REV. 253, 253 (2014) (explaining that evolving standards of decency require courts to consider public opinions of what constitutes cruel and unusual punishment in Eighth Amendment challenges). *See generally* Schneider, *supra* note 172 (applying the evolving standards of decency doctrine into assessments of transgender inmates’ claims for the constitutional right to medical care).

175. Schneider, *supra* note 172, at 851 (“The requirement that the protections of the Eighth Amendment square with the reality of our national conscience bears directly on the argument that transgender prisoners cannot be denied access to adequate medical care. Just as our common understanding of what constitutes a ‘cruel’ punishment has changed over time, so has the sense of what deprivations a prisoner may suffer while incarcerated.”).

176. *See id.* at 852–55 (discussing the increasing acceptance of “transgenderism” within the legal profession and amongst the general public). *See generally supra* Parts I.C.3–4 (discussing how being forced into binary housing is harmful to TNGI safety and wellbeing).

177. The biggest flaw in this comparative argument is that in order for courts to find that prisons must provide trans health care to TNGI prisoners, the prisoner must first be diagnosed with gender dysphoria. While this could analogously be incorporated into this Note’s solution in Part III, this would contradict my argument that there should not be any dispositive factor in prison placement determinations. The decision needs to be based on a thorough analysis of many factors, and a diagnosis of gender dysphoria is certainly one such factor, but it should not be a dispositive element.

178. *See* Mason, *supra* note 118, at 179.

successful avenue of relief for individual inmates,<sup>179</sup> it is an important foundation for explaining the need to revamp current placement policies and develop a new solution.

#### B. CURRENT SOLUTIONS AND THEIR SHORTCOMINGS

The current solutions offered for remedying the injustices of segregation based on biological sex and the safety risks do not fully address the underlying issues. The most commonly implemented placement policy replacing policies based on biological or birth sex is separation based on gender identity. In order to “protect” the safety and wellbeing of TNGI individuals who have already been placed, correctional officers often resort to administrative segregation as an attempted solution. This Section will evaluate both of these in turn and highlight the problems with their implementation.

##### 1. Separation Based on Gender Identity

A common solution that more prison systems are incorporating requires that transgender prisoners be separated based on their gender identity,<sup>180</sup> but this solution involves several issues that cannot be resolved by simply revising classification methods. New York City provides one example of this type of separation policy: in 2018, the city’s mayor announced a new policy that all prisoners are to be incarcerated based on their individual gender identity, not their biological sex.<sup>181</sup> This system fails to fully address the entire problem, even though it is certainly preferable to forced housing based on an individual’s genital construction.<sup>182</sup> Trans men and women who feel comfortable living in the company of their cis-gendered counterparts will finally find respite in this system, but it still excludes countless other non-binary and gender non-conforming individuals who do not exist within the binary that prisons force upon them.<sup>183</sup> When the standard

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179. *Id.* at 178 (acknowledging the shortcomings of using the Eight Amendment framework to ensure access to safe housing for transgender inmates).

180. *Id.* at 167–69 (describing PREA’s mandate to consider placement factors beyond an inmate’s genitalia).

181. *Transgender Prison Housing Assessed*, *supra* note 24, at 53.

182. See Tara Dunnavant, Note, *Bye-Bye Binary: Transgender Prisoners and the Regulation of Gender in the Law*, 9 FED. CTS. L. REV. 15, 39 (2016) (arguing that prisons should eliminate placement policies that make determinations based on external sex characteristics).

183. By definition, non-binary, gender non-conforming, and intersex people do not fall into the categories of man or woman. See *supra* Part I.A for an explanation of the nuances between these identities.



prison system only provides housing for men and women, all of the people who don't neatly fit into these categories fall to the wayside.

A second issue with the system that separates prisoners based on gender identity is that it can still fail to address other relevant factors, namely the health and safety risks at stake for TNGI prisoners.<sup>184</sup> This failure is evident when remembering why prisoner housing placements based on biological sex or current anatomy is problematic. One of the major issues with sex-based placement systems is that trans women housed in male prisons are abused and raped by other prisoners.<sup>185</sup> When the more progressive systems allow for individuals to be placed in housing based on their gender identity, the trans women who were previously subjected to abuse in the male prisons are just replaced with trans men who could become victims of that same abuse.<sup>186</sup>

Another essential element missing from many transgender placement policies is the need to account for the individual's personal preferences when making case-by-case determinations. Under a diagnosis-based classification system, requiring a legal record of their identity or a diagnosis of gender dysphoria would exclude many TNGI individuals.<sup>187</sup> People who identify as TNGI do not always have legal documents that match their identity because they cannot meet some of the restrictive requirements to make these changes,<sup>188</sup> or because they could be worried that such a change will "out"<sup>189</sup> them against

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184. See *supra* Parts I.C.2–3 for examples of how inappropriate housing determinations cause suffering to TNGI prisoners.

185. See Rodgers et al., *supra* note 80, at 5.

186. See Harris, *supra* note 107 (depicting a trans man who was afraid to reveal his identity because he didn't want to get sent to a men's prison and be abused); cf. Mason, *supra* note 118, at 163–64 (“[T]ransgender men housed in women's facilities are also routinely abused.”).

187. See *What Is Gender Dysphoria?*, *supra* note 46 (explaining that gender dysphoria involves a psychiatric diagnosis based on the criteria in the *Diagnostic and Statistical Manual of Mental Disorders*); Dunnivant, *supra* note 182, at 40 (discussing the shortcomings of such medical diagnoses when based on a binary conception of gender).

188. Dunnivant, *supra* note 182, at 24. Many states require court orders in order to adjust gender markers on birth certificates and can include requirements such as confirmation that the individual received gender confirmation surgery or has a diagnosis of gender dysphoria. See *id.* at 24–25.

189. “Outing” someone means to disclose a person's sexual orientation or gender identity against their will. See *Outing*, ACLU, <https://www.aclu.org/issues/lgbt-rights/lgbt-youth/outing> [<https://perma.cc/T3RR-YM2M>]. Outing someone constitutes a violation of privacy and can subject a person to discrimination and possible marginalization. Arielle P. Schwartz, *Why Outing Can Be Deadly*, NAT'L LGBTQ TASK FORCE, <https://www.thetaskforce.org/why-outing-can-be-deadly> [<https://perma.cc/>

their will and subject them to hostility.<sup>190</sup> Legal documentation does not provide an accurate measure for determining every individual's gender identity, and so reliance upon such measures for determining separation based on gender identity would be problematic. Instead, placement policies need to rely upon a case-by-case determination that consider the individual's own perspective of the decision.<sup>191</sup> This Note relies upon the premise that there is a definite need for TNGI individuals to have input in their housing accommodations, that their agency and personal preferences matter. Denying TNGI individuals the right to have their preference counted in their placement determination is different from other fights for accommodations in prisons, such as the rights of pregnant and breastfeeding mothers; incarcerated mothers need protections in order to ensure that they receive necessary prenatal care and have the opportunity to breastfeed their children, which is known to provide significant health benefits for the baby's development.<sup>192</sup> Depriving TNGI individuals the "liberty" of understanding and expressing their own gender is different from the theory of liberty deprivation that underlies the system of incarceration,<sup>193</sup> and the law needs "to recognize gender as a fundamental

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8CM8-NJ97]. Due to the fear of harassment and discrimination and the desire for privacy, just because someone is open about their identity in certain social circles does not mean they feel comfortable sharing their identity in every situation, and in some situations, it is illegal to out someone without their consent. *See Outing, supra* ("It's against the law for school officials to disclose a student's sexual orientation or gender identity to parents or other school staff. . . ."); *see also Schwartz, supra* (explaining how the Social Security Administration ended its policy that allowed outing TNGI employees' identities to their employers). It is a deeply personal decision to decide who one is open with about their identity, and "[o]ften people who are outed feel blindsided and forced to reveal a deeply personal part of their identity without their consent and under someone else's terms. . . . People must choose for themselves how and when to come out." *Schwartz, supra*.

190. *Dunnavant, supra* note 182, at 24.

191. *See Mason, supra* note 118, at 168–69 (describing the Washington, D.C., DOC's transgender placement committee that "considers the inmate's safety needs, genitalia, gender identity, and potential vulnerability (factoring in the individual's perception of his or her own vulnerability)").

192. *See About Breastfeeding*, MINN. DEP'T HEALTH, <https://www.health.state.mn.us/people/breastfeeding/aboutbf.html> [<https://perma.cc/8UK3-HNLM>] (detailing the health benefits that breastfeeding provides for both newborns and mothers). Thankfully, many states do believe that breastfeeding infants is a protected right for imprisoned mothers, even though it is not a specific right guaranteed by the Eighth Amendment. MICH. BREASTFEEDING NETWORK, WORKING TO OVERCOME ROADBLOCKS KITS: GUIDE TO BREASTFEEDING AND INCARCERATION 2 (2018), <https://www.mibreastfeeding.org/wp-content/uploads/2018/05/Guide-to-Breastfeeding-and-Incarceration.pdf> [<https://perma.cc/Y3FL-BQFZ>].

193. *See Victor L. Shammass, Pains of Imprisonment*, in 2 THE ENCYCLOPEDIA OF

social right of self-identification.”<sup>194</sup> There are so many individualized factors that contribute to the most ideal placement for a TNGI person, including the individual’s gender identity and expression<sup>195</sup> and the overall risk of harm,<sup>196</sup> that ignoring the person’s subjective understanding of their placement needs strips them of the ability to have constitutionally safe housing.

## 2. Administrative Segregation

When TNGI prisoners complain about their safety in prison housing due to their gender identity, the officers’ response is often to place these prisoners in “administrative segregation,” or solitary confinement.<sup>197</sup> Aside from the psychological harm that solitary confinement causes for any prisoner subjected to it,<sup>198</sup> TNGI prisoners are particularly vulnerable when placed in solitary confinement.<sup>199</sup> Isolation of TNGI individuals worsens their plight by increasing their vulnerability to physical violence.<sup>200</sup> Some TNGI prisoners report that by placing them in protective custody, the abusive correctional staff had easier out-of-sight access to them.<sup>201</sup> Isolated segregation also removes the possibility of forming positive relationships with other prisoners, which could potentially help them avoid future violence, or at least offer the benefit of a caring support system to process their trauma.<sup>202</sup> In addition to psychological and social harm, extended solitary confinement poses dangers to any prisoner’s physical health, and it creates even further consequences for trans prisoners who lose access to certain trans healthcare needs.<sup>203</sup> While correctional officers may feel better about themselves for removing the TNGI prisoners from the harmful consequences of general population and placing them into relative “safety,” this isolated segregation often happens despite protests from the TNGI prisoners who actually *prefer* being in the general population over protective custody.<sup>204</sup> The TNGI inmates’ desire to

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CORRECTIONS 679, 680 (2017) (“The fundamental premise of prisons is to remove or restrict liberty.”).

194. Dunnavant, *supra* note 182, at 40.

195. *See supra* Parts I.A–B.

196. *See supra* Parts I.C.2–3.

197. *See Classification and Housing, supra* note 121, at 1746–47.

198. *See supra* note 122 and accompanying text.

199. Arkles, *supra* note 113, at 537–44.

200. *Id.* at 539.

201. *Id.* at 540.

202. *Id.* at 539.

203. *See Mason, supra* note 118, at 166.

204. Arkles, *supra* note 113, at 537.

live in a prison population where there are known dangers of being “beaten, raped, and/or stabbed by other prisoners” rather than living in the so-called “safer” isolated custody speaks to how horrible living in solitary confinement must be.<sup>205</sup> The horrible conditions of solitary confinement create a difficult paradox where even well-meaning prison officials who recognize the harms that placement in the general population has on TNGI inmates do not have the necessary tools for dispelling those dangers. In order for separation of TNGI prisoners to actually be helpful for promoting safety rather than harmful to well-being, there must be both an element of agency in the TNGI prisoner’s decision to be removed from the general population as well as a guarantee that the separation is not done in isolation, so as to counteract the harms that come from solitary imprisonment.<sup>206</sup>

C. A COMPARISON OF PROGRESSIVE AND REGRESSIVE PLACEMENT POLICIES

Within the current range of transgender placement policies, two starkly contrasting approaches are the federal Transgender Offender Manual<sup>207</sup> and Minnesota’s Policy for Managing Trans/Non-conforming Offenders.<sup>208</sup>

In 2017, the federal Bureau of Prisons (“BOP”) amended their Transgender Offender Manual, so that it now mandates the use of “biological sex as the initial determination for designation” and allows for classification based on gender identity “only in rare cases.”<sup>209</sup> This update undid all of the progress that the Obama administration made with recognizing transgender and non-binary identities.<sup>210</sup> Prior to 2017, the Obama administration’s policy of separating transgender prisoners based on their gender identity had been praised for its adherence to PREA and its consideration of TNGI individuals’ safety.<sup>211</sup>

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205. *See id.* at 537–39.

206. *See id.* at 537–44.

207. TRANSGENDER OFFENDER MANUAL, *supra* note 24.

208. POL’Y 202.045, *supra* note 24.

209. TRANSGENDER OFFENDER MANUAL, *supra* note 24, at 6.

210. *Id.* (repealing the Obama administration policy and reverting back to a classification system based on biological sex).

211. *See New Federal Guidance*, *supra* note 24.

The new 2017 policy no longer complies with PREA,<sup>212</sup> despite a BOP spokesperson claiming otherwise.<sup>213</sup>

Additionally, the 2017 policy goes against the Eighth Amendment by reinstating harmful practices that satisfy the *Farmer v. Brennan* test for these claims.<sup>214</sup> For the first prong—the objective finding that the prisoner was subjected to “a substantial risk of serious harm”—courts have not expanded upon a more descriptive or guiding definition for what constitutes a substantial risk of harm and instead often conduct factual comparisons for determining level of harm.<sup>215</sup> Though there is no clear factual comparison for arguing that this placement policy creates a substantial risk of harm, an analogy to *Irving v. Dormire* is helpful.<sup>216</sup> In *Irving*, the Eighth Circuit found that there was a substantial risk of serious harm when a prison guard falsely labeled the plaintiff as a “snitch” or a “rat” because there is a well-known danger that someone who is considered a snitch will be assaulted or killed by other inmates.<sup>217</sup> Similarly, TNGI individuals who are housed within the general population and against their gender identity are subjected to a substantial risk of serious harm because the prison officials are falsely labeling the prisoners based on perceived sex. Erroneously ushering them into categories based on biological sex is a serious harm in its own right, and it subjects them to a great risk that they will be assaulted or sexually abused by other inmates, another serious harm.<sup>218</sup> Attempting to force TNGI individuals into cis-gendered housing that does not align with their gender identity is extremely dangerous to their health and wellness;<sup>219</sup> it constitutes a

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212. Gathright, *supra* note 158 (“Th[e] Trump BOP revisions to the Transgender Offender Manual] stand[] in direct defiance of the Prison Rape Elimination Act, which mandates prison officials must screen all individuals at admission and upon transfer to assess their risk of experiencing abuse. The new policy strips away these guidelines and encourages broad, blanket placement of prisoners based on their sex assigned at birth.”).

213. *Id.* (“[S]he believes the policy does consider individual needs in accordance with the Prison Rape Elimination Act: ‘The manual now addresses and articulates the balance of safety needs of transgender inmates as well as other inmates, including those with histories of trauma, privacy concerns, etc., on a case-by-case basis.’”).

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

215. See, e.g., *Lawrence v. Bowersox*, 297 F.3d 727, 731–32 (8th Cir. 2002) (distinguishing the facts in this case relating to a guard’s unconstitutional use of pepper spray from a previous case where the use of pepper spray was much less severe and was actually warranted under the circumstances).

216. See *Irving v. Dormire*, 519 F.3d 441 (8th Cir. 2008).

217. *Id.* at 450–51.

218. See *Mason*, *supra* note 118, at 163–69.

219. *Id.*

denial of their identity as well as a complete disregard for their safety. The 2017 placement policy also meets the second *Farmer* prong requiring “deliberate indifference.”<sup>220</sup> “Deliberate indifference . . . is the conscious or reckless disregard of the consequences of one’s acts or omissions.”<sup>221</sup> Based on the notice prison officials and policy administrators had from the policy during the Obama administration, one must logically conclude that not only do they know about the harms that come from placing prisoners based on birth sex, but they consciously disregard those risks by promoting and implementing this new 2017 policy. Though showing deliberate indifference is a difficult standard and is often where *Farmer* claims fail,<sup>222</sup> knowledge of these dangers is clear from the Obama placement policy that immediately preceded the 2017 policy and meets this high standard.<sup>223</sup> Thus, both prongs of *Farmer* have been met, and the 2017 Transgender Offender Manual is unconstitutional under the Eighth Amendment.

In contrast, the Minnesota system appropriately considers non-binary and gender non-conforming folks as part of their classification system.<sup>224</sup> The decision of where to house each qualifying prisoner is made on a case-by-case basis after an evaluation by the Transgender Committee, whose duty is to make “recommendations regarding placement, property, and programming for transgender and intersex offenders.”<sup>225</sup> Factors that the committee considers in the evaluation include “offender’s health and safety, and whether the placement would present management or security problems” and “offender’s security level, criminal and disciplinary history, current gender expression, medical and mental health needs, vulnerability to sexual victimization, and the likelihood of perpetrating such abuse on other offenders.”<sup>226</sup> This system excels in its multi-variable consideration and acknowledging how there is not one factor that should be dispositive as to which placement option is best for each inmate. However, even after this individualized evaluation, the only two options for

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220. *Farmer v. Brennan*, 511 U.S. 825, 825–26 (1994).

221. *Est. of Holton v. Terhune*, 40 F. App’x 387, 389 (9th Cir. 2002).

222. See *Mason*, *supra* note 118, at 179.

223. See generally TRANSGENDER OFFENDER MANUAL, *supra* note 24.

224. See POL’Y 202.045, *supra* note 24.

225. *Id.* (“The committee is comprised of the department’s health services director, medical director, director of behavioral health, and director of nursing, along with an intake/security representative, health services administrator from the intake facility, warden of the facility where the offender is housed, and any other department employee deemed necessary to make a decision.”).

226. *Id.*

placement are still male or female prisons.<sup>227</sup> Though this is significantly better than the federal mandate, it still falls short of fully addressing the problem by only having male and female options for placement. Following Section II.A, which explained how placements that deny prisoners the right to housing where they feel comfortable in their gender identity violates the Eighth Amendment, there needs to be an option for those who will not be comfortable in either a male or female setting.

### III. IMPLEMENTING A THIRD CHOICE FOR TNGI PLACEMENT

None of the current placement policies at the state or federal level are able to accommodate the needs of TNGI prisoners, and that is because the prison system lacks the infrastructure needed to make these accommodations.<sup>228</sup> The most ideal solution to remedying this injustice would involve a complete overhaul of the current American prison system, either through prison abolition efforts or some other drastic measure to ensure that the United States incarcerates fewer people in the first place.<sup>229</sup> Such an overhaul would allow the nation

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227. *Id.* Under this policy, the Transgender Committee is ultimately deciding whether to place an individual into a facility for male or female offenders.

228. *See, e.g., Classification and Housing supra* note 121, at 1748 (explaining that the two predominant methods of housing transgender inmates are “birth sex” classification or isolation).

229. *See supra* notes 96–99 and accompanying text.

One drastic criminal justice reform that has recently gained popularity through protests following the death of George Floyd, a Black man who was murdered by (now former) Minneapolis police officers while in police custody, is a push for defunding police departments and refocusing those funds on mental and public health resources and community-based safety programs. *See, e.g., Associated Press, When Protesters Call for ‘Defunding the Police,’ What Does It Mean?*, MPR NEWS (June 8, 2020), <https://www.mprnews.org/story/2020/06/07/when-protesters-call-for-defunding-the-police-what-does-it-mean> [<https://perma.cc/6GVR-WM4Z>]; Eliza Collins, *Calls to Cut Funding for Police Grow in Wake of Protests*, WALL ST. J. (June 9, 2020), <https://www.wsj.com/articles/calls-for-defunding-police-grow-in-wake-of-protests-11591663621>; Sam Levin, *Movement to Defund Police Gains ‘Unprecedented’ Support Across US*, GUARDIAN (June 4, 2020), <https://www.theguardian.com/us-news/2020/jun/04/defund-the-police-us-george-floyd-budgets> [<https://perma.cc/8NJM-MFLH>]. Some municipal legislators, such as the Minneapolis City Council, have already started taking steps to achieve such reform. *See Associated Press, supra*. The Minneapolis City Council proposed an amendment to the city’s charter that would eliminate the Minneapolis Police Department and its requirements for funding a minimum number of police officers, replacing it instead with a Department of Community Safety and Violence Prevention that includes the *possibility* for licensed peace officers. *E.g., Madeline Deninger, What Does Changing the Minneapolis City Charter Mean for Public Safety?*, MINN. DAILY (July 12, 2020), <https://www.mndaily.com/article/2020/07/what-does-changing-the-minneapolis-city-charter-mean-for-public-safety> [<https://perma.cc/HJZ8-GY2A>].

to focus on rehabilitative and preventative efforts rather than purely punitive and carceral ones.<sup>230</sup> However, because this solution is highly unlikely to become reality anytime soon given the established American infrastructure, it is imperative to consider more attainable—albeit less ideal—solutions that will protect TNGI inmates, such as re-vamping placement policies and accommodation options. This Part proposes that in order to create adequate placement policies for TNGI inmates, there needs to be a third placement option available—a separate (but not solitary) wing within an otherwise single-sex prison, open only to TNGI individuals. Section A describes what this separate housing should look like. Section B discusses the best and worst methods for instituting such a system. Section C acknowledges the imperfections in such a placement system, while defending its appropriateness given significant constraints. Section D finishes with an analysis

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The Council's goal was to allow Minneapolis voters to decide the amendment's fate in a November 3, 2020 election, but this has been delayed due to the Minneapolis Charter Commission's decision to use additional time for review. Liz Navratil & Miguel Otárola, *Minneapolis Charter Commission Blocks Controversial Policing Proposal from November Ballot*, STAR TRIB. (Aug. 6, 2020), <https://www.startribune.com/charter-commission-blocks-plan-to-remake-police-from-ballot/572016392> [<https://perma.cc/LW3S-KZUN>]. The Council views this amendment as a first step to addressing systemic racism and the disproportionate use of force against people of color, particularly Black men. *E.g.*, Associated Press, *Minneapolis Council Members Pledge Thoughtful Police Revamp*, MPR NEWS (July 9, 2020), <https://www.mprnews.org/story/2020/07/09/minneapolis-council-members-pledge-thoughtful-police-revamp> [<https://perma.cc/4KK5-RTEA>]; Liz Navratil, *What You Need to Know About the Proposal to End the Minneapolis Police Department*, STAR TRIB. (July 21, 2020), <https://www.startribune.com/what-you-need-to-know-about-proposal-to-end-the-mpls-police-department/571761992/> [<https://perma.cc/5ZK6-UX9W>]. A reformed public safety model such as this proposal could also combat the problems associated with overincarceration, as all people in prison were once apprehended by police and the criminal justice system, and racial disparities in prisoner demographics start with racially biased policing. *See supra* notes 85–92 and accompanying text.

230. *See* McLeod, *supra* note 96, at 1167. McLeod argues that the widespread reluctance to consider an abolitionist framework is grounded upon “a failure of moral, legal, and political imagination” to see abolition as anything but the literal “tearing down of all prison walls.” *Id.* at 1156. McLeod suggests a model of “grounded preventative justice” to be considered in tandem with prison abolition. *Id.* She considers grounded preventative justice to be a “positive substitutive abolitionist framework” which would include:

expanding social projects to prevent the need for carceral responses, decriminalizing less serious infractions, improving the design of spaces and products to reduce opportunities for offending, . . . proliferating restorative forms of redress, and creating both safe harbors for individuals at risk of or fleeing violence and alternative livelihood for persons subject to criminal law enforcement.

*Id.*



of how likely it is that this proposed system can be successfully implemented within the federal prisons and Minnesota prisons.

A. THE NEED FOR SEPARATE, NON-SOLITARY TNGI HOUSING

The United States would not be the first country to develop separate housing options for TNGI prisoners.<sup>231</sup> First, this section will look to models in other countries that have planned prison wings for TNGI inmates, and then it will describe how the system should function within the United States.

1. International Examples of Separate TNGI Housing

A few other countries have attempted or implemented some form of separated (but not solitary) housing for TNGI prisoners. In France, “prisons in Fleury-Mérogis and Caen have separated quarters for trans inmates.”<sup>232</sup> The United Kingdom opened its first transgender prison unit in March 2019, operating as a separated wing of an otherwise all women’s prison.<sup>233</sup> In 2010, Italy announced a plan to turn a sparingly used women’s prison into an all-transgender person prison.<sup>234</sup> Crossing back to this side of the Atlantic, Argentina does not have exclusively transgender housing, but they do have special prisons for gay men, and usually assign transgender women to these prisons.<sup>235</sup> Though sometimes the transgender women are relocated to women’s prisons, “in many cases, they (the trans women) do not wish to be moved because they sometime [sic] find it a little easier to live (or survive) in a prison with other trans women and gay men, to whom they can turn to for protection, advice or emotional support.”<sup>236</sup> It is important to note that while these countries experienced varying

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231. See *infra* III.A.1 for examples.

232. INT’L BAR ASS’N LGBTI L. COMM., MR & MS X: THE RIGHTS OF TRANSGENDER PERSONS GLOBALLY, 31 (2015) [hereinafter INT’L BAR], <https://www.ibanet.org/Document/Default.aspx?DocumentUid=17DF4B83-2209-4EF8-BBF7-9C8C163AF15E> [<https://perma.cc/7S8W-JA8Z>].

233. *First UK Transgender Prison Unit to Open*, BBC NEWS (Mar. 3, 2019), <https://www.bbc.com/news/uk-47434730> [<https://perma.cc/2Y98-XPQQ>].

234. *Italy to Open First Prison for Transgender Inmates*, BBC NEWS (Jan. 12, 2010), <http://news.bbc.co.uk/2/hi/europe/8455191.stm> [<https://perma.cc/W62U-SRYA>]. However, a change of heart in the administration quashed this plan. Pietro Pruneddu, *La Doppia Sofferenza Delle Trans in Carcere*, LA REPUBBLICA (Aug. 28, 2013), [https://inchieste.repubblica.it/it/repubblica/rep-it/2013/08/28/news/sesso\\_trans\\_in\\_carcere\\_princesa\\_in\\_gabbia\\_di\\_pietro\\_pruneddu\\_smeralda\\_non\\_sa\\_chi\\_sia\\_fabrizio\\_de\\_andr\\_e\\_non\\_ha\\_mai\\_visto\\_65430608](https://inchieste.repubblica.it/it/repubblica/rep-it/2013/08/28/news/sesso_trans_in_carcere_princesa_in_gabbia_di_pietro_pruneddu_smeralda_non_sa_chi_sia_fabrizio_de_andr_e_non_ha_mai_visto_65430608) [<https://perma.cc/DRG8-NBF8>].

235. INT’L BAR, *supra* note 232, at 32. This system is similar to the LA County Jail’s K6G Unit. See *supra* Part I.C.4.a.

236. INT’L BAR, *supra* note 232, at 32.

levels of success in their efforts to create special TNGI prison housing, these nations were operating on a much smaller scale than the vast system of overincarceration that runs rampant throughout the U.S. prison system.<sup>237</sup> The United States should not, and cannot, rely on these examples as a strict model for how to implement TNGI wings nationwide because the proportional differences between the United States and these other countries makes this unfeasible.<sup>238</sup> Rather, these examples could be used as inspiration or a starting point for how to implement a pilot program in one state, or even one prison, as a progressive experiment.<sup>239</sup>

## 2. Developing New TNGI Wings in U.S. Prisons

In order to protect the rights and safety of TNGI inmates, prisons need to create particularized wings that are designated solely for TNGI housing. The wings in this solution would need to still have generally the same conditions as are present in the rest of the prison. This would prevent situations where the separate wings could be criticized for being either a much better imprisonment experience than what cis-gendered prisoners experience (thus potentially encouraging cis-gendered prisoners to feign a non-binary identity to have access to better resources and living environments, or else just formalizing complaints about the new wings), or the reverse where the separate wing is actually a much worse and less safe environment.<sup>240</sup>

Smaller wings within an existing single-sex prison is a better solution than creating (or re-designating) an entire facility solely for TNGI prisoners, given the resources available within the United States prison system.<sup>241</sup> Having separate wings rather than an entire separate facility would make it easier to keep the conditions equal. With the disparate wings so close and yet separated, prison officials will be able to manage them so that resources are evenly shared amongst all prisoners, rather than relying on different officials of different prisons to practice uniformity. Additionally, having separate wings rather than entire facilities means that the TNGI prisoners likely will not have

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237. See *supra* Part I.C.1.

238. Additionally, these examples cannot serve as practical models since there is little to no scholarship exploring their implementation and effectiveness.

239. See *infra* Part III.D for an explanation of how Minnesota is one potential example for serving as a pilot state.

240. Richard Ford, *Transgender Prison Wing 'Failed Its Inmates,'* TIMES (Jan. 4, 2020), <https://www.thetimes.co.uk/article/transgender-prison-wing-failed-its-inmates-phqkp0qff>.

241. See *supra* Part I.C (discussing the limited capacity of prisons to provide individualized accommodations).

to be transferred as far from their homes in order to be placed in appropriate housing. Because distance from home has a large impact on whether an inmate will receive visitors,<sup>242</sup> the more spread out that TNGI wings are, the more likely it is that the offenders placed there can maintain contact with their loved ones outside of the prison.

#### B. INSTITUTING THIS SYSTEM

In order for this change to work, effective implementation of the policy is imperative. This must be done through a mandate that prisons must provide separate TNGI wings and by creating effective placement procedures for placement within these wings. There also needs to be an appropriate consideration of resource management. When a U.K. prison moved too quickly to open a dedicated unit to offenders who were trans women, their plan backfired, and the unit is now being criticized for poor implementation and an insufficient access to resources for the prisoners.<sup>243</sup> Implementation of such a drastic systemic overhaul requires thorough planning and appropriate mechanisms to enact change.

##### 1. Mandating Creation of TNGI Wings

The first step is to figure out how to ensure that the different federal and state prison systems create TNGI wings within their prisons. One potential method for implementation is through the courts, but this is not likely to succeed.<sup>244</sup> First, it would be extremely difficult for plaintiffs to meet the burden for specifically showing that not offering a new wing for TNGI prisoners is somehow a constitutional concern.<sup>245</sup> Additionally, courts will appropriately argue that instituting such an infrastructure falls within the realm of Congress, not the courts.<sup>246</sup> While courts can, and do, find that specific prison policies

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242. Bernadette Rabuy & Daniel Kopf, *Separation by Bars and Miles: Visitation in State Prisons*, PRISON POL'Y INITIATIVE (Oct. 20, 2015), <https://www.prisonpolicy.org/reports/prisonvisits.html> [<https://perma.cc/7MDL-TH5P>].

243. See Ford, *supra* note 240.

244. See generally Darryl K. Brown, *The Warren Court, Criminal Procedure Reform, and Retributive Punishment*, 59 WASH. & LEE L. REV. 1411 (2002) (explaining how courts are generally ineffective at enacting dramatic reform within the criminal justice system).

245. See *supra* Part II.A.

246. See, e.g., *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (“When an issue involves a host of considerations that must be weighed and appraised, it should be committed to those who write the laws rather than those who interpret them. In most instances, the Court’s precedents now instruct, the Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability.”) (internal citations and quotations omitted).

violate the Constitution,<sup>247</sup> they cannot just pass new legislation mandating a new prison infrastructure in the form of case law.<sup>248</sup>

Ideally, federal prison officials would be able to realize the need for these special accommodations and would take it upon themselves to accumulate the resources and establish the necessary policies. But it is much more likely that without a mandate from above, the BOP and state departments of corrections (“DOCs”) would not feel compelled to create such “revolutionary” change.<sup>249</sup> In order for the BOP and state DOCs to act, Congress needs to step in.

The mandates for change need to be instituted legislatively, but that does not mean that implementation will be easy. Congress can make change at the federal level to modify the prison structure and affect resource allocation, but federal legislators cannot take over states’ rights to run their own prisons.<sup>250</sup> One way that Congress could effect change on state prison systems is by using the Congressional spending power to influence reform.<sup>251</sup> By tying new budgetary allocations to the requirement for TNGI wings,<sup>252</sup> Congress would incentivize states to comply.<sup>253</sup> This is obviously not going to work for every state, as states would have the power to decline the new funds in order to avoid making the changes, but hopefully the law could affect a majority of state departments. If a significant number of states opt in, it would help normalize the practice and one day ensure full compliance and cooperation among all U.S. carceral systems because that is just what has come to be expected. Though there are significant hurdles to overcome, and the road to even partial compliance is extremely long, the best way to ensure that the new system is implemented is through legislative action.<sup>254</sup>

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247. See *Victory!*, *supra* note 150.

248. See U.S. CONST. art. 1, § 1.

249. See, e.g., *supra* notes 118–19 and accompanying text.

250. See U.S. CONST. amend X; *id.* art I.

251. See *id.* art I, § 8, cl. 1.

252. This needs to be more effective than Congress’s use of the spending power under PREA, since at least 40 states still do not fully comply with PREA and are willing to pass on the budgetary benefit that comes from compliance. See Gilna, *supra* note 117 (“[F]orty states had not complied with PREA standards as of 2016, resulting in token financial penalties that have done little to ensure future compliance.”).

253. See, e.g., *South Dakota v. Dole*, 483 US 203 (1987) (confirming Congress’s ability to act indirectly under its spending power to encourage state action).

254. Executive orders and policies are another potential option, but given the fluidity of policies between different administrations, see Part II.C (discussing the changes between the Obama and Trump administration policies), legislative action would ensure a longer lasting, more permanent solution.

## 2. Placing Prisoners Within These Wings

Once Congress has passed legislation that mandates the creation of TNGI prison wings, appropriate placement policies and procedures for assigning prisoners to these wings are integral for success.

One possible placement method is through the courts, but again, this is unlikely to succeed because the courts will not want to be involved in the actual placement of the prisoners.<sup>255</sup> If the courts were to be a part of the placement, these case-by-case determinations could be part of the sentencing decision/evaluation that the judge makes when initially sentencing the prisoner. However, even if it had this power, a court would probably be hesitant to use it because the judge would not necessarily be an expert in trans health and wellbeing or appropriate prison housing placement.<sup>256</sup> Furthermore, “[c]ourts are usually very reluctant to limit the discretion of state prison officials to classify prisoners,”<sup>257</sup> and courts are generally “ambivalen[t] toward the issue of housing transgender inmates” and would rather not intervene.<sup>258</sup>

Placement policies should be developed by the BOP and individual DOCs. To ensure that these policies appropriately include case-by-case determinations analyzing a range of factors, emphasizing personal preference, Congress could include specific requirements in their legislation of what needs to be incorporated in the placement policies, much like they did with PREA.<sup>259</sup> The need for individualized determinations is essential, and the relevant factors for the consideration could include: the inmate’s preferred placement, their gender identity and gender expression, whether the inmate has a diagnosis of gender dysphoria, vulnerability to sexual assault and other safety needs, medical and mental health needs, criminal history and disciplinary record, safety needs of the prison community, and the inmate’s personal experiences with discrimination.<sup>260</sup> Most importantly, these

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255. See *supra* note 246; *infra* note 257.

256. See *supra* note 246.

257. *Prison Law*, HG.ORG LEGAL RES., <https://www.hg.org/prison-law.html> [<https://perma.cc/4WS5-U9K8>].

258. Etheridge, *supra* note 109, at 605; see *Kosilek v. Spencer*, 889 F. Supp. 2d 190, 205 (D. Mass. 2012), *rev'd*, 774 F.3d 63 (1st Cir. 2014) (finding that where to house a transgender inmate is a decision that must be made by the DOC, not by a court).

259. Again, there need to be more persuasive incentives tied to compliance with these standards to ensure that the act is actually successful at affecting a majority of states, unlike PREA. See *supra* note 119 and accompanying text.

260. Many of these factors are drawn from Minnesota’s transgender placement policy described in Part II.C. This is certainly not a dispositive list of the factors that could or should be used in these policies.

factors must include the inmate's own preference.<sup>261</sup> Assignment to this wing needs to be a voluntary placement, in order to avoid discriminatory segregation and a harmful "othering," such as when the Fluvanna Correctional Center for Women forced "butch" or more masculine women into a segregated wing and left them there with fewer resources.<sup>262</sup> Voluntariness in the placement is key because just as there are some TNGI individuals who will not feel comfortable living in all-male or all-female housing, there are also those, such as some trans women, who would prefer to live in the standard single-gendered housing.<sup>263</sup> One reason they may prefer the single-gendered housing is so that they can have a community with those who share their gender identity.<sup>264</sup> None of the placement factors should be entirely dispositive because it is important to make a holistic determination on what is safest for the inmate and the rest of the prison population.

C. THOUGH IT IS NOT PERFECT, THIS IS THE BEST SOLUTION GIVEN THE UNITED STATES' SYSTEM OF IMPRISONMENT

While this solution is not perfect, as these TNGI wings would still be part of an otherwise all-male or all-female prison, it is a step in the right direction towards satisfying the Eighth Amendment. Individual wings within the existing prisons are certainly more feasible in this nation's prison system rather than creating brand new facilities that are entirely for TNGI folks for a few reasons. Creating new facilities would be much more expensive than repurposing an existing structure.<sup>265</sup> The public would likely push back harder to a brand new prison that is going to exclusively service TNGI prisoners than to a smaller scale renovation for their benefit.<sup>266</sup> Furthermore, since it is

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261. Cf. LYDON ET AL., *supra* note 26, at 4 (explaining how harmful it is when TNGI inmates are forced to hide their identity and not be able to live openly). Just as there is grave harm when prisons force these inmates into one of the binary housing options, the prisons should not be able to force these same inmates into a separate TNGI option without accounting for the inmate's desires.

262. See *supra* Part I.C.4.a.

263. See Sosin, *supra* note 111.

264. See *id.*

265. Additionally, the United States already suffers from mass incarceration and over-imprisonment of minorities such that adding new prisons could potentially expand this issue and encourage more prison sentences. See *supra* Part I.C.1.

266. This is also not to say there will be no critics to repurposing an existing wing in a single sex prison. Because there is no perfect solution given the current status of the U.S. prison system, any action taken for accommodating TNGI prisoners will be met with criticism, ranging from valid arguments relating to how well these

difficult to know exactly how many TNGI prisoners are incarcerated in the U.S. prison system,<sup>267</sup> it is more realistic to provide smaller scale accommodations before assuming there is going to be enough demand for brand new facilities. This system of individualized wings will allow these individuals to express their identities without fear of being attacked by cis-gendered inmates and give them access to constitutionally adequate,<sup>268</sup> safe housing.

Another benefit of this system is that it can facilitate improved access for TNGI inmates to trans healthcare. Having a separate wing for TNGI prisoners will allow prisons to focus their trans healthcare resources in a centralized location and can ensure that these prisoners' needs are not overlooked.<sup>269</sup>

Significantly, what this Note has proposed is not a foolproof, perfect solution. Critics of separated housing for transgender inmates explain how placing transgendered people in a separate wing can exacerbate the "othering" concern, where these people are reminded that they are different from the "normal" prison population.<sup>270</sup> Segregated housing of transgender people leads to issues including stigmatization, lack of access to work opportunities and other privileges or resources, and encouraging further violence by correctional officers.<sup>271</sup> Thankfully, these negative consequence can be avoided, or at least minimized, when the separation occurs on a completely voluntary basis.<sup>272</sup> Additionally, concerns about "othering" do not eliminate the needs of TNGI individuals to feel physically, mentally, and emotionally safe, which can be best achieved through specialized TNGI wings. As described above,<sup>273</sup> this system will only work if the same resources that are available to TNGI inmates are available to prisoners not housed in the TNGI wing, because the "[p]eople who are separated should have access to the same programs, privileges, education and work opportunities as everybody else."<sup>274</sup> By providing the same opportunities and making assignment to the unit a wholly voluntary choice, prisons can combat the potential negative effects of segregated housing.

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accommodations serve the needs of TNGI individuals to crude arguments based on transphobic beliefs.

267. See *supra* note 102-103 and accompanying text.

268. See *supra* Part II.A.

269. See *supra* Part I.C.3.

270. See *FAQ, supra* note 145.

271. *Id.*

272. *Id.*

273. See *supra* Part III.A.2.

274. *FAQ, supra* note 145.

Focusing on the importance of prisoner voluntariness and having a third placement option eliminates the Eighth Amendment concerns addressed in Part II of this Note.<sup>275</sup> The main constitutional issues with current placement policies revolve around how the stark binary options are inadequate to provide safe housing for TNGI inmates and exacerbate the psychological suffering that they endure while imprisoned contrary to their gender identity.<sup>276</sup> Having an option that allows for inmates to live with others who have TNGI identities will counteract the suffering that comes from being forced into single-sex housing and lowers the safety risks. This means there would no longer be an objective, substantial risk of serious harm, and the first prong of an Eighth Amendment *Farmer* claim could not be met.<sup>277</sup> And as long as the placement is voluntary and involves the consideration of multiple placement factors, then the officers cannot be said to have acted with deliberate indifference (the subjective second *Farmer* prong).<sup>278</sup> Accordingly, this new solution eliminates the Eighth Amendment problems inherent within a binary placement system.

D. LIKELIHOOD OF SUCCESS: MINNESOTA VS. FEDERAL PRISONS, AND MINNESOTA AS A POTENTIAL PILOT PROGRAM

At this point, it should be unsurprising that this Note predicts that these proposed changes are much more likely to be successful in the Minnesota prison system rather than the federal system.<sup>279</sup> However, this still provides hope for long-term change as successful small-scale implementation can encourage a landslide of reform on a larger scale. Minnesota already has a method of recognizing non-binary identities legally, and it has a comprehensive policy that considers the unique situation of each person who is not cisgendered.<sup>280</sup> The state's practices have established the foundation for a natural graduation towards specialized housing; Minnesota's readiness and willingness to accommodate TNGI identities make it a prime candidate for implementation.

In contrast, under the current federal administration and policies, a change requiring a redesigned wing solely for the benefit of TNGI prisoners seems nearly impossible, and almost laughable.<sup>281</sup> Without the congressional action discussed in Section III.B, a new

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275. See *supra* Parts II.A, C.

276. See *supra* notes 173–77 and accompanying text.

277. See *supra* Part II.A.

278. See *supra* Part II.A.

279. See *supra* Part II.C.

280. See *supra* notes 224–26 and accompanying text.

281. See *supra* note 60 and accompanying text.



administration would have to take over and revert the classification policies back to what had been developed during the Obama administration, and then include language in the policy that addresses the existence of non-binary folks.<sup>282</sup> The Trump administration has made clear that they have no interest in promoting any policy that would better the lives of TNGI people.<sup>283</sup>

In order for a dramatic change like TNGI wings to take hold nationwide, there needs to be an established example to convince other states that this solution is feasible and effective. A good way to accomplish this is by implementing the new system in one state that can serve as a pilot program.<sup>284</sup> Minnesota is one such state that could serve as an effective test run, as the state already has policies in place that address the importance of recognizing TNGI identities, and it tends to have a liberal majority in the state government who would be more likely to favor such action.<sup>285</sup> Just as the Minnesota DOC implemented the current placement policy for transgender, gender non-conforming and intersex offender,<sup>286</sup> the new TNGI placement option and policies could be incorporated state-wide in Minnesota Correctional Facilities (“MCFs”) by the DOC and serve as a pilot program for this legislation.<sup>287</sup> DOC action could also implement the new unit

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282. See *supra* notes 156–58 and accompanying text.

283. See *supra* note 60 and accompanying text.

284. Cf. David Rudovsky, Opinion, *Philly’s Experiments with Progressive Criminal Justice Lend Evidence to Public Safety Debate*, PHILA. INQUIRER (Aug. 21, 2019), <https://www.inquirer.com/news/larry-krasner-criminal-justice-reform-progressive-20190821.html> [<https://perma.cc/ZL2C-P7P4>] (explaining how Philadelphia has instituted progressive policies that have effectively addressed public safety concerns and how this evidence can serve as an example for the nation).

285. See *Party Control of the Minnesota House of Representatives, 1951-present*, MINN. LEGIS. REFERENCE LIBR. (2020), <https://www.leg.state.mn.us/lrl/history/caucus?body=h> [<https://perma.cc/2Q9Q-UA7A>]; *Party Control of Minnesota State Government*, BALLOTPEdia (2020), [https://ballotpedia.org/Party\\_control\\_of\\_Minnesota\\_state\\_government](https://ballotpedia.org/Party_control_of_Minnesota_state_government) [<https://perma.cc/3EN4-3Y8U>].

286. See POL’Y 202.045, *supra* note 24.

287. Minnesota currently has ten different correctional facilities that house adults: Faribault, Lino Lakes, Oak Park Heights, Red Wing (though this is primarily a juvenile residential facility), Rush City, Shakopee, St. Cloud, Stillwater, Togo, and Willow River/Moose Lake (one facility with different designations based on security level). *Adult Facilities*, MINN. DEP’T CORR., <https://mn.gov/doc/facilities> [<https://perma.cc/4YK2-X97T>]; see *Willow River/Moose Lake Correctional Facility*, PRISONPRO, <http://www.prisonpro.com/content/willow-rivermoose-lake-correctional-facility> [<https://perma.cc/FZ7H-U8UL>]. However, two of these (Togo and Willow River) will be closing soon to address budget shortfalls. Liz Sawyer & Jessie Van Berkel, *Citing Budget Shortfalls, Department of Corrections to Close Two Minnesota Prisons*, STAR TRIB. (Aug. 3, 2020), <https://www.startribune.com/citing-budget-shortfalls-doc-to-close-two-minnesota-prisons/571994242> [<https://perma.cc/6NMM-RVGY>].

within one particular prison, such as how MCF-Faribault contains a special geriatric unit designed to house inmates in need of substantial nursing care.<sup>288</sup> If the experiment goes well—which would require demonstrating that it was administrable, was not too expensive, and was actually beneficial to the population it aims to serve—then other states and institutions could be encouraged to adopt similar legislation. Granted, relying on this process will mean reform on a national scale moves very slowly, but any successful implementation would serve as a positive beacon for change to come.<sup>289</sup>

### CONCLUSION

The rampant abuses that plague our prison system are exemplified through the plight of TNGI prisoners, and prisons struggle to figure out the best method for one of the most fundamental aspects of imprisoning these offenders: where and how to house them. The increasing prevalence of people who identify outside of the man and woman binary complicate the placement process. The emergence of different approaches on how to best address this issue all fall short of fully addressing the complexity of the issue, as these placement systems are all limited by only having male and female prisons as the final options. In order to provide constitutionally adequate housing for TNGI prisoners, legislation needs to be passed across the country so that after conducting individualized assessments of TNGI offenders, and with their consent, there will be a third option for placement: specialized transgender wings that provide the same resources as male and female wings.

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288. PROGRAM EVALUATION DIV., MINN. OFFICE OF THE LEGIS, AUDITOR, HEALTH SERVICES IN STATE CORRECTIONAL FACILITIES 4 (2014), <https://www.leg.state.mn.us/docs/2014/other/140287.pdf> [<https://perma.cc/N25T-4L4J>]; *Minnesota Correctional Facility-Faribault*, MINN. DEP'T CORR., <https://mn.gov/doc/facilities/faribault> [<https://perma.cc/N2DU-SFDR>].

289. See, e.g., Rachael A. Jaspersen, *Animal-Assisted Therapy with Female Inmates with Mental Illness: A Case Example from a Pilot Program*, 49 J. OFFENDER REHAB. 417 (2010) (detailing a pilot program's success in Utah State Prison that hopes to be a model for expanding its use in other jurisdictions).