

Transgender Inmates in Prisons: A Review of Applicable Statutes and Policies

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Abstract

Transgender inmates provide a conundrum for correctional staff, particularly when it comes to classification, victimization, and medical and health issues. Using LexisNexis and WestLaw and state Department of Corrections (DOC) information, we collected state statutes and DOC policies concerning transgender inmates. We utilized academic legal research with content analysis to determine whether a statute or policy addressed issues concerning classification procedures, access to counseling services, the initiation and continuation of hormone therapy, and sex reassignment surgery. We found that while more states are providing either statutory or policy guidelines for transgender inmates, a number of states are lagging behind and there is a shortage of guidance dealing with the medical issues related to being transgender.

Keywords

PREA, transgender, gender, inmate

Health care for inmates has long been a problematic issue for prison administrators¹ (Colopy, 2012; *Farmer v. Brennan*, 1994; Lloyd, 2005; von Dresner, Underwood, Suarez, & Franklin, 2013). The need to recognize and treat inmates with mental and psychological problems has further added to the health care deficits in corrections. Transgender inmates are particularly vulnerable to both physical and mental health

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care shortcomings in corrections. For example, in Oregon, several transgender inmates, who were incarcerated at different times, have recently filed lawsuits against the Oregon Department of Corrections (DOC; Denson, 2014; Willson, 2014). Issues with classification, housing, and treatment for transgender inmates are posing problems for the Oregon DOC. Inmates were denied access to medical treatment (i.e., hormone therapy) and the ability to practice more feminine mannerisms (i.e., dressing as a woman or shaving their legs). Despite several federal court rulings that gender dysphoria and gender identity disorder are legitimate medical issues requiring treatment, the Oregon DOC failed to address, and ignored, these transgender inmates' medical needs. Eventually, one inmate, after several attempts at autocastration and finally being successful, was finally sent to the Oregon State Hospital for treatment for her physical injuries and for her gender identity disorder (Willson, 2014).

This case from Oregon illustrates some of the issues that transgender inmates have historically encountered. Lawsuits alleging the mistreatment of transgender inmates in corrections have provided some of the impetus for the development of these laws. Moreover, research emanating from the Prison Rape Elimination Act (PREA) of 2003, specifically the development of PREA regulations which jails and prisons must adhere to in their treatment of LGBT (lesbian, gay, bisexual, and transgender) inmates, has also spurred change. It is from these catalysts that policies created by state corrections departments regarding the care and treatment of transgender inmates have recently begun to evolve. Although these are often criticized as being vague, inadequate, or restrictive (Alexander & Meshelemiah, 2010; Brown & McDuffie, 2009; Tarzwell, 2006), it does appear that state corrections departments are beginning to respond in a more sophisticated and humane way to the issues of transgender inmates. Since the filing of lawsuits, the Oregon DOC has created policies addressing the treatment of transgender inmates (Willson, 2014). The new policies regarding transgender inmates address issues with inmate classification, housing, and showering units that take gender non-conforming inmates into account when making housing and treatment decisions. As more states start to follow Oregon's example, transgender inmates can begin to feel some reprieve from the double impact felt by being transgender in a society and prison system that does not understand what it means to be transgender and the associated prison and health care issues.

The purpose of this article is to identify and analyze state statutes and state DOC policies regarding the classification, interaction with, and treatment of transgender inmates, specifically those who express feminine characteristics in male prison facilities. A discussion of these issues surrounding transgender inmates, their medical needs and legal requirements, and compilation of the various approaches to dealing with transgender inmates should provide policymakers, prison administrators, and scholars with a better understanding of the current state of affairs. To accomplish this purpose, we divide our article into four sections:

1. The definition of transgender, as this is paramount to our study;
2. A review of the literature pertaining to issues encountered by transgender individuals in prison, including court cases filed by transgender inmates and requirements of PREA;

3. An analysis of the state statutes and state DOC policies addressing the numerous issues that transgender inmates experience in prison, specifically as those relate to health care; and
4. Policy implications based on our findings.

Defining and Acknowledging Transgender Inmates

The way the legal system has defined transgender inmates in corrections has set the tone for their care. In the past, their status and needs have received little acknowledgement or attention mainly due to the lack of understanding of the issues they experience. The criminal justice system has had to reexamine the definition of sex, gender, and gender identity to determine what legal rights, if any, transgender people have and how they should be treated (e.g., see *Brooks v. Berg*, 2003; *Farmer v. Brennan*, 1994; *Farmer v. Moritsugu*, 1998; Jauk, 2013; Lloyd, 2005; Monro & Warren, 2004). Transgender inmates have presented a particular conundrum for correctional officials because one's gender at birth has been defined based on their genitalia (von Dresner et al., 2013). This synonymous pairing or interchanging of the terms and definitions of sex and gender, albeit inappropriate pairing and interchanging of terms, has always defined one's gender in life and in correctional facilities. Essentially, the traditional view of gender is that it is determined based on one's genitalia at birth (von Dresner et al., 2013). However, this traditional definition used for classification by gender is no longer sufficient in contemporary times. Transgender individuals do not see themselves as the gender they were assigned at birth. Instead, they wish to become and be treated as the gender they identify with (Jauk, 2013).

Gender Identity Disorder and Gender Dysphoria and Legal Definition Quandaries

No matter how a transgender plaintiff argues his or her case, he or she is likely to be met with harsher criticism by the court, experience a lack of basic legal protections due to the ambiguity concerning their transgender status, and be dismissed due to his or her gender nonconformity (Jauk, 2013; Lloyd, 2005; Monro & Warren, 2004). For instance, Chief Justice Rehnquist opined the term *sex* under the Civil Rights Act of 1964 was originally defined as, and limited to, either being male or female.

The binary definition of sex is inadequate for describing or classifying transgender people. The concepts of gender and gender identity can add to the definition and classification process for legal status and protections while in prison. By adding these concepts to the definition, it will be possible for classification to be more precise and to take into account the greater diversity of ways that inmates identity themselves. Gender is a subjective assessment of an individual based on the expression of traits he or she exhibits and societal perception of whether that trait fits a normative, or stereotypical, attribution of the expressed traits as male (masculine) or female (feminine) (Lorber, 2011). Transgender individuals' expression of gendered traits do not match the social normative expectation of their sex assigned at birth.² It is because of this

incongruity that gender and gender identity should be included in classification criteria and the binary definition of sex is inadequate for classification purposes.

The legal system is now recognizing that the binary definition is inadequate as it conforms to medical conceptions of gender and its classification. The medical field draws heavily upon tools developed by psychiatry, specifically the *Diagnostic and Statistical Manual of Mental Disorders (DSM)* published by the American Psychological Association, for definitions regarding transgender persons. According to the *Diagnostic and Statistical Manual of Mental Disorders* (5th ed.; *DSM-5*; American Psychiatric Association [APA], 2013) gender dysphoria emphasizes “gender incongruence,” and includes “cross gender identification” and “aversion towards one’s gender” as diagnostic criteria for adolescents and adults and a “strong desire to be the other gender” as a key attribute for children experiencing dysphoria (pp. 814-815). The *DSM-5* definition (for the complete definition, see *DSM-5*, APA, 2013, p. 451) appears to encompass the more vernacular terms of “transgender” and “gender identity.” Notably, the *DSM-5* recommends that “gender” be used in lieu of the term *sex* when referring to the diagnosis of gender disorders as the term *sex*, although it refers to male and female, includes sexual concepts and is too restrictive.

Lloyd (2005) argues that the law and the criminal justice system further victimize transgender people by forcing them to conform to sexual identities that are at odds with, or in stark contrast with, their self-identified and preferred gender identity. This is especially true when transgender people are open, or forced to be open, about being transgender. The law fails to account for individuals who do not fit perfectly into the social normative definitions (i.e., binary classification based on gender). Jauk (2013) concludes that the social and legal environments are structurally designed to allow and perpetuate violence and further victimization of transgender people.

Another issue with these definitions is that transgender people must seek professional medical treatment to be “diagnosed” with gender identity disorder or gender dysphoria. To receive any type of benefits, legal or medical, transgender people must expose their status to a judgmental society and forever be branded with a mental disorder (Colopy, 2012; Lloyd, 2005). The stigma of a mental health diagnosis follows an individual throughout his or her lifetime and ironically creates a barrier to finding employment and housing in a way which is analogous to the mark of a criminal record and how that stymies the ability to gain employment or housing (Lloyd, 2005; Rose, 2001). However, without this diagnosis, many transgender individuals are left with limited options for legal recourse when confronting discrimination in the workplace or experiencing harsher treatment and further victimization in the American prison system. And even with this diagnosis, transgender individuals are still demonized and victimized and left with limited options for legal protections and remedies.

The last major issue is how the criminal justice system utilizes these definitions to award protections to transgender persons. Most courts and Congress have taken a literal, or traditional, definition of gender. The Seventh, Eighth, and Tenth Circuit Courts of Appeal have ruled in favor of the binary definitions concerning sexual discrimination brought forward under Title VII of the Civil Rights Act of 1964 (Lloyd, 2005; Twing & Williams, 2010). Similarly, the Americans With Disabilities Act (ADA) and

the Federal Rehabilitation Act (FRA) excludes transgender, transsexualism, and transvestism from the protections outlined by these laws, despite the recognition of gender dysphoria in the *DSM-5* by the APA and the United States Supreme Court. Lower federal and state courts have used these rulings to justify the restriction of the expansion of legal protections to transgender individuals who make claims of injustice or mistreatment within the prisons.

A few courts have taken a new approach to awarding protections to transgender people, however. The Ninth Circuit Court of Appeals ruled in favor of expanding legal protections to transgender individuals by adding gender identity to the concept of sex (Colopy, 2012; Lloyd, 2005). The court stated that the discrimination endured by transgender individuals is related to their gender identity.

Transgender Inmates in Prisons

Just as there is a lack of legal protections for transgender citizens in the workplace (Rose, 2001; Thaler, 2010; Twing & Williams, 2010), the prison system has been notoriously lax in protecting such inmates. The hardships transgender inmates experience while in prison, and due to correctional practices, are difficult to justify with legitimate penological or prison control or safety interests. Because there is little education and training around the issues faced by transgender people, the prison system, much like the free community, is ill-prepared to accommodate the needs of transgender inmates (Tarzwell, 2006). Several themes pertaining to transgender inmates' experiences while in prison have been identified and these involve problems with classification, victimization, and a lack of adequate/appropriate medical treatment.

Classification

The classification process performed at the intake center for a prison starts the long road of hardship for transgender inmates. Inmates are strip-searched in front of both correctional staff and (sometimes) other inmates for security reasons, and to determine their gender via their genitalia (Scott, 2013; Sexton, Jenness, & Sumner, 2010; Tarzwell, 2006). In turn, inmate genitalia, rather than gender identity, is used to classify transgender inmates as male or female. There are two major problems with this process. First, correctional facilities, just like most courts, use a binary sex-based classification system based on genitalia. While a transgender inmate may have male primary sex organs, their gender identity and expression may be female. As previously discussed, utilizing only the genitalia-based classification system does not provide a meaningful or accurate classification.

Second, the classification process forcibly reveals, or "outs" an inmate's transgender status to correctional staff and other inmates. The classification is usually performed by correctional staff. Most correctional staff have very little, if any, education or training on how to recognize or classify an inmate as transgender (Tarzwell, 2006). This gives rise to potential abuse and derogatory comments from both correctional staff and inmates alike. Scott (2013) provides a description of a male-to-female (MTF)

transgender inmate's experience during the classification process. During this process, multiple correctional staff addressed the inmate as "titty man" and made derogatory references about her breasts. Also, this inmate was left undressed in front of the other inmates going through the intake and classification process, some of whom made similar remarks.

Victimization

Both problems with the classification process lead directly and indirectly to the victimization, or potential victimization, of transgender inmates by other inmates and correctional staff. Inmate-on-inmate violence in prisons varies by facilities and by inmate. For transgender inmates in some facilities, it can be a common experience. The violence, and subsequent victimization, can be attributed to numerous factors, including environmental culture, administration, and inmate characteristics (Jauk, 2013; Jenness & Fenstermaker, 2014; Scott, 2013).

The prison environment itself is a contributing factor. Existing within the prison is a hierarchical structure predicated on a hypermasculine culture (Lutze & Murphy, 1999; Okamura, 2011; Tarzwell, 2006). Inmates rank-order one another based on their actions and how masculine those actions are perceived. Transgender inmates who express more feminine characteristics are at a higher risk of being victimized compared with inmates who act according to the "male" gender characteristics. Because of their feminine gender expression and identity, and female physical appearance, transgender inmates are classified as "queens" and are beaten, raped, and made to be subservient to other inmates much more than other inmates (Mazza, 2012; Okamura, 2011; Sexton et al., 2010). Transgender female inmates experience this abuse because the prison system does not take into account gender expression and identity during housing placement (see, for example, *Farmer v. Brennan*, 1994).

Consequently, to survive this grueling prison experience, transgender inmates must seek protection from other inmates or they may ask to be placed, or be placed involuntarily, in segregation units. When in the general population, transgender inmates may seek to form protective pairings with inmates who rank higher in the hypermasculine structure (Iyama, 2012; Scott, 2013). A protective pairing is defined as a partnership between a transgender inmate and a higher ranked inmate who provides protection from the general population. However, this protection comes at a cost. While protection is granted from the general population, transgender inmates are subject to victimization by the protective partner. They are still beaten, raped, and forced to be subservient to maintain the protective pairing.

Correctional staff contribute to this victimization of transgender inmates. This can be purposeful, as evidenced by the excerpt from Scott (2013), or unintentional, due to the lack of education and training provided to correctional staff and the dearth of resources available to them to accommodate transgender inmates (Jenness, 2010; Jenness & Fenstermaker, 2014; Tarzwell, 2006). The use of administrative segregation³ or protective custody to protect transgender inmates from victimization is

often employed (Smith, 2012). Victimization still occurs despite the high security and the isolation of segregation units. For example, there have been accounts of other inmates forcing their way into protective custody cells and beating and raping transgender inmates (Smith, 2012; Tarzwell, 2006).

More disturbingly, the bulk of the victimization in protective custody is conducted by the correctional staff. First, the use of protective custody, though it may be voluntary or used as a means of protecting the trans inmate from abuse, is an indirect form of victimization perpetuated by correctional staff. Being locked away in solitary confinement exacerbates extant mental health issues (*Farmer v. Moritsugu*, 1998; Pizzaro & Stenius, 2004). For example, in *Farmer v. Moritsugu* (1998), Dee Farmer, a transgender inmate, challenged the use of administrative segregation (protective custody) under the Eighth Amendment's cruel and unusual punishment clause. While in protective custody, Farmer experienced the psychological trauma of being placed in isolation. Despite numerous requests to be removed from isolation, correctional staff ignored these requests and left Farmer in isolation. The court held that the prison's penological interest and duty to maintain order and safety ranked higher than the trauma she experienced while in isolation.

Second, the mandatory strip search and pat-downs required to enter and leave protective custody serve as a direct form of victimization by correctional staff. In essence, transgender inmates face the same humiliation in administrative segregation, even when used for protective custody, as they did during the intake and classification process. Gropings and unwanted and unnecessary sexual contact by correctional staff further humiliate and victimize transgender inmates. Correctional staff are required to check all areas to ensure prison safety. However, in most instances, this practice becomes sexualized when correctional staff focus on certain bodily areas for extended periods of time, and by pressing the transgender inmate against the wall with their bodies (Gallagher, 2011; Scott, 2013). Add to this the derogatory comments arising from the perception that transgender inmates choose their gender identity disorder, and the refusal by correctional staff to address transgender inmates by the pronoun which fits their gender identity, one can see why the correctional environment can be rife with victimization and abuse (Faithful, 2009). The lack of education and training⁴ as well as respect for inmates and their needs leads to this purposeful and unintentional victimization that does not serve a legitimate penological interest, nor does it promote prison control or safety.⁵

Medical Treatment

The transgender population has its own set of health issues. Many transgender inmates have poor health arising from substance abuse, poverty, and mental health disorders which existed before incarceration (Alexander & Meshelemiah, 2010; Brown & McDuffie, 2009; von Dresner et al., 2013). Typically they have received little, if any, treatment for their conditions, including diagnostics. If their gender identity disorder or gender dysphoria are left untreated, serious medical issues such as depression, suicidal thoughts, and autocastration attempts can occur (Terry, 2015).

Identification and standards of care protocols do exist. In the 1970s, Harry Benjamin pioneered transgender care by creating two instruments: the Gender Disorientation Scale (GDS) and the Standards of Care (SOC; Meyer, Bockting, Cohen-Kettenis, Coleman, DiCeglie, Devor, et.al., 2001). The GDS was designed to classify the level of transgender thoughts and tendencies. The scale has six categories ranging from the occasional thought and practice of cross-dressing to the full-immersion in transgenderism, where the person desires to and has become the opposite sex through sexual reassignment surgery.⁶

The second instrument, the SOC, provides detailed information on how to reconcile the incongruities between a person's gender assigned at birth and their gender expression and identity later in life. Five progressive stages of treatment were identified for health practitioners: diagnostic assessments, psychotherapy, real-life experience as living as the opposite sex through dress and mannerisms, hormone therapy, and, if desired, sexual reassignment surgery (Gordon, 1991; Levine, 1999; World Professional Association for Transgender Health's Standards of Care for Gender Identity Disorders, 2009). When these instruments are used together, health practitioners, either in the community or in prison, can identify the issue that transgender inmates are experiencing and match the individual to an appropriate level of treatment.

Prison health practitioners may use these instruments, especially the SOC, for treating transgender inmates who actually are, or believed to be, experiencing gender identity disorder (von Dresner et al., 2013). First, access to care may be limited, or correctional staff may not refer transgender inmates for care, instead employing the use of protective custody. As noted above, correctional staff receive very little, if any, education and training pertaining to transgender inmates' needs or the issues associated with being transgender (Iyama, 2012; Jenness, 2010; Jenness & Fenstermaker, 2014). The humiliation and victimization experienced by transgender inmates when in protective custody as a result of the mandatory strip searches and pat-downs to leave segregation to visit the medical wing of the facility is a major barrier to access to health care. Many transgender inmates do not wish to go through this experience to receive the treatment they need (Scott, 2013; Smith, 2012). However, serious medical issues can develop or worsen for transgender inmates in protective custody who do not receive proper medical care as, depending on their degree of transitioning or prior care, they may be in need of medical attention. Failure to treat symptoms associated with gender identity disorder can result in self-treatment such as suicide or autocastration attempts as means to find reprieve from their suffering.

Second, some prisons have tried to require a diagnosis of gender identity disorder in order for transgender inmates to receive treatment specifically designed for those who suffer from gender identity disorder (Alexander & Meshelemiah, 2010; von Dresner et al., 2013). Inmates must be diagnosed by medical personnel. Inmates without a diagnosis could be denied treatment for their gender identity disorder (see *Brooks v. Berg*, 2003; *Meriwether v. Faulkner*, 1987). The problem is that diagnoses are often ignored or rejected. Some correctional staff believe these requests are frivolous and that inmates were only seeking body altering procedures for cosmetic purposes. Therefore, transgender inmates who are incarcerated during their transition period

may not receive the treatment they need to complete the transition or, at the very least, maintain their transition until release. The same medical issues that were previously noted may set in and cause excruciating agony for these individuals, especially if hormone therapy is stopped abruptly (Alexander & Meshelemiah, 2010; Brown & McDuffie, 2009; *De'lonta v. Angelone*, 2003; *Phillips v. Michigan Department of Corrections*, 1990). While both barriers present potential issues for the correctional facility and its staff, the harm done to the transgender inmates far exceeds any legitimate penological interest, order maintenance, and safety concerns within the facility walls.

The PREA

No argument exists that facilitating, condoning, or allowing sexual assault to occur within a correctional facility is acceptable. The passage of the Prison Litigation Reform Act of 1995 (PLRA) established specific conditions inmates needed to meet to bring forward a suit against correctional facilities, in effect constructing a barrier to consideration of such an issue. Most controversial within the act was the grievance-exhaustion provision establishing that inmates exhaust all internal facility grievance procedures (Buchanan, 2007). Claims failing to demonstrate exhaustion of all internal requirements were dismissed. In addition, as Buchanan (2007) and Golden (2004) note, navigating legal requirements and meeting the threshold of the physical injury requirement specified in this law imposes significant barriers to the reporting of sexual assaults. However, this Act was beneficial in that it required that states report the perpetrator, the victim, the amount, types, and disposition of cases of sexual assault in prisons and jails. In this sense, it provided a foundation for what was to come under the PREA.

Before the passage of the PLRA, some commentators have claimed that there appeared to be a state of societal amnesia (or ambivalence) to the harm befalling inmates (Buchanan, 2007; Robinson, 2011). It was not until the release of the report "No Escape: Male Rape in U.S. Prisons" that greater attention was paid to the issue (Human Rights Watch, 2001). In fact, this report is credited with establishing a congressional inquiry into the state of sexual assault in correctional facilities, prompting the creation of the PREA of 2003 and the National Prison Rape Elimination Commission, which PREA established (Robinson, 2011).

With the broad task of establishing standards to eliminate prison rape, the act did not reach final implementation until 2012. The delayed implementation is attributed to conflicting perspectives on key language within the standards (Robinson, 2011). Despite its namesake, PREA regulates detention rules for all state and federal⁷ public correctional institutions, including jails, prisons, detention, and community confinement facilities. These standards regulate a broad range of local, state, and federal corrections department procedures aligning them toward best practices for producing a safer environment for residents and correctional staff. Categories of these standards include preventive processes, investigative procedures, data collection and auditing, and compliance. States risk forfeiting 5% of federal funding, allocated for prison purposes, if their

correctional facilities, including jails, prisons, and detention facilities, fail to comply with PREA regulations. However, states demonstrating good faith toward compliance are able to retain federal funding. Noncompliance forfeiture does not apply to private correctional facilities. At the time of this writing in 2015, all but 4 states (Alaska, Arkansas, Idaho and Utah) are either fully compliant (10 states) or are actively seeking compliance (Boone, 2015).

As regards transgender inmates and detainees, key provisions regulate a variety of situations, including (a) cross-gender viewing and searches (§ 115.15⁸), (b) employee training on effective communication strategies (§ 115.31), (c) screening for victimization risks and abusiveness (§ 115.41), (d) use of the screening information (§ 115.42), and (e) protective custody (§ 115.43). Specific to cross-gender viewing and searches, facilities may not conduct a physical search of the inmate's genitals for screening. Instead, inmates may be asked to provide their gender. If an inmate refuses to disclose this information, the facility is barred from disciplining the inmate, and must ascertain the inmate's gender via alternative means, such as reviewing medical records or obtaining confirmation from a private medical practitioner who has conducted a general medical examination. The importance of this process is to properly screen and classify residents during the intake process evaluating victimization risks and proclivities toward violence. Consideration of the inmate's views of risk and gender identification must occur when completing a residential assignment.

PREA includes provisions limiting residential assignment based exclusively on anatomical classifications. Instead, a facility must act in good faith to consider the inmate's gender identification and view of risk when making assignments (§ 115.42 [g]). This includes, if requested, providing the opportunity for the inmate to shower separately from other inmates. Compliance with this provision requires continuing assessment, which must occur at least biannually. Residential assignments then must be voluntary and assignment in segregated units may not use LGBT status as the sole means of assignment. Rather, agencies must include additional factors when determining residential assignment. Under certain criteria, involuntary residential assignment in segregated units may occur, but only on an individual basis, and these inmates should receive the same opportunities and program access as other units.

Contraband searches, including cross-gender strip searches and visual body cavity searches, may only occur under exigent circumstances or when performed by medical practitioners. Unfortunately, standards regulating cross-gender searches, including pat-down searches, do not specifically include language offering inmates the choice to select the gender of the person conducting the search. Instead, the language states that cross-gender searches be conducted "in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs" (§ 115.15).

Clearly, the issue of transgender inmates is a complex one, with courts having provided limited guidance until recently, and the Supreme Court having only tangentially dealt with the specific issues relevant to transgender inmates and their constitutional rights. State legislatures and corrections administrators have been left to sort out the requirements, based on their interpretation of court rulings and the mandates of PREA.

We provide in the next section of this article a summary and analysis of state statutes and state DOC policies addressing the issues raised by transgender inmates.

Method

This analysis seeks to build upon a previous study (Tarzwell, 2006). Specifically, we seek to examine whether any changes in statutes and policies have been made since the content analysis conducted by Tarzwell (2006). Data for this study were gathered through a content analysis of the statutes from all 50 states. Statutes for each state were located through the LexisNexis Academic and WestLaw information repositories. We examined each state's statutes, to determine whether a provision existed that dealt generally with inmates and their medical needs, and specifically with the medical needs of transgender inmates. Building upon prior research on the medical needs of transgender inmates, we sought to determine whether there were statutes concerning the following:

1. Classification,
2. Medical diagnosis of gender identity disorder,
3. Counseling,
4. Hormone therapy—both initiation and continuation, and
5. Sex reassignment surgery.

We focused on these issues as they are the forms of treatment and medical care that transgender inmates commonly file lawsuits to obtain (see, for example, *Brooks v. Berg*, 2003; *De'lonta v. Angelone*, 2003; *Farmer v. Brennan*, 1994; *Farmer v. Moritsugu*, 1998; *Kosilek v. Maloney*, 2002; *Maggert v. Hanks*, 1997; *Meriwether v. Faulkner*, 1987; *Phillips v. Michigan Department of Corrections*, 1990; *Praylor v. Texas Department of Criminal Justice*, 2005; Tarzwell, 2006).

In addition to examining the 50 state statutes, we sought to locate any relevant state DOC policies. We did this in an effort to more completely cover the topic. A number of state DOCs have created policies that address the issues related to transgender inmates, even in the absence of state laws. These policies may have been developed as the result of lawsuits or by progressive correctional administrators seeking to get out ahead of the situation before problems arise. We examined state DOC websites and contacted each state DOC to obtain any relevant policies.

Variables and Analytic Technique

For this study, we utilized content analysis to assess whether a state statute and state DOC policies addressed one or more of the issues transgender inmates experience. Specifically, the variables in this study were dichotomous measures (yes or no) that indicated whether or not a state statute or state DOC policy addressed issues of classification, diagnostics for gender identity or gender dysphoria, counseling services, hormone initiation, hormone continuation, or sex reassignment surgery. For example,

if a state statute or state DOC policy addressed the issue of diagnostics without addressing hormone therapy, a “yes” or “Y” was placed into the diagnostics column while a “no” or “N” was placed in the hormone therapy column. If the statute or policy was ambiguous or was not available, a “U” for unconfirmed was placed into the column. This was done to account for the possibility of a statute or policy existing. A “no” or “N” was only placed into the columns if the statute or policy did not address one of the five issues.

Discussion

As shown in Table 1, a large majority of the 50 states have enacted, in some form, policies regarding transgender inmates that conform with the relevant provisions of the PREA of 2003. However, PREA has not compelled states to adequately address the issues surrounding the protection, classification and placement, or treatment of transgender inmates. Recently, and in many cases in reaction to reports of sexual abuse, many states’ DOC have been drafting policies that address the special needs of transgender inmates (Boone, 2015).

Currently, 39 states have started to address the unique situation that transgender inmates pose for the correctional system. Of these states, a majority recognize the condition and diagnosis of gender identity disorder and/or gender dysphoria. Similarly, some states have adopted a screening process in some form or another, such as interviews and examinations by medical personnel or a specialized board.

Treatment policy differs across the states that have written policies. Some states follow the treatment criteria laid out by the *DSM-5* for gender identity disorder or gender dysphoria. Most policies serve to enhance the PREA guidelines by adding to the protections awarded to cisgender⁹ inmates (those who are not transgender) to transgender inmates. However, when it comes to offering counseling, hormone treatment (either initiation or continuation), and sex reassignment surgery, the states take a variety of approaches.

According to the SOC developed by Benjamin (Meyer et al., 1977), counseling is part of the first two stages of care. Counseling can be used for two things: diagnostic appointments (Stage 1) and psychotherapy (Stage 2). Thirty-seven states allow for a counseling appointment for transgender inmates. These counseling appointments are utilized to help already identified inmates cope with gender identity disorder or gender dysphoria. Some states also use these appointments to help determine if an inmate is transgender. Either way, the inmate is at least given some form of treatment plan which varies by the individual and their circumstances, pre-existing treatment (if any), and the level of suffering the inmate is experiencing. Seven states do not allow for counseling while 6 states’ policies concerning counseling are unknown.

As indicated in Table 1, the greater the cost for treatment options, the greater the likelihood that treatment will be denied. Just over half of the states (28) do not allow transgender inmates to obtain treatment once incarcerated. Only 13 states allow for the initiation, or beginning, of hormone treatment (Stage 4 of the SOC). Interestingly, more states (21) allow the continuation of hormone therapy. However, 20 states do not

Table 1. State Statutes and Department of Corrections Policies Regarding Medical Services and Treatment for Transgender Inmates.

State	Date	Definition/classification	Policy	CC	HI	HC	SRS
Alabama	2005	Diagnosis of GID ^a	Provide appropriate treatment to inmates meeting the criteria for <i>DSM-IV</i>	Y	N	Y	N
Alaska	U	U	U	U	U	U	U
Arizona	2010 2012	Interview and screening Case-by-case approach	Inmate gender has to be determined by medical practitioners with or without the inmate's consent if an inmate has clear visible physical characteristics that warrant gender reassignment	Y	N	Y	Y
Arkansas	2014	Treatment provided on an individual basis, must be determined by the GD Management and Treatment Committee	Provide appropriate treatment to inmates that meets the criteria for GD in the <i>DSM-IV</i>	Y	Y	Y	Y
California	2007	Diagnosis of GID	The CCHCS and CDCR shall provide necessary treatment that meets constitutional requirements for inmates who are diagnosed with GID, using the <i>DSM-IV</i>	Y	Y	Y	Y
Colorado	2013	Diagnosis of GID	Provide appropriate treatment service to offenders identified as meeting the criteria for a diagnosis of GID	Y	Y	Y	Y
Connecticut		N	N	N	N	N	N
Delaware	2013	Diagnosis of GID on a case-by-case basis through interviewing and medical screening	Provide guidance for housing, medical, and mental health treatment for transgender inmates and to avoid any discriminatory actions against transgender inmates and also takes into account PREA 2003, and treatments are based on individual assessment and needs	Y	Y	Y	N
Florida	N	N	N	N	N	N	N
Georgia	2001	Inmates are medically screened upon intake to determine their sexuality and assigned accordingly	Inmates who are medically screened and identified as transsexual or in the process of attempting to get sexual reassignment surgery will be properly assigned and cared for. The policy is limited to maintenance of the inmate's transgender status	Y	N	Y	Y

(Continued)

Table 1. (Continued)

State	Date	Definition/classification	Policy	CC	HI	HC	SRS
Hawaii ^b	2007	Diagnosis of GD	GD as a medical condition can only be established by a primary care physician, psychiatrist, or psychologist and no inmate shall be allowed to begin sex hormone treatment while incarcerated	N	N	Y	N
Idaho	2011	Diagnosis of GID	The policy has a standard operating system (SOP) in place to ensure that guidelines for the diagnosis, treatment, management, and placement of offenders diagnosed with GID are strictly followed and also benefits from all other medical treatment accorded other inmates	Y	Y	Y	Y
Illinois	N	N	N	N	N	N	N
Indiana	2010	N	Policy not specific to transgender inmates. Focuses on providing general health care for inmates	N	N	N	N
Iowa	2013	N	Inmates who pose a health and safety threat to themselves or other inmates shall be housed in segregation and shall be provided necessary health services and mental treatment as deemed fit	N	N	N	N
Kansas	2004 2010 2011	U	Policies provide only essential medical services	U	U	U	U
Kentucky	2014	Transgender means a person whose gender identity is different from the person's assigned sex at birth as established in 28 C.F.R. & 115.5	Provides guidance on how to identify and communicate effectively with transgender inmates, searches, classification, placement, and protection from sexual abuse	Y	U	U	U
Louisiana*	2003	N	N	N	N	N	N
Maine*	2013	Inmates with different sexual orientations are adequately placed and protected from any form of sexual abuse or harassment	Protects inmates from any form of discrimination based on sexual orientation	Y	N	N	N
Maryland*	2012	U	Protect inmates from any form of sexual harassment and discrimination	U	U	U	U
Massachusetts	2012	Diagnosis of GID	The Policy ensures that inmates with GID are appropriately diagnosed, treated, and managed based on individual needs and unique adjustment issues.	Y	Y	Y	N

(Continued)

Table 1. (Continued)

State	Date	Definition/classification	Policy	CC	HI	HC	SRS
Michigan	2010	Diagnosis of GID	The Policy encourages a prompt and thorough initial medical and mental health evaluation and followed by individual management plan	Y	Y	Y	Y
Minnesota	2013	Multiple definitions such as transgender or transsexual reviewed by transgender committee	The Policy ensures that the placement and treatment of transgender inmates takes into consideration health and safety issues for the offender and management and security issues	Y	Y	Y	N
Mississippi	U	U	U	U	U	U	U
Missouri*	2013	Clear definition of Intersex and Transgender inmates	The policy is based on PREA and provides for the protection of all inmates including intersex and transgender inmates from any form of sexual harassment and abuse.	Y	N	N	N
Montana	U	U	U	U	U	U	U
Nebraska	U	U	U	U	U	U	U
Nevada*	2013	U	Policy provides for the protection of all inmates from any form of sexual harassment and abuse by inmates or staff	Y	U	U	U
New Hampshire	2014	Diagnosis of GD	Establishes a standard of care for the treatment of GD on a case-by-case basis, to inmates and patients identified as meeting the criteria for a diagnosis of GD	Y	Y	Y	Y
New Jersey*	2014	Addresses the special needs of inmates and takes gender into consideration	It establishes a Zero-Tolerance Policy to the sexual assault/rape of offenders while in the custody and care of the department of corrections.	Y	N	N	N
New Mexico	2013	Classification of inmates based on gender and special needs	The policy focuses on classification and placement of inmates based on gender, special needs, risk to self or others, and the provision of mental health	Y	N	N	N
New York	2013	Diagnosis of GID	The Policy recognizes GID as defined in the <i>DSM-IV-TR</i> and can be established prior to or subsequent to admission by a trained mental health professional with expertise in GID	Y	Y	Y	N
North Carolina	2013	Diagnosis of GD	The Policy ensures that a professionally appropriate, evidence-based, and legally sound policy is in place to ensure the physical and mental well-being of those with GD.	Y	Y	Y	N

(Continued)

Table 1. (Continued)

State	Date	Definition/classification	Policy	CC	HI	HC	SRS
North Dakota ^{a,c}	2009 2011	Clear definition of intersex and transgender	All inmates are expected to be treated equally with regard to medical treatment but inmates do not have a right to elective medical care. Also, the special needs of transgender inmates are met.	Y	N	Y	N
Ohio ^d	2013	No clear definition; reviewed by relevant professions	The Policy establishes guidelines for health care services to all inmates and takes gender change into consideration	Y	N	Y	N
Oklahoma [*]	2014	Defines transgender	Builds on PREA and provides for the protection of all inmates from sexual harassment and abuse, and in identifying and placement of transgender inmates	Y	N	N	N
Oregon ^e		N	N	N	N	N	N
Pennsylvania [*]	2014	Identifying inmates as transgender	The policy builds on PREA 2003 and ensures that inmates are protected from sexual harassment and abuse, receive health care services, mental health and to aid in the classification and placement of transgender inmates	Y	N	N	N
Rhode Island ^f	2007	N	N	N	N	N	N
South Carolina ^g	2012 2013	No definition	The policy ensures that state funds cannot be used for hormone therapy, and sexual reassignment surgery; but hormonal therapy can be continued for inmates on hormonal therapy at the time of their incarceration	N	N	Y	N
South Dakota	U	U	U	U	U	U	U
Tennessee	2011 2014	N	For Classification purposes of inmates, prevention from sexual abuse and discrimination, and access to health care services	Y	N	N	N
Texas	2013	Intersex condition, transgender, GID, or GD	The Policy ensures that offenders with GID are evaluated by medical and mental health professionals and treatment is administered on a case-by-case basis	Y	Y	Y	N
Utah ^h	U	U	U	U	U	U	U
Vermont [*]	2014	Defines intersex	The policy builds on PREA and ensures the safety of any individual confined to their facilities and has a zero-tolerance standard for sexual abuse even in the face of consent as it strongly believed that inmates are unable to provide consent	Y	N	N	N

(Continued)

Table 1. (Continued)

State	Date	Definition/classification	Policy	CC	HI	HC	SRS
Virginia	2013	No clear definition and very little focus on transgender or intersex offenders	The Policy focuses on determining the offender's genital status for classification, placement, and possible treatment	N	N	N	N
Washington	2013 2014	Clear definitions and diagnosis of transgender and intersex inmates	They Policies focuses on health, mental health, and PREA, and ensures that transgender inmates are classified, adequately housed, protected from any form of discrimination, sexual harassment and abuse, and receive the necessary health care and hormone treatment	Y	Y	Y	N
West Virginia*	2013	N	Policy builds on PREA and ensures that inmates are protected from discrimination and any form of sexual harassment or abuse by other inmates or correctional officers	Y	N	N	N
Wisconsin ¹	2012 2014	Diagnosis of GD and clear definition of transgender	The policies build on PREA, helps in the classification of transgender inmates, provides a definition for transgender inmates, provides health care and mental health, and protects inmates from any form of sexual abuse and discrimination	Y	N	N	N
Wyoming	2013 2014	Transgender, Intersex	Policy focuses on classification of inmates; transgender or intersex inmates are assessed at least twice a year to review threats and placement	N	N	N	N

Note. States marked with asterisk address PREA 2003 but no Specific Policy on Transgender Issues. CC = counseling consult; HI = hormone initiation; HC = hormone continuation; SRS = sex reassignment surgery; GID = gender identity disorder; *DSM-IV* = *Diagnostic and Statistical Manual of Mental Disorders* (4th ed.; American Psychiatric Association [APA], 1994); Y = yes; N = no; U = unconfirmed; GD = gender dysphoria; CCHCS = California Correctional Health Care Service; CDCR = California Department of Corrections and Rehabilitation; PREA = Prison Rape Elimination Act; *DSM-IV-TR* = *Diagnostic and Statistical Manual of Mental Disorders* (4th ed., text rev.; APA, 2000). DOC = Department of Corrections.

¹*Diagnostic and Statistical Manual of Mental Disorders* (5th ed.; *DSM-5*, APA, 2013) disorder.

²Department of Public Safety. Inmates shall be responsible for medication costs.

³Only found Correctional Medical Training manual which does not include medical treatment on transgender inmates.

⁴Department of Rehabilitation and Correction.

⁵Oregon DOC submitted the draft policy on management of transgender inmates in April 2014; http://www.oregonlive.com/politics/index.ssf/2014/04/transgender_prisoners_in_orego.html

⁶No public access to medical treatment information at all.

⁷Original source: http://www.scsenatehouse.gov/sess119_2011-2012/bills/1062.htm

⁸No public access to medical treatment information at all.

⁹Wisconsin Statute § 302.386(5m) prohibited certain medical treatment for transgender inmates.

allow for the continuation of hormone therapy. In 10 states, it is unknown how the DOC handles hormone initiation or continuation, as we were unable to locate a relevant policy or statute.

Last, very few states (7) allow for sex reassignment surgery. Sex reassignment surgery is a last resort for many transgender persons. Some are able to find the reprieve they desperately seek through lived real-life experiences, living as the opposite sex and gender, or through hormone therapy; but for some persons, this may not be enough to quell the desire to be the opposite gender. While some court cases have given medical treatment rights to transgender inmates (*Brooks v. Berg*, 2003; *Meriwether v. Faulkner*, 1987; *Phillips v. Michigan Department of Corrections*, 1990), sex reassignment surgery still has not been granted as a method to ease the discomfort trans inmates experience while incarcerated.

The cases of *Kosilek v. Maloney* (2002) and *Maggert v. Hanks* (1997) illustrate the barriers to health care for transgender inmates, specifically the lack of definitive policy. Medical treatment must be granted; however, not all options must be provided. The weak definition of “adequate care” in many laws along with both the potential negative public image and costs associated with treating transgender inmates hinders access to vital care. The trans inmates who are unable to find reprieve through psychotherapy from their discomfort due to their gender incongruity (where most state DOC’ level of care stops) are not at this juncture further treated. The costs of other medical procedures that state DOC are required to provide (e.g., major surgery or continual hormone therapy) cost substantially more than short-term psychotherapy.

Policy Implications

It is clear from a review of the state statutes and DOC policies that there is significant variation in the options available to transgender inmates, depending on the state in which the inmate is incarcerated. A number of states follow the treatment criteria laid out by the *DSM-5* for gender identity disorder or gender dysphoria. However, when it comes to offering counseling, hormone treatment (either initiation or continuation), and sex reassignment surgery, the states take a variety of approaches.

Although a significant number of states allow for a counseling appointment for transgender inmates, several do not. It is imperative that states have clear treatment criteria to guide correctional staff and medical personnel who are dealing with transgender inmates. Following such criteria will reduce the likelihood of lawsuits and improve the quality of life for transgender inmates. For instance, refusing hormone therapy, or refusing to continue it, can lead to serious medical issues.

Not surprisingly, given the difficult budget situation faced by almost all states and state DOCs, the greater the cost for treatment options, the greater the likelihood that treatment will be denied. A majority of the states do not allow transgender inmates to obtain treatment once incarcerated, and only 13 states allow for the initiation of hormone treatment and 20 states do not allow for the continuation of hormone therapy. Only 7 states provide for sex reassignment surgery. Although some court cases have given medical treatment rights to transgender inmates, sex reassignment surgery still

has not been granted as a method to ease the discomfort trans inmates experience while incarcerated. Nonetheless, DOCs must come to grips with the medical needs of transgender inmates, regardless of the cost. Clear policies delineating when medical treatment such as hormone therapy or sex reassignment surgery need to be in place, to guide state DOCs and to reduce the likelihood of inmate lawsuits.

The adoption of policies for transgender inmates is certainly a step in the right direction. However, until all states have written policy that addresses the protection, identification and classification, and treatment of transgender inmates, there is still much work to be done to take care of these inmates.

Notably, a perusal of Table 1 does not indicate that there is a regional pattern to the responses by states and their prisons to the issues under examination here. There are states in the West (i.e., Alaska, Montana, Nevada, Oregon, Utah), Midwest (i.e., Illinois, Indiana, Iowa, Kansas, Nebraska, South Dakota), Southeast (i.e., Florida, Louisiana, Maryland, Mississippi, Tennessee, West Virginia) and the Northeast (i.e., Connecticut, Rhode Island) who at the time of this research had yet to determine, as indicated by a U or a N in the Definition/Classification column, how or whether to resolve what treatments and approaches are appropriate in handling trans inmates. It appears likely that as states respond to the new federal guidelines required for PREA compliance, most will more clearly indicate the approach they wish to take to meet the needs of trans inmates.

Conclusion

Since the United States Supreme Court acknowledged, in *Estelle v. Gamble* (1976), that corrections administrators have a duty to provide a minimal level of medical care to inmates, courts and prison officials have struggled to define the parameters of this general constitutional requirement. Inmate lawsuits and the passage of the PREA (2003) have addressed some of these issues, but states and their prisons still must determine what they must do for transgender inmates.

Transgender inmates raise the issue of what sort of medical treatment, counseling, and housing prisons are required to be provided. As society becomes more sensitive to the needs of transgender people, prisons are being forced to acknowledge their existence and unique needs and vulnerabilities as well. This review of the current status of the rights of transgender inmates reveals that state corrections departments still have a long way to go. Access to medical care varies dramatically among the 50 states, an unacceptable situation when the Constitution is supposed to apply with equal effect across the country.

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Notes

1. Health care has been a problematic issue for both inmates and prison administrators. However, as this is a statute and policy analysis piece, we chose to focus only prison administrators as they have the power to decide which policies to enact and how to enact them.
2. As previously stated, gender is somewhat decided at birth based on the sex/genitalia of the baby. The terms *sex* and *gender* are inappropriately used interchangeably. Due to this misuse of terms, gender is highly associated/correlated with sex; therefore, gender is subsequently determined based on sex.
3. We acknowledge there are different types of segregation units and purposes for segregation. For instance, administrative segregation can be used for any number of purposes such as protective custody or to keep inmates separate before they are transferred to separate criminal associates, and so on. When we refer to administrative segregation in this article, and in reference to trans inmates who are placed there, it is usually for the purposes of protective custody. Disciplinary segregation is used as a punishment for those who have violated prison rules. Protective custody is used to preserve the safety of the inmate and as mentioned in the foregoing may be under the label of administrative segregation.
4. See *Maggert v. Hanks* (1997). Prisons do not have to comply with all requests or pursue all treatment options available.
5. See *Praylor v. Texas Department of Criminal Justice* (2005). This court case held that correctional staff may override the different forms of treatment as long as they provide a legitimate security or penological concern.
6. It should be noted that the cost of reassignment surgery is very high, to the point of being prohibitive for many individuals. Furthermore, given the high unemployment rate among the trans communities, it is a privilege afforded to very few to be able to access any medical care, let alone surgical procedures. We thank an anonymous reviewer for raising this issue.
7. Prison Rape Elimination Act (PREA) was extended to Federal Facilities under a Presidential Memorandum—<http://www.whitehouse.gov/the-press-office/2012/05/17/presidential-memorandum-implementing-prison-rape-elimination-act>
8. The National PREA Resource Center provides overviews of the specific standards governing prisons, lockup, community confinement, and juvenile facilities. It can be accessed via <http://www.prearesourcecenter.org/training-technical-assistance/prea-101/prisons-and-jail-standards>
9. *Cisgender* describes a person who is not transgender, whose gender identity and physical characteristics are the same. Schilt and Westbrook (2009: p. 444) define cisgender as a label for “individuals who have a match between the gender they were assigned at birth, their bodies, and their personal identity.”

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