

LENGTH: 21215 words

ARTICLE: The Treatment of Transgender Prisoners, Not Just an American Problem - A Comparative Analysis of American, Australian, and Canadian Prison Policies Concerning the Treatment of Transgender Prisoners and a "Universal" Recommendation To Improve Treatment

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SUMMARY:

... On the street, Mathew stole to make ends meet, and he resorted to prostitution in order to save money to buy cosmetics, women's clothing, black market hormones, and eventually, sex reassignment surgery. ... Finally, in most instances, insurance does not cover the cost of hormone therapy or sex reassignment surgery, thus leaving the transgender individual to bear all of the cost. ... Identity-based placement houses the transgender inmate in a prison facility based on the gender with which he or she self-identifies, regardless of whether the inmate has undergone sex reassignment surgery. ... Additionally, it appears hypocritical that prison systems prohibit housing a transgender inmate with other female prisoners out of concern for the female prisoner's safety and well-being, but seem to have no concern for the safety and well-being of the transgender prisoner who is automatically sent to a male facility. ... In addition to the policy of continuing hormone therapy, the "universal" recommendation should also include Australia and Canada's policies of providing the transgender prisoners the opportunity to undergo sex reassignment surgery at his or her own expense. ... A primary concern that prison administrations must take into account when determining placement is whether or not a transgender prisoner has undergone sex reassignment surgery prior to incarceration. ...

TEXT:

[*92]

I. Introduction

Mathew grew up living a life trapped in the shell of a body that was not his own. n1 At the young age of ten, he felt that, although he had a penis, he was a girl. He had no interest in playing with trucks with the neighborhood boys or participating in sports. Instead he wanted to wear his mother's makeup and clothes and play "house" with his sister and her friends. He tried to "be a man" and fit in with the other boys, but he never felt comfortable in his own skin. His parents kicked him out of the house when he was eighteen because they did not understand why he [*93] dreamed about being a woman. On the street, Mathew stole to make ends meet, and he resorted to prostitution in order to save money to buy cosmetics, women's clothing, black market hormones, and eventually, sex reassignment surgery.

One night, Mathew wandered into a fast-food restaurant to use the restroom. Instead of using the men's restroom, he entered the door marked "Women." The women inside the restroom called the police. The police came and arrested Mathew and charged him with solicitation, prostitution, indecent exposure, and failure to produce proper identification. n2 The police officers and other inmates at the jail made crude remarks because Mathew was dressed in women's clothes, had long hair, long fingernails, and had developed small breasts due to taking hormones. Mathew told the arresting officer his name was Mary because that was the name he had chosen, but his driver's license revealed that his

legal name was Mathew. He insisted that he belonged in the women's ward and not with the men because, emotionally and psychologically, he was a woman. The officers ignored him and told him that as long as he had a penis, he was a male and would be housed in the men's facility. An officer then took him to the general population of the men's jail to await arraignment. Less than two hours later, a fellow inmate attacked and raped Mathew, and not long thereafter, the rest of the inmates took their turns. He was beaten, kicked, and raped multiple times with no assistance from or intervention by the nearby guards.

After his conviction, Mathew pleaded to the court to send him to the women's facility, but this request was denied. He pleaded with jail officials to separate him from the general population, but was again denied. The prison system placed him in the male facility, where he faced daily bouts of ridicule, humiliation, and sexual assault. On a good day, Mathew endured only one sexual assault, while, on a bad day, there were more than he could count. He no longer had his feminine clothes, makeup, or hormones. He no longer felt like the woman he so desperately wished to be. He thought of ending his misery with suicide, or at the very least, mutilating himself to get rid of the "thing" that put him in the men's ward. Before he could take matters into his own hands, however, another inmate took them into his own and brutally raped and [*94] beat Mathew to death while he sat helplessly in the general population of the men's ward.

Sadly, this scenario is not an uncommon one in the prison systems of the United States. In a country that supposedly promotes gender equality through gender symmetry while opposing discrimination, the U.S. prison system's treatment of transgender prisoners actually promotes gender equality through gender asymmetry. Other common law countries, such as Australia and Canada, face similar problems. A fusion of Australian and Canadian prison policies regarding hormone therapy and sex reassignment surgery can create a universal recommendation for the general treatment of transgender prisoners in all countries. In addition to the medical treatment policies, the general placement policy should be that all preoperative transgender prisoners, regardless of sex or gender identity, should be placed within a female facility. Although this placement policy conflicts with the majority of academic suggestions, it is the only policy that results in the least harm to all transgender prisoners. Conversely, all postoperative transgender prisoners should be placed based on their new sex. This universal recommendation combines approaches in an attempt to create the least harmful result.

This Article first summarizes the different aspects of trans-genderism and provides a general overview of the Harry Benjamin Standards of Care for transgender individuals. Part II explores the general rights of transgender individuals within the United States, focusing on the treatment of transgender prisoners within the U.S. prison systems, and specifically analyzes methods of placement and available medical treatment for transgender inmates. Part III analyzes some of the general Australian and Canadian policies regarding transgender individuals and compares the prison policies affecting the treatment of transgender prisoners to those of the United States. Part IV briefly summarizes American, Australian, and Canadian prison policies affecting transgender individuals, and Part V suggests a universal recommendation for the correction of the disparate treatment of transgender prisoners.

A. Overview of Transgenderism

"Gender" and "sex" are two terms often used incorrectly in common parlance as synonyms. "Sex" reflects a person's anatomy, biology, genitalia, internal sexual organs, and chromosomal structure. n3 [*95] "Gender," by contrast, is socially constructed and refers to a person's self-image, the public perception of that self-image, and the individual's expression of sexual roles. n4 Society expects that people will fit into one of two "sex" categories, male or female, and in so doing, males will act in a masculine manner and females will act in a feminine manner. However, there are some people who simply do not fit realistically within society's norms (the norm being that a person's gender equates with their sex). Transgender individuals, either because of external pressures or personal choice, take extreme measures to transform their sexual anatomy to match their self-identified gender. Transgenders are people who do not fit within society's gender box. Some transgender individuals, through sex reassignment surgery, try to comply with society's norms by surgically transforming their sexual anatomy to match their gender identity, while nonoperative transgender individuals try to break out of society's norms altogether by not surgically transforming their sex to match their gender identity.

A "transgender" is currently described as someone who has "'[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,' and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change." n5 In addition, transgenders most likely suffer from gender identity disorder (GID), which the Diagnostic and Statistical Manual of Mental Disorders (Fourth Edition) (DSM-IV) defines as a major mental illness. n6 The DSM-IV describes gender identity disorder as a "diagnosable condition that is evidenced by a "strong and persistent cross-gender identification, which is the desire to be, or the insis-

tence that one is, of the other sex." n7 It is in transgender [*96] individuals where "gender fails to conform to their sex as dictated by traditional standards." n8

Transgenders spend most of their lives transforming themselves into their desired gender. n9 Some accomplish this goal simply by cross-dressing and living as the opposite sex. These individuals are considered to be "nonoperative transgenders." Nonoperative transgenders view themselves as the opposite sex, but do not feel it necessary to pursue surgical means to change their body to match that of the preferred sex. n10 Individuals who prefer to change their bodies to match their emotional and psychological identity are either "preoperative" or "postoperative" transgenders. Preoperative transgenders are those people who are moving towards sex reassignment surgery by undergoing hormonal treatment and cosmetic surgery. n11 Postoperative transgenders are those people who have actually undertaken the genital transformation to become the "other sex." n12

B. Harry Benjamin Standards of Care

Harry Benjamin, a German physician, was one of the first to work with gender dysphoric patients. n13 The term "transsexualism" was widely used by Dr. Benjamin to refer to those patients whose anatomical sex did not match their self-identified "gender." n14 "Transsexual" and "transsexualism" refer to "sex" and medical treatment associated with [*97] "sex," rather than "gender" and the psychological aspect of the disorder. n15 "Transgender" and "transgenderism" are "umbrella terms" encompassing all aspects of gender identity including "transsexualism." n16 The term "transgender" incorporates the physical challenges to gender identity and recognizes the awareness of a psychological element. n17

Gender dysphoria, gender identity disorder, and the transgender phenomenon were all brought to light in the United States during the late 1950s and early 1960s when Dr. Benjamin created the diagnostic parameters of transgenderism and distinguished the transgender characteristics from other secondary disorders related to gender identity issues. n18 After years of dedication and work on the subject, the Harry Benjamin International Gender Dysphoria Association promulgated the Harry Benjamin Standards of Care (Standards of Care). n19 The Standards of Care are to be used by both domestic and international gender clinics as flexible directions for the treatment of persons with gender identity disorders. n20 Individual physicians and clinics may use the Standards of Care to understand the parameters within which to treat an individual suffering from gender identity disorder, but may vary the Standards of Care to fit each unique patient. n21 Patients and families of patients may also refer to the Standards of Care to understand more fully the expert thinking and treatment goals for the disorder. n22

The Standards of Care approach is referred to as "triadic therapy" and includes: (1) a real-life experience in the desired gender role, (2) hormone therapy for the desired gender, and (3) sex reassignment surgery to change the genitalia and other sex characteristics. n23 Although "triadic therapy" consists of three steps, not all patients need or want to complete all three steps. n24 For example, the Standards of Care suggest [*98] that, "in some patients, hormone therapy alone may provide sufficient symptomatic relief to obviate the need for cross living or surgery." n25

If a patient is looking to complete all three steps, however, each step has minimum requirements that the patient must complete before moving on to the next step. n26 The first step is the real-life experience, which requires that the patient undertake a combination of: (1) maintaining "full or part-time employment[,]" (2) functioning as a student[, or] (3) functioning in community-based volunteer" activities, as a member of the desired sex. n27 Additionally, the patient must acquire a legal name change which is gender appropriate, and provide documentation that persons other than the monitoring therapist know that the patient is functioning in the desired gender role. n28

In order to proceed to the second step of hormone therapy, the patient must be (1) at least eighteen years old, (2) understand the benefits and the risks of hormone therapy, and (3) either complete a documented three month real-life experience, or a minimum of three months of psychotherapy. n29 The final step of the "triadic therapy" is sex reassignment surgery. The patient must meet a plethora of minimum eligibility requirements prior to undergoing sex reassignment surgery. The patient must: (1) be the legal age of majority in the patient's country of residence; (2) participate in at least twelve months of continuous hormonal therapy; (3) complete at least twelve months of successful full time real-life experience; (4) participate regularly in psychotherapy throughout the real-life experience, if required by a mental health professional; (5) demonstrate knowledge of the surgical costs, likely complications, the length of hospitalization, and post-surgery rehabilitation; (6) demonstrate progress in dealing with potential consequences resulting from the transition; and (7) control problems such as sociopathy, substance abuse, suicidal tendencies, and psychosis. n30

A lingering question revolving around the Standards of Care is whether "triadic therapy" can, or should, continue while a transgender is [*99] incarcerated in prison. The Standards of Care expressly address the issue of continuing hormone therapy for transgender prisoners, suggesting:

Persons who are receiving treatment for gender identity disorders should continue to receive appropriate treatment following these Standards of Care after incarceration. For example, those who are receiving psychotherapy and/or cross-sex hormonal treatments should be allowed to continue this medically necessary treatment to prevent or limit emotional liability, undesired regression of hormonally-induced physical effects and the sense of desperation that may lead to depression, anxiety and suicidality [sic]. Prisoners who are subject to rapid withdrawal of cross-sex hormones are particularly at risk for psychiatric symptoms and self-injurious behaviors. Medical monitoring of hormonal treatment as described in these Standards should also be provided. n31

The practice of U.S. physicians in following the Standards of Care seems to fluctuate with most doctors recently complying with, but not fully adopting, the suggested standards. n32 Canadian hospitals have competing views regarding the continuation of appropriate treatment provided by the Standards of Care. There are two primary gender clinics in Canada which regulate transgender medical treatment, the Clarke Institute in Montreal and the Vancouver Gender Clinic. n33 The Vancouver Gender Clinic asserts that the real-life experience can be fulfilled while a transgender individual is in prison through the use of cross-dressing and makeup. However, the Clarke Institute in Montreal believes that it is impossible to fulfill the requirements of the real-life experience while incarcerated because prison is an "artificial environment." n34

The inconsistent application of the Standards of Care in the general medical treatment of transgenders is easily correctable and can lead to more fair treatment of all transgender individuals, especially transgender inmates, around the world. As written, the Standards of Care are merely recommendations for the clinical treatment of persons with gender identity disorders. n35 If the Standards of Care were instead the legal standard for treatment, then all organizations, whether private clinics or public prisons, would be legally required to abide by them, resulting in universal and consistent treatment of transgender individuals.

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II. United States of America

A. Overview of Transgender Rights in the United States

Before, during, and after transformation, transgender individuals face many difficulties. The most obvious obstacle a transgender faces on a daily basis is discrimination. Some of the situations in which transgenders face discrimination are employment, mere presence in public places, and available insurance coverage.

1. Transgender Rights Under Title VII of the Civil Rights Act of 1964

The overwhelming trend in the United States is to prohibit discrimination; however, it is often difficult for individuals to find and keep employment after revealing to employers their transgender status. Title VII of the Civil Rights Act of 1964 provides in part that "it shall be an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." n36 By its plain meaning, Title VII prohibits discrimination against women "because they are women and against men because they are men." n37 Title VII expressly prohibits discrimination based on sex, yet transgenders have difficulty bringing a Title VII claim based on sex discrimination because they are typically excluded from protection on the grounds that they do not fall within the traditional definition of "sex." n38 Currently there is no federal law prohibiting discrimination against gay, lesbian, transgender, or bisexual individuals. However, the United States Supreme Court has recently held [*101] that under some circumstances this normally unprotected group may be entitled to Title VII protection. n39

2. Recognition of Changes or Alterations to Legal Identification

Discrimination in public places is also a struggle frequently faced by transgenders. Often, transgenders cross-dress in their self-identified gender, but the self-identified gender does not match the name, picture, or sex on their legal identification, subjecting them to problems upon entering bars, clubs, restrooms, airports, and other locations requiring identification. n40 However, transgender individuals are not without recourse because it is possible for them to obtain alterations to legal identification documents. n41 In the United States, whether a transgender can change or alter his or her birth certificate or other legal identification depends on whether the individual has undergone sex reassignment surgery.

n42 This requirement makes it virtually impossible for preoperative or nonoperative transgenders to ever truly fit into society because, even if they are living as the self-identified gender, the legal identification will still define them with reference to the anatomical identity. n43 Most states have statutes or public policies which allow the government to amend or reissue a new birth certificate, indicating the new sex, to those individuals who have undergone sex reassignment surgery. n44 In fact, forty-eight out of fifty states allow some form of alteration or amendment to a birth certificate. n45 A completely new birth certificate is provided upon the production of a certificate from the surgeon who performed the sex reassignment surgery in Illinois, New Jersey, Alabama, Hawaii, Maryland, North Carolina, Pennsylvania, and Virginia. n46 In every other state except Tennessee and Ohio, an amended [*102] birth certificate will be issued upon the production of proof of sex reassignment surgery. n47

3. Insurance Coverage for Hormone Therapy and Sex Reassignment Surgery

Finally, in most instances, insurance does not cover the cost of hormone therapy or sex reassignment surgery, thus leaving the transgender individual to bear all of the cost. It is the general practice that transgenders pay for any surgeries out of their own pocket. n48 Medicare, n49 the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), n50 and private insurance contracts exclude sex reassignment surgery from coverage. n51 In addition to excluding the sex reassignment surgery itself, insurers often deny coverage for routine [*103] postoperative medical treatments because they are determined to be caused by the sex reassignment surgery. n52

Although the majority of circumstances result in the individual personally paying for procedures, in some instances, Medicaid, unlike other types of insurance, will provide coverage for therapies as well as surgeries. n53 Unlike its counterparts, Medicaid does not specifically exclude sex reassignment surgery from coverage. n54 In fact, a court that faced the issue of Medicaid coverage for transgender treatment concluded that states cannot categorically exclude sex reassignment surgery, especially if the surgery is "medically necessary." n55 The United States Court of Appeals for the Eighth Circuit followed this general rule in *Pinneke v. Preisser*. n56 *Pinneke* was a postoperative male-to-female transgender who was eligible for Medicaid benefits, and after undergoing sex reassignment surgery, she applied to Medicaid to cover the cost. n57 When the Iowa Department of Social Services declined to cover the surgery, *Pinneke* brought an action seeking injunctive and declaratory relief for violation of her constitutional rights to equal protection and due process and her statutory right to Medicaid benefits. n58 The Eighth Circuit affirmed the ruling of the United States District Court for the District of Northern Iowa holding that "the policy of denying Medicaid benefits for sex reassignment surgery where it is a medical necessity for treatment of transsexualism is contrary to the provisions of Title XIX of the Social Security Act and therefore violates the supremacy clause of the United States Constitution." n59

[*104] In the past, transgender individuals have also had difficulty acquiring coverage for routine medical postoperative treatments related to the new sex, but courts are beginning to hold in favor of transgenders and against the insurance companies denying coverage. n60 *Germaine Beger* was a forty-nine-year-old male-to-female transgender Medicaid recipient, who lived as a woman for twenty-five years. n61 She had breast implants which required replacement due to calcification and leakage. n62 Her doctor submitted the appropriate paperwork to Medicaid, stating that the "surgery to remove the implants and reconstruct the breasts was medically necessary." n63 The Massachusetts Superior Court noted that the surgery in this instance was considered reconstructive and thus reimbursable to physicians when medically necessary. n64 *Beger* presented "uncontroverted evidence" that the reconstructive surgery would correct the effects of a defective breast caused by calcification and leakage. n65 The court held that the Division of Medical Assistance did not present any evidence showing that the surgery was not medically necessary and therefore had wrongly denied reimbursement. n66

B. Transgender Life in the U.S. Prison System

From the outset, transgender persons are incarcerated in a body that does not match their gender identity. In addition to living daily within their own personal prisons, when transgender individuals are incarcerated within prison systems, they face additional confinement in a ward in which they feel they do not belong. n67 In the United States there are two methods of housing transgender inmates within prison systems. The most prevalent type of placement used is genitalia-based placement, and the other type is identity-based placement. n68

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1. Genitalia-Based Placement versus Identity-Based Placement

Prison administrations using the genitalia-based placement consider only the anatomical sex of the transgender individual. n69 Even if the inmate self-identifies with the opposite gender, for purposes of prison housing, the inmate is placed according to his or her anatomical sex. n70 The argument in favor of genitalia-based placement is that as long as the inmate possesses internal and external sex organs corresponding with a specific sex, then he or she will be housed in accordance with that sex. n71 There is, however, a problem with this type of placement. Genitalia-based placement puts the transgender inmate, the male-to-female transgender inmate in particular, at a significant risk of being beaten, raped, or even killed. n72 The prison hierarchy and prison life in general are difficult for any inmate, but especially for transgender inmates. The nature of the prison hierarchy in a male facility ranks prisoners based on their fighting ability and "manliness." n73 Transgender inmates are considered "queens." n74 They take on traditionally feminine tasks such as doing the laundry and cleaning, and are often used for prostitution, either by choice or by being beaten into submission. n75 The genitalia-based classification places male-to-female transgender inmates "at special risk for physical injury, sexual harassment, sexual battery, rape, and death, because the prison hierarchy subjugates the weak to the strong and equates femininity with weakness." n76 This type of classification not only places the transgender inmate at substantial risk of harm, but also places the prison administration at risk of civil liability. n77 Prison administrations have a duty to protect inmates from dangerous conditions and risk violating the Eighth Amendment if they fail to provide such protection. n78

[*106] Identity-based placement is used considerably less than genitalia-based placement. Identity-based placement houses the transgender inmate in a prison facility based on the gender with which he or she self-identifies, regardless of whether the inmate has undergone sex reassignment surgery. n79 As with genitalia-based placement, identity-based placement is subject to objections and criticisms, but for every criticism there is a strong argument in favor of this latter placement method. The first criticism is that, in general, women's prisons lack the resources necessary to deal with the basic needs of a male-to-female transgender prisoner. n80 Thus, a male-to-female transgender prisoner may be forced to choose between staying in a facility which has the necessary resources, but a higher risk of harm, or a facility which has a low risk for harm, but fewer resources. n81 The response to this criticism is that if a male-to-female transgender prisoner were allowed to choose between placement in a male facility with the necessary resources available but a higher risk of harm, or placement in a female facility with fewer resources and a low risk of harm, then at least she was given a choice in the matter. n82 Currently, the prisoner has no choice. n83

The second criticism made against identity-based placement is that male-to-female transgender inmates should not be housed in a women's facility for fear that the transgender inmate might have sex with other female inmates. n84 The justification for not housing male-to-female transgender prisoners in a women's facility is that of preventing them from threatening the safety of the female inmates. n85 There are at least two counterarguments to this criticism. First, if prison authorities administered appropriate hormone therapy to transgender inmates, a preoperative male-to-female transgender's penis would be neither a functional sexual organ nor a threat to female prisoners. n86 Additionally, it appears hypocritical that prison systems prohibit housing a transgender inmate with other female prisoners out of concern for the female prisoner's safety and well-being, but seem to have no concern for the safety and well-being of the transgender prisoner who is automatically [*107] sent to a male facility. Legitimate concerns for transgender prisoners' safety should "trump [any] complaints grounded in personal prejudice." n87

The treatment of female prisoners poses the final criticism against identity-based placement. Female prisoners often argue that their privacy rights are violated when a male-to-female transgender is placed in their cell. n88 These privacy rights, they argue, encompass the prisoner's right to confidentiality and the right to protection against search and seizure under the Fourth Amendment. In *Powell v. Schriver*, the United States Court of Appeals for the Second Circuit held that a prisoner's transgender status is confidential information, and when prison officials reveal the information to other inmates they violate the transgender prisoner's privacy rights because disclosure does not serve a "legitimate penological interest." n89 Conversely, prisoners do not have a right to privacy in their cells, such that the Fourth Amendment provides them protection from search and seizure. The Supreme Court held in *Hudson v. Palmer* that "the recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions." n90 Prison is an institution for punishment; therefore, prisoners do not have the right to choose with whom they share a cell. Thus, this criticism of identity-based placement appears moot. n91

2. Solutions to Placement Problems

When faced with the problem of placing transgender prisoners, most prisons simply segregate the inmate from the rest of the prison population. Prisons refer to segregation by many different names - [*108] protective custody, administrative segregation, administrative detention or administrative confinement. n92 Whatever the title, segregation is a con-

venience for the system and only solves the problem from the prison administration's point of view, while simultaneously increasing the problems for transgender inmates. Segregation is a form of confinement prisons use to separate an inmate from the prison's general population. n93 The purpose of segregation is to protect a prisoner who either is a threat to the security of the institution, other inmates, himself, or the prison staff. n94 Protective custody is designed to be used for only short periods of time, and should not be used for long periods of confinement. n95 In fact, administrative and protective segregation are subject to Eighth and Fourteenth Amendment scrutiny. n96 Prisons are liable under these amendments if prisoners are subjected to indefinite periods of time in segregation on the basis of their transgender status. n97 Segregation not only creates possible civil liability for prisons, but also creates tremendous pitfalls for the transgender inmate. n98 As a result of being segregated from the general population, transgender inmates are cut off from any recreational, educational, and occupational activities the prison provides, as well as the opportunity to socialize with other inmates. n99 They are left alone for hours at a time without any resources or human contact. n100 In addition, protective custody only protects the segregated inmate from other inmates; it does not protect the inmate from prison officials. n101 Thus, any segregated inmate, especially a transgender inmate, [*109] is still subject to attack, harassment, and sexual assault from the prison guards and administrators. n102

Segregation is considered by the majority of prison systems to be the best available solution; however, the transgender inmate is still housed in a facility based on his or her genitalia, rather than on gender identity. A better solution is to prevent transgender inmates from being housed in the "wrong" facility in the first place. The San Francisco prison system created a model that addresses the initial placement of transgender inmates, thus preventing the need for protective custody. n103 New York and a few other jurisdictions have also considered the San Francisco model of creating segregated "pods" or wards for vulnerable inmates. n104 The San Francisco model defines "vulnerable" to mean "presenting a higher than average risk of being victimized in the general prison population." n105 The "pod" model requires prison administrators to evaluate and screen each individual prisoner and determine whether he or she presents heightened vulnerability to placement in the general population. n106 This model allows for the prison system to segregate those inmates who truly present a considerable vulnerability to other inmates, who although members of a minority group, are prone to victimizing others of that same group. n107

As with any new model, there are criticisms and drawbacks to the "pod" model. Some jurisdictions may not have large enough facilities or large enough numbers of transgender inmates to justify building an entirely separate ward for vulnerable inmates. n108 In such a case, shared housing with geographically close prisons could provide a solution; however, there are some administrative obstacles to be overcome. First, the adjoining prison may not have the extra space necessary to house vulnerable inmates. n109 Second, the two prisons may have conflicting rules, one more restrictive than the other. n110 Third, moving an inmate to [*110] another facility can make contact with family and friends more difficult. n111 Fourth, conducting individual evaluations of each prisoner is too time consuming; the prison system does not have the necessary personnel to sufficiently screen each prisoner. Fifth, building separate wards is a large economic burden, especially for areas which have small prison facilities. n112 Finally, dedicating a facility or ward, specifically for transgender inmates, is simply illogical. For example, in Canada, as of November 2000, there were ten preoperative transgender inmates out of a total of 12,500 inmates in the federal prison system. n113 In previous years, the Canadian federal prison system housed ten to twenty-three transgender inmates, less than one percent of the total prison population. n114 It is logical to assume that a similar proportion of transgender inmates exists in the United States' prison system. n115 The response of the Canadian prison administration to the suggestion of providing a separate facility for these inmates was that there were simply too many obstacles to overcome for the limited number of prisoners affected. n116

3. Transgender Prisoners' Specific Medical Needs

Appropriate placement of transgender prisoners is crucial to their safety, but available medical treatment is even more crucial to their survival and overall health. The Eighth Amendment protects prisoners by requiring prisons to provide "adequate medical care" to incarcerated individuals. n117 The United States Court of Appeals for the Seventh Circuit noted in *Meriwether v. Faulkner* that "there is no reason to treat transsexualism differently than any other psychiatric disorder," and such a disorder presents a "serious medical need." n118 The plaintiff in *Meriwether* was a male-to-female transgender prisoner who, prior to [*111] incarceration, had undergone approximately nine years of estrogen therapy, as well as cosmetic surgery, in order to look anatomically more female. n119 She suffered severe withdrawal symptoms since the termination of medical attention while in prison and brought an action against the Indiana Department of Corrections, claiming that the denial of medical treatment violated the First, Eighth, Ninth, and Fourteenth Amendments. n120 The court concluded that the plaintiff's condition presented a "serious medical need." n121 Although the Seventh Circuit recognized that gender dysphoria and transgenderism present "serious medical needs," and the Eighth Amend-

ment requires adequate medical care, the court found that a transgender prisoner is not guaranteed a particular type of treatment, only some type of treatment. n122 Thus, the Seventh Circuit deferred to the prison officials' judgment as to the appropriate form of medical treatment. n123

As discussed, the type of necessary medical treatment varies for each transgender individual. n124 Some individuals may only require psychotherapy to feel complete with his or her self-identified gender, while others may require hormones and sex reassignment surgery to feel fully satisfied. n125 Generally, prison administrations and hospital staffs provide the necessary support for prisoners who do not have gender dysphoria, but administrations must do a better job of providing the necessary support for transgender prisoners. Perhaps the easiest type of support the prison system can provide is that of allowing transgender prisoners to wear clothing and cosmetics appropriate for their self-identified gender. Wearing the appropriate clothing and cosmetics is essential for the well-being of any transgender, and especially for a transgender prisoner. n126 Providing the necessary clothing is not only easy, [*112] but the overall financial cost to the prison is minimal, so all parties benefit.

Psychological support is the next method of treatment prisons can provide to transgender inmates. The psychologists must have special training to deal with each transgender situation. So while the cost of therapy could be high, the benefit of providing psychological support is significantly higher. n127 The purpose of such psychotherapy is not necessarily to cure the individual, but to educate him about the different options transgenders have. n128 The Standards of Care recommend that psychotherapy sessions occur on a regular basis at fifty minute intervals. n129 Because prison administrations are concerned about the bottom line and the financial cost of psychotherapy, other possibilities may include weekly therapy at thirty minute intervals, or group therapy instead of individual therapy. Although this suggestion does not follow the Standards of Care, it at least provides some support to transgender prisoners, which may be more than what the prison facility currently offers. n130

Hormone therapy is the next level of support prisons should provide. The medical community recognizes that hormone therapy is a "medically necessary" treatment for transgender people. n131 In most jurisdictions, however, the law does not require prisons to provide hormones to transgender prisoners. n132 This policy applies to those prisoners who started hormones prior to incarceration, but is especially beneficial for prisoners who did not start hormone therapy prior to incarceration. n133 Prisons are not required to begin hormone therapy if the prisoner shows symptoms of gender identity disorder while incarcerated. n134 The policy of the United States Bureau of Prisons is one [*113] of maintenance. Prison administrations provide a transgender inmate with enough hormones to maintain the prisoner who began hormones prior to incarceration at the same level of feminization or masculinization, but do not provide any additional therapy. n135 Even with the Bureau of Prisons' "maintenance" policy, there is no guarantee that prison administrations will provide the appropriate level of hormones. n136

The great debate over whether transgender prisoners are entitled to hormone therapy while in prison has resulted in substantial litigation. Proponents of hormone therapy argue that it is a violation of the Eighth Amendment prohibition against cruel and unusual punishment for prison administrations to exhibit "deliberate indifference" to an inmate's "serious medical need." n137 In the past, courts consistently ruled that prisoners should not receive hormone therapy or sex reassignment surgery; however, in more recent cases courts are beginning to rule in favor of transgender inmates. n138 For example, in *Kosilek v. Maloney*, Kosilek, an inmate serving a life sentence for murder, had severe gender identity disorder with an intense desire for sex reassignment surgery. n139 The United States District Court for the District of Massachusetts determined that "these facts alone demonstrate that Kosilek has a serious mental health need and will continue to be at a substantial risk of serious harm until he receives adequate treatment." n140 The court also ruled that Kosilek was not receiving adequate care or support services from the prison administration to diminish his risk of suicide, self-mutilation, and severe depression. n141 The court held that Kosilek's gender identity disorder constituted a serious medical need and directed the prison administration to provide adequate treatment. n142

One explanation for changing attitudes towards providing hormones to transgender prisoners is the realization that serious physical and mental side-effects result from the abrupt termination of hormone [*114] therapy once transgenders enter prison. The Standards of Care suggest that "prisoners who are subject to rapid withdrawal of cross-sex hormones are particularly at risk for psychiatric symptoms and self-injurious behaviors." n143 Other possible effects include, but are not limited to, the return of facial hair growth and male pattern baldness, the recession of surface fat, and a markedly changed gender appearance, leaving transgender prisoners "trapped in a netherworld between manhood and womanhood." n144 Both the medical and legal communities recognize that transgender individuals have "serious medical needs" and thus require sufficient medical treatment, and the only counterargument that prison administrations seem to offer is that the economic cost of providing hormones to prisoners is too high. n145 This argument is unacceptable, because although hormone treatment is expensive, it is needed by many transgenders. n146 If a prisoner was diag-

nosed with cancer prior to or during incarceration, the prison administration, seemingly, would not deny the prisoner the appropriate method of treatment, chemotherapy, and then claim that funding for the treatment was unavailable. Similarly, if a prisoner suffers from gender identity disorder, a recognized mental disorder, the prison cannot and should not deny an appropriate treatment, hormone therapy, and then claim hormones are too expensive.

Sex reassignment surgery is the final phase of gender transformation. Courts have consistently held that prisons are not required to perform surgery on transgender prisoners to further the transformation process. n147 This policy exists throughout the United States. n148 Opponents to sex reassignment surgery for prisoners assert the same argument as they do against the provision of hormone therapy, namely that sex reassignment surgery is too expensive for prisons to provide treatment. n149 There are, however, ways of combating the increasingly contentious "price tag" argument and minimizing the cost of surgery. Prison officials could limit the number of sex reassignment surgery candidates, and thus reduce the cost of sex reassignment surgery, by requiring that the prisoner demonstrate a high degree of [*115] transformation prior to incarceration. n150 Second, officials could require prisoners to undergo long-term psychological care prior to sex reassignment surgery. n151 Finally, to truly reduce costs, prisons could require that prisoners contribute their own funds to the cost of surgery. n152

III. Australian and Canadian Prison Policies Regarding Transgender Inmates

The treatment of transgender prisoners is not only a concern for U.S. prison administrations, but also for international prison facilities. This Article will next analyze the prison policies and treatment of transgender inmates in Australia and Canada and compare those policies with those of the United States.

A. Australia

The national government of Australia, a federation comprised of six states and two federal territories, has limited powers enumerated in the Australian Constitution. n153 Where state and federal law conflict, the laws of the Commonwealth govern and the laws of the states are deemed invalid to the extent of the inconsistency. n154

1. Recognition of Changes or Alterations of Legal Identification

Australia is very similar to the United States in its treatment of transgender individuals. An example of such similarity is evidenced by federal recognition of alterations or changes of sex on identification documents. The requirement for federal recognition of an alteration to a passport depends on whether the individual is a preoperative or postoperative transgender. n155 If a preoperative transgender provides a change-of-name deed and a letter from a supervising doctor stating that the individual intends to have sex reassignment surgery, then she may change the sex on her passport and receive a limited one-year passport. n156 A postoperative transgender may change the sex on her passport by [*116] providing a change-of-name deed and a letter from a surgeon stating that sex reassignment surgery was performed. n157 Although there is a general federal policy for transgenders to change or alter identification, each state or territory creates its own laws and policies that affect the general treatment of transgenders. n158 For example, New South Wales' Births, Deaths and Marriages Registration Act 1995 legally recognizes only those transgenders who have undergone sex reassignment surgery. n159

2. Overview of Australian Prison Policy

The similarity between Australia and the United States continues with Australia's general prison policy regarding treatment of transgender prisoners. For example, as in the United States, Australian prison officials fail to provide transgender prisoners with a basic level of protection when it is clear that transgender prisoners are extremely vulnerable to harm within the prison's general population. n160 In New South Wales, Catherine Moore, a male-to-female transgender, was placed in protective custody in a male facility because she was effeminate. However, in spite of her segregation she was raped by a male prisoner. n161 Soon after her attack, Catherine committed suicide, which the Coroner believed to be the result of the rape and the ingestion of illegal drugs provided to Catherine by a fellow inmate. n162 Australia is not without its [*117] share of tragedies, but the country is taking significant strides to prevent further tragedies from occurring within its prison walls.

a. Placement of Transgender Prisoners

Australian prison administrations and officials consider several related issues when determining where to house transgender inmates: (1) any relevant safety concerns and laws, (2) reduction of the risk of self-harm or sexual assault to all

inmates, and (3) a determination upon what basis hormonal or surgical intervention should be made available to inmates. n163 As in the United States, improper placement of transgender prisoners is a major problem in Australia. There are both state and territorial policies regarding the determination of how to "classify" transgender inmates, but individuals may still be subject to inconsistent treatment. n164

When choosing the institution in which to incarcerate prisoners, there are two classification approaches used by prison administrations. n165 The first approach is a "social-based" approach which emphasizes the social aspects of identity and how a person self-identifies. n166 The second approach is a "surgery-based" approach which considers whether the individual has undergone sex reassignment surgery. n167 Neither policy is without drawbacks; thus, both are open to criticism. Opponents to the "social-based" approach argue that it is too subjective, while opponents of the "surgery-based" approach argue that it is problematic because Australia does not have an agreed-upon standard for sex reassignment surgery. n168

Reducing the risk of self-harm or assault to all inmates is an important concern, but it is especially important to those inmates who are subject to a higher risk of harm. As in the United States, Australia utilizes protective custody as a method of separating transgender [*118] prisoners from the general population, and as in the United States, this does not guarantee the transgender inmate's safety. n169 The approach utilized in New South Wales appears to be the most progressive of all of the Australian states in protecting high risk prisoners from themselves and from others. The New South Wales prison system, for instance, employs a policy which specifies that transgender inmates are to use separate toilet and shower facilities, and are allowed to wear the gender-appropriate clothing. n170 Additionally, the policy requires that prison management help maintain transgender inmates' self-esteem and self-identity, as well as ensure that the prison administration address transgender prisoners by his or her chosen name and gender identity. n171

Australia and the United States differ noticeably over the issue of hormonal therapy and sex reassignment surgery. The general policy throughout Australia regarding hormone therapy is that transgender inmates who commenced hormone treatment prior to incarceration should continue the hormone therapy while in prison. n172 Policies regarding sex reassignment surgery are more inconsistent and are not universal. Because there is no single standard for sex reassignment surgery in Australia, the decision of whether to commence surgery is left to the discretion of the prison medical staff. n173 For example, in South Australia, hormone therapy may be initiated while in prison at the discretion of the medical staff, while in New South Wales, inmates may have access to hormone therapy or "elective" surgery, provided they bear the costs themselves. n174 Australia and the United States adopt the view that because transsexuality and gender identity disorder are recognized medical disorders, failure to provide adequate medical treatment by prison administrations could constitute a violation of a prisoner's basic civil rights. n175

b. New South Wales: A Closer Analysis

New South Wales and South Australia have two of the more comprehensive prison policies in Australia. n176 The New South Wales [*119] prison system is considered a positive example of the appropriate transgender inmate treatment and deserves a closer analysis. The territory's prison policy for the management of transgender inmates is a comprehensive policy based on inmate self-identification, which applies to all correctional centers in New South Wales, court cell blocks, lock-ups, police stations, and any other location where a person is taken into legal custody. n177

i. Identification of Inmates

The policy is based on a presumption that inmates have a right to be placed in the facility of their "gender identification," unless it is determined, on a case-by-case basis, that they should be placed elsewhere. n178 For example, male-to-female transgender inmates are placed in female institutions except where there is great concern for the safety of the inmate, or for other female prisoners. n179 An exception to this policy of "gender identification" placement is with the female-to-male transgender inmates. Although these inmates self-identify as male, they are generally not placed in a male facility, but are rather placed in a female institution due to identified safety concerns and the high risk of sexual assault in a male facility. n180 One method of avoiding this disparity is if the female-to-male transgender inmate has his birth certificate amended specifying the new sex. n181 New South Wales treats transgender individuals with amended birth certificates exclusively as their new sex; thus prison administrations speculate that transgender inmates with a conclusively amended birth certificate should be housed as the new sex, even if this means housing a female-to-male transgender inmate in a male facility. n182

[*120]

ii. Initial Placement of Transgender Inmates

The placement of transgender inmates is not only critical within the prison institution, but also in any facility a prisoner may pass through on the way to prison. Whenever a transgender prisoner is transported to court or to a holding facility, the security staff and police must advise the Placement Officer of every transgender inmate received into custody. n183 Then the Placement Officer and other personnel are responsible for keeping the transgender inmate separate from the other inmates. n184

Any individual who claims to be a transgender is subject to a full induction screening, provided by the Metropolitan Remand and Reception Center (MRRC), in addition to individual and continuing case management of placement. n185 The purpose of the MRRC screening is to determine the inmate's individual needs and the appropriate placement. n186 Unless the MRRC induction screening uncovers an overwhelming safety concern or security risk, the transgender inmate is to be placed in a correctional center accommodating his or her gender identity. n187 Note, however, that not all transgender inmates are placed based on gender identity. Inmates can be placed in a correctional facility according to anatomical sex based on the perceived risk to the safety and security of other inmates and prison personnel, previous management problems, or whether the charged offense was a crime of violence or was sexual in nature. n188

Even in the event that a transgender inmate is separated from the general prison population, the correctional facility must provide the inmate with the full range of correctional services and programs. n189 Additionally, facilities must provide transgender inmates access to special services specific to their needs, such as community support services, support groups such as The Gender Centre, and community legal services. n190

iii. Transgender Prisoners' Access to Health Services

New South Wales Corrections Health Services' Policy regarding available health services to transgender inmates specifically states:

[*121]

Hormone therapy will only be provided to those transgender inmates who have been receiving this treatment before imprisonment. Elective gender surgery will not be performed on inmates if the cost is to be met by [Corrections Health Services]. Transgender inmates may make application to have elective gender surgery, hormone therapy[,] or other therapies of choice, specific to their needs, at their own cost. n191

It is important to notice that even though the New South Wales prison system does not pay for sex reassignment surgery or elective surgery, the system provides the opportunity for transgender inmates to pursue these means of transformation. n192

iv. Management Issues

Prison officials, administrations, and staff are an essential part of the smooth management of transgender inmates. This is why it is essential that the prison system hire and sufficiently train individuals to specifically manage transgender inmates. The officials within the New South Wales facilities are required to address transgender inmates by name and according to their chosen gender. n193 Similarly, all records, name badges, and registrations must reflect the inmate's chosen gender. n194 Correctional facilities must provide all transgender inmates, including those housed based on anatomical sex, with gender-appropriate clothing, underwear, and cosmetics at all times. n195 It is clear that the New South Wales prison system makes a concentrated effort to protect transgender individuals. n196 Overall, it appears that Australia follows Harry Benjamin's Standards of Care better than any other country.

B. Canada

Canada, like the United States and the majority of territories in Australia, assumes that only two sexes exist. n197 Canadian transgenders face two obstacles in their quest for equality that American and Australian transgenders do not face. First, there is little Canadian scholarship regarding a transgender individual's disadvantaged situation [*122] and, second, what is known about transgenders is based on misconceptions. n198

Canadian transgender rights piggyback on the country's acceptance of gay and lesbian equality. In 1993, the High Risk Project, a Canadian activist group, began a difficult campaign to protect transgender individuals through lobbying the Canadian legislature to add "gender identity" as a prohibited ground for discrimination. n199 The fight for transgender equality received a large boost from the 1998 landmark case *Vriend v. Alberta*, where the Supreme Court of

Canada held that if human rights legislation exists, it must protect people from discrimination on the basis of sexual orientation. n200 At issue in Vriend was the guarantee of equality rights provided by section 15 of the Canadian Charter of Rights and Freedoms, which states "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability." n201 Vriend established that the list of protected rights in section 15 is not exclusive and that equality rights can be extended to any and all groups who suffer disadvantage, stereotyping, or political or social prejudice. n202 Other cases following Vriend solidified equality rights for lesbian and gay individuals in Canada and were also important in laying the foundation for equality claims based on gender identity for the transgender community. n203 Following the Vriend decision, Canadian tribunals started recognizing the need to protect transgender individuals from discrimination. Canada continues to make great strides in [*123] accepting transgender individuals and prohibiting discrimination against them. n204

1. Recognition of Changes or Alterations of Legal Identification

As in the United States and Australia, Canada generally accepts the alteration of legal identification documents, but each province varies as to the specific requirements necessary to make a change. n205 British Columbia requires that prior to altering a birth certificate a transgender individual must provide certification from the licensed surgeon who performed the surgery and a certificate from a doctor licensed to practice in Canada stating that the surgical results meet the required regulation. n206 After the alteration, British Columbia legislation treats the individuals as if he or she had always been the reassigned gender. n207 Individuals may also change their driver's license to their preferred sex by producing a letter to show that he or she is enrolled in the Vancouver Gender Clinic. n208

2. Canadian Insurance Coverage of Hormone Therapy and Sex Reassignment Surgery

One area where Canada substantially differs from the United States is with medical insurance. Although there is a trend towards decentralization, Canada currently provides national health care. n209 The federal government provides assistance in funding for all necessary medical care throughout the country, but the responsibility of administering health care to the masses is that of the individual province [*124] or territory with guidance from the Canada Health Act. n210 Canada's Medicare is paid for through taxes, and in addition, most provinces require monthly payments from participants. n211 Gay, lesbian, bisexual, and transgender individuals are noted as a group which is possibly underserved by the Canadian health system. n212 Even so, most provinces fund sex reassignment surgery as a necessary medical procedure. n213 Similarly, the Canadian military provides medical health coverage outside the federal coverage and also funds sex reassignment surgery. n214 Not only does the military provide funding for the surgery, but it also authorizes a period of leave for the individual to undergo the transformation. n215 Once transformation is complete, the individual is allowed to return and is accepted by the military as a member of the "other" sex. n216 It is difficult to imagine the U.S. military being nearly so accommodating.

3. Treatment of Transgender Prisoners in Canadian Prisons

As in the United States, transgender inmates in Canada are generally held in the facility that matches with their anatomical sex, unless they have already undergone sex reassignment surgery. n217 Over the past decade, the Correctional Services of Canada significantly changed its approach to the treatment of transgender prisoners. n218 An example of this turnaround is its treatment of transgender inmates at Bath Institution, a medium security male prison, in Ontario:

The inmate, who is on hormone therapy, and is described as "highly feminized," is permitted to cross-dress and wear cosmetics at all times. The inmate has been provided with a separate living area, consisting of a bedroom and private bathroom, but is able to mix with other inmates [*125] during the day. The inmate has also been permitted to decorate the living area, and is even permitted to keep a cat. n219

Even with the existence of facilities like Bath Institution, there is no guarantee that every transgender prisoner will experience such a "luxurious" lifestyle. Correctional Services still has a lot of work to do, including offering specialized training to prison administrators, officials, and staff on transgender inmates and their specific needs. n220

a. Evolution of the Correctional Services of Canada Policies

Correctional Services of Canada first began investigating the management of transgender prisoners in 1980. n221 By 1982, Canada's first prison policy regarding transgender prisoners mandated that each prisoner should be dealt with on an individual basis and that no form of treatment should be instigated while in prison, unless the prisoner was already taking hormones prior to incarceration. n222 There was no provision regarding the availability of sex reassignment surgery while in prison. n223 An additional report was added to the 1982 policy recommending the "freezing" of transgender inmates at the stage of feminization or masculinization they were at when incarcerated. n224

The policy continued to evolve throughout the years. In 1993, the Correctional Services revised the policy to permit hormone therapy as well as "sexual reconstructive surgery," but not sex reassignment surgery, during incarceration. n225 Finally, in 1995, the policy was amended to expressly permit sex reassignment surgery to transgender inmates; however, the amendment was eliminated in 1997. n226 The rationale behind eliminating access to sex reassignment surgery was threefold. First, the policies and practices of other jurisdictions revealed that sex reassignment surgery was only allowed after a court specifically ordered the surgery, or the inmate personally paid for it. n227 By eliminating the possibility of sex reassignment surgery, Correctional Services of Canada [*126] fell more in line with other jurisdictions. n228 Second, only the Menard Clinic in Montreal performs sex reassignment surgery, so the elimination of the possibility of such surgery "prevents an inmate from pinning his or her hopes on what was, in reality, a practical impossibility." n229 Finally, Correctional Services eliminated the provision of sex reassignment surgery to inmates because the procedure is not always made available to the general public; thus, there could be an incentive for people desperate for the procedure to commit crimes. n230

The current policy, known as the Commissioner's Directive 800, does not provide for sex reassignment surgery, but "ensures that inmates have access to essential medical, dental and mental health services in keeping with generally accepted community standards." n231 "Essential services" are those medical treatments which are provided to inmates at the expense of Correctional Services, and nonessential services are services provided at the expense of the inmate. n232 Sections 29 through 31 of Commissioner's Directive 800 specifically address gender dysphoria:

29. If an inmate has been on hormones prescribed through a recognized gender program clinic prior to incarceration, they may be continued under the following conditions:

- a) that the inmate be referred to and reassessed by a recognized gender assessment clinic; and
- b) that continuation of hormone therapy is recommended by the gender assessment clinic.

30. Unless sex reassignment surgery has been completed, male inmates shall be held in male institutions.

31. Sex reassignment surgery will not be considered during the inmate's incarceration. n233

[*127] Correctional Services views hormone therapy as elective, a non-essential service; however, it still covers the expense of treatment, on a "gratuitous basis." n234

b. The Kavanagh Influence

Kavanagh v. Attorney General of Canada is the seminal Canadian case challenging sections 30 and 31 of the Commissioner's Directive, in which Synthia Kavanagh, a federal inmate, claimed that the sections violated the Canadian Human Rights Act. n235 Section 5 of the Canadian Human Rights Act specifically makes it "a discriminatory practice, in the provision of services customarily available to the general public, to deny access to any such service to any individual, or to differentiate adversely in relation to any individual, on a prohibited ground of discrimination." n236 Section 3 designates "sex and disability as prohibited grounds of discrimination." n237

Synthia Kavanagh was a male-to-female postoperative transgender prisoner diagnosed with gender identity disorder. n238 She had taken hormones since the age of thirteen and was approved for sex reassignment surgery prior to incarceration. n239 Kavanagh was convicted of second-degree murder in 1989 and was sentenced to incarceration in a male facility. n240 She made frequent requests for a transfer to a women's facility, but was denied. n241 Initially, Kavanagh was denied access to hormone therapy and lost most of her female secondary characteristics, but the therapy was reinstated in 1993. n242 She was also not permitted to begin with sex reassignment surgery, even though she was approved prior to incarceration. n243 Kavanagh filed complaints with the Canadian Human Rights Commission, and eventually, some of her individual complaints were settled. n244 After the settlement, Kavanagh underwent sex reassignment surgery, at her own expense, and was transferred to a [*128] women's facility. n245 Kavanagh brought two

additional complaints before the Canada Human Rights Tribunal. n246 The first related to the Correctional Services' placement policy for preoperative transgender inmates, as outlined in section 30 of the Commissioner's Directive, and the second challenged the lack of prisoner access to sex reassignment surgery as specified in section 31. n247

The Tribunal found that the placement policy for preoperative transgender inmates "has a differential impact on transsexual inmates: In requiring that pre[operative] transsexual inmates be placed with other inmates sharing their anatomical structure, CSC's policy fails to recognize the particular vulnerability of this group of inmates, and their need for accommodation within the prison setting." n248 However, the Tribunal did not order the abandonment of section 30, but instead ordered only that Correctional Services take appropriate action to create a policy that would ensure the needs of preoperative transgender inmates are sufficiently met. n249 Second, the Tribunal found that section 31 discriminated on the basis of sex and disability by denying access to sex reassignment surgery. n250 In this case, the Tribunal ordered Correctional Services to stop applying section 31 and to consult with the Canadian Human Rights Commission to formulate a new policy providing inmates access to sex reassignment surgery. n251

IV. Country Comparison

A review of the different prison policies shows that for the most part, the United States, Australia, and Canada, have similar methods for handling transgender prisoners. Both the United States and Canada place transgender inmates in prison facilities based on the inmate's anatomical sex, and incorporate a maintenance policy of "freezing" transgender inmates at the hormone level with which they enter prison. Conversely, Australia uses the gender-identity approach to place inmates in the prison facility corresponding to their gender and continues hormone therapy for those prisoners who started therapy prior to incarceration. The U.S. prison administrations do not provide prisoners sex reassignment surgery, while Australia and Canada provide the [*129] opportunity for inmates to undergo sex reassignment surgery at their own expense. The commonality among all three countries' policies is that they incorporate some form of protective custody in order to keep transgender inmates segregated from the general population.

V. A "Universal" Recommendation

Although all three countries have similar policies, there is always room for improvement. The Harry Benjamin Standards of Care provide an international professional "consensus [regarding] the psychiatric, psychological, medical, and surgical management of gender identity disorders." n252 Their purpose is to provide general clinical guidance for physicians who treat gender dysphoric patients. n253 Similarly, there should also be a general guide for prison administrations regarding the placement and treatment of transgender prisoners. A combination of different aspects of the United States, Australian, and Canadian policies can create a "universal" recommendation for such situations. As with the Standards of Care, this recommendation is merely that, a recommendation, and each country can choose to follow or not follow the recommendation as it sees fit. n254

A. Medical Treatment

In terms of available medical treatment, Australia provides the most comprehensive program providing for hormone therapy. The continuation of hormone therapy, rather than "freezing" inmates at a particular hormone level, is both in accordance with the Standards of Care and with the generally accepted medical and legal opinion that hormone therapy is necessary to meet a transgender's "serious medical need." In addition to the policy of continuing hormone therapy, the "universal" recommendation should also include Australia and Canada's policies of providing the transgender prisoners the opportunity to undergo sex reassignment surgery at his or her own expense. The economic concerns and hesitations that prison administrations may have regarding payment for surgical procedures are vacated if the prisoner, and not the prison system, shoulders the burden of financing the surgery. In addition to continuing hormone therapy and making available surgical procedures, prison administrations should also provide psychotherapy for transgender prisoners.

[*130]

B. Placement

1. Nonoperative or Preoperative Transgender Prisoners

Availability of the appropriate medical treatment is critical if transgender prisoners are going to survive in prison. The bigger issue, however, is the placement of the prisoner. A primary concern that prison administrations must take into account when determining placement is whether or not a transgender prisoner has undergone sex reassignment surgery prior to incarceration.

a. Identity-Based Placement

When a transgender prisoner is nonoperative or preoperative, the majority of prison administrations place transgender prisoners based on anatomical sex. Opponents of this type of placement argue that a transgender prisoner should be placed in a facility based on his or her gender identity because emotionally and psychologically the individual is the opposite gender. The academic opinion also seems to favor adopting identity-based placement as the preferred general policy for several reasons. Identity-based placement considers the psychological as well as the physical aspect of transgenderism, it does not force individuals to lose their sense of identity, and it promotes gender equality. Although identity-based placement is perhaps the ideal, and there are certainly strong arguments in support of such placement, it creates an abundance of problems, most significantly increased safety concerns for the transgender inmate. Preoperative female-to-male transgender inmates, in particular, may self-identify as male, but would be exposed to an incredible risk of harm if placed in a male facility.

Gender symmetry means that there is balance and proportionality between genders. Gender equality encompasses the idea that both genders have the same rights and status. Commentators may want to create gender equality through gender symmetry, but in this instance, it cannot be done. Identity-based placement of preoperative transgender prisoners is a situation where gender symmetry actually creates gender inequality. n255 Placing male-to-female transgender prisoners in female [*131] facilities does not put the transgender prisoner at any significant increase risk of harm. This is not the case for preoperative female-to-male transgender prisoners who are placed in a male facility. When placed in a male facility based on gender identity, female-to-male transgender prisoners face an increased risk of sexual assault, harassment, and abuse. When placed in a female facility, based on anatomical sex, female-to-male transgender prisoners do not face this increased risk of harm. n256 Although identity-based placement creates gender symmetry because the genders are treated proportionately, it clearly does not promote gender equality, because male-to-female transgenders are not subjected to an increased risk of harm, while female-to-male transgenders are subjected to a higher risk of harm.

b. Genitalia-Based Placement

Genitalia-based placement for preoperative transgender prisoners also fails to solve the problem of creating gender equality through gender symmetry. When placed in a male facility, based on anatomical sex, preoperative male-to-female transgender prisoners face an increased risk of sexual assault, harassment, and abuse. Female-to-male transgender prisoners placed in a female prison based on anatomical sex, however, do not face an increased risk of harm. Again, while genitalia-based placement promotes gender symmetry, it does not promote gender [*132] equality, because male-to-female transgender prisoners are at a significantly increased risk of harm. n257

Based on this analysis, it appears that the significant and increased risk of harm only occurs within the male facility. Placement within a female facility does not increase the risk of harm for preoperative transgender prisoners. Therefore, it logically follows that the only harmless solution is to place both male-to-female and female-to-male transgender prisoners within a female facility. n258 This type of placement itself does not conform to the idea of gender symmetry, but it does promote gender equality.

2. Postoperative Transgender Prisoners

Placement of transgender prisoners who have undergone sex reassignment surgery prior to incarceration also presents a situation where gender symmetry results in gender inequality. The placement policy regarding postoperative transgender inmates is that a prisoner who has surgically transformed into the opposite sex should be placed in a facility based on the new sex. Therefore, a male-to-female transgender should be placed in a female facility and a female-to-male transgender should be placed in a male facility. Although this follows the current majority view of genitalia-based placement, the female-to-male transgender prisoner is still subject to an increased risk of harm in the male facility, while the male-to-female transgender prisoner is not subject to an increased risk of harm in the female facility. Both genders are treated proportionately, but the result is inequality.

C. Conclusion

The "universal" recommendation takes into account both preoperative and postoperative transgender individuals and therefore [*133] promotes both gender symmetry and gender asymmetry. n259 Treating people equally does not require treating them exactly the same, and therefore, gender asymmetry must be part of the "universal" recommendation. Unless a significant security issue surfaces, prison administrations should place all preoperative transgender inmates in a female facility. The increased safety risk occurs to both preoperative male and female transgender inmates when such

inmates are placed in a male facility, so the recommendation is to avoid such placement. When a transgender has undergone sex reassignment surgery, however, placement should be based on the new sex, thus resulting in an increased risk of harm for female-to-male transgender prisoners. In this situation, gender symmetry results in gender inequality. Regardless of the placement, prison administrations must provide transgender prisoners the appropriate medical treatment, clothing, management, and care, in an attempt to make their life a little more bearable.

FOOTNOTES:

n1. The events described in this account are wholly fictional.

n2. See Christine Peek, *Breaking Out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 *Santa Clara L. Rev.* 1211, 1218-19 (2004) (noting that transgender people are likely to end up in prison because they are often stereotyped as sex workers, falsely arrested for entering the "wrong" bathroom or for failing to produce "proper" identity documents and that "because transgender people are disproportionately low-income, they often face consequences for 'quality-of-life' crimes such as sleeping in public").

n3. See Anita Barnes, *The Sexual Continuum: Transsexual Prisoners*, 24 *New Eng. J. on Crim. & Civ. Confinement* 599, 606 (1998).

n4. See *id.* at 601, 606.

n5. *Farmer v. Brennan*, 511 *U.S.* 825, 829 (1994) (quoting Am. Med. Ass'n, *Encyclopedia of Medicine* 1006 (Charles B. Clayman ed., 1989)); see also *In re Estate of Gardner*, 22 *P.3d* 1086, 1093 (*Kan. Ct. App.* 2001) ("A transsexual is one who experiences himself or herself as being of the opposite sex, despite having some biological characteristics of one sex, or one whose sex has been changed externally by surgery and hormones.").

n6. See Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 532 (4th ed. 1994) [hereinafter *DSM-IV*].

n7. Nan D. Hunter, Courtney G. Joslin, & Sharon M. McGowan, *The Rights of Lesbians, Gay Men, Bisexuals, and Transgender People* 172 (2004) (quoting *DSM-IV* 532 (4th ed. 1994)). The *DSM-IV* details four criteria for *GID*:

(A) A strong and persistent cross-gender identification (not merely a desire for any perceived cultural advantages of being the other sex); (B) persistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex; (C) the disturbance is not concurrent with an intersex condition [meaning sexually ambiguous genitalia]; [and] (D) the disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Kosilek v. Maloney, 221 *F. Supp. 2d* 156, 163 (*D. Mass.* 2002).

n8. Barnes, *supra* note 3, at 607. "Sex reflects biology and gender connotes sexual identity, and [] the two are not necessarily in agreement." *Id.* at 606.

n9. Transformation can include either simple cross-dressing or full sex reassignment surgery. Sex reassignment surgery (SRS) is the medical treatment undertaken to change one's physical sex. See Hunter et al., *supra* note 7, at 172.

n10. See Peek, *supra* note 2, at 1217.

n11. See Darren Rosenblum, "Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarity, 6 *Mich. J. Gender & L.* 499, 510-11 (2000). Some of the preoperative treatments that transgenders may undergo include electrolysis, estrogen therapy, and breast augmentation for female transgenders and testosterone therapy, hysterectomies, and mastectomies for male transgenders. See *id.* at 509-10.

n12. See *id.* at 509. Male-to-female sex reassignment surgery is complete with a vaginoplasty, which includes inversion of the penis to create a vagina, and the use of scrotal tissue to create a clitoris. See *id.* Female-to-male sex reassignment surgery is complete with a phalloplasty, which is the surgical creation of a penis either by clitoral enlargement or by the rolling of skin from another part of the body and attachment to the body "like a suitcase handle." *Id.* Male-to-female transgender individuals are more common than female-to-male transgenders, so this Article will primarily refer to male-to-female transgenders. See *id.* n.48.

n13. See Harry Benjamin International Gender Dysphoria Association, About HBIGDA, <http://www.hbigda.org/about.cfm> (last visited Mar. 18, 2006).

n14. See Harry Benjamin, Transvestism, Transsexualism, and Homosexuality, in *The Transsexual Phenomenon* (1966), available at <http://www2.hu-berlin.de/sexology/GESUND/ARCHIV/COLLBEN.HTM> (last visited Mar. 18, 2006).

n15. Rosenblum, *supra* note 11, at 507.

n16. See *id.*

n17. See *id.* at 506.

n18. See Jamil Rehman et al., The Reported Sex and Surgery Satisfaction of 28 Postoperative Male-to-Female Transsexual Patients, 28 *Archives Sexual Behav.* 71 (1999).

n19. See Walter Meyer III et al., The Harry Benjamin International Gender Dysphoria Association's Standards of Care for Gender Identity Disorders, 5 *Int'l J. Transgenderism* 1-2 (Jan.-Mar. 2001), http://www.symposium.com/ijt/soc_2001/index.htm.

n20. See *id.* The purpose of the Standards of Care is to "articulate this international organization's professional consensus about the psychiatric, psychological, medical, and surgical management of gender identity disorders." *Id.*

n21. See *id.*

n22. See *id.*

n23. See *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 166 (D. Mass. 2002); Meyer III et al., *supra* note 19, at 3.

n24. See Meyer III et al., *supra* note 19, at 2-3.

n25. *Id.* at 14.

n26. See *id.* at 2.

n27. *Id.* at 17-18. The purpose of requiring a real-life experience is to make the patient aware of the possible familial, vocational, economic, interpersonal, educational and legal consequences of the gender transition. See *id.* The real-life experience also protects the surgeons from lawsuits by post-operative patients who in retrospect did not have enough time to truly appreciate their decision before surgery. See Barbara Findlay, *Transsexuals in Canadian Prisons: An Equality Analysis* 23-24 (1999), available at <http://www.barbarafindlay.com/articles/45.pdf> (last modified May 4, 2000).

n28. See Meyer III et al., *supra* note 19, at 17-18.

n29. See *id.* at 13.

n30. See *id.* at 20.

n31. *Id.* at 14; *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 166-67 (D. Mass. 2002) (emphasis added).

n32. See *infra* Part II.

n33. See generally Findlay, *supra* note 27, at 21 (describing the relationship between the Canadian gender clinics and the Harry Benjamin International Gender Dysphoria Association's Standards of Care).

n34. *Id.* at 24.

n35. See Meyer III et al., *supra* note 19, at 1-2.

n36. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (quoting 42 U.S.C. 2000e-2(a)(1) (1994)); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (stating that Congress made a "simple but momentous" decision that sex was not relevant in employment decisions when it passed Title VII).

n37. Barnes, *supra* note 3, at 615.

n38. See *id.* at 613-14. To be successful, transgenders must prove discrimination due to their sex, and not their transsexuality. See *id.* at 616. In situations where the Title VII claim is unsuccessful, courts hold that the discrimination is not based on the individual's sex, but rather on their transsexuality; thus they are not protected under Title VII. See *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984) (noting that district courts have ruled that discrimination based on transsexuality is outside the scope of Title VII); *Underwood v. Archer Mgmt. Servs., Inc.*, 857 F. Supp. 96, 98 (D. D.C. 1994) (holding that Archer Management Services discriminated against plaintiff, Underwood, "because of her status as a transsexual - that she transformed herself into a woman - but alleges no facts regarding discrimination because she is a woman"); *Dobre v. Nat'l R.R. Passenger Corp.*, 850 F. Supp. 284, 286-87 (E.D. Pa. 1993) (noting that the court failed to find any cases which "broadened Title VII so as to prohibit an employer from discriminating against a male because he wants to become a female").

n39. See Courtney Joslin, Protection for Lesbian, Gay, Bisexual, and Transgender Employees Under Title VII of the 1964 Civil Rights Act, 31 Hum. Rts. 14, 14-15 (2004). See generally *Price Waterhouse*, 490 U.S. at 251 (holding that Title VII was not limited to discrimination on the basis of one's biological status as a man or a woman but instead prohibited the "entire spectrum" of discrimination on the basis of sex, including discrimination on the basis of gender stereotypes).

n40. See Peek, *supra* note 2, at 1218-19.

n41. See Press for Change, Integrating Transsexual and Transgenderal People 46.2, <http://www.pfc.org.uk/legal/liba-4a6.htm> (last visited Mar. 18, 2006).

n42. See *id.* 46.2-46.4.

n43. See *id.* 36.4.

n44. See *id.*

n45. See *id.* 46.1. Tennessee and Ohio are the two states which do not allow for alterations or changes to birth certificates.

n46. See *id.* 46.4. The new certificate will have no mention of the individual's previous sex. See *id.*

n47. See *id.* The biological sex is only crossed out on an amended certificate, thus the previous sex is still present. See *id.*

n48. See Hunter et al., *supra* note 7, at 172.

n49. Medicare rationalizes noncoverage of sex reassignment surgery as follows:

Transsexual surgery, also known as sex reassignment surgery or intersex surgery, is the culmination of a series of procedures designed to change the anatomy of transsexuals to conform to their gender identity. Transsexuals are persons with an overwhelming desire to change anatomic sex because of their fixed conviction that they are members of the opposite sex. For the male-to-female, transsexual surgery entails castration, penectomy and vulva-vaginal construction. Surgery for the female-to-male transsexual consists of bilateral mastectomy, hysterectomy and salpingo-oophorectomy, which may be followed by phalloplasty and the insertion of testicular prostheses.

Transsexual surgery for sex reassignment of transsexuals is controversial. Because of the lack of well controlled, long-term studies of the safety and effectiveness of the surgical procedures and attendant therapies for transsexualism, the treatment is considered experimental. Moreover, there is a high rate of serious complications of these surgical procedures. For these reasons, transsexual surgery is not covered.

Medicare Program, National Coverage Decisions, *54 Fed. Reg. 34,555, 34,572* (Aug. 21, 1989).

n50. CHAMPUS covers gender dysphoria under the section entitled "transsexualism or such other conditions as gender dysphoria":

All services and supplies directly or indirectly related to transsexualism or such other conditions as gender dysphoria are excluded under CHAMPUS. This exclusion includes, but is not limited to, psychotherapy, prescription drugs, and intersex surgery that may be provided in connection with transsexualism or such other conditions as gender dysphoria. There is only one very limited exception to this general exclusion, that is, notwithstanding the definition of congenital anomaly, CHAMPUS benefits may be extended for surgery and related medically necessary services performed to correct sex gender confusion (that is, ambiguous genitalia) which has been documented to be present at birth.

32 C.F.R. 199.4(e)(7) (2005).

n51. See Hunter et al., *supra* note 7, at 172; see also Shannon Minter, *Representing Transsexual Clients: Selected Legal Issues* V[3], <http://www.transgenderlaw.org/resources/translaw.htm> (last modified Oct. 2003).

n52. See Hunter et al., *supra* note 7, at 181.

n53. See Minter, *supra* note 51, V[2].

n54. See *id.* Transgender individuals have also been able to make claims for coverage under private insurance as long as there is no explicit contractual provision specifying that the insurance company will not pay for sex reassignment surgery or hormone therapy. See *id.*

n55. *Id.* (citing *Beger v. Acting Comm'r, Div. of Med. Assistance, 2000 Mass. Super. LEXIS 126, at 11-14* (Mass. Super. Ct. May 1, 2000)).

n56. See *623 F.2d 546 (8th Cir. 1980).*

n57. See *id. at 547.*

n58. See *id.*

n59. *Id.* (citation omitted). The court noted further:

The decision of whether or not certain treatment or a particular type of surgery is "medically necessary" rests with the individual recipient's physician and not with clerical personnel or government officials... . Pinneke proved a real need for the only medical service available to alleviate her condition, and the record indicates her condition has improved since the surgery.

Id. at 550; see also *G.B. v. Lackner*, 80 Cal. App. 3d 64, 71 (Cal. Ct. App. 1978) (concluding that it was "impossible" to consider transsexual surgery as cosmetic surgery and reversing the decision to deny Medicaid coverage).

n60. See *Pinneke*, 623 F.2d at 550; *Lackner*, 80 Cal. App. 3d at 71.

n61. See *Beger v. Acting Comm'r, Div. of Med. Assistance*, 2000 Mass. Super. LEXIS 126, at 1-2 (Mass. Super. Ct. May 1, 2000).

n62. See *id.* at 2.

n63. See *id.*

n64. See *id.* at 12-13. Reconstructive surgery is defined as "a surgical procedure that is performed to correct, repair, or ameliorate the physical effects of physical disease or defect (for example, correction of cleft palate), or traumatic injury." 130 Mass. Code Regs. 433.401 (2005). The Division of Medical Assistance does not pay for "reconstructive surgery, unless the Division determines, pursuant to a request for prior authorization, the service is medically necessary to correct, repair, or ameliorate the physical effects of physical disease or defect, or traumatic injury." *Id.* 433.451(B)(3).

n65. *Beger*, 2000 Mass. Super. LEXIS 126, at 12.

n66. See *id.* at 12-14.

n67. See *Rosenblum*, *supra* note 11, at 516.

n68. See *Hunter et al.*, *supra* note 7, at 181; *Barnes*, *supra* note 3, at 620; *Peek*, *supra* note 2, at 1219-20, 1241; *Rosenblum*, *supra* note 11, at 522.

n69. See *Hunter et al.*, *supra* note 7, at 181.

n70. See Peek, *supra* note 2, at 1219-20.

n71. See *id.*

n72. See *id.* at 1220.

n73. See *id.* at 1226.

n74. See *id.* at 1227.

n75. See *id.* at 1227-29.

n76. *Id.* at 1220 (footnotes omitted).

n77. See *Farmer v. Brennan*, 511 U.S. 825, 857-58 (1994) (Blackmun, J., concurring) (noting that the majority's clear message is that prison officials must fulfill their affirmative duty under the Eighth Amendment to prevent inmate assault, including prison rape, or otherwise face the risk of being held liable for damages or being required to rectify the dangerous conditions); see also Murray D. Scheel & Clair Eustace, Nat'l Lawyers Guild & City & County of San Francisco Human Rights Comm'n, Model, Protocols on the Treatment of Transgender Persons by San Francisco County Jail 12 (Aug. 7, 2002), available at <http://transreference.transadvocacy.com/reference/transgenderprotocol.pdf> (noting that a genitalia-based classification system may expose jails to civil liability).

n78. See *Farmer*, 511 U.S. at 832.

n79. See Peek, *supra* note 2, at 1241.

n80. See *id.* at 1241-42.

n81. See *id.*

n82. See *id.* at 1244.

n83. See *id.*

n84. See *id.* at 1242; Rosenblum, *supra* note 11, at 532.

n85. See Peek, *supra* note 2, at 1243-44.

n86. See *id.* at 1242-43.

n87. *Id.* at 1243-44.

n88. See *id.* at 1243; Rosenblum, *supra* note 11, at 531.

n89. *175 F.3d 107, 112 (2d Cir. 1999)* (comparing the disclosure of an inmate's HIV status to the disclosure of an inmate's transgender status). The revelation of an inmate's HIV status furthers penological interests because HIV is a contagious disease and other inmates could be at risk. See *id.* Revelation of an inmate's transgender status, however, does not further penological interests because transgenderism is not a contagious disease. See *id.*

n90. *468 U.S. 517, 526 (1984)*. The Court held further:

A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order. We are satisfied that society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount interest in institutional security. We believe that it is accepted by our society that "loss of freedom of choice and privacy are inherent incidents of confinement."

Id. at 527-28 (quoting *Bell v. Wolfish*, *441 U.S. 520, 537 (1979)*).

n91. See *id.* at 526-28.

n92. See Barnes, *supra* note 3, at 638.

n93. See *id.*

n94. See *id.* There are two situations in which a transgender inmate should be segregated: (1) when the inmate specifically requests segregation for his or her own safety and (2) when the danger to the inmate is so blatantly clear that prison officials would be exhibiting deliberate indifference to leave the inmate in the prison's general population. See Rosenblum, *supra* note 11, at 530.

n95. See Barnes, *supra* note 3, at 638.

n96. See Scheel & Eustace, *supra* note 77, at 11.

n97. See *id.*

Transsexualism falls within the definition of a status. Specifically, it is beyond the person's control, it is acquired innocently and involuntarily, possibly at birth, and those afflicted are powerless to overcome the condition... .

Placing transsexual prisoners in protective custody, given their status, compounds the unconstitutionality of such a practice. Although a legitimate safety concern exists, segregation for protective reasons limits a prisoner's privileges and constitutional rights. Ultimately, such confinement becomes punitive and results in a disproportionate sentence.

Barnes, *supra* note 3, at 644 (emphasis added).

n98. See Peek, *supra* note 2, at 1220.

n99. See *id.*

n100. See *id.*

n101. See *id.* at 1239-40.

n102. See *id.*

n103. See Scheel & Eustace, *supra* note 77, at 2.

n104. See *id.* at 10; Peek, *supra* note 2, at 1240; Rosenblum, *supra* note 11, at 534-35.

n105. Scheel & Eustace, *supra* note 77, at 10. The vulnerability determination is based on, but not limited to, physical appearance, youth, or belonging to a group subject to harassment. See *id.*

n106. See *id.*

n107. See *id.*

n108. See *id.*; Peek, *supra* note 2, at 1240; Rosenblum, *supra* note 11, at 534-35.

n109. See Scheel & Eustace, *supra* note 77, at 10.

n110. See *id.* For example, in the San Francisco County Jail, an attorney may visit a client in the jail at any hour of the day and use a private room during consultation. However, if the same client were housed in the Alameda County Jail, the attorney must make an appointment to meet the client and the consultation would take place through a glass partition. See *id.*

n111. See *id.*

n112. See Peek, *supra* note 2, at 1240.

n113. See *Kavanagh v. Canada (A.G.)*, [2001] C.H.R.T. P 113, available at <http://www.chrt-tcdp.gc.ca/> (last visited Mar. 20, 2006).

n114. See *id.*

n115. The U.S. federal prison system is much larger than Canada's federal prison system. On December 31, 2004, there were 2,135,901 prisoners held in United States Federal and State prisons, and local jails. See U.S. Dep't of Justice Office of Justice Programs: Bureau of Justice Statistics, Prison Statistics (2004), <http://www.ojp.usdoj.gov/bjs/prisons.htm> (last updated Dec. 28, 2004). As of 2001, federal prison officials had no formal policy on transgender inmates. See Peek, *supra* note 2, at 1219. Defendants with penises are placed in male prisons and those with vaginas in female prisons.

n116. See *Kavanagh* [2001] C.H.R.T., P 113.

n117. Barnes, *supra* note 3, at 633.

n118. *821 F.2d 408, 413 (7th Cir. 1987)*.

n119. See *id. at 410*.

n120. See *id. at 411*.

n121. *Id. at 413*.

n122. See *id. at 413-14*.

n123. See *id.*

n124. See *supra* text accompanying notes 18-27.

n125. See *id.*

n126. See Rosenblum, *supra* note 11, at 550. See generally Scheel & Eustace, *supra* note 77, at 11 & n.16 (noting that in *Robinson v. California*, 370 U.S. 660, 666-67 (1962), the Supreme Court held that prisons may not punish a prisoner for illness or conditions that are beyond the inmate's control). In some California prisons, it was reported that transgender inmates were not permitted to wear clothing and cosmetics appropriate for their gender identities. See *id.* at 11. Male-to-female transgender prisoners who had developed breasts, but were housed in the male facility, were not allowed to wear bras, so they would make their own undergarments from other clothing provided by the prison, only to have the undergarment confiscated by the administration. See *id.*

n127. See Rosenblum, *supra* note 11, at 550.

n128. See Meyer III et al., *supra* note 19, at 11.

n129. See *id.* at 12.

n130. See *id.*

n131. See Scheel & Eustace, *supra* note 77, at 13 & n.25; *Doe v. Dep't of Pub. Welfare*, 257 N.W.2d 816, 819 (Minn. 1977).

n132. See Rosenblum, *supra* note 11, at 545.

n133. See *id.*; Scheel & Eustace, *supra* note 77, at 13.

n134. See Scheel & Eustace, *supra* note 77, at 13. There was never a formal policy prohibiting the start of hormone therapy in the San Francisco County jail system. See *id.* Instead, the practice was to simply defer the start of hormone therapy until release. See *id.* The decision to defer until release seems to be based primarily on the fact that inmates are not incarcerated in a county jail for an extended period of time. See *id.* at 14. The San Francisco Model Protocols suggests that prison officials provide evaluation and counseling for transgender inmates so they will be better educated upon release for the decision-making process. See *id.* at 14. If the inmate was evaluated prior to incarceration and recommended for hormone therapy, the county jail should administer the hormones. See *id.* These two suggestions, applicable in a short-term county jail setting, are easily transferable to a long-term prison setting, provided the prison personnel are sufficiently trained to perform the evaluations. See *id.*

n135. See Hunter et al., *supra* note 7, at 181; Rosenblum, *supra* note 11, at 545.

n136. See Hunter et al., *supra* note 7, at 181.

n137. Minter, *supra* note 51, V[2].

n138. See, e.g., *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 158-59 (D. Mass. 2002).

n139. See *id.* at 158.

n140. *Id.* at 184.

n141. See *id.* at 185.

n142. See *id.* at 194-95; see also *De'Lonta v. Angelone*, 330 F.3d 630, 633-36 (4th Cir. 2003) (holding the prison's refusal to provide the transsexual prisoner with hormone treatment was based solely on a policy rather than on a medical judgment concerning the prisoner's specific condition); *Wolfe v. Horn*, 130 F. Supp. 2d 648, 652 (E.D. Pa. 2001) (holding that a prison's failure to treat the severe withdrawal symptoms resulting from termination of hormonal treatment could constitute "deliberate indifference").

n143. Meyer III et al., *supra* note 19, at 14.

n144. Rosenblum, *supra* note 11, at 547 (quoting Ann Sweeney, *Garnet News Servs.*, June 1, 1989).

n145. See *id.* at 546. The annual cost of providing hormone therapy for one prisoner per year in New York is \$ 9000. See *id.*

n146. See *id.*

n147. See *id.* at 543.

n148. See *id.* at 543-44.

n149. See *id.* at 544.

n150. See *id.*

n151. See *id.*

n152. See *id.* at 544-45. Prisoners could contribute to the surgery costs with payment from their own personal funds, payment from family members, or garnished post-release wages. See *id.*

n153. See Henry Finlay, *Legal Recognition of Transsexuals in Australia*, 12 *J. Contemp. Health L. & Pol'y* 503, 503 (1996).

n154. See *id.*

n155. See *Press for Change*, *supra* note 41, 42.3.

n156. See *id.*

n157. See *id.*

n158. See Finlay, *supra* note 153, at 503.

n159. See New South Wales Law Reform Comm'n, *Review of the Anti-Discrimination Act 1977 (NSW)* (Nov. 1999), available at <http://www.agd.nsw.gov.au/irc/nsf/pages/r92toc> (last visited Mar. 19, 2006). A "recognized transgender person" is a person who had his or her birth certificate altered. *Id.* 5.127. The New South Wales Anti-Discrimination Act 1977 prohibited discrimination based on homosexuality, but did not prohibit transgender discrimination until 1996, with the introduction of the Transgender (Anti-Discrimination) Act 1996. See *id.* 5.4 & n.6. This Act specifically prohibits discrimination against transgender individuals in the area of employment, unions, education, accommodation, services and clubs. See *id.* South Australia's Equal Opportunity Act 1984 prohibits discrimination based on sexuality. See *id.* Transsexuality is included within the definition of "sexuality." See *id.* South Australia, through the Sexual Reassignment Act 1988, was the first state to recognize transgenders. See Finlay, *supra* note 153, at 517. The legislation provides a recognition certificate for an adult who was born in, or who has undergone sex reassignment surgery in, South Australia. See Press for Change, *The Sexual Reassignment Act, 1998*, <http://www.pfc.org.uk/legal/sa-act.htm> (last visited Mar. 21, 2006). Compare Tasmania's Sex Discrimination Act 1984, which does not expressly protect transgender individuals from discrimination. See *Anti-Discrimination Act 1998 (Tas.)*, available at <http://www.thelaw.tas.gov>.

n160. See Richard Edney, *To Keep Me Safe from Harm? Transgender Prisoners and the Experience of Imprisonment*, 9 *Deakin L. Rev.* 327, 333-34 (2004), available at <http://www.deakinlawreview.org/archive/9/2/data/4.pdf>.

n161. See *id.* at 333.

n162. See *id.*

n163. See Jake Blight, *Austl. Inst. of Criminology, Transgender Inmates*, 2-3 (Sept. 2000), available at <http://www.aic.gov.au/publications/tandi/t168.pdf>. These considerations are also issues that the U.S. prison system should consider before making hasty decisions in housing transgender inmates. See *id.*

n164. See *id.* at 3.

n165. See *id.*

n166. See *id.*

n167. See *id.*

n168. See *id.* Not all Australian states follow one of these two approaches. The Australian Capital Territory has no formal prison policy for placement of transgender inmates, but rather, places the inmates based on physical appearance during a strip search. See *id.* at 4. Western Australia uses the social-based approach and considers family background, developmental history, development of sexual identity, recent lifestyle, medical history with reference to hormone therapy, and gender identity preference when assessing transgender inmates. See *id.*

n169. See *id.* at 5.

n170. See id.

n171. See id.

n172. See id.

n173. See id.

n174. See id.

n175. See id.

n176. In 1996, New South Wales adopted The Transgender (Anti-Discrimination and other Acts Amendment) Act, specifically prohibiting discrimination against a person based on the grounds of being transgender. See Gender Ctr. Inc., Management of Transgender Inmates, <http://www.gendercentre.org.au/inmates.htm> (last visited Apr. 18, 2005). South Australia has fairly comprehensive prison policies, including placement according to the "surgery-based approach." See Blight, *supra* note 163, at 2. The South Australia Equal Opportunity Act covers discrimination based on the ground of sexuality, including an express protection of transsexuals. See Press for Change, *supra* note 41, 42.9. Furthermore, The Sexual Reassignment Act 1988 provides for legal recognition for children as well as adults who undergo sex reassignment surgery. See id. 42.5.

n177. See Gender Ctr., Inc., *supra* note 176; Blight, *supra* note 163, at 4.

n178. See Blight, *supra* note 163, at 4.

n179. See id. at 4-5.

n180. See id.

n181. See id. at 5.

n182. See id. at 4.

n183. See Gender Ctr., Inc., *supra* note 176.

n184. See id.

n185. See id.

n186. See id.

n187. See id.

n188. See id.

n189. See id.

n190. See id.

n191. Id. See generally *Lawarik v. CEO, Corr. Health Serv.*, (2003) N.S.W.A.D.T. 16, P 4 (discussing discrimination by Corrections Health Services (CHS) against an inmate on the grounds she was transgender and CHS' refusal to prescribe a course of hormone therapy).

n192. See *Gender Ctr., Inc.*, supra note 176.

n193. See id.

n194. See id.

n195. See id.

n196. See id.

n197. See *Findlay*, supra note 27, at 9.

n198. See id. at 7-8 & n.8.

n199. See id. at 1. In the beginning, the Canadian government was not as dedicated to protecting the transgender community as they were to protecting the gay and lesbian community. See id.

n200. [1998] 1 S.C.R. 493 (Can.); see also *Findlay*, supra note 27, at 1, 4.

n201. Can. Const. (Constitution Act, 1982) pt. 15 (Canadian Charter of Rights and Freedoms). Courts look to three critical issues when interpreting section 15:

(A) Whether a law imposes differential treatment between the claimant and others, in purpose or effect; (B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and (C) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.

Findlay, *supra* note 27, at 5 (quoting *Law v. Canada*, [1999] 1 S.C.R. 497 (Can.)).

n202. See *Vriend*, [1998] 1 S.C.R. PP 67-74; Findlay, *supra* note 27, at 5.

n203. See Findlay, *supra* note 27, at 3.

n204. See generally *Sheridan v. Sanctuary Inv. Ltd. (No.3)*, [1999] 33 B.C.H.R.T. 467, PP 1, 94, 97 (Can.) (holding that a policy prohibiting a preoperative transgender from using the restroom in accordance with her gender identity discriminated because of sex, physical or mental disability); *Quebec v. Maison des Jeunes (No. 2)*, [1998] R.J.Q. 2549 (Trib. Que.) (holding that transsexuals are protected from discrimination based on sex after the employer of a male-to-female preoperative transsexual fired her when she revealed her intention to undergo sex reassignment surgery); *Mamela v. Vancouver Lesbian Connection* [1999] B.C.H.R.T. PP 16, 94-99, available at <http://www.bchrt.bc.ca> (concluding that Vancouver Lesbian Connection discriminated against a male-to-female transgender in denying her membership to the organization on the basis of her gender identity).

n205. See Findlay, *supra* note 27, at 9.

n206. See *Press for Change*, *supra* note 41, 40.4.

n207. See *id.* 40.3. The Vital Statistics Act, R.S.B.C., c. 479 27(3) (1996), which states that every "birth certificate issued after the registration of birth is changed ... must be issued as if the original registration had been made showing the sex designation as changed under this section." But see R.S.Q., c. 10, s. 16-22 (1974) (noting that the transsexual becomes their new sex at a specific point in time after surgery, thus still recognizing the sex prior to surgery).

n208. See Findlay, *supra* note 27, at 10.

n209. See *id.* at 11.

n210. See *Canada Health Act*, R.S.C., ch. C-6 (1985); Findlay, *supra* note 27, at 11.

n211. See Findlay, *supra* note 27, at 11.

n212. See Health Canada Online, *Certain Circumstances: Issues in Equity and Responsiveness in Access to Health Care in Canada (Access to Health Services for Underrepresented Populations in Canada)* (2000), at 11, available at http://www.hc-sc.gc.ca/hcs-sss/alt_formats/hpb-dgps/pdf/pubs/2001-certain-equitaccess/2001-equit-access_e.pdf (last visited Mar. 20, 1006).

n213. See Findlay, *supra* note 27, at 11.

n214. See *id.* at 11-12, 25.

n215. See *id.* at 25.

n216. See *id.*

n217. See *id.* at 20-21. Canada asserts the same justifications as the United States does for housing transgender prisoners in this fashion: (1) the risk of traumatization and retraumatization by men or "women" with a penis, (2) the risk of sexual assault on women inmates by the male-to-female transgender inmate, and (3) the risk of pregnancy. See *id.* at 21.

n218. Correctional Services of Canada is similar to the United States Bureau of Prisons.

n219. *Kavanagh v. Canada (A.G.)*, [2001] C.H.R.T. P 118, available at <http://www.chrt-tcdp.gc.ca/> (last visited Mar. 20, 2006).

n220. See *id.* P 125 (noting that Correctional Services of Canada does not provide formal training to staff, but rather, the staff learn on a trial and error basis).

n221. See *id.* P 30.

n222. See *id.* P 31.

n223. See *id.*

n224. See *id.* P 32.

n225. *Id.* P 34.

n226. See *id.* PP 34, 39.

n227. See *id.* P 39. Correctional Services of Canada reviewed the practices and policies of the United States, the United Kingdom, Australia, and New Zealand. See *id.*

n228. See *id.*

n229. Id. P 40. The fact that the Menard Clinic is the only facility performing the surgeries is problematic for inmates. See id. Furthermore, inconsistent views of the necessary qualifications and approvals for surgery also pose problems. See id.

n230. See id. P 41. For instance, Correctional Services of Canada provides a higher level of dental treatment than is ordinarily available to the general public, and there is evidence that some people committed crimes so they could be incarcerated and take advantage of the dental treatment. See id.

n231. Id. P 35 (noting the general policies of the Directive).

n232. See id. P 36. This policy of covering the cost of "essential services" is a nationwide policy and applies to services deemed "essential," "regardless of whether or not the particular service in issue is a listed service under the provincial health care plan for the province where the inmate is being held." Id.

n233. Id. P 35. Section 30 specifies that male-to-female preoperative inmates will be held in male institutions. However, the Directive does not address female-to-male preoperative inmates, thus it is assumed that these individuals are housed in women's facilities. See id. P 35 n.3.

n234. Id. P 37.

n235. See id. P 134.

n236. Id.

n237. Id.

n238. See id. PP 2-4.

n239. See id. P 4.

n240. See id. PP 3-5.

n241. See id. P 5.

n242. See id. P 6.

n243. See id.

n244. See id. PP 7-8.

n245. See id. P 8.

n246. See id. P 140.

n247. See id. P 140.

n248. Id. P 196.

n249. See id. P 197.

n250. See id. P 198.

n251. See id.

n252. See Meyer III et al., *supra* note 19, at 1.

n253. See id. at 1-2.

n254. See id.

n255. An example of another situation where gender symmetry creates gender inequality is with a recently proposed congressional bill. See Federal Prohibition of Genital Mutilation Act of 2006, (MGM Bill), <http://www.mgmbill.org/usmgmbill2006.pdf>. This proposed bill would ban circumcisions performed on baby boys. In 1996, Congress passed a statute prohibiting female circumcision. See *18 U.S.C. 116(a)* (2000). Proponents of the pending bill appear to suggest that male circumcision and female circumcision are the same and therefore there should be a ban on male circumcisions. See MGM Bill, Endorsements, <http://www.mgmbill.org/endorsements.htm>. This is not true. Female circumcision, also known as female genital mutilation, is an extreme procedure resulting in a lifetime of pain, including urinary distress, painful intercourse, and complications during delivery of children. See Sherry Colb, A Proposed Bill To Ban Male Circumcision, CNN.com, Apr. 8, 2005, <http://www.cnn.com/2005/LAW/04/08/colb.circumcision/index.html>. Male circumcision, although not a trivial procedure, is not as extreme and may actually be beneficial. See *id.* Treating male and female circumcision equally could result in either both procedures being banned, or neither procedure being banned. If both procedures were banned, then females would be spared genital mutilation, but males would not benefit. If both procedures were allowed, then females would suffer a lifetime of problems, while males would most likely not even remember the procedure. These options promote gender symmetry, but do not promote gender equality. This situation, like that of transgender prisoners, calls for gender asymmetry in order to promote gender equality. See *id.*

n256.

3Preoperative Identity-Based Placement
Type of Transgender Prisoner

Facility

Potential Harm?

15 Law & Sex. 91, *

| | | |
|----------------|--------|-----|
| Male-to-female | Female | NO |
| Female-to-male | Male | YES |

n257. #

3Preoperative Genitalia-Based Placement

| | | |
|------------------------------|----------|-----------------|
| Type of Transgender Prisoner | Facility | Potential Harm? |
| Male-to-female | Male | YES |
| Female-to-male | Female | NO |

n258. Building separate wards for transgender prisoners is also a possible solution, but as discussed, it is not the most economically sound solution.

n259. #

7"Universal" Recommendation

| | Type of | Facility | Potential | Hormone | SRS | Psychother- |
|---|---|----------|-----------|--------------------|-----|-------------|
| | | | Harm? | Therapy | | apy |
| Gender equality through gender asymmetry | Transgender Preoperative male-to-female | Female | NO | YES | YES | YES |
| Gender inequality through gender symmetry | Preoperative female-to-male | Female | NO | YES (if necessary) | n/a | YES |
| | Postoperative male-to-female | | | | | |
| | Postoperative female-to-male | Male | YES | | | |

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