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MA Human Rights and Cultural Diversity

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DISSERTATION TITLE: How are the US prison system failing to accommodate for transgender inmates' human rights and what can be done to improve conditions?

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UNIVERSITY OF ESSEX

SCHOOL OF LAW / HUMAN RIGHTS CENTRE

MA in Human Rights and Cultural Diversity

2018/2019

Supervisor: Emily Jones

DISSERTATION

How are the US prison system failing to accommodate for transgender inmates' human rights and what can be done to improve conditions?

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Introduction

It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones. – Nelson Mandela¹

Mandela might not have had transgender persons in mind when he uttered these famous words, but they nevertheless encompass the fight for basic rights and fair treatment of transgender prisoners.

“Transgender” is commonly used to refer to people whose gender identity is different from the gender they were assigned at birth, and the term “trans” is often used as a shorthand. And gender identity is explained by the *Yogyakarta Principles* as “each person’s deeply felt internal and individual experience of gender, which may or may not corresponds with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerism.”² Being transgender comes with pervasive discrimination in virtually all aspects of life. The 2015 Transgender Survey found patterns of mistreatment and discrimination on “the most basic elements of life, such as finding a job, having a place to live, accessing medical care, and enjoying the support of family and community.”³ This is therefore not surprisingly reflected within the prison system. The issues facing the prison population as a whole disproportionately affects trans prisoners as a vulnerable population. With higher rates of reported violence, with transgender prisoners being nearly 10 times more likely to be sexually assaulted than the general population⁴. Besides, humiliation and degradation is often a daily part of the transgender prison experience. Fellow prisoners and staff alike contribute to this by the denial and punishment of trans persons gender identity and expression. This paper seeks to analyse the state of transgender persons human rights within the prison system in the United States from the perspective of international human rights law

¹ United Nations, “Nelson Mandela Rules”

https://www.un.org/en/events/mandeladay/mandela_rules.shtml accessed 09 August 2019

² The Yogyakarta Principles, <http://yogyakartaprinciples.org/principles-en/> accessed 09 August 2019

³ Sandy E. James and others, *The Report of the 2015 U.S. Transgender Survey*. (Washington, DC: National Center for Transgender Equality 2016), 4

⁴ *LGBTQ People Behind Bars: A Guide to Understanding the Issues Facing Transgender Prisoners and Their Legal Rights* (National Center for Transgender Equality 2018) 6

(IHRL), in an attempt to gauge the extent in which an IHRL is a useful tool to advance trans prisoners human rights.

During this years' International Day against Homophobia, Transphobia and Biphobia (IDAHOT), the World Health Assembly announced that in the 11th iteration of their International Classification of Diseases (ICD-11) gender nonconformity would no longer be described as a "mental disorder"⁵. This involves a change in replacing the diagnostic classification of ICD-10 "transsexualism" to "gender incongruence", which is described as a "condition relating to sexual health rather than a mental and behavioural disorder."⁶ This is significant because of the as WHO explains in their press release "The previous classification of trans-related and gender-diverse identity issues created stigma and potential barriers to care. For example, individuals had to be diagnosed as mentally ill in order to access gender-affirming health care supported by health insurance coverage."⁷ Furthermore, this change signalises to the world the growing commitment to transgender equality. According to WHO, transgender people make up an estimated 0.3-0.5% of the worlds' population⁸, they as a group often face grave discrimination, stigma, and harassment from most areas of society. The 2015 U.S Transgender Survey (USTS) reported that one-third (33%) had had at least one negative experience when seeking healthcare, and one-quarter (23%) did not seek healthcare in fear of being mistreated because of their gender identity⁹. This new classification of "gender incongruence" will hopefully work as a push for fairer treatment and better understanding by health care providers. In ICD-11 "Gender Incongruence of Adolescence and Adulthood" is described as

"characterized by a marked and persistent incongruence between an individual's experienced gender and the assigned sex, which often leads to a desire to 'transition', in order to live and be accepted as a person of the experienced gender, through hormonal treatment, surgery or other health care services to

⁵ 'New Health Guidelines Propel Transgender Rights' (*Human Rights Watch*, 27 May 2019) <<https://www.hrw.org/news/2019/05/27/new-health-guidelines-propel-transgender-rights>> accessed 14 July 2019

⁶ 'Moving one step closer to better health and rights for transgender people' (*World Health Organisation Regional Office for Europe* 17 May 2019) <<http://www.euro.who.int/en/health-topics/health-determinants/gender/news/news/2019/5/moving-one-step-closer-to-better-health-and-rights-for-transgender-people>> accessed 14 July 2019

⁷ *ibid*

⁸ 'WHO/Europe brief – transgender health in the context of ICD-11' (*World Health Organisation Regional Office for Europe*) <<http://www.euro.who.int/en/health-topics/health-determinants/gender/gender-definitions/who-europe-brief-transgender-health-in-the-context-of-icd-11>> accessed 14 May 2019

⁹ Sandy E. James and others, 'U.S. Transgender Survey - Executive Summary' 16 <<https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf>> accessed 26 June 2019

standard of treatment for prisoners as the general public¹⁶ and principle 2 which states that “It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment.”¹⁷ While these principles are rather dated, they provide a baseline for the role of medical professionals concerning prisoners. They also offer insight to how the relationship between medical personnel and prison administrations can come in conflict over the treatment of trans persons, as the administration often has multiple conflicting factors to consider beyond the wellbeing of their prisoners. This was evident in Kosilek’s multiple lawsuits, where the prison Commissioner faced political pressure to deny Michelle Kosilek hormone therapy and gender reassignment surgery. Lastly, principle 6 makes it clear that any deviation from these principles are forbidden: “There may be no derogation from the foregoing principles on any ground whatsoever, including public emergency.”¹⁸ These principles clearly and plainly states the ethical code of health personnel, which should enable them to care for transgender inmates without discrimination, However, oftentimes it is the prison administration who hinders trans inmates from receiving adequate health care¹⁹.

¹⁶ UNGA Res 37/194 (18 December 1982)

<https://www.ohchr.org/EN/ProfessionalInterest/Pages/MedicalEthics.aspx> accessed 9 August 2019

¹⁷ UNGA Res 37/194

¹⁸ UNGA Res 37/194

¹⁹ *Kosilek v Spencer* [2012] 889 F.Supp.2d 190

Chapter 2 – International Human Rights Law Framework

The international human rights law framework for trans people's rights is sparse to say it lightly, and even more so for prisoners specifically. However, the rights of sexual minorities are a growing field. There may not have a specific UN human rights body, like the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) or International Convention on the Elimination of All Forms of Racial Discrimination (CERD). It is also noteworthy that the categories of gender identity and sexual orientation are not protected categories under non-discrimination rights. It has been argued that 'sex' and 'other status' covers this²⁰, but because of its ambiguity, the lack of clear language has lead states to argue that "international human rights law does not protect against discrimination on the basis of sexual orientation or even prohibits this protection."²¹ This presents clear issues which allow states to decide for themselves whether or not to respect the rights of sexual minorities. In response to this and the wider landscape of sexual minority rights, the Yogyakarta Principles were created by a group of human rights experts in 2016 as an instrument for the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity²². The principles attracted great attention when they were launched and were described as "the most authoritative statement of what international human rights law obliges States to do and not do in promoting and protecting the rights of persons of diverse sexual orientations and gender identities and of intersex status."²³ However, as a nonbinding document with "official sponsorship from sovereign state or multilateral organisations"²⁴ it remains a soft law instrument. But these sets of principles builds on existing human rights, which means that "structurally, the Yogyakarta Principles rest on a stable, widely recognized foundation; they themselves are not in any way legally binding but do explicitly demand that states comply with other binding obligations to which they have voluntarily committed themselves."²⁵

²⁰ Michael O'Flaherty and John Fisher, "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles" (2008) *Human Rights Law Review* 8:2, 215

²¹ Kerstin Braun, 'Do Ask, Do Tell: Where Is the Protection against Sexual Orientation Discrimination in International Human Rights Law' (2014) 29 AM U INT'L L REV 873

²² Michael O'Flaherty, "The Yogyakarta Principles at Ten" (2016) *Nordic Journal of Human Rights*, 33:4, 280-298, 280-1

²³ *Ibid*, 281

²⁴ Ryan Richard Thoreson, "Queering Human Rights: The Yogyakarta Principles and the Norm That Dare Not Speak Its Name" (2009) *Journal of Human Rights* 8:4, 324

²⁵ *Ibid*, 329

In 2016 the Human Rights Council appointed an Independent Expert on Sexual Orientation and Gender Identity for a three-year term, which was renewed earlier this year. The resolution passed 27 to 12 with 7 abstentions during the 41st session of the Human Rights Council in Geneva²⁶. This mandate “assess the implementation of existing international human rights instruments with regard to ways to overcome violence and discrimination against persons based on their sexual orientation or gender identity, and to identify and address the root causes of violence and discrimination.”²⁷ The independent expert was mandated through Human Rights Council resolution 32/2, which recalls The Vienna Declaration and Programme of Action which “affirms that all human rights are universal, indivisible and interdependent and interrelated... it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms,”²⁸. This approach of opening with the wider human rights framework and responsibilities is a tactic used by multiple human rights tool for sexual minorities. As it reminds States of their overarching responsibilities, which they have already agreed upon, before arguing for the inclusion of sexual minorities within old frameworks. Besides, they also recall the General Assembly resolution 60/251, which states the responsibility States has “for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner,”²⁹ The impact and influence of the independent expert will be further explored throughout this paper.

Civil and political rights are a cornerstone to the advancement of prisoner rights. transgender individuals who are already marginalised by society, who find themselves in the prison system are further marginalised by its’ gender-segregated structure and ignorance of their specific needs. Bantekas and Oette make the point that “social exclusion, inequality and discrimination in particular are prone to significantly increase vulnerability, as evident in the higher likelihood of persons from certain ethnic or class or national background being subjected to arbitrary arrest, detention, ill-

²⁶ Milagos Chirinos, “U.N. Human Rights Council Votes in Favor of Independent Expert to Protect LGBTQ People Worldwide” *Human Rights Watch*, 12 July 2019 <https://www.hrc.org/blog/u.n.-human-rights-council-votes-in-favor-of-LGBTQ-independent-expert> accessed 18 August 2019

²⁷ United Nations Human Rights Office of the High Commissioner, “Independent Expert on sexual orientation and gender identity” <https://www.ohchr.org/en/issues/sexualorientationgender/pages/index.aspx> accessed 29 August 2019

²⁸ UNHRC Res 32/2 (2016)

²⁹ *ibid*

treatment and other violations.”³⁰ And this calls for an intersectional approach which takes into consideration the myriad of ways in which transgender prisoners are vulnerable to mistreatment within the prison system. An intersectional approach means to view the study of race, gender, class, and sexuality “as interconnected variables that shape an individual's overall life experiences, rather than as isolated variables.”³¹ In this context being incarcerated intersects with being transgender, as well as other intersections such as race, gender, class, sexuality, disability, and others. When talking about trans individuals the “virtual guarantee of experiencing the harsh and pervasive effects of discrimination.”³² Are persistently stated. Furthermore, “Transgender people are vulnerable to poverty, unemployment, employment discrimination, harassment in the educational system, homelessness, and rejection by family members.”³³ These characteristics of the experience of being transgender are in line with the above explanation of increased vulnerability made Bantekas and Oette, and the intersectional approach adds further to the understanding of violations made towards incarcerated transgender individuals.

Looking at the rights of transgender prisoners through a human rights law framework offers a fruitful perspective and also works as a useful tool to combat future violations. Civil and political rights are a core for this approach, with multiple rights which are relevant and can be applied to prisoners. Chiefly, the rights to life, to be free from torture, to liberty and security, to a fair trial, and freedom of expression, privacy, assembly and association, are especially applicable. The right to life is outlined in article 6.1 of the ICCPR and states: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”³⁴ This right is relevant to prisoners and especially transgender prisoners because of the risk of attack from other prisoner or prison guards, and suicide. Also, because prisoners are in the care of the state their right to live is particularly

³⁰ Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (2nd edn, Cambridge University Press 2016) 340

³¹ Justin D. García. “Intersectionality.” (Salem Press Encyclopedia, 2019) <http://0-search.ebscohost.com.serlib0.essex.ac.uk/login.aspx?direct=true&db=ers&AN=108690556&site=eds-live> accessed 28 July 2019

³² Jordan Rogers, ‘Being Transgender behind Bars in the Era of Chelsea Manning: How Transgender Prisoners’ (2015) 6 *Alabama Civil Rights & Civil Liberties Law Review* 193 https://0-heinonline-org.serlib0.essex.ac.uk/HOL/Page?Inname=Rogers&public=false&collection=journals&handle=hein.journals/alabcrcl6&men_hide=false&men_tab=toc&kind=&page=189&t=1560702229 accessed 16 June 2019

³³ *Ibid*, 193

³⁴ UNGA Res 2200A (XXI) (12 December 1966) 6.1

at risk “both through the state’s use of force and its failure to provide adequate protection from threats of life.”³⁵ These threats to prisoners right to life are universal, but transgender prisoners as a vulnerable group should be given particular care to, and practices such as solitary confinement and housing with other inmates should be performed with due diligence and risk assessment. It is therefore a valid argument to be made to the increased risk of transgender inmates face in prison, which should lead prison officials to take appropriate measures to increase their safety. In addition, “The right not to be arbitrarily deprived of one’s life is considered to have attained the status of customary international law and to be non-derogable.”³⁶ Which makes this an even more pressing issue to address. The ways in which this can be done is multifaceted and plays into many different points throughout this paper, as sadly assault and suicide can be the ultimate result of a number of violations. From lacking medical care to use of isolation and housing issues. All of which will be further explored.

Furthermore, the protection of the right to life is set out as a “primary duty... to put in place legislative and administrative framework designed to provide effective deterrence against threats to the right to life.”³⁷ As of the *Öneryıldız v Turkey* case³⁸. However, the question of how a state can and should act to prevent threats to the right of life is debated. The *Osman Test*³⁹ was created out of the *Osman v United Kingdom* ECtHR case, where a teacher killed the father of a young student whom he had become obsessed with. The police had previously ignored reports of the teacher being observed near Osman’s house and the school and received multiple complaints about the teacher. Nevertheless, the issue of whether or not the state had failed in adequately protecting Osman’s right to life, the court declared: “it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk”⁴⁰. While this is a case from the ECtHR, it is comparable to the notion of ‘deliberate indifference’ which can be found in

³⁵ Bantekas (n 30) 340

³⁶ Ibid, 342

³⁷ Ibid, 348

³⁸ *Öneryıldız v Turkey* ECHR 2004-XII

³⁹ Bantekas (n 30) 349

⁴⁰ *Osman and Osman v United Kingdom* ECHR 1998-VIII

American courts of law as arguments for Eight Amendment prohibition of cruel and unusual punishments. This has been done by trans prisoners seeking medical treatment and for this to be successful these two criteria had to be met: “the plaintiff must show that she had a serious medical need” and “the plaintiff must show that the defendant acted in deliberate indifference to her serious medical needs.”⁴¹

However, meeting these standards are very difficult and Tara Dunnivant brings up the *D.B v Orange County* case where a transgender woman, who had undergone surgeries to feminize her appearance, was placed in a cell with a fellow male inmate and was raped by him⁴². And this was not seen as sufficient evidence of the prison officials being aware of a heightened risk of sexual assault.⁴³

Therefore, it is similar to the ECtHR approach, which has proven to be “pragmatic and seemingly offers the authorities considerable leeway, it comes at the expense of more precise guidance.”⁴⁴

Access to medical care is a crucial component to improving prison conditions for transgender inmates and this will be further explored in a later chapter. Furthermore, when related to prisoners, “a heightened duty to exercise due diligence is also recognised in the custodial context where the state needs to protect the lives of those under its physical control. This obligation entails putting in place custodial safeguards against violence by officials and providing adequate medical assistance. The state also needs to protect prisoners against self-harm and violence from other prisoners.”⁴⁵ This heightened duty must be offered to transgender inmates as they are especially vulnerable to these violations and their specific needs should be met without discrimination.

Principle 9 of the Yogyakarta Principles revolves around the right to treatment with humanity while in detention. It states “Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person’s dignity.”⁴⁶ Furthermore, it lays out obligations for States, demanding that “a) placement in detention avoids further marginalising persons on the basis of sexual orientation or gender identity or

⁴¹ Tara Dunnivant ‘Bye-Bye Binary: Transgender Prisoners and the Regulation of Gender in the Law’ (2016) 9 Fed. Cts. L. Rev. 15, 29

⁴² Ibid 31

⁴³ Ibid 31

⁴⁴ Bantekas (n 30) 349

⁴⁵ Bantekas (n 30) 350

⁴⁶ Yogyakarta Principles (n 2) 9

subjecting them to risk of violence, ill-treatment or physical, mental or sexual abuse;⁴⁷ Here it clearly sets out the necessity to see someone's sexual orientation and gender identity as a fundamental aspect of someone's dignity, which heavily implies need to not only recognise diversity among the prison population but also accommodate for it. Secondly, point B stresses the need to provide "adequate access to medical care and counselling appropriate to the needs of those in custody, recognising any particular needs of persons on the basis of their sexual orientation or gender identity...access to hormonal or other therapy as well as to gender-reassignment treatments where desired;"⁴⁸. In addition, point C, involves the participation of prisoners in regard to housing, D stresses the need for protective measure for prisoners which are vulnerable to abuse or violence, and G urges the need for personnel training and awareness-raising "regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identity."⁴⁹ Together these standards set out the framework for a human rights strategy for trans prison rights; protection from violence, safe housing, and adequate health care. These three main issues will be further explored throughout this paper, with reference to international human rights standards.

The UNODC Handbook on Prisoners with Special Needs from 2009 recognises 'transgender' as 'special needs' group because of their significant vulnerability while in prison. Furthermore, the handbook stresses that decisions of allocation of trans prisoners should be taken on a case-by-case basis while taking into account the wishes of the prisoner and safety consideration⁵⁰. In their opinion this is because "Allocating prisoners according to their birth sex—and especially housing male to female transgender prisoners among male prisoners—actively facilitates the sexual abuse and rape of such offenders, irrespective of whether they have undergone sex reassignment surgery or not."⁵¹ Pointing out that regardless of having had sex reassignment surgery, trans women are at risk of abuse is crucial because of the overwhelming use of biological sex as the only criteria for deciding on housing within the U.S. prison system. As will be shown, trans women do and can express their gender identity in a multitude of ways, some which involve surgeries but many that do not. As shown in the 2015 U.S. Transgender Survey, which found that 25% of the participants had undergone some

⁴⁷ Ibid 9

⁴⁸ Ibid 9

⁴⁹ Ibid 9

⁵⁰ UNODC 'Handbook on Prisoners with Special Needs' (United Nations Publication 2009) 116

⁵¹ Ibid 115

form of transition-related surgery, and 49% had had hormone therapy⁵². Furthermore, on the subject of medical treatment, the handbook lays out comprehensive guidelines for treatment which includes: “Prisoners with gender dysphoria should be provided with treatment available in the community, such as hormone therapy, as well as psychological support if required. Transgender prisoners may already be on hormone therapy on entry to prison, in which case access to such therapy should be continued. If sex reassignment surgery is available in the community, it should also be available to prisoners.”⁵³ Under these guidelines the U.S. would be required to offer sex reassignment surgery, as it is an option available in the national community, through the Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People⁵⁴, while the cost and distance to health care providers remain barriers for accessing care⁵⁵. In addition, the handbook argues that due to the extreme vulnerable position of LGBT persons within the prison system it “may amount to their sentence being transformed into a much harsher punishment than that handed down by the courts, thereby justifying a degree of positive discrimination during sentencing, taking into account the safety and security requirements of the public, as well as the offender.”⁵⁶

On the 22nd of May this year, the Inter-American Commission on Human Rights (IACHR) released a report entitled Recognition of the Rights of Lesbian, Gay, Bisexual, Trans and Intersex (LGBTI) Persons in the Americas. This report. As Commissioner Flávia Piovesan, the IACHR Rapporteur on the Rights of Lesbian, Gay, Bisexual, Trans and Intersex Persons stated, aims to: “collect best practices in data collection and in efforts to enforce the rights to democratic and political participation, education, health, personal safety, access to justice and economic well-being.”⁵⁷ Furthermore, she admits that “the report is not comprehensive, but it does seek to lay the foundations for other countries to move forward with an agenda of equality, inclusion and non-discrimination, supporting the individual capacities of LGBTI persons to ensure they enjoy integral protection,”⁵⁸. The report uncovered the

⁵² 2015 U.S. Transgender Survey (n 3) 93

⁵³ UNODC (n 75) 117

⁵⁴ The World Professional Association of Transgender Health ‘Standards of Care Version 7’ <https://www.wpath.org/publications/soc> accessed 20 July 2019

⁵⁵ 2015 U.S. Transgender Survey (n 3) 99

⁵⁶ UNODC (n 75) 113

⁵⁷ OAS ‘IACHR Publishes Report on Progress and Challenges toward Recognition of the Rights of LGBTI Persons in the Americas’ 22 May 2019

https://www.oas.org/en/iachr/media_center/PReleases/2019/126.asp accessed 1 August 2019

⁵⁸ Ibid

challenges faced by LGBTI people in the region and the “alarming reality of widespread violence against them”⁵⁹. One of the main findings of the report was the urgent need for States to develop good data collecting mechanisms, which can have “particular attention to the disaggregation of data regarding persons belonging to the acronym LGBTI, as well as taking into account the specific types of vulnerability to which they are subject.”⁶⁰ This is similarly important in the context of trans person rights, as models which sees trans persons as a homogenous group fails to understand the particularities of trans people’s lived experiences and the countless ways in which different identities intersect and plays into systems of abuse. Furthermore, through the report, the Inter-American Commission urges the region’s States to respect and uphold the standards laid out in Advisory Opinion No. 24/17 of the Inter-American Court of Human Rights, which includes the “right of persons to have their self-perceived gender identity recognized and to the rights of LGBTI persons to equal marriage.”⁶¹

⁵⁹ IACHR ‘Advances and Challenges towards the Recognition of the Rights of LGBTI Persons in the Americas’ (OEA/Ser.L/V/II.170 2019) 9

⁶⁰ Ibid 10

⁶¹ Ibid 10

Chapter 2 - Heightened Vulnerability to Physical and Sexual Abuse

As already stated, trans persons are especially vulnerable to abuse while in prison. The 2015 Transgender Survey found that trans people, and particularly trans people of colour experience “elevated levels of negative interactions with law enforcement officers and the criminal justice system.”⁶² One respondent describes her experience with the criminal justice system in this way: “I was in [jail] for 12 days housed with male detainees. Upon being booked, I was escorted to the shower area where I was forced to strip down and shower with male inmates who made sexual advances towards me while mocking me for being different. I feared for my life and the guards were of no help because they mocked me for being different.”⁶³ This quote is emblematic of the kind of abuse trans people in the face of the prison system; even if no physical abuse occurs, humiliation and verbal harassment appear to be a constant to the trans prison experience. Furthermore, the survey revealed that 30% of respondents reported being physically and/or sexually assaulted in the past year by facility staff and/or another prisoner⁶⁴ and “respondents who were incarcerated were five to six times more likely than the general incarcerated population to be sexually assaulted by facility staff, and nine to ten times more likely to be sexually assaulted by another inmate.”⁶⁵ These higher rates of reported sexual assault should cause alarm and call for special measures to protect trans people, as this could amount to a violation of the right to life and the right to be free from torture and degrading treatment, as stipulated through article 6 and 7 of the ICCPR.

On the right to be free from torture, inhuman or degrading treatment, there are a number of international human rights bodies. Article 7 of the ICCPR states “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”⁶⁶ In regard to prisoners, cruel, inhuman or degrading treatment are the focus, which can come from mistreatment, indifference and lack of risk assessment. As well as lack of medical care which in some cases can be argued amounts to torture. this will be explored further in the chapter on medical treatment. In the Convention against

⁶² 2015 U.S. Transgender Survey (n 3) 184

⁶³ Ibid 188

⁶⁴ Ibid 190

⁶⁵ Ibid 192

⁶⁶ UNGA Res 2200A (XXI) (12 December 1966) 7

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1 defines torture to involve the “infliction of severe mental or physical pain”⁶⁷, which should fall under the criteria of “intent...purpose....official involvement”⁶⁸. Meaning torture is an intentional act with a purpose to obtain something from the target, done by someone in an official capacity. This definition somewhat excludes lacking medical treatment from being classified as torture. However, the Inter-American Convention to Prevent and Punish Torture defines torture as “‘any purpose’, and ‘methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish’.”⁶⁹ This definition leaves torture as a wider category in the context of the prison system. In addition, the ECHR article 3 prohibits torture, inhuman or degrading treatment and punishment, and it distinguishes between torture and ill-treatment by a “definition of torture in which it distinguishes between forms of ill-treatment (which must reach the required threshold of a ‘minimum level of severity’) and torture (deliberate inhuman treatment causing very serious suffering).”⁷⁰ Here the focus on ‘deliberate’ mistreatment is very interesting in the context of denial of medical treatment for trans prisoners as it can in some cases be argued that the lack of treatment amounts to torture by only if the prison administration is fully aware of the risk they are putting their prisoners in by denying treatment. Furthermore, for prisoners in specific, there are considerations on “the issue of cruel, inhuman or degrading treatment has also been considered in the context of certain detention regimes. These include being kept in isolation, being locked up in a small room for twenty-three hours a day”.⁷¹

The right to liberty and security of person is also of great importance. Articles 9 and 10 of the ICCPR outline these rights, and art. 9.1 reads: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”⁷² As this paper largely focuses on those who are legally arrested or detained, this right is somewhat beside the point. However, it forms the basis for article 10.1, which reads: “All persons deprived of their liberty shall be

⁶⁷ Bantekas (n 30) 358

⁶⁸ *ibid* 358

⁶⁹ *Ibid* 360

⁷⁰ *Ibid* 360

⁷¹ *Ibid* 362

⁷² UNGA Res 2200A (XXI) (12 December 1966) 9.1

treated with humanity and with respect for the inherent dignity of the human person.”⁷³ In this context “the term liberty refers to ‘physical liberty’ as opposed to ‘mere restriction of freedom of movement’.”⁷⁴ This right should innately include the needs of transgender persons and their inherent human dignity should be seen without discrimination of any kind. This is however not always the case. While, as Bantekas and Oette writes: “the modern system of imprisonment grants states considerable power to deprive persons of their liberty and control of their freedom.”⁷⁵ The question then becomes; to what extent does this allow denial of gender identity and expression? With the very nature of the prison system as restrictive of ones’ liberty, there is a fine line between what is and what is not unlawfully limitations of one’s liberty. Transgender inmates have needs which are unique to them and to what extent should these be catered to by prison officials. A way of looking at this issue is by taking into account the severity and the potential consequences of the denial of these needs. Besides, it is known that “individuals who belong to marginalised communities or groups are more likely to be targeted by the authorities, such as members of ethnic or other minorities, foreign nationals, Afro-American in the USA”⁷⁶. This adds further to the urgency to look intersectionally at the needs of individual prisoners. Additionally, it is important to remember the adverse effects arrest and detention can have for the detainee. This can be viewed as simply a part of the punishment, fitting for the crime. But, in the case of transgender persons, these effects can be exponentially worse. Bantekas and Oette write: “Arrest and detention can entail devastating and potentially irreversible consequences such as stigmatisation, loss of employment, the breakdown of a relationship, psychological damage and illnesses contracted in prison.”⁷⁷ These are issues which are already present for trans individuals in their everyday lives, incarceration can also however, worsen their situation, because of the restrictions of prison life.

This year it is 25 years since the landmark Supreme court case, Farmer v Brennan which contended that prison rape violated the 8th Amendment of the United States Constitution right to be free of cruel and unusual punishment. Dee Dee Farmer had been presenting as female for years before being incarcerated, had been on hormone therapy since the age of 16, had breast implants and an unsuccessful ‘black market’ testicle-removal surgery, which she attempted to finish herself while in

⁷³ Ibid10.1

⁷⁴ Bantekas (n 30) 369

⁷⁵ Ibid 367

⁷⁶ Ibid 368

⁷⁷ Ibid 368

prison, with a razor⁷⁸. In 1986 she was convicted of credit card fraud, an un-violent crime, but she was later transferred to a maximum-security prison and put in the general population⁷⁹. This is where she was physically and sexually assaulted by a fellow prisoner.⁸⁰ Richard Edney in *Keep Me Safe From Harm* notes of the case, it “provides a salient example of what may be described as a typical, or at the least, not unusual experience for a trans- gender inmate and the significant harm attributable solely to the fact of her trans- sexualism.”⁸¹ Meaning the risk she was put under by being placed in general population was wholly due to her gender identity. The lawsuit entailed the claim that the prison administration had not done enough to protect Brennan from assault by other prisoners when they knew that her feminine gender expression and female gender identity made her a heightened risk of assault. This in turn amounts to a violation of the right to be free of inhuman or degrading treatment, as of the ICCPR article 7, mentioned above.

The case was momentous as one of the first supreme court cases that dealt with prison rape. Chris Daley the director for Just Detention International, an NGO who works to end sexual abuse within the prison system, said “There is no aspect of our criminal justice system that says part of your sentence is to be sexually abused, and Farmer was the first place where that was said with authority,”⁸² The concept which is outlined in this quote is applicable to close to all human rights abuses that are inflicted upon trans prisoners. The simple fact that any action which is not a part of the prison sentence should be heavily scrutinised for how it affects the prisoner’s wellbeing and whether it is unequally affecting marginalised groups within the prison system. This amounts to a question of ‘deliberate indifference’, which is the criteria for a violation of the 8th Amendment. this is the argument Farmer makes for her lawsuit, which from the court documents states that she “alleged that respondents had acted with “deliberate indifference” to petitioner’s safety in violation of the Eighth Amendment because

⁷⁸ Alison Flowers, “Dee Farmer Won a Landmark Supreme Court Case on Inmate Rights. But that’s Not the Half of It.” (29 January 2014) *The Village Voice* <https://www.villagevoice.com/2014/01/29/dee-farmer-won-a-landmark-supreme-court-case-on-inmate-rights-but-thats-not-the-half-of-it/> accessed 03 September 2019

⁷⁹ Ibid

⁸⁰ Rogers (n 32) 200

⁸¹ Richard Edney ‘To Keep Me Safe From Harm? Transgender Prisoners and The Experience of Imprisonment’ (2004) *Deakin Law Review* vol 9 no 2, 330

⁸² Flowers (n 91)

they knew that the penitentiary had a violent environment and a history of inmate assaults and that petitioner would be particularly vulnerable to sexual attack.”⁸³

The 8th Amendment has become an important defence for trans prisoners and Tara Dunnavant notes: “In the last two decades, trans prisoners have had some success in accessing hormone therapy and safe confinement by arguing that prison officials' deliberate indifference to their serious medical need or their safety violates the Eighth Amendment prohibition of cruel and unusual punishment.”⁸⁴

‘Deliberate indifference’ first appeared as a term in the United States Reports in *Estelle v. Gamble* (1976), where it was used to show “that deliberate indifference describes a state of mind more blameworthy than negligence.”⁸⁵ The test of ‘deliberate indifference’ under the 8th Amendment has two criteria which can be seen as an objective and subjective prong. The first involves showing the seriousness of the claim. For example, when it comes to medical care “a prisoner must show that he has a serious medical need. A serious medical need is one that involves a substantial risk of serious harm if it is not adequately treated”⁸⁶. Secondly, the subjective prong dictates that “to establish deliberate indifference it must be proven that the responsible official knows that the prisoner is at high risk of serious harm if his condition is not adequately treated.”⁸⁷ Meaning the prison administration must know of the risk and deliberately ignore it. However, it becomes rather hard to fulfil these criteria because especially in the context of medical care, as “It is conceivable that a prison official, acting reasonably and in good faith, might perceive an irreconcilable conflict between his duty to protect the safety and his duty to provide an inmate adequate medical care. If so, his decision not to provide that care might not violate the Eighth Amendment because the resulting infliction of pain on the inmate would not be unnecessary or wanton.”⁸⁸

However, as the decision of *Kosilek v Spencer* (2012) points out: “As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty. Yet the law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of human dignity

⁸³ *Farmer v Brennan* [1994] 511 U.S. 825

⁸⁴ Dunnavant (n 41) 31

⁸⁵ *Farmer v Brennan* [1994] 511 U.S. 825

⁸⁶ *Kosilek v Spencer* [2012] 889 F.Supp.2d 190

⁸⁷ *Ibid*

⁸⁸ *Ibid*

inherent in all persons.⁸⁹ It is this recognition of certain rights and human dignity which is fundamental to the discussion of human rights for trans prisoners and cannot be compromised. Continuing, "Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment. "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."⁹⁰ Incarcerated persons are in a special category under the protection of the 8th Amendment, as they as prisoners become unable to "provide for their own needs. Prisoners are dependent on the State for food, clothing, and necessary medical care. A prison's failure to provide sustenance for inmates "may actually produce physical `torture or a lingering death."⁹¹ "Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society."⁹² In the same way, a prisoner cannot remove themselves from a dangerous situation or person, and are therefore under the protection of the prison administration, which has a responsibility to evaluate which person or group of persons are in need of a higher level of protection.

Back to Dee Dee Farmer, she succeeded in arguing the prison administration had been deliberately indifferent to her safety and wellbeing. But the court "declined to adopt an objective rule, and maintained that the plaintiff must show that a prison official possessed actual knowledge of a serious medical need and deliberately failed to act."⁹³ This presents a range of issues, especially for marginalised groups, because it allows vulnerable prisoners to be punished for the prison administrations ignorance. While it can be argued that it is impossible for the prison the aware at all times of all risks and threats faced by every single prisoner, this could potentially lead to a 'hear no evil, see no evil' attitude where prison administrations can avoid having to protect marginalised groups and individuals by not adequately education themselves on potential risks and threats. Furthermore, it seems from the decision that "the practice of the Federal Bureau of Prisons was to place 'preoperative transsexual prisoners with prisoners of like biological sex'."⁹⁴ This is a stance which wholly ignores the

⁸⁹ Ibid

⁹⁰ Ibid

⁹¹ Ibid

⁹² Ibid

⁹³ Dunnavant (n 41) 30

⁹⁴ Edney (n 95) 330

lived experiences of Farmer, which as explained above had been living as a woman for years before her incarceration. It becomes clear that “the Federal Bureau of Prisons made an assumption that sex, as indicated in the presence of male or female genitals, was equivalent to gender. Such an assumption is wrong in that it not only defies recognised medical and psychiatric definitions of gender dysphoria, but ignores the lived, subjective reality of transgender persons.”⁹⁵ A subjective reality which has been and still is being ignored by regulations which applies rigid guidelines that do not reflect the humanity and individuality of trans persons. To summarise Edney pinpoints the risks trans persons face within the prison system: “The factual matrix in Farmer typifies one of the most likely sources of danger for the transgender inmate: placement in an inappropriate custodial situation.”⁹⁶ In an interview to commemorate the 20th anniversary of the Supreme Court case Farmer reflected on the legacy of her landmark lawsuit, saying “I would like for my legacy to be that I changed injustices for a multitude of people who were or would have suffered unjustly,”⁹⁷.

On the overall status of the management of trans prisoners, Edney notes that it “amounts to a failure to guarantee the human rights of such prisoners and to provide basic protections concerning privacy, security and bodily integrity.”⁹⁸ In particular, there is a lack of research on the experiences of trans prisoners and “how they deal with the prison and counter those features of prison life which are dangerous and threatening.”⁹⁹ This is important because the little research that has been done in recent years that has shown the critical situation for trans prisoners has created “legal imperatives [which] are turning the tenor of the war to a ceasefire.”¹⁰⁰ However, the suppression of trans prison rights are still by all means under attack and as Edney notes: “The empirical evidence suggests that the level of protection is not of such quality as to guarantee the basic human rights of transgender persons while in custody. Thus sexual violence remains a dominant and particular privation likely to be more encountered by transgender prisoners.”¹⁰¹ While there is domestic protection under the 8th Amendment, the lack of knowledge on the part of both prison administration and the courts sees trans

⁹⁵ Ibid 330

⁹⁶ Ibid 331

⁹⁷ Flowers (n 91)

⁹⁸ Edney, (n 95) 332

⁹⁹ Ibid 336

¹⁰⁰ Mary K. Stohr ‘The Hundred Years’ War: The Etiology and Status of Assaults on Transgender Women in Men’s Prisons’ (2015) *Women & Criminal Justice* 25:1-2, 120

¹⁰¹ Edney (n 95) 336-7

people with far less support than more privileged prison groups. Furthermore, Edney makes it clear that this treatment cannot continue and strongly claims that: “Such less than equal treatment cannot be sustained in the operation of the criminal justice system. To do otherwise is to render the idea of the equality of law in relation to transgender persons redundant.”¹⁰²

In the international human rights law framework, the 2015 report from the IACHR noted that “LGBTI persons are at the bottom of the informal hierarchy in detention centers, resulting in double or triple discrimination, and are disproportionately subjected to acts of torture and other forms of ill-treatment.”¹⁰³ This knowledge, taken together with their other observation which found that “LGBTI persons deprived of their liberty face an increased risk of sexual violence, as well as other acts of violence and discrimination, at the hands of other persons deprived of their liberty or custodial staff.”¹⁰⁴ Forms a clear picture of the urgent need to see LGBTI persons as a special needs group within the prison system as of the UNODC Handbook on Prisoners with Special Need 2009. In addition, the IACHR has raised “special concern about the situation of women, particularly young trans women who are victims of violence, and referred to data indicating that “80% of trans persons killed were 35 years of age or younger”¹⁰⁵. These dark statistics cannot be forgotten when it comes to providing a safe environment for trans women in prison. As it can be assumed these violent attitudes towards trans women does not cease to exist within the prison walls. Similarly, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, while it does not explicitly mention sexual orientation and gender identity “it refers to factors that may increase women’s vulnerability to violence and, consequently, discrimination, these necessarily include sexual orientation, gender identity and the body diversity of lesbian, bisexual, transgender or intersex women.”¹⁰⁶ In light of this, the IACHR 2019 report “reiterates that States have an obligation to prevent, punish and eradicate all forms of violence against women, and that the right of every woman to live free from violence includes the right to live free from discrimination, whether they be lesbian, bisexual, trans and intersex women.”¹⁰⁷ This should in turn be taken as an incentive to improve the living

¹⁰² Edney (n 95) 338

¹⁰³ IACHR (n 85) 89

¹⁰⁴ Ibid 89

¹⁰⁵ Ibid 92

¹⁰⁶ Ibid 93

¹⁰⁷ Ibid 93

conditions of trans women in prison, as it is an arena where they especially vulnerable to discrimination and abuse.

Chapter 3 - Access to Adequate Medical Care

On the forefront of rights for trans prisoners is the right to adequate healthcare, as this is an issue quite uniquely for transgender persons. Since there is no national law protecting trans prisoner healthcare the individual prisoner often is left to sue their prison administration if they refuse them healthcare related to gender dysmorphia. The American Psychiatric Association (APA) changed their categorisation of gender identity disorders as gender dysphoria¹⁰⁸, and describes the condition as: “people with gender dysphoria may be very uncomfortable with the gender they were assigned, sometimes described as being uncomfortable with their body (particularly developments during puberty) or being uncomfortable with the expected roles of their assigned gender.”¹⁰⁹ As by WHO’s classification of gender incongruence stated earlier, gender dysmorphia can be treated in a number of ways, from lifestyle and cosmetic changes to better align with one’s gender identity, to medical interventions such as hormone therapy or gender reassignment surgery. This is experienced differently by different people and it is highly individual whether someone seeks medical assistance to alleviate their gender dysmorphia, the financial cost of it also plays into the decision¹¹⁰. Therefore, when a trans person enters the prison system they can arrive at various stages of their transition or and with very different needs, medical or otherwise. Because of this it’s impossible to apply blanket policies for the treatment of trans prisoners. A popular blanket policy was the ‘freeze frame’¹¹¹ strategy, which meant that someone’s medical treatment where ‘freeze frame’ on the point of their entry into prison. Meaning only trans persons who already where on hormone therapy prior to entering prison where allowed this treatment. This of course excluded anyone how would develop gender dysmorphia while incarcerated and ruled out gender reassignment surgery altogether, as well as excluded those who had taken ‘black marked’ hormones prior to incarceration. The 2015 U.S. Transgender Survey found that 37% of respondents who were taking hormones before being imprisoned were stopped from continuing their hormone treatment while in prison¹¹². However, after

¹⁰⁸ Rogers (n 32) 192

¹⁰⁹ American Psychiatric Association, “What is Gender Dysphoria” <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> accessed 17 August 2019

¹¹⁰ Rogers (n 32) 192-193.

¹¹¹ Stohr (n 114) 127

¹¹² 2015 U.S. Transgender Survey (n 3) 190

settlement in the *Kosilek v Maloney* (2002) lawsuit Bureau of Prisons changed their policy to view transgender prisoners' medical need on an individual and continuous basis¹¹³.

The United Nations Standard Minimum Rules for the Treatment of Prisoners, or the Nelson Mandela Rules, reflects the common stipulation of incarceration facilities being segregated on the basis of sex¹¹⁴. Prisons can be said to be one of the most gender-segregated institutions in modern society, and this comes with its' own issues. However, the Mandela Rules recognises gender identity. From the creation and adaption of the Standard Minimum Rules for the Treatment of Prisoners by the First UN Congress on the Prevention of Crime and the Treatment of Offenders in 1955, there has been a firm precedent for the rights of prisoners. It may be a soft law instrument, but it has nevertheless been used in human rights jurisprudence of human rights treaty bodies to "determine acceptable conditions of detention."¹¹⁵ In 2011 the General Assembly decided to create "an open-ended intergovernmental Expert Group to review and possibly revise the rules"¹¹⁶ and in 2015 the revised rules were adopted by the UN General Assembly. Of particular note is Rule 7(1) which recognises gender identity: "No person shall be received in a prison without a valid commitment order. The following information shall be entered in the prisoner file management system upon admission of every prisoner: (a) Precise information enabling determination of his or her unique identity, respecting his or her self-perceived gender;"¹¹⁷. This is significant because by respecting a prisoner's self-perceived gender, the prison administration has to recognise their individual needs as transgender individuals; from the usage of correct pronouns to gender confirming medical treatments. However, these standards have not been adopted by the United States, as they rather operate on "pre-existing correctional standards bolstered by reforms resulting from prisoner civil rights litigation."¹¹⁸ The Nelson Mandela Rules are nevertheless a useful guidance tool for viewing international standards of prison standards and if or how the United States fall behind. Other rules of note are among others Rule 1 and 2 which highlights the necessity of treating prisoners with respect and non-discrimination. In particular, Rule 2.2 urges the individuality of

¹¹³ Stohr (n 114) 127

¹¹⁴ ECOSOC Res 663 C (XXIV) (31 July 1957) and ECOSOC Res 2076 (LXII) (13 May 1977)

¹¹⁵ Bantekas (n 30) 65

¹¹⁶ United Nations "Nelson Mandela Rules"

https://www.un.org/en/events/mandeladay/mandela_rules.shtml accessed 20 July 2019

¹¹⁷ UNGA Res 70/175 (17 December 2015) 9

¹¹⁸ Sara A Rodriguez, 'The Impotence of Being Earnest: Status of the United Nations Standard Minimum Rules for the Treatment of Prisoners in Europe and the United States' (2007) 33 NEW ENG J ON CRIM & CIV CONFINEMENT 61-62

prisoners, stipulating: “prison administrations shall take account of the individual needs of prisoners”¹¹⁹. This rule is of particular use for trans prisoners as their individual needs are often ignored and blanket policies such as ‘freeze framing’ of medical treatments related to gender dysphoria were common practice. This will be discussed further in the chapter on medical concerns.

Michelle Kosilek is an inmate at a Massachusetts prison, incarcerated in 1990 for the murder of her then-wife. In 1992 she sued the prison commissioner for denying her gender confirmation surgery (also known as gender reassignment surgery); an umbrella term of a number of surgical interventions aimed to aid to “help alleviate feelings of dysphoria, help align your body with your internal sense of your gender, and make it easier to navigate the world in your gender”¹²⁰. The Massachusetts district court found in 2012, that the Department of Corrections (DOC) had violated the Eighth Amendment on cruel and unusual punishments by refusing her surgery. This was a historic decision and the first of its’ kind. However, the decision was later overturned by the First Circuit Court of Appeals in 2014. And finally, in May of 2015 the U.S. Supreme Court declined to hear the appeal on Kosilek’s behalf, ending her decades-long legal battle for essential medical care¹²¹. GLBTQ Legal Advocates & Defenders (GLAD), a leading LGBT rights organisation, followed the case closely and condemned the decision of the court. Jennifer Levi the director of their Transgender Rights Project, commented “This is a terrible and inhumane result for Michelle. But it is just a matter of time before some prison somewhere is required to provide essential surgery, meeting the minimal Constitutional obligations of adequate medical care for transgender people in prison.”¹²² Furthermore, GLAD attorney Joseph L. Sulman commented: “The treatment of Michelle has been cruel and unusual, according to two lengthy, thoughtful, and closely reasoned judgements... The DOC’s behaviour has been abominable as they have repeatedly defied their own experts in their eagerness to deny her desperately needed medical attention.”¹²³ The case in question was called ‘unusual’ by the Massachusetts state court because the plaintiff was suing for access to treatment which had been prescribed to her by the defendant

¹¹⁹ UNGA Res 70/175 (17 December 2015) 8

¹²⁰ KC Clements ‘What to Expect from Gender Confirmation Surgery’ (*Healthline*, 19 December 2019) <https://www.healthline.com/health/transgender/gender-confirmation-surgery#afab-bottom-surgery> accessed 10 September 2019

¹²¹ ‘U.S. Supreme Court Will Not Hear Case Concerning Medical Care for Transgender Woman in Prison’ (*GLAD*, 4 May 2015) <https://www.glad.org/post/u-s-supreme-court-will-not-hear-case-concerning-medical-care-transgender-woman-prison/> accessed 1 August 2019

¹²² *Ibid*

¹²³ *Ibid*

Commissioner of the Massachusetts Department of Correction's (the "DOC") doctors¹²⁴. Hens the DOC was actively going against its own medical council. Jennifer Levi continued to say "It is difficult or impossible to imagine a decision like this one – that second-guesses every factual determination made by the trial court – in the context of any other prisoner health care case."¹²⁵

The Massachusetts State Court found that former DOC Maloney and Dennehy both had neglected Kosilek's medical needs and used 'security concerns' as justification. However, Maloney "had some sincere security concerns about providing Kosilek with hormones or sex reassignment surgery, his reluctance to authorize these treatments was substantially attributable to his fear of public and political criticism that any expenditure for hormones or sex reassignment surgery would be an improper use of public funds."¹²⁶ Dennehy on the other hand, "did not decide to deny Kosilek sex reassignment surgery because of a sincere or reasonable concern for security. Rather, she was motivated by her understanding that providing such treatment would provoke public and political controversy, criticism, scorn, and ridicule."¹²⁷ This is a common attitude towards the medical needs of transgender people, in prisoner as well as in society in general. A quick look into the public response and media coverage of this case reveals a large number of critical views. Senator Scott Brown called it "an outrageous abuse of taxpayer dollars"¹²⁸ and the then-Democratic Senate candidate Elizabeth Warren commented: "I have to say, I don't think it's a good use of taxpayer dollars,"¹²⁹¹³⁰. A Vice article from 2013 bearing the

¹²⁴ Kosilek v Spencer [2012] 889 F.Supp.2d 190

¹²⁵ 'GLAD Appalled by Appeals Court Ruling that Dept. of Corrections Can Deny Care to Transgender Woman'(GLAD 16 December 2014) <https://www.glad.org/post/glad-appalled-appeals-court-ruling-dept-corrections-can-deny-care-transgender-woman/> accessed 1 August 2019

¹²⁶ Kosilek v Spencer [2012] 889 F.Supp.2d 190

¹²⁷ Ibid

¹²⁸ Wendy Kaminer 'Is Denying Treatment to Transsexual Inmates 'Cruel and Unusual'? (*The Atlantic*, 7 September 2012) <https://www.theatlantic.com/national/archive/2012/09/is-denying-treatment-to-transsexual-inmates-cruel-and-unusual/262074/> accessed 1 August 2019

¹²⁹ Michael Levenson 'Elizabeth Warren disagrees with judge's sex-change ruling' (*Boston Globe*, 7 September 2012) <https://www.bostonglobe.com/metro/2012/09/07/elizabeth-warren-radio-interview-disagrees-with-sex-change-ruling-addresses-native-american-issue/2kiz8FGO5T9cFZxhxOm3KJ/story.html> accessed 1 August 2019

¹³⁰ Warren has recently responded to the comment through a spokesperson for Warren's presidential exploratory committee: "Senator Warren supports access to medically necessary services, including transition-related surgeries. This includes procedures taking place at the VA, in the military, or at correctional facilities." Zack Ford 'Elizabeth Warren addresses the one anti-LGBTQ blemish on her record' (Think Progress, 7 January 2019) <https://thinkprogress.org/elizabeth-warren-transgender-prisoners-lgbtq-record-352c3b445bba/> accessed 1 August 2019

headline “Should Murderers Be Allowed State-Funded Sex Changes?”¹³¹ presents the lawsuit as a dilemma with two ‘equally compelling’ sides: “On one side, you have the human rights of a prisoner. On the other you have an individual who has severely violated that same code of morality.”¹³² However, the flaw in this statement is that every prisoner has in one way or the other violated some ‘code of morality’, but transgender inmates are largely the only ones denied essential medical care. Kosilek herself made this point in a 2011 phone interview with Associated Press: “People in the prisons who have bad hearts, hips or knees have surgery to repair those things. My medical needs are no less important or more important than the person in the cell next to me.”¹³³

Back in 2002 the district court ruled in her favour but determined that hormone treatment was adequate for treating her gender dysphoria¹³⁴. In addition, she has received hair removal treatments, women’s clothing and psychotherapy to alleviate gender dysphoria, which has been beneficial.¹³⁵ As she had early on in her prison sentence tried to self-castrate and attempted suicide twice.¹³⁶ However, Kosilek’s doctors recommended gender confirmation surgery which the prison failed to provide, and this resulted in the 2012 suit. The court found that the then Commissioner Dennehy had “engaged in a pattern of pretence, pretext, and prevarication to deny Kosilek the sex reassignment surgery that the DOC doctors prescribed after Kosilek had completed more than a year of “real life experience” living as a female in prison.”¹³⁷ This was proved by Dennehy’s determination not to be the “first prison official to provide an inmate sex reassignment surgery”¹³⁸, testifying that would “retire rather than obey an order from the Supreme Court to do so.”¹³⁹ This resulted in the district court of Massachusetts becoming historic in their decision to grant Kosilek GCS. However, the Commonwealth of Massachusetts appealed, and a three-judge panel of the First Circuit Court of Appeals in 2014

¹³¹ Danny McDonald ‘Should Murderers Be Allowed State-Funded Sex Changes?’ (*Vice*, 15 May 2013) <https://www.vice.com/da/article/9bnpmz/should-murderers-be-given-sex-change-surgery-by-the-state> accessed 1 August 2019

¹³² *Ibid*

¹³³ Associated Press in Boston ‘Massachusetts prison does not have to pay for inmate’s sex change, court rules’ (*The Guardian*, 16 December 2014) <https://www.theguardian.com/us-news/2014/dec/16/prison-transgender-surgery-ruling-boston> accessed 1 August 2019

¹³⁴ *Dunnavant* (n 41) 16

¹³⁵ *Ibid* 16

¹³⁶ *Ibid* 16

¹³⁷ *Kosilek v Spencer* [2012] 889 F.Supp.2d 190

¹³⁸ *Ibid*

¹³⁹ *Ibid*

maintained the district court's judgment, but when the Commonwealth requested and was granted a rehearing before the full bench, the judgment was overturned.¹⁴⁰

It becomes clear that the opinions expressed by the aforementioned politicians are prevalent in prison administrations too, and Judge Thompson of the appeal court, dissenting, observed that she "would not need to pen this dissent. . .were she not seeking a treatment that many see as strange or immoral."¹⁴¹ This is in stark contrast to the views of many medical professionals and transgender specialist and advocates who hold the view that "breast augmentation, facial feminization, genital reconstruction, and other gender confirming surgeries are not elective, for individuals with gender dysphoria whose distress is not removed through other treatment options alone."¹⁴² This view is also upheld by WHO in their new categorisation of 'gender incongruence', which includes surgery as a means to live in ones experienced gender, as mentioned earlier. In addition, Dunnivant writes: "the likely result of denying individuals the requisite treatment is suicide and self-mutilation. Eighth Amendment jurisprudence establishes that a clear risk of future harm may suffice to sustain an Eighth Amendment claim."¹⁴³ It is therefore damning that the court of appeals ultimately decided to overturn the decision. Like it was written about the aforementioned Farmer v. Brennan supreme court case "Prison Rape is not a Part of the Sentence"¹⁴⁴, the denial of medical care is not a part of the sentence. Jennifer Levi, who is the director of the Transgender Rights Project of GLAD, commented on the decision saying "it is impossible to imagine a decision like this one- that second-guesses every factual determination made by the trial court- in the context of any other prisoner health care case."¹⁴⁵ This exemplified the bias against trans healthcare, which despite ample evidence to its fundamental need is disregarded as nonessential, shown by the Repeal Court's decision. Judge Thompson similarly remarks in her closing statement that the majority's judgement "aggrieves an already marginalized

¹⁴⁰ 'U.S. Supreme Court Will Not Hear Case Concerning Medical Care for Transgender Woman in Prison' (n 128)

¹⁴¹ Dunnivant (n 41) 17

¹⁴² Ibid 18

¹⁴³ Ibid 18

¹⁴⁴ Ellen Goodman 'Prison Rape is not a Part of the Sentence' (Stamford Daily Advocate 15 June 1994) http://transacity.org/files/news/1994_06_15_Stamford_CT_Daily_Advocate_A16.jpg accessed 30 July 2019

¹⁴⁵ Dunnivant (n 41) 17

community, and enables correctional systems to further postpone their adjustment to the crumbling gender binary.”¹⁴⁶

The unfortunate outcome of this case shows the continuing struggle for recognition of trans rights and the public and political forces which seek to undermine them. It is evident from the general lack of support from the public that trans people are a misunderstood and marginalised group, but it is because of this that laws and regulations to safeguard them is important. As Thoreson writes in his essay *Queering Human Rights*: “If rights cannot actually be safeguarded for unpopular groups, the legitimacy and moral foundation of the human rights regime are called into question.”¹⁴⁷ It has been shown that universal human rights obligations have not been particularly effective for the rights of sexual minorities and other marginalised groups which are offered specific protections. While “the UN Human Rights Committee has maintained that the International Covenant on Civil and Political Rights (ICCPR) offers protection from discrimination on the basis of sexual orientation as part of its reference to “sex” in Articles 2.1 and 26.”¹⁴⁸ The vagueness of this classification leaves it open to interpretation. The Yogyakarta Principles seeks to bridge this gap and Thoreson similarly notes “The Principles are theoretically and practically critical for the human rights project in general, since those populations who are especially at risk indicate where protections fail to be legally and practically enforceable”¹⁴⁹. Like on the national scale in the U.S., where health care for prisoners is a constitutional right under the 8th Amendment, as of *Estelle v Gamble*¹⁵⁰, basic healthcare for trans persons should not be such a controversial topic, especially since the treatments are nationally and globally recognised, as explained above. Furthermore, Former Supreme Court Justice Anthony Kennedy wrote in 1979: “[T]he whole point of the [Eighth] [A]mendment is to protect persons convicted of crimes. Eighth [A]mendment protections are not forfeited by one's prior acts.”¹⁵¹ The utmost care should therefore be taken to avoid someone’s circumstances playing into decisions regarding 8th Amendment cases. Continuing, this dynamic of ignored rights comes at the cost of the alleged universality of human rights, Thoreson resumes: “It is precisely those rights that are the least popular or most controversial

¹⁴⁶ Ibid 18

¹⁴⁷ Thoreson (n 24) 324

¹⁴⁸ Ibid 326

¹⁴⁹ Ibid 325

¹⁵⁰ *Estelle v. Gamble* [1976] 429 U.S. 97

¹⁵¹ *Kosilek v Spencer* [2012] 889 F.Supp.2d 190

in the global arena that draw attention to the bias, oversight, unenforceability, and hypocrisies of any international human rights, where power differentials in the global community allow some states to assert their normative prescriptions on their less influential counterparts.”¹⁵²

The IACHR 2019 report on the Recognition of the rights of LGBTI Persons highlights the right to health in a number of human rights instruments, such as the American Declaration (Article XI) and the Protocol of San Salvador (Article 10)¹⁵³. These define the right to health as “the enjoyment of the highest attainable standard of physical, mental, and social well-being.”¹⁵⁴ In addition Articles II of the Declaration and 3 of the Protocol of San Salvador, states that “the right to health must be guaranteed without distinction of any kind, including on grounds of sexual orientation, gender identity or expression, and body diversity.”¹⁵⁵ This shows the presence of health rights which are not upheld in the many instances for trans prisoners, as shown above with the difficulty in which many find accessing healthcare related to gender dysmorphia and transitioning. The Inter-American Court has stated that right to health includes “the absence of disease or infirmity, but also a complete state of physical, mental, and social well-being, derived from a lifestyle that allows people to achieve a comprehensive balance”¹⁵⁶. Which calls of a holistic and comprehensive treatment of trans people while incarcerated, that follows the guidelines set out by the likes of the World Health Organisation, as described above. Additionally, the Yogyakarta +10 Principles states that under article 17 ‘relating to the right to the highest attainable standard of health’, states shall “K. Ensure access to the highest attainable standard of gender affirming healthcare, on the basis of an individual’s free, prior and informed consent” and “L. Ensure that gender affirming healthcare is provided by the public health system or, if not so provided, that the costs are covered or reimbursable under private and public health.”¹⁵⁷ All in which entitles trans persons the access to treatment for gender dysmorphia according to the newest medical standards and gender confirmation treatments.

¹⁵² Thoreson (n 24) 325

¹⁵³ IACHR (n 85) 80

¹⁵⁴ Ibid 80

¹⁵⁵ Ibid 80

¹⁵⁶ Ibid 80

¹⁵⁷ Yogyakarta Principles Plus 10, 20 <http://yogyakartaprinciples.org/principles-en/official-versions-pdf/> accessed 10 August 2019

Chapter 4 - Self-Identification and Housing Policies

Freedom of expression, assembly and association are rights which “serves as a critical measure of pluralistic and tolerant society and as a key to participatory rights in its political life.”¹⁵⁸ These are crucial for the freedom of gender identity and expression, while they are limited. In addition, “the freedom of thought, conscience and religion as well as the right to privacy, i.e. rights that largely protect the space of an individual against unwarranted interference, they constitute core civil and political rights.”¹⁵⁹ Especially the right to privacy is important for transgender persons as being ‘outed’, that means to be publicly exposed as transgender, can have fatal consequences. the right to privacy could potentially also be used to counter ‘bathroom/lockerroom bills’ which goes out of their way to expose, and in the process, harm transgender people. Sarah McBride, a vocal voice to the battle against these bills stated “the discomfort of others shouldn’t be grounds of differential treatment. And when you do that, when you single us out, it puts a bull’s-eye on our backs for harassment and bullying and reinforces the prejudice that we are not really the gender we are.”¹⁶⁰ As well as practices which seek to expose transgender persons in the prison system. In the ICCPR the right to privacy is outlined in article 17.1 and 17.2 “1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.”¹⁶¹ These rights should include the aforementioned ‘outing’ and are relevant to the prison system in the sense that transgender prisoners often are made to undergo humiliating procedures to show or defend their gender identity. As detailed by a participant of the 2015 U.S. Transgender Survey: “While I was in solitary, a cop asked about my gender. I told him I was male, and he told me I sounded female. Next thing I know, I was being taken to the jail doctor to spread my legs and have him confirm my gender. It was humiliating.”¹⁶²

¹⁵⁸ Ibid 390

¹⁵⁹ Ibid 390

¹⁶⁰ Sarah McBride, *Tomorrow Will Be Different: Love, Loss, and the Fight for Trans Equality* (Crown Archetype 2018) 127

¹⁶¹ UNGA Res 2200A (XXI) (12 December 1966) 17.1

¹⁶² 2015 U.S. Transgender Survey (n 3) 188

Article 19 of the ICCPR states “1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression.”¹⁶³ And article 21 sets out the “right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”¹⁶⁴ Similarly to article 19, the right to peaceful assembly is limited by the protection of public order, health or moral, which can lead to significant limitations for the rights of marginalised people. This is because “with the exception of the internal dimensions of freedom of thought, conscience and religion, these rights are not absolute.”¹⁶⁵ They are also, as shown through the open limitations, up to debate around how wide-reaching these rights should be. This can be seen in as Bantekas and Oette puts it: “However, even some nominally democratic states have a poor record of protecting these fundamental freedoms. Political and community activists, human rights defenders and journalists are particularly vulnerable to intimidation, harassment, ill-treatment and murder.”¹⁶⁶

While the majority of policies on prisoner housing uses a wholly biological determination of sex and gender, there have been some attempts to house trans women in women’s prisons. However, the main argument against this new practice is that of safety concerns for the cis women prisoners. In the United Kingdom there recently was a major case of a trans woman, Karen White, who was convicted of “indecent assault, indecent exposure and gross indecency involving children, animal cruelty and dishonesty.”¹⁶⁷, was put in a women’s prison, where she sexually assaulted a cis woman¹⁶⁸. The Ministry of Justice apologised admitted to not having considered White’s offending history when deciding on her housing arrangements¹⁶⁹. In the wake of this many was quick to wholesale condemn the practice of housing trans women in women’s prisons. Janice Turner of The Times wrote on the

¹⁶³ Ibid 19

¹⁶⁴ Ibid 21

¹⁶⁵ Bantekas (n 30) 390-1

¹⁶⁶ Ibid 391

¹⁶⁷ Nazia Parveen ‘Transgender prisoner who sexually assaulted inmates jailed for life’ (*The Guardian* 11 October 2018) <https://www.theguardian.com/uk-news/2018/oct/11/transgender-prisoner-who-sexually-assaulted-inmates-jailed-for-life> accessed 1 September 2019

¹⁶⁸ Ibid

¹⁶⁹ Ibid

practice “[it] is like locking a fox in a hen house.”¹⁷⁰ A response to the aforementioned article wrote: “We’re being painted with the same brush as Karen White as she is being paraded about as an example of what we- me and people like me, are capable of- and asserting to others that we all have the same intent; To harm women and young girls.”¹⁷¹ And Fair Play for Women, a campaign group against trans rights, created a petition which gained over 10,000 signature for a prison review and stated they “want to see policy changed so that prisoners are located based on the SEX THEY WERE BORN.”¹⁷²

Similarly, back in the U.S., lawmakers in the state of California is currently nearing the 13th of September deadline to pass a number of LGBTI bills, one of which is bill 132 ‘the Transgender Respect, Agency, and Dignity Act’. This bill will “require that incarcerated transgender people in California jails be housed based on their gender identity, unless doing so put their safety at risk, and be referred to by their preferred pronouns, gender, and name.”¹⁷³ financial incentives have been listed as the bill had been previously tried but killed in the Legislature, citing the cost of prion staff training and of transferring trans prisoner to new facilities¹⁷⁴. Madeleine Kearns, of the National Review, called this proposed bill a “disaster for women”¹⁷⁵, and speculated “what if the individual is a convicted sex offender, wife beater, or stalker? No matter, the person must still be treated according to his or her gender-identity preference.”¹⁷⁶ Again the protection and safety of cis women are brought forward as the leading reason for opposing the bill, which is underpinned by the outdated and incorrect notion that trans women are fundamentally men. While the case of Karen White shows what the opposition is afraid of, it is extremely rare and most policies which allow for self-identification will not allow violent

¹⁷⁰ Janice Turner ‘Trans rapists are a danger for women’ (*The Times* 8 September 2018) <https://www.thetimes.co.uk/article/trans-rapists-are-a-danger-in-women-s-jails-5vhgh57pt> accessed 1 September 2019

¹⁷¹ Phaylen Fairchild ‘We Have To Talk About Karen White Who Sexually Assaulted Four Women In Prison And Identifies As Trans’ (*Medium* 18 September 2018) <https://medium.com/@Phaylen/lgbtqwe-have-to-talk-about-karen-white-who-sexually-assaulted-four-women-in-prison-and-identifies-353459964502> accessed 1 September 2019

¹⁷² ‘After Karen White: What is the government doing to make sure women in prison never get attacked by a male inmate ever again?’ (*Fair Play For Women* 13 December 2018) <https://fairplayforwomen.com/prison-review/> accessed 1 September 2019

¹⁷³ Matthew S. Bajko ‘Deadline nears to pass CA LGBT bills’ (*The Bay Area Reporter* 4 September 2019) <https://www.ebar.com/news/news//281301> accessed 01 September 2019

¹⁷⁴ Ibid

¹⁷⁵ Madeleine Kearns ‘California’s Transgender Prison Policy Is a Disaster for Women’ (*The National Review* 26 June 2019) <https://www.nationalreview.com/2019/06/californias-transgender-prison-policy-is-a-disaster-for-women/> accessed 01 September 2019

¹⁷⁶ Ibid

trans offenders in women's prisons. This will be further explored in this chapter. In addition, the radical feminist group Women's Liberation Front was quoted the National Review article, stating the bill would "put women prisoners and women prison guards and staff, at serious increased risk of male violence."¹⁷⁷ Which not only paints all trans women as perpetrators of male violence but wholly ignores the abuse prisoners, trans or cis, are subjected to by male prison staff. The 2015 U.S. Transgender Survey found that one in five (20%) were physically and/or sexually assaulted by prison or jail staff in the past year¹⁷⁸.

An example of housing policies which takes into account the inmates self-identification can be found in the New South Wales state of Australia. Going back to the suicide of Catherine Moore in later 1997. She had been "placed within the protection unit because of her overt feminine characteristics."¹⁷⁹ But even with this protection, she was raped by a male prisoner. After the autopsy, the Coroner found that "her suicide was as a result of both the sexual assault and her being provided with drugs by another prisoner."¹⁸⁰ Furthermore, the Coroner recommended that "the prison policy should be designed so that it results in an outcome that would 'house transgender prisoners in institutions appropriate to their gender identification'."¹⁸¹ While the practice of housing trans women in women's prisons goes back to 1984 it is not until the late 1990's that the practice become more commonplace¹⁸². Nevertheless, the NSW policies on trans inmates are seen as one of the most progressive on identification and health services. As by the Custodial Operation policies from the NSW Government, self-identification in the founding principles of identification and treatment of prisoners. It states: "A person received into custody must be managed as the gender with which they identify at the time of their incarceration regardless of their identified gender in previous periods of incarceration."¹⁸³ Furthermore, point 1.5 on placement assessment makes it clear that "An intersex person or a person who self-identifies as

¹⁷⁷ Ibid

¹⁷⁸ 2015 U.S. Transgender Survey (n 3) 191

¹⁷⁹ Edney (n 95) 333

¹⁸⁰ Sam Lynch and Lorana Bartels, 'Transgender Prisoners in Australia: An Examination of the Issues, Law and Policy' (2017) 19 FLINDERS LJ 185 McGill 185

¹⁸¹ Edney (n 95) 333

¹⁸² Mandy Wilson and others "You're a woman, a convenience, a cat, a poof, a thing, an idiot': Transgender women negotiating sexual experiences in men's prisons in Australia' (2017) Sexualities Vol. 20, 385-6

¹⁸³ Justice Corrective Services "Custodial Operations Policy and Procedures 3.8 Transgender and intersex inmates" (NSW Government 16 December 2019) 4 <https://www.correctiveservices.justice.nsw.gov.au/Documents/copp/transgender-and-intersex-inmates-redacted.pdf> accessed 5 September 2019

transgender has the right to be housed in a correctional facility of their gender of identification unless it is determined through classification and placement that the person should more appropriately be placed in a correctional centre of their biological sex.”¹⁸⁴ The conditions includes considerations of the individual’s criminal history and current offence, meaning that someone who’s committed crimes of violence or sexual assault against children or women would be excluded from serving time in a women’s prison, the second condition revolves around one’s custodial history, meaning previous behaviours in custody that might pose a safety risk, lastly the perceived risk(s) are considered to ensure the enduring safety of all inmates.”¹⁸⁵

These policies seem close to what activist and prisoners in the U.S. have been arguing for and the strong focus on self-identification is refreshing in comparison to the medial model applied by the U.S. prison system. However, as Edney points out “As part of any project to take seriously the concerns of transgender prisoners it is critical to take into account the precise details of the treatment of transgender persons by the criminal justice system.”¹⁸⁶ Social scientists has done some research into the experience of incarceration by trans people, but it is far from exhaustive. A 2017 article in *Sexualities* explores the issue of transgender women negotiating sexual experiences in men’s prisons in Australia.¹⁸⁷ By their own account, they are the first to document the experiences of trans women who have both been in male and female prisons. While it is telling that this is not something that has been done before, their small sample size is nevertheless very useful for evaluating the merit of housing trans women in women’s prisons. One of the participants talked about her experience in a women’s prison, saying “I’m not scared at all in the women’s prison ... I don’t feel intimidated here. I still love men. I could have a field day in there [male prison] but I didn’t want that, because I was scared in there [of being raped], I’m not scared here’ (ID 17).”¹⁸⁸ Another participant spoke about the different levels of violence in men’s to women’s prisons: “Of sexual violence, she stated ‘sexual violence in the women’s centres is only a black eye. You don’t really see like stabbings or scaldings with boiling water’ (ID 27).”¹⁸⁹ These two were the only participants that had experienced both men’s

¹⁸⁴ Ibid 5-6

¹⁸⁵ Ibid 5-6

¹⁸⁶ Edney (n 95) 327

¹⁸⁷ Wilson (n 181)

¹⁸⁸ Ibid 392

¹⁸⁹ Ibid 393

and women's prisons, so while their experiences cannot be viewed as universal, they do provide a positive view of women's prisons as safer for trans women. It is also worth noting that according to the research sexual harassment and assault of trans women in women's prisons happen, but according to the two participants it would be "either infrequent or perceived as less serious than what occurs in the men's prisons, both participants had strategies to avoid any problems from arising. The first explained, 'I basically just stick to myself, and not get involved in gaol politics' (ID 27)."¹⁹⁰

In U.S. based social science research, Sexton, Jenness, Sumner and Fenstermaker has focused their research on trans women living in California men's prisons. In the 2014 paper *Agnes Goes To Prison*, by Jenness and Fenstermaker, they remark upon the duality of trans lives in prison, stating: "The transgender populations in California prisons for men is paradoxically visible and invisible... Transgender inmates constitutes a highly visible population because of their gender display... In contrast, from the point of view of systematic, empirical social science, they are – or more accurately, *were* – what Tewksbury and Potter (2005) dubbed a 'forgotten group' of prisoners."¹⁹¹ This duality comes from trans people standing out in their behaviours and looks, but as a group, they are still made invisible by the disregard prison administration show their specific needs. Furthermore, this duality is able to continue by the lack of focused research on the experiences of trans people in prison. This was pointed out in another article named "We're like community", which stated: "Despite notable exceptions, the extent to which scholars in criminology and criminal justice have explicitly included LGBTQ populations or themes in research is underwhelming."¹⁹² This is significant because the lack of research is mirrored in the lack of guidelines and legislation for trans prisoners. There needs to be a bigger emphasis put on exploring the lived experiences of incarcerated trans people in order to bridge this gap and facilitate better guidelines. One way in which this gap is displayed in the prison system how "The label "transgender inmate"...is seldom ascribed by the institution to prisoners who identify or present as female – not because their often noticeable difference from the large inmate population are ignored by prison personnel, but rather because they are frequently (and often erroneously)

¹⁹⁰ Ibid 393

¹⁹¹ Valerie Jenness and Sarah Fenstermaker 'AGNES GOES TO PRISON: Gender Authenticity, Transgender Inmates in Prisons for Men, and Pursuit of "The Real Deal' (2014) *Gender and Society*, Vol. 28, No. 1, 12

¹⁹² Lori Sexton and Valerie Jenness. "We're like community': Collective identity and collective efficacy among transgender women in prisons for men' (2016) *Punishment and Society* vol 18(5), 547

categorised as homosexual.”¹⁹³ This goes back to the abuse and humiliation trans prisoners face, erasure of their identity being commonplace.

Trans women in men’s prisons expressed a sense of community with other imprisoned trans women in studies conducted for the article ‘We’re like community’. Even going as far as calling their fellow inmates as family. One young Hispanic trans prisoner expressed: “I consider them family. I don’t have much family on the streets. With lots of transgenders in there, it feels like one big family.”¹⁹⁴ As trans women are unlikely to be placed in a women’s prison this is not a subject of their research, but it becomes clear that a significant number of their participants valued and preferred the company of women. A white trans woman from a middle-class background said to the interviewer “I’m a girl, so I’d rather be around other girls. For sociability (ID#10).”¹⁹⁵ Furthermore, she reflected on the trans prison experience, saying: “It’s very hard to be transgender in prison because you don’t identify with the gender of the people you’re incarcerated with. You’re sexually vulnerable all the time. It’s exhausting. Because you feel like you can’t be yourself. Like most people we just want to be ourselves and express ourselves (ID#10).”¹⁹⁶ This observation encapsulates a number of the most pressing issues for incarcerated trans people, highlighting the sexual vulnerability as perhaps one of the most pressing issues. While the prison system limits self-expression for all inmates to an extent but the near total denial of self-defined gender identity which some prisoners experience can have fatal consequences. As evident by self-harm, suicide and suicide attempts made by prisoners who have been denied treatment of gender dysphoria (see: the chapter on medical care and *Kosilek v Spencer*). Another participant considered the issue of preferred housing, coming to a more nuanced answer; “I’ve never thought about it. It’s hard. I want the company of men, but I feel safe around transgenders. I like women friends. (ID#1)”¹⁹⁷ Since the trans women of the study have not been given the option of serving their time in women’s prisons as in Australia NSW, this is in the context of prison units of trans women. It must also be considered as they found from their research that the vast majority was sexually attracted to men¹⁹⁸, and that desire for intimacy and companionship can be seen as a factor

¹⁹³ Ibid 568

¹⁹⁴ Ibid 560

¹⁹⁵ Ibid 565

¹⁹⁶ Ibid 560

¹⁹⁷ Ibid 565

¹⁹⁸ Ibid 559

as to why men's prisons are a preference to some. It is also for many the only option, making having a preference irrelevant. It was also discovered that trans prisoners also to some extent shared a collective identity with the wider prison population, with multiple participants remarking along the lines of "we're all criminals and convicts of one try or another"¹⁹⁹ and "treat us as every other criminal"²⁰⁰. One participant poignantly stated "It's all about humanity. All of us – races and genders – civil rights, women's rights, all rights. We're human. Live and let live. Can we all get along? (ID#5)"²⁰¹

Another example of housing policy which is guided by self-identification can be found in the State of Argentina. As of the 2016 changes to their Gender Identity Act, Argentina operates on a system which "respect gender identity and protect trans persons in confinement situations, the Federal penitentiary system has Trans pavilions to accommodate trans women in women's prisons"²⁰². Furthermore, the IACHR 2019 report highlights Argentina's practices in regard to trans persons as the best in the region, because "it does not require any type of medical intervention or procedure, judicial procedure or psychiatric or medical certification, for the recognition of the gender of persons according to their gender identity"²⁰³. Their practices are exceptionally noteworthy because it has been shown that since this practice has been enacted "violence and discrimination against trans persons in Argentina has decreased."²⁰⁴ This can therefore be used as an incentive to bring similar policies to the U.S., as they are shown to have a positive effect on the lives of trans people. Furthermore, this Argentinian law does "not only ensures the rectification of the sex and the change of name in all documents that prove the identity of the person, but also guarantees access to comprehensive health, hormonal treatments and partial or total surgical interventions, without requiring judicial or administrative authorization, the only requirement is the person's informed consent."²⁰⁵ All of which would greatly improve the quality of life for trans persons if something similar was adopted by the U.S.

¹⁹⁹ Ibid 561

²⁰⁰ Ibid 561

²⁰¹ Ibid 561

²⁰² IACHR (n 85) 89

²⁰³ IACHR (n 85) 57

²⁰⁴ Ibid 57

²⁰⁵ Ibid 57

Conclusion

What it keeps coming back to is the glaring lack of research on the topic of trans prisoners, which need to be done if there is any hope of more trans-friendly legislation and IHRL. One way in which this is being worked on is by The United Nations Independent Expert on Sexual Orientation and Gender Identity, who said in 2017 that “more empirical research is needed on the issue” and that his own work “is an opportunity for encouraging and generating information and data, possibly disaggregated”²⁰⁶. This is done in part through the Sustainable Development Goals, which the United Nations Development Program is working on “a lesbian, gay, bisexual, transgender and intersex inclusion index to help generate more data, which will also contribute to policy formulation and programming”²⁰⁷. Furthermore, the absence of data is reflected in the lived experiences of trans people, as their struggles are largely invisible to the public. This, in the words of the IACHR 2019 report leads to an “absence of adequate public policies, or in the making of very difficult political decisions aimed at confronting the structural problem of discrimination against LGBTI persons in the American continent.”²⁰⁸ Similarly, Australian social science research notes the lack of data and poignantly concluded that: “Without such research, health and correctional administrators are left with the task of determining what is best for transgender prisoners; a task that has increasing legal implications due to emergent legislative protections for transgender persons under Australian anti-discrimination laws.”²⁰⁹ This can too be said for the U.S. as a slowly growing set of laws urges each State reinvent their treatment of trans prisoners.

While it is clear that the U.S. is not ideal in their treatment of transgender persons in general and trans prisoners in specific. The UN and IHRL are even further behind when it comes to hard law obligations. This is problematic because the ambiguity of international law gives less progressive states close to carte blanche to interpret and define what, if any, protections gender and sexual minorities are entitled under international law. While soft law instruments like the Yogyakarta Principles and the IACHR Report on the Recognition of the Rights of LGBTI Persons, has if nothing else raised the awareness of

²⁰⁶ Ibid 35

²⁰⁷ Ibid 35

²⁰⁸ Ibid 128

²⁰⁹ Wilson (n 181) 382

the need to include LGBTI perspectives in discussions of universal rights. The Yogyakarta Principles takes use of a humanising strategy; “asking states to recognize sexual minorities as humans within the existing human rights framework.”²¹⁰ In this context, trans persons can be seen as a group that cannot be erased by simply ignoring their need for specialised care. In addition, the work of UNDOC, through their Handbook on Prisoners with Special Needs, trans persons were defined as a vulnerable group that deserves and requires protection. As mention, soft law instruments have a limited reach on leading change, but as Thoreson points out “one of the most important uses of the Yogyakarta Principles (or perhaps any nonbinding declarations) is that they provide a detailed set of principles or policies that local, national, or regional governments can choose to codify into law to provide redress.”²¹¹ It is an important first step to recognise the need for rights and laws.

U.S. prisons are still working on a pathological model in which gender affirming treatments are only given as medical treatment for gender dysphoria. This is at odds with the wider international society which are moving away from medical models, and over to models of self-identification. This is shown in the decades-long legal battle Michelle Kosilek endure only to be denied having her case heard by the Supreme Court. While progress has been made in regard to accessing hormone therapy for gender dysmorphia and access to suitable clothing and personal grooming articles, there appears to be a long way to go before trans prisoners have access to gender confirmation surgery. It became apparent through the *Kosilek v Spencer* case that there is a gap between prison administration and medical professionals in their options on the best ways to treat trans prisoners. As the district court explained, on the prison commissioner’s defence of security concerns regarding allowing Kosilek to transition: “[S]ecurity is a legitimate consideration for Eighth Amendment purposes. A concern about political or public criticism for discharging a constitutional duty is not.”²¹² The prison administration has many concerns beyond the medical needs of the individual prisoners to consider, but as multiple examples have shown, many of these are motivated by “a fear of controversy or criticism from politicians, the press, and the public serves no legitimate penological purpose. It is precisely the type of conduct the Eighth Amendment prohibits.”²¹³ The human rights instruments mentioned which

²¹⁰ Thoreson (n 24) 327

²¹¹ Thoreson (n 24) 334

²¹² *Kosilek v Spencer* [2012] 889 F.Supp.2d 190

²¹³ *Ibid*

specifically targets the rights of LGBTI persons all stress the importance of equal rights to medical care, as it is fundamental to one's quality of life and the abuse of this right can in the extreme amount to violations to the right to life and the right to be free from torture. This was made clear in the Seventh Circuit case *Fields v Smith*, which also revolved around the right to hormone therapy and gender confirmation surgery²¹⁴. In which the court stated: "surely, had the Wisconsin legislature passed a law that DOC inmates with cancer must be treated only with therapy and pain killers, this court would have no trouble concluding that the law was unconstitutional. Refusing to provide effective treatment for a serious medical condition serves no valid penological purpose and amounts to torture."²¹⁵

The issues of access to medical treatment and housing are closely linked, as pushback to allow gender confirmation treatments are sometimes backed by concerns of having to re-house the prisoner after they have transitioned. This was explored above both in the *Kosilek v Spencer* case and in the proposed State of California Bill 132 'the Transgender Respect, Agency, and Dignity Act', with financial concerns and the concern of the safety of the cis woman population listed as the strongest arguments. But these arguments wholly ignore the safety of the trans population. The 2015 U.S. Transgender Survey found that respondents were far more likely than the general prison population to be sexually assaulted by both prison staff and their fellow inmates. A chief solution to this would be to house trans women in women's prisons. According to Australia research, this would be a favourable practice, as they found that "our findings suggest that housing trans women prisoners in women's prisons may act protectively against sexual assault and coercion which provides further support for NSW's policy approach."²¹⁶ Furthermore, they like the UNODC Handbook on Prisoners with Special Need 2009 argues for a case-by-case basis for risk assessments related to housing, explaining: "Our findings reinforce US findings that trans women are at a high risk of experiencing sexual violence while incarcerated, and that addressing this risk presents a continual challenge to custodial authorities; the policy approach adopted by NSW is a positive step forward in that it recognizes an individual's self-identification and purports to assess risk on a case-by-case basis."²¹⁷ In addition, Argentina's Gender Identity Act proved to decreased violence and discrimination against trans persons, which should act

²¹⁴ Ibid

²¹⁵ *Fields v Smith* [2011] 653 F.3d 550

²¹⁶ Wilson (n 181) 397

²¹⁷ Ibid 397-8

as further proof of the benefits of more trans-inclusive legislation in within the U.S. Dunnavant similarly argues for self-identification, writing: "Prisons should not make housing determinations based on primary on the appearance of a person's sex characteristics, but rather should honor a person's gender presentation and self-identification as fully as possible under the circumstances."²¹⁸

Overall, it has been shown that the U.S. prison system operates on an outdated traditional approach in their care for trans persons. A leading factor in this is how they have "failed to appreciate the distinction between sex and gender. Self-identification of transgender prisoners has not been accorded the appropriate degree of importance in the classification, treatment and placement of transgender prisoners."²¹⁹ This comes down to a reliance on the gender binary and traditional gender roles, which seeks to render any transgressors invisible. Invisible in the sense of the administration not offering legitimacy for trans prisoners identity; though the use of pre-transition names and pronouns and verbal harassment, and also through the lack of adequate medical care. This practice ignores "the actual reality of trans- gender lives and made the experiences constituting such a life story invisible and otiose to the functioning of the prison system."²²⁰ It is therefore crucial for the furthering of trans rights to take the lived experiences of trans persons seriously and allow them a platform to have a say in future decision making on a global scale. As Thoreson writes about the universal marginalisation of trans persons: "is a type of abuse that transcends local, national, and regional borders. A global framework to protect sexual minorities is thus justified both by the repression that sexual minorities face in virtually every sovereign state and the fact that anti-queer elites around the world already share goals, rhetorics, and tactics among themselves."²²¹ In addition to a global framework, regional and national legislation is also a vital part in the process. Sarah McBride poignantly wrote in her memoir about gender identity and the trans equality movement in the U.S., while talking about Delaware's Gender Non-discrimination Act "And while no law will ever be a silver bullet, no bill can change every heart or open every mind, and no protection can stamp out every act of discrimination, these laws provide a foundation. That night we were one step closer to justice."²²²

²¹⁸ Dunnavant (n 41) 20

²¹⁹ Edney (n 95) 337

²²⁰ Ibid 337-8

²²¹ Thoreson (n 24) 326

²²² Sarah McBride, *Tomorrow Will Be Different: Love, Loss, and the Fight for Trans Equality* (Crown Archetype 2018) 140

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