
CHAPTER THREE

CLASSIFICATION AND HOUSING OF TRANSGENDER INMATES IN AMERICAN PRISONS

A. Introduction

Between two and three million people are behind bars in state and federal facilities in the United States today.¹ Commentators have catalogued a litany of day-to-day problems facing these inmates and the correctional institutions that house them, including overcrowding, understaffing, high incidences of violence and sexual assault, and inadequate healthcare.² Within this already difficult environment, transgender inmates lead particularly challenging lives: from suffering the negative effects of increased isolation³ to experiencing higher rates of violence and sexual assault,⁴ the transgender inmate population has found itself especially “hard hit” in American correctional institutions.⁵

Many of these hardships stem from the ways in which virtually all American prison authorities classify and house transgender inmates. First, housing assignments are based almost exclusively on genitalia or birth sex.⁶ Second, in many institutions or circumstances transgender inmates are automatically placed in some form of administrative segregation or protective custody (also known as solitary confinement).⁷ Constitutional challenges to these practices — in particular under the Fifth, Eighth, or Fourteenth Amendments — have found minimal success: although the Constitution prohibits egregious abuses by correctional authorities, these protections, at least as currently understood, simply do not speak to the prevailing housing practices.⁸

¹ LAUREN E. GLAZE & ERIKA PARKS, U.S. DEP’T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2011, at 3 tbl.2 (2012), available at <http://www.bjs.gov/content/pub/pdf/cpus11.pdf>; *Daily Chart: Locked Up Tight*, THE ECONOMIST (Aug. 1, 2013, 3:32 PM), <http://www.economist.com/blogs/graphicdetail/2013/08/daily-chart>.

² See, e.g., Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 886–89 (2009).

³ See, e.g., Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 537–40 (2009).

⁴ See, e.g., Lori Sexton et al., *Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men’s Prisons*, 27 JUST. Q. 835, 857–58 (2010).

⁵ Arkles, *supra* note 3, at 516.

⁶ See, e.g., NAT’L CTR. FOR LESBIAN RIGHTS, RIGHTS OF TRANSGENDER PRISONERS 1 (2006) [hereinafter NCLR REPORT], available at <http://www.nclrights.org/wp-content/uploads/2013/07/RightsOfTransgenderPrisoners.pdf>.

⁷ See, e.g., Arkles, *supra* note 3, at 544–45.

⁸ See *infra* section C, pp. 1751–56.

For these reasons, many advocacy organizations and commentators have urged correctional authorities to reform their housing policies by accounting for each inmate's gender identity and by curtailing their reliance on automatic segregation.⁹ Recently, a handful of jurisdictions have heeded these calls, enacting policies that specifically address the housing and classification of transgender inmates. The three jurisdictions with the most well-publicized policies — Washington, D.C., Denver, Colorado, and the federal government — have sought to create a more flexible framework for housing transgender inmates while simultaneously maintaining order and safety.¹⁰

This Chapter focuses on the housing of transgender inmates in American prisons;¹¹ it proceeds in four parts. Section B sets forth the prevailing practices of genitalia-based classification and segregation and summarizes the risks faced by transgender inmates under this system. Section C describes the legal and constitutional frameworks under which inmates have sought to litigate the conditions of their confinement and recounts their limited success. Section D outlines the calls for reform that have surrounded transgender inmate housing and details recent reforms in Washington, D.C., and Denver, Colorado, and at the federal level. In analyzing these three policies, it concludes that they provide a critical improvement over the status quo and a possible model for other jurisdictions. Section E offers a brief conclusion.

B. Prevailing Practices and Their Effects

Any attempt to study transgender inmates' experience in American correctional institutions encounters a threshold difficulty: Rather than

⁹ See, e.g., JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL. & NAT'L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 171 (2011), available at http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf; Richael Faithful, *Transitioning Our Prisons Toward Affirmative Law: Examining the Impact of Gender Classification Policies on U.S. Transgender Prisoners*, 5 MODERN AM. 3, 7–8 (2009); Darren Rosenblum, "Trapped" in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 530 (2000).

¹⁰ See 28 C.F.R. § 115.42(c) (2013); DENVER SHERIFF DEP'T, DEP'T ORDER NO. 4005.1, TRANSGENDER AND GENDER-VARIANT INMATES (2012), available at <http://nicic.gov/Library/files/026337.pdf>; D.C. DEP'T OF CORR., PROGRAM STATEMENT NO. 4020.3D, GENDER CLASSIFICATION AND HOUSING (2013), available at <http://doc.dc.gov/publication/gender-classification-and-housing>.

¹¹ A related subject, the medical needs of transgender inmates, has generated increasing publicity over the past few years. See, e.g., *Kosilek v. Spencer*, 889 F. Supp. 2d 190 (D. Mass. 2012) (ordering the Massachusetts Department of Correction to provide a transgender inmate with sex-reassignment surgery); Michael Levenson, *Elizabeth Warren, in Radio Interview, Disagrees with Sex-Change Ruling, Addresses Native American Issue*, BOSTON.COM (Sept. 7, 2012, 10:42 AM), <http://www.boston.com/politicalintelligence/2012/09/07/elizabeth-warren-radio-interview-disagrees-with-sex-change-ruling-addresses-native-american-issue/S2Ck9nEN6fWmFFgUXw6n3I/story.html> (reporting the reactions of Massachusetts's 2012 U.S. Senate candidates to the *Kosilek* decision). While important, this topic is beyond the scope of this Chapter.

resulting from formal or written rules or procedures, the placement of transgender inmates often occurs under prison regulations that essentially ignore the possibility of transgender individuals' existence.¹² And, as one commentator notes, "minimal reliable information exists about the prison housing policies and treatment of transgender prisoners because there is 'no real legal standard for determining placement of transgender prisoners,' and most prisons attempt to withhold this information."¹³ Nevertheless, the predominant method of housing transgender inmates is widely understood to comprise two practices. First, transgender inmates in American prisons who have not undergone sex reassignment surgery "are generally classified according to their birth sex for purposes of prison housing, regardless of how long they may have lived as a member of the other gender, and regardless of how much other medical treatment they may have undergone."¹⁴ For example, such was the federal government's practice until recently: "federal prison authorities . . . incarcerate[d] preoperative transsexuals with prisoners of like biological sex."¹⁵ A number of justifications have been given for such policies, including administrative ease,¹⁶ "respecting the privacy interests of female inmates in women's facilities, protecting women from potential coercive sex by [male-to-female] inmates, and preventing pregnancy."¹⁷

Second, correctional institutions often routinely place transgender inmates in some form of segregation or isolation "against their will, allegedly for their own good."¹⁸ For example, the Sacramento County Main Jail reserves its "Total Separation" classification "for two groups

¹² See Faithful, *supra* note 9, at 5 ("Most jurisdictions do not recognize transgender people within procedural policies — classification-based or otherwise — at all."); Beth Schwartzapfel, *Fixing Corrections*, ADVOCATE.COM (Nov. 13, 2009, 10:00 AM), <http://www.advocate.com/society/transgendered/2009/11/13/fixing-corrections> ("New York State, like almost all states and counties nationwide, lacks any formal policy on housing transgender inmates . . .").

¹³ Whitney E. Smith, Note, *In the Footsteps of Johnson v. California: Why Classification and Segregation of Transgender Inmates Warrants Heightened Scrutiny*, 15 J. GENDER RACE & JUST. 689, 697 (2012) (quoting Emily Alpert, *Gender Outlaws*, IN THE FRAY (Nov. 20, 2005), <http://inthefray.org/content/view/1381/39>).

¹⁴ NCLR REPORT, *supra* note 6, at 1; see also Faithful, *supra* note 9, at 5 ("Generally, U.S. jurisdiction classifies prisoners by their perceived anatomical sex . . . [A]s long as the inmate possesses internal and external sex organs corresponding with a specific sex, he or she will be housed in accordance with that sex."); Schwartzapfel, *supra* note 12.

¹⁵ *Farmer v. Brennan*, 511 U.S. 825, 829 (1994) (citing *Farmer v. Haas*, 990 F.2d 319, 320 (7th Cir. 1993)).

¹⁶ Sydney Scott, Comment, "One Is Not Born, but Becomes a Woman": A Fourteenth Amendment Argument in Support of Housing Male-to-Female Transgender Inmates in Female Facilities, 15 U. PA. J. CONST. L. 1259, 1261 (2013).

¹⁷ *Id.* at 1272.

¹⁸ Arkles, *supra* note 3, at 544; see also NCLR REPORT, *supra* note 6, at 1; Arkles, *supra* note 3, at 517–18; Smith, *supra* note 13, at 701–02.

of inmates: gang members and transgender persons.”¹⁹ Similarly, the head of San Francisco’s jails indicated in 2003 that “no transgender inmate ever would be housed in a general population setting.”²⁰ Correctional agencies justify such segregation on the theory that it protects transgender inmates from violence that they would otherwise face in the general population, that it furthers “the safety of other people in detention,”²¹ and that it “serves a prison’s interest of administrative ease.”²²

Under this status quo, transgender inmates’ health and safety are often at risk.²³ Indeed, by the numbers transgender inmates are “doubly vulnerable” because both transgender populations *and* incarcerated populations face higher incidences of violence:

As compared to inmates in US and California men’s prisons . . . transgender people experienced more than five times as many incidents of non-sexual physical victimization. . . . Statistics are just as revealing for sexual victimization. While approximately one in 10 Americans — and one in six American women — has experienced rape or attempted rape, numerous estimates for the transgender population range from 13.5% to nearly 60%. The corresponding figure for transgender inmates in California prisons is higher still, with over 75% of the population reporting a lifetime prevalence of sexual victimization . . .²⁴

These higher rates of sexual assault owe themselves at least in part to the practice of genitalia-based classification. For example, transgender women²⁵ who are placed in male housing because they have yet to undergo sexual reassignment surgery but who nevertheless have significant feminine features become obvious targets for abuse in prison.²⁶

In addition to these broader concerns, the practice of segregating transgender inmates can lead to health and safety problems. “When transgender victims are placed in administrative segregation, they have only minimal interaction with people, no access to jobs or treatment

¹⁹ Smith, *supra* note 13, at 689.

²⁰ Cosmo Garvin, *What’s She Doing in the Men’s Jail?*, SACRAMENTO NEWS & REV. (Feb. 13, 2003), <http://www.newsreview.com/sacramento/whats-she-doing-in-the-mens-jail/content?oid=14229>.

²¹ Arkles, *supra* note 3, at 545.

²² Smith, *supra* note 13, at 702.

²³ See, e.g., Drake Hagner, Note, *Fighting for Our Lives: The D.C. Trans Coalition’s Campaign for Humane Treatment of Transgender Inmates in District of Columbia Correctional Facilities*, 11 GEO. J. GENDER & L. 837, 860 (2010) (“Ample research and case law indicate that transgender individuals are at greater risk of abuse when classified and housed based on birth sex or genitalia.”).

²⁴ Sexton et al., *supra* note 4, at 858 (citations omitted). These statistics reveal that “[e]ven when compared to other relatively vulnerable populations, transgender people are perilously situated.” *Id.*

²⁵ This Chapter uses the term “transgender woman” to refer to an individual whose birth sex is male but who identifies as a woman. Likewise, “transgender man” refers to an individual whose birth sex is female but who identifies as a man. See generally NAT’L CTR. FOR TRANSGENDER EQUAL., TRANSGENDER TERMINOLOGY (2014), http://transequality.org/Resources/TransTerminology_2014.pdf.

²⁶ See Rosenblum, *supra* note 9, at 522–23.

programs, and their privileges, such as phone access, are greatly reduced.”²⁷ According to Professor Gabriel Arkles, “[t]he catastrophic consequences of isolation on human beings’ basic mental stability, health, and ability to function have been well documented.”²⁸ “Isolation can also increase vulnerability to physical violence” by placing transgender inmates in segregation along with the inmates “who are most likely to be violent” (that is, those who are segregated because of the threat that they pose) and by “depriv[ing] [them] of any support systems, friendships, or opportunities for solidarity that could help them to avoid and survive violence.”²⁹ Finally, “[b]y isolating victims of sexual abuse in ‘protective custody,’ prison officials deter other victims of violence from reporting incidents” by “punishing the victims, rather than the perpetrators.”³⁰

Aggravating these problems is the fact that transgender individuals are incarcerated at a disproportionately high rate.³¹ As one commentator notes, transgender people are often “profiled by the police as sex workers,” which “makes it more likely that they will get arrested for solicitation without cause or for minor infractions like not having identification that matches their gender expression.”³² Many transgender individuals may also find themselves “incarcerated for minor offenses like loitering and sleeping outside due to homelessness or ‘survival crimes’ like sex work and distribution of black market hormone therapy.”³³ Thus, the problems accompanying transgender inmates’ health and safety are even more pressing because transgender individuals are more likely to end up behind bars.

²⁷ Angela Okamura, Note, *Equality Behind Bars: Improving the Legal Protections of Transgender Inmates in the California Prison System*, 8 HASTINGS RACE & POVERTY L.J. 109, 120 (2011).

²⁸ Arkles, *supra* note 3, at 538 (citing Tracy Hresko, *In the Cellars of the Hollow Men: Use of Solitary Confinement in U.S. Prisons and Its Implications Under International Laws Against Torture*, 18 PACE INT’L L. REV. 1, 3 (2006)). Such consequences “include intense anxiety, confusion, lethargy, panic, impaired memory, psychotic behavior, hallucinations and perceptual distortions, difficulty eating, inability to communicate, hypersensitivity to external stimuli, violent fantasies, and reduced impulse control.” *Id.*

²⁹ *Id.* at 539–40. “Some trans people have [also] reported that they are more likely to be attacked in protective custody or other forms of segregation because it is easier for abusive correctional staff to access them alone and out of the sight of other prisoners or video surveillance.” *Id.* at 540.

³⁰ Okamura, *supra* note 27, at 120.

³¹ See GRANT ET AL., *supra* note 9, at 163.

³² Scott, *supra* note 16, at 1261 (footnote omitted).

³³ *Id.*

*C. Constitutional Challenges to Transgender
Inmates' Conditions of Confinement*

Litigation challenging the foregoing landscape has met with limited success. On the one hand, the Constitution does provide some basic protections to transgender inmates with regard to their housing assignments. In particular, various provisions — including the Fifth, Eighth, and Fourteenth Amendments — constrain prison authorities' discretion in housing such inmates. On the other hand, the standards defining a cognizable claim on these grounds are often quite demanding; it can be “extreme[ly] difficult[.]” for such inmates to obtain relief.³⁴ While some individual inmates have successfully challenged particularly egregious cases of prison action, none have seen broader success in fighting the prevailing practices described in section B. For this reason, further litigation does not seem to offer much promise to efforts seeking to change the status quo.

As a threshold matter, courts have recognized the general practice of segregating inmates by sex as “unquestionably constitutional.”³⁵ And because courts do not consider transgender people a suspect class for Fourteenth Amendment purposes, alleged discriminatory treatment of transgender inmates is analyzed under deferential rational basis review.³⁶ Moreover, the Supreme Court has indicated that, in judging the constitutionality of a correctional institution's policies, “courts should be *particularly* deferential to the informed discretion of corrections officials.”³⁷ Accordingly, “no ruling has definitively objected to the administrative status quo that allows and even promotes genitalia-based classification.”³⁸

Instead, the primary constitutional safeguard for transgender inmates seems to have been the Eighth Amendment's prohibition against “cruel and unusual punishments,”³⁹ under which the government must ensure a certain measure of safety in prison housing. The Supreme Court articulated the standard governing this protection in *Farmer v. Brennan*.⁴⁰ There, a transgender woman sued federal prison officials for monetary damages after allegedly being “beaten and raped by

³⁴ Okamura, *supra* note 27, at 125.

³⁵ *Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia*, 93 F.3d 910, 926 (D.C. Cir. 1996). *But cf.* *Johnson v. California*, 543 U.S. 499, 505–09 (2005) (applying strict scrutiny to a California correctional policy of placing inmates with cellmates of the same race).

³⁶ *See, e.g.*, *Kaeo-Tomaselli v. Butts*, Civ. No. 11-00670, 2013 WL 399184, at *5 (D. Haw. Jan. 31, 2013); *Lopez v. City of New York*, No. 05 Civ. 10321, 2009 WL 229956, at *13 & n.7 (S.D.N.Y. Jan. 30, 2009).

³⁷ *Turner v. Safley*, 482 U.S. 78, 90 (1987) (emphasis added).

³⁸ *Faithful*, *supra* note 9, at 4.

³⁹ U.S. CONST. amend. VIII.

⁴⁰ 511 U.S. 825 (1994).

another inmate” in her cell.⁴¹ She claimed that officials had transferred her to the facility in question and placed her in its general male population “despite knowledge that the penitentiary had a violent environment and a history of inmate assaults, and despite knowledge that [she] . . . would be particularly vulnerable to sexual attack” as a transgender woman with feminine characteristics.⁴² In elaborating on the Eighth Amendment’s requirements, the Court determined that the Cruel and Unusual Punishments Clause places prison officials under “a duty . . . to protect prisoners from violence at the hands of other prisoners,”⁴³ which is violated when the “injury suffered by one prisoner at the hands of another”⁴⁴ is “sufficiently serious”⁴⁵ and prison officials exhibit “‘deliberate indifference’ to inmate health or safety.”⁴⁶ The Court clarified that “deliberate indifference” means not only that prison officials must “be aware of facts from which” they could draw the inference “that a substantial risk of serious harm exists,” but also that they must actually “draw the inference.”⁴⁷ The *Farmer* Court ultimately remanded for the district court to determine whether the claims at issue met this standard.⁴⁸

Since *Farmer*, “[l]ower court decisions have variably affirmed transgender prisoners’ rights to safer living conditions.”⁴⁹ For example, in cases like *Greene v. Bowles*⁵⁰ and *Doe v. Yates*,⁵¹ lower courts have allowed plaintiffs to proceed on Eighth Amendment claims arising out of the circumstances of their prison housing. The plaintiff in *Greene*, a transgender woman with “medium-security” classification, was housed

⁴¹ *Id.* at 830.

⁴² *Id.* at 831.

⁴³ *Id.* at 833 (alteration in original) (quoting *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 558 (1st Cir. 1988)) (internal quotation mark omitted). When the prisoner in question is a pretrial detainee, this duty is technically imposed by “the Due Process Clause of the Fifth Amendment if the pretrial detainee is held in federal custody, or the Due Process Clause of the Fourteenth Amendment if held in state custody.” *Caiozzo v. Koreman*, 581 F.3d 63, 69 (2d Cir. 2009).

⁴⁴ *Farmer*, 511 U.S. at 834.

⁴⁵ *Id.* (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)) (internal quotation marks omitted). This is an objective inquiry. *See id.*

⁴⁶ *Id.* (quoting *Wilson*, 501 U.S. at 302–03). This is a subjective inquiry. *See id.* at 839–40.

⁴⁷ *Id.* at 837. *Farmer*’s “deliberate indifference” standard remains the same when applied to pretrial detainees under the Fifth or Fourteenth Amendment. *See Caiozzo*, 581 F.3d at 71; *see also id.* at 71 n.4 (collecting cases).

⁴⁸ *Farmer*, 511 U.S. at 848–49. After a few more rounds in federal district court and the Seventh Circuit, *see Kevin Murphy, Transsexual Inmate’s Lawsuit Against Prison System Is Revived*, MILWAUKEE J. SENTINEL, Apr. 30, 1996, at 5B, *Farmer* ultimately lost at trial, *see Jennifer McMenamain, Thief, Freed to Die, Charged Anew*, BALTIMORE SUN, Sept. 28, 2006, at 4B.

⁴⁹ Faithful, *supra* note 9, at 4.

⁵⁰ 361 F.3d 290 (6th Cir. 2004).

⁵¹ No. 08-CV-01219, 2009 WL 3837261 (E.D. Cal. Nov. 16, 2009) (findings and recommendations of magistrate judge), *adopted in full*, No. 08-CV-01219, 2010 WL 1287056 (E.D. Cal. Jan. 13, 2010).

in an Ohio prison's Protective Custody Unit (PCU) "[b]ecause of her feminine appearance" in order to "guard against attacks from other inmates."⁵² After suffering numerous assaults by "a second inmate in the PCU" with "a long history of assaults on other inmates" and a "maximum-security" classification, the plaintiff brought an Eighth Amendment claim against the prison's warden.⁵³ According to the court, summary judgment for the warden was inappropriate because at least some evidence demonstrated that placing her in protective custody with dangerous inmates violated *Farmer's* "deliberate indifference" standard.⁵⁴ In particular, the court found that the plaintiff had offered evidence that she was vulnerable to physical and sexual assault, in part because of her physical appearance and transgender status, "such that her presence in the PCU with other inmates without segregation or protective measures presented a substantial risk to her safety of which [the warden] was aware."⁵⁵

Similarly, in *Doe*, a California district court held that a transgender woman had stated a claim under *Farmer* after she was attacked and raped by male inmates with whom she was assigned to live.⁵⁶ According to the plaintiff, the defendant prison officials had "constructive knowledge that she [was] a particularly vulnerable inmate that [was] in danger of violence."⁵⁷ She alleged that she had informed the defendants of the risks she faced, but that "they ignored her concerns and threatened her with disciplinary action if she refused" her housing assignment.⁵⁸ Further, officers "continued to let her remain in the cell" after being raped by her cellmate.⁵⁹

⁵² 361 F.3d at 292. According to the court, the plaintiff "was preoperative, but still displayed female characteristics, including developed breasts and a feminine demeanor, and was undergoing hormone therapy." *Id.* The prison in question, Warren Correctional Institution (WCI), *id.*, was an all-male facility. See, e.g., *Population Count Sheets — 2013-11-25*, OHIO DEP'T OF REHABILITATION & CORRECTION (Nov. 25, 2013), <http://www.drc.ohio.gov/web/Reports/count/November%2025%202013.pdf>.

⁵³ *Greene*, 361 F.3d at 292. During the worst such assault, the second inmate "beat [the plaintiff] with a mop handle and then struck her with a fifty-pound fire extinguisher." *Id.*

⁵⁴ *Id.* at 293–94.

⁵⁵ *Id.*

⁵⁶ *Doe*, 2009 WL 3837261, at *2–3, *5. The *Doe* court was examining the plaintiff's complaint pursuant to 28 U.S.C. § 1915A, which requires courts "to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity" to determine whether the claim is "frivolous or malicious" or "fail[s] to state a claim upon which relief may be granted." *Id.* at *1 (quoting 28 U.S.C. § 1915A(b) (2012)) (internal quotation marks omitted).

⁵⁷ *Id.* at *2. The decision did not state whether this vulnerability to violence was due to her transgender status. See *id.*

⁵⁸ *Id.* at *5.

⁵⁹ *Id.*

By contrast, in cases like *Lopez v. City of New York*⁶⁰ and *Lucrecia v. Samples*,⁶¹ lower courts have determined that plaintiffs failed to adduce sufficient evidence of deliberate indifference based on their housing assignments. The plaintiff in *Lopez*, a transgender woman, challenged New York City's decision to house her with male inmates during a three-day period of incarceration at its Rikers Island complex.⁶² According to the court, there was insufficient evidence to support an Eighth Amendment claim: the plaintiff made "no allegations that any prison official deliberately ignored an excessive risk to her safety by placing her in general population for those three days," and summary judgment for the city was therefore appropriate.⁶³

Likewise, the court in *Lucrecia* denied a transgender woman's challenge to housing with male inmates.⁶⁴ The court stated simply that the "[p]laintiff's evidence [did] not establish that [the defendant] possessed . . . a culpable state of mind"; that is, he did not act with "deliberate indifference" under *Farmer*.⁶⁵ Neither *Lopez* nor *Lucrecia* mentioned how the plaintiff's transgender status factored into the court's analysis of the defendant's alleged deliberate indifference. In short, while cases applying *Farmer* provide some measure of protection for transgender inmates with regard to housing placements, it can be quite difficult for inmates to meet the Eighth Amendment's "deliberate indifference" standard.

Some inmates have also successfully mounted challenges to the practice of placing transgender prisoners in administrative segregation or protective custody — purportedly for their own safety — especially when this segregation comes with reduced privileges or itself places the inmate in harm's way. Such challenges have been brought under a number of substantive frameworks. First, some claims have proceeded under the Eighth Amendment. As above, stating a claim under this doctrine can be quite difficult: plaintiffs must show that placement in segregation evidenced "deliberate indifference to [their] health or safety,"⁶⁶ "placed [them] at substantial risk of serious harm,"⁶⁷ or

⁶⁰ No. 05 Civ. 10321, 2009 WL 229956 (S.D.N.Y. Jan. 30, 2009).

⁶¹ No. C-93-3651, 1995 WL 630016 (N.D. Cal. Oct. 16, 1995).

⁶² 2009 WL 229956, at *13–14. In particular, the plaintiff challenged the institution's denial of her request for "gay housing." *Id.* at *13. From the discussion in the decision, it is unclear whether the plaintiff alleged that the violence or victimization she experienced arose out of her housing in the general population. *See id.* at *1, *13–14.

⁶³ *Id.* at *14. The court noted that the "plaintiff refused to sign a form indicating she was gay," *id.* at *13, presumably a prerequisite to obtaining housing in an LGBT unit. The court did not indicate whether this refusal factored into its analysis of defendants' alleged deliberate indifference.

⁶⁴ 1995 WL 630016, at *6. The plaintiff alleged that prison officials and other inmates harassed, abused, and assaulted her, including by fondling her breasts. *Id.* at *1.

⁶⁵ *Id.* at *6.

⁶⁶ *Carter v. Hubert*, 452 F. App'x 477, 479 (5th Cir. 2011) (per curiam).

⁶⁷ *Mennick v. Smith*, 459 F. App'x 649, 650 (9th Cir. 2011).

“result[ed] in the denial of the minimal civilized measure of life’s necessities.”⁶⁸ Nevertheless, courts have recognized that segregation “may constitute cruel and unusual punishment in violation of the Eighth Amendment.”⁶⁹ For example, in *Meriwether v. Faulkner*,⁷⁰ a transgender prisoner challenged her indefinite placement in administrative confinement, which could have lasted her entire thirty-five-year sentence.⁷¹ The Seventh Circuit concluded that “it was premature for the district court to dismiss plaintiff’s claim . . . without ascertaining the actual conditions of plaintiff’s confinement and the existence of any feasible alternatives.”⁷²

Second, plaintiffs may be able to challenge segregation on due process grounds. As with Eighth Amendment claims, however, due process actions can prove challenging: “To prevail on such a claim based on prison housing, an inmate must show that the segregation created an ‘atypical and significant hardship on [him] in relation to the ordinary incidents of prison life’”⁷³ In other words, as several courts have noted, a prisoner typically “has no liberty interest in remaining in the general population.”⁷⁴ These difficulties notwithstanding, in *Medina-Tejada v. Sacramento County*,⁷⁵ a transgender woman challenged her automatic placement in “total separation” and the resultant circumstances of her confinement.⁷⁶ In denying the defendants’ motion for summary judgment, the court noted that the defendants had not demonstrated as a matter of law that the restrictions placed on the plaintiff in segregation were on par with “the alleged safety purpose in keeping her segregated” and had not shown “why this purpose could not have been achieved by alternative and less harsh methods.”⁷⁷

Finally, transgender prisoners might be able to challenge placement in administrative segregation or protective custody on equal protection grounds.⁷⁸ However, such claims are subject to highly deferential ra-

⁶⁸ *Carter*, 452 F. App’x at 478 (alteration in original) (quoting *Palmer v. Johnson*, 193 F.3d 346, 352 (5th Cir. 1999)) (internal quotation marks omitted).

⁶⁹ *Meriwether v. Faulkner*, 821 F.2d 408, 415 (7th Cir. 1987). When involving a pretrial detainee, the Fourteenth Amendment would provide the relevant (albeit identical) standard. See *supra* note 43; see also, e.g., *Anderson v. Cnty. of Kern*, 45 F.3d 1310, 1313–14 (9th Cir. 1995).

⁷⁰ 821 F.2d 408.

⁷¹ *Id.* at 415.

⁷² *Id.* at 417.

⁷³ *Rahman X v. Morgan*, 300 F.3d 970, 973 (8th Cir. 2002) (alteration in original) (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)).

⁷⁴ *Lekas v. Briley*, 405 F.3d 602, 607 (7th Cir. 2005) (quoting *Williams v. Ramos*, 71 F.3d 1246, 1248 (7th Cir. 1995)) (internal quotation mark omitted).

⁷⁵ No. Civ. S-04-138, 2006 WL 463158 (E.D. Cal. Feb. 27, 2006).

⁷⁶ *Id.* at *6.

⁷⁷ *Id.* at *9 (quoting *Jones v. Blanas*, 393 F.3d 918, 935 (9th Cir. 2004)) (internal quotation marks omitted).

⁷⁸ *Cf.*, e.g., *Arauz v. Bell*, 307 F. App’x 923, 929–30 (6th Cir. 2009) (finding plaintiff’s allegations that he was placed in administrative segregation “because of his race” nonfrivolous, *id.* at

tional basis review; as discussed above, transgender people are not a suspect class for Fourteenth Amendment purposes.⁷⁹ In particular, inmates must show that their placement — and any resulting differential treatment — “was not reasonably related to some legitimate penological purpose”⁸⁰ or did not “bear a rational relationship to [their] protection.”⁸¹

In addition to considering transgender inmates’ challenges to their housing circumstances, it is also worth noting briefly that correctional agencies may face legal challenges from cisgender⁸² inmates who object to being housed with transgender individuals.⁸³ As some commentators have argued, concerns harbored by potential cellmates, such as privacy concerns relating to using the shower or toilet, can constitute “[l]egitimate objections to housing transgendered inmates according to their self-defined gender identity.”⁸⁴ Although no court has yet imposed liability on a correctional institution based on a cellmate’s objections, at least one case — in which four cisgender female plaintiffs sought damages for “being compelled to live with” a transgender woman⁸⁵ — settled in the plaintiffs’ favor.⁸⁶ Fears of such liability may factor into a correctional institution’s or court’s decisionmaking with regard to transgender inmates.

As demonstrated by the foregoing discussion, the government enjoys a great deal of discretion in deciding how to classify and house transgender inmates, and plaintiffs often find it extremely difficult to challenge their housing status on constitutional grounds. While correctional authorities do face some constitutional constraints in deciding how to classify and house transgender inmates, further litigation seems unlikely to significantly alter the prevailing practices of gender-based classification and placement in administrative segregation.

930 (internal quotation marks omitted)); *Williams v. Lane*, 851 F.2d 867, 881–82 (7th Cir. 1988) (holding that the state “failed to establish the necessary relationship between prison security and disparate treatment of residents of protective custody,” *id.* at 881).

⁷⁹ See sources cited *supra* note 36.

⁸⁰ *Templeman v. Gunter*, 16 F.3d 367, 371 (10th Cir. 1994) (dismissing equal protection claim because plaintiff failed to demonstrate a lack of “relevant differences between him and other inmates that reasonably might account for their different treatment”).

⁸¹ *Taylor v. Rogers*, 781 F.2d 1047, 1050 (4th Cir. 1986). For this reason, correctional institutions seem likely to succeed in arguing that unequal segregation of transgender inmates is rationally related to, for example, the goal of protecting them from attacks by other inmates.

⁸² The term “cisgender” refers to an individual whose gender identity matches his or her birth sex. See *Recent Case*, 126 HARV. L. REV. 1731, 1732 (2013).

⁸³ See, e.g., *Crosby v. Reynolds*, 763 F. Supp. 666, 666–67 (D. Me. 1991).

⁸⁴ Rosenblum, *supra* note 9, at 531.

⁸⁵ Civil Action Complaint at 61, 63, 65, 68, *Barnett v. City & Cnty. of Philadelphia*, No. 11-CV-07012 (E.D. Pa. Nov. 9, 2011).

⁸⁶ See Timothy Cwiek, *Transgender-Related Prison Lawsuit Terminated*, PHILA. GAY NEWS (Jan. 17, 2013, 11:07 AM), http://epgn.com/view/full_story/21438576/article-News-Briefing.

D. Recent Policy-Based Reforms

Many organizations and commentators have advocated reforming transgender inmate housing practices through the adoption of new policies. For example, in their report on transgender discrimination, the National Center for Transgender Equality and the National Gay and Lesbian Task Force recommend that correctional agencies adopt “policies on transgender and gender non-conforming inmates, to ensure they are housed according to their gender identity, unless their safety is jeopardized by this classification.”⁸⁷ The report stresses that the need to ensure the safety of transgender inmates “does not mean transgender and gender non-conforming inmates should be held in solitary confinement or administrative segregation or otherwise have their privileges reduced in a misguided attempt to keep them safe.”⁸⁸

Richael Faithful elaborates a similar vision of identity-based housing, arguing that “the ideal classification policy” is one of “[f]lexible self-identification” — that is, “plac[ing] [inmates] in the facility of their ‘gender identification’ unless it is determined, on a case-by-case basis, that they should be placed elsewhere.”⁸⁹ According to Faithful, “[f]lexibility is essential” because of “the complex relationships among gender identity, expression, and body diversity. A trans-man, for instance, may be extremely vulnerable in a male population, even though he is male-identified.”⁹⁰ Faithful points to New South Wales, Australia, as one jurisdiction that has implemented a policy in line with her view of identity-based housing.⁹¹

Similarly, Professor Darren Rosenblum calls for a specific policy on solitary confinement, indicating that a transgender inmate should be segregated only “where she requests the segregation for her own safety or well-being, or where the danger to the prisoner is so patently clear that prison authorities would be exhibiting deliberate indifference to leave her in the general population.”⁹² These proposals, while only a sample of the calls for reform, indicate some of the possible approaches to ameliorating the problems faced by transgender inmates.

Although the practices described in section B remain the predominant method of assigning housing to transgender inmates in American

⁸⁷ GRANT ET AL., *supra* note 9, at 171.

⁸⁸ *Id.*

⁸⁹ Faithful, *supra* note 9, at 7 (quoting Rebecca Mann, *The Treatment of Transgender Prisoners, Not Just an American Problem — A Comparative Analysis of American, Australian, and Canadian Prison Policies Concerning the Treatment of Transgender Prisoners and a “Universal” Recommendation to Improve Treatment*, 15 LAW & SEXUALITY 91, 119 (2006)) (internal quotation mark omitted); see also Rosenblum, *supra* note 9, at 531 (“Placement based on self-defined gender identity would be ideal for transgendered people, given a sex-dichotomized prison system.”).

⁹⁰ Faithful, *supra* note 9, at 7–8.

⁹¹ See *id.* at 7.

⁹² Rosenblum, *supra* note 9, at 530.

prisons, some jurisdictions have begun responding to these calls for reform by implementing formal policies that abandon strict reliance on genitalia-based classification and placement in segregation.⁹³ This section examines three of the most prominent of these reforms: those adopted by Washington, D.C., Denver, Colorado, and the federal government. After providing an overview of each policy, this section addresses why they can serve as a model for other jurisdictions around the country.

1. *Washington, D.C., Reforms.* — The District of Columbia Department of Corrections introduced its policy on transgender inmate housing in early 2009.⁹⁴ The directive sets forth a list of procedures governing the placement of transgender inmates in D.C. jails⁹⁵ and was “one of the country’s first policies allowing transgender inmates to be housed according to their gender identity.”⁹⁶ To implement its procedures, the directive establishes a “Transgender Committee” composed “of a medical practitioner, a mental health clinician, a correctional supervisor, a Chief Case Manager and a [Department of Corrections] approved volunteer who is a member of the transgender community or an acknowledged expert in transgender affairs.”⁹⁷ The committee determines whether the inmate will be assigned to the male or female population and “whether the inmate will be housed in the general population or in a protective custody unit.”⁹⁸ In reaching a decision, the committee is instructed to consider an inmate’s “safety/security needs, housing availability, gender identity,” “genitalia,” and “potential vulnerability.”⁹⁹ Vulnerability is assessed after an interview with the inmate by the Transgender Committee, during which “[t]he Committee shall ask the inmate his or her own opinion of his or her vulnerability in the general jail population of the male or female units.”¹⁰⁰

The directive also establishes a number of standards regulating the use of administrative segregation in D.C. jails. First, upon arriving at a jail, a transgender inmate is automatically placed in protective cus-

⁹³ See, e.g., Karen Hawkins, *Jail Has New Policy for Transgender Inmates*, NBC CHI. (Apr. 9, 2011, 4:54 PM), <http://www.nbcchicago.com/news/local/cook-county-jail-transgender-inmates-119516094.html>.

⁹⁴ See Jason Cherkis, *D.C. Jail Establishes New Procedures for Transgender Inmates*, WASH. CITY PAPER (Feb. 20, 2009, 4:14 PM), <http://www.washingtoncitypaper.com/blogs/citydesk/2009/02/20/dc-jail-establishes-new-procedures-for-transgender-inmates>.

⁹⁵ See D.C. DEP’T OF CORR., *supra* note 10.

⁹⁶ Schwartzapfel, *supra* note 12.

⁹⁷ D.C. DEP’T OF CORR., *supra* note 10, § 7(e).

⁹⁸ *Id.* § 10(c). After making these determinations, the committee must forward a written decision to the facility’s warden for approval. *Id.* § 10(b).

⁹⁹ *Id.* § 10(a).

¹⁰⁰ *Id.* § 10(b). “An inmate identified as transgender may [also] waive the Transgender Committee hearing . . . and be housed according to their biological gender.” *Id.*

tody “for the duration of the intake process.”¹⁰¹ After intake, the inmate is then “afforded the opportunity to request and receive protective custody” while the Transgender Committee makes a decision about the inmate’s permanent placement (which it has seventy-two hours to do).¹⁰² According to the directive, the committee should assign an inmate to long-term administrative segregation only “when there is reason to believe the inmate presents a heightened risk to [him- or herself] or to others or where the inmate fears he or she will be vulnerable to victimization in any other housing setting.”¹⁰³ The policy contemplates periodic review of placement in segregation under existing department policy¹⁰⁴ and specifies that while in protective custody “[i]nmates . . . shall have access to programs and services consistent with that status.”¹⁰⁵

Finally, in addition to establishing a housing policy for transgender inmates, Washington’s directive contains other procedures related to the treatment of transgender inmates, including instructions to use gender-neutral forms of address¹⁰⁶ and a requirement for the provision of appropriate attire.¹⁰⁷ In one major respect, however, the policy is similar to prereform practice. If, for whatever reason, the Transgender Committee does not make a recommendation to the contrary, the Department of Corrections continues to “classify an inmate who has male genitals as a male and one who has female genitals as a female.”¹⁰⁸

2. *Denver, Colorado, Reforms.* — The Denver Sheriff Department’s policy on transgender inmates, which was launched in June 2012,¹⁰⁹ is similar to the District of Columbia’s in many respects. Under the directive, “[a] review board with multiple experts . . . help[s] place inmates where they belong. When the inmate is booked, he or

¹⁰¹ *Id.* § 9(d).

¹⁰² *Id.* § 10(a).

¹⁰³ *Id.* § 10(e).

¹⁰⁴ *See id.* § 10(d).

¹⁰⁵ *Id.* § 10(e).

¹⁰⁶ *Id.* § 9(g) (“Inmates shall be called by their last names without reference to gender specific identifiers such as Mr., Mrs., Miss, Ma’am, Sir or other gender specific terms used in addressing a person. Instead, the gender neutral term, ‘Inmate’ is to be used with the person’s last name.”).

¹⁰⁷ *Id.* § 10(h) (“Transgender and intersex inmates will be provided standard jail attire and privileges consistent with the gender of their housing assignment. Inmates under hormone therapy with secondary sexual characteristics such as breasts shall be provided appropriate undergarments such as a bra when clinically indicated by appropriate medical staff.”).

¹⁰⁸ *Id.* § 2(a).

¹⁰⁹ *See* DENVER SHERIFF DEP’T, *supra* note 10; *see also* Anastasiya Bolton, *Denver Changes the Way It Handles Transgender Inmates*, 9NEWS (Jul. 6, 2012, 3:19 AM), <http://www.9news.com/news/article/276191/222/Denver-changes-the-way-it-handles-transgender-inmates>. The Denver Sheriff Department manages the Van Cise-Simonet Detention Center, which houses pretrial detainees, and the Denver County Jail, a longer-term facility. *See Denver Sheriff Department: Facilities*, DENVER SHERIFF DEP’T, <http://www.denvergov.org/sheriff/SheriffDepartment/Facilities/tabid/444923/Default.aspx> (last visited Mar. 1, 2014).

she [spends] 72 hours away from others while experts determine what's best for [him or her]."¹¹⁰ However, Denver's policy differs from Washington's in a number of important ways. First, and most notably, its directive is much more holistic. Rather than limiting itself to housing, the policy seeks to address a broader array of transgender inmates' needs, including issues related to the administration of strip searches and the provision of healthcare.¹¹¹ Second, unlike Washington's Transgender Committee, Denver's "Transgender Review Board" does not include a member of — or expert on — the transgender community.¹¹² However, the directive does allow the review board to "consult with an identified member of the Gay, Lesbian, Bisexual and Transgender (GLBT) or allied community who is knowledgeable with the issues surrounding transgender and gender-variant people to assist in forming and making a recommendation for housing,"¹¹³ and an inmate also "has the option to have a representative of the GLBT or allied community . . . present at the hearing/interview" with the review board.¹¹⁴ Third, the standards governing the Denver review board's decisionmaking process in assigning housing are slightly different from Washington's. In Denver, the board considers inmates' stated preferences, their gender, their adjustment to incarceration, and other psychological factors that affect their vulnerability in assessing their cases.¹¹⁵ And unlike the Washington committee, the Denver review board appears merely to make recommendations, with final decisions made by the prison's "classification unit."¹¹⁶

Finally, the Denver policy differs from Washington's in its regulation of administrative segregation. On the one hand, Denver's policy allows greater restriction of a transgender inmate during his or her first few days of incarceration. Whereas automatic segregation in Washington is limited to the initial intake process, in Denver transgender inmates are placed in protective custody for up to the entire seventy-two hours during which the Transgender Review Board makes its housing

¹¹⁰ Bolton, *supra* note 109.

¹¹¹ See DENVER SHERIFF DEP'T, *supra* note 10, § 5(B)(2), (H).

¹¹² *Id.* § 4. The Transgender Review Board is composed of "members of the Administrative Review Board, which includes the Special Management Captain, Classification Sergeant, Special Management Deputy, staff psychologist, the Medical Sergeant, and the Nurse Manager or designees." *Id.*

¹¹³ *Id.* § 5(F)(3).

¹¹⁴ *Id.* § 5(F)(4). However, by exercising this option, "the inmate [must] agree to waive the seventy-two hour deadline and Health Insurance Portability and Accountability Act (HIPAA) privacy rules." *Id.* § 5(F)(4)(a).

¹¹⁵ *Id.* § 5(F)(1). The policy goes on to specify that housing decisions for transgender inmates "should not be determined solely based on the inmates' birth sex, identity documents, or physical anatomy" and that such decisions "should be made to maximize the health and safety of the individual." *Id.* § 5(G)(2).

¹¹⁶ See *id.* § 5(G)(1).

decision.¹¹⁷ On the other hand, the policy appears more lenient once a permanent assignment is finalized. In particular, the policy provides that “[transgender and gender-variant] inmates must be housed safely and in the least restrictive setting possible”¹¹⁸ and indicates that such “inmates shall have the right to request that their housing assignment be re-evaluated.”¹¹⁹ Furthermore, transgender inmates in any type of segregation “shall have the same access to the provisions of services and programs as any other inmate housed in a [Denver] facility.”¹²⁰

3. *Federal Reforms.* — In accordance with the Prison Rape Elimination Act of 2003,¹²¹ the federal government has also released a policy on transgender inmate housing, which applies to all federal facilities and those facilities receiving federal funding.¹²² The policy provides that in deciding whether to house a transgender inmate in male or female facilities,¹²³ covered correctional agencies must consider “whether a placement would ensure the inmate’s health and safety, and whether the placement would present management or security problems.”¹²⁴ In making this decision, the agency is also directed to consider the ten factors assessed in the inmate’s initial “risk screening”¹²⁵ and to give “serious consideration” to the “inmate’s own views with respect to his or her own safety.”¹²⁶ According to the policy, placements must be

¹¹⁷ See *id.* § 5(E).

¹¹⁸ *Id.* § 5(G)(3).

¹¹⁹ *Id.* § 5(G)(8).

¹²⁰ *Id.* § 5(G)(7).

¹²¹ 42 U.S.C.A. §§ 15601–15609 (West 2013).

¹²² See Scott, *supra* note 16, at 1290; Press Release, Office of Pub. Affairs, Dep’t of Justice, Justice Department Releases Final Rule to Prevent, Detect and Respond to Prison Rape (May 17, 2012), available at <http://www.justice.gov/opa/pr/2012/May/12-ag-635.html>.

¹²³ The policy prohibits “plac[ing] lesbian, gay, bisexual, transgender, or intersex inmates in dedicated facilities, units, or wings solely on the basis of such identification or status, unless such placement is in a dedicated facility, unit, or wing established in connection with a consent decree, legal settlement, or legal judgment for the purpose of protecting such inmates.” 28 C.F.R. § 115.42(g) (2013).

¹²⁴ *Id.* § 115.42(c).

¹²⁵ *Id.* § 115.42(a). These factors include:

- (1) Whether the inmate has a mental, physical, or developmental disability;
- (2) The age of the inmate;
- (3) The physical build of the inmate;
- (4) Whether the inmate has previously been incarcerated;
- (5) Whether the inmate’s criminal history is exclusively nonviolent;
- (6) Whether the inmate has prior convictions for sex offenses against an adult or child;
- (7) Whether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming;
- (8) Whether the inmate has previously experienced sexual victimization;
- (9) The inmate’s own perception of vulnerability; and
- (10) Whether the inmate is detained solely for civil immigration purposes.

Id. § 115.41(d).

¹²⁶ *Id.* § 115.42(e).

made on an “individualized,”¹²⁷ “case-by-case”¹²⁸ basis and “reassessed at least twice each year.”¹²⁹

Like the D.C. and Denver policies, the federal policy sets forth specific intake procedures¹³⁰ and restrictions on the use of protective custody.¹³¹ In particular, the policy provides that:

Inmates at high risk for sexual victimization shall not be placed in involuntary segregated housing unless an assessment of all available alternatives has been made, and a determination has been made that there is no available alternative means of separation from likely abusers. . . . The facility shall assign such inmates to involuntary segregated housing only until an alternative means of separation from likely abusers can be arranged, and such an assignment shall not ordinarily exceed a period of 30 days.¹³²

Under the policy, a facility must review “whether there is a continuing need for separation from the general population” every thirty days.¹³³

Unlike the other two policies, the federal policy does not establish a committee decisionmaking process — indeed, it does not specify who makes a final housing decision at all. This lack of specificity may owe itself to the broad reach of the federal policy, which applies to different types of institutions at both the state and federal level.

4. *Evaluating These Reforms.* — As a threshold matter, it is important to note that any discussion of the efficacy or normative value of these policies is necessarily incomplete, since there is little public information about their operation in practice. At least on paper, however, a number of the features of these three policies represent a step in the right direction: the policies place new emphasis on transgender inmates’ health, safety, and self-determination while simultaneously maintaining the order and safety of the correctional institutions in question.

First, and most prominently, each policy seeks to ensure a greater role for transgender inmates’ self-identification. In particular, under each policy, prisons must account for an inmate’s gender identity in

¹²⁷ *Id.* § 115.42(b).

¹²⁸ *Id.* § 115.42(c).

¹²⁹ *Id.* § 115.42(d).

¹³⁰ *Id.* § 115.41.

¹³¹ *Id.* § 115.43. Unlike the other two policies, the federal policy is part of a broader set of regulations designed to curb sexual abuse and rape in prisons; it applies to all inmates at risk of sexual victimization. See Scott, *supra* note 16, at 1290; Press Release, *supra* note 122.

¹³² 28 C.F.R. § 115.43. The policy does provide that “the facility may hold the inmate in involuntary segregated housing for less than 24 hours while completing the assessment” of available alternatives. *Id.* § 115.43(a). In instances where an inmate is placed in involuntary segregation under the policy, or in instances where placement in segregation results in decreased access to certain programs or privileges, the policy directs prisons to document the details and justifications for such conditions. *Id.* § 115.43(b), (d).

¹³³ *Id.* § 115.43(e).

making final housing determinations, rather than automatically following an inmate's genitalia or sex at birth.¹³⁴

Second, D.C., Denver, and federal authorities now explicitly focus on the health and safety of transgender inmates.¹³⁵ By considering a host of factors in making classification and placement decisions — including gender identity — and by adjusting such decisions based on an assessment of an inmate's vulnerability,¹³⁶ the three policies are structured to avoid the risk that a prison will “disregard[] an excessive risk to inmate health or safety.”¹³⁷ This structure is further supported by the practice of interviewing transgender inmates to assess the degree to which they perceive a threat to their safety.¹³⁸

Third, the three policies seek to further the twin aims of safety and greater autonomy by limiting the use of involuntary solitary confinement: Under these new policies, transgender inmates are not automatically segregated¹³⁹ and generally do not lose privileges if they are segregated.¹⁴⁰ Furthermore, the District of Columbia's contemplation of “communal protective custody”¹⁴¹ addresses the criticisms that arise when protective custody necessarily means isolation.¹⁴² Of course, all three policies do contemplate an initial period of segregation while final housing arrangements are made; in Washington and Denver, such segregation is mandatory.¹⁴³ However, brief placement in segregation pending the collection of more information and the finalization of housing arrangements seems to be a sensible compromise in the interest of overall safety: when all a correctional institution knows about a particular inmate is his or her transgender status, it is hard to assess what type of placement would be best.

Finally, the Washington and Denver policies both provide a role for an individual who is a member of the transgender community or an

¹³⁴ See *id.* § 115.41(d)(7); DENVER SHERIFF DEP'T, *supra* note 10, § 5(F)(1); D.C. DEP'T OF CORR., *supra* note 10, § 10(a).

¹³⁵ See 28 C.F.R. § 115.42(c); DENVER SHERIFF DEP'T, *supra* note 10, § 5(G)(2); D.C. DEP'T OF CORR., *supra* note 10, § 10(a)–(b).

¹³⁶ See 28 C.F.R. § 115.41(d); DENVER SHERIFF DEP'T, *supra* note 10, § 5(F)(1); D.C. DEP'T OF CORR., *supra* note 10, § 10(a).

¹³⁷ *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

¹³⁸ See 28 C.F.R. § 115.41; DENVER SHERIFF DEP'T, *supra* note 10, § 5(F)(1); D.C. DEP'T OF CORR., *supra* note 10, § 10(b).

¹³⁹ See 28 C.F.R. § 115.43(a); DENVER SHERIFF DEP'T, *supra* note 10, § 5(G)(3); D.C. DEP'T OF CORR., *supra* note 10, § 10(c).

¹⁴⁰ See 28 C.F.R. § 115.43(b); DENVER SHERIFF DEP'T, *supra* note 10, § 5(G)(7); D.C. DEP'T OF CORR., *supra* note 10, § 10(e).

¹⁴¹ See D.C. DEP'T OF CORR., *supra* note 10, § 10(d). The D.C. policy does not flesh out the exact features of communal protective custody, nor does the term appear to be used elsewhere by the D.C. Department of Corrections or other relevant literature.

¹⁴² See *supra* notes 27–30 and accompanying text.

¹⁴³ See 28 C.F.R. § 115.43(a); DENVER SHERIFF DEP'T, *supra* note 10, § 5(E); D.C. DEP'T OF CORR., *supra* note 10, § 9(d).

expert on the issues facing transgender people. In Washington, this individual actually sits on the Transgender Committee.¹⁴⁴ In Denver, the Transgender Review Board may consult with such an individual, and the inmate under consideration also has the right to have such an individual present at his or her housing assignment hearing.¹⁴⁵

At the same time, by preserving prison authorities' discretion and focusing on case-by-case resolution, these policies further the government's interest in overall institutional safety and order. Courts have taken the view that "[p]rison life . . . contain[s] the ever-present potential for violent confrontation and conflagration" and that "[r]esponsible prison officials must be permitted to take reasonable steps to forestall such a threat."¹⁴⁶ These three policies — like the broader constitutional norms under which they exist — remain "deferential to the informed discretion of corrections officials."¹⁴⁷

Of course, each of these policies might benefit from adopting some of the best practices of the others. For example, both the Denver policy and the federal policy pledge to house transgender inmates "in the least restrictive setting possible."¹⁴⁸ The District of Columbia's transgender inmates should receive a similar guarantee. Along the same lines, Denver and the federal government might look to Washington's "communal protective custody" as a possible improvement on their current policies. While the exact features of this type of housing are not clear,¹⁴⁹ to the extent that it allows transgender inmates to be removed from potentially violent or abusive situations without being placed in isolation, it would provide a valuable protection in a model policy.

Critics might also identify deeper shortcomings in these policies. For example, Faithful and others might criticize them on the grounds that they do not live up to the paradigm of "[f]lexible self-identification"¹⁵⁰ because both Washington and Denver still explicitly account for genitalia in making housing assignments and the federal policy seems to allow such considerations as well.¹⁵¹ However, a number of potential counterarguments are worth considering. First, if one accepts that the objections of potential cellmates — including those

¹⁴⁴ D.C. DEP'T OF CORR., *supra* note 10, § 7(e).

¹⁴⁵ DENVER SHERIFF DEP'T, *supra* note 10, § 5(F)(3)-(4).

¹⁴⁶ *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 132 (1977).

¹⁴⁷ *Turner v. Safley*, 482 U.S. 78, 90 (1987).

¹⁴⁸ DENVER SHERIFF DEP'T, *supra* note 10, § 5(G)(3); *accord* 28 C.F.R. § 115.43(a).

¹⁴⁹ See *supra* note 141.

¹⁵⁰ Faithful, *supra* note 9, at 7.

¹⁵¹ For an example of criticism of the continued relevance of genitalia in the District of Columbia's policy, see Amanda Hess, *Trans Slammer: Are D.C.'s Transgender Inmates Still Screwed?*, WASH. CITY PAPER (Mar. 4, 2009, 12:00 PM), <http://www.washingtoncitypaper.com/blogs/sexist/2009/03/04/trans-slammer-are-dcs-transgender-inmates-still-screwed>.

based on privacy concerns — are legitimate,¹⁵² it would make sense for a transgender inmate’s physical characteristics to at least factor into the housing determination. In the context of federal employment discrimination statutes, for example, such privacy concerns are allowed to trump otherwise strong antidiscrimination norms.¹⁵³ Second, because “it is beyond dispute that prohibiting sexual activity in prison is a legitimate governmental interest,”¹⁵⁴ if one gives weight to the possibility that “a transgendered woman in women’s prisons might have sex with the other women,”¹⁵⁵ genitalia would remain relevant to the classification decision.¹⁵⁶ Third, there may be a fear that inmates will fabricate their gender identity; while genitalia may be an imperfect means of classifying inmates, it at least provides a measure of objectivity.

Similarly, someone adopting Rosenblum’s approach to protective custody might criticize these policies on the ground that an inmate can be placed in segregation more often than in the limited instances “where she requests the segregation for her own safety or well-being, or where the danger to the prisoner is so patently clear that prison authorities would be exhibiting deliberate indifference to leave her in the general population.”¹⁵⁷ However, such a criticism does not consider that there may be situations in which danger to the inmate is not *patently clear* but is still sufficiently high that it makes sense (in the interests of institutional safety and the safety of the transgender inmate) to resort to administrative segregation.

Critics could also note that these policies do not address the possibility of objections by transgender inmates’ cisgender cellmates.¹⁵⁸

¹⁵² See Rosenblum, *supra* note 9, at 531–32. *But see supra* ch. II. One could distinguish the prison context from those contexts discussed in Chapter II on the ground that, even in comparison to the minimal privacy in school restrooms or locker facilities, inmates may have almost no ability to maintain privacy from their cellmates.

¹⁵³ See generally Amy Kapczynski, Note, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257 (2003).

¹⁵⁴ *Lute v. Johnson*, No. 08-CV-00234, 2012 WL 913749, at *5 (D. Idaho Mar. 16, 2012).

¹⁵⁵ Rosenblum, *supra* note 9, at 532.

¹⁵⁶ To carry much weight, this argument would likely need to rely on the proposition that (1) this type of sex is more likely to occur than sex between two cisgender female inmates, or (2) this type of sex creates more problems than sex between two cisgender female inmates. To support the latter proposition, one might point to the risk of pregnancy created by this type of sex and the burdens inherent in caring for pregnant inmates. See Kelly Parker, *Pregnant Women Inmates: Evaluating Their Rights and Identifying Opportunities for Improvements in Their Treatment*, 19 J.L. & HEALTH 259, 264–67 (2004–05).

¹⁵⁷ Rosenblum, *supra* note 9, at 530.

¹⁵⁸ One provision of Denver’s directive appears to address this issue indirectly by providing that “[a]dditional safety precautions [for transgender/gender-variant inmates] may include (but are not limited to) access to private showers, single cells, etc., and will be offered if and when available” and that “[r]equests from a transgender/gender-variant inmate to be placed in the same cell with another transgender/gender-variant inmate should be honored when possible.” DENVER SHERIFF DEP’T, *supra* note 10, § 5(G)(3).

While such objections do not seem to find much success in the courts,¹⁵⁹ as a prudential matter it might be wise for prisons to consider how to handle objections by potential cellmates.

Finally, these policies could be criticized on the ground that they will mean little in practice. Whether directing a committee to balance a multifactor test¹⁶⁰ or calling for correctional institutions to satisfy a vague standard like “health and safety,”¹⁶¹ all three policies could allow a decisionmaker to hew to the status quo (strict genitalia-based classification and placement in segregation) so long as the decision in each individual case is explained in the terms set forth in the relevant policy. On the other hand, a more specific, bright-line rule would not permit the type of case-by-case decisionmaking that seems necessary when dealing with questions as individualized as gender identity and vulnerability to attack. Ultimately, determining the extent to which this problem materializes will require more time.

E. Conclusion

Although certainly susceptible to critique, the policies for housing transgender inmates implemented by Washington, Denver, and the federal government provide a model for other correctional agencies to follow. Of course, no prison policy will ever strike a perfect balance between inmates’ rights and government interests in safety and order — let alone a policy dealing with an issue as sensitive as that of housing arrangements for transgender inmates. But by navigating the competing interests of inmates and prison officials, these three policies generally succeed in establishing a framework to protect transgender inmates’ health and safety. Moving forward, the implementation of these policies warrants careful examination to determine their efficacy and outcomes in practice. For now, however, it seems that other jurisdictions would do well to look toward these policies as they consider how to accommodate transgender inmates in their correctional institutions.

¹⁵⁹ See *supra* p. 1756.

¹⁶⁰ DENVER SHERIFF DEP’T, *supra* note 10, § 5(F)(1); D.C. DEP’T OF CORR., *supra* note 10, § 10(a)–(b).

¹⁶¹ 28 C.F.R. § 115.42(c) (2013).