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## Is a Rainbow Pink or Blue? Creating Jail Policies for Transgender Inmates

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**Is a Rainbow Pink or Blue?**

**Creating Jail Policies for Transgender Inmates**

by

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College of Humanities and Social Sciences  
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### **Dedications**

This paper is dedicated to my wife, Anna. Without her constant support, this paper never would have been completed.

### **Abstract**

The United States prison system functions on a binary of male and female inmates. Transgender, non-binary, gender non-conforming, and intersex individuals challenge the limits of these systems and their policies. This paper addresses how to create policy for transgender individuals and what the policies should include. The best practice for creating policies involves basing them in solid ethics. Looking at different ethical theories will help solve ethical dilemmas involving housing, searching, and other policies for transgender and gender non-conforming inmates. To ensure that policies coincide with the law, an examination of case law provides the legal background for these policies. By looking at several different cases involving transgender inmates suing detention facilities over failing to provide sex reassignment surgeries, administration developing policies can avoid violating the eighth amendment rights of detainees. Effective policy for transgender individuals can provide guidelines for correctional facilities in changing times. Examining and using policy development steps, we can use the Prison Rape Elimination Act to determine what needs to be considered when writing these policies.

*Keywords: Transgender, TNGI, non-binary, gender non-conforming, intersex, prison, jail, detention facility, policy*

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## Chapter One: Introduction

There are few systems in the United States that are more binary than the prison system. From the time that an individual enters the prison, they are labeled as either a male inmate or a female inmate. This label affects their housing, clothing options, searches, and available programming. This has been effective in the past, but more people are recognizing that they do not fit inside the gender binary. With the rise of people being openly transgender, prisons must develop new policies to help fit transgender prisoners into the strict boxes of male and female. Transgender, non-binary, gender non-conforming, and intersex (TNGI) individuals are becoming more commonly accepted, and, unfortunately, some of these people are ending up in the criminal justice system, which means that the binary system needs to find ways to adapt.

Transgender individuals are not new to society. C. Riley Snorton describes transgender as a “movement with no clear origin and no point of arrival” (Agarwal, 2018). However, the public’s awareness of transgender individuals has been growing rapidly since the mid-twentieth century (Flores et al., 2016). Because of this change in awareness and acceptance, more people are feeling free to be out as transgender, and it becomes society’s responsibility to make sure that there are policies in place to handle these individuals.

### **Background**

The current system involves separating men and women when they get admitted into a detention facility. There are certain benefits to this. First, safety is the most important factor in detention facilities. The main reason that men and women are separated in the first place is to maintain safety, specifically protecting female inmates from being physically or sexually assaulted by male inmates. This method is effective as most people do fit mostly into gender

categories. Being able to make quick determinations about housing and searching speeds up intake processes and clears confusion.

The real weakness of this system is only highlighted when dealing with transgender or gender non-conforming individuals. By one estimate, approximately 1.4 million Americans identify as transgender (Flores et al., 2016). A higher percentage of people aged 18-24 identify as transgender (0.7%) than people who are age 65 or older (0.5%) (Flores et al., 2016). This could be indicative that the number of people who self-identify transgender is rising, meaning that this is going to be a growing problem. One meta-analysis on the number of transgender individuals suggests that future surveys could find higher numbers of transgender individuals (Meerwijk, 2017).

With this in mind, administrations must accept that the current system of dividing men and women is going to have an increasing number of people left out. Knowing that this is coming, policies must be enacted now to handle it. Some detention facilities already have some policies in place for dealing with transgender individuals. Yet, these policies can be incomplete. Even more inconveniently, some of these policies are more akin to side notes or exceptions to the “normal” policy for men or women. These policy asides are found within larger policies regarding searches or housing. The best practice would be for every detention facility to have a policy that contains all the information for transgender individuals in one place.

Before there can be a discussion about policies on TNGI inmates, there must first be a general understanding of gender. The concept of gender is more complex than simply XY or XX chromosomes. Gender is a combination of biological, environmental, and cultural factors that create a unique identity (Rosenthal, 2018). Individuals who are transgender, non-binary, gender

non-conforming, or intersex have combinations of factors that might seem to contradict each other or have their own unique blend.

A good way to understand the complexities of gender is to consider hair color. There are categories such as blonde, brown, black, and red hair. Even within a category, there can be much diversity. For instance, there is a difference between dark brown hair versus light brown hair. There is no clear definition of when hair stops being dark blonde and starts being brown, but these categories exist so that one can quickly gain knowledge. If someone says that they have brown hair, there is a general understanding of what that looks like.

Gender is much the same. There are many different factors that go into someone's gender such as external genitalia, chromosomes, internal sex organs, gonads, hormone production, hormone response, and secondary sex characteristics (Quinn, 2018). All those factors boil down to two widely recognized categories, male and female. Like hair color, the categories are valid and help people quickly recognize important details, but one also needs to be aware that there are many times when people do not fit into these boxes. By definition, TNGI individuals do not fit neatly into male and female categories. When policies only reference male and female inmates, TNGI inmates are excluded, which is why it is important that administrations create policies specifically for TNGI individuals.

When making decisions in the workplace, one can rely on their organization's policies and procedures to help guide them. For most situations, policies can be very clear about what steps to take. Even when situations occur that policies are not expressly written for, they can provide guidelines for how employees should process the information and how to proceed. Policies are incredibly helpful and informative, and they all start as drafts that must be written, edited, and implemented. How do policies evolve from an idea in an administrator's head to a

thoughtful and complete product? Most importantly, how does policy get developed in a way that creates an ethical and legal guideline for employees to follow? The best practice for developing policies that create ethical actions from employees is to base the policies in sound ethical theories.

Modern-day criminal justice is under intense scrutiny from the public. The community expects criminal justice employees to be held to a high ethical and professional standard. For police officers working on the streets, there are more cameras than ever before, from surveillance cameras, dashboard cameras in squad cars, body worn cameras, and even civilian's camera phones. This kind of public attention can help hold police officers accountable for their actions and keep them aware of the necessity of making ethical choices. Inside of a jail, there are just as many cameras; however, the public frequently will not see the video footage unless there has been a critical incident. Despite the lesser awareness from the public, jail staff should still be held to the same high ethical standards as other criminal justice practitioners. Again, the best path to having ethical actions by staff is by having ethical policies for them to follow.

### **Statement of Problem**

As mentioned above, the number of people who identify as transgender, non-binary, gender non-conforming, and intersex is growing. Many current detention facility policies use specific gendered language of male or female inmates which excludes this population. This paper will address the ethical, legal, and administrative aspects of this topic to help determine the best practices for dealing with TNGI inmates. This paper will focus on short-term detention facilities, or jails, where the length of stay for inmates is less than a year.

## **Conclusion**

Policies provide guidelines for staff to follow as well as hold them accountable when things go wrong. Well-written policies are critical to organizational success because they allow administrations to dictate how staff should handle various situations. When there are gaps in policy, staff members must use their own judgment to determine the correct course of action, which can cause a variety of problems ranging from inconsistent treatment to ethical or legal violations. Jails are based on binary systems and are dealing with an increased amount of people who do not fit in the system. To accommodate everyone, jail administrations should create comprehensive policies for transgender, non-binary, gender non-conforming, and intersex individuals that are detailed and contained all in one place. The following section will review the literature on this topic through an ethical lens, a legal lens, and an administrative lens.

## Chapter Two: Review of Literature

### **Ethical Application of Transgender Policies**

As with any new policy, there are many considerations that policy writers must be aware of before the first draft. By far, the most important consideration is ethics. One must consider the ethical impacts that this policy would have on those involved and strive to reduce any opportunity for confusion or abuse. This section will first address ethical considerations for policies on TNGI inmates. Then it will discuss how to implement this policy, ensure ethical behaviors, and promote accountability for those impacted.

The difficulty in creating ethical policies lies in first identifying which actions are the most ethical. There are many different ethical philosophies that have been argued for centuries. Each philosophy has its strengths and weaknesses and can come to different conclusions, which makes determining the ethical action even more difficult. Depending on the ethical philosophy, the same action could be perceived as the morally correct action or immoral.

The following section will first identify and describe the basic ethical theories. It will then use those theories to examine policymaking for transgender and gender non-conforming inmates from the different theories to see if there can be a consensus on the ethical approach to some of the dilemmas involving said inmates.

### ***Ethical Theories***

The first ethical theory to be examined is ethical formalism. Ethical formalism is a more black and white perspective of ethics. It is part of the deontological system of ethical beliefs which base the morality of actions on the inherent nature of the act itself and stresses the importance of duty (Pollock, 2019). Pollock defines duties as “actions that an individual must perform in order to be considered moral” (2019, p. 10). In the case of corrections workers, their

main duty is the safety of the inmates who are in their facility. Therefore, actions that increase the safety of inmates, such as making spaces gender-inclusive and correcting intolerance, are the morally correct path because it will help achieve the end goal.

Another ethical theory is the ethics of care. This belief judges the morality of actions based on human relationships (Pollock, 2019). The ethical action according to this theory would be the one that strengthens human relationships. If jails had had an effective policy for TNGI inmates, it would help foster a sense of trust between the inmates and officers, which would make it a moral action. However, ethics of care has been considered by some to be a “feminine morality” based on the concept that women are more caretakers (Pollock, 2019, p. 38). Criminal justice professions, including corrections, can be a very tough or even macho environment. If one tries to create buy-in for the policy for treatment of TNGI inmates based on the fact that it will strengthen relationships, there could be some pushback from employees who view their roles as more of rule enforcers than caretakers.

The theory of utilitarianism says that the ethical action is the one that creates the greatest happiness for the greatest number of people (Pollock, 2019). In our prison system, there are many different stakeholders whose perspectives would need to be considered before a determination could be made about the ethical actions through utilitarianism. The next section will examine these stakeholders and discuss what ethical considerations and impacts those new policies might have.

### ***Ethical Considerations and Impacts***

The first step to evaluating ethical dilemmas is to identify the groups who would be impacted by the decisions. The parties that may be impacted by this new policy are transgender,

gender non-conforming, or cis-gender inmates; transgender, gender non-conforming, or cisgender correctional officers; administrative staff; other inmates; and the community.

### **TNGI Inmates**

For transgender, intersex, or otherwise gender non-conforming inmates, the main considerations involve balancing their safety with their expression. Transphobia is a real and serious danger in the prison system. Transgender inmates are five to six times more likely to be victims of physical or sexual abuse while incarcerated (Szuminski, 2020). They must question how to be themselves and assert their rights without making themselves a potential target. A study in Pennsylvania found that transgender individuals face a stigma in prisons, ranking among such “social undesirables” such as pedophiles, molesters, mentally ill patients, and “snitches” (Janness & Fenstermaker, 2016, p. 19).

Some policies for TNGI inmates rely on the inmate’s own determination of their gender and expectations. For instance, inmates could be asked upon booking if they prefer a male or female officer to perform their search or where they would feel comfortable being housed. This creates ethical dilemmas for the inmate because they must make these decisions. Teleological ethics, which focuses on the outcomes of actions to determine morality, would be a good system to evaluate decisions in this case (Pollock, 2019).

The choices that face TNGI inmates can have huge consequences. Looking at moral decision-making steps and examining how a TNGI inmate might work through the process will help determine how to best make these decisions.

### ***Example Moral Decision Making for TNGI Inmates***

There are five steps identified by Pollock in moral decision making: identify the facts, identify relevant values and concepts, examine dilemmas for involved parties, determine the

most immediate issue, and then resolve the dilemma (2019). In the case of where to house TNGI inmates, the facts would be what was stated above regarding safety and gender considerations. The relevant values and concepts delve more into the core of what makes this a moral dilemma. The main value is safety, but there are other important values that need to be considered. Some examples are self-respect, self-expression, and pride. While these are not necessarily in contradiction of the value of safety, sometimes people who are different must sacrifice some self-expression in order to blend in and not draw negative attention to themselves. These values would all need to be considered when looking at making decisions on who they want to search them, how they want to present, how open they are about their identity with other inmates or officers, or other potential moral dilemmas.

The next step is to identify dilemmas for involved parties. The above dilemmas could be for the inmate involved, but they are far from the only stakeholder. Other people who might be impacted or have their own ethical dilemmas could be officers who are making the final decision on housing, administration who is determining policy, and other inmates who must determine how to interact with TNGI inmates. Due to the violence that transgender people face in prison, the most immediate issue would have to be their safety, and how to fit their other values around staying safe.

The last step would be to resolve the dilemma. As previously mentioned, a teleological system would be a good framework to start with. Since teleological ethics is focused on the outcome and the main issue is remaining safe, the ethical decision would be whatever decision keeps the inmate out of harm's way.

## **Officers**

Oftentimes while the TNGI inmate's opinion is taken into consideration, officers have the final say over housing and other major decisions. Officers are faced with moral dilemmas involving how to maintain inmate's dignity while still ensuring safety and the prevention of contraband. They can also struggle with their own beliefs about transgender people and must determine how to interact with someone who is different. The following section will look at the moral dilemma would be concerning housing for non-binary inmates from the perspective of officers.

### ***Example Moral Decision Making for Officers***

Again, the first step would be to review the facts. The prison system is set up on a binary. Without a complete overhaul of the system, decisions on where to house inmates must be made within those parameters. How do officers determine which of the two boxes non-binary inmates go into when, by their very definition, they do not fit in the boxes? The TNGI inmates will have opinions on how they would like to be treated, and the officers need to balance their wishes with the good of the facility.

The next step in the process is to identify relevant values and concepts in this dilemma. For transgender inmates, some of the values are equality, respect, and inclusion. The main concept is the idea of gender and how to take a spectrum and turn it into a dualistic system. The other concept involved is safety. Decisions about where to place transgender inmates and how to treat them can impact their safety while they are housed in the facility.

The involved parties, in this case, would be the custody staff, make the final decision on where to house gender non-conforming inmates, administration, other inmates, the community, and the inmate themselves. For the non-binary individual, some moral dilemmas could be

deciding which gender they would want to be housed with. Considering that the only choices are male or female, someone who by definition, is neither would be forced to choose the option that fits best for them personally. Some of their considerations would be if people perceive them as more masculine or feminine, if they want to be associated with the gender they were assigned at birth, and are they going to be safer with male or female inmates.

While their opinion can be taken into consideration, custody staff would have to approve the housing decision. Dilemmas faced by the officer making the determination are like the ones faced by the individual. The officer must decide if the individual should be housed according to their gender assigned at birth or not. They also need to evaluate where the inmate would be safest from other inmates and officers.

Reviewing the moral dilemmas faced by parties involved, the most immediate issue that would need to be resolved is if the custody officer should respect the request from the non-binary inmate and place house them where the inmate feels they belong.

The final step is to examine ethical theories to resolve the dilemma. The utilitarian principle involves determining if an action is moral based on its consequences (Pollock, 2019, p. 32). The amount of good that would be done for the non-binary inmate if the officer decided to approve their choice would be great, but would it outweigh the impact that this individual's placement would have on other inmates? For example, if the non-binary inmate presents masculine, placing them in the female prison could be very good for them, but could also make other female inmates uncomfortable. One criticism of the utilitarian perspective is that all good consequences are not equal, making an objective determination on this balance impossible (Pollock, 2019, p. 32).

The most relevant ethical system to this dilemma is the ethics of care. Ethics of care focuses on the human aspect by determining morality by what strengthens relationships and addresses the needs of the parties involved (Pollock, 2019, p. 37). In this case, the moral decision would be respecting the choice of the non-binary individual because it meets their need to be safe and respected. It also starts to build a relationship of trust between the custody staff and the inmate. This decision would also work under the generalization principle, which states that when making a decision, one must assume that in every other similar situation, the decision would be the same (Pollock, 2019, p. 42). Respecting the choice of an individual can be considered moral in most if not all situations, so that decision here can be generalized.

### **Other Inmates**

Other inmates face similar problems without the benefit of having a policy to guide their actions. They also face the dilemma if they should share information on another inmate's genital status or how to respond if they learn it inadvertently. Since the population of jails is constantly changing and the individuals are not bound by any type of policy, this paper will not focus on ethical decision-making for them.

### **TNGI Officers**

Inmates are not the only ones who can be transgender or gender non-conforming. There are transgender or gender non-conforming officers who have a unique set of dilemmas. Most policies on searches use binary language such as "cross-gender" or "same-gender". What does this mean for a non-binary officer? If they appear androgynous, it can make inmates uncomfortable because they want to know their privacy is being respected, and who is doing their search. Do inmates deserve to know if the searching officer is gender non-conforming? Written policies can clear up the legality of whom non-binary officers can search, but it does not

address if an inmate feels uncomfortable because they perceive they are being searched by the opposite sex. While there have been great strides in discussing issues for TNGI inmates, there has been little actual guidance about how TNGI officers should operate.

### ***Example Moral Decision Making for TNGI Officers***

First step is to identify the facts. It is difficult to determine how many lesbian, gay, bisexual, and transgender (LGBT) correctional officers are currently employed because many officers may feel hesitant about sharing their sexual identity with their workplace, and agencies may fear asking questions about employee's sexual orientation (Sklansky, 2006). Some officers may fear for their career if they reveal their orientation because for many years, being LGBT was considered "conduct unbecoming of a criminal justice officer" and could result in termination (Doss, 1990). Criminal justice organizations, such as corrections, are their own culture. Typically, this culture "prizes traditional masculinity and presumes heterosexuality" (Mennicke et al., 2018, p. 1). This can lead to LGBT criminal justice practitioners being excluded or experiencing a hostile work environment. All of these factors contribute to the lack of policies for transgender or gender non-conforming officers. Because of this, their values would be very similar to the values of TNGI inmates with safety, self-expression, and self-respect.

Moral dilemmas abound for TNGI correctional officers. Do they have an obligation to inform inmates of their gender identity if they are performing a search of their person? Should TNGI officers have to "choose a side"? Does it matter how they present their gender identity? The moral dilemma that affects the most people would be considering searching inmates.

To resolve this dilemma, look first at utilitarianism. There are two categories of this theory: act utilitarianism and rule utilitarianism. In the former, the morals are considered based on the outcome of the act itself, and in the latter, the morals are concerned with the precedent

that the action could set (Pollock, 2019, p 37). The end goal of this dilemma solving is to help create policy, so this situation would be most concerned about rule utilitarianism. While admitting their gender identity to every person they search could be harmful for the officer, it would be helpful for the person being searched. Since there are more of them and it is difficult to quantify 'good', basic utilitarian principles would suggest that one ought to tell each person their identity. However, the lack of qualifications on 'good' make this an unreliable theory on its own. If telling everyone their gender identity does actual mental harm to the officer, it may not outweigh the benefits of the inmates.

Another lens to look at it from would be through ethics of care. Ethics of care would say that the building of relationships is the most important aspect, which would seem to back the utilitarian conclusion. One question that could be brought up is if the relationship between officer and inmate that could be short worth cultivating. The answer to this question would largely depend on the officer and their individual beliefs.

Based on the indeterminate nature of these analyses, we can conclude that the moral action for TNGI officers would be relative to their situation and would strongly depend on the officer's comfort level.

### **Administrative Staff**

Administrative staff responsible for writing these policies must face moral dilemmas about how to balance institutional security and inmate privacy. They must ensure that officers are treating transgender inmates with respect. Administrative staff face the moral dilemmas involved in creating housing and searching policies for transgender individuals. There are similar arguments and analyses to dilemmas faced by officers, which supports the same conclusion as above.

## **Community**

Community members are a stakeholder in this ethical dilemma in more of a bystander role. While certain groups, such as LGBT rights groups, would be pleased with these new policies, more socially conservative groups might take objection. Since community relations is such a complex concept, this paper will not be going into it any further.

## ***Implementation***

Even though administrative staff may write the policies, they are not the ones that make it come to life. For the policy to take off, line staff must read it, understand it, and abide by it. The Centers for Disease Control and Prevention (CDC) has identified some tips to having successful implementation of new policy. First, the CDC says that it is important to have clear goals, so everyone knows what they are focused on and trying to achieve. Second, the administration must determine what resources they have available fiscally but also staffing, training, and infrastructure. Lastly, identify what role everyone is going to play during implementation, so people know their responsibilities (CDC, 2021).

## ***Ensuring Ethical Behavior and Promoting Accountability***

Any policy without proper enforcement is as weak as the paper that it is written upon. To best ensure the policy and ethical behaviors are followed, administrative staff must stand behind the policy. Administrative staff needs to create buy-in for the policy from employees. This can be done by explaining the ‘why’ the policy is written the way it is and what it hopes to achieve. During training on the new policy, the ethics driving it should be taught as well. This also ensures that people understand not just the letter of the policy, but the spirit as well. When people understand the policy, it is easier to hold them accountable for breaking policy.

## ***Conclusion***

As the culture grows and becomes more socially progressive, more people are feeling comfortable openly identifying as TNGI. It is inevitable then that TNGI individuals would end up involved in the criminal justice system, either as a practitioner or offender. Effective policy can help mitigate some of the issues that will arise from the influx of diversity, and these policies must be based in sound ethics. This paper examined how ethical theories relate to gender and TNGI inmates and evaluated ethical dilemmas by the people who would be affected by this policy. Effective policy implantation can lead to the advancement of the most important value, safety.

## **Legal Application of Transgender Policies**

Once based on solid ethics, the next most important step for good policies is to ensure that the policies follow the law. This may seem like an obvious point, but it can be difficult to ensure that brand new policies are legal when there are no clear precedents for their foundation. Since policies on transgender individuals are only recently becoming common, there are fewer examples for policy writers to look at while drafting their own. Also, there are considerations that can be impossible to predict.

As with any policy, there are going to be unforeseen circumstances and very specific instances that are not going to be able to expressly be covered in the policy. For more well-established topics, these potential areas for problems can be somewhat predicted. For example, in the use of force policies, while administration cannot possibly predict every situation that an officer might find themselves in, they can predict the general type of situation and make allowances for it. With policies for transgender inmates, there are going to be situations that

everyone is completely unfamiliar with. To cope with this, policies will need to be thoroughly researched, reviewed frequently, and updated as needed.

A starting point for research is to look at already established case law. This provides policy writers with an understanding of how courts have interpreted laws in the past, which gives them clues on how to write their policies to comply with both the letter of the law and the spirit of the law. The following section will look at legal considerations for policies on transgender and gender non-conforming inmates. It will also review case law to help establish the reasoning behind how the policies should be written.

Any policy developed for TNGI inmates must cover housing, clothing, searches, showering, hygiene, and medical needs. Most of those categories will be very simple to update in detention facilities and can be implemented with few issues. However, medical needs are a topic that will need special consideration. What types of treatment will the prison be responsible for paying for, and how will those items be approved? The administrative staff of the prison would not be able to make these determinations on their own. It will require planning and discussions with their contracted medical service.

### ***Action Plan***

In order to enact this policy, the prison administration and their contracted medical services will need to decide what types of medical care are necessary to cover and what procedures or interventions would be considered optional surgeries outside of prison, and therefore, not covered. A good starting point is to accept that basic healthcare needs that would be provided to other inmates should be covered by this policy. *Estelle v. Gamble* “establish[ed] the government's obligation to provide medical care for those whom it is punishing by incarceration” (*Estelle v. Gamble*, 1976). Even if the inmate might be in a men’s prison, they still

are entitled to basic health care that is necessary for their body. For example, if the women's prison covers medical care such as a pelvic exam or PAP smear, the same services must be available to transgender or gender non-conforming inmates in a men's prison.

However, there needs to be a line drawn somewhere. Prisons are not responsible for paying for cosmetic surgeries for inmates, but some gender-confirming or sex reassigning surgeries are classified as cosmetic surgeries even though they are also considered a treatment for gender dysphoria. Should the prison be required to provide those services to transgender inmates as treatment or should they be viewed as cosmetic and not be allowed while detained? This topic has been one that has been active in courts in the last decade. This next section will look at those decisions to establish if they are necessary treatments.

### ***Sex Reassignment or Gender Confirmation Surgery***

There have been several transwomen inmates who have sued the prison they are incarcerated in for failure to provide sex-reassignment surgeries. Looking at these rulings can help inform policy decisions.

#### **Eighth Amendment Argument**

The main argument in most of the cases involving transgender women attempting to receive sex reassignment surgery is that it violates their Eighth Amendment rights. The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted" (U.S. Const. Amend. VIII). The argument being used by transgender women inmates is that refusing surgery qualifies as "deliberate indifference" to a serious medical need which would be considered cruel and unusual punishment. This topic was explored in the case *Farmer v. Brennan* in 1994.

### ***Farmer v. Brennan***

Dee Farmer, a transgender woman, was incarcerated in male prisons and spent most of her time in segregation housing. When she was transferred to a higher security prison, she was also placed in the general population. Farmer claims that she was beaten and raped by another inmate and that corrections workers acted with “deliberate indifference” to her health and safety by putting her in the general population. Farmer also alleges they put her in the general population knowing that she was a potential victim and failed to protect her. The case was brought before the Supreme Court, and they held that corrections workers must have and ignore “actual knowledge of potential danger” before it became a criminal act of deliberate indifference (*Farmer v. Brennan*, 1994). The Court said that correctional workers have an obligation to provide food, water, medical treatment, and protection from violence by other inmates, and it only constituted a violation of the Eighth Amendment if the lack of care is “sufficiently serious” and remanded it to lower courts for reconsideration (*Farmer v. Brennan*, 1994). This case is the foundation of the arguments of later cases that refusing sex reassignment surgery is ignoring their serious medical condition of gender dysphoria.

### ***Limits of Eighth Amendment***

The Diagnostic and Statistical Manual (DSM-5) defines gender dysphoria as a “marked incongruence between one’s expressed/experienced gender and assigned gender” (American Psychiatric Association [APA], 2013). This condition was only added to the DSM in the fifth edition, which came out in 2013. This addition is significant because it now provides a diagnosis for transgender and gender non-conforming persons. That diagnosis can be used to claim disability, obtain insurance authorization for treatments, and other medical needs. From *Farmer v. Brennan*, we know that in order for the violation to have risen to the level of criminal intent to

violate the Eighth Amendment rights of the inmates, it needs to be “deliberate indifference” to a “sufficiently serious” medical need (*Farmer v. Brennan*, 1994). Since it has been added to the DSM-5, gender dysphoria is recognized as a serious medical condition.

Theoretically, based on these facts, any transgender or gender non-conforming inmate who has a diagnosis of gender dysphoria would be entitled to treatment while incarcerated. In practice, it can be difficult to get that diagnosis. Some inmates face implicit or even overt transphobia from corrections workers, who can prevent them from getting an appointment with a doctor who is able to diagnose gender dysphoria. Without the proper diagnosis, officers can’t have “actual knowledge of potential danger” necessary to require treatment under the Eighth Amendment (*Farmer v Brennan*, 1994). Another aspect to consider is that in order for TNGI inmates to qualify for any medical or special housing or searching procedures, they must out themselves as transgender, which means opening themselves up to potential ridicule or judgments. More importantly, with gender dysphoria being a recognized by the DSM-V, admitting one’s status as transgender is admitting to a mental health disorder that can carry a lot of stigmas (Routh et al., 2017).

Even with a diagnosis and the requirement of treatment, inmates often do not get to choose what type of treatment they receive. There are several accepted forms of treatment for gender dysphoria, such as hormone replacement therapy, hormone suppression therapy, gender confirming or sex reassignment surgery, and counseling (APA, 2013). As long as the prison is providing some sort of treatment, they are protected from the “deliberate indifference” standard. To understand the details of what is and what is not required, a more thorough look at the relevant decided court cases is needed.

**Quine v. Beard**

Shiloh Quine is a transwoman in a California's Department of Corrections and Rehabilitation (CDCR), serving life without the possibility of parole for murder (*Quine v. Beard*, 2014). Quine suffered from gender dysphoria and was seeking to have sex reassignment surgery. When she was told she could not, she sued CDCR for violating her eighth amendment rights. She claimed that because of her gender dysphoria, she was severely depressed and reported self-mutilation, and had attempted self-castration and suicide multiple times (*Quine v. Beard*, 2014). The State of California ended up settling on the case and agreeing to fund her sex reassignment surgery (*Quine v. Beard*, 2014). Quine is the first prisoner in the United States to have a state-funded sex reassignment surgery (Watson, 2017).

**Edmo v. Idaho**

This case arose when Adree Edmo, and inmate in an Idaho correctional facility, requested sex reassignment surgery. Even though she had already attempted to self-castrate twice, the prison psychiatrist denied her request (*Edmo v. Idaho*, 2017). The Idaho Department of Corrections believed that she should not have her surgery paid for by taxpayers, so she sued the Department of Corrections for violating her Eighth Amendment rights claiming that they were showing "deliberate indifference" to her medical condition (*Edmo v. Idaho*, 2017). The Ninth Circuit of Appeals found in her favor in an unsigned unanimous decision (*Edmo v. Idaho* (2017)). The Ninth Circuit rejected the State's appeal to hear the case en banc (*Idaho Department of Corrections v. Edmo*, 2020). Similarly, the Supreme Court also refused to pick up the case letting the Ninth Court's ruling that her rights were violated stand (*Idaho Department of Corrections v. Edmo*, 2020).

### **Gibson v. Collier**

Vanessa Lynn Gibson was a convicted murderer in Texas who was diagnosed with gender dysphoria. The facility provided her with hormone replacement therapy as a solution, but because Texas has no policy regarding “irreversible surgical intervention,” and her request for sex reassignment surgery was denied (*Gibson v. Collier*, 2019). Gibson became severely depressed and attempted suicide several times. She sued, claiming that by refusing to let her have a medical examination for sex reassignment surgery, they were ignoring an urgent medical need and were violating her Eighth Amendment rights (*Gibson v. Collier*, 2019). The Fifth Circuit Court of Appeals disagreed with her. They said that it is not cruel to deny a treatment that isn’t available in other prisons (*Gibson v. Collier*, 2019). The court also explained that she was receiving care for her medical condition in the form of hormone replacement therapy. The Supreme Court rejected her appeal and let the ruling stand that her rights were not violated.

### **Analysis of Opinions**

The biggest thing to note with these cases is that they all came to different conclusions. While their requests (sex reassignment surgery) and arguments (violation of Eighth Amendment rights) are the same, the outcomes are different even with all of the judges and justices using the same Eighth Amendment text. The different rulings could be explained by several factors. First, they were decided in different states and Circuits of Appeals. States have unique perspectives and values that can lead to the discrepancies in the courts’ rulings. The seriousness of the crime should not affect the amount of protection guaranteed by the Eighth Amendment, and it appears not to have been a factor here. Both Shiloh Quine and Vanessa Gibson were convicted of murder and in one case, the State settled, and the other held there was no rights violation (*Quine v. Beard*, 2014; *Gibson v. Collier*, 2019). In *Gibson*, the court held that receiving some form of

treatment for gender dysphoria relieved the prison of needing to provide sex reassignment surgery as a treatment option (2019). With the Supreme Court refusing to hear *Edmo v. Idaho* or *Gibson v. Collier*, we do not have clear national case law in this matter.

Notably, all of the above cases involved prison sentences ranging from ten years to life without parole (*Quine v. Beard*, 2014; *Edmo v. Idaho* 2017; *Gibson v. Collier*, 2019). In these cases, delaying treatment until after they serve their sentence is either impossible or forcing the individuals to wait a long time for treatment. In short-term detention facilities, delaying the surgery until after they are out of prison does not have nearly as much impact as having to wait ten years.

### ***Public Opinion***

The public opinion of these cases varies widely depending on the level of support for transgender persons. Given that transgender rights are already a divisive topic, it's only natural that providing transgender inmates with free surgery would garner opposition. After the court ruled that Edmo was entitled to a sex reassignment surgery through the prison, a MoveOn petition gained 5,919 signatures demanding that taxpayer dollars should not be used to pay for the surgery (David, n.d.). There is already debate about how much money should be spent on prisoners, and adding the transgender element can cause these policies to become a lightning rod for criticism.

In order to balance case law, public opinion, and prisoners' rights, this proposed policy will not include gender confirmation or sex reassignment surgery intervention as treatment options for gender dysphoria while incarcerated. Typically, the Supreme Court has opposed blanket bans on medical treatments (*Fields v. Smith*, 2010). In *Fields v. Smith* (2010), the Supreme Court refused to grant certiorari after the Seventh Circuit of Appeals ruled against a

Wisconsin law aimed to limit the type of treatments the Department of Corrections had to offer to individuals with gender identity disorder (presently known as gender dysphoria). The court found that the law, which sought to ban hormone treatments and sex reassignment surgeries, violated the Eighth Amendment rights of the petitioners who were transgender women incarcerated at the Wisconsin Department of Corrections (*Fields v. Smith*, 2010).

Policies for short-term detention facilities should not include a ban on gender-confirming surgeries but should encourage medical staff to assist the inmate in setting up surgery for when they are released from prison if possible. With this provision, the policy still provides assistance in care for inmates with gender dysphoria, but it does not require the procedure to happen immediately. It can take months to find a good surgeon for gender confirmation surgery and even longer to make an appointment for a consultation. With the maximum length of stay at this facility being less than one year, it would be difficult to even schedule and perform the surgery before the inmate is released.

### ***Impact of Policy Change***

#### **Criminal Justice System**

The court decisions on special surgeries for transgender inmates impacts all areas of corrections. Corrections facilities need to consider the health concerns of transgender inmates and to what degree they are able to facilitate treatment of gender dysphoria. Helping inmates set up these types of surgeries for when they get out of prison can have an impact on social workers and parole officers. Surgeries typically require several doctor's appointments before and after to ensure that the procedure is without complications. Also, for surgeries of this level, pain management is going to be an issue. Some prisoners may have existing drug addictions that

would typically make prescribing narcotics risky. This will require extra communication between the patient and their parole officer.

### **Court System**

Since the Supreme Court seems to be reluctant to pick up cases regarding the level of medical care and intervention required for transgender inmates, the lower courts are left to draw their own conclusions (*Fields v. Smith*, 2010; *Edmo v. Idaho*, 2017; *Gibson v. Collier*, 2019). The lack of direction and the currently conflicting holdings in different circuits will eventually need to be addressed. As seen above, even with the same legal text, different courts can rule in different ways. While transgender people are not new, awareness of gender dysphoria as a medical condition with necessary treatments is, and it will continue to be an issue as more people feel comfortable being who they are.

### **Prisons**

Even without incorporating gender-confirming or sex reassignment surgery, policies should ensure that transgender and gender non-conforming inmates have their rights respected and that their incarceration experience will not be negatively affected by their gender identity. Implementing this policy would have a significant impact on the medical company that is contracted through the prison. Prisons are a very segregated environment, with many prisons being strictly for men or for women. The medical staff on site is tailored to meet the needs of the majority of inmates. Transgender inmates who require special medical considerations for situations regarding their sexual organs will need to see a medical professional who is trained in that field. This might require transporting inmates to a hospital, clinic, or other facilities to maintain the basic level of care.

## **Community**

As mentioned earlier, these levels of healthcare decisions can be a lightning rod for opponents of transgender or prisoner rights. Some people have the perspective that taxpayers should not have to foot the bill for elective procedures requested by inmates. A lot more people do not understand transgenderism or are against it in general. Creating and implementing these policies could draw negative attention to the facility. However, there are also people who would view these changes as advancements in human rights. They will support the facility for taking these actions. In the end, public opinion should not impact the decision on how to handle inmates' medical needs.

## ***Administrative Considerations***

The administrative considerations for this policy would be how to accommodate these medical procedures. Would a facility need to adjust any contracted medical services? The administration would have to consider if services specific to certain sexes could be performed by in-house medical staff or if the prison needs to contract with outside facilities to be able to provide care. If outside care is necessary, that would affect costs.

## ***Expectations and Accountability***

Aside from the medical portion, it should require very little effort to implement this kind of policy. The most difficult aspect will be making sure that correctional staff follows through with the policy. As much as they should be acting objectively towards every inmate, biases do exist. There could be difficulty gaining compliance from officers who are strongly opposed to transgender people.

Policy should also require that during the booking process, every inmate will be asked their gender identity. If they indicate they are transgender, they will receive written explanations

of their rights and of the policy. Policy should dictate that all gender identities and relevant communication be documented. Administration could then go back and randomly audit inmate files to ensure that the officers are asking gender identity and explaining the policy. If officers are not meeting expectations, they could have a meeting with their supervisors to determine where they are having difficulty and assign training or coaching as necessary.

### ***Conclusion***

Transgender and gender non-conforming prisoners blur the clear lines between men's and women's facilities. Any proposed policies are not a long-term solution. They are intended to help the current prison population. To correct this issue long-term, America must reexamine the binary nature of the prison system. It is impossible to make room for gray when you're only thinking in black and white.

The court system has made it quite clear that prisons have a responsibility to maintain the healthcare of their inmates but have not clarified to what extent they need to go to, especially with transgender inmates. The medical portion of this policy has been informed by court law. With a comprehensive policy, prisons can make advancements in transgender, prisoner, and human rights.

### **Administrative Application of Transgender Policies**

Policy writing tends to be an overlooked area of management because it is unglamorous and often tedious, yet good policies can make a difference in whether an organization is successful or not. They provide a framework for employees on how to handle various situations. Our world, technologies, and perceptions are rapidly changing, so policies need to be able to keep up to provide employees with guidance in situations that are constantly changing. This is especially true in the criminal justice system.

One of the keys for running a successful criminal justice organization is to have good policies and procedures that are up to date, researched based, and the best practices for the field. Policies provide a guide for how the administration expects their employees to behave. From a legal standpoint, policies are important because they can be used to protect the department from liability in cases of employees breaking policy. For example, if a jail has in its policy that corrections officers are supposed to check the wellbeing of inmates every twenty minutes, officers are expected to follow that instruction. If an officer does not follow that guide, they could miss an inmate having a medical emergency. If that inmate died, somebody is going to need to be held liable for the wellbeing check that was not done. If there were no policies in place, the jail would be responsible for any injuries or illnesses suffered by the inmate. With a policy in place stating exactly how the welfare checks must be performed, the corrections officer who failed to do the check will be held responsible for not following policy. Conversely, if the correctional officer was following policy, they are shielded from most lawsuits brought by disgruntled inmates. It protects both the employee and the employer to have well-written policy statements.

Policies can also help organizations stay up to date on current issues. The issue of transgender and gender non-conforming individuals in prison is an issue that, while not new, has started to gain more public awareness over the last decade. Since some employees may have limited knowledge of transgender and gender non-conforming individuals, policies can help educate them on proper terminology and any special considerations that may be needed. This section will focus on how to create a comprehensive policy for TNGI inmates for a short-term detention facility.

With an understanding of the importance of policies, the next step is to look at how to create them. Creating policy can be difficult because the writer must phrase the policy in a way that is both thorough and concise. A wordy policy is not effective, nor is an overly vague policy. There is a balance that needs to be struck in covering enough information that it gives a basis for how to handle situations that aren't explicitly covered by a policy. In the criminal justice field, this is especially important because all the calls or duties performed are different from day to day. Looking at law enforcement, for example, there could be policy for how to handle traffic stops, but there is no way that a policy could explain every situation that an officer might come across. A good policy allows the reader to easily expand upon it to make the correct determination of a course of action for the situation they are dealing with. This can be a very tall order in the criminal justice field.

The following section will look at the basics of policy writing. It will follow policy-making steps and apply them to the topic of transgender individuals to help departments create effective and inclusive policies for all individuals.

### ***Public Policy-Making Cycle***

In the 1950s, Harold Lasswell developed a Public Policy Making Cycle that goes through the steps for making quality policies (Mwiji, 2013). The steps of Lasswell's cycle are problem identification and agenda setting; policy development; issue resolution and policy adoption; policy implementation and application; and policy evaluation (U.S. Fire Administration, 2017).

The first step in developing policy is problem identification and agenda setting. Depending on the situation, this can be done individually or as a group of policymakers. In this step, policymakers create a problem statement that clearly expresses the issue they are trying to correct by taking into consideration the needs of the community and any potential risk factors.

All the planning and research is done during this phase, so the creators have all the information they need in the future.

The next step in the cycle is policy development. This is where the actual policy gets written. Like with the previous step, policies can be written by one person or as a team of people. The proposed policy then goes into issue resolution and policy adoption. Policymakers give the proposed policy to shareholders for their opinions and any possible edits. One policy can go through many different edits before it is deemed sufficient. Once shareholders agree that the proposed policy is thorough and complete, they vote to accept the proposed policy.

The fourth step is policy implementation and application. During this phase, the policy is enacted within the organization. Finally, the policy goes through evaluation where shareholders and policy makers look at whether the policy is successfully fixing the problem that they identified earlier. If it is not, they make modifications to the policy and evaluate again.

### ***Applying Policy Making Steps to Transgender Policy***

Following the steps listed above will create a comprehensive policy for transgender and gender non-conforming individuals in a short-term detention facility. The first step is problem identification and agenda setting. TNGI inmates are put in a difficult position from the very beginning of their incarceration. Of all the aspects of society, prison systems might be the most forced binary system. There are clear “women’s” and “men’s” sections with no overlap. Anyone who doesn’t fit inside these categories is assigned to one. By definition, TNGI individuals do not fit into either of these black and white categories. TNGI inmates are put at risk for assault, sexual assault, and suicide by forcing them to conform to predetermined boxes.

## **Problem Identification and Agenda Setting**

Transgender prison populations are already at a higher risk of mental health issues, suicide, and victimization than the general prison population. According to one study in a California prison, 59% of responding transgender inmates reported that they experienced sexual assault compared to only 4.4% of the general populations (Janness et al., 2007, p. 30). This current system isn't working to keep TNGI inmates safe.

While some prisons have parts of the policies to be discussed already written, there are very few examples of comprehensive TNGI policies. Using established federal acts and regulations as a foundation, this paper will describe best practices in creating an all-encompassing policy. This will allow prisons to keep TNGI inmates safe from assault and help maintain their mental health by educating correctional officers on the process and clarifying expectations.

## **Policy Development**

One of the important parts of developing this policy is that it won't be created from scratch. There are federal and state regulations that need to be followed. One of the most significant federal acts to reduce sexual victimization in prisons is the Prison Rape Elimination Act (National Center for Transgender Equality, 2012).

### ***Prison Rape Elimination Act***

The Prison Rape Elimination Act (PREA) of 2003 was created to reduce the incidents of sexual assault in prisons, provide guidelines for how to best prevent sexual assault, and provide funding the training of officers. For TNGI inmates, PREA may be the most important set of federal regulations because it outlines how to protect them as a vulnerable class from sexual abuse. When writing this policy, care needs to be taken to ensure all the policies are PREA

compliant. The main parts of PREA that are relevant to TNGI inmates are rules and regulations regarding housing, searching, and showering (National Center for Transgender Equality, 2012).

PREA prohibits housing people solely on their genital status and requires TNGI inmate strictly prohibits performing any strip search or similar medical evaluation for the sole purpose of determining an individual's genitals. It also suggests that TNGI inmate's placement be reevaluated twice a year. This accounts for changes that may be from hormones the inmate is taking, their actual or perceived safety, or other influencing factors. The second relevant part is searches. PREA says that the classification of TNGI inmates from their intake housing will dictate which gender will be viewed as and bans cross-gender searches (Department of Justice, 2012).

The phrase "cross-gender" can cause confusion when the inmate is has no gender or an unclear gender. "Cross-gender" assumes a binary with male in one box and female in the other. People who are gender non-conforming do not fit inside these boxes, and this language does not specify the gender of the officer that can perform their search. When writing policy, it will be necessary to add in clarification in these cases. This can be done by adding a clause in the policy that states that inmates with no specified gender will be considered on a case-by-case basis with input from the inmate. For the majority of the cases, the inmate's wishes on who searches them will be respected, but there is room in the policy for a supervisor to override that decision. This can prevent predatory inmates from getting into positions to sexually harass staff or other inmates.

The final piece of protection that PREA gives TNGI inmates is about showering. PREA says that TNGI inmates must be given a chance to have a separate shower from the rest of the inmates (Department of Justice, 2012). It is important to note that the standard is not that they are

obligated to shower separately, but that they are given the choice. If that individual feels comfortable showering with the general population, they should be allowed to. Since there is already a significant stigma for TNGI inmates, giving them the freedom to shower with the general population if they feel comfortable doing so prevents added stigma for showering separately. PREA is also very clear that TNGI inmates should be able to request these protections without being punished (Prison Rape Elimination Act, 2003).

### ***Aspects of Policy Needed***

Using PREA standards can determine what aspects and considerations need to go into creating a comprehensive policy.

### **Housing**

Possibly one of the biggest considerations when it comes to TNGI inmates is where to house them. As mentioned earlier, the prison system is notoriously binary. Where an inmate is housed, even what prison they go to, is largely based upon the sex assigned at birth. This kind of placement doesn't account for TNGI inmates whose sex assigned at birth does not match their gender. It can make them vulnerable for assault and aggravate mental health conditions. One solution to this problem would be to separate all TNGI inmates into their own housing area. For an example of how this could be accomplished, consider the Men's Central Prison and their special housing ward.

### ***Men's Central Prison***

The Men's Central Prison in Los Angeles, California, created a separate ward, K6G, for lesbian, gay, bisexual, and transgender (LGBT) inmates in 1985 following a lawsuit from the American Civil Liberties Union (ACLU) (Wagner, 2014). The lawsuit alleged that transgender inmates were being attacked at a much higher rate than cisgender inmates and that the prison

wasn't doing enough to keep them safe. When inmates are being booked into the facility, officers ask if they identify as LGBT. If the inmate says they do, they are immediately housed in K6G. This ward is known to be quieter and safer than most of the other housing wards, which have caused some problems of its own. "Imposters", or inmates who claim to be LGBT just to get housed in K6G, became such an issue in overcrowding this ward that upon intake, officers would ask questions to determine if the inmate was truly gay, such as asking them to name local gay bars or even how much their cover charges are (Wagner, 2014).

This type of situation with semi-forced segregation presents its own set of moral issues as well. Inmates who are even suspected of being gay are also housed in that separate ward because even the impression of homosexuality can increase the risk of an inmate being assaulted (Wagner, 2014). It gets complicated when trying to identify what behaviors, appearances, or mannerisms make someone "appear" gay. Forcing someone into special housing area, because the corrections officer thinks they may be perceived as gay, can give opportunities for corrupt officers to abuse the placement system. Having a separate ward also only works if the prison has a large population. There need to be enough other inmates in special housing that it is not a punishment. For smaller detention facilities that might only have one or two TNGI inmates at a time, segregated housing like this could effectively amount to solitary confinement. Separate housing can add stigma to an already vulnerable population. It can also prevent inmates from attending prison programs and education opportunities.

Policy for short-term detention facilities regarding housing for TNGI inmates should be based on how they self-identify. To prevent people from misusing the policy, all situations involving a TNGI inmate's housing should be approved by a supervisor. This will prevent first-line officers from having to decide someone's sex based on their appearance or mannerisms. The

ultimate decision on where to house the inmate should consider the inmate's request, medical history, and any potential safety issues.

### **Searches**

There are three different kinds of searches typically performed: pat searches, strip searches, and cavity searches, with the last being typically carried out by a medical professional. As per PREA (2003), a strip search must be performed by an officer of the same sex as the inmate. When the sex of the person is unknown, medical staff will look over the inmate's medical records and have a discussion with them to determine their gender. Again, it is strictly prohibited to perform an invasive medical examination for the sole purpose of determining genitals. Any inmates who self-identify as TNGI can elect to have a male or female officer perform their search (Prison Rape Elimination Act, 2003). One key piece that is missing is any guidelines for transgender officers.

### **TNGI Corrections Officers**

While the issue of TNGI inmates has been relatively widely considered, TNGI corrections officers have been largely forgotten. PREA doesn't have any guidelines for TNGI officers. TNGI officers must be aware of their perceived gender when searching inmates to avoid a sexual harassment complaint. While inmates are allowed to self-identify, having officers self-identify can still cause an issue if the inmate assumes their gender incorrectly. It is not ethical to force androgynous officers to self-identify to every inmate they must search. It violates an assumption of privacy in not having to disclose personal information to inmates. The best practice for officers must be similar to inmates: on a case-by-case basis considering factors such as the officer's comfort level, outward presentation, the invasiveness of searches, and the gender which the officer identifies.

## **Medical Policy**

The right for prisoners to have medical treatment for necessary conditions is guaranteed within the eighth amendment. In the Supreme Court case *Estelle v. Gamble* (1976), the Court held that “deliberate indifference to serious medical needs of prisoners” violates the eighth amendment. Included in that ruling, the Court held that the lack of care needs to meet the standard of “deliberate indifference” and that not all cases of refusing medical treatment to a prisoner constitute a violation (*Estelle v. Gamble*, 1976).

TNGI inmates have special considerations when it comes to medical needs such as hormone replacement therapy, gender-affirming surgery, and mental health needs. What treatments then, if any, are guaranteed by the eighth amendment? From *Estelle v. Gamble*, neglecting the medical issue needs to reach the level of “deliberate indifference to a serious medical need” (*Estelle v. Gamble*, 1976). Gender dysphoria is listed in the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders (DSM-V)* and can be considered a serious medical need, especially when partnered with depression and body image issues. In these cases, transitioning, or taking medical steps toward becoming a different gender than assigned at birth, can be crucial to helping mental health. Between 22% and 43% of transgender people have attempted suicide in their lifetime (Bauer, 2015). With a risk factor that large, any protections that can be made to reduce the likelihood of suicide should be considered a necessity for a serious medical condition. Being able to transition has been shown to lower the risk of suicide in transgender persons (Bauer, 2015).

In a long-term detention facility, certain medical transitions may be possible. If a TNGI inmate who wants to have gender confirmation surgery is serving ten years, denying them that surgery could arguably constitute “deliberate indifference”. In a short-term detention facility like

is being considered in this paper, denying them a surgery for only up to a year most likely would not reach that standard. Most non-emergency medical procedures can and should be rescheduled for a time when the person is released from jail. While treatments may important, the timing of them is not critical. Hormone replacement therapy requires regular meetings with a healthcare provider when getting started. Because of the necessity for frequent appointments and difficulty of scheduling and attending these appoints while incarcerated, starting hormone replacement therapy should also not be considered a medical necessity that needs to happen while the person is incarcerated. Once a person is established on hormones, appointments to monitor their effectiveness and health become much more infrequent. Continuing hormone replacement therapy should fall under the same category as prescription medication and be covered by the policy in the same way. TNGI inmates who are already established on hormone replacements must be allowed to continue to receive their hormones while they are incarcerated.

### **Legal issues**

TNGI individuals can have many legal considerations relating to their change of gender, especially if the individual is currently in the process of transitioning. As with the previous section, many legal issues that are non-emergency should be postponed until the person is out of the short-term detention facility. TNGI people can have many legal questions or changes regarding changing their birth certificate, changing legal name, changing their gender, and other related issues. These official actions require time in court, and therefore it should be policy that the department will not facilitate these changes unless there are exigent circumstances. However, when an inmate gets booked in, policy should dictate that they can specify their preferred pronouns and name and that the department will respect those wishes.

### **Policy Evaluation**

Once the details of the policy have been laid out as above, the next step in the public policy-making cycle is issue resolution and policy adoption. During this step, shareholders are made aware of the potential policy and a vote happens. Professionals and stakeholders should be consulted about the policy to find any modifications that need to be made. The opinions that would be relevant to this matter would be board members, anyone with a financial interest in the jail, local LBGT community, TNGI community, corrections officers and inmates of the facility, and their families.

When the policy has been officially approved, it can be implemented. There should not be a lot of complications when enacting this policy. Most of the changes are easily made by personnel training and small additions to forms. Since the topic of transgender persons can be new to some officers, departments should expect a slight resistance when implementing this policy as some officers may have religious or moral objections. Trainings and education are going to be critical to helping everyone understand the importance of the issue.

After the policy has been in effect for a year, it should be evaluated to ensure it is creating the desired changes. To measure this, corrections officers can demonstrate how well they understand the topic after training through a self-report and anonymous survey. Any TNGI inmates can be given a survey about their experience solely from the perspective of a TNGI individual. Any problems that arise can be fixed by talking with experts again and making edits to the policy.

### ***Policy vs. Politics***

Some critics might question the need for this policy and claim that it is just a form of political correctness, but there are tangible benefits. Having this policy can make TNGI inmates

feel more accepted, lowering their risk of suicide. It also teaches officers how to handle situations involving TNGI, letting them be more successful in keeping inmates safe and lowering the risk of assault. Keeping these risks low will help the jail be able to focus more energy on rehabilitation efforts.

Rather than avoid the political aspect of policy writing, it should be embraced. Clarence Stone said that “Policy needs to shape politics” (2005, p. 1). When considering new policy, politics is going to be a factor. Policy must be the driver of the relationship between the two. If politics can influence policy, the organization will remain stagnant with the public opinion. Strong organizations drive progress with their policies. Determining that there are policy gaps is inherently a political act (Stone, 2005). Policymakers must be willing to push the boundaries of politics in order to bring about change.

### ***Conclusion***

Policymaking can be tedious, but it is a vital step in organizational development, employee training, and the quality of the service they provide. Transgender and gender non-conforming prisoners have special considerations that need to be met. Following federal guidelines like PREA, a comprehensive policy for TNGI prisons can be developed. PREA gives a foundation layer of what is absolutely required regarding housing, searches, and showering. Depending on the size of the jail, medical and legal issues can also arise. With a complete policy and training, Corrections Supervisors can be sure that they are doing everything within their power to create a safe space for TNGI inmates that allows them to focus on the true goal, rehabilitation.

### **Chapter Three: Implications, Recommendations, and Conclusions**

To be compliant with the Prison Rape Elimination Act (PREA), all prisons must have some policy regarding transgender inmates (National Center for Transgender Equality, 2012). The requirements are the bare minimum that should be addressed. Most of the current policies surround basic areas that were covered by PREA like housing and searches. The next sections will look at what these current policies say about transgender inmates.

#### ***Housing Policies***

Every agency has its own policies for where to house transgender inmates and how to make those determinations. Many departments have staff transgender committees made up of healthcare workers or other jail staff to make determinations on where to house inmates on a case-by-case basis to balance inmates wishes with the safety and security of the facility (Anderson, 2019). Despite these policies, in 2020, NBC News investigated the over 4,890 self-reported transgender inmates in state prisons in the United States, and they could only confirm that 15 of them were living in housing congruent with their lived gender (Sosin, 2020). With such stark numbers, there is clearly a disconnect between policies stating that they will make individualized determinations and what is happening in practice.

#### ***Searching Policies***

It is easy to track how the housing policies are playing out because there is a clear record that can be requested for where inmates are housed. With searches, it becomes much more difficult to track. Many organizations that have policies for how to handle searches for TNGI inmates base the determinations for how the inmate should be searched on their housing classification (Anderson, 2019). As previously shown, the housing determinations appear to be blanketly determining that inmates are going to be housed with their gender assigned at birth.

When this translates to searches, it means that people who were assigned male at birth but identify as female are being searched by male staff.

### ***Problems With Current Policies***

The problem with the current policies is a lack of follow-through. While the policies are saying that they are going to make determinations on a case-by-case basis, transgender inmates are being categorically lumped in with the gender they were assigned at birth. Simply by adopting policies on transgender inmates, administrations are acknowledging that people do not fit into strict categories like male and female. Yet even with these policies, administrations have made the determination that TNGI inmates constitute a third, homogenous category. TNGI inmates are all unique, and it would be a mistake to try to create a policy with a one-size-fits-all plan for deal with them. The best way to mitigate this discrepancy is to provide policies that clearly define what criteria can and should be used to make housing determinations and therefore determinations on who should be searching TNGI inmates.

The next section will look at what specifically can be changed about current policies to move more towards respecting transgender inmates.

### **Practical Applications**

Many organizations' policies discuss transgender inmates in the corresponding policies, such as having a small note inside the searches policy mentioning their policy for searching transgender inmates. To alleviate confusion and provide more instruction, organizations should put together a policy for TNGI inmates that encompasses all aspects in one place. This would not only make it easier for staff to quickly reference all relevant transgender policy when necessary, but would also allow the administration to be more thorough in what is expected of staff and how determinations should be made.

There are several areas that can be addressed to help current policies be more effective in maintaining the safety and security of facilities while still respecting transgender inmates. First, as mentioned earlier, the administration should update policy to include specific items that can be used to make determinations for housing inmates. Policies should be worded so it is clear that these factors should be taken into consideration as a whole.

The first factor that should be considered is the inmate's wishes. They will understand their gender better than the jail administration or transgender committee possibly could. The inmate should be given the opportunity to express where they will feel the safest. This will not only make housing determinations easier, but it can also help the mental health of the inmate. If inmates are forced into housing that does not match their gender identity, it could cause mental health distress. In extreme cases, this could lead to self-castration attempts or suicide attempts. While the inmate's wishes should not be the only consideration, it does help the safety of the facility if housing determinations use them as a foundation.

Another major factor to be considered is gender presentation. "Passing" is a term used by the transgender community to describe to what extent others' perceive them as their identity. Someone who passes well might not be recognized as transgender. Passing as a concept can be highly problematic because cisgender individuals can have a very wide variety of gender expressions, and so can transgender individuals. Cisgender females range from extremely feminine to more masculine without throwing their gender into question. Similarly, transgender individuals can and should be able to express themselves to the degree they feel without having their gender questioned. Just as ciswomen do not owe it to society to be constantly wearing high heels and makeup, neither do transgender women.

With that in mind, the degree to which a transgender inmate passes should be taken into account because it can be a safety issue for the inmate. A transgender female who has breasts and passes well would be less likely to be victimized when housed with females than a transgender woman who does not pass as well.

Other factors could be previous victimization, victimizing of others, or the mental health status of the inmate. Housing determinations should be made based on the totality of the circumstances using these factors.

### **Training**

Another area of policies that can be updated is the training requirements for staff. Many organizations already have policies in place to address discrimination against different categories of inmates. These training requirements would not just discuss the respect and dignity that TNGI inmates should be treated with, but would address basic knowledge gaps and common misconceptions that officers have about transgender individuals in jail and in general. This would help ensure that everyone starts with some foundational knowledge.

These trainings should educate officers on preferred name and pronoun usage, definitions, and address misconceptions that they might hold about transgender inmates that could affect how they interact with them. One major assumption that a lot of people have is that gender-confirming surgery is the ultimate goal for all transgender individuals and can be used as a benchmark for when someone “finishes” transitioning. In reality, only around 25-35% of transgender individuals have gender confirming surgery (Nolan et al., 2019). There are many barriers to getting gender confirmation surgery such as cost, and some transgender individuals simply have no interest in surgery. This should be taught to jail staff because if there is an

assumption that someone cannot be considered “actually” female until they have surgery, the majority of transgender females would be ignored.

This ties in with another common misconception that people’s genitals are going to match their gender identity if they are “actually” transgender. This would be relevant when deciding on which gender officer should search a transgender inmate. If the officer assumes that since the person is a transgender female, they will have removed their penis, there could potentially be confusion or worse during a search of that inmate.

Another major misconception that should be addressed in training is that transgender individuals are sexual predators. While there are incidents of transgender women getting housed with other women and sexually assaulting them, most transgender inmates are not sexual predators. There is also the fear that a cisgender male may lie about being transgender to be housed with females. This is why jail policies should not just respect inmate’s wishes for their placement and use the factors discussed earlier.

### **Recommendation for Future Research**

There are many potential avenues for future research on this topic. One area this paper briefly touched on was policy dealing with TNGI correctional officers. Not much current research has been done on TNGI officers, and policies for them tend to be non-existent.

### **Conclusion**

Current policies for TNGI inmates, while a good place to start, have proven to be inadequate. TNGI inmates are still being primarily housed according to their gender assigned at birth and are still at a higher risk of being assaulted than the general prison population. The best way to fix this problem is to update the current policies to reflect specific factors that should be used to make determinations on a case-by-case basis for transgender inmates. Also,

administrations should update their policy to include training for officers to help correct common misconceptions that can affect housing determinations, searching, and overall treatment of TNGI inmates. The goal of these policy changes is to move from simply having policy for the sake of having policy on transgender inmates to having clear and effective policy that not only accepts transgender individuals' identities, but also respects them.

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