



GIC TIP JOURNAL

Transgendered In Prisons



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*“Support, education,
outreach and advocacy
for the transgender
community”*

Breaking Out of the Prison Hierarchy: Transgender Prisoners, Rape and the Eighth Amendment

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tine Peek [FN1] and the Santa Clara Law
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Due to the length of the article and
newsletter space limitations, it will be pub-
lished in two parts. The first part will in-
clude a brief introductory overview and
some background information, ending with
an examination of “Rape and Coercive Sex
in Prison”.

The second part continues this discus-
sion with a section on “Civil Remedies for
Victims of Prison Rape”. It will be published
in the Spring 2005 edition, along with the
remaining sections of the article.

All the footnotes will be included, be-
cause of the wealth of information that can
be obtained from them and the source mate-
rial to which they refer.

I. Introduction

On December 17, 2002, Kelly
McAllister filed a claim against Sacramento
County, its district attorney, and the sheriff's
department, alleging threats and slurs based
on her transgender [FN1] status, battery, and
an assault that culminated in rape. [FN2]
McAllister is a five-foot seven-inch, 135-
pound pre-operative transsexual in her mid-
thirties, who has lived as a woman for
several years. [FN3] She was arrested in
connection with a reported public distur-
bance. [FN4] After McAllister's court ap-
pearance, she was placed in a cell with a
larger male inmate who brutally raped her.
[FN5] Her attorney claims that the sheriff's
department knew of McAllister's trans-
gender status, but still placed her in a cell
with a man. [FN6]

McAllister's ordeal typifies the risk
faced by male-to-female (MTF) transgender
persons incarcerated in jails and prisons
across the country. [FN7] The common
practice of classifying transgender prisoners

based on their genitalia alone creates a substantial risk of rape and prolonged sexual

abuse at the hands of more aggressive prisoners. [FN8] Although 42 U.S.C. § 1983 [FN9] provides a civil remedy for constitutional violations of prisoners' civil rights, [FN10] case law interpreting the civil rights statute as applied to Eighth Amendment violations has placed several barriers before prisoner plaintiffs seeking damages or injunctive relief. [FN11] Often, advocates for prisoners' civil rights must fight against the stereotype that prisoners' claims are frivolous and do not belong in federal court. [FN12] This comment will examine the phenomenon of prison rape with emphasis on the transgender prisoner's perspective, [FN13] discuss the current legal standard for civil rights claims, [FN14] and offer suggestions for reducing violence. [FN15]

Part II will provide background information on how courts have dealt with transgender and transsexual persons generally, in terms of how such individuals are defined and how they define themselves. [FN16] It will present information on how the prison system classifies transgender inmates, and how this compares with attempts to classify transgender persons in civil cases. [FN17] Part II will also discuss the prevalence of rape in prison, the nature of the prison hierarchy, and complications presented by AIDS. [FN18] Finally, the background section will explain the standard for § 1983 claims based on Eighth Amendment violations, and identify areas of difficulty for plaintiffs. [FN19]

Part III will describe how the existing legal standards and prison administrative policies combine to disadvantage transgender inmates. [FN20] Part IV will analyze how the policy of genitalia-based placement, the subjective prong of the deliberate indifference test, and exhaustion requirements work together to put transgender prisoners at risk and simultaneously cut off ave-

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A Call for Change: Protecting the Rights of LGBT Inmates

© Stop Prison Rape

In U.S. prisons and jails, gay, bisexual, and transgender inmates live dangerously. One study shows that more than four in ten LGBT inmates are sexually assaulted while behind bars. The gravity of the problem prompted SPR to host a Community Dialogue in Los Angeles in November, bringing together more than 40 human rights advocates, rape crisis counselors, gay rights activists, corrections officials, and politicians.

The goals of the Community Dialogue were to jump-start a frank discussion about the plight of LGBT prisoners and to rally community support behind a "Call for Change," a set of policy recommendations that, if fully implemented, would significantly decrease the frequency of sexual assault of LGBT inmates.

"Historically, gay rights groups and rape crisis centers have shied away from the issue of prisoner rape, perhaps feeling that it's marginal," explained Emily Frydrych, SPR's Policy Associate. "I think it became obvious to everyone in the room today that we are looking at a widespread human rights crisis, and that sexual abuse is never marginal."

Addressing the Community Dialogue, California State Assembly Member Jackie Goldberg concluded that a lack of popular demand for prison reform has kept legislators passive.

"People still believe that there are prisoners and then there is everybody else, with no link between them. We need to start educating lawmakers about prisoner rape. Silence is death. We know that in the LGBT community."

T.J. Parsell, a gay prisoner rape survivor and member of SPR's Board of Directors, gave first-hand testimony at the Community Dialogue, describing how he was gang-raped on his first day in prison. "I was 17 and I weighed 158 pounds. Afterward, they flipped a coin to decide who would be my man," said Parsell. "I never reported the abuse because I was afraid. As a prisoner, you know that snitches die."

While LGBT prisoner rape remains widespread, some facilities go to great lengths to keep these inmates safe.



Deputies Randy Bell and Bart Lanni, for example, head a special unit at Men's Central Jail in Los Angeles in which LGBT prisoners are housed, protected, and educated.

"Our philosophy is to have people help people," explained Deputy Bell. Since the creation of their program, the recidivism rate among participating inmates has dropped from a whopping 90 percent in 1998 to 30 percent in 2004. Though the results are striking, prison programs like the one at Men's Central Jail remain rare in the U.S.

The Community Dialogue ended with a passionate discussion about how community-based organizations and advocates could contribute to the fight against prisoner rape. In the coming months, SPR and allied groups will finalize the "Call for Change" document, before submitting it to prisons and jails.

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Renée

Thank you so much for adding me to your mailing list and for sending me the fall issue of your newsletter. I enjoyed it immensely.

My name is Renée. I am a MTF transgendered woman. Although I am not currently receiving hormones, I am a naturally androgynous person and give an effeminate appearance 100% of the time. [*Androgynous means (1) both male and female in one; hermaphroditic (2.a.) of or marked by both male and female characteristics, roles, etc. (2.b.) designating or of something that is not differentiated as to sex. Ed.*]

Because of this, I have been subjected to constant harassment, discrimination and even threats of violence by several of the corrections officers here at CSATF/SP Corcoran II. I won't go into

a lot of detail of what they have done to me except to say that I believe my civil rights have been violated.

I have already filed complaints against 8 of the officers and their supervisors, who stood by and allowed these violations to occur. I am currently in the final stages of exhausting the departmental grievance procedure, after which I plan to proceed with filing a 42 USC § 1983 civil suit.

I have suffered extensive reprisals from these guards and their colleagues for filing these complaints. In addition to the threats - some subtle and others not so subtle - on September 23, 2004, I was viciously beaten by another inmate, who I believe was working for these officers, though it will be difficult to prove.

For that reason, I keep a daily journal, a log of every incident, which includes the date and time, the place, the names of the officers involved and their ranks, the identities of any witnesses present and a brief description of what occurred. I have made up my mind that I will not succumb to their terror tactics. I will go forward to the bitter end, even after my parole, which is coming up in May 2005. If I gain nothing in my civil suit, hopefully I will at least expose the corruption of this prison and its staff.

I used to think I was all alone in this struggle, and sometimes, when I was by myself in my cell, I would cry. I really believed that no one cared.

When I read your newsletter, I realized that this is not so. I have sisters all over this country fighting the same battle as I am, and some of them have it much worse than I do—places like Texas, Utah, Arizona and several others I could probably name, if I were so inclined.

My point is when I read the stories of my sisters nationwide and read of their courage and resilience, it gives me the hope and the strength to carry on. I have never met any of these courageous ladies, but I would consider it an honor to someday do so. Until then, I love you all and God bless you.

Kevin Jackson

Thank you for sending me your courageous, informative journal. I have

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(Continued from page 2) Kevin been getting it for about two years now, and I wanted your other subscribers to know that I can definitely relate to their troubles with prison authorities discriminating against them because of their gender identity or sexual orientation.

My attitude is to keep an open mind, and I have loved both transgendered women and gay males. For me, variety truly is the spice of life, and it's what makes the world go around.

Unfortunately, not enough people in here seem to feel the way that I do, and I see a lot of gay bashing in this prison. I can't understand in this day and age why so many people are still stuck in the Dark Ages when it comes to alternative lifestyles. As long as we are not hurting anyone else, why can't they leave us alone and let us live our lives the way we want to? Why go out of the way to malign us?

I hope all of my transgendered, gay and intersex friends in prison had a Merry Christmas and a Happy New Year. Remember, even though you are in prison, your heart and mind can be free, so stand tall through it all.

PS: Please let Vanity know I would like to write to her too.

Jessica Maria Brooks

AKA Mark L. Brooks

I just received the Fall 2004 issue of the *GIC TIP Journal*, and, as always, I am pleased and impressed with it and its contents.

I found the two-part article by Alexander L. Lee entitled "Gendered Crime & Punishment" very educational and enlightening. However, as a TS prisoner having served 15+ years so far, I might disagree with some of his conclusions. One of these is his rejection of TGI only prison wards or units.

I have been researching prison privatization, and it seems to me that TGI only prisons are just the kind of market niche that these companies were created to fill. I also think that just the opposite is true for the big state-run institutions.

Obviously, the idea needs a lot more research, but I would certainly love to hear what the rest of you think of it.

Other than that, I would agree with the author that most large-scale prison

reforms are an exercise in futility. There is just too institutional inertia to overcome at that level.

I would also agree that the best way to tackle the problems associated with TGI prisoners is on an individual, case-by-case basis. I mean that quite literally. Instead of focusing on large-scale reforms, I think advocates should simply find one TGI prisoner in need of help and make them the focus of their efforts.

I will use my own case as an example. I am a pre-op MTF serving a life sentence in the New York DOC. However, because I had not been diagnosed with gender identity disorder prior to my incarceration, prison policy prevented me from receiving any treatment for it.

So I filed a lawsuit, which is currently pending in the Federal District Court, Northern District of New York. I am litigating this case *pro se*. [*"Pro se" is a legal term meaning for himself. In other words, the litigant is serving as his/her own attorney. Ed.]*

During all those years I spent researching it and preparing my case for litigation, I have been in contact with many people, as well as various groups and organizations who claim they are advocates for TGI prisoners. Yet none have provided any real support for my lawsuit, nor does it seem to me that they have had much of an impact anywhere else.

Even without their help, I still managed to win a big pre-trial decision, which was that "prison officials cannot deny transsexual inmates all medical treatment simply by referring to a prison policy which makes a seemingly arbitrary distinction between inmates who were and were not diagnosed with GID prior to incarceration." [*See also "Trans Inmate Entitled to Care: Feds nix prison's policy of treating only pre-existing gender identity disorder" in the Fall 2003 GIC TIP Journal. Ed.]*

It's just one case, but the precedent it sets could have a tremendous effect on the treatment of TGI prisoners in the New York prison system and throughout the country.

On a more personal note, I would like to send a big hello to my sister Synthia-China Blast in New York's Wende Correctional Facility.

In the *Journal's* Fall 2004 issue, Syn

thia told how she has been trying, without much success, to get transferred out of the Wende facility because of threats from certain gang members against her life. She was trying to get into the Assessment and Program Preparation Unit (APPU), which is a Special Needs Unit within the Clinton facility in Danemora, NY. While it's true it might well be safer there, I wanted to let Synthia know that there are a couple of much better alternatives.

My suggestion would be to try to get into either the Sullivan or the Eastern facility. Both facilities have excellent reputations, and the environment is not nearly as hostile. If any trouble-makers do get in there, they are quickly transferred out, and there is a long waiting list of others just waiting to take their place. Your chances of receiving treatment for your GID is also much better there than it is in a max unit like Attica or Clinton.

Finally, I wanted Synthia to know that I did receive her letter from last October and that I wrote back. I do miss you, Synthia, and send you my love.

And Jessie, I do hope you continue the Pen Pal listings. It does a girl good to feel there is hope that someone might eventually reach out and contact her, however remote that chance might be.

Sarah Leezie

Hello. My name is Sarah, and I am a 27 year-old transgendered prison inmate serving a three year sentence at the Arrowhead Correctional Center in Canon City, Colorado.

Recently I was given a copy of your *GIC TIP Journal*, and I was so moved that I started crying.. I never knew there was anything like this out there for people like me. Until then, I had always felt so alone, and it was such a relief to know I wasn't.

On the other hand, after reading about the problems others have had in getting treatment for their GID, maybe I should count my blessings. Because I started my hormone therapy prior to my incarceration, the state has continued to provide them for me while I am in prison.

But there have been other battles over my gender identity where I have not

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(Continued from page 3) Sarah
been so fortunate.

When I entered the system at the Denver Reception and Diagnostic Center, the state issued me five bras, which suited me just fine. After all, I did identify as a female, and I was far enough along in my transition to have significant breast development.

However, after I was transferred to the Four Mile Correctional Center, all my bras were taken away. The Major and other DOC staff there decided that it was too much of a security risk.

I decided to fight back, so I filed a series of grievances protesting their actions. As I expected, the first two were denied, and I am awaiting a response on the third one, which was filed in August.

And I will continue to fight, because now I know I am not alone.

Sieda Paynes

I am Sieda Paynes, and I am incarcerated at the High Desert Prison in Susanville, California. This certainly isn't the first time I've been in prison, but I am hoping it will be the last.

That is also what I thought the last time I got out of prison, which was on June 3, 2002. I made a promise to myself then that I would change my ways and that this time I wouldn't be back. Obviously, in my case, that proved to be much easier said than done.

My life of crime started with prostitution. I didn't really have a lot of choice in the matter. I couldn't get a regular job, because I had no training or work experience, and even if I had, no one wanted to hire a transsexual anyway.

Along with the prostitution, I also started using drugs, and before long I was landing in jail on a pretty regular basis. When that didn't straighten me out, the next step was prison.

It might sound strange, but a part of me was thrilled at being surrounded by men, even if they were convicts. Maybe one of them would turn out to be the man of my dreams! As if on cue, someone did come into my life that made me think I had.

I met this guy named Brent at the California Men's Colony (CMC) East.

He was very handsome, and there was no question I was very attracted to him.

It soon blossomed into a relationship, even though he turned out to be extremely jealous, possessive, controlling and abusive. But when you are in love, as I was, you tend to overlook the bad stuff. I knew he was going through some tough times with his family, and I flattered myself into thinking I was the only one who really understood him.

We remained together until my release in June 2002. Before I left, I promised him I would remain faithful and do what I could to maybe help patch things up with his family. If you remember, I also promised myself that I was going to change my ways and stay out of prison.

Despite my good intentions, four days after my release I got busted again for prostitution. I told myself I was just doing it to get my hands on some fast money for me and Brent, and this was the only way I could do it.

I did manage to earn a few bucks, some of which I sent to Brent. I also bought a few things for myself and some presents for Brent, which I planned to send him later. I was living in a motel at the time, and, of course, everything was gone by the time I got out of jail.

I was so distraught that, as soon as I got out of jail, I started drinking and got extremely intoxicated. Too drunk to even remember, I got in a fight and hit some guy over the head with a beer bottle, which earned me another 9 year stretch in prison.

It would have been some comfort if they had sent me back to where Brent was, which I thought they were going to do, but. I was sent to the High Desert Prison instead.

I started blaming myself for having let Brent down, and I did a lot of crying. I wrote him a letter, and eventually he wrote back. He said that he felt I had moved on, so he had moved on too. He was now in a relationship with another transgender prisoner. He also admitted that he had kind of been leading me on.

I was so hurt. Just about everything I had done, I had done for him.

Maybe this time I have finally learned my lesson. This time, when I get out of prison, I won't be going back - not for nothing or nobody.

J. Coleman

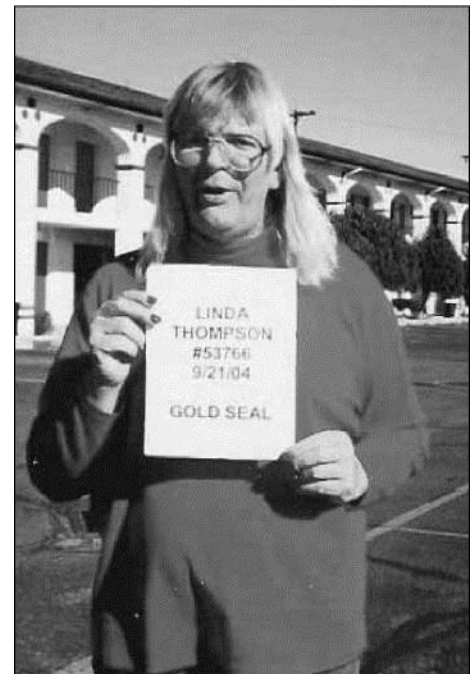
I have been getting your newsletter for a little over a year now, and I have enjoyed every story in it - the good, the bad and the ugly.

Like some of your other subscribers, I am not a transgendered, but I do have a lot of respect for them.

I guess I have been around more than most people have, because I have met literally hundreds of transsexuals and gay drag queens, both in prison and out. Some of them are better looking than most regular women are, particularly the ones down in North Hollywood. There are some real lookers in some of the California Prisons too, especially the one called Vacaville, which is a medical facility.

Something else that I admire are people who stand up for what is right and for what they believe in. When you are transgendered, that really gets tested. I have seen a lot of them disrespected, cheated, beaten up and a few killed just for standing up for their beliefs.

So I would like to take my hat off to all the transgendered people in the world and wish them the best.



MAXED OUT

(Continued from page 1) **TG Prisoners & Rape** nues for relief. [FN21] Part V proposes a strategy for encouraging changes to genitalia-based placement policies. [FN2]

II. Background

A. *The Struggle to Claim a Transgender Identity*

The first difficulty in any case involving a transgender litigant often lies in determining the extent to which the court will give the person's subjective gender identity legal significance.

[FN2] In cases involving transsexual litigants, courts often have begun this inquiry by establishing whether or not the person is a "genuine" transsexual.

[FN2] But, as one commentator has noted: "Any time we try to draw a clear boundary around gender we end up cutting somebody's flesh." [FN25] This sentiment resonates strongly with respect to legal definitions. [FN26] Debra Tedeschi has observed, "[W]hile the law draws lines, a transsexual crosses lines," [FN27] and indeed, the attempt to devise a formula for classifying transgender persons as either male or female has frustrated courts and the transgender community alike. [FN28] Frequently, courts have tried to hammer transgender litigants into one category or the other, [FN29] and have struggled to define the term "transsexual" itself. [FN30] The definitions used are important, because they can exclude from protection persons who may be in need of it. [FN31]

1. *Terminology in the Courts*

Courts and legal scholars have applied a variety of definitions of the term "transsexual." [FN32] Writing for the majority in *Farmer v. Brennan*, [FN33] Justice Souter adopted the often criticized [FN34] medical definition found in the 1989 *Encyclopedia of Medicine*: "one who has '[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,' and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change." [FN35] Another court defined "transsexualism" as a gender identity disorder in which people believe themselves to be "cruelly imprisoned within a body incompatible with their real gender identity." [FN36] Courts have also begun their analysis "by stat

ing what a transsexual is not." [FN37] After distinguishing transsexuals from homosexual and transvestites, the court in *In re Estate of Gardiner* went on to say: "A transsexual is one who experiences himself or herself as being of the opposite sex, despite having some biological characteristics of one sex, or one whose sex has been changed externally by surgery and hormones." [FN38] Finally, some courts seem to conflate transsexuality with transgenderism in their attempt to define the former, [FN39] even though the two are generally recognized as distinct, but not mutually exclusive. [FN40]

2. *Medicalization*

On one hand, the practice of defining transsexuals in medical terms, combined with the availability of hormones and surgery, made a "politicized transgender movement" possible. [FN41] As the courts have used them, however, medical definitions more often have perpetuated negative stereotypes about transsexual people without helping them to achieve their goals in court. [FN42] Rejecting the notion that a prisoner not formally diagnosed with "gender dysphoria" was entitled to treatment, Judge Posner gratuitously inserted the following opinion on transsexuals: "Someone eager to undergo this mutilation is plainly suffering from a profound psychiatric disorder." [FN43] Posner's blanket characterization of transsexuals as "disordered" has been widely disputed by the transgender community: "Such language, touted as being 'scientific and neutral' or merely descriptive, is stigmatizing and seldom descriptive (e.g., gender dysphoria, 'wrong body,' and 'afflicted' or 'suffering' transsexuals)." [FN44] Nonetheless, courts seem reluctant to recognize transsexuals as such without some kind of mandate from a medical professional. [FN45]

3. *Self-definition*

Apart from medical definitions, definitions based on individual perception of identity have arisen in the transgender community. [FN46] Kate Bornstein's is one of the most inclusive: "Anyone whose performance of gender calls into question the construct of gender itself." [FN47] Bornstein also delineates three categories of transsexuals: pre-operative, post-operative, and non-operative. [FN48] The last category describes those

who live in society as their opposite gender, but who do not wish to change their biological sex, either because they feel the surgery is too expensive or too risky, or because they are happy with their bodies the way they are. [FN49] Others in the transgender community feel that a transgender person with no intention of having surgery would not view him or herself as a transsexual. [FN50] Furthermore, because many transsexual people spend a significant period of time in transition, they may not fit neatly into any of these categories at any given point in time. [FN51] Finally, the transgender community is so diverse and the experience of gender so personal that some prefer broad definitions [FN52] over narrow ones. [FN53] In a nutshell: "There is no one way to be 'trans'." [FN54]

B. *Making Transgender People Fit*

Gender non-conforming people have consistently been among the most visible and vulnerable members of gay communities--among the most likely to be beaten, raped, and killed; among the most likely to be criminalized and labeled deviant; among the most likely to end up in psychiatric hospitals and prisons; among the most likely to be denied housing, employment, and medical care; among the most likely to be rejected and harassed as young people, and; among the most likely to be separated from their own children. [FN55]

Not surprisingly, prison merely exacerbates the prejudice transgender persons already face. [FN56] Because little formal research on transgender prisoners exists, [FN57] it is difficult to assess how many people are put in harm's way as a result of genitalia-based placement. Author Darren Rosenblum has estimated that transgender prisoners number in the low thousands nationwide. [FN58] More significant than raw numbers is the disproportionate rate at which transgender persons enter the criminal justice system. [FN59] A study of police attitudes towards transgender individuals in the San Francisco Bay Area revealed that transgender women are often stereotyped as sex workers. [FN60] This in turn leads to harassment and solicitation by undercover officers attempting to crack down on prostitution. [FN61] In addition,

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(Continued from page 5) **TG Prisoners & Rape** transgender persons often spend time in jail following false arrests for entering the "wrong" bathroom or for failure to produce "proper" identity documents. [FN62] Finally, because transgender people are disproportionately low-income, [FN63] they often face consequences for "quality-of-life" crimes such as sleeping in public. [FN64]

1. Prison Placement Policies

On May 4, 2001, a federal judge recommended that Patricia McGrath, a sixty-six-year-old transgender inmate convicted of armed bank robbery, be placed in a women's prison upon her discharge from a federal medical center. [FN65] Although prison authorities are not required to follow the judge's recommendation, they often do. [FN66] While federal prison officials had no formal policy on transgender inmates as of 2001, "usually, a defendant with a penis is placed in a male prison, and a defendant with a vagina is placed in a female prison." [FN67] Commenting on McGrath's gender identity prior to sentencing, Judge DuBois noted that from McGrath's outward appearance, she obviously viewed herself as a woman. [FN68] McGrath had been living as a female for the past thirty years. [FN69]

Genital surgery alone usually determines whether a transsexual or transgender prisoner will be classified as male or female, for the purposes of prison housing. [FN70] Individuals who have not opted for this surgery are housed according to their biological sex, even if they identify differently and have had other surgeries in order to appear more masculine or feminine, as the case may be. [FN71] Courts have not been receptive to plaintiff's challenges to the system. [FN72] In *Meriwether v. Faulkner*, the court concluded that an administrative decision to place the plaintiff in a men's prison did not violate equal protection, without evidence that the classification was motivated by an intent to discriminate against her. [FN73] Genitalia-based classification puts MTF transgender prisoners at special risk for physical injury, sexual harassment, sexual battery, rape, and death, [FN74] because the prison hierarchy subjugates the weak to the strong [FN75] and equates femininity with weakness. [FN76]

New York, a state that tends to house greater numbers of transgender prisoners, attempted to reduce this risk by creating a ward to house gay prisoners and placing transgender prisoners with them. [FN77] Often, prison officials resort to segregating transgender prisoners from other prisoners, [FN78] simultaneously cutting off recreational, educational, and occupational opportunities, and associational rights. [FN79] Faced with the possibility of prolonged isolation, boredom and loneliness, some transgender prisoners may prefer the general population. [FN80]

2. Determining Sex in Civil Litigation

By comparison, in many civil cases, even the decision to undergo genital surgery has no effect on the status of transgender litigants. [FN81] The outcome of the *Gardiner* case on appeal to the Kansas Supreme Court illustrates the typical manner in which courts deny post-operative transsexuals with genital surgery legal recognition of their reassigned sex. [FN82] The case involved a dispute over the probate of the plaintiff's father's will. [FN83] In 1998, Marshall G. Gardiner married J'Noel Gardiner, a male to female transsexual. [FN84] When Marshall died his son Joe, from whom Marshall had been estranged, filed a petition for letters of administration, claiming that he was the sole heir to Marshall's estate because J'Noel was born a man, and therefore her marriage to his father was void. [FN85]

The district court entered summary judgment in Joe's favor on the issue of the validity of the marriage, relying on *Littleton v. Prange* to conclude that J'Noel was male as a matter of law, because her chromosomes remained the same even after the many surgeries and other forms of treatment she had undergone. [FN86] Reversing and remanding for further consideration on the issue of J'Noel's sex, the court of appeals directed the trial court to consider "factors in addition to chromosome makeup, including: gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity." [FN87] Further, the court of appeals indicated that the trial court should consider whether an individual was male or

female at the time the marriage license issued, not at the time of birth. [FN88]

The supreme court disagreed, on the ground that the state legislature had intended the words "opposite sex" in the narrow and traditional sense when it wrote the state's marriage statute. [FN89] Without a clear indication from the legislature that it intended to include transsexuals, J'Noel could not be considered the "opposite sex" of Marshall for the purposes of the marriage statute. [FN90] After refusing to recognize J'Noel as a female, the Kansas Supreme Court went on to say: We are not blind to the stress and pain experienced by one who is born a male but perceives oneself as a female. We recognize that there are people who do not fit neatly into the commonly recognized category of male or female, and to many life becomes an ordeal. However, the validity of J'Noel's marriage to Marshall is a question of public policy to be addressed by the legislature and not by this court. [FN91] The United States Supreme Court declined to grant certiorari. [FN92]

C. Rape and Coercive Sex in Prison

"A million jockers, punks, and queens demand an explanation, and their numbers continue to soar with every year." [FN93]

1. How Prevalent Is Prison Rape?

Although prison rape between males entered relatively recently into the general public's awareness, [FN94] its prevalence no longer comes as a surprise to most Americans. [FN95] The phenomenon has been recorded in popular songs such as "Date Rape," by Sublime, [FN96] and in movies, such as *The Shawshank Redemption*. [FN97] Studies vary as to the estimated frequency of prison rapes. [FN98] In 1974, Carl Weiss and David James Friar wrote that of the forty-six million Americans who would be arrested at some point in their lives, ten million of them would be raped in prison. [FN99] In 1992, the Federal Bureau of Prisons estimated that between nine and twenty percent of prisoners had been sexually assaulted. [FN100] Two studies, one in 1982 by Wayne S. Wooden and Jay Parker, and another in 1996 by Cindy Struckman-Johnson, concluded that the rate at which inmates are forcibly penetrated is somewhere around

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(Continued from page 6) **TG Prisoners & Rape** twelve to fourteen percent of the total male inmate population. [FN101] In addition, Struckman-Johnson's study observed that twenty-two percent of male inmates had been coerced or persuaded into some form of sexual contact in prison, close to the twenty-three percent finding of Daniel Lockwood's 1986 study of a maximum security New York state prison. [FN102] In contrast, a 1994 study by Christine Saum reported much lower results. [FN103] Saum anonymously surveyed 101 inmates in a medium security drug treatment program, but only five participants reported having ever been victimized, and none of them admitted they had been raped in the year prior to the study. [FN104]

The lack of consensus in the studies has several explanations. [FN105] First, the results often depend on how broadly or narrowly rape is defined. [FN106] Some studies, such as Struckman-Johnson's, define "rape" broadly as any unwanted sexual contact. [FN107] Others, like Saum's, define it narrowly as unwanted oral or anal sex. [FN108] Furthermore, prison rape experts do not agree on whether some sexual experiences in prison might be considered consensual. [FN109] Writers like Terry Kupers challenge studies that do not take into account the inherently coercive atmosphere in prison: [FN110] [T]hese figures do not include the huge number of men who "consent" to having sex with a tougher con or consent to having sex with many other prisoners only because they are very afraid that, if they do not, they will be repeatedly beaten and perhaps killed. In my view, this kind of coerced sex also constitutes rape. [FN111]

Second, prison rape experts often find official prison records of inmate rape unreliable. [FN112] In 1968, after investigating 156 cases of rape over a two-year period, and interviewing over 3000 inmates and guards, Philadelphia chief assistant district attorney Alan J. Davis concluded that the reported rapes were "the tip of the iceberg" and that the actual number of rapes in this time period was closer to 2000. [FN113] Of those, only ninety-six were reported by the victims; sixty-four had been written up in prison records; forty of the offenders had been disciplined; and twenty-six

cases had been passed on to the police for prosecution. [FN114]

Third, many inmates do not report rape for fear of being labeled a "snitch," which would place their lives at risk. [FN115] Finally, the outcome of the study may depend on what kind of prisoner is examined. [FN116] Prison rape tends to be more prevalent in state and city institutions, which house greater numbers of inmates convicted of crimes of violence, than in federal institutions. [FN117]

Combined with lack of reporting, the relative absence of reliable studies on prison rape frustrates efforts to make prisons safer. [FN118] To further the goal of preventing prison rape, Congress enacted the Prison Rape Elimination Act of 2003, [FN119] which calls for the Bureau of Justice Statistics of the Department of Justice to conduct a yearly "review and analysis of the incidence and effects of prison rape." [FN120] Among other things, the Act directs that the Bureau shall review and analyze common characteristics of victims and perpetrators of rape. [FN121] The Act also creates a National Prison Rape Commission to study the effects of prison rape and make recommendations to the Attorney General regarding national standards for prevention. [FN122] States that fail to adopt the national standards will receive a five percent reduction in federal funding for programs covered by the Act. [FN123]

2. Masculinity and the Prison Hierarchy

Prison rapes do not occur in a vacuum. [FN124] In order to understand the phenomenon of rape between inmates, one must place it in the context of the prison hierarchy, the "ranking of prisoners by their fighting ability and manliness." [FN125] Often referred to informally as the prison "code," [FN126] the set of rules governing interaction between prisoners requires that men "act tough, lift weights, and be willing to fight to settle grudges," [FN127] or risk being labeled weak and subjected to beatings and rape. [FN128] At the top of the hierarchy, dominant men [FN129] subjugate weaker men through physical violence or manipulation. [FN130] In general, sexually dominant inmates consider themselves heterosexual and view

their role as different from the passive/receptive role forced upon their victims. [FN131]

The bottom of the hierarchy is "defined in terms of the feminine." [FN132] At the lowest level are "punks," usually heterosexual inmates who have been forced into a sexually submissive role, often by gang rape, but also by other coercive tactics. [FN133] A "punk" can also be a homosexual or bisexual who rejected the "queen" role described below, but was forced into a sexually submissive role ("turned out") anyway. [FN134] Young or inexperienced prisoners often find themselves preyed upon by "wolves" offering loans, cigarettes, or other luxuries, and later demanding sexual repayment of the debts. [FN135] Sexual harassment usually precedes victimization, and can take the form of statements that feminize the target, overt sexual propositions, sexual extortion, or physical overtures. [FN136] The number of punks tends to increase with the security level of the institution, although big city jails and juvenile institutions are also thought to house them in high numbers. [FN137]

Another smaller class of inmates termed "queens" consists mainly of transgender and effeminate homosexual inmates who are assigned female roles and referred to as females generally. [FN138] Queens and other submissive inmates take on stereotypically feminine tasks: doing laundry, cleaning the cell, straightening the bunks, and making and serving coffee. [FN139] Queens are forbidden to hold overt positions of power and are often used for prostitution, [FN140] with their earnings going to the pimp responsible for their protection. [FN141] Because they are often scapegoated and viewed with contempt by prison staff, queens are frequently given the least desirable jobs, kept under surveillance, and harassed by homophobic guards. [FN142] In institutions that segregate queens from other prisoners, they are often denied privileges afforded the general population, including "recreation hall attendance, exercise and fresh air in the yard, library visits, chapel attendance, and hot food." [FN143] They nonetheless enjoy a marginally higher status in the hierarchy than punks, proba-

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(Continued from page 7) **TG Prisoners & Rape** bly because they are considered desirable sexual partners, [FN144] and because punks are condemned for lacking the courage to defend themselves and their masculinity. [FN145]

Nevertheless, the "benefits" of being classed as a queen have little practical significance. [FN146] Queens do not have the power to say "yes" or "no" to sex without the approval of the "pimp" or "daddy" who is protecting them at the time. [FN147] Anecdotal accounts tell of queens or punks being sold to pay debts: Well, naturally, I didn't like the idea of being pimped off and all that stuff. But O.K.; when the guy was getting short, he sold me to somebody for two hundred dollars. . . . Well, if he'd waited for a little bit longer, he'd a got five hundred bucks cause the guy was fixin to offer five hundred. [FN148] Thus, because of the nature of the prison hierarchy, an entering transgender inmate can either choose to act submissive or be beaten into submission, and more often than not, sex is coercive for them on some level. [FN149] Despite this reality, all prisoners can be disciplined for engaging in any sex that they are not physically forced to perform. [FN150] Further, prisons do not often provide condoms, on the rationale that prisoners are not supposed to be engaging in sex at all. [FN151]

3. The Consequences of AIDS

"Rapes occur at night, no condoms used. Sometimes I can prevent rape by telling the person that I have HIV and that it could be passed on to them." [FN152]

Although the effect of the AIDS crisis on the prison population has yet to be fully documented, [FN153] HIV and AIDS are prevalent among those incarcerated. [FN154] In 1993, Stephen Donaldson observed of federal prisons that "homophobia has risen . . . the status of queens has fallen; virgin heterosexuals are more highly prized; fewer jockers are hooking up; and much of the sexual behavior has become more covert." [FN155] While prostitution also decreased, Donaldson predicted that rape would increase under such circumstances. [FN156] Although most inmates become infected outside of prison, [FN157] a transgender inmate has increased risk of exposure while incarcer-

ated, because of the high risk of rape, coerced sex, and coerced prostitution. [FN158]

Footnotes

- [FN1]. Managing Editor, Santa Clara Law Review, Volume 44, J.D. Candidate, Santa Clara University School of Law; B.A., San Jose State University. [FN1]. This comment will use the word "transgender" as an umbrella term encompassing a variety of individuals, "including transsexuals, transvestites, cross-dressers, drag queens and drag kings, butch and femme lesbians, feminine gay men, intersexed people, bigendered people, and others who... 'challenge the boundaries of sex and gender.'" Shannon Minter, Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion in the Gay Rights Movement, 17 N.Y.L. Sch. J. Hum. Rts. 589, 589-90 n.4 (2000) (quoting Leslie Feinberg, *Transgender Warriors: Making History from Joan of Arc to RuPaul* x (1996)). The term "transsexual" will refer more specifically to persons who "believe they belong to, want to be, and function as the 'other' sex." Jason Cromwell, *Transmen & FTMs* 20-21 (1999). In general, the word "sex" will be used to refer to biology or anatomy, and "gender" will refer to "the collection of characteristics that are culturally associated with maleness or femaleness." Jamison Green, Introduction to Paisley Currah & Shannon Minter, Policy Inst. of the Nat'l Gay & Lesbian Task Force & Nat'l Ctr. for Lesbian Rights, *Transgender Equality: A Handbook for Activists and Policymakers* 1, 2 (2000), available at <http://www.nglrf.org/library/index.cfm>. Finally, "[g]ender identity" refers to a person's internal, deeply felt sense of being either male or female or something other or in between." *Id.* at 3.
- [FN2]. See Press Release, National Transgender Advocacy Coalition, *Transgendered Woman Raped in Sacramento Jail Files Claim* (Dec. 18, 2002), available at <http://www.ntac.org/pr/release.asp?did=59>.
- [FN3]. See *id.*
- [FN4]. See *id.*
- [FN5]. See *id.*
- [FN6]. See *id.*
- [FN7]. See *infra* Part II.B.1 (discussing

- genitalia-based placement). This comment will focus on sexual violence directed at male-to-female (MTF) transgender prisoners housed in men's prisons. Though genitalia-based placement also creates problems for MTF and female-to-male (FTM) prisoners housed in women's prisons, experiences of transgender prisoners in women's prisons have not been well documented. Alexander L. Lee, *Nowhere to Go But Out: The Collision Between Transgender & Gender-Variant Prisoners and the Gender Binary in America's Prisons* 26-28 (2003), at <http://srp.org/alex%20lees%20paper2.pdf>.
- [FN8]. See Darren Rosenblum, "Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarity, 6 Mich. J. Gender & L. 499, 522-23 (2000).
- [FN9]. 42 U.S.C. § 1983 (West 1994).
- [FN10]. See *infra* Part II.D.1-2 (discussing claims for civil rights violations).
- [FN11]. See *infra* Part II.D.2.
- [FN12]. See Roger A. Hanson & Henry W.K. Daley, U.S. Dep't of Justice, *Challenging the Conditions of Prisons and Jails* 3 (1995) (discussing popular images of prisoner litigation).
- [FN13]. See *infra* Part II.B-C.
- [FN14]. See *infra* Part II.D.
- [FN15]. See *infra* Part V.
- [FN16]. See *infra* Part II.A.
- [FN17]. See *infra* Part II.B.
- [FN18]. See *infra* Part II.C.
- [FN19]. See *infra* Part II.D.
- [FN20]. See *infra* Part III.
- [FN21]. See *infra* Part IV.A-C.
- [FN22]. See *infra* Part V.
- [FN23]. See Debra Sherman Tedeschi, *The Predicament of the Transsexual Prisoner*, 5 Temp. Pol. & Civ. Rts. L. Rev. 27, 28-29 (1995).
- [FN24]. See *Littleton v. Prange*, 9 S.W.3d 223, 225 (Tex. App. 1999) ("Christie was diagnosed psychologically and psychiatrically as a genuine male to female transsexual."); *Maggert v. Hanks*, 131 F.3d 670, 671 (7th Cir. 1997) (asking whether prisons had a duty to administer the standard cure (estrogen therapy) "to a prisoner who unlike Maggert is diagnosed as a genuine transsexual") (emphasis added).
- [FN25]. Emi Koyama, *A Fest in Dis-*

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tress, *Bitch*, Summer 2002, at 71 (Koyama contributes to a discussion of questions raised by the inclusion of trans women in the Michigan Womyn's Music Festival.).

[FN26]. See Tedeschi, *supra* note 23, at 28-29. "Perhaps transsexual prisoners would not pose such a problem to the legal and penal systems if their situations were analyzed from a perspective that takes into account the uniqueness of being a transsexual." *Id.* at 28-29.

[FN27]. *Id.* at 27.

[FN28]. See Littleton, 9 S.W.3d at 230-31. The court held that Christie Lee Littleton, a post-operative male-to-female transsexual, was correctly classified as male because her chromosomes remained the same after surgery and her original birth certificate stated she was male. *Id.* Therefore, she could not legally be married to another male and could not bring a cause of action as his surviving spouse. *Id.* Even though Littleton underwent surgery to bring her body into congruence with her gender identity and amended her birth certificate to reflect her gender identity, the court was not persuaded, and summarily declared: "There are some things we cannot will into being. They just are." *Id.* at 231. See also *In re Estate of Gardiner*, 22 P.3d 1086, 1110 (Kan. Ct. App. 2001) (reversing the trial court's determination that the post-operative male-to-female transsexual plaintiff was male and her marriage therefore void and remanding with the order that the trial court consider the following factors in addition to the her chromosomal makeup in determining her gender: "gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity"), *aff'd in part and rev'd in part*, 42 P.3d 120 (Kan. 2002), cert. denied sub nom *Gardiner v. Gardiner*, 123 S. Ct. 113 (2002).

[FN29]. See Littleton, 9 S.W.3d at 230-31; *Gardiner*, 22 P.3d at 1110.

[FN30]. See *infra* Part II.A.1 (discussing various definitions of the term "transsexual").

[FN31]. See *Maggert v. Hanks*, 131 F.3d 670, 671 (7th Cir. 1997) (distinguishing between an individual whose "sexual identity is polymorphous" and an indi-

vidual diagnosed with gender dysphoria). See generally Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 *Wm. & Mary J. Women & L.* 37 (2000) (outlining the advantages and disadvantages of different strategies in drafting transgender-specific protective legislation).

[FN32]. See discussion *infra* Part II.A.1.

[FN33]. *Farmer v. Brennan*, 511 U.S. 825 (1994).

[FN34]. See *Rosenblum*, *supra* note 8, at 506-07; *Cromwell*, *supra* note 1, at 11, 19.

[FN35]. *Farmer*, 511 U.S. at 829 (quoting American Medical Association, *Encyclopedia of Medicine* 1006 (1989)).

[FN36]. See *Rosenblum*, *supra* note 8, at 506 (quoting *Powell v. Shriver*, 175 F.3d 107, 111 (2d Cir. 1999)).

[FN37]. *Gardiner*, 22 P.3d at 1093.

[FN38]. *Id.*; see also *Cromwell*, *supra* note 1, at 20 ("'Transsexual' is used in two ways: first, to describe someone who is in the process of becoming (transitioning) a man (and vice versa); and second, to describe someone who has completed sex reassignment surgery.").

[FN39]. *Littleton v. Prange*, 9 S.W.3d 223, 226 (Tex. App. 1999)

("'Transgenderism describes people who experience a separation between their gender and their biological/anatomical sex'") (quoting Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 *UCLA Women's L.J.* 219, 237 (1998)).

[FN40]. See *Cromwell*, *supra* note 1, at 22-23. Within [the transvestite and transsexual] community, [the term "transgender"] is used in two ways.

First, it designates individuals who do not fit into the categories of transvestite and transsexual. Transgendered identification offers a more specific reference to people who live as social men or as social women but neither desire nor have sex reassignment surgery. ... Second, "transgender" is used as an encompassing term for transvestites and transsexuals as well as for those who do not fit neatly into either category. *Id.* at 23; see also *Minter*, *supra* note 1, at 589-90 n.4.

[FN41]. *Minter*, *supra* note 1, at 608. *Minter* also points out that the medical

profession has defined transsexualism in "rigid, heterosexist terms." *Id.* at 609. [O]nly transsexual people who conformed to stereotypical gender norms and who were deemed capable of "passing" in their new sex were able to obtain treatment. More generally, the ability of transsexual people to gain access to medical services, and to legal recognition and protection has depended on how successfully they could hide their transsexual status and approximate a "normal" heterosexual life, with the result that those who are unable or unwilling to comply with these oppressive standards have little or no protection at all. *Id.*

[FN42]. See *Maggert v. Hanks*, 131 F.3d 670, 671 (7th Cir. 1997) (simultaneously rejecting prisoner's claim of cruel and unusual punishment for failure to treat gender dysphoria and labeling all transsexuals "profound [ly]... disorder[ed]"); see also Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 *Berkeley Women's L.J.* 15 (2003) (discussing the disadvantages of relying on gender identity disorder to argue on behalf of transgender litigants); cf. *Murray v. United States Bureau of Prisons*, No. 95-5204, 1997 WL 34677 (6th Cir. Jan. 28, 1997). On the rationale that transsexualism was recognized as a medical disorder, the *Murray* court held that a "complete refusal by prison officials to provide a transsexual with any treatment at all would state an Eighth Amendment claim for deliberate indifference to medical needs." See *id.* at 3. Nevertheless, the court refused to second-guess the prison physician's allegedly mistaken assessment of the level of hormones required to prevent the plaintiff from regressing in the development of feminine characteristics. See *id.*

[FN43]. *Maggert*, 131 F.3d at 671.

[FN44]. *Cromwell*, *supra* note 1, at 19.

[FN45]. See *Schwenk v. Hartford*, 204 F.3d 1187, 1193, 1193 n.4 (9th Cir. 2000) (commenting that *Schwenk* never received any medical or psychiatric treatment for gender dysphoria, but referencing with approval *Schwenk's* submission of the affidavit of Karil Klingbeil, a Clinical Associate Professor of Social Work and Adjunct Professor of Psychiatry and Behavioral sciences at

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(Continued from page 9) **TG Prisoners & Rape** the University of Washington, in which Klingbeil confirmed that Schwenk's behavior was in no way "inconsistent with gender dysphoria"); Littleton, 9 S.W.3d at 224-25 (acknowledging Littleton as a "genuine male to female transsexual" according to a psychological and psychiatric diagnosis based on guidelines established by the Johns Hopkins Group). [FN46]. See supra notes 1, 41, 43. [FN47]. Kate Bornstein, *Gender Outlaw* 121 (1995). [FN48]. *Id.* [FN49]. See Currah & Minter, supra note 1, at 40 (advising that language in anti-discrimination statutes should recognize that transgender identities can manifest themselves in many different ways). [FN50]. See Cromwell, supra note 1, at 22. [FN51]. See *id.* at 23 (questioning whether an FTM or transman who has chest reconstruction and nothing more is appropriately classed as "pre-op" or "post-op"). [FN52]. See Green, supra note 1, at 3-4 ("In its broadest sense, transgender encompasses anyone whose identity or behavior falls outside stereotypical norms."). [FN53]. See *id.* at 8. [FN54]. *Id.* [FN55]. Minter, supra note 1, at 592. [FN56]. See Rosenblum, supra note 8, at 516 ("Once imprisoned, transgendered people find fighting for their gender identity a monumental task, as they confront the gender segregation, transphobia, and limited resources of the prison system."). [FN57]. See Alexander L. Lee, supra note 7, at 5. [FN58]. Rosenblum, supra note 8, at 517. [FN59]. See Lee, supra note 7, at 10 (citing results of a February 18, 1998 study by the San Francisco Department of Public Health). Of the 155 individuals surveyed, "65% of [male-to-female] respondents had been incarcerated over one night in a jail or prison, while 29% of [female-to-male] respondents had been." *Id.* [FN60]. See Lee, supra note 7, at 8. [FN61]. See *id.* [FN62]. See, e.g., Spade, supra note 42,

at 17, 17 n.5. [FN63]. *Id.* at 36. [FN64]. See Lee, supra note 7, at 9. [FN65]. See Timothy Cwiek, Judge Rules on Trans Inmate, *Phila. Gay News*, May 25-31, 2001 (copy on file with Philadelphia Gay News). [FN66]. See *id.* When federal prison officials decline to follow a judge's recommendations, they must notify the judge in writing. See Federal Bureau of Prisons Policy Statement, P.S. 5070.10, at 4 (June 30, 1997), http://www.bop.gov/progstat/5070_010.pdf ("When the court's recommendation regarding an institution and/or geographic location is not followed, the Regional Director shall write a letter to the court explaining the reason(s) for this decision within five working days after designation."). [FN67]. See Cwiek, supra note 65. [FN68]. *Id.* [FN69]. See *id.* [FN70]. See Nat'l Center for Lesbian Rights, *Transsexual Prisoners* (Dec. 2001) [hereinafter *Transsexual Prisoners*], www.nclrights.org/publications/pubs/tsp_rison.pdf. [FN71]. See *id.* See generally Rosenblum, supra note 8, at 520-36 (discussing genitalia-based placement and alternatives). [FN72]. See *Meriwether v. Faulkner*, 821 F.2d 408, 415 n.7 (7th Cir. 1987). [FN73]. See *id.* [FN74]. See Rosenblum, supra note 8, at 522-26 (discussing the risks transgender people face in prison). [FN75]. See *id.* at 523. [FN76]. See Terry A. Kupers, *Rape and the Prison Code*, in *Prison Masculinities* 111, 115 (Don Sabo et al. eds., 2001) ("Of course, the hierarchy does not begin or end with prisoners. The security officers wield power over the prisoners; the warden dominates the security officers; and at the other end of the hierarchy, more than a few prisoners have been known to rape women or beat them and their children."); Stephen Donaldson, *A Million Jockers, Punks, and Queens*, in *Prison Masculinities*, 118, 119 (Don Sabo et al. eds., 2001) ("[Transvestites] are highly desirable as sexual partners because of their willingness to adopt 'feminine' traits, and they are highly visi-

ble, but the queens remain submissive to the 'Men' and, in accordance with the prevalent sexism, may not hold positions of power in the prisoner social structure.").

[FN77]. See Rosenblum, supra note 8, at 534. New York had seventy prisoners on hormone treatments in its state prisons and seventeen in its city prisons at the time Rosenblum wrote his article. See *id.* at 517.

[FN78]. See *id.* at 529.

[FN79]. See *Transsexual Prisoners*, supra note 70; Rosenblum, supra note 8, at 530.

[FN80]. See Rosenblum, supra note 8, at 530.

[FN81]. See *Littleton v. Prange*, 9 S.W.3d 223, 230-31 (Tex. App. 1999); *In re Estate of Gardiner*, 42 P.3d 120, 136-37 (Kan. 2002) (reversing on the issue of whether the trial court must determine the transsexual litigant's gender status by a multi-factor test, and holding that absent a clear indication from the legislature to change the public policy of Kansas to include transsexuals within the definition of "opposite sex," a transsexual person will be considered his or her original sex for the purposes of the state marriage statute) [hereinafter *Gardiner II*].

[FN82]. See *Gardiner II*, 42 P.3d at 136-37.

[FN83]. See *id.* at 121.

[FN84]. See *id.* at 123.

[FN85]. See *id.*

[FN86]. See *id.* at 124.

[FN87]. See *In re Estate of Gardiner*, 22 P.3d 1086, 1110 (Kan. Ct. App. 2001).

[FN88]. See *id.*

[FN89]. See *Gardiner II*, 42 P.3d at 136-37 (citing *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984)).

[FN90]. See *id.* at 136-37.

[FN91]. *Id.* at 137.

[FN92]. See *Gardiner v. Gardiner*, 123 S. Ct. 113, 113 (2002). Subsequent cases involving the legality of transgender marriages include *Kantaros v. Kantaras*, No. 98-5375CA, (Fla. Cir. Ct. Feb. 21, 2003), <http://www.courtvtv.com/archive/trials/kantaros/docs/opinion.pdf> (holding that the marriage of a transsexual man, Michael Kantaras was a legal marriage), and *In re Marriage of Simmons*, in which an Illi-

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(Continued from page 10) **TG Prisoners & Rape** nois trial court held that Sterling Simmons, a transgender husband and father, was not legally male and therefore not legally married or a father. National Center for Lesbian Rights, *In re Marriage of Simmons*, at <http://www.nclrights.org/cases/simmons.htm> (case summary). Both cases have been appealed.

[FN93]. See Donaldson, *supra* note 76, at 126.

[FN94]. See Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most "Open" Secret*, 18 *Yale L. & Pol'y Rev.* 195, 197 (1999).

[FN95]. See Daniel Brook, *The Problem of Prison Rape*, *Legal Aff.*, Mar.-Apr. 2004, at 29 (noting that jokes about prison rape have become more common in popular culture).

[FN96]. *Sublime, Date Rape, on 40 Oz. to Freedom (Gasoline Alley/MCA Records, 1992)*. One night in jail it was getting late. He was butt-raped by a large inmate. And he screamed, but the guards paid no attention to his cries. *Id.* "Date Rape" became the most requested song ever at KROQ, a modern rock radio station in L.A. Zack Stenz, *Sublime Time: Band's Success Far from Ridiculous*, *The Sonoma Independent*, May 16-22, 1996, <http://www.metroactive.com/papers/sonoma/05.16.96/music-9620.html>.

[FN97]. *The Shawshank Redemption* (Castle Rock Entertainment/Time Warner, Inc. 1994). Hundreds of web pages around the world are devoted to this film. Stephen Schurr, *Shawshank's Redemption: How a Movie Found an Afterlife*, *Wall St. J.*, Apr. 30, 1999, at B1, B4, <http://www.vzavenue.net/~speedtech/index2.html> (on file with the Santa Clara Law Review).

[FN98]. Bell et al., *supra* note 94, at 198.

[FN99]. Carl Weiss & David James Friar, *Terror in the Prisons: Homosexual Rape and Why Society Condone It* 61 (1974). Though the term "homosexual rape" has often been used in reference to male prison rape, e.g., *Farmer v. Brennan*, 511 U.S. 825, 852 (1994) (Blackmun, J., concurring), the idea that "predatory homosexuals" lurk in prisons is a myth. Brook, *supra* note 95, at 28; Donaldson, *supra* note 76, at 125 ("For

the majority of prisoners, penetrative sex with a punk or queen remains a psychologically heterosexual and, in the circumstances of confinement, normal act....").

[FN100]. Kupers, *supra* note 76, at 111.

[FN101]. Bell et al., *supra* note 94, at 198. Furthermore, Struckman-Johnson found that prison guards were responsible for approximately one-fifth, or eighteen percent, of all sexual victimizations. *Id.* at 198 n.15. Struckman-Johnson performed another study in 2000, which revealed rates of sexual aggression of twenty and twenty-one percent in seven midwestern prisons. James Robertson, *A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 *N.C. L. Rev.* 433, 442 n.47 (2003).

[FN102]. Bell et al., *supra* note 94, at 198.

[FN103]. *Id.*

[FN104]. *Id.* at 198-99.

[FN105]. See *id.* at 199.

[FN106]. See *id.*

[FN107]. *Id.*

[FN108]. Bell et al., *supra* note 94, at 199.

[FN109]. See *id.*

[FN110]. Kupers, *supra* note 76, at 111.

[FN111]. *Id.* In addition, Kupers acknowledges that consensual sex sometimes occurs in prison, distinguishing it from coercive sex or rape. *Id.* at 115.

[FN112]. See Bell et al., *supra* note 94, at 199.

[FN113]. Susan Brownmiller, *Against Our Will: Men, Women and Rape* 264-65 (1975).

[FN114]. *Id.* at 265.

[FN115]. E.g., Kupers, *supra* note 76, at 112. "According to the code, snitching is the worst offense, ... punishable by repeated beatings, rapes, or even death." *Id.*

[FN116]. See Bell, et. al., *supra* note 94, at 199 (noting that Saum questioned inmates who were in a drug treatment program in a medium security setting, and admitted that the prison conditions may have affected the prevalence of rape); Human Rights Watch, *No Escape: Male Rape in U.S. Prisons* 138 (2001) (noting significant differences in victimization rates among prison systems).

[FN117]. Brownmiller, *supra* note 113, at 260.

[FN118]. See Human Rights Watch, *supra* note 116, at 144-45 (noting that prison authorities' failure to collect data can indicate that they do not take the issue of prison rape seriously); *infra* Part II.D.3 (noting that underreporting creates opportunities for prison authorities to argue they did not know of the risk of rape).

[FN119]. *Prison Rape Elimination Act of 2003*, Pub. L. No. 108-79, 117 Stat. § 972-87 (2003).

[FN120]. 42 U.S.C. § 15603(a) (2003).

[FN121]. *Id.* § (a)(1)(A).

[FN122]. 42 U.S.C. § 15606(a), (e). The Commission's power to make recommendations is limited by subsection (e)(3), which states: "The Commission shall not propose a recommended standard that would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities." *Id.* § e(3).

[FN123]. 42 U.S.C. § 15607(b)

[FN124]. See Kupers, *supra* note 76, at 113.

[FN125]. *Id.*

[FN126]. *Id.* at 113-14.

[FN127]. *Id.* at 114.

[FN128]. See *id.*

[FN129]. Colloquial terms for dominant prisoners include "wolves," "daddies," "jockers," and "pimps." Inez Cardozo-Freeman, *The Joint: Language and Culture in a Maximum Security Prison*, 370-94 (1984) (using the terms "wolf," "daddy," and "pimp"); Donaldson, *supra* note 76, at 118 (explaining the term "jocker"). This comment uses these terms because they appear frequently in anecdotal reports of prison rape. The reader should nonetheless be aware that colloquial expressions change rapidly and vary from region to region.

[FN130]. See Kupers, *supra* note 76, at 115.

[FN131]. See Donaldson, *supra* note 76, at 125.

[FN132]. Kupers, *supra* note 76, at 115.

[FN133]. Donaldson, *supra* note 76, at 119.

[FN134]. *Id.* at 119; Cardozo-Freeman, *supra* note 129, at 370-71 (using the phrase "turned out" in context).

[FN135]. Brownmiller, *supra* note 113, at 266-67 (quoting Alan J. Davis, *Sexual Assaults in the Philadelphia Prison Sys-*

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(Continued from page 11) **TG Prisoners & Rape** tem, in *The Sexual Scene* 107-24 (Gagnon & Simon eds., 1970)). [FN136]. James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 *Am. Crim. L. Rev.* 1, 9-15 (1999). [FN137]. Donaldson, *supra* note 76, at 119-20. [FN138]. *Id.* at 119. [FN139]. See *id.* at 120; Brook, *supra* note 95, at 28. [FN140]. Donaldson, *supra* note 76 at 119; Human Rights Watch, *supra* note 116, at 179-80 (2001) (anecdotal account of prostitution). [FN141]. See Cardozo-Freeman, *supra* note 129, at 385. [FN142]. Donaldson, *supra* note 76, at 119; see also Cardozo-Freeman, *supra* note 129, at 386 ("Some heterosexuals despise the homosexuals, but in general, the prison population is more tolerant of true queens than the prison guards."). [FN143]. Donaldson, *supra* note 76, at 119. [FN144]. See *id.* [FN145]. See Cardozo-Freeman, *supra* note 129, at 371. Ironically, homosexual male and transgender inmates are accorded (only slightly) higher status because they act in conformity with the stereotypical feminine role, but heterosexual "punks" are given lower status because they could not or would not fight to preserve their masculinity. See *id.* [FN146]. See Donaldson, *supra* note 76, at 119 (describing the negative aspects of being classed as a "queen"). [FN147]. See Cardozo-Freeman, *supra* note 129, at 386. "Pimping is a safe business in prison. The girls are respected that work for a pimp and behave themselves; they're not sluts. If they do screw around, they get their butts kicked. They flirt but just to get business." *Id.* [FN148]. See *id.* at 390 (quoting Sandy, a transvestite prisoner); see also *The Story of a Black Punk*, in *Prison Masculinities* 127, 129 (Don Sabo et al. eds., 2001) (describing a punk's experience being sold). I got raped a few more times until a Black Brother offered to be my man, which I accepted right away to avoid getting killed. He wasn't too bad but he got into heavy debt and 'sold' me

to this other Black dude for swag to get him off the hot seat. *Id.* There is at least one documented example of organized resistance to the practice of buying and selling queens. See Daniel Burton-Rose, *The Anti-exploits of Men Against Sexism, 1977-78*, 224, in *Prison Masculinities* (Don Sabo et al. eds., 2001). In the mid-1970s, prisoners Ed Mead and Danny Atteberry founded Men Against Sexism (MAS), an organization of gay and bisexual prisoners dedicated to disrupting the system of sexual exploitation at the maximum-security penitentiary in Walla Walla, Washington. *Id.* at 224-25. They created the concept of "safe cells," purchased from other prisoners as they transferred out. *Id.* at 226. MAS members would intercept likely targets for prison rape as they stepped off the bus, explain the situation, and offer them a safe cell. *Id.* The organization also prevented other prisoners from claiming effeminate gay men as their property. *Id.* at 228. MAS was unofficially disbanded when its leaders were transferred to other state and federal institutions, following a foiled escape attempt. *Id.* at 228-29. [FN149]. See Cardozo-Freeman *supra* note 129, at 390. A transgender prisoner explains how she viewed the situation when she first arrived: "I knew ahead of time that I was goin to come here, that I wasn't goin to have no alternative but to be what I really was. I came here wearin tight pants cause I knew I was goin to have to give it up to somebody." *Id.* [FN150]. See Donaldson, *supra* note 76, at 123 (noting that disciplinary codes in United States confinement institutions outlaw all sexual activity). [FN151]. See Richard D. Vetstein, *Rape and AIDS in Prison: On a Collision Course to a New Death Penalty*, 30 *Suffolk U. L. Rev.* 863, 877 (1997); see also Donaldson, *supra* note 76, at 123 (noting that prison administrators refuse to allow condoms because to do so would be condoning homosexuality, "something they apparently consider worse than the death of prisoners"). [FN152]. *Male-to-Female Transsexuals and Transgendered People in Prisons: HIV/AIDS Issues and Strategies*, 4 *Canadian HIV/AIDS Pol. & L. Newsl.*, Spring 1999, available at [http://www.aidslaw.ca/Maincontent/otherdocs/](http://www.aidslaw.ca/Maincontent/otherdocs/Newsletter/spring99/prisons.htm#2)

[Newsletter/spring99/prisons.htm#2](http://www.aidslaw.ca/Maincontent/otherdocs/Newsletter/spring99/prisons.htm#2) (quoting an anonymous transsexual and transgender prisoner). [FN153]. See Donaldson, *supra* note 76, at 123. [FN154]. See Vetstein, *supra* note 151, at 874-76. Although a comprehensive analysis of HIV and rape in the prison system is beyond the scope of this paper, Vetstein's article discusses rape and HIV in the context of recent Eighth Amendment decisions. See *id.* [FN155]. Donaldson, *supra* note 76, at 123. [FN156]. See *id.* In transsexual inmate Dee Farmer's case, discussed *infra* Part II.D.2, the possibility that Farmer might have been HIV positive apparently did not deter her attacker, and in fact, she was HIV positive when the other inmate beat and raped her. See *United States v. Farmer*, No. 95- 7414, 1997 U.S. App. LEXIS 9699, at 1-2 (4th Cir. 1997) (regarding Farmer's AIDS status at the time of her sentencing); *Farmer v. Brennan*, 511 U.S. 825, 830 (1994) (regarding Farmer's allegations of rape). [FN157]. See Vetstein, *supra* note 151, at 876. [FN158]. See discussion *supra* Part II.C.2 (discussing the risks facing transgender prisoners).

Happy Fourth Anniversary!

This edition marks the fourth anniversary of the *GIC TIP Journal*. We started with about 25 or 30 subscribers in December of 2000. Today we have 380 on our mailing list from 40 states.

Thank you all for helping make this a success, and please keep sending us your stories and your art work.

Jessie Shafer, Editor

