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Equality Behind Bars: Improving the Legal Protections of Transgender Inmates in the California Prison System

ANGELA OKAMURA*

Introduction

Historically, transgender individuals have faced unchecked and underreported discrimination in virtually every facet of their lives, including employment, housing, health care, and education.¹ As the struggle for gay and lesbian rights progresses, legal rights for the transgendered often get left in the dust due to stereotypes, myths, and misunderstandings by courts and legislatures.² However, in recent years, increasing numbers of state legislatures have passed anti-discrimination laws, forbidding discrimination based on gender identity, as well as hate crimes laws, which increase the punishment for crimes motivated by bias based on gender identity.³

In California, transgendered individuals have gained more recognition of their legal rights in employment.⁴ California's Fair

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1. See Christopher Daley, Dir., Transgender Law Center, Testimony before the Nat'l Prison Rape Elimination Comm'n in S.F., Cal.: *Safety Inside: Problems Faced by Transgender Prisoners and Common Sense Solutions to Them* (Aug. 15, 2005), available at <http://www.transgenderlawcenter.org/pdf/prisonrape.pdf>.

2. See Dean Spade, *Trans Formation: Three Myths Regarding Transgender Identity Have Led to Conflicting Laws and Policies that Adversely Affect Transgender People*, L.A. LAWYER, October 2008, 35.

3. *Id.*

4. Nat'l Center for Lesbian Rights & Transgender Law Center, ADVANCEMENTS IN STATE AND FEDERAL LAW REGARDING TRANSGENDER EMPLOYEES: A COMPLIANCE GUIDE FOR EMPLOYERS AND EMPLOYMENT LAW ATTORNEYS, 4 (2006), available at <http://www.nclrights.org/site/DocServer/complianceguideemployers.pdf?docID=1201>.

Employment and Housing Act ("FEHA") explicitly protects transgender employees from discrimination by altering the definition of discrimination based on "sex."⁵ Passed in 2004, this amendment to FEHA signals California's recognition of transgender employees' rights to be free from discrimination in the workplace.⁶ It encourages employers to adopt anti-discrimination policies, use appropriate pronouns when referring to their transgender employees, provide appropriate restroom access, allow employees to dress in the manner associated with their gender, and provide training related to gender sensitivity.⁷

California's progressive approach to protecting transgender employees starkly contrasts with its treatment of transgender prisoners. In California, as in the rest of the United States, harassment and discrimination create barriers for transgender individuals to gain and retain employment.⁸ These barriers create a virtual pipeline to prison: economic hardship causes many transgender individuals to resort to illegal means to live, which results in arrest, conviction, and ultimately incarceration.⁹ The high rate of homelessness in the transgender population, as well as increased rates of police profiling, also contribute to the disproportionate percentage of transgender individuals in prison.¹⁰ Once transgender individuals are in prison, they face increased sexual assaults by both fellow inmates and guards, neglect, and inadequate health care, including denial of necessary hormones.¹¹ A 2007 study of California prisons revealed that transgender inmates are disproportionately victims of sexual assault.¹²

5. Nat'l Center for Lesbian Rights & Transgender Law Center, *supra* note 4; see CAL. GOV'T CODE § 12926(p) (2005).

6. CAL. GOV'T CODE § 12926(p) (2005).

7. Nat'l Center for Lesbian Rights & Transgender Law Center, *supra* note 4, 5-7.

8. Kylar Broadus, *The Criminal Justice System and Trans People*, 18 TEMP. POL. & CIV. RTS. L. REV. 561, 562 (Spring 2009); Daley, *supra* note 1.

9. *Id.* at 563.

10. *Id.* at 563-64; LORI SEXTON, VALERIE JENNESS, & JENNIFER SUMNER, UNIVERSITY OF CALIFORNIA, IRVINE, WHERE THE MARGINS MEET: A DEMOGRAPHIC ASSESSMENT OF TRANSGENDER INMATES IN MEN'S PRISONS 20 (2009) (in California prisons, 47.4% of the transgender inmate population had been homeless, compared to 12.4% of the California men's prison population) available at <http://nicic.gov/Library/023837>.

11. Daley, *supra* note 1, at 5-6.

12. VALERIE JENNESS, CHERYL L. MAXSON, KRISTY N. MATSUDA, & JENNIFER MACY SUMNER, CENTER FOR EVIDENCE-BASED CORRECTIONS, DEPARTMENT OF CRIMINOLOGY, LAW AND SOCIETY, UNIVERSITY OF CALIFORNIA, IRVINE, VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT (2007), available at http://ucicorrections.seweb.uci.edu/pdf/PREA_Presentation_PREA_Report_UCI_Jenness_et_al.pdf.

The prevalence of sexual abuse¹³ of transgender prisoners is due, in part, to the inadequate safety concerns for such inmates, which is exemplified in the California law that lays out housing procedures.¹⁴ Currently, the California Department of Corrections and Rehabilitation ("CDCR") classifies and houses inmates while taking into account certain risk factors, including age, violent/nonviolent offender status, repeat offender status, and history of mental illness.¹⁵ Notably missing from this list of factors is safety concerns related to the sexual orientation or gender identity of the inmate, or a history or risk of victimization. The CDCR internal regulations do include "[d]ocumentation that the inmate has been the victim of a sexual assault" as a factor to be considered, but the fact that actual documentation is required leaves out expressed or implied safety concerns from a vulnerable segment of the prison population.¹⁶ This creates more opportunities for other inmates to sexually abuse transgender inmates, due to combination of the ease in identifying them and their vulnerability, which is compounded by prison guards' lack of care. As this note will demonstrate, including sexual orientation and gender identity in the factors considered in housing and classifying prisoners would be a small but significant step in the struggle to protect transgendered prisoners in California, and would mirror California's dedication to protecting transgendered employees in the workplace under the FEHA. Although the sexual abuse of an inmate by a guard ("guard-on-inmate sexual abuse") is a very serious criminal offense, this note will primarily focus on the egregious and increasing problem of sexual abuse against transgender inmates by other inmates ("inmate-inmate sexual abuse") in male prisons in California.

I. Transgender Employees in California

California's trend toward preventing discrimination is apparent in its protection of transgender employees. FEHA prohibits employers in California from firing, refusing to hire, or altering the terms and conditions of employees' employment based on "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation."¹⁷ FEHA was amended in 2004 to include

13. In this note, I will use the terms "sexual abuse" and "sexual assault." "Sexual abuse" refers to unwanted sexual contact in prison, and "sexual assault" refers to a general instance of unwanted sexual contact.

14. See CAL. PENAL CODE § 2636 (2006).

15. *Id.*

16. 15 CAL. ADMIN. CODE §3269(a) (2009).

17. CAL. GOV'T CODE § 12940(a) (2005).

transgender employees within its protective sphere by including "gender" in the definition of "sex" as a prohibited criterion for discrimination, as defined by the California Penal Code.¹⁸ Section 422.56(c) of the California Penal Code – California's Hate Crimes Statute – defines gender as "sex, [including] a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth."¹⁹ This has the practical effect of forbidding employers from discriminating against their transgender employees because they identify with a different gender than the one with which they were born, or by failing to conform to certain stereotypes associated with the biological sex with which they were born.²⁰

California offers more protection against discrimination for transgender employees than federal law. Title VII of the Civil Rights Act of 1964 ("Title VII") makes it unlawful for an employer to discriminate against any employee because of the employee's "race, color, religion, sex, or national origin."²¹ Historically, this law has protected employees from discrimination based on the traditional notions of sex, but not sexual orientation or gender identity.²² However, in 2004, the Sixth Circuit Court of Appeals in *Smith v. City of Salem* found that "sex" includes protection for transgender employees based on sex-stereotyping.²³ The court followed the U.S. Supreme Court's holding in *Price Waterhouse v. Hopkins*, and reasoned that a transgender employee, who fails to conform to a given gender and the behavior expected of that gender, is protected from discrimination under Title VII.²⁴ Similarly, in 2006, the United States District Court of Washington, D.C. in *Schroer v. Billington*, held that a male-to-female transgender who had successfully interviewed for a position as a terrorism research analyst with the Congressional Research Service as a man, but was later denied the position after she revealed her gender identity disorder, was protected under Title VII's ban on sex discrimination.²⁵ However, unlike the reasoning in *Smith*, the court did not analyze *Schroer* under the *Price Waterhouse* sex-stereotyping approach, but rather

18. CAL. GOV'T CODE §12926(p).

19. PENAL § 422.56(c).

20. Bryan J. Lazarski, *Sexual Orientation - The California Viewpoint*, A.L.I. - A.B.A. CONTINUING LEGAL EDUC. 1017, 1019 (July 2008) available at <http://www.lacba.org/Files/LAL/Vol31No7/2525.pdf>.

21. 42 U.S.C. § 2000e-2 (2008).

22. See *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998).

23. *Smith v. City of Salem, Ohio*, 378 F.3d 566, 574 (6th Cir. 2004); Nat'l Center for Lesbian Rights & Transgender Law Center, *supra* note 4, at 2.

24. *Smith*, 378 F.3d at 571-74; 490 U.S. 228.

25. *Schroer v. Billington*, 424 F. Supp. 2d 203, 208 (D.D.C. 2006).

under the understanding that discrimination against transsexuals is literally discrimination based on sex, since Schroer wanted to conform *with* the female gender, rather than seeking acceptance as a man with feminine traits.²⁶ Even though Title VII does not protect against discrimination based on sexual orientation, the court stated that sexual identity should still be protected, as it is possible that either homosexuals or heterosexuals could identify with a gender other than one with which they were biologically born.²⁷ According to this decision, there are factual complexities that underlie human sexual identity, and “[t]hese complexities stem from real variations in how the different components of biological sexuality — chromosomal, gonadal, hormonal, and neurological — interact with each other, and in turn, with social, psychological, and legal conceptions of gender.”²⁸ Therefore, sex encompasses more than just anatomy, and the law should reflect that reality.²⁹

Although the United States Supreme Court has not spoken on this issue since 1998 in *Oncale v. Sundowner Offshore Services*, which held that transgender employees are not protected under Title VII³⁰, the holdings of *Smith* and *Schroer* indicate that rights for transgender employees on the federal level are gaining more recognition. Similarly, Congressional efforts and President Obama’s commitment to pass the Employment Non-Discrimination Act (“ENDA”), which would forbid most employers from discriminating against their employees due to their sexual orientation or gender identity, signals that the federal government is willing to protect transgender employees’ rights to be free from discrimination in the workplace.³¹

Even though advancements in California state law paint a positive picture for transgender employees, a 2008 survey conducted by the Transgender Law Center shows that two-thirds of transgender individuals in California have experienced some form of discrimination in the workplace based on their gender identity.³² Similarly, transgender respondents were twice as likely to be living below the poverty line when compared to the general population of California.³³ Also, the survey showed that fourteen percent of the

26. 424 F. Supp 2d at 210-11.

27. *Id.* at 212-13.

28. *Id.*

29. *Id.* at 213.

30. See *Oncale*, 523 U.S. at 83.

31. H.R. 3017, 111th Cong. (2009); see also Nat’l Center for Lesbian Rights, ENDA: The Employment Non-Discrimination Act, http://www.ncrights.org/site/PageServer?PageName=issue_federallegislation_enda.

32. TRANSGENDER LAW CENTER, THE STATE OF TRANSGENDER CALIFORNIA REPORT: RESULTS FROM THE 2008 CALIFORNIA TRANSGENDER ECONOMIC HEALTH SURVEY 9 (2009).

33. *Id.* at 7.

respondents were unemployed, compared to the seven percent unemployment rate for California at the time of the survey.³⁴ This bleak picture of transgender economic health in California supports the notion that transgender individuals are more likely to end up in prison by resorting to illegal means to make ends meet, because of the fact that they are transgendered.³⁵

II. Sexual Abuse in Prison

In order to understand the effect of sexual assaults of transgender inmates in prison, one must first look to the problem of prison rape and sexual assault in general. The problem of sexual assault and rape in prison is not a new phenomenon. Despite gross underreporting, a 2008-2009 survey conducted by the Department of Justice, Bureau of Justice Statistics estimates that over 88,500 inmates nationwide had been victims of sexual abuse that year.³⁶ The rate of inmate-inmate sexual abuse was significantly higher for inmates whose sexual orientation was something other than heterosexual compared to heterosexual.³⁷ In 2003, Congress estimated that the total number of inmates who have been sexually assaulted in the past twenty years exceeds one million.³⁸ Despite this large number, countless prison rapes go unreported every year, either because victims are scared to come forward and identify themselves for fear of retaliation by the perpetrators, or because of inadequate staffing and lack of supervision.³⁹

Victims of sexual abuse in prison suffer many consequences from their experience, which may continue to haunt them years after their time in prison.⁴⁰ Even outside prison walls, victims of sexual assault suffer severe emotional and physical trauma, including feelings of culpability or disbelief.⁴¹ In combination with the oppressive prison setting, the effects on the inmate victim are much worse.⁴² Victims of prison rape may suffer post-traumatic

34. *Id.* at 9.

35. See Broadus, *supra* note 8, at 562.

36. ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008-09 5 (2010).

37. *Id.* at 5.

38. 42 U.S.C. § 15601(2).

39. Philip Ellenbogen, *Beyond the Border: A Comparative Look at Prison Rape in the United States and Canada*, 42 COLUM. J.L. & SOC. PROBS. 335, 340; 42 U.S.C. § 15601(6).

40. See Anthony Thompson, *What Happens Behind Locked Doors: The Difficulty of Addressing and Eliminating Rape in Prison*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 119, 165 (Winter 2009).

41. *Id.* at 120.

42. *Id.* at 119.

stress disorder and depression, or find that the presence of a mental illness has worsened.⁴³ The fear of, and actually contracting HIV/AIDS and other sexually transmitted diseases from a prison rape is another burden that victims of prison rape must face.⁴⁴

For many victims, the emotional pain is worse than the physical.⁴⁵ When he was seventeen, T. J. Parsell, non-transgender male, was convicted of robbing a convenience store with a toy gun, and was sentenced to prison for a term of four to fifteen years.⁴⁶ On his first night, an inmate spiked his drink with Thorazine and raped him.⁴⁷ At a hearing in front of the National Prison Rape Elimination Commission, Mr. Parsell testified that what he experienced went beyond sex: "They'd stolen my manhood, my identity, and part of my soul."⁴⁸ When he was released from prison five years later, Mr. Parsell became a drug addict to "drown out the memories and pain."⁴⁹ Similarly, Congress found that because "[v]ictims of prison rape suffer severe physical and psychological effects that hinder their ability to integrate into the community and maintain stable employment . . . [t]hey are thus more likely to become homeless and/or require government assistance."⁵⁰

During the California energy crisis of 2001, California Attorney General Bill Lockyer made headlines when he stated during a press conference that he would like to "escort [Enron CEO Kenneth Lay] to an 8-by-10 cell that he could share with a tattooed dude who says, 'Hi, my name is Spike, honey.'"⁵¹ Although intended to be a jab at white-collar criminals who often escape punishment for their crimes, it was perceived as an endorsement of prison rape as part of the penalty criminals pay.⁵² This lack of reaction to and implicit acceptance of prison rape is caused partly by the myth of the "unsympathetic victim."⁵³ Many members of society believe that

43. Ellenbogen, *supra* note 39, at 338.

44. *Id.* at 339; see NAT'L PRISON RAPE ELIMINATION COMM'N, NATIONAL PRISON RAPE ELIMINATION REPORT 129 (June 2009), available at <http://www.ncjrs.gov/pdffiles1/226680.pdf>.

45. Carolyn Marshall, *Panel on Prison Rape Hears Victims' Chilling Accounts*, N.Y. TIMES, Aug. 20, 2005, available at <http://www.nytimes.com/2005/08/20/politics/20rape.html>.

46. *Id.*; Jennifer Farbar, *Review, Fish: A Memoir of a Boy in a Man's Prison*, THE EAST HAMPTON STAR, Feb. 13, 2007, available at <http://www.easthamptonstar.com/DNN/Default.aspx?tabid=1291>.

47. Marshall, *supra* note 45.

48. *Id.*

49. *Id.*

50. 42 U.S.C. § 15601(11).

51. Op-Ed, Tom G. Palmer, *Shame on Lockyer*, L.A. TIMES, June 6, 2001, available at http://www.cato.org/pub_display.php?pub_id=6884.

52. *Id.*

53. Thompson, *supra* note 40 at 134.

abuse in prison is simply the price that criminals pay for breaking the law.⁵⁴ In *What Happens Behind Locked Doors: The Difficulty of Addressing and Eliminating Rape in Prison*, Anthony Thompson suggests that the acceptance of prison rape stems from society's notions of deterrent and retributive punishment.⁵⁵ If prison poses threats and dangers and is therefore undesirable, individuals will more likely conform to social norms in order to avoid going to prison.⁵⁶ Similarly, the lack of sympathy toward victims of sexual abuse in prison is consistent with this notion of just deserts.⁵⁷ Victims are merely being punished for their crimes to society, and whatever happens in prison is simply a part of that punishment.⁵⁸ Further, these victims' lack of visibility may make it easier for society to turn a blind eye: if you don't see it, it doesn't exist.

III. Experiences of Transgender Inmates in Prison

As if sexual assault victims in prison weren't marginalized enough, the transgender inmate population faces even more harassment and experiences even more fear than the general inmate population.⁵⁹ The severity and prevalence of sexual assaults on transgender prisoners is empirically supported by two surveys conducted by researchers at the University of California, Irvine. *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* studied the inmate population in general, the transgender inmate population, and English and Spanish speaking inmates.⁶⁰ The study found that fifty-nine percent of transgender inmates reported experiencing sexual assault, and forty-eight percent reported engaging in sexual conduct that they would not define as against their will, but they would rather not have done.⁶¹ This was compared to 4.4 percent of the general inmate population reporting experiencing sexual assault, and 1.3 percent of inmates who reported sexual conduct that they would rather not have done.⁶²

This astounding disparity between the transgender and general inmate populations is consistent with the numerous stories of

54. *Id.*

55. Thompson, *supra* note 40 at 135.

56. *Id.*

57. *Id.*

58. *Id.*

59. See Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 525 (2009).

60. Jenna et. al., *supra* note 12 at 14.

61. *Id.* at 30.

62. *Id.*

transgender prisoners in California getting abused, while prison officials look the other way. Male-to-female transgender inmates have even reported molestation in the California Medical Facility, a prison hospital known for its treatment of transgender prisoners.⁶³ CMF employs sympathetic staffers and doctors who do their best to get hormones to inmates who request them.⁶⁴ However, it is clear that even in this comparatively enlightened prison, transgender inmates are still at risk for abuse. One transgender inmate in a California prison said “rapes occur with frequency.” She added “and we’ve learned to keep our big mouths shut because what happens is we are victimized again. We’re called liars; people say, ‘You enticed them, you didn’t have your bra on, you were dressed in an overly feminine condition. You asked for it.’”⁶⁵ In San Quentin State Prison, an official warned a transgender prisoner that she would almost certainly be a victim of sexual violence, and that officials are incapable of doing anything about it.⁶⁶

Further compounding the problem of sexual abuse and rape is the fact that transgender prisoners often do not receive adequate health care. In *Estelle v. Gamble*, the Supreme Court held that a prison official’s deliberate indifference to a prisoner’s serious illness or injury constitutes cruel and unusual punishment in violation of the “cruel and unusual punishment” clause of the Eighth Amendment of the Constitution,⁶⁷ yet transgender inmates still face impediments in receiving treatment for sexual abuse.⁶⁸ Healthcare in corrections facilities is grossly underfunded, and many inmates with serious medical issues have never been seen by a medical professional in prison.⁶⁹ In addition, by interviewing physicians at California prison health clinics, researchers found that most health care professionals have had almost no exposure to transgender people, which leads to lack of proper knowledge, training and experience of how to effectively treat transgender inmates.⁷⁰ They also found that while 1.6 percent of inmates in the United States are HIV positive, an astounding sixty percent to eighty percent of

63. Tali Woodward, *Life In Hell: In California Prisons, an Unconventional Gender Identity Can Be Like an Added Sentence*, S.F. BAY GUARDIAN, March 21, 2006, available at http://www.sfbg.com/40/24/cover_life.html.

64. *Supra* note 63.

65. *Id.*

66. Alex Coolman, Lamar Glover & Kara Gotsch, *Stop Prisoner Rape & ACLU National Prison Project, Still in Danger: The Ongoing Threat of Sexual Violence Against Transgender Prisoners* 5 (June 2009), <http://www.justdetention.org/pdf/stillindanger.pdf>.

67. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

68. NAT’L PRISON RAPE ELIMINATION COMM’N, *supra* note 44, at 15.

69. *Id.* at 15-16.

70. SEXTON ET. AL., *supra* note 10, at 16.

transgender inmates in California prisons are HIV positive.⁷¹ The stark contrast of sexual abuse and healthcare as compared to the general inmate population reflect the prevalent mistreatment of transgender inmates.⁷²

IV. Classification, Housing and Segregation

The path to sexual abuse of transgender inmates begins even before they arrive at the prison. First, they are classified by gender and assigned to a prison, primarily based on their birth gender or present genital status.⁷³ The view that gender is assigned at birth, and will remain that way, is still dominant in society, and the prison system provides no exception.⁷⁴ Dean Spade of the Seattle University School of Law, founder of the Sylvia Rivera Law Project, argues that there is a myth that transgender people do not exist.⁷⁵ Spade explains that by placing people in sex-segregated facilities based on birth-assigned gender, the prison system “refuses recognition of transgender existence by insisting that birth-assigned gender is the only relevant criteria for placement.”⁷⁶ No account is taken of gender identity, which in itself is a denial of rights to transgender inmates.⁷⁷ California prisons, however, base gender classification on present genital status.⁷⁸ Therefore, if a transgender individual has had genital surgery (often referred to as a “transsexual”), it is possible that she could be placed in a women’s prison.⁷⁹ However, this is problematic as well as most transgender people, let alone ones that end up in prison, are impoverished and do not have or have had the means to pay for such an operation and maintenance.⁸⁰

Once transgender individuals arrive at a male prison, the path to sexual abuse continues.⁸¹ Prison administrators sort inmates into housing assignments in an attempt to reduce escapes and minimize

71. *Id.*

72. *Id.* at 27.

73. Richael Faithful, *Transitioning Our Prisons Toward Affirmative Law: Examining the Impact of Gender Classification Policies on U.S. Transgender Prisoners*, 5 THE MODERN AM. 3, 5 (Spring 2009); see also Broadus, *supra* note 8, at 568.

74. *Id.*

75. Spade, *supra* note 2, at 36.

76. *Id.*

77. *Id.*

78. Don Thompson, *Bill Addresses Transgender Inmates in Calif.*, SAN JOSE MERCURY NEWS (Apr. 29, 2009) (“[t]he department’s policy is to classify inmates based on their physical gender, regardless of how they identify themselves”).

79. Faithful, *supra* note 73, at 5.

80. *Id.* at 5-6.

81. See Broadus, *supra* note 8, at 568.

dangers, many times using a scoring system to place inmates based upon a variety of factors.⁸² Classification of inmates may be subject to officers' prejudice against certain inmates or a general class of inmates, including convicted sex offenders, homosexuals, or transgender individuals.⁸³ Because transgender inmates are disproportionately more likely to be sexually assaulted by fellow inmates than the general population, the housing process is an extremely significant factor that figures into the likelihood that sexual abuse will occur.⁸⁴ There has even been a documented incident where an official has deliberately placed a transgender inmate in a cell with a convicted sex offender, with the intent that she would be raped.⁸⁵ In one particular incident, the assaults continued for more than twenty-four hours, and the victim's injuries were so severe that she had to be hospitalized.⁸⁶

In California, prisons are required to take into account the following factors when classifying prisoners for housing assignments: (1) age; (2) violent offender status; (3) repeat offender status; and (4) mental illness.⁸⁷ The primary purpose of these factors, however, seem to be aimed at reducing the risks of aggressors perpetrating sexual abuse and not for alleviating the risk of victimization. In other words, California prisons take a reactive, rather than proactive, approach to protecting inmates from sexual abuse. Housing is largely up to the discretion of prison officials, and they are not required by statute to consider any other factors besides the four above.⁸⁸ Because prison officials have so much discretion, individual prejudices and biases often invade decisions about housing, which leads to greater instances of sexual assault of transgender inmates. The CDCR does take into account "documentation that the inmate has been the victim of a sexual assault," but considering that most victims of sexual assault are afraid to report it for fear of retaliation or more violence from other inmates. This leads to a disproportionate number of sexual assaults on the transgender inmate population as detailed above. However,

82. *Id.*

83. See NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 44, at 56.

84. See Jenness et. al., *supra* note 12, at 30.

85. NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 44, at 73.

86. *Id.*

87. CAL. PENAL CODE § 2636(a)(1)-(4).

88. *Id.* ("The Department of Corrections and Rehabilitation inmate classification and housing assignment procedures shall take into account risk factors that can lead to inmates . . . becoming the target of sexual victimization or of being sexually aggressive toward others. Relevant considerations include: (1) age of the inmate or ward, (2) whether the offender is a violent or nonviolent offender, (3) whether the inmate or ward has served a prior term of commitment, (4) whether the inmate or ward has a history of mental illness.").

the CDCR urges that its housing policies are “gender-neutral”: an official with the CDCR stated that it “tr[ies] to address the individual’s specific needs, as opposed to having a policy for a group or a class of people. [CDCR] really [doesn’t] distinguish between transgender and non-transgender inmates.”⁸⁹ This view effectively ignores the higher risk of sexual assault transgender inmates face by virtue of being transgender, and therefore ignores their unique vulnerability to sexual assault by non-transgender inmates.⁹⁰

Segregation, a popular attempted solution to prevent assaults on transgender inmates, has been proven to be ineffective and in some ways even more harmful to the transgender inmate population. Many prisons use segregation as a rudimentary stop-gap for sexual abuse of transgender inmates, based on the reasoning that if the person “causing the problem” – the victim – by inciting sexual violence from other inmates, is out of the picture, the problem will disappear.⁹¹ This concept of double victimization, championed as the “solution” of protective segregation, which is often involuntary, has been criticized by scholars and attorneys.⁹² The stated purpose of administrative segregation is to confine inmates that pose a danger to themselves or others; by placing transgender inmates, who are also victims, into segregation, the prison sends a signal that the person’s gender identity itself threatens the safety within the institution.⁹³ When transgender victims are placed in administrative segregation, they have only minimal interaction with people, no access to jobs or treatment programs, and their privileges, such as phone access, are greatly reduced.⁹⁴ In *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, Gabriel Arkles passionately argues that the segregation of transgender inmates is actually counter-productive by causing further violence and unrest.⁹⁵ By isolating victims of sexual abuse in “protective custody,” prison officials deter other victims of violence from reporting incidents, and are punishing the victims, rather than the perpetrators.⁹⁶ Further, when they are released into the general

89. Meghann Myers, *Sentenced to Rape: LGBT Inmates Face Unusually High Risk of Sexual Assault in Prison*, S.F. BAY GUARDIAN (Dec. 23, 2008), available at <http://www.sfbg.com/2008/12/24/sentenced-rape?page=0,0>.

90. See *supra* note 89.

91. See Arkles, *supra* note 59, at 545.

92. *Id.*; Daley, *supra* note 1, at 4-6.

93. Daley, *supra* note 1, at 6.

94. *Id.*

95. See Arkles, *supra* note 59, at 537.

96. *Id.* at 545.

population, transgender inmates may be labeled as victims, drawing even more attention to them and more likely making them a target for future violence.⁹⁷

Transgender inmates disproportionately end up in administrative segregation, for either protective or punitive reasons, because they are disproportionately victims of sexual assault.⁹⁸ Often, transgender inmates end up in segregation as punishment for such indiscretions as possessing a bra or make-up because they are assumed to have had sexual contact with other prisoners, or simply because of their sexual preference or feminine appearance.⁹⁹ According to Arkles, sometimes it is “for their own good” after an incident of sexual assault, to remove them from the situation.¹⁰⁰ Some prisons even employ a policy that any victim must be placed in involuntary segregation, which may increase violence down the road.¹⁰¹

V. Statutory Responses to Sexual Abuse in Prison

The lack of legal remedies afforded to transgender victims of sexual assault in prison prompted Congress and state legislatures to enact legislation designed to prevent and provide remedies for victims. Although these statutes have failed to adequately protect transgender victims, the National Prison Rape Elimination Commission has published standards which, if enacted, may prove to be more effective.

A. Federal Prison Rape Elimination Act

In 2003, Congress enacted the Prison Rape Elimination Act (“PREA”).¹⁰² PREA established the Prison Rape Elimination Commission, which must hold public hearings and submit its findings to Congress.¹⁰³ It also requires the Bureau of Justice Statistics to collect, review, and analyze incidents of prison rape and its effects, as well the characteristics of victims and their perpetrators and submit its findings to Congress.¹⁰⁴ According to Congress, the purposes of the PREA include establishing a “zero-tolerance standard” for prison rape, preventing prison rape,

97. *Id.* at 541.

98. *Id.* at 544-45.

99. *Supra* note 95 at, 545.

100. *Id.* at 544.

101. *Id.* at 545.

102. 42 U.S.C. § 15602 (2006).

103. § 15606.

104. § 15603(a).

“develop[ing] and implement[ing] national standards for the detection, prevention, reduction, and punishment of prison rape,” and increasing the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape.¹⁰⁵

B. California’s Sexual Abuse in Detention Elimination Act

As a response to PREA, California enacted the Sexual Abuse in Detention Elimination Act (“SADEA”) in 2005.¹⁰⁶ In order to prevent the incidents of sexual violence and promote inmate safety, SADEA requires the California Department of Corrections and Rehabilitation (“CDCR”) to establish policies and procedures to address the sexual abuse of inmates.¹⁰⁷ Such policies and procedures include taking into account certain risk factors during inmate classification and housing assignments, such as age, violent offender status, repeat offender status, and history of mental illness.¹⁰⁸ It also provides protection for any inmate that alleges he has been a victim of sexual abuse from retaliation, and requires that prison officials investigate the claim, and provide safe housing to inmates who have experienced repeated abuse.¹⁰⁹ Additionally, staff may not discriminate in their response to inmates who are gay, bisexual, or transgender who experience sexual aggression, or report that they have experienced sexual abuse.¹¹⁰

C. Effectiveness of PREA and SADEA

In spite of the admirable goals of PREA and SADEA, these statutes have failed to effectively protect transgender prisoners. Critics of PREA allege that since its main focus is on collecting data, its goal of preventing and eliminating prison rape will be difficult to achieve because of the serious problem of underreporting.¹¹¹ For transgender prisoners in particular, the 2007 study revealed that transgender inmates continue to be disproportionately victims of sexual assault, even though PREA and SADEA had been in effect for four years and two years, respectively.¹¹² The lack of empirical

105. § 15602.

106. CAL. PENAL CODE §§ 2635-2642 (2006).

107. Heather L. McCray, *Protecting Human Rights in California’s Detention Facilities: The Sexual Abuse in Detention Elimination Act of 2005*, 37 MCGEORGE L. REV. 303, 308 (2006); CAL. PENAL CODE §§ 2636; CAL. PENAL CODE §§ 2627 (2006).

108. CAL. PENAL CODE § 2636(a).

109. § 2637(a).

110. § 2637(e).

111. Ellenbogen, *supra* note 39, at 350.

112. Jenness, et. al., *supra* note 12, at 30.

social science research devoted to the transgender population in prisons, compounded by the problem of underreporting, makes it difficult to accurately quantify the effects of the statutes.¹¹³

SADEA, although more specific and detailed in its guidelines, has also fallen short in protecting transgender inmates from sexual assault. Unlike PREA, SADEA provides that staff shall not discriminate in their response to inmates who are gay, bisexual or transgender who experience abuse, but it does not specifically provide any other prevention or remedial scheme for the vulnerable transgender population.¹¹⁴ Also, despite its enactment, the prevalence of transgender inmate sexual abuse in California prisons remains astonishingly disproportionate to the general inmate population.¹¹⁵

D. National Prison Rape Elimination Commission Standards

In June of 2009, the Prison Rape Elimination Commission ("Commission") released its national report and accompanying standards as required by PREA, which the Attorney General must implement within one year of its submission.¹¹⁶ Once enacted, the standards would subject all prisons in the U.S. to the regulations. Attorney General Eric Holder missed the deadline to submit final standards, and suffered a storm of criticism by prisoners' rights, civil rights, and religious organizations, all urging Mr. Holder to act more quickly in implementing the standards.¹¹⁷

The Commission found that leadership in corrections administration must create an environment that promotes safety, rather than one which tolerates abuse. The Commission also specifically found that certain inmate populations are more vulnerable to sexual abuse, including youth, the mentally ill, homosexuals, and transgender inmates.¹¹⁸ The report acknowledges the "rigid cultures" of masculinity present in men's prisons, and recognizes that male-to-female transgender inmates are particularly at risk.¹¹⁹ In response, "[c]orrections administrators must routinely

113. Sexton, et. al., *supra* note 10, at 4.

114. CAL. PENAL CODE § 2637(e).

115. See Jenness, et. al., *supra* note 12, at 836; Sexton, et. al., *supra* note 10, at 4.

116. See NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 44, at 23.

117. Letter from Eric Holder, United States Attorney General, to Representatives Wolf & Scott (June 22, 2010), <http://big.assets.huffingtonpost.com/PREAletter.pdf>; see also Dan Froomkin, DOJ Foot-Dragging on Prison Rape, Unites Left-Right Coalition (Aug. 17, 2010), http://www.huffingtonpost.com/2010/08/17/doj-footdragging-on-priso_n_685165.html.

118. NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 44, at 7.

119. *Id.* at 73.

do more to identify those who are vulnerable and protect them in ways that do not leave them isolated and without access to rehabilitative programming.”¹²⁰ Further, administrators will be sanctioned, and may even be fired, for deviating from the standards.¹²¹ By holding prison officials responsible for failing to abide by these clear rules, the Commission signals an effort to increase the ability of victims to receive remedies for the violation of their statutory rights by corrections administrators.

In light of the Commission’s finding that certain populations are at more risk than others, it encourages corrections administrators to reconstruct their screening and classification requirements to better assess the risks of inmates of vulnerable populations.¹²² Specifically, the standard for screening for Risk of Sexual Victimization and Abusiveness (“SC”), or Standard SC-1, requires prison officials to screen incoming inmates for a risk of sexual victimization.¹²³ Criteria to consider include mental or physical disability, young age, slight build, first incarceration in prison or jail, nonviolent history, prior convictions for sex offenses against an adult or child, sexual orientation of gay or bisexual, gender nonconformance (e.g., transgender or intersex identity), prior sexual victimization, and the inmate’s own perception of vulnerability.¹²⁴ These factors should “inform housing, bed, work, education, and program assignments with the goal of keeping separate those inmates at high risk of being sexually victimized from those at high risk of being sexually abusive,” while making individual determinations of each inmate’s safety.¹²⁵ Also, the standard for Medical and Mental Health Care, or Standard MM-1, requires prison officials to ask inmates about prior sexual victimization and abusiveness during medical and mental health reception and intake screenings.¹²⁶ If they reveal a history of sexual victimization, the official must provide an appropriate referral for treatment, and may be used to inform decisions on housing, bed, work, or education assignments.¹²⁷

In a surprising turn, the Commission also suggests that male-to-female transgender inmates may even be able to be housed in female prisons, citing to “individualized determinations based on

120. *Id.* at 7.

121. *Id.* at 223.

122. *Id.* at 217.

123. *Id.*

124. NAT’L PRISON RAPE ELIMINATION COMM’N, *supra* note 44, at 7.

125. *Id.*

126. NAT’L PRISON RAPE ELIMINATION COMM’N, *supra* note 44, at 218.

127. *Id.* at 219.

other factors in addition to the person's current genital status."¹²⁸ Although it is merely one sentence in a 276-page report and not a part of an official standard, the Commission has identified the value of assessing risks to specific individual inmates, and has taken a step toward equating the rights and safety of transgender inmates to those of the general inmate population.

VI. Deliberate Indifference and the Duty to Protect

In addition to statutes providing for the oversight and institutional requirements to protect transgender inmates, inmates also have the option of bringing a cause of action against the prison or an official for failing to protect them.¹²⁹ However, these remedies have also proven ineffective for transgender prisoners because of the extreme difficulty in meeting the evidentiary bar a plaintiff must overcome to meet her burden of proof and prevail.¹³⁰

A. Eighth Amendment: Deliberate Indifference

In the 1994 U.S. Supreme Court case of *Farmer v. Brennan*, a male-to-female transgender inmate, within two weeks of being transferred to an Indiana prison, was beaten and raped by another inmate.¹³¹ She filed a *Bivens* complaint,¹³² alleging that prison officials had violated her constitutional rights by placing her in general population despite knowledge that the prison had a violent environment and history of inmate assaults, and despite knowledge that Farmer was particularly vulnerable to sexual attack due to her feminine characteristics.¹³³ The Court recognized that "gratuitously" allowing the beating or rape of a prisoner is not part of the penalty

128. *Id.* at 74.

129. See *Farmer v. Brennan*, 511 U.S. 825, 837 (1970); *Giraldo v. Cal. Dep't of Corr. & Rehab.*, 168 Cal. App. 4th 231 (1st Dist. 2008).

130. Congress limited the relief federal courts could grant to inmates in 1996. The Prisoner Litigation Reform Act provides that a court "shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." The Act also requires that the inmate plaintiff exhaust his or her administrative remedies by pursuing whatever internal grievance procedure the prison provides. 18 U.S.C. § 3626(a)(1); 42 U.S.C. § 1997e(a).

131. *Farmer*, 511 U.S. at 830; see SEXTON, JENNESS, & SUMNER, *supra* note 10, at 836.

132. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 392 (1971). (holding that an individual whose constitutional rights were violated through the unlawful actions of federal agents has a cause of action for monetary damages "[a]nd where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief").

133. *Farmer*, 511 U.S. 825 at 830-31.

that criminals pay for their offenses, but held that prison officials are not held liable under the Eighth Amendment's "cruel and unusual punishment" clause unless they were found to be subjectively "deliberately indifferent" to the inmate's safety, meaning that officials actually knew of and disregarded an excessive risk to inmate health or safety.¹³⁴

For example, in the 2009 *Doe v. Yates* case, a federal court in California denied a prison's motion to dismiss a complaint from an unnamed transgender inmate, holding that she stated a cognizable claim under the Eighth Amendment.¹³⁵ In her complaint, the plaintiff alleged that she informed the defendant correctional officers of a serious threat to her safety by being housed with male aggressors.¹³⁶ She alleged that the officers ignored her concerns and threatened her with disciplinary action if she refused to be housed with the aggressors.¹³⁷ After she was raped by her cellmates, the plaintiff went through the prison's grievance process and wrote a letter to an officer describing the attack.¹³⁸ Yet, she claimed, the officers continued to force her to stay in the same cell, despite their knowledge of the rape.¹³⁹ Because she alleged that corrections officers knew of the sexual assaults, ignored her concerns, and even threatened her with disciplinary action if she did not comply with her housing assignment, the court concluded that the plaintiff stated a cognizable claim under *Farmer's* "deliberate indifference" standard.¹⁴⁰

However, this subjective "deliberate indifference" standard has been criticized by many scholars as placing too heavy a burden on the plaintiff.¹⁴¹ Because this standard requires that prison officials have actual knowledge of the risk to the inmate, officials can escape liability by turning a blind eye towards potential harm.¹⁴² Indeed, in the case described above, the plaintiff has only crossed the first hurdle of litigation. Just because her complaint was not dismissed does not mean that she will ultimately prevail. The facts surrounding plaintiffs were unusual as well, as she documented her attacks, continually informed officers, and used the prison's grievance process.

134. *Id.* at 837.

135. *Doe v. Yates*, 2009 WL 3837261, *1, *10 (E.D. Cal. Nov. 16, 2009).

136. *Id.* at *2.

137. *Id.*

138. *Id.* at *2-3.

139. *Id.*

140. *Doe*, 2009 WL 3837261, at *4-5.

141. See Ellenbogen, *supra* note 39, at 348; McCray, *supra* note 107 at 206.

142. Ellenbogen, *supra* note 39, at 348.

B. California's Duty to Protect

In California, the end of the struggle to free all inmates from sexual assault by other inmates depends on the duty owed to them by the prison officials. A 2001 *New York Times* article covering a civil case, based on law that was later abrogated, of a prison rape tells the story of Eddie Dillard, a 120-pound inmate of Corcoran State Prison in California.¹⁴³ Dillard filed his complaint, first in criminal court then in civil court, alleging that prison guards, angry at Dillard for kicking another guard, deliberately transferred him to a cell with Wayne Robertson, a "230-pound sexual predator."¹⁴⁴ At trial, Robertson testified that he sodomized Dillard "all night long."¹⁴⁵ Robertson also testified that the guards agreed to his request to be housed with Dillard so Robertson could show Dillard "how to do his time," and that the guards put Dillard in the cell "for something to happen to him."¹⁴⁶ The four guards were acquitted in the criminal trial.¹⁴⁷ In 2003, a jury found that the prison guards were not civilly responsible for Dillard's rape.¹⁴⁸

Dillard may have received justice if his case had been heard in a California state court after November of 2008. That month, the Court of Appeals for the First District held that a special relationship exists between a jailer and prisoner, which imposes on the jailer a duty of care to the prisoner.¹⁴⁹ In *Giraldo v. California Department of Corrections and Rehabilitation*, Giraldo, a male-to-female transgender inmate, was assigned to Folsom State Prison.¹⁵⁰ Within a week of her assignment, another inmate who was employed as a lieutenant's clerk requested that Giraldo be his cellmate.¹⁵¹ The lieutenant granted the inmate's request, and almost immediately afterwards, Giraldo's new cellmate "sexually harassed, assaulted, raped, and threatened" her on a daily basis.¹⁵² About a month later, the lieutenant granted another request by a friend of Giraldo's rapist

143. See Tamar Lewin, *Little Sympathy or Remedy for Inmates Who Are Raped*, N.Y. TIMES, Apr. 15, 2001, available at <http://www.nytimes.com/2001/04/15/us/little-sympathy-or-remedy-for-inmates-who-are-raped.html?pagewanted=1>.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. Brian Skoloff, *Jury Finds Rape Not Prison Workers' Fault*, THE ASSOCIATED PRESS, October 21, 2003, available at <http://spr.igc.org/en/news/2003/1021.html>.

149. Giraldo, 168 Cal. App. 4th at 250.

150. *Id.* at 238.

151. *Id.* at 238-39.

152. *Id.* at 239.

that she be transferred to his cell.¹⁵³ Not surprisingly, the new cellmate also beat and raped her daily.¹⁵⁴ Giraldo reported the abuse to corrections officers numerous times, but each time they ignored her complaints and ordered her back to her cell.¹⁵⁵ It was not until months later, when she was raped and attacked with a knife, that Giraldo was placed in segregated housing.¹⁵⁶

In her complaint, Giraldo alleged that she continued to suffer emotional distress that caused severe depression and anxiety, and would need professional mental health treatment for the rest of her life as a result of the abuse she suffered.¹⁵⁷ The court held that because the relationship between jailer and prisoner is “special,” a jailer or warden has a duty to exercise reasonable care to protect a prisoner from foreseeable harm by a third party.¹⁵⁸ The court reasoned that it is “manifestly foreseeable” that a particular inmate may be at risk of harm, and the “special relationship” underscores the vulnerability and dependence of prisoners.¹⁵⁹ The court cited both the PREA and SADEA as support for its finding, restating their “zero-tolerance policy for . . . prison rape” and the practices to be instituted by the CDCR concerning the prevention of, and response to, sexual abuse in California prisons.¹⁶⁰

Giraldo demonstrates California’s recognition of the duty of care owed to prisoners by prison officials. This is especially significant for transgender inmates, because prison officials often claim that reported incidents of rape were actually consensual, based on the fact that the victim was considered weak and not strong enough to repel the attack.¹⁶¹ With any incidence of prison rape, there is always a possibility that officials will simply turn away and pretend like nothing is happening.¹⁶² With transgender rape victims, officials may turn away with more frequency, motivated by their bias and prejudice against transgender people.¹⁶³ Even more disturbing are instances in which officials use rape to reduce other forms of violence, in order to “keep the peace” among some inmates.¹⁶⁴ As seen in *Giraldo*, transgender inmates are particularly

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 245-46.

159. *Id.* at 250.

160. *Id.*

161. Ellenbogen, *supra* note 39, at 341; see NAT’L PRISON RAPE ELIMINATION COMM’N, *supra* note 43, at 73.

162. Ellenbogen, *supra* note 39, at 341.

163. See Arkles, *supra* note 59, at 526.

164. Thompson, *supra* note 40, at 133.

vulnerable to sexual violence and face greater risks due to their feminine nature or sexual preference, and are therefore more susceptible to prison officials' negligence or reckless or intentional disregard for their safety.¹⁶⁵

VII. Solution

A severe problem exists in the California prison system: California prisons do not adequately protect transgender inmates from sexual abuse. By aligning its views and principles with those supporting FEHA's protection for transgender employees against unlawful discrimination, the CDCR could decrease sexual violence perpetrated against transgender inmates, and reduce their liability for violating a duty of care. Even though prisoners do not possess the same rights as non-incarcerated members of society,¹⁶⁶ there exists the universal right to be free from unwelcome sexual advances and violence.¹⁶⁷ "Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society,'" and "serves no 'legitimate penological objective.'"¹⁶⁸

In February of 2009, California Assemblyman Tom Ammiano introduced the Lesbian, Gay, Bisexual, and Transgender ("LGBT") Prisoner Safety Reform Act ("A.B. 382").¹⁶⁹ The bill proposed to amend section 2636 of SADEA to add "[s]elf-reported safety concerns related to the sexual orientation and gender identity of the inmate or ward" to the list of risk factors to be taken into account by prison officials when classifying and housing inmates, along with the other enumerated factors.¹⁷⁰ The bill passed easily through both the Assembly and Senate.¹⁷¹ However, when presented to Governor

165. Dean Spade, *Keynote Address: Trans Law & Politics on a Neoliberal Landscape*, 18 TEMP. POL. & CIV. RTS. L. REV. 353, 358 (Spring 2009).

166. See AMERICAN CIVIL LIBERTIES UNION, KNOW YOUR RIGHTS: THE PRISON LITIGATION REFORM ACT (PLRA), available at http://www.aclu.org/files/assets/Know_Your_Rights_PLRA_-_UPDATED.pdf (2007).

167. See *Farmer*, 511 U.S. at 832 ("The Constitution does not mandate comfortable prisons but neither does it permit inhumane ones.").

168. *Id.* at 834 (internal quotation marks and citations omitted).

169. Equality California, Press Release: Ammiano Introduces LGBT Prisoner Safety Act in California Assembly (Feb 23, 2009), available at <http://www.eqca.org/site/apps/nlnet/content2.aspx?c=kuLRJ9MRKrH&b=4869041&ct=6778361>.

170. A.B. 382, 2009 Assem. Sess. (Cal. 2009), available at http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0351-0400/ab_382_bill_20090911_enrolled.pdf.

171. Equality California, Press Release: LGBT Prisoner Safety Act Passes Assembly with Bipartisan Support (May 11, 2009), available at <http://www.eqca.org/site/apps/nlnet/content2.aspx?c=kuLRJ9MRKrH&b=4869041&ct=6992145>; Equality California, Press Release: Prisoner Safety Act Passes California Senate (Sep. 3, 2009), available at <http://www.eqca.org/site/apps/nlnet/content2.aspx?c=kuLRJ9MRKrH&b=4869041&ct=7456297>.

Schwarzenegger, the bill was vetoed.¹⁷² In his veto message, the governor reasoned that because CDCR already considers factors of sexual orientation and gender identity in housing and classifying inmates, the proposed amendment to the SADEA was “unnecessary.”¹⁷³

Upon introducing A.B. 382, and in arguing that the bill is indeed necessary, Assemblyman Ammiano stated: “All people deserve basic protections — including those serving time in our state prisons. No prisoner should fear for his or her life or be the target of abuse because of his or her sexual orientation or gender identity.”¹⁷⁴ The bill states that the legislature has found and declares that inmates may be at a heightened risk of sexual violence of abuse based on certain factors, including being lesbian, gay, bisexual or transgender.¹⁷⁵ Further, according to the bill, it is the intent of the legislature to ensure that the CDCR recognizes that inmates may be at an increased risk based on these factors, and that the CDCR provides vulnerable inmates with heightened protection in classification and housing decisions.¹⁷⁶ The CDCR should institute such protective measures without automatically subjecting them to restrictive or isolated settings or denying them access to programs and services, which is a consequence of being placed in administrative segregation.¹⁷⁷

According to the bill, SADEA requires the CDCR to classify inmates in order to prevent inmate sexual violence and to promote inmate safety.¹⁷⁸ Existing law also requires the CDCR to consider specified risk factors when classifying the inmate.¹⁷⁹ By adding sexual orientation and gender identity among the factors to be considered, prison officials would be *required* to take such factors into account — legally preempting officers’ discretion, which has for too long been abused to the detriment of transgender inmates.¹⁸⁰ In doing so, officials would not be able to turn a blind eye or ear to safety concerns voiced by transgender inmates without risking liability under SADEA. This would also decrease the incidents of, and hold prison guards liable for, purposely placing a sexually

172. See Gov. Arnold Schwarzenegger, Veto Message (Oct. 11, 2009), *available at* http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0351-0400/ab_382_vt_20091011.html.

173. *Id.*

174. Equality California, *supra* note 158.

175. A.B. 382, *available at* http://leginfo.ca.gov/pub/09-10/bill/asm/ab_0351-0400/ab_382_bill_20090911_enrolled.pdf.

176. *Id.*

177. A.B. 382, see *supra* note 175.

178. *Id.*

179. *Id.*

180. *Id.*

aggressive inmate in a cell with a transgender or otherwise vulnerable inmate as punishment for another offense.¹⁸¹

Following the governor's veto, Ammiano's office introduced A.B. 633 in February of 2009, which passed both houses, and was presented to the governor in September of 2010.¹⁸² A.B. 633 expanded the requirements placed on the CDCR that A.B. 382 imposed. A.B. 633 would require the CDCR to revise the risk factors for assessing inmates for risk of victimization or risk of being abusive, providing different factors based on whether the inmate is being assessed for risk of victimization or of abusive behavior, and based on whether the inmate or ward is in a facility for male or female inmates.¹⁸³ Sexual orientation and gender identity, then, would presumably be among the risk factors for inmates at risk of being victimized. A.B. 633 would have gone a step further than A.B. 382 to focus on the risks of *being* victimized, rather than the risks of an inmate as a perpetrator of victimization, taking a proactive, instead of reactive, response to separate the "predator" from the "prey." On October 11, 2010, however, Governor Schwarzenegger also vetoed A.B. 633.¹⁸⁴ The governor did not release a statement as to why he vetoed the bill, although it may be safe to assume that he believed it was "unnecessary" as well.¹⁸⁵

It is evident that such bills are not "unnecessary." While some prison officials may consider such risk factors when assigning housing, the fact remains that they are under no obligation to do so.¹⁸⁶ The little empirical evidence that does exist demonstrates that sexual violence against transgender inmates is rampant, growing, and disproportionately high when compared to the general male inmate population.¹⁸⁷ In addition, California prison officials have a duty of care owed to their inmates, and refusing to require them to consider risk factors of victimization when housing inmates allows them to evade liability while neglecting their requisite standard of care.¹⁸⁸

181. See Lewin, *supra* note 143.

182. A.B. 633 Ammiano, *available at* http://totalcapitol.com/?bill_id=200920100AB633.

183. *Id.*

184. *Id.*

185. See Schwarzenegger, *supra* note 172.

186. See CAL. PENAL CODE § 2636(a).

187. See Sexton et. al., *supra* note 10, at 4.

188. See Giraldo, *supra* note 129, at 250.

A. San Francisco County Jail System

The “predator-prey” distinction in prison housing, while not a novel idea, has not been widely accepted by prison systems. The San Francisco County Jail, however, does make such a distinction, and provides insight into how such a system would fair in the CDCR. In 2002, San Francisco promulgated the “Model Protocols on the Treatment of Transgender Persons by San Francisco County Jail,” which was written by the National Lawyers’ Guild and the San Francisco Human Rights Commission.¹⁸⁹ The Model Protocols require officials of the County Jail to “assess the transgender inmate for potential vulnerability in the general prison population” by asking each inmate their opinion on their own vulnerability.¹⁹⁰ If the official determines the transgender inmate to be vulnerable, she will be placed in a “vulnerable female unit” with other vulnerable populations, away from “predators.”¹⁹¹

The result of such an operation has been largely positive: as of April of 2010, San Francisco County Jails had only three reports of sexual assault in the previous two and a half years.¹⁹² Although this success is not based solely on San Francisco’s housing model, physically separating aggressors from victims is an effective way to prevent sexual violence, and even violence in general.¹⁹³ And because transgender individuals are visible targets for sexual assault, this system, as proposed by A.B. 633, would largely benefit them and possibly decrease incidents of violence throughout the institution.

Even though Governor Schwarzenegger vetoed both bills, it still remains to be seen what effects the national standards of the Commission will have on the CDCR and California prisons. Because the Commission now requires the fact of one’s gender identity to play a role in classifying inmates,¹⁹⁴ the new national

189. Murray D. Scheel & Claire Eustace, Model Protocols on the Treatment of Transgender Persons by San Francisco County Jail (2002), available at <http://www.transgenderlaw.org/resources/sfprisonguidelines.doc>; see also Ally Windsor Howell, *A Comparison of the Treatment of Transgender Persons in the Criminal Justice Systems of Ontario, Canada, New York, and California*, 28 BUFF. PUB. INT. L.J. 133, 174 (2010).

190. Scheel & Eustace, *supra* note 189, at 5.

191. *Id.*

192. Judy Muller, *Preventing Inmate Rape: San Francisco Cracking Down on Predators in Prisons*, ABC NEWS, April 18, 2010, available at <http://abcnews.go.com/WNT/story?id=131106&page=1>.

193. See CorrectionsOne Staff, *How Should Agencies Manage Transgender Offenders? An Interview with Jail Risk Management Consultant Donald L. Leach*, Jun. 15, 2010, available at <http://www.correctionsone.com/correctional-healthcare/articles/2082675-How-should-agencies-manage-transgender-offenders/>.

194. See NAT’L PRISON RAPE ELIMINATION COMM’N, *supra* note 44, at 74.

standards may have the same effect as A.B. 382 or A.B. 633, had either been passed into law.

Conclusion

California's reputation as a liberal and progressive state can be seen in no better place than through FEHA, which explicitly protects transgender employees against unlawful discrimination.¹⁹⁵ Yet, transgender employees continue to face unequal treatment, including termination from employment, not being allowed to use the appropriate restroom, or simply being called by the incorrect pronoun – all of which has been declared unlawful by FEHA.¹⁹⁶ While some aspects of transgender individuals' economic health have improved (in 2008, transgender respondents were twice as likely to hold a bachelor's degree as the general California population), an astonishing sixty-seven percent of respondents to a 2008 survey still reported having experienced workplace harassment or discrimination based on their gender identity.¹⁹⁷ Out of the seventy percent who experienced harassment and discrimination, only fifteen percent filed any type of complaint, and only thirty-one percent of the filed complaints were resolved favorably.¹⁹⁸ Yet, despite this grim outlook, the fact remains that California law has protected transgender employees since 2004. It is now up to employers, for purposes of their own legal and financial interests, to enforce internal nondiscrimination policies and provide gender sensitivity training to Human Resources and other employees.¹⁹⁹

The same cannot be said for the state of transgender inmates in California. While it is hopeful that recent findings and standards of the Commission will provide more protection for transgender inmates, the fact remains that transgender inmates are disproportionately more likely to experience sexual abuse than the general inmate population.²⁰⁰ Because of the marginalization of transgender individuals in society, many transgender people simply fall victim to California's prison pipeline, due to being economically forced to resort to illegal means to make a living.²⁰¹ The poor and the homeless are themselves *de facto* criminalized, as police routinely profile transgender and homeless populations, all leading

195. CAL. GOV'T CODE § 12926(p) (2005).

196. See Nat'l Center for Lesbian Rights & Transgender Law Center, *supra* note 4, at 22.

197. TRANSGENDER LAW CENTER, *supra* note 32, at 6, 9.

198. *Id.* at 10.

199. *Id.* at 11.

200. Jenness et. al., *supra* note 12 at 10.

201. See Spade, *supra* note 2, at 38.

to the heightened likelihood of imprisonment.²⁰²

Similarly, prejudice, misunderstanding, and fear of transgender individuals follows them from the streets into prison.²⁰³ Transgender inmates are targeted as sexual victims because of their feminine characteristics and their presumed sexual preference of males. They are considered weak and therefore become easy targets.²⁰⁴ Like any rape victims, transgender inmates suffer emotional and psychological trauma as a consequence of their assaults.²⁰⁵ Victims of prison rape, however, suffer trauma and mental setbacks on a different level than rape victims in society.²⁰⁶ In addition to depression, thoughts of suicide, and physical pain, victims of prison rape must face the possibility of infection of HIV/AIDS or a myriad of other sexually transmitted diseases.²⁰⁷ The problem is made worse by society's general lack of sympathy or even apathy toward prison rape victims, thus slowing the progress that should be made. Lack of sympathy for prison rape victims stems from societal notions that devalue prisoners. They have already been judged guilty, and whatever happens in prison is simply perceived as part of their punishment for the crimes they have committed.²⁰⁸

Congressional attempts to stem the flow of increasing sexual assaults on inmates are seen in the enactment of PREA, and on the state level, in SADEA. Both statutes recognize the severity of the problem, and the liability attached.²⁰⁹ However, in practice, both have proven ineffective in protecting the transgender population from sexual violence in prison.²¹⁰ Reports of sexual violence against transgender inmates has grown, leaving victims both physically and emotionally injured, and even more marginalized than before.²¹¹

Prisons have attempted to solve the problem of sexual abuse in prison most often by "removing the problem" — that is, removing the victim — from the situation by placing him or her in administrative segregation.²¹² This "solution," however, creates more problems than it solves.²¹³ By placing the transgender victim in "protective" custody, officials actually punish her by isolating her

202. Arkles, *supra* note 59, at 525-26.

203. *Id.*

204. *Id.* at 526-27.

205. Thompson, *supra* note 40, at 165.

206. Ellenbogen, *supra* note 39, at 338.

207. *Id.* at 338-39.

208. Thompson, *supra* note 40, at 135.

209. 42 U.S.C. § 15601 (2003); CAL. PENAL CODE § 2636 (2006).

210. See NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 44, at 73-74.

211. See Arkles, *supra* note, 59 at 546.

212. Thompson, *supra* note 40, at 171.

213. Spade, *supra* note 165, at 358.

from human contact, depriving her of privileges, and indirectly punishing her for her gender identity by sending a signal to the rest of the inmates.²¹⁴ This method has proven inadequate to address the need for protecting transgender inmates.

A more logical solution, then, would be to attack the problem where it begins — at classification and housing. By requiring prison officials to consider safety concerns based on the risk of victimization, and therefore sexual orientation or gender identity, the CDCR will be held liable for attacks on transgender inmates if they house such inmates without any regard for their concerns, and it will reduce sexual violence against transgender inmates.²¹⁵ Unfortunately, Governor Schwarzenegger incorrectly viewed such a requirement as “unnecessary” — a view that could not be further from the truth.²¹⁶ Allowing the CDCR to escape liability by not requiring it to consider sexual orientation and gender identity is a huge gap that must be filled for transgender inmates to be safe from vicious sexual attacks that leave lasting emotional scars. The national standards put forth by the Commission are a step toward filling that gap. Hopefully one day the rights of transgender inmates will no longer be seen as inferior within the California prison system.

214. See Broadus, *supra* note 8, at 568.

215. See Farmer, 511 U.S. 825 at 837; *Giraldo*, 168 Cal. App. 4th at 245-46.

216. See Arkles, *supra* note 59, at 544.

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