

THE IMPLICATIONS OF NEW YORK’S GENDER EXPRESSION NON-DISCRIMINATION ACT FOR TRANSGENDER HOUSING IN PRISONS

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INTRODUCTION

The following paragraphs contain descriptions of assault and sexual violence and may be triggering to those who are survivors of such violence. To avoid reading these descriptions, please skip to paragraph four of this Part, which can be found in the middle of page 104.

In 2012, Ashley Diamond (Ashley), a forty-two-year-old transgender woman, was taken into custody by the Georgia Department of Corrections (GDOC).¹ She was diagnosed with gender dysphoria at age fifteen and had been taking hormones since she was seventeen.² She had feminine hips, breasts, and had never had facial hair before her incarceration due to taking hormones from a young age.³ During her intake interview, Ashley told prison officials she was a trans woman and was afraid of being sexually assaulted while in a male facility.⁴ Despite her fears—and warnings from the prison’s own clinicians that she was at high risk for sexual victimization—GDOC ignored her pleas and housed her at a male facility.⁵

Less than a month after being incarcerated, Ashley was brutally gang-raped by six incarcerated men, who beat her until she was unconscious.⁶ Over the next three years, Ashley was sexually assaulted over ten times until she was finally released from prison in 2015.⁷ During this time, she repeatedly notified GDOC about the “sexual assaults and begged to be transferred to a safer facility.”⁸ She was told by GDOC employees that they could not protect her inside a men’s prison and that she should “guard her booty” and “be prepared to fight.”⁹ Because of these assaults, Ashley developed PTSD—including symptoms such as nightmares, panic attacks, and flashbacks—and severe depression,

¹ Complaint at 16, 18, *Diamond v. Ward*, No. 5:20-cv-00453, 2022 WL 3221224 (N.D. Ga. Nov. 23, 2020) [hereinafter *Complaint*].

² *Id.* at 17.

³ *Id.* at 17–18.

⁴ *Id.* at 18.

⁵ *Id.* at 18–19.

⁶ *Id.* at 19.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 19–20.

manifesting in self-harm and thoughts of suicide.¹⁰ In 2018, Ashley spent four months in county jail for a traffic ticket she received for a broken taillight and a trumped-up bribery charged that was later dismissed.¹¹ In 2019, she was arrested again for a technical parole violation for spending two weeks at a trans-inclusive drug treatment facility in Florida and for missing a court date, leading to Ashley's parole being revoked and to her being sent back to prison.¹² Despite knowing her history of sexual victimization, GDOC again placed Ashley in a series of men's prisons.¹³ Between 2019 and November of 2020, when her lawsuit against GDOC was filed, she had been sexually assaulted an additional fourteen times.¹⁴

While Ashley's story is shocking, it is certainly not uncommon. There are many other similar stories of trans women suffering abuse in prisons that have been publicized through advocacy, lawsuits, and the media.¹⁵ While Ashley's story has become widely known through her self-advocacy efforts, including videos she shot from prison about her

¹⁰ *Id.*

¹¹ *Ashley Diamond*, CTR. FOR CONST. RTS. (Sept. 15, 2022), <https://ccrjustice.org/ashley-diamond> [<https://perma.cc/652D-9ZC9>]. When Ashley was arrested, she reportedly told the officer that she "would do anything" not to go back to jail. *Id.* The officer interpreted this as an offer to perform sexual acts in exchange for not being arrested. *Id.* This charge was later dismissed. *Id.* Municipal fees punishing people for broken taillights have been criticized as an unfair practice that punishes people for being poor. Kirby Corley Swartz, *The Broken Taillight Theory: Striking a Balance Between Due Process Requirements and Budgetary Concerns in Texas Municipal Courts*, 57 HOUS. L. REV. 953, 955–57 (2020). Something that is simple and easy for a rich person to fix can, through spiraling fees, fines, and court appearances, destroy a poor person's life, as is demonstrated by Ashley's case. *Id.* at 957–58.

¹² *Ashley Diamond*, *supra* note 11. Ashley reportedly spent two weeks at a treatment facility in Florida because there was no trans-inclusive facility in the State of Georgia. *Id.* This violated her parole because she was forbidden to leave the state, although she did not attempt to flee or escape her parole. *Id.*

¹³ Complaint, *supra* note 1, at 24.

¹⁴ *Id.* at 25. For more on Ashley Diamond's story and activism, see the award-winning documentary WHERE JUSTICE ENDS (Buddha Dog Productions LLC 2019).

¹⁵ See, e.g., Joshua Zitser, *A Transgender Woman Was Forced to Share a Jail Cell with 3 Men, and One of Them Beat Her up So Badly It Broke Her Jaw, Lawsuit Says*, INSIDER (Nov. 14, 2021, 10:24 AM), <https://www.insider.com/trans-woman-forced-share-jail-cell-3-men-assaulted-lawsuit-2021-11> [<https://perma.cc/34DY-TV8V>] (describing a transgender woman in a San Diego County jail who was placed in a cell with three men, one of whom assaulted her while she slept); see also Tresa Baldas, *Transgender Female Inmate Sues MDOC: I Was Forced to Bunk with Rapist, Then Got Raped*, DETROIT FREE PRESS (Mar. 3, 2021, 5:21 PM), <https://www.freep.com/story/news/local/michigan/detroit/2021/03/03/transgender-female-prisoner-forced-bunk-rapist-and-got-raped/6894034002> [<https://perma.cc/7RAD-M467>] (describing a transgender woman who was forced to bunk with a convicted rapist against her wishes and was then raped by him within twenty-four hours). For more information on the lives of transgender people in prison, see generally CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX (Eric A. Stanley & Nat Smith eds., 2d ed. 2015) [hereinafter CAPTIVE GENDERS].

condition on a contraband cellphone¹⁶ and through lawsuits brought on her behalf by the Southern Poverty Law Center,¹⁷ many trans people in prison suffer without the benefit of public and media attention. A large survey conducted on incarcerated trans people found 15% of trans people reported being sexually assaulted while in jail or prison.¹⁸ To put that in perspective, this is over three times higher than the average rate of sexual assault in U.S. state and federal prisons, which is 4%.¹⁹ The numbers are even worse for Black trans people; the same survey found that 34% of Black trans people had experienced sexual assault in prison or jail.²⁰

Mass incarceration is one of the defining civil rights issues of our time.²¹ It is widely known that the United States has not only the greatest incarceration rate,²² but also the greatest total number of people in prison, even more than much more populous countries like China.²³ Trans people are often ignored in our discussions of prisons, despite the fact that the lifetime incarceration rate for trans people is more than twice the

¹⁶ *Transgender Woman Pleas for Care and Basic Rights in Secret Video Message from Prison Cell*, PRISON PHOTOGRAPHY (Apr. 10, 2015), <https://prisonphotography.org/2015/04/10/transgender-woman-pleas-for-care-and-basic-rights-in-secret-video-message-from-prison-cell> [<https://perma.cc/QD57-XNMR>].

¹⁷ *Ashley Diamond v. Brian Owens, et al.*, S. POVERTY L. CTR., <https://www.splcenter.org/seeking-justice/case-docket/ashley-diamond-v-brian-owens-et-al> [<https://perma.cc/634L-5SHZ>]; *Ashley Diamond v. Timothy Ward, et al.*, S. POVERTY L. CTR., <https://www.splcenter.org/seeking-justice/case-docket/ashley-diamond-v-timothy-ward-et-al> [<https://perma.cc/F3XZ-5XXF>].

¹⁸ JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., NAT'L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 6, 158, 167 (2011), https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf [<https://perma.cc/A7WE-N2PM>].

¹⁹ ALLEN J. BECK, MARCUS BERZOFKY, RACHEL CASPAR & CHRISTOPHER KREBS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12, at 6, 9 (2013). This number reflects incarcerated people who report they have been sexually assaulted within the past year. *Id.*

²⁰ GRANT ET AL., *supra* note 18, at 167.

²¹ See generally ROBYNN J.A. COX, ECON. POL'Y INST., WHERE DO WE GO FROM HERE? MASS INCARCERATION AND THE STRUGGLE FOR CIVIL RIGHTS (2015), <https://files.epi.org/2014/MassIncarcerationReport.pdf> [<https://perma.cc/G58E-CPM4>]; GLENN C. LOURY, RACE, INCARCERATION, AND AMERICAN VALUES (2008); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (rev. ed. 2012).

²² Incarceration refers to people in prisons and jails. *Incarceration*, FREE DICTIONARY, <https://legal-dictionary.thefreedictionary.com/Incarceration> [<https://perma.cc/QL3Q-Y7J3>]. Jails are places where people are confined pre-trial or to serve a sentence that is less than one year. *FAQ: Jail vs. Prison*, PRISON FELLOWSHIP, <https://www.prisonfellowship.org/resources/training-resources/in-prison/faq-jail-prison> [<https://perma.cc/N8QV-UEKH>]. Prisons are where people are confined to serve longer sentences. *Id.*

²³ ROY WALMSLEY, INST. FOR CRIM. POL'Y RSCH., WORLD PRISON POPULATION LIST 2 (12th ed. 2018), https://www.prisonstudies.org/sites/default/files/resources/downloads/wpppl_12.pdf [<https://perma.cc/8PJX-5D5L>].

national average.²⁴ For Black trans people, 47%—nearly half—report having been to prison or jail at some point in their lives, compared to 32.2% of all Black men.²⁵ In the United States, prisons are conservative institutions that strictly enforce the gender binary and gender roles.²⁶ Trans people do not fit neatly in this binary, so they are erased both within the prison system and in media discussing prisons.²⁷ Although LGBTQ+ people are a minority in prisons,²⁸ the numbers are not insignificant. In the United States, an estimated 1.4 million people identify as transgender.²⁹ Around 2% of transgender people report having

²⁴ Sixteen percent of trans people report they have been to prison at some point in their lifetime. NAT'L CTR. FOR TRANSGENDER EQUAL., LGBTQ PEOPLE BEHIND BARS: A GUIDE TO UNDERSTANDING THE ISSUES FACING TRANSGENDER PRISONERS AND THEIR LEGAL RIGHTS 5 (2018) [hereinafter LGBTQ PEOPLE BEHIND BARS], <https://transequality.org/sites/default/files/docs/resources/TransgenderPeopleBehindBars.pdf> [<https://perma.cc/97V2-BEVU>]. If incarceration rates remain the same, an estimated six percent of the general population will go to prison in their lifetime. THOMAS P. BONCZAR, BUREAU OF JUST. STAT., PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 1 (2003), <https://bjs.ojp.gov/content/pub/pdf/piusp01.pdf> [<https://perma.cc/2KHY-5VV7>]. The U.S. Transgender Survey (USTS) uses the term “transgender” loosely to include a variety of identities on the “transgender identity spectrum” including genderqueer and nonbinary people. SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 23 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [<https://perma.cc/JKL8-YXLM>]. The authors stated that over one-third of their survey participants included nonbinary or genderqueer people. *Id.* at 45. However, when reporting the annual incarceration rate, they did not provide separate incarceration rates based on subidentities within the transgender spectrum. *Id.* at 190.

²⁵ LGBTQ PEOPLE BEHIND BARS, *supra* note 24, at 5; BONCZAR, *supra* note 24, at 1.

²⁶ See Jessica Szuminski, Note, *Behind the Binary Bars: A Critique of Prison Placement Policies for Transgender, Non-Binary, and Gender Non-Conforming Prisoners*, 105 MINN. L. REV. 477, 502–03 (2020); Jaclyn M. White Hughto et al., *Creating, Reinforcing, and Resisting the Gender Binary: A Qualitative Study of Transgender Women's Healthcare Experiences in Sex-Segregated Jails and Prisons*, 14 INT'L J. PRISONER HEALTH 69 (2018).

²⁷ Many federal and state guidelines on prisons provide no guidance to prisons on how to address issues most critical to incarcerated transgender people. See Elliot Oberholtzer, *The Dismal State of Transgender Incarceration Policies*, PRISON POL'Y INITIATIVE (Nov. 8, 2017), <https://www.prisonpolicy.org/blog/2017/11/08/transgender> [<https://perma.cc/J7TR-9C4B>]. The U.S. prison system must classify someone into one of two gender categories in order to place them in an institution. This classification necessarily erases and ignores the identity of nonbinary individuals. Szuminski, *supra* note 26, at 479–81.

²⁸ One survey found that “5.5% and 3.3% of men in prisons and jails, respectively, identify as gay or bisexual,” and “33.3% and 26.4% of women in prisons and jails, respectively, identif[y] as lesbian or bisexual.” Ilan H. Meyer et al., *Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011–2012*, 107 AM. J. PUB. HEALTH 267, 271 (2017). The author of the study theorized that the high rate of sexual minority women in prisons and jails might be due in part to factors such as social stigma, lack of family support, substance use to cope, and over-policing. *Id.* at 271–72.

²⁹ ANDREW R. FLORES, JODY L. HERMAN, GARY J. GATES & TAYLOR N.T. BROWN, WILLIAMS INST., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 3 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Adults-US-Aug-2016.pdf> [<https://perma.cc/7NLD-8FAM>].

been incarcerated within the past year.³⁰ Thus, multiplying 1.4 million transgender people in the United States by 2% shows that approximately 28,000 trans people in the United States experience incarceration annually.

The type of prison—such as male or female, minimum security or maximum security—a trans person is housed in can have an impact on their experiences inside prison.³¹ The vast majority of incarcerated people are housed in single-sex prisons.³² This has posed a problem for housing trans people because of the conflict between the trans person's gender identity and the desire of prison officials to house people according to their genitals.³³ Adding to the complexity, any discussion about accommodating trans people is controversial and politically divisive, especially issues of including trans women in women's spaces.³⁴ Whether trans people will be housed according to gender identity or to their sex assigned at birth has been an *exceptionally* controversial and divisive topic, especially around the issue of housing trans women in women's prisons.³⁵ Trans activists do not universally agree on the correct solution

³⁰ JAMES ET AL., *supra* note 24, at 190. Incarceration includes people detained in both prisons and jails. See *Incarceration*, *supra* note 22.

³¹ See generally CAPTIVE GENDERS, *supra* note 15.

³² A 2019 census found that 93.5% of confinement facilities are single-sex. LAURA M. MARUSCHAK & EMILY D. BUEHLER, BUREAU OF JUST. STATS., CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES, 2019—STATISTICAL TABLES 8 tbl.2 (2021).

³³ Kate Sosin, *Trans, Imprisoned—and Trapped*, NBC NEWS (Feb. 26, 2020), <https://www.nbcnews.com/feature/nbc-out/transgender-women-are-nearly-always-incarcerated-men-s-putting-many-n1142436> [<https://perma.cc/5TLR-B35E>].

³⁴ For example, there have been controversies around trans women in women's sports. Jo Yurcaba, *Ivy League Swimming Champion Becomes Target of Transphobic Rhetoric*, NBC NEWS (Dec. 17, 2021, 9:24 AM), <https://www.nbcnews.com/nbc-out/out-news/ivy-league-swimming-champion-becomes-target-transphobic-rhetoric-rcna9074> [<https://perma.cc/9895-Y2T7>]. There have also been controversies around transgender people in the military. Julie Moreau, *Year After Trans Military Ban, Legal Battle Rages On*, NBC NEWS (Apr. 11, 2020, 12:00 PM), <https://www.nbcnews.com/feature/nbc-out/year-after-trans-military-ban-legal-battle-rages-n1181906> [<https://perma.cc/5SE3-6E3D>]. Lastly, there have been controversies around transgender women in women's restrooms. Katy Steinmetz, *Why LGBT Advocates Say Bathroom 'Predators' Argument Is a Red Herring*, TIME (May 2, 2016, 4:29 PM), <https://time.com/4314896/transgender-bathroom-bill-male-predators-argument> [<https://perma.cc/SM52-4G25>].

³⁵ See Andrew Sheeler, *California Law Allows Transgender Inmates in Women's Prisons. Now, Female Inmates Are Suing*, SACRAMENTO BEE (Nov. 24, 2021, 5:25 AM), <https://www.sacbee.com/news/politics-government/the-state-worker/article256071452.html> (last visited Nov. 25, 2022) (reporting a lawsuit initiated by a women's rights group challenging a California law that required trans people to be housed according to their gender identity); *Putting Trans Women in Female Prisons Sets up a Clash of Rights*, ECONOMIST (Jan. 30, 2021) [hereinafter *Trans Women in Female Prisons*], <https://www.economist.com/united-states/2021/01/30/putting-trans-women-in-female-prisons-sets-up-a-clash-of-rights> [<https://perma.cc/T2VE-ZC3U>] (describing the safety and privacy rights of incarcerated cis women that supposedly conflict with the rights of trans people to be incarcerated in a facility matching their gender identity).

to this problem, but most agree that de facto policies placing trans women almost exclusively in men's prisons with little to no protection violate federal law and endanger trans women's lives.³⁶ Opponents of laws allowing trans people to be housed in a prison that matches their gender identity—although they only seem concerned about trans women being housed in women's prisons—are vocal about their view that opportunistic men will take advantage of these laws to assault women.³⁷

In 2019, New York passed the Gender Expression Non-Discrimination Act (GENDA).³⁸ This law bans discrimination in “housing accommodations” on the basis of gender identity.³⁹ By passing this law, New York joined an ever-increasing number of states that have passed laws to protect trans people in various areas, including housing,⁴⁰ employment discrimination,⁴¹ and hate crimes.⁴² A few states have even passed laws that require incarcerated trans people to be housed according to their gender identity.⁴³ Discourse around GENDA has focused on its impact on housing for nonincarcerated people.⁴⁴ Accordingly, this Note focuses on GENDA's impact on housing for incarcerated trans people

³⁶ One of these activists is Mateo De La Torre, the former director of Black and Pink National. Black and Pink is a national advocacy organization made up of over 20,000 incarcerated and formerly incarcerated transgender people. See BLACK & PINK, <https://www.blackandpink.org> [<https://perma.cc/3NU7-V973>]. They advocate for prison abolition and liberation of LGBTQ+ folks through grassroots organizing. *Id.*; see also Sosin, *supra* note 33.

³⁷ See, e.g., Abigail Shrier, *Male Inmates in Women's Prisons*, WALL ST. J. (May 31, 2021, 11:16 AM), <https://www.wsj.com/articles/male-inmates-in-womens-prisons-11622474215> (last visited Oct. 28, 2022); *Trans Women in Female Prisons*, *supra* note 35.

³⁸ Robert Harding, *NY Legislature OKs Transgender Rights Bill, GENDA, After Years-Long Effort*, AUBURNPUB.COM (Jan. 16, 2019), https://auburnpub.com/blogs/eye_on_ny/ny-legislature-oks-transgender-rights-bill-genda-after-years-long/article5db65f40-18e9-11e9-b778-cb512b704c42.html (last visited Oct. 28, 2022); Kenneth Lovett, *Cuomo Signs Law Granting Transgender New Yorkers Anti-Discrimination Rights*, N.Y. DAILY NEWS (Jan. 25, 2019, 6:00 PM), <https://www.nydailynews.com/news/politics/ny-pol-cuomo-transgender-genda-conversion-therapy-20190125-story.html> [<https://perma.cc/EQ8S-H5AV>].

³⁹ N.Y. EXEC. LAW § 296(2)(a) (McKinney 2022).

⁴⁰ See generally *Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT [hereinafter *Nondiscrimination Laws*], https://www.lgbtmap.org/equality-maps/non_discrimination_laws/housing [<https://perma.cc/TLU8-99H9>].

⁴¹ See generally *Employment Nondiscrimination*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/employment_non_discrimination_laws [<https://perma.cc/8TGW-ZAFF>].

⁴² See generally *Hate Crime Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/hate_crime_laws [<https://perma.cc/5CW8-TGPR>].

⁴³ As of 2021, these states include California, Connecticut, and New Jersey. Jaclyn Diaz, *New Jersey Prisoners Will Be Placed Based on Gender Identity Under a New Policy*, NPR (June 29, 2021, 6:07 AM), <https://www.npr.org/2021/06/29/101181718/new-jersey-prisoners-will-be-placed-based-on-gender-identity-under-a-new-policy> [<https://perma.cc/U8AG-9P22>].

⁴⁴ See Harding, *supra* note 38.

and argues that GENDA makes the de facto housing of trans people in prisons based on the sex assigned to them at birth unlawful.

Part I discusses the current law, on the state and federal level, that provides protections to incarcerated transgender people and how that law has shaped where trans people are housed in prison.⁴⁵ Part II details the background behind GENDA and provides an analysis of the law based on the text, canons of legal construction, the legislative history, and previous New York case law.⁴⁶ Part III examines how this interpretation of the law interacts with existing New York law, federal law, and similar laws in other states, and how it impacts public policy considerations.⁴⁷

I. BACKGROUND

A. *Basics About Transgender Identity*

This Section will define various terms that are useful for understanding the subsequent discussion. Broadly speaking, a transgender person is someone whose gender identity is different from the sex they were assigned at birth.⁴⁸ Someone who is not transgender is cisgender. A cisgender person is someone whose gender identity matches the sex they were assigned at birth.⁴⁹ Two of the most common transgender identities are trans men—people assigned as female at birth but who transition to male—and trans women—people assigned as male at birth who transition to female.⁵⁰ It should be noted that not all trans

⁴⁵ See *infra* Part I.

⁴⁶ See *infra* Part II.

⁴⁷ See *infra* Part III.

⁴⁸ *Transgender*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/transgender> [https://perma.cc/UCM3-5699]. Sex is a concept that refers to biological sex, usually caused by having either XX or XY chromosomes. Claire Donnelly, Tianna Hicklin & Bonnie Tabasko, *Sex and Gender: How Being Male or Female Can Affect Your Health*, NIH, May 2016, at 1, <https://newsinhealth.nih.gov/sites/nihNIH/files/2016/May/NIHNIHMay2016.pdf> [https://perma.cc/76VN-95GY]. Gender, on the other hand, is a social construct that refers to a complex set of social roles and behaviors. *Id.* The terms male and female denote sex, while the terms man and woman refer to gender. *Id.* The terms sex and gender are frequently conflated, even among academics and scientists. Cristina Richie, *Sex, Not Gender. A Plea for Accuracy*, 2019 EXPERIMENTAL & MOLECULAR MED. 133, 133.

⁴⁹ *Cisgender*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/cisgender> [https://perma.cc/UP8Y-XAVQ]. This is the assumed default state and describes most people who have never thought of or questioned their own gender identity.

⁵⁰ Linell Smith, *Glossary of Transgender Terms*, JOHNS HOPKINS MED. (Nov. 20, 2018), <https://www.hopkinsmedicine.org/news/articles/glossary-of-terms-1> [https://perma.cc/ZN42-XXCC].

people fit neatly into these two categories.⁵¹ There are many people who fall along the trans spectrum who identify as nonbinary,⁵² genderqueer,⁵³ two-spirited,⁵⁴ or one of a myriad of other identities.⁵⁵ For the sake of simplicity, this discussion focuses on trans people generally, with an emphasis on the experiences of trans men and trans women.

Transitioning is the process by which a trans person moves from living as their sex assigned at birth to their actual gender identity.⁵⁶ Transitioning looks different for everyone.⁵⁷ It can include using different pronouns, wearing different clothes, using makeup, getting different gender markers on legal documents, or undergoing hormone therapy or various medical procedures.⁵⁸ For many, medical procedures that aid transition are critical and lifesaving,⁵⁹ but not everyone needs or wants a particular medical intervention.⁶⁰ While the media focuses on gender confirmation surgery,⁶¹ there are many other surgeries that trans people

⁵¹ The division of trans people into trans men and trans women reinforces the gender binary, which does not conform to modern understandings of the nature of gender as a spectrum. See generally Surya Monro, *Beyond Male and Female: Poststructuralism and the Spectrum of Gender*, 8 INT'L J. TRANSGENDERISM 3 (2005).

⁵² Nonbinary people identify as neither male nor female. *Understanding Non-Binary People: How to Be Respectful and Supportive*, NAT'L CTR. FOR TRANSGENDER EQUAL. (Oct. 5, 2018) [hereinafter *Understanding Non-Binary People*], <https://transequality.org/issues/resources/understanding-non-binary-people-how-to-be-respectful-and-supportive> [<https://perma.cc/2JLB-V7CP>].

⁵³ Genderqueer refers to people who do not fit neatly into male or female but identify as a combination of these two genders. *Genderqueer*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/genderqueer> [<https://perma.cc/7UPS-LG9W>].

⁵⁴ "Two-spirited" is a term used by some indigenous people to describe people who have both a masculine and feminine spirit. *Two-Spirit Community*, RE:SEARCHING FOR LGBTQ2S+ HEALTH, <https://lgbtqhealth.ca/community/two-spirit.php> [<https://perma.cc/R4FE-424B>].

⁵⁵ See *Understanding Non-Binary People*, *supra* note 52.

⁵⁶ *Frequently Asked Questions About Transgender People*, NAT'L CTR. FOR TRANSGENDER EQUAL. (July 9, 2016), <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people> [<https://perma.cc/S5G8-9RQW>].

⁵⁷ *Id.*

⁵⁸ *Id.*; WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 8–10 (7th ed. 2012), https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf [<https://perma.cc/XL4F-5KN8>].

⁵⁹ Anthony N. Almazan & Alex S. Keuroghlian, *Association Between Gender-Affirming Surgeries and Mental Health Outcomes*, 156 JAMA SURGERY 611, 611–12 (2021) (showing that undergoing gender-affirming surgery was linked to lower rates of psychological distress and suicidal ideation).

⁶⁰ WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, *supra* note 58, at 8–9.

⁶¹ Parker Marie Molloy, *Can Media Please Stop Focusing on Trans People's Bodies?*, ADVOCATE (Jan. 9, 2014, 5:00 AM), <https://www.advocate.com/commentary/2014/01/09/op-ed-can-media-please-stop-focusing-trans-peoples-bodies> [<https://perma.cc/VJX9-GZ78>].

can undergo, including breast implants, removing breasts, liposuction, body contouring, hair removal, and hair reconstruction.⁶²

In the past, trans people were diagnosed with a mental illness called gender identity disorder (GID). GID was replaced with gender dysphoria when the Diagnostic and Statistical Manual of Mental Disorders V (DSM-5) came out in 2013.⁶³ The DSMs are books listing mental disorders and explaining how to classify them.⁶⁴ GID labeled being transgender itself as a mental disorder, while gender dysphoria says the stress caused by not being able to live as your true gender identity is what causes mental health issues.⁶⁵ This change reflects shifting attitudes in the psychiatric community and an increasing acceptance of transgender identity as legitimate and not a problem in need of fixing.⁶⁶

Gender dysphoria is defined by the DSM-5 as a clinically significant condition related to a strong inclination to be another gender; this can include a desire to change one's genitalia or secondary sex characteristics.⁶⁷ Not all gender nonconforming people have gender dysphoria.⁶⁸ Gender dysphoria is about the *distress* associated with the discrepancy between someone's actual gender identity and the gender they are perceived as by others.⁶⁹ Not everyone experiences this distress.⁷⁰ Despite gender dysphoria being an improvement over GID, it is controversial among some trans activists and psychiatrists because they believe it is stigmatizing.⁷¹

⁶² WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, *supra* note 58, at 57–58.

⁶³ Francine Russo, *Where Transgender Is No Longer a Diagnosis*, SCI. AM. (Jan. 6, 2017), <https://www.scientificamerican.com/article/where-transgender-is-no-longer-a-diagnosis> [<https://perma.cc/2N9B-6L9C>].

⁶⁴ See, e.g., AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-5-TR) (5th ed. 2022).

⁶⁵ Russo, *supra* note 63.

⁶⁶ GENNY BEEMYN, TRANSGENDER HISTORY IN THE UNITED STATES 25–26 (Laura Erickson-Schroth ed., 2014) (ebook).

⁶⁷ *What Is Gender Dysphoria?*, AM. PSYCHIATRIC ASS'N, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> [<https://perma.cc/W5YX-FSLE>].

⁶⁸ WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, *supra* note 58, at 4–6.

⁶⁹ *Id.* at 4–5.

⁷⁰ *Id.* at 5.

⁷¹ Dallas Ducar, *Giving Gender-Affirming Care: 'Gender Dysphoria' Diagnosis Should Not Be Required*, STAT (Mar. 11, 2022), <https://www.statnews.com/2022/03/11/giving-gender-affirming-care-gender-dysphoria-diagnosis-should-not-be-required> [<https://perma.cc/P33E-F5F5>] (“Some have called for the American Psychiatric Association, which created and is updating the DSM-5, to remove this diagnosis entirely, as it conflates a social identity with a mental disorder and propagates stigma.”).

B. *Current Federal Protections for Transgender People in Prisons*

The main federal protections for the civil rights of incarcerated people come from the Eighth Amendment's Equal Protection Clause and the Fourteenth Amendment's Due Process Clause.⁷² The Americans with Disabilities Act (ADA)⁷³ and the Prison Rape Elimination Act (PREA)⁷⁴ have also been interpreted as useful tools to protect, and to advocate for the rights of, transgender incarcerated people, respectively. These will each be assessed on how they have been applied to the housing of transgender people in prisons.

1. Eighth Amendment

The Eighth Amendment states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁷⁵ This clause banning cruel and unusual punishment is the one most relevant to the discussion of how transgender people are housed in prisons.⁷⁶ The purpose of the Eighth Amendment is to protect our values as a society that favors dignity and humanitarian standards for people in prison.⁷⁷ Even though incarcerated people are denied many of the pleasures and comforts that free people have, the Eighth Amendment embodies our belief that they are still human beings deserving of dignity.⁷⁸

In a 1994 Supreme Court case, *Farmer v. Brennan*, the Court considered the Eighth Amendment claim of a trans woman who was

⁷² See *Estelle v. Gamble*, 429 U.S. 97, 101–02 (1976) (discussing how the Eighth Amendment should be applied to incarcerated people who claim prison officials neglected to provide medical care); *Johnson v. California*, 543 U.S. 499, 502, 515 (2005) (holding that a California prison policy that segregated newly incarcerated people and transferees by race for a period of sixty days was entitled to strict scrutiny review under the Equal Protection Clause of the Fourteenth Amendment).

⁷³ See *Doe v. Mass. Dep't of Corr.*, No. 17-12255, 2018 WL 2994403, at *6–7 (D. Mass. June 14, 2018) (holding that a transgender woman's claim that the Massachusetts Department of Corrections had failed to make a reasonable disability accommodation for her gender dysphoria under the ADA should not be dismissed because gender dysphoria may be a protected disability under the ADA); see also 42 U.S.C. § 12132.

⁷⁴ 28 C.F.R. § 115.42(c) (2012).

⁷⁵ U.S. CONST. amend. VIII.

⁷⁶ See *id.*

⁷⁷ *Estelle*, 429 U.S. at 102 (“The [Eighth] Amendment embodies ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency’” (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968))).

⁷⁸ *Brown v. Plata*, 563 U.S. 493, 510 (2011) (“Prisoners retain the essence of human dignity inherent in all persons.”).

raped while in general population at a federal men's prison.⁷⁹ To have an Eighth Amendment claim for inhumane conditions of confinement, an incarcerated person must show that the condition is "sufficiently serious" and that prison officials acted with "deliberate indifference."⁸⁰ A condition can be sufficiently serious if it amounts to a denial of "life's necessities."⁸¹ Or, if it is about failure to prevent harm, an incarcerated person can show that the conditions of their incarceration "pos[ed] a substantial risk of serious harm."⁸² A prison official is deliberately indifferent if the official knows that an incarcerated person faces a "substantial risk of serious harm," but the official disregards that risk by failing to do something to mitigate it.⁸³ Deliberate indifference is a subjective, not an objective, standard, which means it is not enough that an official should have known their action or inaction would cause harm.⁸⁴ Deliberate indifference is a high standard that requires the official to not only have been actually aware of the relevant facts from which they could draw an inference that there was a "substantial risk of serious harm", but they must also have actually drawn the inference.⁸⁵

Incarcerated trans people who were harmed by other incarcerated people when housed in a facility according to their sex assigned at birth and not according to their gender identity have brought suits under the Eighth Amendment.⁸⁶ Because these suits often occur after substantial harm has already been inflicted, these suits are retroactive, rather than proactive, solutions.⁸⁷ *Farmer* held that the petitioner could show that

⁷⁹ *Farmer v. Brennan*, 511 U.S. 825, 829–30 (1994).

⁸⁰ *Id.* at 834 (quoting *Wilson v. Seiter*, 501 U.S. 294, 298, 302–03 (1991)); *Harris v. Miller*, 818 F.3d 49, 63–64 (2d Cir. 2016).

⁸¹ *Farmer*, 511 U.S. at 834 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

⁸² *Id.*

⁸³ *Parkell v. Danberg*, 833 F.3d 313, 335 (3d Cir. 2016) (quoting *Chavarriaga v. N.J. Dep't of Corr.*, 806 F.3d 210, 229 (3d Cir. 2015)).

⁸⁴ *Farmer*, 511 U.S. at 838–39 (holding that an objective test for deliberate indifference would be incompatible with the Court's holding in *Wilson*).

⁸⁵ *Randle v. Alexander*, 960 F. Supp. 2d 457, 470 (S.D.N.Y. 2013) (stating that to show deliberate indifference, an official "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference" (quoting *Cuoco v. Moritsugu*, 222 F.3d 99, 107 (2d Cir. 2000))).

⁸⁶ See, e.g., *Farmer*, 511 U.S. at 829–30; *Tay v. Dennison*, 457 F. Supp. 3d 657, 684 (S.D. Ill. 2020); *Doe v. District of Columbia*, 215 F. Supp. 3d 62, 73, 77 (D.D.C. 2016); *Ashley Diamond v. Brian Owens, et al.*, S. POVERTY L. CTR., <https://www.splcenter.org/seeking-justice/case-docket/ashley-diamond-v-brian-owens-et-al> [<https://perma.cc/634L-5SHZ>].

⁸⁷ Before Ms. Farmer brought her Eighth Amendment claim against prison officials, she had been beaten and raped by another incarcerated person in her cell. *Farmer*, 511 U.S. at 830. In another Eighth Amendment case, the plaintiff, an incarcerated trans woman, had been sexually assaulted numerous times and subject to daily harassment before filing her claim. *Tay*, 457 F. Supp. 3d at 663–64. In yet another case, a trans woman who brought an Eighth Amendment claim had

prison officials had the culpable state of mind required for an Eighth Amendment violation by showing that those officials subjectively knew she was a member of an “identifiable group . . . frequently singled out for violent attack by other inmates,” which includes trans women.⁸⁸ Some courts have held that an incarcerated person’s status as transgender is enough to establish that an official had subjective knowledge that the incarcerated person was part of a vulnerable group singled out for violence.⁸⁹ Other courts have said that showing Bureau of Justice Statistics (BJS) data that trans women experience higher rates of sexual assault in prison can be evidence of subjective knowledge of a substantial risk of harm by prison officials.⁹⁰

2. Fourteenth Amendment

In addition to the Eighth Amendment, the Fourteenth Amendment also provides a basis to protect the rights of incarcerated people.⁹¹ The most important part of the Fourteenth Amendment for present purposes is the Equal Protection Clause.⁹² The meaning of the Equal Protection Clause is simply that people whose situations are similar should be treated similarly.⁹³ State action violates the Equal Protection Clause where the

been raped twice by another incarcerated person with a history of sexual violence after he had been placed inside her cell. *Doe*, 215 F. Supp. 3d at 66–69.

⁸⁸ *Farmer*, 511 U.S. at 842–44.

⁸⁹ *Tay*, 457 F. Supp. 3d at 684 (holding that an incarcerated trans-woman plaintiff “can establish exposure to a significantly serious risk of harm by showing that [s]he belongs to an identifiable group of prisoners who are frequently singled out for violent attack by other inmates” (alteration in original) (quoting *Farmer*, 511 U.S. at 843)); *Doe*, 215 F. Supp. 3d at 77 (holding that a jury could infer that prison officials knew of a substantial risk of rape due to the plaintiff’s status as a trans woman).

⁹⁰ See, e.g., *Zollicoffer v. Livingston*, 169 F. Supp. 3d 687, 695–96 (S.D. Tex. 2016) (holding that the plaintiff could show the defendants knew of a substantial risk to her safety based in part on BJS statistics showing that incarcerated trans women experience high rates of sexual assault).

⁹¹ The text of the Fourteenth Amendment reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

⁹² The Equal Protection Clause of the Fourteenth Amendment reads, “[N]or [shall any State] deny to any person within its jurisdiction the equal protection of the laws.” *Id.*

⁹³ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (stating that the Fourteenth Amendment stands for the proposition “that all persons similarly situated should be treated alike”).

classification is “arbitrary or irrational” and is based on nothing more than a desire to harm a group of people that is politically unpopular.⁹⁴

Under the *Turner* standard, prisons used to be afforded a lesser degree of scrutiny for equal protection violations.⁹⁵ To pass constitutional muster, a prison regulation only needed to be “reasonably related” to legitimate penological objectives and could not represent an “exaggerated response” to those concerns.⁹⁶ *Johnson v. California* abrogated this standard for racial classifications in prisons.⁹⁷ Since then, some circuits—including the Eighth Circuit,⁹⁸ Ninth Circuit,⁹⁹ and D.C. Circuit¹⁰⁰—have followed *Johnson* and applied heightened scrutiny based on *United States v. Virginia*¹⁰¹ to equal protection cases based on gender in prison settings. Following *Bostock v. Clayton County*—which held that discrimination “because of” sex in Title VII includes discrimination against homosexual and transgender people—it is unclear if discrimination against transgender people is discrimination “because of” sex under the Equal Protection Clause.¹⁰² At least some courts have held that discrimination against transgender people is sex discrimination in the context of school bathroom policies¹⁰³ and in a state law barring healthcare providers from performing gender confirmation surgery for someone under the age of eighteen.¹⁰⁴

⁹⁴ *Id.* at 446; *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (holding that “a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate government interest” under the Equal Protection Clause).

⁹⁵ *Turner v. Safley*, 482 U.S. 78, 87, 89 (1987).

⁹⁶ *Id.* at 87.

⁹⁷ *Johnson v. California*, 543 U.S. 499, 515 (2005) (holding that a California prison policy that segregated new newly incarcerated people and transferees by race for a period of sixty days was subject to strict scrutiny).

⁹⁸ *Roubideaux v. N.D. Dep’t of Corr. & Rehab.*, 570 F.3d 966, 974–76 (8th Cir. 2009).

⁹⁹ *Harrison v. Kernan*, 971 F.3d 1069, 1075 (9th Cir. 2020).

¹⁰⁰ *Pitts v. Thornburgh*, 866 F.2d 1450, 1453 (D.C. Cir. 1989).

¹⁰¹ *See United States v. Virginia*, 518 U.S. 515, 555 (1996) (requiring a “heightened scrutiny” analysis “for ‘all gender-based classifications’” (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994))).

¹⁰² *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739–42 (2020).

¹⁰³ *See, e.g., Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020) (holding that transgender people constitute at least a quasi-suspect class under the Equal Protection Clause in the context of a case about a transgender student being denied access to school bathrooms).

¹⁰⁴ *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 887–89 (E.D. Ark. 2021).

3. Americans with Disabilities Act

The last law that will be discussed here that can provide some protection to transgender people in prison is the ADA.¹⁰⁵ The ADA protects people who are prevented from participating in a government program or service because of their disability status.¹⁰⁶ The ADA defines the term “disability” as some type of impairment that is physical or mental and that “substantially limits [a] major life activit[y].”¹⁰⁷ The ADA was held to apply to prisons in *Pennsylvania Department of Corrections v. Yeskey*.¹⁰⁸ Specifically, Title II prohibits state entities from discriminating against people on the basis of a disability.¹⁰⁹

Untreated gender dysphoria can impair one’s major life activities, so it is a good candidate to qualify as a disability.¹¹⁰ Mental impairments are included in the ADA’s definition of disability.¹¹¹ Part of the statute explicitly states that the term disability does not include “transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders.”¹¹² Courts have taken three approaches to interpreting the text of § 12211(b)(1).¹¹³ The first is the plain meaning

¹⁰⁵ See 42 U.S.C. § 12132 (“Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”).

¹⁰⁶ See *Furgess v. Pa. Dep’t of Corr.*, 933 F.3d 285, 288–89 (3d Cir. 2019). To state a claim under the ADA, a plaintiff “must allege that [they are] a qualified individual with a disability, who was precluded from participating in a program, service, or activity, or otherwise was subject to discrimination, by reason of [their] disability.” *Id.*

¹⁰⁷ 42 U.S.C. § 12102(1). The definition of a disability is “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or; (C) being regarded as having such an impairment . . .” *Id.* The ADA further states that “major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” *Id.* § 12102(2)(A).

¹⁰⁸ *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 213 (1998).

¹⁰⁹ *Id.* at 208, 210.

¹¹⁰ See Rosalia Costa & Marco Colizzi, *The Effect of Cross-Sex Hormonal Treatment on Gender Dysphoria Individuals’ Mental Health: A Systematic Review*, 12 NEUROPSYCHIATRIC DISEASE & TREATMENT 1953, 1954 (2016).

¹¹¹ § 12102(1)(A).

¹¹² *Id.* § 12211(b)(1). The inclusion of pedophilia in a list with transvestitism, transsexualism, and gender identity disorders likely reflects the ADA drafters’ view about transgender people, namely that they were deviant criminals. The inclusion of things like “compulsive gambling, kleptomania, or pyromania” or “psychoactive substance use disorders” in § 12211(b)(2)–(3) further underlines that the ADA drafters likely passed moral judgment on, and attributed criminality to, transgender people. § 12211(b)(2)–(3).

¹¹³ *Doe v. Pa. Dep’t of Corr.*, No. 20-cv-00023, 2021 WL 1583556, at *8 (W.D. Pa. Feb. 19, 2021).

approach, and the majority approach, which says that Congress intended that the ADA should not protect people with disabling and nondisabling gender identity disorders, such as gender dysphoria.¹¹⁴ The second approach says that gender dysphoria is not excluded from the ADA by § 12211(b)(1) so long as the gender dysphoria substantially limits a person's life activities.¹¹⁵ This approach has been sharply criticized.¹¹⁶ The third approach says that judges do not know what causes gender dysphoria, so they do not know whether it is truly a gender identity disorder “not resulting from [a] physical impairment[.]”¹¹⁷

4. Prison Rape Elimination Act and Housing and Urban Development

PREA prohibits placing transgender individuals in certain facilities based exclusively on their genitalia, requiring instead that the agency make an “individualized determination[.]”¹¹⁸ PREA further requires that a transgender incarcerated person's “own views with respect to his or her own safety shall be given serious consideration.”¹¹⁹ As of February 11, 2021, the federal department of Housing and Urban Development (HUD) issued a memorandum (HUD No. 21-021) confirming that it is illegal to discriminate in housing based on sexual orientation and gender identity.¹²⁰ As a result, LGBTQ+ people across the country can file housing discrimination complaints with HUD.¹²¹

¹¹⁴ See, e.g., *Parker v. Strawser Constr., Inc.*, 307 F. Supp. 3d 744, 753–54 (S.D. Ohio 2018); *Michaels v. Akal Sec., Inc.*, No. 09-cv-01300, 2010 WL 2573988, at *6 (D. Colo. June 24, 2010); *Gulley-Fernandez v. Wis. Dep't of Corr.*, No. 15-CV-995, 2015 WL 7777997, at *3 (E.D. Wis. Dec. 1, 2015).

¹¹⁵ *Blatt v. Cabela's Retail, Inc.*, No. 14-cv-04822, 2017 WL 2178123, at *4 (E.D. Pa. May 18, 2017); *Doe v. Triangle Doughnuts, LLC*, 472 F. Supp. 3d 115, 134–35 (E.D. Pa. 2020).

¹¹⁶ See *Parker*, 307 F. Supp. 3d at 754 (arguing that *Blatt's* interpretation is nonsensical because it would render § 12211(b)(1) superfluous).

¹¹⁷ § 12211(b)(1); *Doe v. Mass. Dep't of Corr.*, No. 17-12255, 2018 WL 2994403, at *6–7 (D. Mass. June 14, 2018); *Tay v. Dennison*, No. 19-cv-00501, 2020 WL 2100761, at *3 (S.D. Ill. May 1, 2020); *Shorter v. Barr*, No. 4:19cv108-WS, 2020 WL 1942785, at *9 (N.D. Fla. Mar. 13, 2020).

¹¹⁸ 28 C.F.R. § 115.42(b) (2012); ACLU, PRISON RAPE ELIMINATION ACT (PREA) TOOLKIT: END THE ABUSE—PROTECTING LGBTI PRISONERS FROM SEXUAL ASSAULT 3–4 (2004), <https://www.aclu.org/sites/default/files/assets/012714-prea-combined.pdf> [https://perma.cc/6AWR-MYKG].

¹¹⁹ § 115.42(e).

¹²⁰ Press Release, U.S. Dep't of Hous. & Urb. Dev., HUD No. 21-021, HUD to Enforce Fair Housing Act to Prohibit Discrimination on the Basis of Sexual Orientation and Gender Identity (Feb. 11, 2021), https://www.hud.gov/press/press_releases_media_advisories/hud_no_21_021 [https://perma.cc/9AFS-B4YD].

¹²¹ *Id.*

C. Current Transgender Housing in Prisons by State

An increasing number of states outlaw discrimination on the basis of gender identity. Twenty-three states and the District of Columbia explicitly prohibit housing discrimination on the basis of sexual orientation and gender identity.¹²² These states are in the Northeast, West Coast, Rocky Mountain Region, and Midwest.¹²³ No states in the Deep South prohibit discrimination on the basis of sexual orientation or gender identity.¹²⁴ However, trans people overwhelmingly continue to be housed according to their sex assigned at birth, even in states that prohibit discrimination on the basis of gender identity.¹²⁵ A small number of states have policies that house transgender incarcerated people according to their gender identity, including California, Connecticut, and, recently, New Jersey.¹²⁶

Now looking at state laws that deal specifically with prisons, PREA mandates certain aspects of state prison policy. It states that incarcerated trans people need to be evaluated on a case-by-case basis and that consideration needs to be given to the trans person's own views regarding their safety.¹²⁷ In reality, most trans people are housed according to their genitalia.¹²⁸ Prisons officials often only pay lip service to PREA compliance. When prison officials house trans people according to their genitalia, they need only recite that a trans person's housing request was "serious[ly] consider[ed]."¹²⁹ Much deference is paid to a prison's views on security and housing.¹³⁰ Therefore, often all that is needed is one administrator or one clinician to have regressive views on gender identity

¹²² *Nondiscrimination Laws*, *supra* note 40. An additional nine states interpret existing laws to include bans on discrimination based on sexual orientation and gender identity. *Id.* One state protects sexual orientation but not gender identity. *Id.* Eighteen states and five territories have no protections for either sexual orientation or gender identity in terms of housing. *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Despite the fact that twenty-three states and the District of Columbia include trans people in housing discrimination laws, in 2020, NBC News could only find 15 trans women, out of the 4,890 identified, who were housed in women's prisons in seven states and the District of Columbia. *Id.*; Sosin, *supra* note 33. Three out of 10 trans women were housed in women's prisons in the District of Columbia, 1 out of 109 in Illinois, 1 out of 25 in Iowa, 1 out of 12 in Maine, 3 out of 189 in New York, 3 out of 69 in Oregon, 1 out of 41 in Virginia, and 2 out of 108 in Washington. *Id.* All of these states and the District of Columbia include gender identity in their housing discrimination laws. *Nondiscrimination Laws*, *supra* note 40.

¹²⁶ See Diaz, *supra* note 43.

¹²⁷ 28 C.F.R. § 115.42(c), (e).

¹²⁸ Sosin, *supra* note 33.

¹²⁹ § 115.42(e).

¹³⁰ Yvette K.W. Bourcicot & Daniel Hirotsu Wooffer, *Prudent Policy: Accommodating Prisoners with Gender Dysphoria*, 12 STAN. J.C.R. & C.L. 283, 288–89, 317 (2016).

for every trans person to be categorically housed according to their sex assigned at birth.¹³¹

When trans people are housed according to their genitalia, this can pose many security and safety issues. As discussed previously, trans people are at a unique risk for victimization and assault while in prison.¹³² Several different solutions have been used to solve this problem, with varying degrees of success. They are discussed below.

1. Use of Restrictive Housing

The oldest method is to place trans people in restrictive housing. “Restrictive housing” is a term that refers to a variety of practices.¹³³ What all of the practices have in common is that they involve keeping people locked in a cell for twenty-three or more hours per day and denying them many privileges given to other incarcerated people.¹³⁴ The purpose of restrictive housing is to remove from the general population incarcerated people whom administration deem disruptive within the facility.¹³⁵ This could be due to the incarcerated person’s own behavior, or the behavior of others toward them.¹³⁶ Restrictive housing has been shown to have a

¹³¹ A stark example of this can be found in *Edmo v. Corizon, Inc.*, in which an incarcerated trans woman, Ms. Edmo, was denied necessary gender-affirming healthcare—despite multiple self-castration attempts—because the clinician in charge of making the recommendation did not think she seemed dysphoric. 935 F.3d 757, 773 (9th Cir. 2019).

¹³² See *supra* Introduction; see also *supra* notes 15–20 and accompanying text.

¹³³ The term restrictive housing includes solitary confinement, administrative segregation, segregated housing, protective custody, and so on. ALLEN J. BECK, BUREAU OF JUST. STAT., USE OF RESTRICTIVE HOUSING IN U.S. PRISONS AND JAILS, 2011–12, at 2 (2015), <https://bjs.ojp.gov/content/pub/pdf/urhuspj1112.pdf> [<https://perma.cc/C7WF-VGWQ>]. These terms can denote for what purpose the restrictive housing is being used. For instance, solitary confinement is often used punitively to punish incarcerated people for violating prison rules, whereas administrative segregation is for the incarcerated person’s own protection. *Id.* at 2, 7. The reality of protective custody is that it often looks exactly like punitive solitary confinement. Aviva Stahl, *Transgender Women in New York State Prisons Face Solitary Confinement and Sexual Assault*, SOLITARY WATCH (Aug. 7, 2014), <https://solitarywatch.org/2014/08/07/transgender-women-in-new-york-state-prisons-face-solitary-confinement-and-sexual-assault> [<https://perma.cc/CZ32-FZH9>].

¹³⁴ Stahl, *supra* note 133.

¹³⁵ MICHAEL KANE, BARBARA PIERCE & MELISSA HAYNES, CRIME & JUST. INST., RESTRICTIVE HOUSING FAQ 1 (2014), https://www.crj.org/assets/2017/07/26_Restrictive_Housing_Overview.pdf [<https://perma.cc/JG2T-GA9Z>] (“Restrictive housing, sometimes called administrative segregation, is used by correctional administrators to manage offenders who may be disruptive within their facilities. Restrictive housing entails physically removing inmates from the general population of a prison, separating them from other inmates, and includes imposing restrictions on their movement, behavior, and privileges.”).

¹³⁶ *Id.*

dramatic impact on physical and mental health.¹³⁷ The United Nations has condemned the use of long-term solitary confinement (greater than fifteen days) as cruel or inhumane treatment and torture.¹³⁸

Because of the deleterious effects of this type of housing, prison reform movements and laws have aimed to reduce its use. PREA's standards state that incarcerated people deemed at high risk for sexual assault—a group that includes trans people—should not be automatically placed in restrictive housing.¹³⁹ If they are placed in this type of restrictive housing, it must be used as a last resort (i.e., there must be no alternative means to separate an incarcerated person from likely abusers),¹⁴⁰ and they cannot be denied access to services, such as programming, education, privileges, or work assignments.¹⁴¹ Despite PREA's insistence that restrictive housing only be used as a tool of last resort, many prison administrators default to holding trans people in restrictive housing to prevent any violent incidents.¹⁴²

¹³⁷ DAVID CLOUD, JESSI LACHANCE, LIONEL SMITH & LAUREN GALARZA, VERA INST. OF JUST., *THE SAFE ALTERNATIVES TO SEGREGATION INITIATIVE: FINDINGS AND RECOMMENDATIONS FOR THE LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, AND PROGRESS TOWARD IMPLEMENTATION* 5, 48 (2019), <https://www.vera.org/downloads/publications/safe-alternatives-segregation-initiative-findings-recommendations-ldps.pdf> [<https://perma.cc/NNJ2-3WAV>]; Comm. Against Torture, *Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America*, at 10, U.N. Doc. CAT/C/USA/CO/3-5 (Dec. 19, 2014).

¹³⁸ Hum. Rts. Comm. on Its Forty-Fourth Session, General Comment 20, art. 7 (1992), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.9, at 200 (May 27, 2008); Letter from Nat'l Orgs., Reg'l Orgs. & Individual Signatories, to Joe Biden, President & Kamala Harris, Vice President on Ending the Practice of Solitary Confinement: Recommendations for Federal Reform 1 (June 3, 2021), https://www.aclu.org/sites/default/files/field_document/letter_to_biden_administration_on_ending_solitary_confinement.pdf [<https://perma.cc/8YLU-Z3CE>].

¹³⁹ 28 C.F.R. § 115.43(a) (2012) (“Inmates at high risk for sexual victimization shall not be placed in involuntary segregated housing unless an assessment of all available alternatives has been made, and a determination has been made that there is no available alternative means of separation from likely abusers. If a facility cannot conduct such an assessment immediately, the facility may hold the inmate in involuntary segregated housing for less than 24 hours while completing the assessment.”).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* § 115.43(b).

¹⁴² LAMBDA LEGAL, *TRANSGENDER RIGHTS TOOLKIT: A LEGAL GUIDE FOR TRANS PEOPLE AND THEIR ADVOCATES* 7–8 (2016), https://www.lambdalegal.org/sites/default/files/publications/downloads/2016_trans_toolkit_final.pdf [<https://perma.cc/AEH2-E23Q>]; Annette Brömdal et al., *Whole-Incarceration-Setting Approaches to Supporting and Upholding the Rights and Health of Incarcerated Transgender People*, 20 INT'L J. TRANSGENDERISM 341, 343 (2019).

2. Transgender Housing Units

As an alternative to restrictive housing, some institutions and states have experimented with so-called transgender housing units. When in a cross-gender institution, trans people are housed in a special unit with each other.¹⁴³ These units have been criticized for being stigmatizing.¹⁴⁴ In addition, trans people in these units are sometimes not given equal access to prison programs and activities.¹⁴⁵ PREA's standards state that LGBTQ+ people cannot be placed in dedicated housing units solely on the basis of gender identity.¹⁴⁶ Some jurisdictions still do this, including the New York City Department of Corrections' jails, which have dedicated housing units for trans people.¹⁴⁷

In New York City jails, transgender women are housed in a special transgender housing unit in the women's jail.¹⁴⁸ They are housed separately from cis women but can attend programming with other women and access female commissary items and packages.¹⁴⁹ New York State prisons are less progressive. Currently, New York State has a policy of housing transgender people on a case-by-case basis, in compliance with PREA.¹⁵⁰ There is no data on what percentage of trans women are housed in men's prisons within the state. However, it is reported that at least some trans women are housed in women's prisons in New York State.¹⁵¹ Formerly incarcerated trans women have reported being housed in men's prisons, and some have endured many years of placement in

¹⁴³ N.Y.C. BD. OF CORR., AN ASSESSMENT OF THE TRANSGENDER HOUSING UNIT 2 (2018), <https://www1.nyc.gov/assets/boc/downloads/pdf/Reports/BOC-Reports/THU%20FINAL%20Feb%202018.pdf> [https://perma.cc/7TUJ-BY7S].

¹⁴⁴ LAMBDA LEGAL, *supra* note 142, at 8.

¹⁴⁵ *Id.*

¹⁴⁶ 28 C.F.R. § 115.42(g) (2012) ("The agency shall not place lesbian, gay, bisexual, transgender, or intersex inmates in dedicated facilities, units, or wings solely on the basis of such identification or status, unless such placement is in a dedicated facility, unit, or wing established in connection with a consent decree, legal settlement, or legal judgment for the purpose of protecting such inmates.").

¹⁴⁷ N.Y.C. BD. OF CORR., *supra* note 143, at 2.

¹⁴⁸ *What You Need to Know About the Treatment of Transgender Persons in Custody*, LEGAL AID SOC'Y, <https://legalaidnyc.org/get-help/bail-incarceration/what-you-need-to-know-about-the-treatment-of-transgender-persons-in-custody> [https://perma.cc/N68G-XWA6].

¹⁴⁹ *Id.*

¹⁵⁰ N.Y. STATE DEP'T OF CORR. & CMTY. SUPERVISION, DIRECTIVE NO. 4401 § VI(B)(3)(c)-(d), GUIDANCE & COUNSELING SERVICES (2020) [hereinafter NYS DOCCS DIR. NO. 4401].

¹⁵¹ *What You Need to Know About the Treatment of Transgender Persons in Custody*, *supra* note 148.

solitary confinement.¹⁵² Efforts have been made to change policy on the county level, with recent successes being made in New York County.¹⁵³

II. INTERPRETATION OF THE GENDA

A. *The Text and Legislative History*

GENDA was passed in 2019 and accomplished two things: it added gender identity to New York's hate crimes statute, and it made discrimination on the basis of gender identity unlawful.¹⁵⁴ The portion of the statute relevant to the present discussion makes it unlawful for the owner or managing agent of a housing accommodation to discriminate in providing housing accommodations on the basis of gender identity.¹⁵⁵ GENDA was first introduced in 2003, but it failed.¹⁵⁶ Subsequently, GENDA was introduced every year from 2008 to 2019.¹⁵⁷ It passed the state assembly each year but was not introduced in the New York Senate until January 2019.¹⁵⁸ The bill passed the New York Senate at the same time as another bill that banned mental health professionals from subjecting minors to conversion therapy.¹⁵⁹ The bill passed largely along

¹⁵² Stahl, *supra* note 133.

¹⁵³ Tim Fitzsimons, *New York County Agrees to 'Landmark' Transgender Jail Reforms*, NBC NEWS (Aug. 6, 2020, 4:33 PM), <https://www.nbcnews.com/feature/nbc-out/new-york-county-agrees-landmark-transgender-jail-reforms-n1236061> [<https://perma.cc/3DGY-E9PQ>].

¹⁵⁴ Press Release, N.Y. State Senate, Senate Majority Passes GENDA & Ban Conversion Therapy (Jan. 15, 2019), <https://www.nysenate.gov/newsroom/press-releases/senate-passes-genda-bans-conversion-therapy> [<https://perma.cc/NR3K-DRD8>].

¹⁵⁵ The relevant language of the statutory text states:

It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof:

... [t]o refuse to sell, rent, lease or otherwise to deny to or withhold from any person or group of persons such a housing accommodation because of... gender identity or expression

N.Y. EXEC. LAW § 296(5)(a)(1) (McKinney 2022).

¹⁵⁶ Harding, *supra* note 38.

¹⁵⁷ See Press Release, N.Y. State Senate, *supra* note 154; Harding, *supra* note 38; S.B. 1047, 2019–2020 Reg. Sess. (N.Y. 2019).

¹⁵⁸ Joseph Spector, *New York Updates Laws to Protect Gender Identity from Discrimination*, DEMOCRAT & CHRON. (Jan. 15, 2019, 1:31 PM), <https://www.democratandchronicle.com/story/news/politics/albany/2019/01/15/new-york-update-laws-protect-gender-identity-discrimination/2574328002> [<https://perma.cc/7H8L-ZS25>].

¹⁵⁹ See Press Release, N.Y. State Senate, *supra* note 154. Conversion therapy is a practice that seeks to change someone's sexual orientation or sexual behavior to be heterosexual, and it has been

party lines.¹⁶⁰ The bill's sponsor, State Senator Brad Hoylman,¹⁶¹ framed the passage of both GENDA and the conversion therapy ban as part of the State's efforts to oppose the anti-LGBTQ+ policies of the Trump administration.¹⁶² He also said that the bill was passed in spite of Republican opposition, and that the sixteen-year delay in getting GENDA passed was due to this opposition.¹⁶³

The stated purpose of the bill is to ensure that every individual has "an equal opportunity to enjoy a full and productive life."¹⁶⁴ It aims to combat the discrimination in employment and housing that prevents people from living full and productive lives.¹⁶⁵ The bill also codifies the legislature's view that New York courts were correct in holding that existing laws that prohibit sex discrimination also prohibit discrimination based on sex stereotypes or because an individual has or will transition.¹⁶⁶ The bill further states that "failure to provide such equal opportunity . . . not only threatens the rights and proper privileges of [New York's] inhabitants, but [also] menaces the institutions and foundation of a free democratic state."¹⁶⁷ Lastly, the bill mentions that the State is not promoting a particular attitude or way of life.¹⁶⁸ It is unclear what is meant by this statement. Perhaps the State was attempting to

widely discredited among psychiatric professional associations. *Conversion Therapy*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (Feb. 2018), https://www.aacap.org/aacap/Policy_Statements/2018/Conversion_Therapy.aspx [<https://perma.cc/6FLG-RCP2>]; AM. PSYCHIATRIC ASS'N, POSITION STATEMENT ON CONVERSION THERAPY AND LGBTQ PATIENTS (2018), <https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-Conversion-Therapy.pdf> [<https://perma.cc/MXK6-WCCL>]. The process is mentally damaging for those who undergo it, causing an increase in depression, anxiety, and suicide. G. Andrade & M. Campo Redondo, *Is Conversion Therapy Ethical? A Renewed Discussion in the Context of Legal Efforts to Ban It*, ETHICS, MED. & PUB. HEALTH, Feb. 2022. The process is especially harmful for minors. Caitlin Ryan, Russell B. Toomey, Rafael M. Diaz & Stephen T. Russell, *Parent-Initiated Sexual Orientation Change Efforts with LGBT Adolescents: Implications for Young Adult Mental Health and Adjustment*, 67 J. HOMOSEXUALITY 159 (2020).

¹⁶⁰ The bill had thirty-eight cosponsors, all of whom were Democrats. S.B. 1047, 2019–2020 Reg. Sess. (N.Y. 2019). It passed the Senate floor on January 15th, on a forty-two to nineteen vote; only three Republicans voted for the bill. *Id.*

¹⁶¹ Brad Hoylman represents New York's 27th Senate District, which encompasses much of Lower and Midtown Manhattan. *Id.*

¹⁶² See Press Release, N.Y. State Senate, *supra* note 154.

¹⁶³ *Id.*

¹⁶⁴ N.Y. S.B. 1047 § 1.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

rebut future criticism that it was attacking so-called “religious liberties.”¹⁶⁹

The law was passed with widespread support from organizations such as the New York Chapter of the American Civil Liberties Union¹⁷⁰ and the New York City Bar Association,¹⁷¹ which praised the GENDA bill for making housing and employment protections for trans people explicit in state law. The bill’s supporters characterized it as a step forward for human rights in the state, and an extension of previous efforts to improve LGBTQ+ civil rights, such as the push for marriage equality.¹⁷² This fits statements made by the bill’s sponsors who referenced their previous support for marriage equality when discussing their support for the bill.¹⁷³ However, the bill has been criticized by some for its punitive nature in adding gender identity to the hate crimes statute.¹⁷⁴ These critics say that placing additional years on a person’s sentence fails to combat the root causes of hate and contributes to mass incarceration.¹⁷⁵ However, there has been little to no discussion about the implications of the law for incarcerated people.

There is no indication in the text of the statute or the legislative history that the authors of the bill or the New York State Legislature were intending to change the housing of transgender people in prisons when they passed this bill. However, such an outcome does fit within the purposes of the bill—to stop housing and employment discrimination that prevents trans people from living full and productive lives, to support the welfare of the public, and to support a free and democratic society.¹⁷⁶

¹⁶⁹ Conservative commentators have framed the fight for LGBTQ+ rights as an attempt to erode what they term “religious freedom.” See, e.g., Thomas Messner, *Same-Sex Marriage and the Threat to Religious Liberty*, HERITAGE FOUND. (Oct. 30, 2008), <https://www.heritage.org/marriage-and-family/report/same-sex-marriage-and-the-threat-religious-liberty> [<https://perma.cc/4DMB-34SK>]; Cal Thomas, *You’ve Been Warned, America, Gay Marriage Is Just the Beginning*, FOX NEWS (June 30, 2015, 12:56 PM), <https://www.foxnews.com/opinion/youve-been-warned-america-gay-marriage-is-just-the-beginning> [<https://perma.cc/6DFV-Y7EC>].

¹⁷⁰ See *Legislative Memo: Gender Expression Non-Discrimination Act (2019)*, N.Y. C.L. UNION, <https://www.nyclu.org/en/legislation/legislative-memo-gender-expression-non-discrimination-act-2019> [<https://perma.cc/G6RN-SWUH>].

¹⁷¹ NOAH E. LEWIS, PHIL DESGRANGES, KATHY H. CHIN, MIRAH E. CURZER & MELISSA S. LEE, N.Y.C. BAR, REPORT ON LEGISLATION BY THE LESBIAN, GAY, BISEXUAL AND TRANSGENDER RIGHTS COMMITTEE, THE CIVIL RIGHTS COMMITTEE, THE ENHANCE DIVERSITY IN THE PROFESSION COMMITTEE AND THE SEX AND LAW COMMITTEE (2019), <https://s3.amazonaws.com/documents.nycbar.org/files/GENDA.pdf> [<https://perma.cc/XQ7N-V36U>].

¹⁷² See Press Release, N.Y. State Senate, *supra* note 154.

¹⁷³ *Id.*

¹⁷⁴ *What Else Happened When GENDA Passed the Senate on Tuesday*, SYLVIA RIVERA L. PROJECT (Jan. 22, 2019), <https://srp.org/what-else-happened-when-genda-passed-the-senate-on-tuesday> [<https://perma.cc/CN87-MQFH>].

¹⁷⁵ *Id.*

¹⁷⁶ S.B. 1047 § 1, 2019–2020 Reg. Sess. (N.Y. 2019).

There is an argument that the statute would have no purpose in prison because prison, by its nature, prevents people from living full and productive lives. However, while prison removes many pleasures of life that a person may enjoy, people in prison may still find fulfillment, purpose, and productivity behind bars through education,¹⁷⁷ religion,¹⁷⁸ community service,¹⁷⁹ and the arts.¹⁸⁰ Discrimination in prison could prevent trans people from leading life to the fullest and most productive extent possible behind bars. Further, in prison, the need to protect the civil rights that are the foundation of a free and democratic society is even greater because of the vulnerable position in which incarceration places someone.¹⁸¹ Thus, applying this law to the context of prisons fulfills the general purpose as stated in the law.¹⁸²

B. Interpretation of Gender Identity

The GENDA bill defines “gender identity or expression” as “actual or perceived gender-related identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being

¹⁷⁷ Margaret diZerega, *Postsecondary Education in Prison Benefits Communities and Saves Taxpayer Dollars*, FORBES (July 1, 2021, 3:12 PM), <https://www.forbes.com/sites/forbeseq/2021/07/01/postsecondary-education-in-prison-benefits-communities-and-saves-taxpayer-dollars/?sh=3ba84ba6684c> [<https://perma.cc/M335-STHC>].

¹⁷⁸ Richard Stansfield, Thomas O'Connor & Jeff Duncan, *Religious Identity and the Long-Term Effects of Religious Involvement, Orientation, and Coping in Prison*, 46 CRIM. JUST. & BEHAV. 337 (2019).

¹⁷⁹ Thousands of incarcerated people have served as volunteer firefighters in California, risking their lives for just a few dollars a day. Mihir Zaveri, *As Inmates, They Fight California's Fires. As Ex-Convicts, Their Firefighting Prospects Wilt*, N.Y. TIMES (Nov. 20, 2018), <https://www.nytimes.com/2018/11/15/us/california-paying-inmates-fight-fires.html> (last visited Nov. 25, 2022).

¹⁸⁰ For example, in Georgia, female incarcerated people have participated in a choir that has received some notable acclaim. Bekah Porter, *Female Inmates Break Free with Music*, GAINESVILLE TIMES (Aug. 24, 2014, 1:30 AM), <https://www.gainesvilletimes.com/life/life-top-stories/female-inmates-break-free-with-music> [<https://perma.cc/P8SY-X92M>]; Christopher Quinn, *Indigo Girl Helps Prison Choir Make CD*, ATLANTA J.-CONST. (Aug. 26, 2009), <https://www.ajc.com/entertainment/celebrity-news/indigo-girl-helps-prison-choir-make/> AAGVFUz1kYiLCvAKLCBheI [<https://perma.cc/P8ZD-2VUD>].

¹⁸¹ See Jerry Metcalf, *A Day in the Life of a Prisoner*, MARSHALL PROJECT (July 12, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/07/12/a-day-in-the-life-of-a-prisoner> [<https://perma.cc/5V7S-YRTN>] (describing a typical day inside a men's prison, which includes time being strictly regulated); see also Jessica Kent, *What Is Prison Life Really Like?*, MEDIUM (May 11, 2020), <https://nymin89.medium.com/what-is-prison-life-really-like-bfda2f9c7c96> [<https://perma.cc/P9HQ-SVMF>] (describing life inside a women's prison, which includes early wake-up times, long work days, and strict meal times).

¹⁸² S.B. 1047 § 1, 2019–2020 Reg. Sess. (N.Y. 2019).

transgender.”¹⁸³ Section 240.00 of New York’s Penal Law was amended by adding a new subdivision that states that “[g]ender identity or expression” includes someone’s “actual or perceived gender-related identity, . . . expression, or other gender-related characteristic . . . , including . . . the status of being transgender.”¹⁸⁴ This definition is deliberately broad. Use of the words “but not limited to[] the status of being transgender” makes the legislature’s intent clear that the law does not just impact people who identify as transgender, but also people who behave in gender nonconforming ways that may allow them to be perceived as transgender or simply outside the cisgender norm. There is nothing in this definition to indicate that it could not apply to prisons.

Specifically in the prison context, the decisionmaker’s choice for who fits under this definition of gender identity or expression becomes a critical one. In prison, the way incarcerated people live is highly controlled and regulated, including when they sleep, when they wake up, what they eat, what they wear, how they keep their hair, how they do their makeup (or lack thereof), and what they do nearly every minute of the day.¹⁸⁵ This total control has been linked to incarcerated people feeling depressed and powerless.¹⁸⁶ This control extends to gender presentation; in prisons, especially in men’s prisons, traditional forms of gender expression are strictly enforced.¹⁸⁷ This can make it difficult for all trans people, but especially trans women housed in men’s prisons, to express their gender identity.

If an incarcerated person wants an exception to be made to the normal strict prison regulations because of a disability, they must seek a disability accommodation.¹⁸⁸ In New York, this means getting evaluated by the medical unit and then filling out a form, which is then approved or rejected by the Deputy Superintendent for Program Services.¹⁸⁹ This is how an incarcerated trans person can get approved to have a feminine or masculine haircut, feminine or masculine undergarments, makeup, and

¹⁸³ S.B. 1047, 2019–2020 Reg. Sess. (N.Y. 2019).

¹⁸⁴ *Id.*

¹⁸⁵ See sources cited *supra* note 181; see also Zara Stone, *Beauty Behind Bars: Why Makeup Matters for Prisoners*, CNN STYLE (Nov. 2, 2021), <https://www.cnn.com/style/article/prisoners-makeup-pandemic/index.html> [<https://perma.cc/DY6J-2KPQ>].

¹⁸⁶ SHELLEY JOHNSON LISTWAN, DENA HANLEY & MARK COLVIN, THE PRISON EXPERIENCE AND REENTRY: EXAMINING THE IMPACT OF VICTIMIZATION ON COMING HOME 5–6 (2012), <https://www.ojp.gov/pdffiles1/nij/grants/238083.pdf> [<https://perma.cc/ADZ3-LLJ6>].

¹⁸⁷ See, e.g., Szuminski, *supra* note 26, at 500–01.

¹⁸⁸ N.Y. STATE DEP’T OF CORR. & CMTY. SUPERVISION, DIRECTIVE NO. 2614, REASONABLE ACCOMMODATIONS FOR INCARCERATED INDIVIDUALS WITH DISABILITIES (2020) [hereinafter NYS DOCCS DIR. NO. 2614].

¹⁸⁹ *Id.*

other items.¹⁹⁰ Because gender dysphoria is considered to be a disability, accommodations provided to them are evaluated by prison officials.¹⁹¹ Individual healthcare providers and administrators have tremendous discretion to approve or disapprove these accommodations.¹⁹² The amount of discretion they have makes it easy for providers or administrators with biases against trans people to deny accommodations to individuals with severe gender dysphoria based on their prejudice. This problem would hinder implementing GENDA in a prison context. In order for a trans person to be provided an appropriate housing accommodation, they would need to get approval and agreement from prison medical staff and administrators that they are indeed transgender.¹⁹³ It is possible that even if the policy were implemented, no trans person would actually be transferred to another prison. Prison officials could simply declare that they evaluated all incarcerated transgender people and concluded that they are all not truly transgender.

C. Interpretation of Housing Accommodation

New York's antidiscrimination statute defines "housing accommodation" as "any building, structure, or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied, as the home, residence or *sleeping place* of one or more human beings."¹⁹⁴ This definition of "housing accommodation" is broad. If we examine the plain meaning of the text, a prison is encompassed under the term "sleeping place." The definition of a sleeping place is "a place used by a person for the purpose of sleeping."¹⁹⁵ Prisons and jails clearly fit under this definition because they are used by incarcerated people for sleeping.

If we apply a more careful reading of the text using canons of legal construction, we reach the same result. Using the surplusage canon of

¹⁹⁰ See *id.*

¹⁹¹ NYS DOCCS DIR. NO. 4401, *supra* note 150, § VI(B)(3)(a)–(b).

¹⁹² *Id.* § VI(B)(3)(b); NYS DOCCS DIR. NO. 2614, *supra* note 188; Niyeti, *Prisoners Health Care*, ETHICAL ISSUES IN HEALTH CARE (Feb. 22, 2014), <https://scholarblogs.emory.edu/philosophy316/tag/doctor-discretion> [<https://perma.cc/SKK5-NKBM>].

¹⁹³ NYS DOCCS DIR. NO. 4401, *supra* note 150, § VI(B)(3)(a)–(b); NYS DOCCS DIR. NO. 2614, *supra* note 188.

¹⁹⁴ N.Y. EXEC. LAW § 292(10) (McKinney 2022) (emphasis added).

¹⁹⁵ *Sleeping Place Definition*, L. INSIDER, <https://www.lawinsider.com/dictionary/sleeping-place> [<https://perma.cc/96ZH-ZBVV>].

legal construction, we interpret statutes to give each word significance.¹⁹⁶ No word should be interpreted to have a duplicative meaning as another word or phrase in the statute.¹⁹⁷ If sleeping place simply meant a traditional home or residence—such as a house, apartment, or condo that is purchased or leased by the occupant—then the term “sleeping place” would violate the surplusage canon, because it would not provide additional meaning to “home” or “residence.” Therefore, the statute is meant to include more than the purchase or rental of houses, apartments, or condos and can be interpreted to include other sleeping places, such as halfway houses, shelters, and prisons.

The case law around the interpretation of this statute supports this conclusion. New York courts have found a variety of nontraditional housing to be within the term “housing accommodation” under the antidiscrimination law. A New York court found that a trans woman who was denied placement in a residential drug treatment program—which was being used as an alternative to incarceration—was denied a housing accommodation under section 296 of the New York Executive Law.¹⁹⁸ Another New York court found that a twenty-four-bed foster care facility qualified as a “housing accommodation” for the purposes of alleging discrimination under section 296.¹⁹⁹ Both of these settings, the residential drug treatment program and the foster care facility, are state-run or state-supported institutions that are free to those who stay in them, like prisons.²⁰⁰ Further, the argument that prisons are similar to the drug treatment facility is strong because people can be sentenced to the facility as part of a legal criminal process in the same way people are sentenced to prison.²⁰¹

The biggest argument against this interpretation of New York’s law comes from previous interpretations of the Fair Housing Act (FHA). The FHA was passed by Congress in 1968 with the goal of preventing racial discrimination in housing.²⁰² While judicial interpretations of the FHA do not control interpretations of equivalent state laws by state courts, state courts have used interpretation of the FHA to guide their

¹⁹⁶ *A Guide to Reading, Interpreting and Applying Statutes*, WRITING CTR. AT GEORGETOWN UNIV. L. CTR. 7 (2017), <https://www.law.georgetown.edu/wp-content/uploads/2018/12/A-Guide-to-Reading-Interpreting-and-Applying-Statutes-1.pdf> [<https://perma.cc/FN7J-CWWD>].

¹⁹⁷ *Id.*

¹⁹⁸ *Wilson v. Phx. House*, 978 N.Y.S.2d 748, 762 (Sup. Ct. 2013).

¹⁹⁹ *Doe v. Bell*, 754 N.Y.S.2d 846, 856 (Sup. Ct. 2003).

²⁰⁰ *See id.* at 847; *Program Profile: Drug Treatment Alternative to Prison (DTAP)*, NAT’L INST. OF JUST.: CRIME SOLS. (May 25, 2011), <https://crimesolutions.ojp.gov/ratedprograms/89> [<https://perma.cc/2HSD-N694>].

²⁰¹ *Program Profile: Drug Treatment Alternative to Prison (DTAP)*, *supra* note 200.

²⁰² *The Fair Housing Act*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/fair-housing-act-1> [<https://perma.cc/7GRH-SW5A>].

interpretations of their own laws.²⁰³ Federal courts have interpreted the FHA to not include prisons, jails, and facilities like prisons and jails.²⁰⁴ In *Garcia v. Condarco*, the court put forward two arguments as to why prisons are not covered by the FHA.²⁰⁵ One argument was that Congress did not intend the FHA to encompass prisons because the purpose of the FHA was to provide freedom of choice in housing.²⁰⁶ The FHA would have no purpose in prison because prisons are designed to deprive people of choices.²⁰⁷ The other argument was that the primary purpose of a dwelling is to serve as a residence, whereas the primary purpose of a prison is to punish offenders, protect the community, and provide rehabilitation.²⁰⁸ Opponents to interpreting New York housing law to cover prisons would likely argue that the same reasoning the court used in *Garcia* applies here.

The court's decision in *Garcia* was in error. While prison is certainly different from a house or apartment in many key ways,²⁰⁹ it functions as a residence for those living there. People in prison in New York can

²⁰³ See, e.g., *Renda v. Iowa C.R. Comm'n*, 784 N.W.2d 8, 15–16 (Iowa 2010) (“The ICRC determined that a prison is not a dwelling by relying on a decision from a federal district court case which determined that a jail was not a dwelling for purposes of the Fair Housing Act. While interpretations of the Fair Housing Act are instructive when interpreting the housing provisions of the Iowa Civil Rights Act, they are not controlling.”); *Firetree, Ltd. v. Norwalk*, No. 17cv1088, 2018 WL 4398253, at *7–8 (D. Conn. Sept. 14, 2018) (stating that the plaintiff's claims of discrimination under the FHA and the Connecticut Fair Housing Act “are adjudicated under similar . . . standards”); *Sw. Key Programs, Inc. v. City of Escondido*, No. 15-cv-01115, 2017 WL 1094001, at *2 n.2 (S.D. Cal. Mar. 24, 2017) (“The Court addresses the FHA claim and applies the same analysis to the FEHA claim because the FEHA is analogous in language to the FHA, and California state courts apply the same standards to FEHA and FHA claims.”).

²⁰⁴ See *Garcia v. Condarco*, 114 F. Supp. 2d 1158, 1159–60 (D.N.M. 2000) (holding that a city jail was not a dwelling under the FHA); see also *Abdus-Sabur v. Hope Vill., Inc.*, 221 F. Supp. 3d 3, 14–15 (D.D.C. 2016) (holding that a residential drug treatment facility was not a dwelling under the FHA); *Hatch v. City of Milwaukee*, No. 20-CV-1791, 2021 WL 4149485, at *3–4 (E.D. Wis. Sept. 13, 2021) (discussing that jails are not considered dwellings because doing so would be contrary to the purpose of the FHA).

²⁰⁵ *Garcia*, 114 F. Supp. 2d at 1161–62.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 1162.

²⁰⁸ *Id.* at 1161.

²⁰⁹ Differentiating a house or apartment from a prison is so obvious that it is borderline absurd. In an apartment, the occupant is free to come and go at will, whereas in a prison, the occupant is confined and cannot leave. See Metcalf, *supra* note 181. An apartment occupant may invite guests over at any time; an incarcerated person can only have visitors during certain hours. Pfoxhrpro, *What It's Really Like to Visit Someone in Prison*, MEDIUM (Aug. 27, 2020), <https://medium.com/@pfoxhrpro1/what-its-really-like-to-to-visit-someone-in-prison-fee14d4faa46> [https://perma.cc/6T6V-ZWF5]. An apartment resident may determine their own schedule; the schedule of someone in prison is tightly controlled. See Metcalf, *supra* note 181. An apartment resident can decide what their meals will be; incarcerated people must eat only what the prison serves them or what they can purchase in commissary. *Id.*

receive mail and packages,²¹⁰ learn new skills and trades, get an education, raise their children up to one year after birth,²¹¹ and get married²¹²—all at the prison. To say a prison is not a residence, especially for those serving long or life sentences, ignores the reality of how prisons function. But even if we accept the premise that prisons are not covered by the FHA, this interpretation is not controlling over New York law. Further, New York law uses the phrase “housing accommodation” in place of the word “dwelling” used by the FHA and many other state antidiscrimination laws.²¹³ By using “housing accommodation” instead of “dwelling,” it could be argued that the New York legislature was signaling that it did not want the precedent around the interpretation of “dwelling” to attach to its law.²¹⁴ Therefore, the term “housing accommodation” was intended to be more expansive and include more places than are included under “dwelling.”

III. IMPLICATIONS OF THE GENDA

A. *Conflicts with Other Areas of New York Law and Policy*

Interpreting section 296 to bar discrimination against trans people in prisons poses some conflicts with another part of section 296. Section 296(2)(b) states, “[n]othing in this subdivision shall be construed to . . . apply to the rental of rooms in a housing accommodation which restricts such rental to individuals of one sex.”²¹⁵ One could argue that prison is a type of housing accommodation that restricts who occupies it based on sex. On the other hand, that section includes the “rental” of rooms, which does not apply to prisons because rooms are not rented in prison. Is this word significant? Does section 296 still apply to places like

²¹⁰ *Mail and Packages*, N.Y. STATE DEP’T OF CORR. & CMTY. SUPERVISION, <https://doccs.ny.gov/mail-packages> [<https://perma.cc/3LWQ-C7FD>].

²¹¹ This program is only available at Bedford Hills, a women’s prison. *Family Services Programs*, N.Y. STATE DEP’T OF CORR. & CMTY. SUPERVISION, <https://doccs.ny.gov/family-services-programs> [<https://perma.cc/KKP9-YG22>].

²¹² Sara Dorn, *Over 1,600 New York State Inmates Married Behind Bars in Past 6 Years*, N.Y. POST (Mar. 28, 2020, 3:07 PM), <https://nypost.com/2020/03/28/over-1600-new-york-state-inmates-married-behind-bars-in-past-6-years> [<https://perma.cc/2YAY-YC64>].

²¹³ *Compare* N.Y. EXEC. LAW § 296(5)(a)(1) (McKinney 2022) (“It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a *housing accommodation*, constructed or to be constructed, or any agent or employee thereof . . . [t]o refuse to sell, rent, lease or otherwise to deny to or withhold from any person or group of persons such a *housing accommodation* because of . . . gender identity or expression” (emphasis added)), with sources cited *infra* note 222.

²¹⁴ See sources cited *supra* note 204.

²¹⁵ EXEC. § 296(2)(b).

foster care homes, residential drug treatment programs, and prisons where beds are paid for with taxpayer money? Further, it is not clear what the meaning of “sex” is in this section. Does it refer to biological sex, or does it refer to gender?

Another law that could conflict with this interpretation of section 296 is section 500-b(8)(4) of the New York Corrections Law.²¹⁶ This section prohibits a woman from being detained with a man in a jail or penitentiary.²¹⁷ Depending on the statutory definitions of “woman” and “man,” this section could pose some problems depending on how it is interpreted. It is possible that this problem could be solved by housing trans women in single cells or in an area away from cis women while still allowing them to participate in programming and activities.

B. *Conflict with the Prison Rape Elimination Act*

As mentioned previously, PREA states that a transgender person’s own view regarding their safety must be considered when determining housing placement in prisons.²¹⁸ This could pose a conflict with an interpretation of section 296 that says trans people must be housed according to gender identity. What if a trans person says they feel that they will be safer in a facility that matches their sex assigned at birth? If prison officials do indeed determine that a person is trans, section 296 as applied to prison would make it discriminatory not to treat them like a cis woman if they are a trans woman or like a cis man if they are a trans man.²¹⁹ Because cis women are housed in women’s prisons, trans women would have to be housed in women’s prisons, with no consideration for their own views of their safety, thus conflicting with PREA.

C. *How Applications of GENDA to Prison Will Impact Other States*

Twenty-three states and the District of Columbia explicitly prohibit housing discrimination on the basis of sexual orientation and gender identity.²²⁰ Different states use slightly different language in their housing statutes. Some states, like Iowa and California, use the phrase “housing

²¹⁶ N.Y. CORRECT. LAW § 500-b(4) (McKinney 2021).

²¹⁷ *Id.*

²¹⁸ 28 C.F.R. § 115.42(e) (2012).

²¹⁹ EXEC. § 296(2-a)(a).

²²⁰ *Nondiscrimination Laws*, *supra* note 40. An additional nine states interpret existing laws to include bans on discrimination based on sexual orientation and gender identity. *Id.* One state protects sexual orientation but not gender identity. *Id.* Eighteen states and five territories have no protections for either sexual orientation or gender identity in terms of housing. *Id.*

accommodation.”²²¹ Others, such as New Jersey, Illinois, and Missouri, include places of “public accommodation” in their anti-housing-discrimination statutes.²²² Still, other states, including Delaware, Utah, and Vermont, mirror the language of the FHA by using the word “dwelling.”²²³ To make matters more confusing, some states, such as Iowa, use both “dwelling” and “housing accommodation” in their anti-housing-discrimination statutes.²²⁴

The distinction between “dwelling” and “housing accommodation” is not entirely clear. The term “dwelling” in the FHA, which influences

²²¹ IOWA CODE § 216.8(1)(a) (2009) (“It shall be an unfair or discriminatory practice . . . [t]o refuse to sell, rent, lease, assign, sublease, refuse to negotiate, or to otherwise make unavailable, or deny any real property or *housing accommodation* or part, portion, or interest therein, to any person because of the . . . sexual orientation [or] gender identity . . . of such person.” (emphasis added)); CAL. GOV’T CODE § 12955 (West 2022) (“It shall be unlawful: (a) For the owner of any *housing accommodation* to discriminate against or harass any person because of the race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, veteran or military status, or genetic information of that person.” (emphasis added)).

²²² N.J. STAT. ANN. § 10:5-4 (West 2017) (“All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any *place of public accommodation*, publicly assisted housing accommodation, and other real property without discrimination because of . . . sexual orientation, . . . sex, [or] gender identity . . .” (emphasis added)); 775 ILL. COMP. STAT. § 5/1-102(A) (2021) (“To secure for all individuals within Illinois the freedom from discrimination against any individual because of his or her . . . sex . . . [or] sexual orientation . . . in connection with employment, real estate transactions, access to financial credit, and the availability of *public accommodations*.” (emphasis added)); MO. REV. STAT. § 213.065(1) (2017) (“All persons within the jurisdiction of the state of Missouri are free and equal and shall be entitled to the full and equal use and enjoyment within this state of any *place of public accommodation*, as hereinafter defined, without discrimination or segregation because of race, color, religion, national origin, sex, ancestry, or disability.” (emphasis added)).

²²³ 42 U.S.C. § 3604(b) (“[I]t shall be unlawful [under the FHA] . . . [t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a *dwelling*, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.” (emphasis added)); DEL. CODE ANN. tit. 6, § 4603(b)(1) (2016) (“[I]t shall be unlawful . . . [t]o discriminate in the sale or rental, to refuse to sell or rent, to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a *dwelling* to any person because of . . . sexual orientation[] [or] gender identity . . .” (emphasis added)); UTAH CODE ANN. § 57-21-5(1)(a)(iii) (West 2015) (“It is a discriminatory housing practice to do any of the following because of a person’s . . . sexual orientation[] [or] gender identity . . . [including to] deny or make unavailable a *dwelling* from any person . . .” (emphasis added)); VT. STAT. ANN. tit. 9, § 4503(a)(1) (2022) (“It shall be unlawful . . . [t]o refuse to sell or rent, or refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a *dwelling* or other real estate to any person because of the . . . sexual orientation[] [or] gender identity . . . of a person . . .” (emphasis added)).

²²⁴ See IOWA CODE § 216.8(1)(a) (2009) (“It shall be an unfair or discriminatory practice . . . [t]o refuse to sell, rent, lease, assign, sublease, refuse to negotiate, or to otherwise make unavailable, or deny any real property or *housing accommodation* or part, portion, or interest therein, to any person because of the . . . sexual orientation[] [or] gender identity . . . of such person.” (emphasis added)). *But see id.* § 216.8A(1) (“A person shall not induce or attempt to induce another person to sell or rent a *dwelling* by representations regarding the entry or prospective entry into a neighborhood of a person of a particular . . . sexual orientation[] [or] gender identity . . .” (emphasis added)).

how states that model their antidiscrimination laws after the FHA interpret their own laws,²²⁵ was interpreted to exclude jails in *Garcia*.²²⁶ In *Garcia*, the court stated that the primary purpose of the FHA was to provide for freedom of choice in housing.²²⁷ The court concluded that this purpose did not apply in prisons and jails because these institutions are designed to punish people by depriving them of choices.²²⁸ The Supreme Court of Iowa, whose state statute also includes the term “dwelling,” agreed with the underlying reasoning of the *Garcia* court that the purpose of jails and prisons is to punish and not to be a residence and, therefore, anti-housing-discrimination laws do not apply.²²⁹ However, some states with antidiscrimination laws that are more broadly worded than the FHA may choose to interpret their laws to include prisons. For example, New Jersey’s law not only bans discrimination in “housing accommodation[s],” but also in places of public accommodation.²³⁰ The District Court for the District of New Jersey found that a prison was a public accommodation within the meaning of the statute.²³¹ However, just because a state court could interpret its antidiscrimination statute more broadly than the FHA does not mean that it will. For example, a Missouri court found that prisons are not places of public accommodation under its antidiscrimination law.²³²

If section 296 is interpreted to apply to prisons, this could provide persuasive support for other states with similar language to interpret their laws to also apply to prisons. However, the impact is likely to be limited.

²²⁵ See *Renda v. Iowa C.R. Comm’n*, 784 N.W.2d 8, 15–17 (Iowa 2010) (citing *Garcia v. Condarco*, 114 F. Supp. 2d 1158 (D.N.M. 2000) (interpreting the FHA to not cover jails)). In its interpretation, the Supreme Court of Iowa determined that the similarly worded Iowa statute, section 216.8A of the Iowa Code, did not cover state prisons. *Id.* at 16–17.

²²⁶ *Garcia*, 114 F. Supp. 2d at 1159–61 (holding that a city jail was not a dwelling under the FHA). Although *Garcia* was decided over twenty years ago, the principles it established continue to be used by courts today when interpreting the FHA. See, e.g., *Abdus-Sabur v. Hope Vill., Inc.*, 221 F. Supp. 3d 3, 14 (D.D.C. 2016) (discussing *Garcia* when determining that a residential drug treatment facility was not a dwelling under the FHA); *Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries*, 717 F. Supp. 2d 1101, 1109–12 (D. Idaho 2010), *aff’d on other grounds*, 657 F.3d 988 (9th Cir. 2011) (holding that a homeless shelter was not a dwelling under the FHA).

²²⁷ *Garcia*, 114 F. Supp. 2d at 1162.

²²⁸ *Id.* at 1161–62.

²²⁹ *Renda*, 784 N.W.2d at 15–17.

²³⁰ N.J. REV. STAT. § 10:5-4 (2017).

²³¹ *Chisolm v. McManimon*, 97 F. Supp. 2d 615, 621–22 (D.N.J. 2000), *rev’d*, 275 F.3d 315 (3d Cir. 2001). Although the Third Circuit reversed the district court’s decision, it only did so because it concluded there was an issue of material fact and, therefore, the case should go to trial. *Chisolm*, 275 F.3d at 332. The Third Circuit never discussed the issue of whether prisons were public accommodations under section 10:5-4. *Id.* at 321–32.

²³² *State ex rel. Naugles v. Mo. Comm’n on Hum. Rts.*, 561 S.W.3d 48, 51–52 (Mo. Ct. App. 2018).

Many states use language that is different from New York's law,²³³ thus providing states an excuse to distinguish their laws from New York's. Also, the interpretation in *Garcia* that the FHA does not include prisons and other states that have held that their laws do not include prisons provide a strong persuasive pull in the other direction.²³⁴ Therefore, a change in the way New York interprets its laws is unlikely to have a wider impact in the short term, although it may have an impact in the long term.

D. Public Policy Considerations

The strongest argument against housing trans people according to their gender identity is that it will harm safety.²³⁵ Opponents of allowing trans women—and it is usually only trans women that they are concerned about—into women's prisons say doing so places cis women at risk of sexual assault.²³⁶ Recently, California enacted the Transgender Respect, Agency, and Dignity Act, which explicitly requires transgender people to be housed according to their gender identity.²³⁷

In an opinion piece published by a critic of the Act, the author said the Act put incarcerated cis women in danger because it would be used by opportunistic men to sexually assault them.²³⁸ The author interviewed several cis woman who had been incarcerated in California who were fearful the law would harm them.²³⁹ She stated that the cis women she talked to would be fine living with an actual transgender woman who had

²³³ See sources cited *supra* notes 221–223.

²³⁴ See *Garcia v. Condarco*, 114 F. Supp. 2d 1158, 1162 (D.N.M. 2000); *Renda*, 784 N.W.2d at 15–17; *Naugles*, 561 S.W.3d at 51–52.

²³⁵ Rachael Wong, *Housing Transgender Women in Female Prisons Is Not the Solution*, WOMEN'S F. AUSTL. (July 3, 2020), <https://www.womensforaustralia.org/housing-transgender-women-in-female-prisons-is-not-the-solution> [https://perma.cc/2477-62VJ].

²³⁶ Valerie Hudson, *Perspective: The Cruel and Unusual Punishment Creeping into Our Prisons*, DESERET NEWS (Dec. 10, 2021, 12:00 AM), <https://www.deseret.com/opinion/2021/12/9/22820725/the-cruel-and-unusual-punishment-creeping-into-our-prisons-trans-women-sexual-assault-california> [https://perma.cc/B6ZS-SEH8]; *Trans Women in Female Prisons*, *supra* note 35.

²³⁷ CAL. PENAL CODE § 2606 (West 2021); S.B. 132, 2019–2020 Reg. Sess. (Cal. 2020). Section 2606(a)(3) of the Act says:

An individual incarcerated by the Department of Corrections and Rehabilitation who is transgender, nonbinary, or intersex, regardless of anatomy, shall:

....

... [b]e housed at a correctional facility designated for men or women based on the individual's preference, including, if eligible, at a residential program for individuals under the jurisdiction of the department.

§ 2606.

²³⁸ Shrier, *supra* note 37.

²³⁹ *Id.*

undergone gender-affirming surgery.²⁴⁰ This statement implies that these cis woman would not be comfortable living with someone who had not had gender-affirming surgery because that person would be more of a threat.

But is the completion of gender-affirming surgery really indicative that someone is trans? The United States Transgender Survey (USTS)²⁴¹ reported that only twelve percent of trans women have had gender-affirming surgery.²⁴² Fifty-four percent of trans women said they want gender-affirming surgery, and an additional twenty-two percent said they might want it.²⁴³ The Philadelphia Center for Transgender Health estimated the cost of gender-affirming surgery for trans women to be \$25,600.²⁴⁴ Additionally, insurance often will not cover the cost of gender-affirming surgery.²⁴⁵ Fifty-five percent of respondents to the USTS reported being denied insurance coverage for transition-related surgeries.²⁴⁶ It seems that whether or not someone has undergone gender-affirming surgery is not based on whether they are really trans, but rather on how much money they have. In fact, the USTS found that the likelihood that a trans person has used surgery to aid their transition increases dramatically with income.²⁴⁷

Another public policy argument that will likely be made against this policy change is that implementing this rule takes discretion away from prison officials. Opponents of the policy may argue that the current policy allows prison officials to consider the safety of the trans person, the other incarcerated people, and the staff when deciding where to house trans people.²⁴⁸ If section 296 were applied to prisons, this discretion would be

²⁴⁰ *Id.*

²⁴¹ The USTS is the largest survey of trans people in the United States. JAMES ET AL., *supra* note 24, at 4. In 2015, the survey had over twenty-seven thousand respondents from all fifty states and many United States territories. *Id.*

²⁴² *Id.* at 102. The report refers to vaginoplasty, which is the name for a type of surgery that reconstructs or, in this case, creates a vagina. *Id.*; *Vaginoplasty*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/treatments/21572-vaginoplasty> [https://perma.cc/PFA2-QD6P] (May 28, 2021).

²⁴³ JAMES ET AL., *supra* note 24, at 102.

²⁴⁴ *Male to Female Price List*, PHILA. CTR. FOR TRANSGENDER SURGERY, <http://www.thetransgendercenter.com/index.php/maletofemale1/mtf-price-list.html> [https://perma.cc/DHS2-YTNG].

²⁴⁵ *Transgender Health Care*, HEALTHCARE.GOV, <https://www.healthcare.gov/transgender-health-care> [https://perma.cc/TST9-MFWW].

²⁴⁶ JAMES ET AL., *supra* note 24, at 95. Interestingly, procedures—such as hormone therapy, mastectomy, or vaginoplasty—which are denied to trans people, are often covered for cis people. Keisi, *It's Covered If You're Cis*, MEDIUM (Oct. 2, 2014), <https://medium.com/@keisisqrl/its-covered-if-youre-cis-b6f64da39b64> [https://perma.cc/4LD5-R2BK].

²⁴⁷ See JAMES ET AL., *supra* note 24, at 100–01.

²⁴⁸ NYS DOCCS DIR. NO. 4401, *supra* note 150, § VI(B)(3)(a)–(d), § IV(C)(2).

taken away.²⁴⁹ Opponents could also argue that prison officials know better than legislators—and law students writing notes—about how to run a safe and secure prison, and we should not second guess their judgment.

In a recent case, *Edmo v. Idaho Department of Corrections*, an analogous argument was made. The Ninth Circuit held that Idaho violated the Eighth Amendment by refusing to provide an incarcerated trans woman with gender-affirming surgery.²⁵⁰ The Ninth Circuit noted that the district court had made a narrow and not intrusive injunction—in compliance with the Prison Litigation Reform Act (PLRA), which says injunctive relief must be narrowly drawn²⁵¹—in order to have a minimal effect on prison officials’ discretion over their own policies.²⁵² The Ninth Circuit also chose to limit the scope of its decision to the plaintiff, declining to extend the scope to other similar cases and remove discretion from prison healthcare providers and administrators.²⁵³ From this decision, it is clear that courts and Congress, through its passage of the PLRA, have a desire to not take discretion away from prison officials in areas of prison policy.

These decisions about where to house trans people are being made not with a view for what will be the best outcome for everyone involved, but rather based on the biases that prison staff have toward trans people. As stated previously, trans people are frequently victimized inside prisons when housed according to their genitals.²⁵⁴ Yet, this is not taken as seriously as the hypothetical fear that trans women may harm women while in prison. If a trans woman has a history of committing sex crimes against women, that is used as an excuse not to house her in a female prison, but cis women who have committed sex crimes against women are always housed in women’s prisons without question.²⁵⁵ Thus, needing to house trans women in male prisons for the same crimes committed by cis women is not a good-faith argument. It is an excuse for prison officials to use their biases to inform public policy and not actual data.

²⁴⁹ *Id.*

²⁵⁰ *Edmo v. Corizon, Inc.*, 935 F.3d 757, 803 (9th Cir. 2019).

²⁵¹ 18 U.S.C. § 3626(a)(1)(A).

²⁵² *Edmo*, 935 F.3d at 783.

²⁵³ *Id.* at 803. It is doubtful that, despite the Ninth Circuit’s desire that this case only be applied to *Edmo* as an individual, the case has no precedential effect.

²⁵⁴ GRANT ET AL., *supra* note 18, at 6.

²⁵⁵ See Anna Slatz, *ACLU Claims Denying Male Sex Offenders Transfer to Women’s Prisons Is “Discriminatory”*, REDUXX (May 19, 2022), <https://reduxx.info/aclu-claims-denying-male-sex-offenders-transfer-to-womens-prisons-is-discriminatory> [<https://perma.cc/7MVB-QM7W>].

CONCLUSION

The approximately twenty-eight thousand trans people that are incarcerated in United States jails and prisons every year²⁵⁶ are overwhelmingly placed in facilities based on their genitalia. This has led transgender people in jails and prisons to experience overwhelming rates of sexual and physical victimizations.²⁵⁷ A small but increasing number of states have chosen to make the policy decision to house people according to their genitalia, but it is possible to make this policy change with existing law. Over twenty-three states and the District of Columbia have laws that protect trans people from housing discrimination.²⁵⁸ Recently, New York also modified its antidiscrimination laws to include trans people.²⁵⁹

The thesis of this Note is that New York's existing policy of not placing trans people in prisons that match their gender identity violates New York's own laws. This thesis is supported by the text, purpose, and legislative history of the statute and existing New York legal precedent. The stated purpose of the bill is to ensure that every individual has "equal opportunity to enjoy a full and productive life."²⁶⁰ This purpose extends to prisons where, while individuals may be deprived of many of the comforts of life, trans people are certainly entitled to have as good of a chance to have a full and productive life as other incarcerated people. The definition of "housing accommodation" includes the phrase "sleeping place," which signals that the law is meant to include more than the purchase or lease of houses, apartments, and condos.²⁶¹ New York courts have held that "housing accommodation" refers to other types of government-funded institutions, including a residential drug treatment facility and a foster care facility.²⁶²

As an increasing number of states continue to pass gender identity nondiscrimination laws, the need for clarification about how these laws

²⁵⁶ See *supra* notes 29–30 and accompanying text.

²⁵⁷ See *supra* notes 18–20, 24 and accompanying text. For Black trans people, fifteen and twelve percent reported being physically assaulted by police and denied routine medical care, respectively, in prison or jail. GRANT ET AL., *supra* note 18, at 6, 169.

²⁵⁸ *Nondiscrimination Laws*, *supra* note 40.

²⁵⁹ See Press Release, N.Y. State Senate, *supra* note 154.

²⁶⁰ S.B. 1047, 2019–2020 Reg. Sess. § 1 (N.Y. 2019).

²⁶¹ N.Y. EXEC. LAW § 292(10) (McKinney 2021).

²⁶² *Wilson v. Phx. House*, 978 N.Y.S.2d 748, 762 (Sup. Ct. 2013) (holding that a trans woman who was denied placement in a residential drug treatment program was denied a housing accommodation under section 296); *Doe v. Bell*, 754 N.Y.S.2d 846 (Sup. Ct. 2003) (holding that a twenty-four-bed foster care facility qualified as a "housing accommodation" for the purposes of alleging discrimination under section 296).

impact prisons will become even more important. More scholarship is needed analyzing how these laws can and should be applied to prisons.