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Citation:

Annette de la Torre, Is Ze an American or a Foreigner - Male or Female - Ze's Trapped, 17 Cardozo J.L. & Gender 389 (2011)

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Thu Feb 7 22:14:05 2019

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IS ZE AN AMERICAN OR A FOREIGNER? MALE OR FEMALE? ZE'S TRAPPED!

ANNETTE DE LA TORRE*

INTRODUCTION

America was founded on the belief “that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness.”¹ These were ideals of which our forefathers had a profound understanding and appreciation because they were all immigrants who came to America for a better life. Since the birth of our nation, America has been known for being a culturally diverse society that welcomes people from everywhere in the world, regardless of race, creed, and background. Given the importance that has been placed on creating a diverse society, one would expect that America’s open-minded and welcoming repute towards people with different backgrounds would translate into the values, aims, and sentiments of the American legal system. Instead, the American legal system has evolved into one that is based on the need for absolute, rigid and identifiable categories with a distaste for ambiguity.

In American society, which is so focused on being able to clearly identify people by checking a box, a transgendered/transsexual immigrant detainee is the epitome of the indefinable. Ze² presents a serious threat to society’s need for having rigid categories. Society does not understand if ze is male or female, and instead they view hir³ as being something caught in between the two. This lack of understanding of the trans individual causes conflict when dealing with the placement of a detainee based on gender. As a result, ze is faced with a unique

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¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

² *Gender Neutral Pronoun Usage*, <http://web.mit.edu/trans/GenderNeutralPronouns.pdf> (last visited Dec. 21, 2010) (Gender-neutral pronouns will be used when referring to transgendered/transsexual individuals throughout the Note. Currently there is no particular gender neutral pronoun that is widely used. “Ze” and its various forms are one of the many accepted gender-neutral third person personal pronouns. See *The Need for a Gender-Neutral Pronoun*, <http://genderneutralpronoun.wordpress.com/> (last visited Dec. 21, 2010).

³ *Id.*

struggle in proving hir⁴ gender. Ze must not only fight for legitimacy to be American, but ze must also fight to be the gender ze so chooses. Ze is trapped with nowhere to go. Hir homeland has rejected hir for who ze is, and America has rejected hir for who ze is *not*, leaving hir oppressed in a legal system that has yet to begin to understand hir predicament. Hir imprisonment is one that extends beyond that of the four cell walls to being in a body that is not truly hirs, battling with the essence of what it means to be male and female, masculine and feminine.

This Note explores the relationship of gender and sex as applied to the transgendered and transsexual immigrant detainees in detention centers operated by U.S. Immigration and Customs Enforcement (“ICE”).⁵ These issues must be addressed because allowing trans⁶ detainees to remain in unsafe conditions within ICE’s detention facilities is a violation of their Eighth Amendment⁷ rights.⁸

Part I of this Note attempts to provide an in-depth definition and discussion of transsexualism. It includes an analysis of the differences and similarities between the terms “gender” and “sex” and how the two terms are related but can also be separate elements of one’s female or male identity. This distinction is important because the goals of a transgendered and transsexual individual differ when it comes to determining what sex the trans individual chooses to live hir anatomical life. After establishing these differences, the Note will then continue with an explanation of Gender Identity Disorder and how it is used to understand transsexualism in our society. This connection is necessary in order to understand how this disorder has become a part of the medical model. All of these steps in defining the various elements of transsexualism set the foundation for providing an understanding of how the law has chosen to incorporate the medical model into the

⁴ *Id.*

⁵ “U.S. Immigration and Customs Enforcement (“ICE”) is the largest investigative arm of the Department of Homeland Security (“DHS”), responsible for enforcing the nation’s immigration and customs laws that protect national security and public safety.” *U.S. Immigration and Customs Enforcement*, About, <http://www.ice.gov/about/overview/> (last visited Dec. 21, 2010).

⁶ For the purposes of this Note, “trans” will be used as an umbrella term referring to both transgender and transsexual individuals. See *Hudson’s FTM Resource Guide*, <http://www.ftmguide.org/terminology.html> (last visited Dec. 21, 2010).

⁷ See U.S. CONST. amend. VIII (Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.).

⁸ See Sydney Tarzwell, Note, *The Gender Lines are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 170-71 (2006).

Transgender individuals – individuals who are both crossing and changing their gender categories – are incompatible with a system that relies on rigidly demarcated gender boundaries to function. In the absence of policies specifically addressing the needs of transgender prisoners, such prisoners are likely to face the denial of gender-affirming medical care (resulting in physical and psychological pain, and a feeling of loss of identity), as well as harassment and assault. The Eight Amendment jurisprudence that guarantees some protection to transgender prisoners (both in terms of safe placements and access to some form of medical or psychological treatment) ultimately fails to ensure humane conditions for transgender prisoners. (citations omitted).

legal definition for transsexualism, as well as how this definition affects what rights a particular individual will have as a result of his status.

Part II of this Note provides an explanation of ICE's current detention policies. This section lays out the differences between civil immigration detention and criminal detention. After establishing the differences, an explanation and background is provided for how detention became a part of the United States' immigration policies and what purposes this civil detention aims to achieve. As part of the discussion of ICE's detention policies, this Note examines the population break-downs on detainees and what implications the detention policies have on trans detainees. In addition, Part II includes a background of access to healthcare and personal hygiene within an ICE detention facility. Lastly, this section examines the procedures for addressing sexual abuse and assault within the facilities and the precautionary measures that are taken with regard to such acts.

Part III provides an assessment of each ICE policy discussed in Parts I and II and provides concrete examples of how the current policies are failing to address the needs of trans detainees. As part of the section, all of the issues that arise with the mere placement and segregation of the transgendered detainees are addressed. Additionally, Part III illustrates the problems that trans detainees face with ICE's current policies regarding access to healthcare, access to personal hygiene, and how all of these issues in many cases lead to social dynamics that perpetuate gender violence against the trans detainee.

Since there is very little information available about immigrant trans detainees, and since ICE uses jails and prison detention standards when they contract with them, Part III attempts to provide background information about current policies in place at jails throughout the country. This is relevant for immigrant trans detainees because examining the current policies towards trans populations in place at these prisons and jails allows the American public to glimpse into the real-life implementation of standards that other detention facilities have used in order to see what is effective and what is not. From these standards stem my policy recommendations for ICE to apply to their detention facilities.

Lastly, in Part IV, I provide an analysis of the recent policy suggestions that have been made by ICE and illustrate how these suggestions only begin to address the problems and shortcomings of ICE's detention standards. In addition, I provide policy recommendations for how ICE detention centers can be improved.

I. ATTEMPTING TO DEFINE TRANSSEXUALISM

A. The Distinction between Gender and Sex

Although society often uses the terms "sex" and "gender" interchangeably, an awareness of the distinctions between the two is crucial to understanding the differences among trans individuals. Sex "is commonly used to denote one's status as a man or woman based upon biological factors . . . [it is] a reflection of one's

biology.”⁹ Gender, on the other hand, refers to the “behavioral, cultural, or psychological traits typically associated with one sex.”¹⁰ Therefore, a further distinction which indicates the differences between someone who is transgender and someone who is transsexual must be made. Someone who is transgender is a person who “choose[s] to live in the world as the opposite gender on a full-time basis but do[es] not wish to undergo sex reassignment surgery. [It is also] an umbrella term used to describe the full range of individuals who have a conflict with or question about their gender.”¹¹

Defining someone who is transsexual is a bit more complicated because there are different stages and classifications for transsexuals. They are as follows:

‘A female to male’ transsexual (ftm) refers to one born with female sex organs who considers himself of the male gender. A ‘male to female’ transsexual (mtf) refers to one born with male sex organs who considers herself of the female gender. Today, with modern technology, it is possible to change genitalia to match. A ‘post-operative transsexual’ has undergone sex reassignment surgery; a ‘pre-operative transsexual’ intends to undergo such surgery. A ‘non-operative transsexual’ is one who desires to undergo such surgery, but is prevented by medical, financial, or other practical reasons. All of these may also undergo nonsurgical treatment to change sexual characteristics.¹²

These distinctions will become crucial as we delve into the issues that trans individuals face when being detained. The category into which the individual falls will dictate how detention-related procedures and regulations will affect hir. More importantly,

[a]mong the many questions arising from this somewhat perplexing situation is one of fundamental importance. Is the gender of a given individual that which society says it is, or is it, rather, that which the individual claims it to be? The answer is not easily arrived at. It would be very simple to state that the gender of an individual has always been that which society says it to be. But to so state would be to disregard the enlightenment of our times.¹³

⁹ Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 271 (1999).

¹⁰ “Gender,” MERRIAM-WEBSTER ONLINE DICTIONARY, 2009, <http://www.merriam-webster.com/dictionary/gender>.

¹¹ MILDRED L. BROWN & CHLOE ANNE ROUNSLEY, TRUE SELVES 19 (1996).

¹² Jillian Todd Weiss, *The Gender Case System: Identity, Privacy, and Heteronormativity*, 10 LAW & SEX. 123, 143-44 (2001).

¹³ *In re Anonymous*, 293 N.Y.S.2d 834, 836 (N.Y. Civ. Ct. 1968).

More importantly, to disregard the desire of a particular individual's choice to be identified as a particular gender would be to disregard and disrespect the identity of that particular individual.

B. Gender Identity Disorder ("GID") and Transsexuality

While transsexuality is not a new and novel concept, it is a phenomenon that has become a reality as a result of the advancement of medical technology. Sex Reassignment Surgery ("SRS"), which is viewed as the completion of a transsexual's transition, is not something that was possible for transsexuals until the twentieth century.¹⁴ Today, before a transsexual can legally be eligible to have SRS, ze must first be diagnosed with Gender Identity Disorder.¹⁵

Gender Identity Disorder ("GID") is a rare condition that affects both children and adults.¹⁶ In defining GID, the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders in 2000 ("DSM-IV-TR") states:

There are two components of Gender Identity Disorder, both of which must be present to make the diagnosis. [1] There must be evidence of a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex . . . [2] There must also be evidence of persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex.¹⁷

The DSM-IV-TR expounds on both criteria, asserting that the first criterion "is manifested by symptoms such as a stated desire to be the other sex, frequent passing as the other sex, desire to live or be treated as the other sex, or the conviction that he or she has the typical feelings and reactions of the other sex."¹⁸ The second criterion "is manifested by symptoms such as preoccupation with getting rid of primary and secondary sex characteristics (e.g., request for hormones, surgery, or other procedures to physically alter sexual characteristics to simulate the other sex) or belief that he or she was born the wrong sex."¹⁹

¹⁴ LYNN CONWAY, VAGINOPLASTY: MALE TO FEMALE SEX REASSIGNMENT SURGERY (2007), <http://ai.eecs.umich.edu/people/conway/TS/SRS.html> (Warning: Link depicts graphic images).

¹⁵ See generally Walter Meyer III et al., *The Harry Benjamin International Gender Dysphoria Association's Standards of Care for Gender Identity Disorders*, Sixth Version, 13 J. PSYCHOL. & HUM. SEXUALITY 1 (2000), <http://wpath.org/Documents2/socv6.pdf>; *Clinical Policy Bulletin: Sex Reassignment Surgery*, http://www.aetna.com/cpb/medical/data/600_699/0615.html (last visited Dec. 21, 2010). See also *Notes on Gender Role Transition*, <http://www.avitale.com/TreatmentPlan.htm> (last visited Dec. 21, 2010).

¹⁶ WebMD, *Sexual Health Center Gender Identity Disorder*, available at <http://www.webmd.com/sex/gender-identity-disorder> (last visited Dec. 21, 2010).

¹⁷ Am. Psychiatric Ass'n, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 576 (4th ed., text rev. 2000) (hereinafter "DSM-IV-TR").

¹⁸ *Id.* at 581.

¹⁹ *Id.*

On the whole, health care professionals tend to agree that a combination of psychotherapy, hormones, and gender-related surgery should be used to treat GID.²⁰ There is no “one-size-fits-all” medical routine that can be made applicable to a trans individual. Rather, each situation should be treated on a case-by-case basis.²¹ Because there is no clear-cut method for how to treat a trans individual, the World Professional Association for Transgender Health has produced medical guidelines to aid health care professionals who work with GID patients.²² Under these guidelines, a transsexual must take a “real life test” where ze must live the life of hir desired gender role before ze is allowed to undergo surgery.²³ This requirement for a “real life test” is put in place to ensure that the trans individual is well aware of what kind of life ze will be living after hir SRS is completed and attempts to ensure that ze is able to adjust to living life as the sex desired after the SRS.

C. The Medical Model and the Law

When determining the legal status of a trans individual, the legal community has chosen to base its determinations upon narrowly defined and socially “appropriate” gender roles by interpreting the medical determinations of sex. “In essence, the medical community determines the status of biology, while the legal community determines the status of one’s body (how to live assigned to a particular sex).”²⁴ The United States Supreme Court has adopted the American Medical Association’s definition that a transsexual is: “one who has ‘[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,’ and who typically seeks medical treatment, including hormonal therapy and surgery to bring about a permanent sex change.”²⁵ Although courts have recognized the chosen sex of individual transsexual people, the recognition is highly dependent on the particular judge hearing the case, the jurisdiction and the legal context in which the question is raised.²⁶ “The law, in short, is very thin,

²⁰ See Gianna E. Israel & Donald E. Tarver, *Transgender Hormone Administration*, in *TRANSSEXUAL CARE: RECOMMENDED GUIDELINES, PRACTICAL INFORMATION, AND PERSONAL ACCOUNTS* 56, 62-68 (Gianna E. Israel & Donald E. Tarver II eds., 1997) (describing different hormone treatments for different trans individuals); R. Nick Gorton, Jamie Buth & Dean Spade, *Medical Therapy and Health Maintenance for Transgender Men: A guide for Health Care Providers* 33-38 (2005) (describing different gender-related surgeries used to treat different trans men) (on file with author).

²¹ *Id.*

²² See Walter Meyer III et al., *The Harry Benjamin International Gender Dysphoria Association’s Standards of Care for Gender Identity Disorders*, Sixth Version, 13 J. PSYCHOL. & HUM. SEXUALITY 1 (2000), available at <http://wpath.org/Documents2/socv6.pdf>.

²³ See Richard Green, *Spelling “Relief” for Transsexuals: Employment Discrimination and the Criteria of Sex*, 4 YALE L. & POL’Y REV. 125 (1985).

²⁴ Leslie Pearlman, *Transsexualism as Metaphor: The Collision of Sex and Gender*, 43 BUFF. L. REV. 835, 851 (1995).

²⁵ *Farmer v. Brennan*, 511 U.S. 825, 829 (1994) (quoting American Medical Association, *Encyclopedia of Medicine* 1006 (1989)).

²⁶ See generally Jerry L. Dasti, Note, *Advocating A Broader Understanding of the Necessity of Sex-Reassignment Surgery under Medicaid*, 77 N.Y.U. L. REV. 1738, 1742 n.10 (2002).

heterogeneous, and ad hoc. But one consistent theme clearly emerges: Courts generally will not recognize a trans[sexual] person's chosen sex or gender without successful completion of sex-reassignment surgery."²⁷ The legal system relies on the classifications within the medical community differentiating transsexuals that are post-operative or pre-operative²⁸ and since "the law [is] a system of regulations that depends upon precise definition, [it] utilizes this diagnosis as another category upon which to base its decisions."²⁹

D. Legal Rights of Trans Individuals

Currently, the legal determinations used in determining who is considered transsexual are ambiguous, unclear, and capricious. This ambiguity is a direct result of discord within the judicial community with regards to how "transsexual sex" should be determined and what rights should be awarded based on the determination.³⁰

[S]ome jurisdictions allow postoperative transsexuals to define their own sex in order to attain a new or amended birth certificate or . . . obtain a marriage license, and others do not. Some States refuse to recognize a postoperative transsexual's new anatomical sex altogether, making of the transsexual's body a mockery, condemning her to live the rest of her days in a body that should be a source of pride and personal honor but is instead downgraded to a humiliating prison, a constant reminder of her sexual deviance.³¹

In addition, there is an even greater need for laws pertaining to such changes to be disseminated and explained to government employees and institutional authorities so that they can properly assist trans individuals.³²

II. ICE'S CURRENT DETENTION POLICIES

A. ICE Detention is Different from Criminal Detention

The criminal incarceration system, unlike ICE detention, refers to the authority of the government to incarcerate individuals charged with, or convicted of, criminal offenses.³³ ICE does not have the authority to detain aliens³⁴ for

²⁷ *Id.* at 1742 n.11.

²⁸ Kevin Tallant, *My "Dude Looks Like a Lady": The Constitutional Void of Transsexual Marriage*, 36 GA. L. REV. 635, 638 (2002).

²⁹ Debra Sherman Tedeschi, *The Predicament of the Transsexual Prisoner*, 5 TEMP. POL. & CIV. RTS. L. REV. 27, 34 (1995) (internal citation omitted).

³⁰ See Jody Lynce Madeira, Comment, *Law as a Reflection of Her/His-Story: Current Institutional Perceptions of, and Possibilities for, Protecting Transsexuals' Legal Interests in Legal Determinations of Sex*, 5 U. PA. J. CONST. L. 128, 183 (2002).

³¹ *Id.* at 183 n.268.

³² There are no statutes or regulations regarding how to have a sex change; there is only case law.

³³ DORA SCHRIRO, U.S. DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION DETENTION

criminal violations.³⁵ Rather, pursuant to the Immigration and Nationality Act, ICE has the authority to detain aliens who may be in violation of administrative immigration law and are subject to removal.³⁶

Although immigration detention is unlike criminal incarceration, society tends to view and treat immigrant detainees as being comparable to criminal detainees, and both populations are typically handled in similar ways.³⁷ With only a few exceptions, the facilities that ICE uses to detain aliens were originally built—and currently operate—as jails and prisons to confine pre-trial and sentenced felons.³⁸ The design of these secure facilities is based upon principles of command and control.³⁹ The facilities are typically in remote locations and at considerable distances from counsel and/or communities.⁴⁰ Along these same lines, ICE has attempted to adopt standards that are based upon corrections law and promulgated by correctional organizations to guide the operation of jails and prisons.⁴¹

B. The Purpose of ICE Detention

In the 1990s, as a response to the previous decade's mass migration of Cuban, Haitian and Central American refugees, the United States implemented detention as a vital part of its immigration policies.⁴² This change came about with the passage of the Antiterrorism and Effective Death Penalty Act ("AEDPA")⁴³ and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").⁴⁴ The passage of these laws was a pivotal point in immigration policy because:

[t]hese laws significantly changed the immigration landscape by expanding mandatory detention and eliminating much of the discretion previously exercised by administrative law judges. Mandatory detention was expanded to include perpetrators not only of crimes designated as "aggravated felonies," which include everything from misdemeanor non-violent theft offenses to violent crimes, but of any crime involving "moral turpitude" a phrase interpreted to justify the detention and deportation of persons guilty

OVERVIEW AND RECOMMENDATIONS 1 (2009), <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>.

³⁴ Webster's online dictionary defines "alien" as "a: belonging to another person, place or thing; strange, b: relating, belonging or owing allegiance to another country or government; foreign, c: exotic," available at <http://www.merriam-webster.com/dictionary/alien>.

³⁵ SCHRIRO, *supra* note 33, at 4 n.1.

³⁶ *Id.* For Immigration and Nationality Act, *see* 8 U.S.C. § 1101 et seq.

³⁷ SCHRIRO, *supra* note 33, at 4 n.1.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Detention Watch Network, *The History of Immigration Detention in the U.S.* <http://www.detentionwatchnetwork.org/node/2381> (last visited Dec. 21, 2010).

⁴³ 8 U.S.C. §§ 1189, 2332(d), 2339(b).

⁴⁴ 8 U.S.C. § 1101.

of shoplifting, drunk driving and minor drug offenses, with reduced discretion for review of individual circumstances.⁴⁵

In addition, the AEDPA and IIRIRA extended mandatory detention to several other categories of persons such as “those who are inadmissible or deportable on terrorism grounds (expanded by Sections 411 and 412. of the USA PATRIOT Act of 2001); . . . most arriving passengers (including those subject to expedited removal); and . . . individuals awaiting the execution of final removal orders.”⁴⁶ Among those who are being detained, there are immigrants that are both documented and undocumented.⁴⁷

With the implementation of these laws, ICE gained the authority to detain aliens who were alleged to have violated immigration laws.⁴⁸ Although the immigrants are held in similar conditions as criminals, their detention is civil and—unlike the purpose of criminal detention—the objective is “not to punish, but to ensure appearance in immigration court and ultimately, departure from the United States after a final order of deportation has been entered.”⁴⁹ These appearances in immigration court are part of the civil process that detained immigrants must undergo in order to determine whether they will be removed from the United States.⁵⁰

C. Populations Detained in ICE Facilities

Although there are records indicating the number of detainees who go through ICE facilities, most of the reports available to the public tend to provide information that breaks down immigrants based on criminal and non-criminal book-ins. For example, as demonstrated by the New York Field Office, Varick Detention Facility, the focus on criminals and non-criminals probably came into play because “[m]any of the detainees held at the [facility] have been picked up from jails, prisons, courts and other law enforcement facilities . . . or [were] transferred by other ICE or DHS components.”⁵¹ The most current report that included a population breakdown of immigrant detainees throughout the United States disclosed that 243,900 (66%) of detainees were non-criminal book-ins and that 125,583 (34%) detainees were criminal book-ins.⁵² The focus of such reports

⁴⁵ Human Rights Watch, *Chronic Indifference*, <http://www.hrw.org/en/node/10575/section/4> (last visited Dec. 21, 2010).

⁴⁶ STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 651 (5th ed., 2004). See also See INA §§ 235(b)(1)(B)(iii)(IV), 235 (b)(2)(A), 236 (c)(1)(A, B, C, D), 241(a)(1, 2, 3).

⁴⁷ See Detention Watch Network, *About the U.S. Detention and Deportation System*, <http://www.detentionwatchnetwork.org/aboutdetention> (last visited Dec. 21, 2010).

⁴⁸ *Id.*

⁴⁹ David Leopold, *Getting to a “Truly Civil Detention System”*, AILA LEADERSHIP BLOG, Oct. 6, 2009 (on file with author).

⁵⁰ See 8 U.S.C. § 1226 (2010).

⁵¹ New York City Field Office Varick Federal Detention Facility (on file with author).

⁵² SCHRIRO, *supra* note 33.

has, for the most part, been to highlight safety and health concerns related to overcrowding as well as the need for separation of criminal and non-criminal detainees within immigration detention centers.⁵³ The focus of these types of criminal breakdown reports is indicative of the lack of attention paid to segregating detainees based on factors other than criminal/non-criminal classification. It appears that ICE has yet to implement a successful detention program that adequately addresses the basic safety concerns of its general detainee population. Such a program has most likely not been implemented because ICE has yet to determine the needs of its detainee population, let alone the more complicated needs and minutiae of specific subgroups within the detainee population, such as trans detainees.

Therefore, since there are no readily accessible reports that provide a breakdown of ICE detainees based on gender, one of two things can be inferred: either those records are not accessible to the public, or they do not exist. This may be because ICE has not yet had the chance to tackle detainee separation/classification beyond the criminal/non-criminal categories. There is also the possibility that the agency does not have an interest in creating such a classification. In the unlikely chance that such gender break-down reports exist, it is unlikely that trans detainee statistics will be included in such reports. Most facilities—both ICE facilities and jails and prisons in general—have not yet determined how to segregate trans individuals and place detainees according to their gender at birth,⁵⁴ rather than choosing to devise an adequate separation system. In addition, when asked about detainees in general, one advocate expressed the sentiment that “statistics on transgender people are hard to come by; ‘No one counts trans people’”⁵⁵ This advocate’s sentiment appears to be applicable in this instance, since trans detainees’ needs have yet to be addressed.

D. General Overview of the Program and Description of Detention Facilities

The Office of Detention and Removal Operations (“DRO”) is the largest program within ICE. It oversees the apprehension, supervision, and removal of inadmissible and deportable aliens.⁵⁶ It assigns aliens to over 300 detention facilities.⁵⁷ The medical care at each of these facilities must be in compliance with national detention standards and is provided by the Division of Immigration Health Services (“DIHS”).⁵⁸ The national detention standards that the Immigration and

⁵³ See *id.* at 12. See also OFFICE OF INSPECTOR GENERAL, DETENTION AND REMOVAL OF ILLEGAL ALIENS [OIG-06-33] (2006).

⁵⁴ Human Rights Watch, *Transgender Prisoners, Identity, and Detention: Policy Recommendations*, http://www.outcast-films.com/films/cu/transgender_prisoners.pdf (last visited Dec. 21, 2010).

⁵⁵ *Id.* at 1.

⁵⁶ *Id.* at 5.

⁵⁷ *Id.* at 10.

⁵⁸ *Id.*

Naturalization Service (“INS”)⁵⁹ use are based upon the American Correctional Association (“ACA”) jail detention standards.⁶⁰ Written guidance in the field of trans individuals is limited since ICE primarily relies on the ACA correction detention standards designed for pre-trial felons and the ACA standards are silent on the treatment and placement of trans detainees.⁶¹ Although the ACA may provide a strong point of reference for the development of these standards, the implementation of standards used for criminal incarceration is inconsistent with the needs of ICE’s population, since that population is comprised of civil—rather than criminal—detainees.⁶² Such standards are inconsistent because the ACA created their standards with the goal of detaining criminals who in theory are more dangerous than ICE’s civil detainees who are not being detained for criminal activity, but for the sole purpose of ensuring that they appear at their immigration hearings.

E. Intake and Classification of Detainees

Upon arrival at a detention facility, each detainee is classified⁶³ before being admitted into the general population housing.⁶⁴ These classifications aim to ensure that detainees are protected from harm.⁶⁵ Each facility “develop[s] and implement[s] a system for classifying detainees . . . facilities may use similar locally established systems, subject to DRO [Detention and Removal Officer] evaluation, as long as the classification criteria are objective and uniformly applied, and all procedures meet ICE/DRO requirements.”⁶⁶ As stated previously, most ICE detention facilities use the ACA standards, which are used by all of the jails and prisons throughout the United States. Since ICE facilities tend to be within one of these establishments, ICE generally adopts that establishment’s standards rather than creating its own standards. ICE classifies detainees as low, moderate, or high risk and bases these determinations on the detainee’s criminal history.⁶⁷ Although the current system distinguishes between non-criminal, non-violent criminal, and violent criminal aliens, it does not properly distinguish within categories of crime

⁵⁹ INS is no longer in existence, today. DHS is the current name of the agency that administers immigration and naturalization services in the US. However, the detention standards that INS chose to implement have continued to be carried out by DHS. http://www.abanet.org/publicserv/immigration/ice_detention_standards0107.pdf.

⁶⁰ Human Rights Watch, *supra* note 54, at 16.

⁶¹ *Id.*

⁶² *Id.*

⁶³ IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE/DRO DETENTION STANDARD, DEFINITIONS 2 (2008) (defines classification as “a process used to make housing and program assignments by assessing detainees on the basis of objective information about past behavior, criminal records, special needs, etc”) (on file with author).

⁶⁴ IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE/DRO DETENTION STANDARD, CLASSIFICATION SYSTEM 1 (2008), www.ice.gov/doclib/PBNDS/pdf/classification_system.pdf.

⁶⁵ *Id.*

⁶⁶ *Id.* at 2.

⁶⁷ SCHRIRO, *supra* note 33, at 17.

for degree of seriousness, and does not verify a detainee's propensity for violence.⁶⁸ In addition, any detainees who cannot be classified because of missing information at the time of the processing will be kept separated from the general population.⁶⁹ ICE neither provides examples of what constitutes missing information, nor defines "missing information" itself.⁷⁰

Furthermore, it is interesting to note that within the classification procedures, ICE does not take into account how to house a "Special-Need Detainee;" yet under the definitions provided in their detention standards, it acknowledges the existence of such detainees.⁷¹ This disconnect is but a small demonstration of the gap between the procedures for classification of detainees and the actual treatment of detainees, and is part of a larger problem that ICE has yet to confront with respect to classifying detainees.

On the whole, ICE's classification guidelines are very general and require that the person administering such classifications look to other sources for more specific guidance. The standards, in theory, provide for how to deal with various scenarios, but often fail to clarify such scenarios.⁷² Given the ambiguous nature of the classification procedures that ICE's handbook lays out, it is very likely that different facilities will have varying and inconsistent classification procedures. Although allowing each facility to address the specific issues and dangers it sees on a regular basis may have its advantages, it could also create problems because there is no uniformity across the country regarding the treatment and classification of detainees. This lack of uniformity in standards has the potential to greatly affect a detainee if, for example, ze is transferred and the new detention facility does not acknowledge a condition that was previously acknowledged. This has a great chance of occurring if the detainee is placed in a facility where an administrator is faced with an unfamiliar scenario and has no guidance on how it should be addressed.

F. Length of Average Detentions

It is unclear how long detainees remain within detention centers. Although there are various sources that cite the average length of time that immigrants are detained, the later the date of the source, the lower the number gets. This decrease has been attributed to the intensification of deportation operations.⁷³ An ICE report

⁶⁸ *See id.* at 18.

⁶⁹ *Id.*

⁷⁰ *Id.* (No definition or examples are given of what would constitute "missing information." This missing information is most likely determined with the discretion of one of the DRO officers.).

⁷¹ IMMIGRATION AND CUSTOMS ENFORCEMENT, *supra* note 63, at 8 (defines "Special-Need detainee" as "a detainee whose mental and/or physical condition requires special handling and treatment by staff. Special needs detainees include but are not limited to those who are emotionally disturbed, mentally challenged or mentally ill, physically disabled, infirm and drug or alcohol addicts/abusers.").

⁷² *See id.* For example, while ICE defines "Special-Needs Detainee," nowhere in the guideline does ICE describe the kinds of individuals who specifically fall within this category (such as trans detainees).

⁷³ *See* Human Rights Watch, *supra* note 45.

from 2006 stated that detainees from “developing countries” were held for an average of eighty-nine days.⁷⁴ The most recent report available on the subject matter made by Homeland Security in October 2009 stated that:

On average, an alien is detained 30 days. The length of detention however, varies appreciably between those pursuing voluntary removals and those seeking relief. As much as 25 percent of the detained population is released within one day of admission, 38 percent within a week, 71 percent in less than a month, and 95 percent within fourth months. Less than one percent of all admissions, about 2,100 aliens, are detained for a year or more.⁷⁵

The reality of the situation is that the length of detention is in fact unclear.⁷⁶ These studies are supposedly based on random samples and are taken at random times, and are supposed to be representative of the whole detainee population. In addition, unlike the report from 2006, the 2009 report is ambiguous as to whether the sample includes the lengths of holding of detainees that are asylum seekers, unaccompanied children, and persons for whom repatriation is problematic.⁷⁷ Including these groups would be irrelevant for such a sampling because many people who fall in these categories generally face longer detention periods.⁷⁸

G. Healthcare in ICE Detention Facilities

ICE’s medical care detention standards aim to “ensur[e] that detainees have access to emergent, urgent, or non-emergent medical, dental, and mental health care” that falls within the services that DIHS provides.⁷⁹ When a detainee arrives, he receives an “initial medical and mental health screening”⁸⁰ This medical screening will not necessarily be conducted by a doctor; a detention officer may perform the screening so long as the facility has documentation of the officer’s special training.⁸¹

While in detention, “[d]etainees will have access to health care services, including prevention, health education, diagnosis and treatment”⁸² In addition to the medical care detention standards, ICE has established detention standards for hunger strikes, and suicide prevention and intervention.⁸³ Moreover, if a health

⁷⁴ OFFICE OF INSPECTOR GENERAL, DETENTION AND REMOVAL OF ILLEGAL ALIENS [OIG-06-33] (2006).

⁷⁵ SCHRIRO, *supra* note 33, at 6.

⁷⁶ See Human Rights Watch, *supra* note 45.

⁷⁷ See *id.*

⁷⁸ See *id.*

⁷⁹ ICE/DRO DETENTION STANDARD, MEDICAL CARE 1 (2008) (on file with author).

⁸⁰ DEPARTMENT OF HOMELAND SECURITY: OFFICE OF INSPECTOR GENERAL, TREATMENT OF IMMIGRATION DETAINEES HOUSED AT IMMIGRATION AND CUSTOMS ENFORCEMENT FACILITIES 3 (2006), <http://trac.syr.edu/immigration/library/P1598.pdf>.

⁸¹ ICE/DRO DETENTION STANDARD, MEDICAL CARE, *supra* note 79, at 11.

⁸² *Id.* at 1.

⁸³ DEPARTMENT OF HOMELAND SECURITY: OFFICE OF INSPECTOR GENERAL, *supra* note 80, at 3.

issue arises that is not available at that particular facility, then a detainee will be transferred in a timely manner to a facility that can address and treat the medical issue.⁸⁴ Also, if a detainee is suspected or known to have mental health concerns, he “will be referred as needed for evaluation, diagnosis, . . . and stabilization.”⁸⁵

In the situation where a detainee gets sick while in detention, the detainee can make a sick call, which gives him unrestricted opportunity to freely request health care services.⁸⁶ Also, if a detainee has special needs, he should go through his facility’s process to notify ICE so that his special need is documented in writing and included as part of his health record file.⁸⁷ Overall, the medical detention standards set forth by ICE seek to address the medical needs of the detainees—although this is not what generally works out in practice.⁸⁸

H. Access to Personal Hygiene

ICE detention standards aim to ensure that each detainee is able to maintain adequate personal hygiene practices by giving an individual an adequate provision of bathing facilities, clean clothing, bedding linens, towels, and personal hygiene items.⁸⁹ As part of the clean clothing that detainees receive, they will find one uniform shirt, one pair of uniform pants, or one jumpsuit, as well as one pairs of socks, two pairs of underwear, and one pair of shoes.⁹⁰ In terms of personal hygiene items, “[s]taff shall provide residents with personal hygiene items appropriate for their gender and shall replenish supplies as needed.”⁹¹

I. Procedures for Addressing Sexual Abuse and Assault

According to the Prison Rape Elimination Act of 2003,⁹² there is “‘zero tolerance’ regarding rape and sexual assault in ‘any confinement facility of a Federal, state, or local government’”⁹³ This zero tolerance policy states that each facility should have written policies and procedures that address and help prevent sexual abuse and assault.⁹⁴ Additionally, there should be an intervention

⁸⁴ *Id.* at 4.

⁸⁵ ICE/DRO DETENTION STANDARD, MEDICAL CARE, *supra* note 79, at 2.

⁸⁶ *Id.* at 4.

⁸⁷ ICE/DRO DETENTION STANDARD, PERSONAL HYGIENE 18 (2008) (on file with author).

⁸⁸ See generally Dana Priest & Amy Goldstein, *System of Neglect: As Tighter Immigration Policies Strain Federal Agencies, The Detainees in Their Care Often Pay a Heavy Cost*, WASHINGTON POST, May 11, 2008 available at http://www.washingtonpost.com/wp_srv/nation/specials/immigration/cwc_d1p1.html.

⁸⁹ *Id.* at 1.

⁹⁰ DEPARTMENT OF HOMELAND SECURITY: OFFICE OF INSPECTOR GENERAL, *supra* note 80, at 21.

⁹¹ ICE/DRO DETENTION STANDARD, PERSONAL HYGIENE, *supra* note 87, at 2.

⁹² Prison Rape Elimination Act of 2003, Pub. L. 108-79, 108th Cong. (2003), available at <http://www.ojjdp.ncjrs.gov/about/PubLNo108-79.txt>.

⁹³ ICE/DRO DETENTION STANDARD, SEXUAL ABUSE AND ASSAULT PREVENTION AND INTERVENTION 2 (2008) (on file with author).

⁹⁴ *Id.* at 3.

program that includes at minimum: “1. Measures taken to prevent sexual abuse and sexual assault, 2. Measures taken for prompt and effective intervention to address the safety and treatment needs of detainee victims if an assault occurs, and 3. Investigation of incidents of sexual assault, and discipline and prosecution of assailants.”⁹⁵ In the case of sexual abuse or assault, a facility should also have a policy and procedure for reporting the offense through a chain-of-command “from the reporting official to the highest facility official as well as the ICE Field Office Director.”⁹⁶

In order to prevent sexual abuse and assault from taking place, staff and detainees “are responsible for being alert to signs of potential situations in which sexual assaults might occur”⁹⁷ Moreover, upon arrival, detainees should be screened for potential “vulnerabilities or tendencies of acting out with sexually aggressive behavior” and will be withheld from the general population until they are able to be classified and housed accordingly.⁹⁸ Interestingly, the standards state that a detainee who appears to be at risk for sexual victimization will be identified, monitored, and counseled.⁹⁹ A detainee considered likely to become a victim then will be placed in the least restrictive housing that is available and appropriate.¹⁰⁰

The next Part provides an explanation and examples for how ICE treats and classifies its immigrant detainees. Understanding this background is necessary to seeing how these policies can and do affect trans detainees in a negative manner.

III. SPECIFIC CASES AND EXAMPLES WHERE ICE’S DETENTION POLICIES HAVE IMPACTED TRANS INDIVIDUALS NEGATIVELY

A. Dynamics of Gender-Based Violence Against Trans Individuals in Detention Centers

From the outset, it is crucial to acknowledge that gender segregation occurs in nearly every detention institution in the country.¹⁰¹ This segregation certainly plays a role in the discrimination that transgender people face. However, equally as harmful are the gendered expectations that this segregation creates. The existence of a ‘men’s’ institution and a ‘women’s’ institution, for instance, not only raises expectations about the gender of the people housed there, but also the stereotypes

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 5.

⁹⁸ *Id.*

⁹⁹ *Id.* at 5.

¹⁰⁰ *Id.* (The section identifies that if he is someone who is likely to become a victim then he will be placed in a less restrictive house, but the standard does not define or provide guidelines for who should be considered more likely to become a victim of sexual abuse).

¹⁰¹ Transgender Law Center, *Testimony before the Commission in San Francisco, CA*, at 4 (Aug. 15, 2005), www.transgenderlawcenter.org/pdf/prisonrape.pdf.

associated with that gender. These expectations and stereotypes are then played out in the way in which prisoners are recognized and treated.¹⁰²

Inmates who deviate from the norms of society—such as those who have diverged from gender norms—tend to become a target in the context of jail culture.¹⁰³ Supporting this idea are findings from Human Rights Watch that state that “‘empirical data on prison sexual violence suggest that it is not a random activity, but arises from the choosing of particular victims who . . . are believed to be more vulnerable.’”¹⁰⁴ This vulnerability places the trans detainee at a “‘heightened risk of torture, sexual assault, rape, and ill treatment.’”¹⁰⁵

The ill treatment of trans detainees is perpetuated because very few prison systems have clearly articulated policies on how to address the needs of trans detainees.¹⁰⁶ As a result, many trans detainees have little access to protection from these crimes and “tend to endure them in silence.”¹⁰⁷ They do not speak up about the injustices committed against them for a number of reasons including that they may believe that they will be “disliked and feared by some guards, as well as by other inmates.”¹⁰⁸ They also may fear sparking more attacks if it becomes known that they were assaulted, raped, or harassed.¹⁰⁹

B. Categorizing Detainees by Genital Sex

Categorizing trans detainees is very difficult, especially if they are pre-operative. There is the fear that if they are placed with their chosen gender they “may pose a threat to other prisoners—particularly women.”¹¹⁰ In order to avoid such difficulties in violating some detainee’s rights while protecting others, one response in classifying them has been to detain them in isolation.¹¹¹ This solution is harmful to the detainees because it is an assault on their dignity, identity, and selfhood.¹¹² In an interview with Human Rights Watch, a transgendered woman in a U.S. immigration detention facility recounted what they did to her when she complained of a possible assault, and said:

They moved me to solitary confinement, lock-down for 23 hours a day. 75-80% of the people there are informants and sexual offenders who are at risk in the general population jail They never let me come out for a

¹⁰² *Id.*

¹⁰³ Human Rights Watch, *supra* note 54, at 4.

¹⁰⁴ *Id.* (citing Human Rights Watch, *No Escape: Male Rape in the United States Prisons* (2010)).

¹⁰⁵ Stop Prisoner Rape, *A Call for Change: Protecting the Rights of LGBT Detainees* (2006) at 2, available at <http://www.champnetwork.org/media/callchange.pdf>.

¹⁰⁶ Human Rights Watch, *supra* note 54, at 4.

¹⁰⁷ Stop Prisoner Rape, *supra* note 105 at 2.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Human Rights Watch, *supra* note 54, at 4.

¹¹¹ Darren Rosenblum, “Trapped” *In Sing Song: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 529 (2000).

¹¹² See Human Rights Watch, *supra* note 54, at 4.

break until late when everyone else has gone away. The phones were available from 8 am until 10 pm. They let me out after the phones shut down – midnight, 1 a.m., so I couldn't call anyone, the ombudsman, the warden, a lawyer. They said I was a security risk, and they were short-staffed, so they couldn't let me go to the law library, and so on. Immigration officers don't come to solitary because that's not where immigration cases are.¹¹³

In this instance, the treatment of the trans detainee was drastic. She was deprived of any possibility of helping herself. She was unable to meet with counsel, contact family, or anyone else to help her get out of her situation. She was treated as if she was a criminal prisoner who needed maximum security, when the purpose of her detention was to ensure that she would merely show up to her immigration hearings.

C. Health Issues Caused as a Result of Lack of Access to Healthcare

Many of the health issues raised by transgendered detainees are caused as a result of poor access to healthcare within the detention system. Transgendered people require a more particularized medical treatment that not only includes physical medical attention, but mental attention as well. Since many of the trans detainees are in some sort of transition—whether physical or merely mental—their transitions require that they receive regular hormonal treatment to address their evolutionary process.

ICE in general is known to have poor medical care standards that extend across the country.¹¹⁴ “According to ICE, approximately one quarter [of the general detainee population is] identified as suffering some chronic health condition.”¹¹⁵ The system which provides necessary medical care to immigration detainees is deeply flawed because:

First, critical medical decisions are made by off-site Managed Care Coordinators (MCCs) rather than on-site clinicians. This is because no detainee may receive diagnostic testing such as a biopsy or an MRI, specialty care, or surgery unless and until on-site medical personnel obtain prior authorization from the Division of Immigration Health Services (DIHS) in Washington, D.C. . . . Second, the treatment authorization decisions made by the MCCs – who are themselves nurses, not doctors – are made in accordance with a DIHS Detainee Covered Services Package

¹¹³ *Id.* at 5 (internal citations omitted).

¹¹⁴ See Generally Nina Bernstein, *U.S. To Reform Policy on Detention for New York, NY TIMES* Aug. 5, 2009, available at <http://www.nytimes.com/2009/08/06/us/politics/06detain.html?hp>.

¹¹⁵ Presentation on Medical Care and Deaths in ICE Custody Tom Jawetz of the ACLU National Prison Project, For a hearing on ‘Detention and Removal: Immigration Detainee Medical Care’ before the House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law at 2, <http://judiciary.house.gov/hearings/pdf/Jawetz071004.pdf> (last visited Dec. 21, 2010) (citation omitted).

that is deeply flawed. By its own terms, the DIHS package primarily provides health care services for emergency care only. Until very recently, emergency care was defined as “a condition that poses an imminent threat to life, limb, hearing or sight” and coverage did not extend to pre-existing conditions.¹¹⁶

What this means for trans detainees is that even if they are diagnosed with the proper diagnosis that states that they have GID, they will most likely not receive the medical attention they need because treatment for GID will most likely be found to fall under specialty care and it is not an “emergency care” situation as defined by DIHS.¹¹⁷

1. Lack of Access to Medication

As is seen in the example provided below, the larger problem with ICE’s poor medical standards is that they leave the detainees in a vulnerable situation where their medical needs are not addressed which causes their preexisting conditions to worsen. Since previous diagnoses are not treated, it is likely that the detainees do not receive the medications that they need to treat their illnesses. This lack of access to medication does not even include the detainees’ need for hormone treatment. Here we are merely talking about access to mainstream mental health medications and medications for physical ailments. This lack of access to medication is a major dilemma in ensuring the welfare of the trans detainee because it is a reality that HIV/AIDS is prevalent within the trans community in general. There is a well known case where a transgendered detainee died in ICE custody and “there are a whole host of reasons to suggest abuse and outright refusal to provide care [were] at play.”¹¹⁸ Victoria Arellano was a transgender, HIV positive detainee who, by all appearances, had her disease well under control before she entered ICE custody.¹¹⁹ Once she entered ICE custody, Ms. Arellano was taken off of the prophylactic medication she required to fend off opportunistic infections, and her health quickly began to deteriorate.¹²⁰ According to reports, she developed a high fever and fellow detainees soaked their bath towels in water to cool her down.¹²¹ She complained of severe pain, nausea, and stomach cramps, and began vomiting blood and suffering from diarrhea.¹²² Again, it was fellow detainees who took care

¹¹⁶ *Id.* at 2-3 (citation omitted).

¹¹⁷ *See id.*

¹¹⁸ Michael K. Lavers, *Answers Sought in Trans Detainee’s Death*, ADVOCATE.COM, Aug. 23, 2007, <http://www.advocate.com/article.aspx?id=41002>.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

of her, using a cardboard box as a makeshift garbage can to collect her vomit.¹²³ She died on July 20, 2007.¹²⁴

The occurrence involving Ms. Arellano is indicative of the fact that the conditions these detainees are sometimes left in are so severe that they manifest into forms of cruel and unusual punishment and ultimately violate the detainee's Eighth Amendment rights.¹²⁵ No human being should be left to fend for him or herself, detained in a cell with no ability to obtain medical treatment. This is inhumane treatment for anyone, but even more so for persons who are being detained simply in order to ensure that they appear at their immigration hearings.

a. Hormonal Difficulties

Trans detainees face an even greater challenge regarding access to medications because they also require hormone treatments. The issue of whether a trans detainee is entitled to hormone therapy while in detention has been a hotly debated issue that is "based on the established constitutional principle that it is a violation of the Eighth Amendment prohibition on cruel and unusual punishment for prison officials to exhibit 'deliberate indifference' to a prisoner's 'serious medical needs.'"¹²⁶ ICE and DHHS do not address the issue of hormone treatment. Since they do not address the issue, it is likely that immigration detention centers look to the prison or jail they have contracted with for direction on the subject matter. Some states such as Wisconsin prohibit the use of government money to provide hormone therapy or SRS for prisoners.¹²⁷ Therefore, if a trans detainee finds himself in a prison that does provide hormone therapy, there is no guarantee that ze will be provided with the appropriate levels of hormones.¹²⁸ More importantly, there is no guarantee that if hormone treatment is administered, it will be done so with the physical and psychological support that is appropriate and necessary for someone who is transitioning.¹²⁹ Since most of these trans detainees suffer from GID, if it is not treated, there is a very real risk that the trans detainee will cause physical harm to himself to continue the physical transition on his own.

¹²³ *Id.*

¹²⁴ Michael K. Lavers, *Answers Sought in Trans Detainee's Death*, ADVOCATE.COM, Aug. 23, 2007, <http://www.advocate.com/article.aspx?id=41002>.

¹²⁵ See U.S. CONST. amend. VIII (The Eighth Amendment prohibits the federal government from imposing cruel and unusual punishments. The neglect on behalf of the ICE officials towards Ms. Arellano most undoubtedly was cruel and unusual.).

¹²⁶ National Center for Lesbian Rights, *Rights of Transgender Prisoners 4* (June 2006) (on file with author).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

b. Autocastration

In severe cases where GID is left untreated and hormone therapy is not administered, autocastration often times becomes a painful reality for inmates.¹³⁰ On the other hand, in states where hormone treatment is administrated properly, cases of autocastration are much rarer.¹³¹ Many times, it appears that prison officials are perplexed by someone wanting to change their sex. In one situation:

A transgendered woman, who has undergone extensive hormonal therapy and cosmetic surgery, is convicted and imprisoned. Because she still has a penis, albeit a nonfunctioning one, prison officials categorize her as a male, and place her in a men's prison. "You were born a boy, and you're going to stay a boy," the prison doctor says, rejecting continuation of her long-term estrogen treatment. Her body begins to regain the masculinity she had largely escaped. Bruised by the changes, her body no longer feels like her own, but one imposed on her by the criminal justice system. Her femininity stands out among the male prisoners who repeatedly rape and beat her. Trapped, not only in her body, but in a prison that refuses to recognize and respect her gender identity, she castrates herself with glass and used razors. The prison hospital's hands forced, it finishes the job. Then, to compensate for the lost masculinity, the doctor orders testosterone replacement treatments. After this fails to restore her masculinity, the prison doctors return her to the estrogen treatments that preceded her incarceration.¹³²

This prisoner was denied the ability to express and live hir life as the gender ze desired. In many instances:

Sex reassignment surgery . . . would be the obvious next step for transgendered prisoners who are at advanced stages of gender transformation at the time of their incarceration. One prisoner arrived to serve her term already castrated, but was placed in a men's prison because she still had a penis. The prison hospital performed castration in only one case where a transgendered woman, placed in segregation because of her femininity, repeatedly attempted to mutilate her testicles. At one point she succeeded to the extent that the hospital had to finish the job. Another transgendered woman, after requests for sex reassignment surgery, electrolysis, cosmetic surgery, hormonal therapy, cosmetics, and a transfer to a women's prison failed, made four attempts at self-castration using razors, metal, and glass. The vital importance of gender transformation for some transgendered people, faced with the refusal of authorities to attend

¹³⁰ See generally George R. Brown & Everett McDuffie, *Health Care Policies Addressing Transgender Inmates in Prison Systems in the United States*, 15.4 J. OF CORRECTIONAL HEALTH CARE 280 (2009), available at jcx.sagepub.com/cgi/rapidpdf/1078345809340423v1.pdf (autocastration is a form of surgical self treatment).

¹³¹ *Id.* at 288.

¹³² Darren Rosenblum, "Trapped" In *Sing Song: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 500-01 (2000).

to their gender identity issues, will likely continue to lead them to attempt to further their transformations themselves.¹³³

This painful reality for trans detainees serves as a strong basis for showing how ICE—as well as ACA—must address the needs of trans detainees. Trans detainees are living with serious mental conditions, such as GID, that can lead them to taking severe and dangerous actions such as autocastration. It would not be sufficient to argue that a lack of funding is behind such decisions, because in the end, by not addressing the problem at the onset, the detention facilities will most likely have to spend more money on dealing with these dangerous situations.

2. Access to Personal Hygiene and the Ability to Dress Appropriately

The standards set forth by ICE/DRO in terms of personal hygiene merely state that staff will provide hygiene items to male and female detainees, based on each individual detainee's gender. This is problematic because when trans detainees are placed in detention centers according to their genital sex, they are often denied basic necessities that a person of their expressed gender requires. For example, many transgendered women housed in men's facilities are denied access to bras and are forced to keep their hair at stereotypical male lengths.¹³⁴ Aside from the possible health problems that can result from women being denied access to bras, their inability to access bras in many cases has facilitated sexual harassment.¹³⁵ This form of harassment is the kind of ongoing indignity that can lead to more significant issues down the road.¹³⁶

Male detainees who identify as female are not the only trans detainees that are denied the ability to dress appropriately, the female detainees who identify as male are housed in the women's facilities often find that they have to keep their face shaven, yet they are not provided with the proper grooming supplies.¹³⁷ In some instances there have even been stories of some women's institutions requiring male inmates to wear garb that is similar to a dress.¹³⁸ All of these practices are harmful to the trans detainee since they attack the core of the GID with which they are battling. These are individuals who are uncomfortable in the bodies that they were born into and who strive to become members of the opposite sex. The facilities that force them to live as their born sex serve as constant reminders of the painful reality in which they have to live. In the long run, this can have strong adverse affects on their mental health and can be a factor in the inmates mutilating their bodies.

¹³³ *Id.* at 543-44.

¹³⁴ *See supra* note 100.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

IV. POLICY RECOMMENDATIONS

Overall, the Department of Homeland Security has acknowledged that there are many shortcomings with ICE's current Immigration Detention standards and policies. In October of 2009 Dr. Dora Schriro¹³⁹ wrote an overview and set of recommendations for Immigration Detention where she provided suggestions and analysis for how to improve the Immigration Detention system.¹⁴⁰ Among these recommendations she suggested:

In coordination with stakeholders, ICE should develop a new set of standards, assessments and classification tools to inform care, custody restrictions, privileges, programs and delivery of services consistent with risk level and medical care needs of the population. ICE should expand access to legal materials and counsel, visitation, and religious practice. ICE should also develop unique provisions for serving special populations . . . ICE should establish a well managed medical care system, with comprehensive initial assessments to inform housing assignments and ongoing care management. ICE should establish clear standards of care for detainees and monitor conditions systematically.¹⁴¹

Although these recommendations do not specifically address the treatment of trans detainees, there is mention made for ICE to create standards that address "special populations." Since ICE is at a crossroads with regard to making new reforms within their detentions policies, LGBT rights groups should be strong in voicing their concerns for trans detainees so that ICE takes their needs into account when implementing the reforms that Dr. Schriro has recommended. Below are some of the more pressing issues that LGBT groups should consider when providing ICE recommendations on the treatment of immigrant trans detainees. Four goals must be met: (1) law enforcement personnel must find ways to recognize and prevent behavior that harasses transgender people; (2) law enforcement personnel must address inmates in a manner appropriate to their gender identity; (3) the ICE must formally adopt a written housing policy that safely houses transgender people according to their gender identity, not their genitalia; and (4) medical services should be tailored to the needs of trans detainees.¹⁴²

¹³⁹ SCHRIRO, *supra* note 33 (Dr. Schriro is one of the foremost expert on correctional policies in the country. It is interesting to note that after issuing her sweeping report Dr. Schriro suddenly left DHS.).

¹⁴⁰ *See id.*

¹⁴¹ *Id.* at 3.

¹⁴² *See* MURRAY D. SCHEEL & CLAIRE ESTACE, MODEL PROTOCOLS ON THE TREATMENT OF TRANSGENDER PERSONS BY SAN FRANCISCO COUNTY JAIL. NATIONAL LAWYERS GUILD & CITY & COUNTY OF SAN FRANCISCO HUMAN RIGHTS COMMISSION (2002), *available at* <http://www.transgenderlaw.org/resources/sfprisonguidelines.doc> (last visited Dec. 21, 2010).

A. Staff Screening and Training

First and foremost, before any policy can be made, ICE must make sure that they are hiring the proper staff to carry out the objectives and goals of the detention policies. It would be a fruitless effort for ICE to create a great set of standards if their staff did not properly ensure that the new policies were carried out. More importantly, proper staff screening is essential in safeguarding against the sexual violence that trans detainees experience.¹⁴³ As part of the staff training, ICE should include the development of clear standards for on-the-job conduct and a zero tolerance policy for non-compliance with policy standards. If this is done, it will set an institutional tone of seriousness and professionalism.¹⁴⁴ Additionally, ICE should conduct background checks of all the employees who will have contact with the inmates, and ensure that none of them have been convicted of or accused of any sexual violence in prior jobs.¹⁴⁵

B. Name Usage, Forms of Address, Searches

1. Name Usage

When booking a detainee, ICE should use the detainee's adopted name—i.e. the non-birth name that the detainee uses in self-reference—either as the primary name or the “also known as”—“aka”. The trans detainee should be booked under the name appearing on his official identification, and if no identification is available, ICE should use the adopted name for booking purposes.¹⁴⁶ The “use of the [detainee’s] adopted name by [ICE] is critical to the dignity of the [detainee]. By diligently following this practice, respect for and willingness to cooperate with jail personnel will increase on the part of the transgender [detainee].”¹⁴⁷

2. Use of Pronouns

“One of the most consistent complaints from [trans detainees] is that they are referred to by pronouns associated with their birth-identified gender instead of those pronouns which respect their gender identity.”¹⁴⁸ This custom does not serve any legitimate administrative or security purpose.¹⁴⁹ “In fact, doing so often creates a culture of disrespect among transgender [detainees]. Like use of a proper name, use of those pronouns which recognize an inmate’s gender identity will increase respect for and cooperation with jail personnel.”¹⁵⁰

¹⁴³ Stop Prisoner Rape, *supra* note 105, at 4.

¹⁴⁴ *See id.*

¹⁴⁵ *See id.*

¹⁴⁶ *See generally id.*

¹⁴⁷ SCHEEL & ESTACE, *supra* note 142, at 8.

¹⁴⁸ *Id.* at 8.

¹⁴⁹ *See id.*

¹⁵⁰ *Id.* at 9.

3. Strip Searches

If a strip search needs to be conducted, ICE should require that officers of the trans detainee's adopted gender perform the search.¹⁵¹ This protocol will be in line with the trans detainee's desires and will grant the trans detainee the right to choose the gender of the officers involved in hir strip search. In the rare case in which the trans detainee is unable to make such a decision, both a male and female officer should be present and conduct the search.¹⁵² Given the intimate nature of a strip search, special attention should be paid to provide the trans detainees with as much privacy as possible.¹⁵³ "A search conducted by one officer in a private booth within a larger public room would provide privacy for the [trans detainee] as well as limit chances of abuse by an officer."¹⁵⁴

C. Conditions During Incarceration

1. Assigning the Inmate to Housing

ICE should assign trans detainees to housing based on their gender identity, not their genitalia.¹⁵⁵ Housing status should be determined first by referring to the detainee's official identification and, in the case that there is no official identification, ICE staff should then ask the detainee whether ze is female or male and house hir accordingly.¹⁵⁶ An LGBT rights advocacy report has suggested that "For those transgender men who have not had genital surgery [ICE should] house them in a vulnerable male unit. If the transgender [detainee] identifies as female, she [should] be housed in the female section. For those transgender women who have not had genital surgery, the [ICE should be] allowed to house them in a vulnerable female unit."¹⁵⁷

If the detainee expresses uncertainty about hir gender, then the detainee should be evaluated by a social worker or psychologist to determine appropriate housing.¹⁵⁸ Ultimately, ICE should not be allowed to conduct a strip search to determine the detainee's sex nor should it house trans detainees in a unit based on hir birth-identified gender.¹⁵⁹ Additionally, it is unjust and against good practice to force a trans inmate into solitary confinement.¹⁶⁰

¹⁵¹ *See id.*

¹⁵² SCHEEL & ESTACE, *supra* note 142, at 9.

¹⁵³ *See id.*

¹⁵⁴ *Id.*

¹⁵⁵ *See id.* at 5.

¹⁵⁶ *See id.*

¹⁵⁷ *Id.*

¹⁵⁸ SCHEEL & ESTACE, *supra* note 142, at 5.

¹⁵⁹ *See id.*

¹⁶⁰ *See id.*

2. Housing and Vulnerability

An individualized assessment should be conducted to determine where a trans detainee will be placed, and should be reviewed periodically.¹⁶¹ ICE should take similar steps to those set out in the *Model Protocols on the Treatment of Transgender Persons by San Francisco County Jail* by also having its intake personnel ask newly arriving detainees questions along these lines: “Have you been attacked before? Have you been in [detention] before? If so, how were you treated by other [detainees]? Do people call you names, intimidate, or harass you? Do you think other people might harm you because of the way you look? Among whom would you prefer to be housed (males, females, vulnerability unit)?”¹⁶² By asking such questions, ICE will ensure that detainees’ preferences are taken into account and will ensure that detainees as little harassment and violence as possible while in detention facilities.

3. Access to Services

ICE should ensure that trans detainees are afforded all the same services that are available to all other detainees. This includes education, jail jobs, and drug treatment.

4. Clothing and Cosmetics

Trans detainees should be allowed to wear and should be provided with the same clothing and cosmetics provided to other detainees of their same gender. For example, if a male-to-female trans detainee identifies as being a female, ze should be provided with the appropriate clothing given to other females in the detention facility.

D. Medical Treatment

1. Treatment by Doctors

ICE’s medical staff should be trained in the evaluation and counseling process used to determine whether hormone therapy is appropriate so that the medical staff may either: (1) continue the trans detainee on hir evaluation process; or (2) begin hormone therapy for the trans detainee if ze has been identified as a candidate for hormone therapy (but did not begin the therapy prior to detention); or (3) determine that the previously undiagnosed trans detainee is a good candidate for hormone therapy and prescribe that therapy.¹⁶³ In addition, trans detainees should

¹⁶¹ *Id.* at 5.

¹⁶² *Id.*

¹⁶³ SCHEEL & ESTACE, *supra* note 142, at 7.

have access to all necessary medical and mental health care—including psychotherapy—if needed.¹⁶⁴

2. Access to Medication

Upon proper diagnosis by the medical staff, trans detainees should be allowed to receive the proper medication. “[ICE] medical staff will be trained on the interactions between hormones, HIV, other STDs and other common ailments.”¹⁶⁵ ICE should ensure that no detainee is denied access to medication because of a previous condition or illness.

E. Alternative Dispute Resolution

1. Transfer of Detainees

Many times when detainees have complained of inadequate care or abuse within the detention facility, staff has failed to deal with the situation and has instead transferred the detainee to another facility. In order to ensure that this does not continue to happen to mistreated detainees, legislation or agency rules should be passed to prohibit retaliatory transfers of those detainees who complain about inadequate medical care or conditions of confinement.¹⁶⁶

2. Responding to Detainee Complaints

ICE staff and officials should take action in a timely and professional manner to address the concerns and needs of trans detainees.¹⁶⁷ This will minimize the harmful consequences that trans detainees face when their needs and concerns are ignored. ICE should establish multiple avenues for filing a complaint so that detainees are not required to report grievances to abusive staff members.¹⁶⁸ Additionally, it is important that detainees understand that it is not imperative that they follow the normal chain of command when reporting sensitive and urgent matters such as sexual abuse.¹⁶⁹ ICE should also ensure that detainees who file complaints of sexual abuse are not punished directly or indirectly—for example by being transferred—and that their complaints remain confidential.¹⁷⁰

¹⁶⁴ *See id.*

¹⁶⁵ *Id.*

¹⁶⁶ Presentation on Medical Care and Deaths in ICE Custody Tom Jawetz of the ACLU National Prison Project, *supra* note 115, at 5.

¹⁶⁷ *See Stop Prisoner Rape, supra* note 105.

¹⁶⁸ *Id.*

¹⁶⁹ *See id.*

¹⁷⁰ *Id.*

CONCLUSION

While ICE has implemented extensive guidelines for their immigrant detention facilities, they have not made any effort in addressing the needs of trans detainees who are housed within their facilities, nor have they made any comprehensive effort to create an overarching, consistent policy among all of their detention facilities nationwide. Since there are no protocols for how trans detainees are treated, often their treatment varies dramatically from staffer to staffer and facility to facility. As a result, there are instances where ICE personnel treat the detainees in a derogatory manner. For these reasons, ICE needs to take initiative in training its personnel in transgender/transsexual issues and needs to bring the agency's detention standards in line with the federal views regarding gender non-discrimination.

By implementing more sensitive detention standards, ICE will ensure that trans detainees are treated more fairly and have their needs met. In addition, with the implementation of these standards, ICE will be taking large proactive strides towards lowering sexual violence and rape in their detention facilities which "is a violation of the Eighth Amendment of the U.S. Constitution, which prohibits cruel and usual punishment."¹⁷¹ By implementing the above policy recommendations, detention facilities will ensure that they are reducing—with the goal of ultimately ending—the dehumanizing violence that trans detainees are susceptible to experiencing.

¹⁷¹ *Id.*

