

Commentary

Punishing the Innocent: How the Classification of Male-to-Female Transgender Individuals in Immigration Detention Constitutes Illegal Punishment Under the Fifth Amendment

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Christina Madrazo, a male-to-female pre-operative transgender immigrant, was detained in Krome Detention Center in Miami, Florida awaiting an appeal of her asylum claim.¹ She fled Mexico after she was violently attacked for being transgender.² Madrazo was placed in solitary confinement at Krome because officials were unsure whether to house her with men or women.³ Solitary confinement was isolating and made her extremely vulnerable to attacks by prison guards.⁴ One of the guards, in charge of bringing her meals and watching over her safety, raped her on two separate occasions.⁵ The first time, the guard attacked Madrazo in her cell and tried to force her to perform oral sex on him.⁶ When she refused, he sodomized her until he heard another person approaching.⁷ Madrazo reported the rape, but the officer was still allowed to serve her food the next day.⁸ Later that night, he raped her a second time.⁹ Unfortunately, this tragic story is not uncommon; transgender detainees, particularly male-to-female

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1. Alisa Solomon, *Nightmare in Miami*, VILLAGE VOICE, Mar. 19, 2002, available at <http://www.villagevoice.com/content/printVersion/168959>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*; see also STOP PRISONER RAPE, NO REFUGE HERE: A FIRST LOOK AT SEXUAL ABUSE IN IMMIGRATION DETENTION 5 (2004), <http://www.justdetention.org/pdf/NoRefugeHere.pdf>.

transgender women, are at a high risk of sexual assault and harassment.¹⁰

Although immigrant detainees are technically held in civil custody, there is an inherent inconsistency between their legal status and their detention conditions. Most are housed in jails and prisons,¹¹ while others are held in prison-like conditions in detention centers without having been convicted of a crime.¹² Detainees are often treated like prisoners: shackled, forced to wear jumpsuits, and permitted to visit with relatives only through glass.¹³ Despite their identification as women, most transgender detainees are housed with men.¹⁴ Abuse in male facilities is rampant, and male-to-female transgender women are often the targets.¹⁵ They experience harassment and sexual assault at rates much higher than the general population.¹⁶ For example, a recent study by the University of California, Irvine found that 59 percent of transgender prisoners in California reported being victims of sexual assault, compared to 4.4 percent of the general prison population.¹⁷

In men's detention facilities, a strict hierarchy is enforced that rewards masculinity and aggression with power and punishes femininity and passivity

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10. See Todd Henneman, *We Too Are Immigrants*, THE ADVOCATE, June 6, 2006, at 29.
 11. VICTORIA NEILSON & KRISTINA WERTZ, IMMIGRATION LAW AND THE TRANSGENDER CLIENT ch. 6 (2008), available at http://www.immigrationequality.org/c6.html#_Toc211075776; Detention Watch Network, About The U.S. Detention and Deportation System, <http://www.detentionwatchnetwork.org/aboutdetention> (last visited Apr. 11, 2010). Over two-thirds of immigrants in detention are housed in prisons or jails. Detention Watch Network, *supra*.
 12. See Detention Watch Network, *supra* note 11.
 13. HUMAN RIGHTS FIRST, U.S. DETENTION OF ASYLUM SEEKERS: SEEKING PROTECTION, FINDING PRISON 1 (2009), available at <http://www.humanrightsfirst.org/index.aspx>.
 14. See NEILSON & WERTZ, *supra* note 11, ch. 6.52, available at http://www.immigrationequality.org/c6.html#_Toc211075786 ("Detainees will almost always be housed according to their external genitalia."); Telephone Interview with Aaron Morris, Staff Attorney, Immigration Equality (Dec. 8, 2009) (stating that most of Immigration Equality's male-to-female transgender clients were housed in male facilities). For example, under California law, a jail must implement a classification plan that segregates inmates on the basis of sex but does not define "sex." MURRAY D. SCHEEL & CLAIRE EUSTACE, MODERN PROTOCOLS ON THE TREATMENT OF TRANSGENDER PERSONS BY SAN FRANCISCO COUNTY JAIL 4-5 (2002), reprinted in TRANSGENDER LAW CENTER, CALIFORNIA TRANSGENDER LAW 101 app. 2, at 144-43 (2006). If jail staff determined that an inmate had "male" genitalia, that inmate was assigned to the men's housing. *Id.* If the jail staff determined that the inmate did not have "male" genitalia, then the inmate was assigned to the women's housing. *Id.*
 15. Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 517 (2009); see also STOP PRISONER RAPE, *supra* note 9, at 13.
 16. Lori Sexton et al., *Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men's Prisons*, JUST. Q., Nov. 30, 2009, at 3-4, <http://www.informaworld.com/smpp/content~db=all~content=a917252820>.
 17. *Id.* (citing author Valerie Jenness's own studies that found that 59 percent of transgender prisoners in California reported sexual victimization, compared to 4.4 percent of a random sample of inmates). This study assessed rates of victimization of transgender prisoners in general and did not specifically address or distinguish immigrant detainees in correctional facilities. See *id.*

with violence.¹⁸ An informal but highly enforced code of conduct requires men to “‘act tough, lift weights, and be willing to fight to settle grudges,’ or risk being labeled weak and subjected to beatings and rape.”¹⁹ Detainees and staff victimize other detainees who are perceived as weak or feminine.²⁰ As one inmate explained, “Smaller, weaker, meeker individuals are usually targets. Meeker individuals tend to ‘act Gay’ is how it’s described here and in turn invites [sic] assault”²¹ Transgender women in men’s facilities immediately stand out due to their femininity. Consequently, they find themselves at the bottom of the hierarchy and become targets of sexual victimization and harassment from other inmates and guards.²²

This commentary focuses on the plight of male-to-female transgender immigrants in men’s detention facilities. The term “transgender” signifies people who have a gender identity or expression that is different from the one associated with their assigned sex. A male-to-female transgender person, or a transgender woman, is a person who was deemed a man at birth but who currently identifies as a woman. This paper uses the term “transgender detainees” to refer to transgender women, who are the focus of this inquiry.²³ Additionally, the term “detention facilities” is used as a general term meant to encompass all types of facilities—including prisons, jails, and detention centers—that detain immigrants for immigration purposes.

I argue that the detention policies of Immigration and Customs Enforcement (ICE)—when applied to transgender immigrants—create an environment that constitutes punishment in violation of the Due Process Clause. This note seeks to identify the efficacy of using a due process challenge to force ICE to make the reforms necessary to reduce the punitive nature of immigrant detention and protect the health and safety of transgender detainees. I identify two necessary reforms: reworking the current gender classification system to reflect gender identity and limiting the use of administrative segregation as the primary means of providing detainee safety. I argue that a successful due process claim is possible to compel these reforms. Previous constitutional challenges to conditions of confinement brought by other groups serve as a litigation guide. Cases that define the constitutional rights of convicted prisoners can be utilized to define the rights of detainees as well as support a due process claim.

18. See Christine Peek, *Breaking out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 SANTA CLARA L. REV. 1211, 1226 (2004).

19. *Id.* at 1226.

20. Alexander Lee, *Nowhere to Go but Out: The Collision Between Transgender & Gender-Variant Prisoners and the Gender Binary in America’s Prisons* (Spring 2003) (unpublished Note, available at <http://spr.org/pdf/NowhereToGoButOut.pdf>).

21. HUMAN RIGHTS WATCH, *NO ESCAPE: MALE RAPE IN UNITED STATES PRISONS* 68 (2001) available at <http://www.hrw.org/reports/2001/prison/report4.html>.

22. Peek, *supra* note 18, at 1226-27.

23. This commentary does not focus on the detention experiences of transgender men or transgender people who were deemed women at birth but display traditionally masculine characteristics. The issues facing those populations are equally pressing but outside the scope of this note.

Successful constitutional challenges brought in the context of juvenile immigrant detention provide strategies for shaping this claim.

In Part I, I will give a brief background of ways in which transgender immigrants end up in ICE detention. Part II will identify the problems caused by the current gender classification system and administrative segregation protocols. In Part III, I propose changes to these current practices that would increase the safety of transgender detainees and create accountability for the detention centers. Part IV will explore the possibility of bringing a constitutional challenge against detention centers to force ICE to implement these proposed changes. By examining the ways in which the courts have defined the proper conditions of confinement for a similar group, namely transgender prisoners, and by proposing several challenges to the current prison jurisprudence, I will provide a roadmap for a successful legal claim by transgender detainees. In fleshing out this roadmap, I look to the successes achieved by juvenile immigrant detainees and suggest that a transgender detainee challenge would benefit from highlighting the similarities between these two groups.

I. AVENUES TO DETENTION

There are two common ways in which a transgender immigrant ends up in detention. The first occurs when ICE arrests a transgender immigrant either crossing the border or living in the United States without proper immigration status. Many male-to-female transgender women migrate to the United States in order to escape persecution on the basis of their gender identity.²⁴ Because they lack the immigration status necessary to enter or remain in the country legally, they are vulnerable to being detained by ICE.²⁵ Federal statute requires mandatory detention of all immigrants who do not have valid visas or who entered the country without inspection, even if the immigrant has expressed an intention to file for asylum.²⁶ Between 2003 and 2009, ICE detained over 48,000 asylum seekers.²⁷ In 2007 and 2008 alone, over 6,000 asylum seekers were caught while crossing the border or shortly after entering the country.²⁸ If detained, transgender immigrants can file an asylum application as a defense to

24. See Victoria Neilson & Aaron Morris, *The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal*, 8 N.Y. CITY L. REV. 233, 239 (2005) (“Although it is impossible to know the exact number of asylum applicants who have filed claims based on sexual orientation, transgender identity, or HIV status, it is probable that thousands of foreign nationals have been granted asylum in the United States on these grounds since 1994.”). See generally National Immigrant Justice Center, National Asylum Partnership on Sexual Minorities, <http://www.immigrantjustice.org/resourcespolicy/naps/napsmttest.html> (last visited Apr. 11, 2010).

25. 8 C.F.R. § 235.3 (2009); NEILSON & WERTZ, *supra* note 11, ch. 6.2, available at http://www.immigrationequality.org/c6.html#_Toc211075780.

26. *Id.*

27. HUMAN RIGHTS FIRST, *supra* note 13, at 3.

28. *Id.* at 15.

deportation, but it rarely results in their release.²⁹ They are automatically held until they can prove a credible fear of returning home.³⁰ As a result, an asylum seeker can spend anywhere from several months up to a year in detention waiting for a decision.³¹

Transgender immigrants of any status can also be detained by ICE after completing a jail or prison sentence for a deportable crime. Federal statute requires mandatory detention until removal for non-citizens who have committed crimes of moral turpitude, aggravated felonies, most controlled substance offenses, or firearms offenses.³² Crimes of moral turpitude include, but are not limited to, prostitution, fraud, and theft.³³

Transgender people in general, particularly transgender people of color, have been subjected to extremely high levels of incarceration.³⁴ One possible explanation for this phenomenon is poverty. Transgender immigrants often experience multiple layers of oppression; the discrimination they face as immigrants is compounded with the discrimination they face because of their transgender status.³⁵ Their transgender status excludes them from the network of jobs and financial support usually available to immigrants.³⁶ Additionally, because of pervasive discrimination, transgender people often have difficulty accessing safety nets such as homeless shelters,³⁷ foster care, and other public

29. *Id.* at 34-38.

30. *Id.* at 37.

31. *Id.* at 38-39; Karen M. Jarvis Johnson, *Fearing the United States: Rethinking Mandatory Detention of Asylum Seekers*, 59 ADMIN. L. REV. 589, 590 (2007).

32. Immigration and Nationality Act § 212(a)(2)(A), 8 USC § 1182(a)(2)(A) (2006) [hereinafter INA]; INA § 237(a)(2)(A), 8 USC § 1227(a)(2)(A) (2006); INA § 236(c), 8 U.S.C. § 1226(c) (2006).

33. U.S. DEP'T. OF STATE, 9 FOREIGN AFFAIRS MANUAL § 40.21(A) NOTES (2010) (citing 22 C.F.R. § 40.21(a) (2009)), available at <http://www.state.gov/m/a/dir/regs/fam/09fam/c22751.htm>.

34. There have been few studies documenting the incarceration of transgender people. One organization reported that rates of incarceration of transgender people range from thirty-seven to sixty-five percent. Kimberly Keller, *Transgender Health and HIV*, BETA, Summer/Fall 2009, at 48, available at http://img.thebody.com/sfaf/2009/beta_2009_sumfall_transgender2.pdf. A San Francisco study reported that sixty-five percent of male-to-female transgender people had a history of incarceration. SAN FRANCISCO DEPARTMENT OF PUBLIC HEALTH, THE TRANSGENDER COMMUNITY HEALTH PROJECT (Feb. 18, 1999), <http://hivinsite.ucsf.edu/InSite?page=cftg-02-02#S3X> (follow "methods" hyperlink). Although there is little formal research on the number of transgender people in correctional facilities, it has been estimated that at least a few thousand transgender people are incarcerated. Darren Rosenblum, "Trapped" in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 516-17 (2000).

35. A study conducted by the Transgender Law Center found that two-thirds of transgender respondents reported experiencing discrimination at work. TRANSGENDER LAW CENTER, STATE OF TRANSGENDER CALIFORNIA REPORT: RESULTS FROM THE 2008 CALIFORNIA TRANSGENDER ECONOMIC HEALTH SURVEY 9 (2009), available at http://www.transgenderlawcenter.org/pdf/StateTransCA_report_2009Print.pdf.

36. Telephone Interview with Aaron Morris, Staff Attorney, Immigration Equality (Sept. 23, 2009).

37. For an example of the difficulties transgender people face accessing homeless shelters, see Jennifer Smith, *Shelters Bar Trans Homeless*, SOUTHERN VOICE, (Feb. 15, 2003), available

services that are supposed to provide for impoverished people.³⁸ Due to crippling poverty and minimal access to social services, many transgender people turn to illegal economies, such as sex work and the drug trade, to survive.³⁹

A second cause of the high incarceration rates is police profiling. Discrimination based on gender identity and race makes transgender individuals especially vulnerable to law enforcement profiling, prosecution, and incarceration.⁴⁰ Police profiling of transgender women as sex workers, particularly women of color, is common.⁴¹ Police officers harass and arrest female transgender sex workers even when they have not witnessed sex work related behavior, and even when sex workers are not engaging in work at the time.⁴² Many transgender sex workers have reported sexual assaults by police officers.⁴³ Sometimes sex workers are forced to have sexual relations with the officers; they face arrest if they refuse.⁴⁴

Transgender immigrants who have been convicted of a crime also have the right to apply for asylum defensively, but have to wait in detention until their asylum claims have been adjudicated.⁴⁵ They are detained in the meantime, not for their former crime but for the civil violation of living in the U.S. without proper status, and often in deplorable conditions.

II. PROBLEMS WITH THE CURRENT SYSTEM

The government holds transgender detainees against their will, often for long periods of time, but does not have proper standards set in place to protect their safety. This section will identify the reasons why the current gender classification system creates a dangerous environment for transgender detainees. It will then explain how the current solution to these dangers, administrative segregation, does not alleviate the problems but instead creates additional ones.

at <http://www.genderadvocates.org/News/Atlanta%20Homeless.html> (reporting that Atlanta homeless shelters put an outright ban on transgender people).

38. SYLVIA RIVERA LAW PROJECT, "IT'S WAR IN HERE": A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN'S PRISONS 21-22 (2007), available at <http://www.srlp.org/files/warinhere.pdf>.
39. Lee, *supra* note 20, at 10 (providing a comprehensive review of the connection between sex work, drug use, and transgender communities).
40. See AMNESTY INT'L, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE UNITED STATES 2 (2005), available at <http://www.amnestyusa.org/outfront/stonewalled/report.pdf>.
41. *Id.* at 12, 15.
42. See Rosenblum, *supra* note 34, at 525.
43. INCITE! WOMEN OF COLOR AGAINST VIOLENCE, POLICE BRUTALITY AGAINST WOMEN OF COLOR & TRANS PEOPLE OF COLOR, http://www.incite-national.org/media/docs/5341_pv-brochure-download.pdf (last visited Apr. 11, 2010).
44. *Id.*
45. Cf. Karen M. Jarvis Johnson, *Fearing the United States: Rethinking Mandatory Detention of Asylum Seekers*, 59 ADMIN. L. REV. 589, 590 (2007) (discussing the same process in the context of transgender immigrants who are detained upon arrival to the U.S.).

A. Inappropriate Gender Classification System

Whether transgender detainees are defined as male or female for housing purposes has a significant impact on their health and safety. A male-to-female transgender woman is far more likely to experience violence if housed with men instead of women.⁴⁶ As victims of sexual assault, harassment, and humiliation, transgender women in detention are likely to suffer serious physical injury and mental anguish.⁴⁷ On the extreme end, transgender women are raped and fear for their lives.⁴⁸ They also suffer smaller indignities daily: they are spit on, sexually objectified, propositioned, and insulted.⁴⁹ Guards may perform sexualized pat downs or strip searches in front of other detainees.⁵⁰ Transgender women regularly complain of being watched in the shower by other detainees or guards.⁵¹ They are also denied hormone treatments and grooming products necessary to maintain a feminine appearance.⁵²

Furthermore, detention with male prisoners can exacerbate the emotional problems of transgender asylum seekers who suffer from post-traumatic stress disorder (PTSD). Since asylum seekers in general are likely to be survivors of persecution in their home countries, they often suffer from PTSD.⁵³ Recent studies of PTSD show that asylum seekers are highly susceptible to psychological distress in detention.⁵⁴ Being placed in hypermasculine, violent conditions can exacerbate the trauma that transgender asylum seekers have experienced in their home country. One transgender asylum seeker who had been detained, tortured, and raped in her home country said that her detention in the United States triggered flashbacks of these memories.⁵⁵ In some cases, detention conditions re-traumatized asylum seekers so severely that they chose to return to

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46. See SCHEEL & EUSTACE, *supra* note 14, at 144 (finding that a male-to-female pre-operative or non-operative transsexual with male genitalia who is on hormones is more safely housed with females inmates than with men, even vulnerable male inmates).
 47. See generally HUMAN RIGHTS FIRST, *supra* note 13 (discussing the adverse effects of detention on immigrant detainees in general, particularly with respect to asylees).
 48. See, e.g., Just Detention International, Survivor Testimony, National Prison Rape Elimination Commission Testimony of Mayra Soto, <http://www.spr.org/en/NPREC/esmeraldasoto.aspx> (last visited Apr. 11, 2010) [hereinafter JDI].
 49. Telephone Interview with Aaron Morris, Staff Attorney, Immigration Equality (Dec. 8, 2009).
 50. SYLVIA RIVERA LAW PROJECT, *supra* note 38, at 21-22.
 51. Telephone Interview with Aaron Morris, Staff Attorney, Immigration Equality (Dec. 8, 2009).
 52. *Id.*
 53. See generally Derrick Silove et al., *Anxiety, Depression and PTSD in Asylum-Seekers: Associations with Pre-Migration Trauma and Post-Migration Stressors*, 170 BRIT. J. PSYCHIATRY 351 (1997).
 54. See Katy Robjant et al., *Psychological Distress Amongst Immigration Detainees: A Cross-Sectional Questionnaire Study*, 48 BRIT. J. CLINICAL PSYCHOL. 275 (2009).
 55. JDI, *supra* note 48; Internet Video: Esmeralda: A Transgender Detainee Speaks Out, <http://vimeo.com/7551045> (last visited Apr. 11, 2010) [hereinafter Esmeralda Video].

the violence in their home country rather than remain in detention.⁵⁶

Despite the significance of gender classification to the health and safety of transgender detainees, ICE does not have any written policies that address how to house the detainees.⁵⁷ This leaves the determination entirely up to the individual detention centers. Unfortunately, detention facilities are simply not equipped to handle the basic needs of gender variant people. Most facilities employ very rigid gender definitions that classify sex based on the presence of particular genitalia, thus increasing the risk of violence and emotional harm to the detainees.⁵⁸

B. Harms of Administrative Segregation

Detention administrators commonly respond to the existence of a transgender person or the complaints made by that person with the problematic solution of administrative segregation—the practice of separating the detainee from the general population.⁵⁹ In theory, this approach is supposed to be a protective, non-punitive measure,⁶⁰ but in practice the conditions are as restrictive as some of the harshest forms of punitive segregation. Many facilities use the same form of segregation to isolate detainees who complain of assault as they do to isolate the most dangerous detainees, or the ones too violent to live with the general population.⁶¹ Administrative segregation often involves completely eliminating contact with other detainees and confining detainees to locked cells for twenty-three hours a day.⁶² It also frequently restricts detainees' access to facilities such as religious services, phones, showers, and recreational facilities.⁶³ Furthermore, facilities often fail to provide educational,

56. See HUMAN RIGHTS FIRST, *supra* note 13, at 8. After spending over 17 months in detention, a young Colombian woman opted to voluntarily return to her home country because she could no longer cope with the stress of detention, which had affected her physically and destroyed her mentally. *Id.* In reviewing her case after she left the United States, the U.S. Court of Appeals ruled that she had a well-founded fear of persecution. *Id.*

57. See U.S. DEP'T OF HOMELAND SEC., ICE/DRO DETENTION STANDARD: CLASSIFICATION SYSTEM (2008), *available at* http://www.ice.gov/doclib/PBNDs/pdf/classification_system.pdf.

58. See NEILSON & WERTZ, *supra* note 11, ch. 6.52, *available at* http://www.immigrationequality.org/c6.html#_Toc211075786. See generally SCHEEL & EUSTACE, *supra* note 14, at 142-43.

59. See Telephone Interview with Aaron Morris, Staff Attorney, Immigration Equality (Dec. 8, 2009) (explaining that most of Immigration Equality's male-to-female transgender clients are in administrative segregation within male facilities); NAT'L CTR. FOR LESBIAN RIGHTS, RIGHTS OF TRANSGENDER PRISONERS, <http://www.nclrights.org/site/DocServer/RightsOfTransgenderPrisoners.pdf?docID=6381> (last visited Apr. 26, 2009); see also Esmeralda Video, *supra* note 55.

60. STOP PRISONER RAPE, *supra* note 9, at 13-14.

61. See *Tates v. Blanas*, No. CIV S-00-2539 OMP P, 2003 U.S. Dist. LEXIS 26029 (E.D. Cal. Mar. 6, 2003) (finding that a jail's policy of automatically placing all transgender detainees in "total separation" violated their constitutional rights because it exposed them to harsh conditions normally reserved for the most dangerous inmates).

62. See SYLVIA RIVERA LAW PROJECT, *supra* note 38, at 18.

63. See Rosenblum, *supra* note 34, at 530 (discussing a detainee who was denied "adequate

rehabilitative, and vocational programs to those segregated.⁶⁴

One transgender detainee who was placed in administrative segregation after she complained of a threat of violence described her experience in this way:

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 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.⁶⁵

Like in this example, administrative segregation often takes the form of solitary confinement.⁶⁶ Because of the detrimental emotional effects of the confinement, some commentators have suggested that long-term segregation amounts to torture.⁶⁷ The effects of solitary confinement are even more extreme on people who have previously experienced mental trauma, namely asylum seekers.⁶⁸ Tellingly, many transgender detainees prefer the risks of housing with the general population to the isolation of administrative segregation.⁶⁹

Additionally, administrative segregation does not always provide more

'recreation, living space, educational and occupational rehabilitation opportunities'"). For example, the detainee in administrative segregation in *Tates v. Blanas*, an unpublished district court case, was prohibited from attending religious services and rarely permitted exercise. *Tates*, 2003 US Dist. LEXIS 26029, at *12, *18. The jail only allowed the detainee to use the dayroom, which had phones and showers, during the middle of the night, restricting his access to his lawyer and reducing his showers to once or twice a week. *Id.* at 16-22.

64. HUMAN RIGHTS WATCH, *supra* note 21, at 17; SYLVIA RIVERA LAW PROJECT, *supra* note 38, at 18.
65. HUMAN RIGHTS WATCH, TRANSGENER PRISONERS, IDENTITY, AND DETENTION: POLICY RECOMMENDATIONS 5 (2006), http://www.outcast-films.com/films/cu/transgender_prisoners.pdf (emphasis omitted).
66. *See* Rosenblum, *supra* note 34, at 529.
67. *See* Atul Gawande, *Hellhole*, NEW YORKER, Mar. 30, 2009, *available at* http://www.newyorker.com/reporting/2009/03/30/090330fa_fact_gawande; *see also* Davenport v. DeRobertis, 844 F.2d 1310, 1313 (7th Cir. 1988) (ruling that "isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total"); Louise Arbour, *Is Segregation Torture?*, TELEGRAPH J., Apr. 4, 2009, *available at* <http://telegraphjournal.canadaeast.com/opinion/article/625323>; Brandon Keim, *Solitary Confinement: The Invisible Torture*, WIRED, Apr. 29, 2009, *available at* <http://www.wired.com/wiredscience/2009/04/solitaryconfinement/>.
68. PHYSICIANS FOR HUMAN RIGHTS & BELLEVUE/NYU PROGRAM FOR SURVIVORS OF TORTURE, FROM PERSECUTION TO PRISON: THE HEALTH CONSEQUENCES OF DETENTION FOR ASYLUM SEEKERS 12-13 (2003), *available at* <http://physiciansforhumanrights.org/library/documents/reports/report-perstoprison-2003.pdf> ("For a person who is affected by post-traumatic stress, the prospect of solitary confinement can be especially fearsome.").
69. SYLVIA RIVERA LAW PROJECT, *supra* note 38, at 18-19.

protection than placement in the general population. Administrative segregation that takes the form of solitary confinement makes a detainee extremely vulnerable to violence by guards, because there are few others around to witness the guards' misconduct.⁷⁰ Because the segregation creates isolation from potential witnesses and cameras, it gives detainees less opportunity to document abuses against them once they occur.⁷¹

The story of Esmeralda, a transgender asylum seeker from Mexico, illuminates the many flaws in administrative segregation. Esmeralda came to the United States seeking refuge after being abused in a Mexican jail, but was detained while the final result of her asylum application was pending.⁷² The facility automatically placed her in administrative segregation due to her transgender status.⁷³ She was not allowed to leave her cell to get food or drink, and she was required to go to the bathroom in shackles.⁷⁴ Three days after her arrival, a guard forced her to perform oral sex on him while she was shackled.⁷⁵ Despite her formal complaint, ICE refused to release her.⁷⁶ She became suicidal but was not allowed to see a psychologist.⁷⁷ Eventually she opted to return to Mexico rather than to stay in detention any longer.⁷⁸

ICE has a policy addressing administrative segregation, but the policy vests detention facilities with the discretion to determine when and how to implement the practice.⁷⁹ The ICE manual defines administrative segregation as a "non-punitive status in which restricted conditions of confinement are required" that may be employed when "the detainee's continued presence in the general population poses a threat to self, staff, [or] other detainees," as well as for "the secure and orderly operation of the facility."⁸⁰ According to these regulations, a detainee may initiate the segregation, but an administrator may also place a detainee in segregation against her will when the administration has determined that the segregation is warranted.⁸¹ The ICE policy states that administrative segregation should only be implemented when reasonable alternatives are unavailable, but leaves the determination as to whether reasonable alternatives exist up to each facility.⁸² Because of this leeway, facilities often use the system

70. SYLVIA RIVERA LAW PROJECT, *supra* note 38, at 18; *see supra* text accompanying notes 5-9.

71. SYLVIA RIVERA LAW PROJECT, *supra* note 38, at 18.

72. JDI, *supra* note 48; Esmeralda Video, *supra* note 55.

73. JDI, *supra* note 48; Esmeralda Video, *supra* note 55.

74. JDI, *supra* note 48; Esmeralda Video, *supra* note 55.

75. JDI, *supra* note 48; Esmeralda Video, *supra* note 55.

76. JDI, *supra* note 48; Esmeralda Video, *supra* note 55.

77. JDI, *supra* note 48; Esmeralda Video, *supra* note 55.

78. JDI, *supra* note 48; Esmeralda Video, *supra* note 55.

79. U.S. DEP'T OF HOMELAND SEC., ICE/DRO DETENTION STANDARD: SPECIAL MANAGEMENT UNITS 10 (2008), *available at* http://www.ice.gov/doclib/PBNDs/pdf/special_management_units.pdf [hereinafter SPECIAL MANAGEMENT].

80. *Id.*

81. *Id.* at 10-11.

82. *Id.* at 1 ("A detainee will be placed in 'protective custody' status in Administrative

they already have in place to protect detainees—placing them under the same conditions as they do dangerous prisoners—instead of fashioning more appropriate conditions.⁸³

ICE guidelines also do not specify how administrative segregation should be implemented. While the manual sets forth basic guidelines for the proper treatment of segregated detainees, these guidelines are inadequate because they leave implementation of the standards up to individual facilities. The ICE manual mandates that detainees in administrative segregation receive “the same privileges as are available to detainees in the general population,” but the ultimate allotment of privileges is varied based on the resources and safety concerns of each facility.⁸⁴ Additionally, ICE suggests that detainees in administrative segregation be housed separately from those in disciplinary segregation.⁸⁵ Instead of being mandatory, however, adherence to the guidelines is determined by the resources of the individual facilities.⁸⁶ Prison and jails are often excused from following the explicit guidelines if they create their own equivalent protocols.⁸⁷ This gives each institution the latitude to modify the protocols, potentially reducing the rights of detainees. By giving detention facilities leeway, ICE guidelines have allowed them to create dangerous and restrictive forms of administrative segregation.⁸⁸

III. PROPOSED CHANGES TO ICE PROTOCOL

While reform within detention facilities may lessen the violence against transgender detainees, the only way to truly end violence in detention would be to rethink the practice of detention entirely.⁸⁹ Although I advocate for the release of all transgender immigrant detainees, winning a legal challenge against the practice of detaining transgender immigrants is highly unlikely.⁹⁰ Therefore, my proposed reforms target one area that I think the law can change, the conditions

Segregation only when there is documentation that it is warranted and that no reasonable alternatives are available.”).

83. *See supra* text accompanying notes 59-66.

84. *See* SPECIAL MANAGEMENT, *supra* note 79, at 5.

85. *Id.* at 4 (“Detainees in Administrative Segregation generally will be housed separately from those in Disciplinary Segregation.”).

86. *See id.* (outlining certain exceptions under which a facility can disregard the guidelines).

87. *See id.* at 1 (stating that while ICE-run facilities must follow specific protocols, state or local government facilities can “adopt, adapt or establish alternatives, provided they meet or exceed the intent represented by these procedures”).

88. *See, e.g.,* Rosenblum, *supra* note 34, at 529-30.

89. *See generally* MARIE L. GRIFFIN, THE USE OF FORCE BY DETENTION OFFICERS 1 (2001).

90. I base this conclusion on the clear legal authority defining the practice of immigration detention as lawful under the Due Process Clause. *See* *Demore v. Kim*, 538 U.S. 510, 523, 528 (2003) (ruling that an immigrant was not entitled to an individualized bond hearing because detention during deportation proceedings is a constitutionally valid aspect of the deportation process); *Reno v. Flores*, 507 U.S. 292, 303 (1993) (ruling that detention of juvenile immigrants was constitutional where the government did not intend to punish the child and where conditions of governmental custody were decent and humane, since it was rationally connected to governmental interest).

within detention facilities. These reforms should not obviate the need for a major overhaul of the current system; they are simply a way to alleviate some of the violence directed at transgender detainees until this wholesale change is achieved.

ICE already has mechanisms necessary to release transgender people from detention and ensure their presence at removal hearings, but they are currently underutilized.⁹¹ Detainees may be released on humanitarian grounds under section 212(d)(5) of the Immigration and Nationality Act (INA).⁹² Humanitarian release is granted to detainees in special cases where there are urgent humanitarian reasons justifying the release.⁹³ These humanitarian concerns include, but are not limited to, people with serious medical conditions that require special medical attention, pregnant women, witnesses in police investigations, victims of torture or rape, and people applying for asylum who have passed a credible fear interview.⁹⁴ In reviewing the petition, ICE evaluates these humanitarian concerns against other standard considerations and detention decisions, such as the arrestee's criminal record and immigration history.⁹⁵ While this provision exists, applications by transgender detainees are routinely denied.⁹⁶

ICE should expand this provision to automatically release transgender immigrants on the basis that they have a credible fear of persecution in detention, so long as they do not pose a threat to society.⁹⁷ ICE can apply several different methods to ensure that detainees are present at removal hearings if they are flight risks. First, ICE can implement supervised release or parole.⁹⁸ Current methods,

91. INA § 212(d)(5), 8 U.S.C. § 1182(d)(5) (2006); *see also* Immigration Equality, Detention FAQs, <http://www.immigrationequality.org/template.php?pageid=181> (last visited Apr. 11, 2010).

92. *See* INA § 212(d)(5); Immigration Equality, *supra* note 91.

93. *See* INA § 212(d)(5); Immigration Equality, *supra* note 91.

94. FLORENCE IMMIGRANT & REFUGEE RIGHTS PROJECT, HOW TO REQUEST HUMANITARIAN PAROLE (2009), *available at* <http://www.firrp.org/publications/kyr/en/How%20to%20Request%20Humanitarian%20Parole%202009.doc>.

95. *Immigration Raids: Postville and Beyond: Hearing before the Subcomm. on Immigration, Citizenship, Refugees, Border Security and Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. 54-55 (2008) (statement of Marcy Forman, Director of Investigations, U.S. Immigration and Customs Enforcement).

96. Telephone Interview with Aaron Morris, Staff Attorney, Immigration Equality (Dec. 8, 2009). This statement coincides with the general trend. Of the 8,748 total humanitarian parole applications adjudicated between October 2001 and June 2007, seventy-six percent of them were denied; over half were denied for lack of exhaustion of other avenues of immigration. U.S. GOV'T ACCOUNTABILITY OFFICE, IMMIGRATION BENEFITS: INTERNAL CONTROLS FOR ADJUDICATING HUMANITARIAN PAROLE CASES ARE GENERALLY EFFECTIVE, BUT SOME CAN BE STRENGTHENED 2 (2008), *available at* <http://www.gao.gov/new.items/d08282.pdf>.

97. While this section focuses specifically on the release options available to transgender immigrants, many other communities are harmed by detention practices; thus these options may apply more universally. I advocate the use of alternative methods to detention for all immigrants, so long as their release does not pose a serious threat to society.

98. Although one common practice is to release detainees on bond, this practice is not

such as enrollment in community or faith-based programs to ensure appearance at scheduled hearings, have proven to be successful in curbing absconding and can also be implemented.⁹⁹ Additionally, electronic monitoring has a near-perfect compliance rate for attendance at final removal hearings.¹⁰⁰ Since electronic monitoring raises concerns about potential health risks and the social stigma associated with its use, ICE should first consider less restrictive measures.¹⁰¹ However, any of ICE's methods, including electronic monitoring, is preferable to detention. They are ten times more cost effective,¹⁰² increase immigrant safety by avoiding the dangers of detention, and are effective in ensuring presence at removal proceedings.¹⁰³

Detention facilities desperately need new housing protocols that affirm and protect transgender detainees who do not qualify for release. As long as placement in detention is sex-segregated by genitalia or birth-assigned sex and the only alternative is administrative segregation, any placement for transgender detainees in detention is dangerous and detrimental.¹⁰⁴ Therefore, ICE must implement an alternative to the current practice of defining gender by genitalia. Additionally, ICE should eliminate the heavy-handed use of administrative segregation as a means to protect vulnerable detainees. My specific reforms are outlined below.

A. Gender Classifications Based on Gender Identity

The National Lawyers Guild and the San Francisco Human Rights Commission created a list of recommended reforms for California prisons that can be used as a guideline for updating detention protocols.¹⁰⁵ They recommend that an individualized assessment for appropriate housing be made for each

recommended because relief is unavailable to those that cannot afford the bond.

99. Between 1997 and 2000, the Vera Institute of Justice coordinated a highly successful alternative program through a contract with the Immigration and Naturalization Service. See Christopher Stone, *Supervised Release as an Alternative to Detention in Removal Proceedings: Some Promising Results of a Demonstration Project*, 14 GEO. IMMIGR. L.J. 673 (2000) (discussing the program and its results); see also Detention Watch Network, *supra* note 11.
100. *The Math of Immigration Detention*, BACKGROUNDER (Nat'l Immigration Forum, Washington, D.C.), July 7, 2009, at 2, available at <http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf>.
101. It is suggested that ICE currently limits GPS monitoring for immigrants already released on bond or their own recognizances. *Id.*
102. *Id.* at 1-2 (calculating the cost of alternative programs at twelve dollars per immigrant per day as opposed to detention costs which are ninety-nine to 141 dollars per immigrant per day).
103. HUMAN RIGHTS FIRST, *supra* note 13, at 2 (crediting different alternative methods with success rates from 91 to 99 percent); ICE Factsheet: Alternatives to Detention for ICE Detainees (Oct. 23, 2009), <http://www.ice.gov/pi/news/factsheets/alternativestodetention.htm> (citing success rates at 87 to 96 percent).
104. SYLVIA RIVERA LAW PROJECT, *supra* note 38, at 19 (basing determination on interviews with transgender inmates, all of whom reported encountering some form of harassment and/or assault during their imprisonment).
105. SCHEEL & EUSTACE, *supra* note 14, at 139-45.

detainee based on a policy of classifying by gender identity, and that each assessment be reviewed periodically thereafter.¹⁰⁶ According to the recommended classification policy, housing status would be determined by referring to a transgender detainee's official identification only if it matched her gender identity.¹⁰⁷ Otherwise, the detainee would be housed according to the gender by which she identified.¹⁰⁸

Some fear that a policy classifying transgender women according to their gender identity will encourage men to pose as transgender women to gain access to women's facilities, or will permit transgender women to assault female detainees.¹⁰⁹ While there is no evidence to support these fears, there is little data to refute them because this method of gender classification has not often been employed in the detention context.¹¹⁰ However, many homeless shelters have integrated transgender women into women's shelters for years without significant problems.¹¹¹ In these cases, there have been no documented instances of men dressing as women to gain admittance.¹¹² Furthermore, these shelters found that transgender women were no more likely to assault other women than were the general female population.¹¹³ In fact, they found that the major concern in the shelters were attacks on transgender women.¹¹⁴

One of the greatest challenges to the proposed gender classification will be ensuring the safety of transgender women in women's facilities. While transgender women are less likely to experience violence when housed with other women than with men,¹¹⁵ they are still likely to be subjected to abuse from

106. *Id.* at 143.

107. *Id.*

108. *Id.* This solution is still imperfect because it relies on the same binary system by simply reorganizing people within it. Reclassification would not benefit transgender detainees who do not identify as women. It would, however, drastically improve conditions for a majority of transgender people in detention.

109. Some psychiatrists argue that creating a gender classification based on self-identity opens the door to imposters who may use the flexibility in the system to abuse other women. Damien Cave, *New York Plans to Make Gender Personal Choice*, N.Y. TIMES, Nov. 7, 2006, available at http://www.nytimes.com/2006/11/07/nyregion/07gender.html?_r=1&pagewanted=print.

110. The method currently applied is gender segregation based on genitalia. NELSON & WERTZ, *supra* note 11, ch. 6.52, available at http://www.immigrationequality.org/c6.html#_Toc211075786 ("Detainees will almost always be housed according to their external genitalia.").

111. LISA MOTTET & JOHN M. OHLE, THE NATIONAL GAY AND LESBIAN TASK FORCE POLICY INSTITUTE, *TRANSITIONING OUR SHELTERS: A GUIDE TO MAKING HOMELESS SHELTERS SAFE FOR TRANSGENDER PEOPLE* 13 (2003), available at <http://www.thetaskforce.org/downloads/reports/reports/TransitioningOurShelters.pdf> ("Shelters in San Francisco and Boston that for many years have integrated transgender women report that they have not had assaults committed by transgender women that are unlike those committed by other women.").

112. *Id.* at 14.

113. *Id.* at 13.

114. *Id.* at 14 ("When it comes to transgender people, the more serious risk is that violence will be committed *against* transgender people by others.").

115. See SCHEEL & EUSTACE, *supra* note 14, at 144 (finding that a male-to-female pre-operative

other detainees.¹¹⁶ Furthermore, they are still disproportionately targeted for sexual assault by staff.¹¹⁷ In order to increase chances of a successful integration of transgender detainees in women's facilities and decrease violence against them both by the staff and the female detainees, administrators should also institute an official policy of respect for transgender people.¹¹⁸ This includes addressing each detainee by her preferred pronoun and name, even when they conflict with official documents. It also includes providing access to women's clothing and medical hormone treatments. Not only will this policy demonstrate respect to the individual detainee, but it will create an environment where transgender women are seen as women, thus reducing violence directed at transgender women based on their transgender status. Facilities should also provide gender identity training to their guards and healthcare professionals.¹¹⁹ These trainings can help dispel the gender stereotypes that underlie much of the discrimination. Formal training of detainees on gender identity may be necessary as well, particularly if there are biological women who feel unsafe being housed with transgender women.

Restructuring the gender classification system of detention centers is not a simple solution. It will likely be a complicated and difficult logistical transition for many facilities.¹²⁰ When faced with the options provided by the current system, some transgender women may choose to remain in male facilities instead of facing unknown conditions in women's facilities.¹²¹ Until the transition is complete and women's facilities are structured to ensure the safety of transgender detainees, placement in them should be optional.¹²²

B. Protective Custody and Administrative Segregation as a Last Resort

Administrative segregation remains a reasonable method for ensuring the

or non-operative transsexual with male genitalia who is on hormones is more safely housed with females inmates than with men, even if housed with only vulnerable male inmates).

116. For instance, it is likely that transgender women in women's detention facilities would experience the same type and frequency of abuse as transgender women in homeless shelters. For a brief description of such abuse, see MOTTET & OHLE, *supra* note 111, at 14.
117. 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, 178 (2006).
118. This policy is based on a policy proposed by The National Gay and Lesbian Task Force Policy Institute. See MOTTET & OHLE, *supra* note 111, at 11.
119. The Transgender Law Center first provided this suggestion in the context of protecting transgender women in men's prisons, but it is equally necessary to ensure the safety of transgender women in women's facilities. See Letter from Christopher Daley, Director, Transgender Law Ctr., to Nat'l Prison Rape Elimination Comm'n, (Aug. 15, 2005), available at <http://transgenderlawcenter.org/pdf/prisonrape.pdf>.
120. Interview with Alexander Li-Hua Lee, Former Director, Transgender, Gender Variant & Intersex Justice Project (Mar. 16, 2010).
121. *Id.*
122. Allowing transgender individuals to choose their housing during the temporary transitional period would also benefit female to male transgender detainees because they would be at a high risk of violence in male detention centers without protective procedures in place.

safety of transgender detainees, but it should take a less restrictive form and only be used on a case-by-case basis. The National Lawyers Guild and San Francisco Human Rights Commission's recommendations suggest that transgender detainees be housed in administrative segregation *only* when there is reason to believe the detainees present a heightened risk to themselves or to others, and *only* for that limited period of time during which the heightened risk exists.¹²³ To guard against indefinite confinement, the facility must prepare a written plan for returning the detainee to less restrictive, but safe, housing.¹²⁴ Administrative segregation should be available, but not required, for detainees who express fear of victimization in their current housing.¹²⁵ Furthermore, a better form of administrative segregation should be implemented: one which gives detainees access to all of the same services—showers, recreational time, and educational programs—as detainees in the general population, and one that does not isolate them in solitary confinement.¹²⁶

Implementing these new protocols and requiring adherence by detention centers is key to protecting the safety of transgender detainees. Unlike the current ICE protocols, the specificity of these proposed standards will provide each center with clear instructions on how to house and protect transgender detainees, making it more likely that they will receive proper care. In cases where detention centers do not follow the guidelines, harmed detainees can use the protocols to demonstrate a clear violation, force compliance, or gain compensation.

IV. FORMING A CONSTITUTIONAL CHALLENGE

Immigrant detainees have few other avenues for legal recourse. Therefore, I propose a constitutional challenge in the form of impact litigation to force ICE to implement these types of changes. Immigrant detainees are often unable to hold detention centers accountable when abuses occur.¹²⁷ Detainees are an extremely vulnerable group with little knowledge of their legal rights.¹²⁸ New to

123. SCHEEL & EUSTACE, *supra* note 14, at 144 (“A transgender inmate will be housed in Protective Custody or Administrative Confinement ONLY when there is reason to believe the inmate presents a heightened risk to himself or herself or to others, and only for that limited period of time during which the heightened risk exists.”).

124. *Id.*

125. *Id.*

126. *See id.*

127. The story of Esmeralda provides a clear example. *See* JDI, *supra* note 48. After Esmeralda was sexually assaulted by a guard, she made a complaint and the guard left the facility. *Id.* Despite the abuse, she was not released from detention. *Id.* She was continually harassed by other guards who blamed her for his departure. *Id.* She became suicidal and eventually gave up her asylum claim and went back to Mexico. *Id.*

128. *See, e.g.*, Internet Video: Due Process Violations in Detention and Deportation (Pro Immigrant 2009), available at <http://proimmigrant.blogspot.com/2009/02/due-process-violations-in-detention-and.html> (documenting stories of detained immigrants who did not understand their basic legal rights and were being asked to sign forms in English that they did not understand).

the United States, they often do not understand English well, nor do they understand the legal system that could grant their freedom.¹²⁹ Once detained, they enter into a liminal legal state that is difficult to navigate without an attorney. Because they are being held for a civil, not criminal violation, they have no right to a court-provided attorney to either defend against the deportation or advocate for their release pending their hearing.¹³⁰ Since many detention centers are located in remote areas, detainees have little access to pro bono attorneys.¹³¹ Additionally, ICE does not always provide detainees with notice of their legal rights.¹³² Some facilities have allowed months or even years to pass before establishing a legal orientation program, leaving detainees without access to basic legal information or resources to find an attorney.¹³³ Consequently, representation rates, and thus asylum success rates, are much lower for detained immigrants than those living outside detention.¹³⁴

Compounding their legal vulnerability is the fact that detainees are routinely transferred far away from their support networks of family and friends.¹³⁵ Because ICE is a federal agency, detainees can be moved to any area of the country without warning.¹³⁶ Reasons for transfers include: the need to create bed space in a particular facility, an upcoming hearing or interview in another part of the country, or the availability of accommodations in cheaper, more remote facilities.¹³⁷ Detainees have also reported being transferred after filing complaints about abuse by prison guards.¹³⁸ Because ICE staff rarely follows the proper notification procedures, the detainees and their supporters rarely know to where they are being transferred.¹³⁹ The transfers make it difficult

129. *Id.*

130. Non-citizens have a right to counsel in removal proceedings, but at “no expense to the government.” INA § 292, 8 U.S.C. § 1362 (2006).

131. HUMAN RIGHTS FIRST, *supra* note 13, at 8.

132. Some detainees have claimed that ICE agents deliberately mislead them about their legal rights. In an illuminating example, an ICE officer tried to convince a detainee to sign a voluntary departure form without telling him what it meant. Due Process Violations in Detention and Deportation, *supra* note 128. The ICE officer got angry with a second detainee when he told his friend that the document was an agreement to leave the country. *Id.*

133. HUMAN RIGHTS FIRST, *supra* note 13, at 8.

134. *Id.* at 7.

135. *See id.* at 26 (describing examples of nation-wide transfers).

136. U.S. DEP’T OF HOMELAND SEC., ICE/DRO DETENTION STANDARD: TRANSFER OF DETAINEES 3 (2008) *available at* http://www.ice.gov/doclib/PBNDS/pdf/transfer_of_detainees.pdf (“The detainee shall not be informed of the transfer until immediately prior to leaving the facility, at which time he or she shall be notified that he or she is being moved to a new facility within the United States and not being removed.”).

137. HUMAN RIGHTS FIRST, *supra* note 13, at 26 (explaining the rationale of the immigrant transfers between facilities).

138. STOP PRISONER RAPE, *supra* note 9, at 4.

139. U.S. DEP’T OF HOMELAND SEC. OFFICE OF INSPECTOR GENERAL, IMMIGRATION AND CUSTOMS ENFORCEMENT’S TRACKING AND TRANSFERS OF DETAINEES (2009), *available at* http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_09-41_Mar09.pdf (finding that ICE agents did not always provide detainees the name of the facility to which they are being sent and had improperly filled out 143 of the 144 Detainee Transfer Notification forms audited).

for a detainee to receive a continuity of legal support.

Due to lack of legal representation and frequent facility transfers, it is extremely difficult for detainees to improve their situation when they are experiencing abuse within the detention system. While grievance procedures are available, they may be hard for detainees to navigate. Although the ICE manual lays out broad procedures for filing grievances, no uniform system is provided across facilities.¹⁴⁰ Immigrant detainees can be housed in three different types of facilities, each with different protocols.¹⁴¹ There is no standardization in the application of grievance procedures, nor is there one authority that hears appeals from all of the facilities.¹⁴² Instead, appeals are heard by high-level administrators in each institution, which can lead to different interpretations of the policies.¹⁴³ Since every detention facility designs the specifics of its grievance policies, an individual detainee who transfers through several facilities potentially has to learn a different procedure in each facility.¹⁴⁴ Without a uniform standard to rely on, detainees cannot ascertain their rights or bring claims based on a facility's violation of a policy.

The lack of legal access combined with inconsistent standards suggest that an impact litigation lawsuit is the best avenue available for reform. In this section, I will first outline the basic legal protection afforded to immigrant detainees. Next, I will outline constitutional challenges to detention conditions made by transgender inmates and examine the ways in which the cases can be utilized by transgender detainees to support a due process claim. Finally, I will analyze successful challenges by juvenile detainees and discuss how they can be used to bolster claims of transgender detainees.

A. Detainees' Rights Under the Due Process Clause

The rights of immigrant detainees derive from the Due Process Clause of the Fifth Amendment.¹⁴⁵ The Fifth Amendment provides protection to any

Agency staff interviewed by the Department of Homeland Security generally considered completing and providing copies of transfer forms to detainees a low priority, and did not know that they were responsible for informing detainees' legal representatives about the transfers. *Id.*

140. See U.S. DEP'T OF HOMELAND SEC., ICE/DRO DETENTION STANDARD: GRIEVANCE SYSTEM 3-7 (2008), available at http://www.ice.gov/doclib/PBNDs/pdf/grievance_system.pdf [hereinafter GRIEVANCE SYSTEM].

141. Immigrant detainees are housed in three types of facilities: Service Processing Centers (SPC) run by ICE, Contract Detention Facilities (CDF) operated by independent contractors, and correctional facilities governed by Intergovernmental Service Agreements (IGSA). See ICE/DRO DETENTION STANDARD: DEFINITIONS 2, 5, 7 (2008) available at <http://www.ice.gov/doclib/PBNDs/pdf/definitions.pdf> (providing definitions of each detention facility); SPECIAL MANAGEMENT, *supra* note 79 at 1 (listing the types of facilities used in the detention of immigrants).

142. See GRIEVANCE SYSTEM, *supra* note 140, at 3-7.

143. See *id.* at 6-7.

144. See *id.* at 2.

145. U.S. CONST. amend. V. For persons born or naturalized in the United States, this protection

person within the custody of the United States from deprivation of “life, liberty, or property, without due process of law.”¹⁴⁶ In the context of detention, the Supreme Court has noted that the Due Process Clause protects pre-trial criminal detainees from punitive detention conditions.¹⁴⁷ Therefore, detainees who have not been found guilty of a crime may not be held in conditions which amount to punishment of the detainee.¹⁴⁸ What constitutes punishment in the context of transgender immigrant detention is undefined; there have been no reported cases of transgender detainees challenging the gender classification or administration policies of detention facilities on due process grounds.¹⁴⁹

B. A Potential Obstacle: Prisoner Challenges to Conditions of Confinement

One of the biggest challenges to a successful due process claim for transgender detainees is a large body of case law that substantially limits the rights of transgender inmates in correctional facilities. Prisoners’ conditions of incarceration are generally defined by the Eighth Amendment. The Eighth Amendment protects convicted criminals from punishments that are “cruel and unusual.”¹⁵⁰ Prisoner cases challenging the genital-based gender classification system as well as administrative segregation policies under this standard, as well as on other grounds, have been largely unsuccessful.¹⁵¹ Even though the Eighth Amendment only applies after a person has been convicted of a crime,¹⁵² there are a few reasons why a judge determining acceptable conditions for immigrant detainees may find prior case law on acceptable conditions for inmates to be persuasive. First, transgender detainees and transgender inmates are detained in similar, if not identical, confinement conditions. Second, while these cases are not precedential, they comprise the largest body of case law outlining detention conditions of transgender people. Consequently, many courts use the detention standards for convicted prisoners as a point of reference when adjudicating due

derives from the Fourteenth Amendment. *Id.* amend. XIV.

146. *Id.* amend. V.

147. *Bell v. Wolfish*, 441 U.S. 520, 535-36 (1979) (citing *Ingraham v. Wright*, 430 U.S. 651 (1977), *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), *Wong Wing v. United States*, 163 U.S. 228 (1896)).

148. *See id.*

149. There is one unpublished case challenging a jail’s practice of automatically placing transgender detainees in administrative segregation under needlessly harsh conditions. *See Medina-Tejada v. Sacramento County*, No. Civ.S-04-138FDC/DAD, 2006 WL 463158 (E.D. Cal. Feb. 27, 2006) (holding that plaintiffs had a valid claim for violation of their Fourteenth Amendment rights where they were heavily shackled, prohibited from attending religious services with other inmates, and received inadequate outdoor recreation time).

150. *See* U.S. CONST. amend. VIII.

151. *See infra* Part IV.B.2.

152. *Bell*, 441 U.S. at 537 n.16 (quoting *Ingraham v. Wright*, 430 U.S. 651, 671-72 n.40 (1977)) (noting that Eighth Amendment scrutiny was appropriate only after criminal prosecution, and that the State did not acquire the power to punish with which the Eighth Amendment was concerned until after it has secured a formal adjudication of guilt in accordance with due process of law).

process claims of immigrant detainees.¹⁵³

Although at first glance this case law looks formidable, there are a few ways in which it can be defeated. In this section I will first demonstrate that the relevant prisoner case law is not definitive. In fact, there are practical factors that can discount much of the logic of previous decisions, suggesting that the outcomes would be different today. Second, I will demonstrate that these decisions are not entirely applicable to immigrant detainees because immigrant detainees should have a stronger set of rights. Finally, I will show how the outcome of these cases can actually bolster due process claims.

1. Case Law Contesting Gender Classification Protocols in Correctional Facilities

Although there are very few published cases regarding a male-to-female transgender inmate's right to be housed with female prisoners when such a classification is necessary to protect her safety, the cases available demonstrate a pattern of deference by the court to the decisions of the correctional facility.¹⁵⁴

In *Lamb v. Maschner*, a Kansas district court denied a constitutional claim by a male-to-female transgender inmate who requested to be transferred to a women's prison.¹⁵⁵ The court questioned the plaintiff's status, ultimately rejecting her transgender identity by denying her claim and stating that "[a] male prisoner cannot be housed in a women's prison."¹⁵⁶ Despite plaintiff's claims that she was experiencing "harassment and molestation" in the male prison, the court described her fear as simple anxiety and held that she had no constitutional right to the transfer.¹⁵⁷ Instead, the court ruled that housing a male prisoner in a women's prison was "clearly a violation of the women's rights."¹⁵⁸ It further stated that the prison's policy of segregating the sexes held a rational purpose, although it did not clarify the purpose.¹⁵⁹

In another case, *Crosby v. Reynolds*, a Maine district court upheld a prison's decision to house a male-to-female pre-operative transgender woman in the women's correctional facility against a violation of privacy claim by her female cellmate.¹⁶⁰ Lamson, the transgender inmate, had not undergone genital

153. See TOM JAWETZ, ACLU NATIONAL PRISON PROJECT, LITIGATING IMMIGRATION DETENTION CONDITIONS 1-2 (2008), http://www.law.ucdavis.edu/alumni/alumni-events/files/MCLE-files/Jawetz_Detention_Conditions.pdf (providing an analysis on how different circuits have defined the rights of immigrant detainees in comparison to both convicted criminals and pre-trial detainees) [hereinafter JAWETZ DETENTION].

154. See *Lamb v. Maschner*, 633 F. Supp. 351 (D. Kan. 1986); see also *Crosby v. Reynolds*, 763 F. Supp. 666, 670 (D. Me. 1991).

155. See *Lamb*, 633 F. Supp. at 353.

156. *Id.* at 353-54.

157. *Id.* at 353.

158. *Id.*

159. *Id.* ("Prison authorities must be given great deference to formulate rules and regulations that satisfy a rational purpose and segregation of the sexes is a rational purpose.")

160. *Crosby v. Reynolds*, 763 F. Supp. 666, 670 (D. Me. 1991).

reconstructive surgery but identified as a woman, was taking female hormones, had breast tissue, and had no sexual male capacity.¹⁶¹ The jail housed Lamson with the female inmates when she requested the placement because the jail psychologist determined that she would likely suffer both physical and psychological harm if housed with the male inmates.¹⁶² The court noted that the psychologist would not have approved the transfer if he had thought Lamson would constitute a physical threat to any of the female inmates.¹⁶³ The court held that the jail officials did not violate any clearly established constitutional right to privacy by housing the plaintiff with a transgender woman.¹⁶⁴

Both of these cases seem to indicate deference to the correctional facilities' discretion to classify an inmate's gender as they see best, and neither expressly support a system of classification according to gender identity.¹⁶⁵ However, there are a few ways in which both cases can be discredited or used to support a challenge to facility discretion today. The holding in *Lamb* can be challenged on the basis that the court erroneously defined the plaintiff as a man when the plaintiff had been properly diagnosed as a transsexual.¹⁶⁶ Today, there is a greater understanding of the fluidity of gender identity.¹⁶⁷ Medical diagnoses of Gender Identity Disorder¹⁶⁸ for transgender people are now standard and common in the medical community; therefore it is more likely that a judge will accept the transgender status of someone like Lamb or Lamson.¹⁶⁹

161. *Id.* at 667.

162. *Id.*

163. *Id.*

164. *Id.* at 669-70.

165. *See id.* at 669 (calling the determination of housing for pre-operative transsexuals "a situation" with "no perfect answer"); *Lamb v. Maschner*, 633 F. Supp. 351, 353 (D. Kan. 1986) (rejecting the idea outright).

166. *Lamb* submitted medical documents as to the diagnosis while defendants submitted documentation that she could not definitively be diagnosed. *Lamb*, 633 F. Supp. at 353. The judge's reasoning was questionable; he interpreted evidence that the plaintiff lacerated her own scrotum as proof of plaintiff's mental instability instead of proof that the plaintiff wanted to destroy her male anatomy. *See id.* at 354.

167. For example, New York City's Board of Health, recognizing the variations in gender identity, proposed changes in 2006 to the current requirements for changing the sex on a birth certificate. Kenji Yoshino, *Sex and the City: New York City Bungles Transgender Equality*, SLATE, Dec. 11, 2006, <http://www.slate.com/id/2155278/pagnum/all/>. Instead of requiring sex reassignment surgery, as do most other states, the proposal required only that an individual have changed her name, "lived in the acquired gender for at least two years," and submitted "two affidavits, demonstrating . . . full transition to and intended permanence in . . . her acquired gender." *Id.* While this proposal was withdrawn in light of practical difficulties, it reflects a greater understanding of gender identity by the administration and is a promising step in the right direction. *See id.* Furthermore, transgender issues in general have permeated popular culture. John Ireland, *Transsexuals in Popular Culture*, IN THESE TIMES, Jun. 27, 2007, http://www.inthesetimes.com/article/3241/transsexuals_in_popular_culture.

168. Transsexualism has been replaced with the diagnosis of Gender Identity Disorder in the Diagnostic and Statistical Manual of Mental Disorders (DSM). AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 576-82 (4th ed., text revision) (2000).

169. Information about Gender Identity Disorder can be found on popular, mainstream websites.

Additionally, the *Lamb* ruling faces critique because the court based its decision on the rationality of segregation by sex, without defining the purpose behind such a system of classification or indicating how sex should be defined.¹⁷⁰ Recent medical advances and a better understanding of transgender people make the decision to house transgender detainees with men seem less rational. Due to the popularity of breast implants and hormone therapy, the “genital standard” that facilities use to distinguish men from women increasingly appears arbitrary and misleading.¹⁷¹ Male-to-female transgender detainees who have been on female hormones can function in the world as women despite still having male genitalia. Often, people choose to avoid reconstructive genital surgery because it is invasive and expensive, not because they are any less feminine.¹⁷² Data from recent medical studies and a more modern understanding of transgender people could challenge the rationality of defining sex as determined by genitalia.

Finally, the holding in *Lamb* is open to challenge because the court referred to the harm caused by living with male prisoners as simple “anxiety” rather than viewing the “harassment and molestation” he experienced as harmful treatment.¹⁷³ Awareness of violence in male prisons has increased dramatically since *Lamb*.¹⁷⁴ Evidence demonstrating the risk of actual and extreme physical and mental harm to transgender inmates in male prisons strengthens the argument that a classification system based on sex violates the Eighth Amendment.

The holding in *Crosby*, on the other hand, supports a challenge to the gender classification system because it rejects the privacy claim of a biologically female cellmate.¹⁷⁵ Privacy concerns are sometimes stated in opposition to classifying transgender women as female, as in this case.¹⁷⁶ The ruling in *Crosby* does not expressly uphold Lamson’s right to be housed with women or challenge

See, e.g., Web MD, Gender Identity Disorder, <http://www.webmd.com/sex/gender-identity-disorder> (last visited Apr. 11, 2010); Wikipedia, Gender Identity Disorder, http://en.wikipedia.org/wiki/Gender_identity_disorder (last visited Apr. 11, 2010).

170. *See Lamb*, 633 F. Supp. at 353.

171. *See generally* GID Reform Advocates, Issues of GID Diagnosis for Transsexual Women and Men, <http://gidreform.org/gid30285.html> (last visited Apr. 11, 2010) (arguing that the DSM-IV’s estimate of the number of people requesting sex reassignment surgeries as one in 30,000 is outdated and that the actual statistic is closer to one in 2500). This study does not distinguish between people who have undergone complete sex reassignment surgery and those who have only chosen particular treatments. *Id.*

172. *See Cave*, *supra* note 109 (discussing the transgender community’s push to have the people of New York recognize that some people may not have money to get a sex-change operation, while others may not feel the need to undergo the procedure).

173. *See Lamb*, 633 F. Supp. at 353.

174. *See generally* SYLVIA RIVERA LAW PROJECT, *supra* note 38; HUMAN RIGHTS WATCH, *supra* note 21; Arkles, *supra* note 15; Lee, *supra* note 20; Dana O’Day-Senior, *The Forgotten Frontier? Healthcare for Transgender Detainees in Immigration and Customs Enforcement Detention*, 60 HASTINGS L.J. 453 (2008); Peek, *supra* note 18; Rosenblum, *supra* note 34; Tarzwell, *supra* note 117.

175. *See Crosby v. Reynolds*, 763 F. Supp. 666, 670 (D. Me. 1991).

176. *See id.*

the traditional gender classification system, but it does permit a facility to make exceptions to the traditional rule.¹⁷⁷ The court's holding suggests that transferring a transgender inmate to the women's jail is a rational decision when a transgender inmate does not want to be segregated and is likely to suffer emotional and physical abuse in the male jail.¹⁷⁸ Because Lamson had been living as a woman for many years and had feminizing medical treatment, this reasoning may not automatically extend to all transgender inmates.¹⁷⁹ Despite the limited nature of the holding, however, this case provides a framework to protect correctional facilities that change their gender classification system.

2. Case Law Contesting Administrative Segregation Policies

The Supreme Court has upheld determinations by correctional institutions to hold an inmate in administrative segregation, seeming to defer to the discretion of the facilities.¹⁸⁰ In the case of *Hewitt v. Helms*, the Supreme Court upheld the use of administrative segregation and stated that prison officials have broad administrative and discretionary authority over the institutions they manage.¹⁸¹ The court stated that administrative segregation did not facially violate the Due Process Clause when it was "well within the terms of confinement ordinarily contemplated by a prison sentence" and done for non-punitive reasons.¹⁸² Given the extensive use of administrative segregation, including for the protection of a prisoner's safety, the court reasoned that all inmates are likely to be thus confined at some point in their incarceration.¹⁸³

However, another court ruling suggests that, when using segregation for protection purposes, correctional facilities cannot segregate transgender inmates indefinitely and instead must maintain the inmate's basic needs.¹⁸⁴ In *Meriwether v. Faulkner*, the Seventh Circuit ruled that a transgender inmate who was segregated indefinitely during her thirty-five year sentence had a legitimate Eighth Amendment claim against the prison.¹⁸⁵ The court noted that prolonged

177. *Id.*

178. *Id.* at 669-70.

179. *See id.* at 667.

180. *See Hewitt v. Helms*, 459 U.S. 460, 467 (1983) (upholding a decision by a Pennsylvania prison to confine an inmate to administrative segregation and stating, "We have repeatedly said both that prison officials have broad administrative and discretionary authority over the institutions they manage and that lawfully incarcerated persons retain only a narrow range of protected liberty interests"). In a separate case involving disciplinary segregation, the Court upheld a Hawaii prison's decision to segregate a prisoner for disciplinary purposes where the prison refused to allow him to present witnesses during his disciplinary hearing. *Sandin v. Conner*, 515 U.S. 472, 472, 487 (1995). The court reasoned that there was no due process violation, in part, because the conditions of disciplinary segregation were no worse than administrative segregation; therefore, there was no liberty interest. *Id.* at 486-87.

181. *Hewitt*, 459 U.S. at 467.

182. *Id.* at 468.

183. *Id.*

184. *See Meriwether v. Faulkner*, 821 F.2d 408, 415-17 (7th Cir. 1987).

185. *Id.* at 410, 417-18.

segregation could constitute cruel and unusual punishment in cases where there were other feasible ways of ensuring the inmate's safety.¹⁸⁶ The court further stated, however, that when administrative segregation lasts for a relatively short period of time, it does not violate the Eighth Amendment unless it deprives inmates of "the minimal civilized measure of life's necessities."¹⁸⁷

In a separate case, *Farmer v. Carlson*, a Pennsylvania court dismissed the Eighth Amendment claim of a transgender inmate who was held in administrative segregation for her own protection.¹⁸⁸ The court deferred to the prison officials' decision that this practice was required to keep the plaintiff safe from a threat in the general population.¹⁸⁹ Noting that the segregation was temporary pending transfer to another institution and that there were periodic reviews of the classification, the court found that the segregation was legal.¹⁹⁰

The fact that neither of these cases explore the harm caused by administrative segregation, however, has left an opening for challenge. Recent scholarship has likened administrative segregation to torture.¹⁹¹ Instead of providing a satisfactory solution to prison violence, it only exacerbates an inmate's mental state, particularly when the mental state is fragile due to previous trauma.¹⁹² Segregation within a male facility can even lead to physical violence.¹⁹³ Furthermore, both *Carlson* and *Meriwether* suggest that prolonged segregation will violate the Eighth Amendment when there are less restrictive means of ensuring a prisoner's safety.¹⁹⁴ If a challenge to the practice of administrative segregation is combined with a challenge to the gender classification system,¹⁹⁵ the courts might conclude that housing a transgender inmate with women is a less restrictive way of ensuring her safety.

While current precedent does not guarantee detainees the right to choose their gender classification and avoid administrative segregation, the holes in the logic of these decisions suggest that the area of law is ripe for change.

186. *Id.* at 417.

187. *Id.* at 416.

188. *See Farmer v. Carlson*, 685 F. Supp. 1335 (N.D. Pa. 1988).

189. *Id.* at 1342.

190. *Id.*

191. *See Gawande, supra note 67; see also Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988); *Arbour, supra note 67; Keim, supra note 67.*

192. SHARON SHALEV, A SOURCEBOOK ON SOLITARY CONFINEMENT 10, 11-17 (2008), available at http://www.solitaryconfinement.org/uploads/sourcebook_web.pdf; James Ridgeway & Jean Casella, *Locking Down the Mentally Ill: Solitary Confinement Cells Have Become America's New Asylums*, OP ED NEWS, Feb. 23, 2010, <http://www.opednews.com/articles/Locking-Down-the-Mentally-by-James-Ridgeway-and-100222-3.html> (arguing that solitary confinement exacerbates mental illness).

193. *See, e.g., STOP PRISONER RAPE, supra note 9*, at 5 (discussing the story of Christina Madrazo, who was raped twice by a guard while in solitary confinement); *see also supra* Part II.B.

194. *Meriwether v. Faulkner*, 821 F.2d 408, 417 (7th Cir. 1987); *Carlson*, 685 F. Supp. at 1341-42 (1988) (allowing the plaintiff to remain in administrative segregation pending transfer to another institution).

195. *See supra* Part IV.B.1.

C. Cases Defining Prisoner Rights as the Baseline of Protection

Even if the standards set by prison litigation remain unchanged, they may be distinguished based on the argument that detainees deserve a higher level of protection under the Constitution than inmates. Therefore, cases involving transgender inmates—those who are serving time for a crime—should not be completely determinative of a judge’s decision in cases involving transgender detainees. As described in Part IV.A, immigrants are protected under the Due Process Clause of the Fifth Amendment; case law has interpreted this clause to protect them from treatment that constitutes punishment.¹⁹⁶ Convicted prisoners, on the other hand, have secured a formal adjudication of guilt in accordance with the due process of law; therefore, the Eighth Amendment applies to permit a certain level of punishment.¹⁹⁷ The Eighth Amendment only protects inmates from punishment that rises to the level of “cruel and unusual.”¹⁹⁸

Immigrant detainees have more rights than inmates for two reasons. First, immigrant detainees are suspected of violating civil, not criminal statutes. Even immigrants who were convicted of crimes prior to detention have completed their criminal sentences and are held as civil detainees. Accordingly, the purpose of detaining immigrants is to prevent them from evading deportation and is explicitly non-punitive.¹⁹⁹ In the context of involuntary civil commitment, the Supreme Court has held in *Youngsberg v. Romero* that persons who are involuntarily committed are entitled to better conditions of confinement than convicted criminals “whose conditions of confinement are designed to punish.”²⁰⁰ The Ninth Circuit interpreted *Youngsberg* to mean that conditions of confinement for an individual detained under civil process but not civilly committed “must be tested by a standard at least as solicitous to the rights of the detainee as the standards applied to a civilly committed individual and to an individual accused but not convicted of a crime.”²⁰¹ In *Jones v. Blanas*, the court held that a plaintiff civilly detained under the Sexually Violent Predator Act (SVPA)²⁰² was entitled to “more considerate treatment” than his criminally detained counterparts, and that if the SVPA detainee was confined in conditions

196. See U.S. CONST. amend. V; *Bell v. Wolfish*, 441 U.S. 520, 535-36 (1979).

197. See U.S. CONST. amend. VIII; *Bell*, 441 U.S. at 537 (1979).

198. See U.S. CONST. amend. VIII; *Bell*, 441 U.S. at 537 (1979).

199. See ICE Office of Detention and Removal, <http://www.ice.gov/pi/dro/index.htm> (stating that the mission of the Office of Detention and Removal is to promote public safety and national security “by ensuring the departure from the United States of all removable aliens through the fair and effective enforcement of the nation’s immigration laws”) (last visited Apr. 11, 2010).

200. See *Youngsberg v. Romeo*, 457 U.S. 307, 320-22, 324 (1982) (holding that persons detained for civil commitment procedures have greater rights than convicted felons and that the proper standard of liability in evaluating confinement conditions of involuntarily committed people was the Due Process Clause, not the Eighth Amendment).

201. See *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004) (holding that a civil detainee is entitled to “more considerate treatment” and less restrictive conditions than convicted criminals).

202. CAL. WELF. & INST. CODE § 6600 (West 2003).

identical or similar to those in which his criminal counterparts were held, that in itself would be presumed to be “punishment.”²⁰³ Not all circuits, however, have followed suit.²⁰⁴

Prison litigation cases are only useful to the extent in which they help determine the bare minimum set of rights that should be afforded to immigrant detainees. While the current cases do not offer much in support of challenges to the gender classification system, the opinions of the administrative segregation cases establish that there are limits to the use of the practice.²⁰⁵ For example, when implemented for protection of an inmate, segregation must last only as long as the inmate continues to pose a safety or security risk, and requires regular review.²⁰⁶ And where feasible alternatives exist, prolonged segregation may constitute cruel and unusual punishment.²⁰⁷ These specific limitations to prison discretion under the Eighth Amendment would arguably be even stricter in the immigration detention context under the Due Process Clause.

D. Common Ground with a Successful Immigrant Challenge

Constitutional challenges to detention conditions made by juvenile immigrants provide a framework by which transgender detainees can obtain similar protection under the Constitution. Cases involving juvenile detainees provide a good model because juvenile detainees are members of a similarly vulnerable population that have had success in improving their conditions of confinement.

In *Flores v. Meese*, the plaintiffs filed a class action lawsuit on behalf of non-citizen minors who were being held in immigrant detention centers in California.²⁰⁸ The claims challenging the conditions of the detention facilities were ultimately settled by a consent decree that promulgated changes to ICE’s detention policies of minors.²⁰⁹ This case was groundbreaking; ICE facilities nationwide became required by law to follow the regulations outlined in the consent decree.²¹⁰ Consequently, the regulations have provided basic standards

203. *Jones*, 393 F.3d at 932.

204. Some circuits have ruled instead that the standards for pre-trial detainees are equivalent to the standards for convicted prisoners, and that pre-trial detainees and civil detainees have the same constitutional protections. JAWETZ DETENTION *supra* note 153, at 2; TOM JAWETZ, ACLU NATIONAL PRISON PROJECT, LITIGATING PRISON AND JAIL CONDITIONS 13-14 (2008), http://www.law.ucdavis.edu/alumni/alumni-events/files/MCLE-files/Jawetz_Jail_Conditions.PDF.

205. See *Meriwether v. Faulkner*, 821 F.2d 408, 416 (7th Cir. 1987); *Farmer v. Carlson*, 685 F. Supp. 1335, 1342 (N.D. Pa. 1988).

206. *Farmer*, 685 F. Supp. at 1342.

207. *Meriwether*, 821 F.2d at 416-17.

208. *Reno v. Flores*, 507 U.S. 292, 296 (1993) (outlining the procedural posture of the original case in the Supreme Court appeal).

209. *Id.* On appeal, the Supreme Court heard the remainder of the challenges, specifically challenges to ICE’s policy of restricting the release of juvenile detainees to parents, close relatives and legal guardians. See *id.* at 294.

210. Stipulated Settlement Agreement at 6, *Flores v. Reno*, No. CV85-4544-RJK Px (C.D. Cal.

for subsequent constitutional challenges.²¹¹ The settlement agreement signed by the parties stipulated that ICE must treat juveniles detainees with dignity, respect, and concern for their vulnerability as children.²¹² Three major agreements came out of the consent decree: ICE would institute a policy favoring release for juvenile immigration detainees; if detention was necessary, the children would be held in the least restrictive setting possible; and detention conditions would meet basic child welfare standards.²¹³ The decree specifically focused on the safety of the children while in detention.²¹⁴ It required that children be held in safe and sanitary facilities, and that they remain separated from the delinquent population as well as unrelated adults in order to protect their safety.²¹⁵

While the settlement in *Flores* specifically applies to children in detention, there are several reasons why transgender detainees, particularly asylum seekers, should receive the same protections. First, because they are both immigrant groups, they are protected under the Fifth Amendment Due Process Clause from treatment that amounts to punishment.²¹⁶ Second, children and transgender detainees are “vulnerable” in that they both risk abuse and mental anguish in detention centers if classified improperly.²¹⁷ Significantly, both groups are easily identifiable and are at risk of sexual exploitation.²¹⁸ This vulnerability stems from different attributes; children are vulnerable because of their immaturity,²¹⁹ whereas transgender detainees are vulnerable because of stigmatization and discrimination against gender nonconformists.²²⁰ Third, children and transgender detainees, specifically asylum seekers, share the fact that they are in the United

Jan. 17, 1997), *filed*, *available* at http://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf [hereinafter *Flores Settlement*].

211. *See, e.g.*, *Walding v. U.S.*, No. SA-08-CA-124-XR, 2009 WL 890265 (W.D. Tex.) (adjudicating a claim that a detention facility in Texas did not comply with the class action settlement agreement in *Flores*); ACLU, ACLU Challenges Prison-Like Conditions at Hutto Detention Center (Mar. 6, 2007), <http://www.aclu.org/immigrants-rights-racial-justice/aclu-challenges-prison-conditions-hutto-detention-center> (discussing another lawsuit involving the detention standards promulgated in *Flores*).

212. *Flores Settlement*, *supra* note 210, at 7.

213. *Id.* at 7-15.

214. *Id.* at 7-8.

215. *Id.*; *see also* U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., UNACCOMPANIED JUVENILES IN INS CUSTODY (2001), *available* at <http://www.justice.gov/oig/reports/INS/e0109/chapter1.htm>.

216. *See supra* Part IV.A.

217. *See* UNICEF, Child protection from violence, exploitation and abuse, http://www.unicef.org/protection/index_juveniljustice.html (last visited Apr. 5, 2010); *supra* text accompanying notes 15-22 (describing the vulnerability of transgender women in male facilities).

218. *See* UNICEF, *supra* note 217; *supra* text accompanying notes 15-22 (describing some of the reasons for violence against transgender women in male facilities).

219. *See generally* Laurel Eade, *Legal Incapacity, Autonomy, and Children's Rights*, 5 NEWCASTLE L. REV. 157 (2001).

220. Megan Tady, *Transgender People Face Violence, Obstacles*, NEW STANDARD, Jan. 15, 2007, <http://newstandardnews.net/content/index.cfm/items/4103>.

States because of forces largely out of their control. The conditions that forced both groups to enter the United States may be different; some children may be brought by their parents or cross into the United States to rejoin their family, whereas other children, similar to transgender asylum seekers,²²¹ voluntarily enter the United States to seek refuge from persecution.²²² Nonetheless, a comparison may be drawn between the two because neither group had a viable option to stay in their home countries.

Finally, both groups, children and asylum seekers, are specifically protected from poor detention conditions by international conventions and guidelines.²²³ Although not necessarily binding in United States courts, these documents highlight the need for both populations to receive special care while in detention.²²⁴ In the United Nations Convention on the Rights of the Child, a child is protected from “arbitrary or unlawful interference with his or her privacy, family, or correspondence.”²²⁵ The Convention also requires states to provide certain basic services to children regardless of their political status; states must “recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.”²²⁶ The Office of the United Nations High Commissioner for Refugees (OHCHR) published similar guidelines for asylum seekers in 1999.²²⁷ OHCHR created these guidelines by drawing on the general standards set out in the 1951 Geneva Convention²²⁸ and other human rights instruments. States are required to ensure adequate treatment and to provide education, healthcare, and counseling.²²⁹ Notably, the guidelines also call for special protection of populations at risk, defining “at risk” to include survivors of trauma.²³⁰ OHCHR recommends that a member of this population only be detained upon certification from a qualified

221. See generally National Immigrant Justice Center, *supra* note 24.

222. Danielle Knight, *Waiting in Limbo, Their Childhood Lost*, U.S. NEWS & WORLD REP., Mar. 7, 2004, available at http://www.usnews.com/usnews/culture/articles/040315/15asylum_print.htm.

223. See Vanita Gupta & Lisa Graybill, *Justice Denied: Immigrant Families Detained at Hutto*, in ACLU, HUMAN RIGHTS BEGIN AT HOME 23, 25-26 (2009), available at http://www.udhr60.org/human_rights_full.pdf.

224. See Convention on the Rights of the Child, art. 27, Nov. 20, 1989, 1577 U.N.T.S. 3; OFFICE OF THE U.N. HIGH COMM’R FOR REFUGEES, UNHCR REVISED GUIDELINES ON APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM SEEKERS 8 (1999), available at <http://www.unhcr.org/protect/PROTECTION/3bd036a74.pdf> [hereinafter UNHCR GUIDELINES]. While the United States has not ratified the Convention on the Rights of the Child, it has ratified both Optional Protocols which stemmed from the convention. U.S. DEP’T OF STATE, TREATIES IN FORCE (2009), available at <http://www.state.gov/documents/organization/123747.pdf>; United Nations Treaty Collection: Databases, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited Apr. 11, 2010).

225. Convention on the Rights of the Child, art. 16, Nov. 20, 1989, 1577 U.N.T.S. 3.

226. *Id.* art. 27.

227. UNCHR GUIDELINES, *supra* note 224.

228. Convention Relating to the Status of Refugees, art. 43, Jul. 28, 1951, 189 U.N.T.S. 150.

229. UNCHR GUIDELINES, *supra* note 224, at 9.

230. *Id.* at 8.

medical practitioner that detention will not adversely affect the immigrant's health and well being.²³¹

There are, however, some weaknesses to this analogy. Children and adults, transgender or otherwise, have distinct legal identities in many areas of law.²³² Traditionally the government has taken a protective role over children.²³³ *Parens patriae*, a doctrine granting the state inherent power and authority to protect persons who are legally unable to act on their own behalf, would by definition apply to all children.²³⁴ Most transgender people, on the other hand, are able to act on their own behalf. Recognition of this distinction is critical to ensure that the "vulnerable" classification does not strip adult transgender detainees of their right to make decisions without government interference.

A transgender detainee challenge should highlight the similarities between juvenile detainees and transgender detainees and argue that transgender detainees should receive the same protections provided to other "vulnerable" populations. Centering the lawsuit on a particularly sympathetic plaintiff—a transgender asylum seeker who was detained after fleeing persecution in her country, for example—would help emphasize these similarities. Highlighting the detainee's fragile mental state as a trauma survivor would demonstrate the need for facilities to offer greater protection. That the plaintiff has experienced persecution in the past underscores the fact that transgender people, like children, are highly identifiable targets. Finally, juxtaposing the details of past persecution that amount to an asylum claim with the details of the abuse that occurred in detention would illustrate the ways in which the current detention conditions are inhumane.

Under this strategy, a challenge to the gender classification system would be premised on the argument that, just as juvenile detainees should not be housed with people who threaten their safety, namely adults and juvenile delinquents, transgender detainees should not be housed with people who pose similar threats, namely men and guards in detention facilities. Similarly, a challenge to the conditions of administrative segregation would argue that transgender detainees, like children, should be housed in the least restrictive setting possible. Thus, transgender detainees should no longer be forced into a restrictive form of administrative segregation.

231. *Id.*

232. For example, juveniles cannot participate in contracts, vote, or join the military; they are also prosecuted under a different criminal justice system. See California Courts: Introduction to Juvenile Court, <http://www.courtinfo.ca.gov/selfhelp/family/juv/intro.htm> (last visited Apr. 11, 2010); Nolo's Plain-English Law Dictionary, Age of Majority, <http://www.nolo.com/dictionary/age-of-majority-term.html> (last visited Apr. 11, 2010).

233. For an early history of the doctrine of *parens patriae*, see Alexander W. Pisciotta, *Saving the Children: The Promise and Practice of Parens Patriae, 1838-98*, 28 CRIME & DELINQ. 410 (1982).

234. See BLACK'S LAW DICTIONARY 520 (3d ed. 2001).

V. CONCLUSION

Transgender detainees suffer horrific abuses in immigrant detention when they are housed in men's facilities.²³⁵ The common response to actual or threatened abuse of a detainee is to put the victim in administrative segregation.²³⁶ But segregation is an inadequate solution because it does not properly protect transgender immigrants. In many cases, segregation exposes detainees to further attacks.²³⁷ Thus, there is an urgent need for reform. A policy encouraging the use of alternative measures to detention that ensure an immigrant's presence at removal hearings is the ultimate goal. With many alternative measures demonstrating success rates in the ninetieth percentile,²³⁸ it is illogical that ICE is still using detention as a major form of absconion prevention.

For those in detention, ICE should change its classification protocol to affirm the gender identities of its detainees instead of relying on genital-based classifications. This is not an easy change to make, but it would protect transgender detainees from conditions that amount to punishment. A change in gender classification procedures should reduce violence against transgender detainees while simultaneously affirming their gender identities.²³⁹ Administrative segregation is inadequate and harmful; thus, ICE should also end the use of segregation as the primary method of violence prevention. Policies that control the violence instead of isolating a particular victim would make detention safer for all immigrants.

A successful legal challenge to the current ICE policies would force them to make these changes or find other methods of ensuring the safety of transgender detainees.²⁴⁰ While a due process challenge is not the only way of convincing ICE to change its protocols, a successful case would have a monumental impact. A positive ruling that defines the constitutional protections for detainees and specifies violations within the current system in regards to transgender immigrants would ensure that these protections remain in place regardless of the administration or the political climate. Lobbying ICE through the political process to change its regulations would not have the same guarantee because there is no law preventing ICE from reverting to former policies.

A detainee challenge should incorporate similar cases brought by convicted criminals, but only to illustrate the baseline of protection afforded to detainees. Because current precedent does not afford many protections to convicted criminals, highlighting the distinction between the legal status of the two groups

235. See, e.g., *supra* text accompanying notes 1-22.

236. NEILSON & WERTZ, *supra* note 11, ch. 6.52, available at http://www.immigrationequality.org/c6.html#_Toc211075786.

237. See *supra* Part II.B.

238. See Detention Watch Network, *supra* note 11.

239. See SCHEEL & EUSTACE, *supra* note 14, at 144.

240. An example of this outcome is the consent decree resulting from *Flores v. Meese*. See Flores Settlement, *supra* note 210.

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is essential. Linking the vulnerabilities of transgender immigrant detainees with those of juvenile immigrant detainees could bolster a constitutional claim and hopefully provide access to the protections afforded to juveniles. Comprehensive change to ICE protocols geared toward the protection of transgender immigrants could ultimately put an end to the type of violence suffered by Christina Madrazo.²⁴¹

241. See *supra* text accompanying notes 1-10.