Gender identity in the era of mass incarceration: The cruel and unusual segregation of trans people in the United States

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The scarce legal recognition of the gender identity of trans people is a contributing factor to the phenomenon of mass incarceration in the United States. The disproportionately higher rates of incarceration of trans people—especially trans people of color—are driven by discrimination-based barriers to housing, employment, education, and trans-specific healthcare. The denial of trans identity in prison results in the ill-treatment of trans persons, including a heightened exposure to assault and violence. Concerningly, incarcerated trans people are commonly confronted with harsh conditions of confinement such as solitary confinement, which are generally enacted to (presumably) protect their own safety. Against this backdrop, this article advances Eighth Amendment-based arguments for (indirectly) affording a more consistent constitutional protection to gender self-determination in prison settings. First, the article argues that a more robust dignity-based interpretation of the Eighth Amendment regarding the conditions of confinement can lead to recognizing (self-determined) gender-affirming placement as a basic human need, the deprivation of which causes constitutionally relevant harm. The second argument relies upon penal theory to illustrate that the denial of gender self-determination in prison settings, with all the negative corollaries it implies, contradicts the fundamental pillars of each major justification for punishment. Thus, such a denial does not serve any constitutionally justified penological need.

1. Introduction

The institutional abuses against people with a non-normative gender expression, including trans people, are among the many pressing issues in contemporary US criminal justice. In a system where mass incarceration mechanisms alarmingly reflect and

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contribute to the structuring of race inequality and socioeconomic discrimination,[1] gender minority people who are trans—especially trans people of color[2]—have been hard hit. To be clear, trans people include individuals:

> . . . whose gender identity and expression does not conform to the norms and expectations traditionally associated with their sex at birth. Transgender people include individuals who have received gender reassignment surgery, individuals who have received gender-related medical interventions other than surgery (e.g. hormone therapy) and individuals who identify as having no gender, multiple genders or alternative genders.[3,4]

This category also includes:

> . . . those people who feel they have to, prefer to, or choose to, whether by clothing, accessories, mannerism, speech patterns, cosmetics or body modification, present themselves differently from the expectations of the gender role assigned to them at birth. This includes, among many others, persons who do not identify with the labels "male" and "female," transsexuals, transvestites and cross-dressers. [A]nalogous labels for sexual orientation of trans[...] people are used according to their gender identity rather than the gender assigned to them at birth.[5]

Studies have indicated that trans people living in the United States are at a higher risk of justice system involvement than their cis peers.[6] Although more aggregate data on the exact relationship between trans hardships and criminal justice involvement are needed,[7] evidence shows that trans populations disproportionately experience social hardships that typically qualify as risk factors for victimization and

1 *See, e.g.*, David Cole, No Equal Justice: Race and Class in the American Criminal Justice System 113–51 (1999); Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2010).

2 *See, e.g.*, Ctr. for Am. Progress & Movement Advancement Project, *Unjust: How the Broken Criminal Justice System Fails LGBT People of Color*, Movement Advancement Project (Aug. 2016), www.lgbtmap.org/file/lgbt-criminal-justice-poc.pdf.

3 Under the Yogyakarta Principles, gender identity refers to "each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms." Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, Mar. 2007, http://data.unaids.org/pub/manual/2007/070517_yogyakarta_principles_en.pdf [hereinafter Yogyakarta Principles]. Hence, gender self-determination entails that each individual is the ultimate choosing authority on their own gender identity. This faculty is strongly embedded in individual agency and autonomy, and is primarily realized through the practice of "self-identification." The latter entails the right to affirm one's own legal identity without external assessment of validation. *See* Eric Stanley, *Gender Self-Determination*, 1 Transgener Stud. Q. 89 (2014); Lal Zimman, *Trans Self-Identification and the Language of Neoliberal Selfhood: Agency, Power, and the Limits of Monologic Discourse*, 256 Int'l J. Socio. Language 147 (2019).

4 Joint U.N. Programme on HIV/AIDS, UNAIDS Terminology Guidelines 47 (2015), www.unaids.org/sites/default/files/media_asset/2015_terminology_guidelines_en.pdf.

5 Comm'r for Hum. Rts., Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe 132 (2d ed. 2011), www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf. For a pivotal theory of trans identity, see Kate Bornstein, Gender Outlaw: On Men, Women, and the Rest of Us (1994).

6 *See, e.g.*, Jane Hareth, Report, Overrepresentation of People Who Identify as LGBTQ+ in the Criminal Legal System (May 2022), https://safetyandjusticechallenge.org/wp-content/uploads/2022/05/LQBTQOverrepresentationReport-1.pdf.

7 *See id. See also* Jordan Blair Woods, *LGBT Identity and Crime*, 105 Cal. L. Rev. 667 (2017) (raising and discussing this issue).

criminal offending,[8] such as discrimination-based socioeconomic inequalities, including barriers to housing, employment, and healthcare.[9] Furthermore, trans people are commonly targeted by the discriminatory enforcement of criminal laws,[10] such as drug laws, illegal immigration laws, and anti-prostitution statutes that often force trans people into criminalized and overpoliced survival economies.[11] Research statistics similarly highlight the overrepresentation of trans youth in court for status offenses.[12]

Hardships increase when trans people come into contact with the incarceration system. To be sure, incarceration in the United States is generally appalling for all populations.[13] Extortion, abuse, assault, and rape are only a few examples of the threats faced by people detained in correctional facilities, regardless of their sex or gender identity. Although life in prison can be horrific for any person in the system, the hyper-gendered prison experience can be especially traumatic for trans people. Indeed, despite recent steps forward in several jurisdictions in recognizing the self-identification of trans status in prison,[14] the carceral system is still legitimized to operate in a sex-segregated manner based on a person's biologically assigned legal sex, and without regard for differential experiences according to sexual orientation, gender identity, or gender expression.[15] With some exceptions,[16] evidence suggests that many trans people continue to find themselves incarcerated based on their anatomy, rather

[8] *See, e.g.*, Woods, *supra* note 7, at 671–2.

[9] *See, e.g.*, Ctr. for Am. Progress & Movement Advancement Project, *Paying an Unfair Price: The Financial Penalty for Being Transgender in America* (Feb. 2015), www.lgbtmap.org/file/paying-an-unfair-price-transgender.pdf; Catherine Hanssens et al., *A Roadmap for Change: Federal Policy Recommendations for Addressing the Criminalization of LGBT People and People Living with HIV* 64–5 (May 2014), https://www.ojp.gov/ncjrs/virtual-library/abstracts/roadmap-change-federal-policy-recommendations-addressing.

[10] *See, e.g.*, Doe v. Jindal, 85 1 F. Supp. 2d 995 (E.D. La. 2012) (challenging Louisiana's Crime Against Nature by Solicitation statute that was disproportionately applied against transgender women).

[11] *See* Hanssens et al., *supra* note 9.

[12] *See, e.g.*, Deane Spade, Normal Life: Administrative Violence, Critical Trans Politics & The Limits of Law (2015) (thoroughly addressing this issue). In youth justice, status offenses are offenses that only apply to minors (because of their minors' status) but would not be offenses if they were committed by an adult. Typical status offenses include skipping school, truancy, running away from home, violating curfew, and underage use of alcohol.

[13] *See, e.g.*, Sharon Dolovich, *Prison Conditions*, *in* 4 Reforming Criminal Justice: Punishment, Incarceration, and Release 261, 262–8 (Erik Luna ed., 2017); James Byrne & Don Hummer, *Myths and Realities of Prison Violence: A Review of the Evidence*, 2 Victims & Offenders 77 (2007); Meghan Novisky & Robert Peralta, *Gladiator School: Returning Citizens' Experiences with Secondary Violence Exposure in Prison*, 15 Victims & Offenders 594 (2020).

[14] *See, e.g.*, Transgender Respect, Agency and Dignity Act, Stats 2020 ch. 182 (Cal. S.B. 132) (affording trans people the right to choose whether they will be housed in a "male" or "female" prison); Denver Sheriff Dep't, Dep't Order No. 4005.1: Transgender and Gender-Variant Inmates (June 6, 2012), https://perma.cc/2V8L-CQTH [hereinafter Denver Sheriff Dep't Order No. 4005.1] (outlining Denver, CO's updated housing policy, which allows trans people to be housed according to their self-determined gender identities); *see also* Mass. Gen. Laws Ann. ch. 127, § 32A (1921); Conn. Gen. Stat. Ann. § 18-81ii (2018).

[15] *See Classification and Housing of Transgender Inmates in American Prisons*, 127 Harv. L. Rev. 1746(2014).

[16] *See* Transgender Respect, Agency and Dignity Act, Stats 2020 ch. 182 (Cal. S.B. 132); Denver Sheriff Dep't Order No. 4005.1, Mass. Gen. Laws Ann., Conn. Gen. Stat. Ann., *supra* note 14.

than their self-determined gender.[17] Moreover, scarce attention is given to the experience of trans people who do not identify with only one gender, but are nevertheless forced into one category because of the way the system is organized.

The binary classification system implies that trans people are often housed in facilities or wings that conflict with their gender self-identification and placed in the general prison population. Accordingly, such a placement exposes trans people to a heightened risk of being victims of gender-motivated violence and abuses. Indeed, trans people are frequently subjected to discriminatory practices within detention facilities, and they are the preferential victims of physical and sexual assault.[18] Concerningly, trans persons are frequent targets of isolation measures that are most commonly enacted under the institutional guise of protection from prison violence and victimization.[19]

The derogatory conditions of confinement for incarcerated people, including for trans people, are well known. Nevertheless, the constitutional protections afforded to (trans) incarcerated populations against harmful prison hardships remain altogether weak.[20] One vehicle for appreciating such constitutional weakness lies with the excessive narrowness of the extant jurisprudential criteria for finding a prison condition or treatment a cruel and unusual punishment under the Eighth Amendment (also known as "conditions jurisprudence").[21] The inadequacy of extant criteria to address the vast majority of prison-condition claims also affect the crisis of trans identities in prison in terms of their placement in correctional facilities. Although the

[17] *See, e.g.*, Diamon v. Ward and Ors., 1:20-CV-04764 (N.D. Ga. Nov. 23, 2020) (the case of Ashley Diamond, a trans woman who filed a federal lawsuit in 2020 against the Georgia Department of Corrections for having assigned her to a male facility upon her return to prison in 2019. During her custody, Diamond was victim of fourteen sexual assaults in one year and was denied access to hormone therapy. The case is set for an expedited merits trial in April 2023).

[18] *See, e.g.*, Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 Am. Crim. L. Rev. 2, 11–19 (2011); Sharon Dolovich, *Two Models of the Prison: Accidental Humanity and Hypermasculinity in County Jail*, 102 J. Crim. L. & Crimininology 956 (2012).

[19] *See* Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 Temple Pol. & Civ. Rts. L. Rev. 515, 536–47 (2009) (making the case that the two premises that justify the disproportionate placement of trans people in solitary confinement—i.e., that isolation and control are efficient ways to reduce violence and to increase the protection of trans people from the risk of assaults—are simply false). *See also infra* Section 2.

[20] *See infra* Section 3.

[21] U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"). *See further infra* Section 3. It is important to clarify from the outset that, over the years, the Eighth Amendment jurisprudence establishing the confines of cruel and unusual punishment has bifurcated in separate branches. The first branch, which includes decisions about penalties that are formally meted out by courts or in statutes, evaluates whether the punishment in question is proportional to the severity of the crime committed. Thus, a punishment is cruel and unusual when "by [its] excessive length or severity [it is] greatly disproportioned to the offenses charged." Weems v. United States, 217 U.S. 349, 371 (1910). *See also* Solem v. Helm, 463 U.S. 277 (1983); Rummel v. Estelle, 445 U.S. 263 (1980); Ewing v. California, 538 U.S. 11 (2003). The second branch, which generally applies to the treatment of people in prison including the conditions of their confinement, evaluates whether the "punishment" in question involves an "unnecessary and wanton infliction of pain." Gregg v. Georgia, 428 U.S. 153, 173 (1976). *See, generally*, Note, *The Psychology of Cruelty: Recognizing Grave Mental Harm in American Prisons*, 128 Harv. L. Rev. 1250, 1253 (2015) [hereinafter *The Psychology of Cruelty*].

Eighth Amendment has occasionally provided a remedy against trans-specific prison hardships, including sexual violence and denial of access to gender-affirming care,[22] it has often been insufficient to require humane placement options that, among other factors, recognize gender identity, take account of gender-based needs, and ultimately guarantee safe and humane conditions for a population that is "otherwise extremely vulnerable."[23]

Against this backdrop, the purpose of this article is to address this constitutional failure by advancing a broader interpretation of Eighth Amendment criteria to find a condition of confinement to be cruel and unusual punishment. The article discusses how such a broader interpretation—potentially benefitting the prison population in general—may also result in more robust protection for trans people against the risk of harm from unsafe placement due to their unrecognized gender identity. Eventually, the article makes the case that broadening the constitutional criteria for challenging conditions of confinement might also lead to recognizing that the denial of (self-determined) trans identities in prison settings, with all the serious harms it may trigger, amounts to the infliction of a cruel and unusual punishment under any Eighth Amendment-relevant perspective.

The remainder of this article is organized in five sections. Section 2 describes the discrimination-driven hardships for trans people in contact with the criminal legal system, with an emphasis on the (institutional) abuses that incarcerated trans people experience due to their misclassification and misplacement in correctional facilities. Section 3 offers an analysis of the Eighth Amendment "conditions jurisprudence" to highlight the interpretive narrowness of the extant criteria, which fail to address the majority of prison-conditions claims. By contrast, Section 4 advances Eighth Amendment-based arguments for affording more consistent constitutional protections to incarcerated persons against unsafe conditions of confinement, including through the recognition of gender self-determination in prison settings. Section 4.1 offers a more robust dignity-based interpretation of the Eighth Amendment regarding the conditions of confinement. Among other corollaries, the section argues that such an interpretation might also result in the recognition that gender-affirming placement, on the grounds of self-determination, qualifies as a basic human need, the deprivation of which gives rise to constitutionally relevant harm. Then, Section 4.2 relies upon penal theory to illustrate that unsafe and inhumane conditions of confinement, including those that result from the denial of gender self-determination in prison settings, contradict the fundamental pillars of each major justification for punishment. Accordingly, the denial of gender self-determination for trans people in prison, with all the negative corollaries it implies, does not serve any constitutionally justified penological goal.

[22] *See, e.g.*, Fields v. Smith, 653 F.3d 550, 559 (7th Cir. 2011); Kosilek v. Spencer, 889 F Supp. 2d 190 (D. Mass. 2012), *rev'd* F.3d (1st Cir. 2014); Edmo v. Corizon, Inc., 935 F.3d 757, 785–97 (9th Cir. 2019); Hicklin v. Precynthe, No. 4:16-CV-01357-NCC, 2018 WL 806764, at *14 (E.D. Mo. Feb. 9, 2018); Diamond v. Owens, 131 F. Supp. 3d 1346, 1379 (M.D. Ga. 2015); Zollicoffer v. Livingston, 169 F. Supp. 3d 687, 691 (S.D. Tex. 2016).

[23] Dolovich, *Strategic Segregation in the Modern Prison*, *supra* note 18, at 78.

2. Trans identities and the (re-)traumatization of the criminal legal system

In the United States, the legal recognition of trans identities based on self-determination is largely fragmentary. State jurisdictions vary in the extent to which they recognize trans people's gender, with some states making gender-affirming surgery a prerequisite of recognition.[24] Steps toward a stronger recognition of gender self-determination have only transpired in a handful of jurisdictions to varying degrees. For instance, around a dozen states have passed legislations and policies that allow for nonbinary gender markers on certain identification documents such as driving licenses and birth certificates.[25]

The fragmentary legal recognition of trans identity negatively reverberates on the social reality of trans persons. The latter are constantly exposed to discrimination-based socioeconomic disadvantages and deprivations; furthermore, they are prevented from freely expressing their identity in public contexts and, as a consequence, they are hindered from feeling safe and comfortable with such identity. Samples of discriminatory practices against trans people are manifold and span barriers to education, employment, and access to social services and care, including trans-specific healthcare.[26] The socioeconomic disparities that trans people experience also manifest through a widespread lack of health insurance coverage and access. Such pervasive discrimination adds to preexisting socioeconomic disadvantages—such as lower economic security, higher rates of poverty, poor education, and employment—that trans people (especially trans people of color) suffer at higher rates compared to their cis peers. A result of these disparities is that trans people are at an increased risk for alcohol and substance abuse, and they present high rates of HIV and other serious physical conditions.[27]

The chronic exposure to the socioeconomic discrimination of people who identify as trans is a major contributing factor to,[28] and is exacerbated by, these people's

[24] *See* Amy Rappole, *Trans People and Legal Recognition: What the U.S. Federal Government Can Learn from Foreign Nations*, 30 Md. J. Int'l L. 196 (2015) (overviewing US state policies on legal recognition of gender identity).

[25] For an updated list of these state jurisdictions, see Lambda Legal, *Changing Birth Certificate Sex Designations: State-By-State Guidelines*, https://legacy.lambdalegal.org/know-your-rights/article/trans-changing-birth-certificate-sex-designations (last visited April 21, 2023).

[26] *See generally* Jaime M. Grant et al., Injustice at Every Turn: A Report on the National Transgender Discrimination Survey 166–9 (2011), https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf.

[27] For an estimate, see Substance Abuse & Mental Health Services Admin., *2018 National Survey on Drug Use and Health: Lesbian, Gay, & Bisexual (LGB) Adults (Annual Report)* (Jan. 14, 2018), www.samhsa.gov/data/report/2018-nsduh-lesbian-gay-bisexual-lgb-adults; *HIV U.S. Statistics*, HIV.gov (last updated Oct. 27, 2022), www.hiv.gov/hiv-basics/overview/data-and-trends/statistics.

[28] *See, e.g.*, Jinhee Yun et al., *Examining Trauma and Crime by Gender and Sexual Orientation among Youth: Findings from the Add Health National Longitudinal Study*, 68 Crime & Delinquency 1 (2021) (finding that transgender youth in prison are often raised in a milieu of rejection, psychological abuse, and isolation, due to their gender identity).

disproportionate involvement in the criminal legal system, notably the incarceration system.[29] Academic literature,[30] official reports,[31] and media accounts[32] have presented a myriad of stories describing the inhuman treatment and degrading conditions that confined trans people are forced into during their incarceration. Among others, a driving factor behind the unsafe housing of trans individuals in prisons is the misclassification of trans people entering correctional facilities due to a—still common and legitimate—binary prison classification system.[33]

The Prison Rape Elimination Act of 2003 (PREA) states that placement decisions in all settings should be individualized on a case-by-case basis and should consider an individual's safety as well as the overall safety and day-to-day operations of the facility. Despite PREA regulations, trans people are still commonly[34] placed in facilities or wings according to their birth-assigned sex rather than their perceived and self-determined identity.

Alternatively, a common classification and placement method in correctional facilities relies upon a pre-existing medical diagnosis of gender dysphoria.[35] Thus, a person can "benefit" from identity-conforming classification and placement under the condition of a certified medical issue. Although this classification method seems to be "gender-identity friendly," it eventually reinforces the mechanisms of the medicalization of gender variance and perpetuates the stigma of a mental health diagnosis. Moreover, as Routh et al. have noted, without evidence of gender dysphoria, trans people are at risk of being left with limited options for legal recourse when "experiencing harsher treatment and further victimization in the prison system. And even with this diagnosis, trans individuals are still

[29] While fewer than 1% of adults in the United States identify as transgender, a 2015 survey found that trans people are incarcerated at about twice the rate of cis people. *See* Nat'l Ctr. for Transgender Equality, LGBT People Behind Bars, https://transequality.org/sites/default/files/docs/resources/TransgenderPeopleBehindBars.pdf (last visited April 21, 2023).

[30] *See, e.g.*, Jennifer Sumner & Lori Sexton, *Same Difference: The "Dilemma of Difference" and the Incarceration of Transgender Prisoners*, 41 Law & Soc. Inquiry 616 (2016); Tanja Phillips et al., *"We Don't Recognize Transsexuals. . . and We're Not Going to Treat You": Cruel and Unusual and the Lived Experiences of Transgender Women in US Prisons*, *in* The Palgrave Handbook of Incarceration in Popular Culture 331, 331–60 (Marcus Hermes, Meredith Hermes, & Barbara Hermes eds., 2020).

[31] *See, e.g.*, *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 (2007), https://srlp.org/files/warinhere.pdf (last visited April 21, 2023).

[32] *See, e.g.*, Janet Baus & Dan Hunt, *Cruel and Unusual: Transgender Women in Prison*, YouTube (October 24, 2006), www.youtube.com/watch?v=5Yzy8oh5Fw0.

[33] For a detailed list of gender classification policies in different state jurisdictions, *see* Douglas Routh et al., *Transgender Inmates in Prisons: A Review of Applicable Statutes and Policies*, 61 Int'l J. Offender Therapy & Comp. Criminology 645 (2015). *See* also *Classification and Housing of Transgender Inmates in American Prisons*, *supra* note 15.

[34] In 2017, the Trump administration removed the application of PREA protections on the classification of trans people in the federal prison system and reintroduced the genitalia-based criterion. *See, e.g.*, *U.S. Rolls Back Protections for Transgender Prison Inmates*, Reuters (May 12, 2018), www.reuters.com/article/us-usa-lgbt-prisons-idUSKCN1ID0O3. In addition, state prisons largely fail to adopt and comply with PREA requirements. Exceptions to this rule exist. Classification systems in a minority of jurisdictions such as Minnesota, California, and Colorado seem to largely comply with PREA requirements.

[35] *See* Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 814–15 (5th ed. 2013).

demonized and victimized and left with limited options for legal protections and remedies."[36]

Trans people who are placed in the general prison population in identity non-corresponding settings are commonly subjected to harassment and violence by both staff and the cis prison population. Because they are targeted in this manner, confined trans people are disproportionately placed in solitary confinement.[37] In the United States, solitary confinement normally refers to the correctional practice of placing an incarcerated person in restrictive housing to meet disciplinary, individual protection, or prison safety needs.[38] Solitary confinement entails living in conditions of isolation for twenty-two or over twenty-three hours per day, every day, for indefinite periods of time ranging from fifteen days upwards, with no meaningful social contacts beyond sporadic interactions with prison guards, and often in precarious tiny cells.[39]

As a general matter, solitary confinement can be psychologically damaging for every individual, with particularly detrimental effects on people with preexisting vulnerabilities. This condition can even precipitate or exacerbate a variety of mental health issues, including major depression, post-traumatic stress disorder, and neurodegenerative illnesses such as Alzheimer's disease.[40] Crucially, recent research has associated the plethora of psychiatric and psychological implications of extreme isolation with (potentially permanent) damages occurring in the brain.[41] Similarly,

[36] *See* Routh et al., *supra* note 33, at 648. It is important to add that being appropriately diagnosed with gender dysphoria (GD) inside correctional facilities, and obtaining adequate gender-affirming care, can be quite contentious, with courts often deferring to the judgment of prison administrations. *See, e.g*, Yvette K.W. Bourcicot & Daniel Hirotsu Woofter, *Prudent Policy: Accommodating Prisoners with Gender Dysphoria*, 12 Stanf. J. Civ. Rts. & Liberties 284, 295–300 (2016); Erin Murphy Fete, *In Need of Transition: Transgender Inmate Access to Gender Affirming Healthcare in Prison*, 55 U. Ill. Chi. L. Rev. 773 (2022) (both detailing this issue); Pooja S. Gehi & Gabriel Arkles, *Unraveling Injustice: Race and Class Impact of Medicaid Exclusions of Transition-Related Health Care for Transgender People*, 4 Sexuality Res. & Soc. Pol'y 7, 10 (2007); Stephanie Saran Rudolph, *A Comparative Analysis of the Treatment of Transgender Prisoners: What the United States Can Learn from Canada and the United Kingdom*, 35 Emory Int'l L. Rev. 95, 121–9 (2019).

[37] *See, e.g.*, Arkles, *supra* note 19. For non-academic literature, see, e.g., J. Lidon et al., Coming Out of Concrete Closets: A Report on Black and Pink's National LGBTQ Prison Survey (2015), https://docs.wixstatic.com/ugd/857027_fcd066f0c450418b95a18ab34647bd15.pdf (finding that 85 percent of incarcerated LGBT respondents had been placed in solitary confinement at some point during their sentence). Among (the many) others, the tragic story of Layleen Polanco, who was found dead in her solitary confinement cell at Rikers Island (NY) in 2019, has raised awareness about the range of abuses suffered by trans people in corrective custody. *See* Josh Manson, *Layleen Polanco's Death Proves the Cruelty of Solitary Confinement*, Them (July 17, 2019), www.them.us/story/trans-incarceration-crisis.

[38] *See* Ryan Labrecque, *The Use of Administrative Segregation and Its Function in the Institutional Setting*, *in* Restrictive Housing in the U.S.: Issues, Challenges and Future Directions 49, 51–3 (Nat'l Inst. Justice ed., 2016); *see also* Sharon Shalev, A Sourcebook On Solitary Confinement (2008).

[39] *See* Correctional Leaders Ass'n & Arthur Liman Ctr., Time-In-Cell: A 2021 Snapshot of Restrictive Housing Based on a Nationwide Survey of U.S. Prison Systems 60–1 (Aug. 24, 2022), https://law.yale.edu/sites/default/files/area/center/liman/document/time_in_cell_2021.pdf.

[40] *See, e.g.*, Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 Crime & Justice 441 (2006); Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*, 47 Crime & Justice 365 (2018).

[41] *See* Federica Coppola, *The Brain in Solitude: An(other) Eighth Amendment Challenge to Solitary Confinement*, 6 J. L. & Biosci. 184 (2019).

research has linked extreme isolation with a heightened risk of developing physical illnesses, such as cardiovascular diseases,[42] and an overall higher risk of mortality.[43]

The disproportionate placement of trans people in solitary confinement is well-documented in the literature.[44] The main reasons "justifying" the solitary confinement of trans people reportedly include their protection from prison violence, the preservation of prison safety from violent incidents and sexual encounters, and punishment for "inappropriate" gender expression.[45] As has been observed,[46] these justifications often prove to be specious, and in any case inadequate to meet the relevant penological needs. Among other perils, trans persons in protective custody are more vulnerable to experiencing abuses and violence by correctional officers.[47] In addition, segregation procedures entail humiliating practices of mandatory strip search and pat-downs at the hands of correctional staff. Such practices constitute a clear form of victimization, as they expose trans persons to the risk of unwanted sexual contact with correction personnel.[48] Moreover, trans people's transition-related medical needs, such as access to hormones, may go unmet during their time in isolation.[49] Although there can be instances where trans persons voluntarily ask to be placed in isolation for their own safety,[50] their subjection to this measure is predominantly involuntary and automatic. Hence, trans persons entering the carceral system can be automatically classified as vulnerable to prison threats and violence and forced into a segregation regime for their own protection for an indefinite period of time. Importantly, even assuming that such a placement option increases trans people's safety, it nevertheless "force[s] vulnerable prisoners into the cruel position of having to choose between personal safety and the satisfaction of other basic and urgent human needs, above all, those of community and fellow human contact."[51]

Overall, incarceration is quite emblematic of the pervasive denial of trans identity in the US legal system. The (mis)placement and segregation of trans people in gender non-responding settings are a major source of the traumas this population commonly endures when they are incarcerated. As Lloyd underscored, prison further victimizes and re-traumatizes trans people by forcing them to conform to gender identities that are at odds or in stark contrast with their self-determined gender identity.[52] For trans people, life in detention can be extremely difficult and damaging for their physical,

[42] *See* Brie Williams et al., *The Cardiovascular Health Burdens of Solitary Confinement*, 34 J. Gender Intern. Med. 1977 (2019).

[43] Christopher Wildeman & Lars Andersen, *Solitary Confinement Placement and Post-Release Mortality Risk among Formerly Incarcerated Individuals: A Population-Based Study*, 5 Lancet Publ. Health, e107 (2020).

[44] *See, e.g.*, Arkles, *supra* note 19.

[45] *See id.* at 545–6.

[46] *See id.* at 537–7.

[47] *Id.* at 540

[48] *Id.*

[49] *Id.* at 542.

[50] *But see* Routh, *supra* note 33, at 651 (correctly pointing out that the mental anguish of solitary confinement, even when it is administered on a voluntary basis or for protective purposes, entails an "indirect form of victimization perpetuated by correctional staff").

[51] Dolovich, *Strategic Segregation in the Modern Prison*, *supra* note 18, at 4.

[52] Abigail W. Lloyd, *Defining the Human: Are Transgender People Strangers to the Law?*, 20 Berkley J. Gender, L. & Justice 150 (2005).

mental, and emotional well-being. *In theory*, the conditions of their detention should ensure an overall physical, mental, and emotional safety as well as offer opportunities to build skills that will help them to successfully rebuild their lives upon release. Regrettably, confinement facilities in the United States too often fail at these most basic goals of decency for everyone who comes into contact with them.

3. Constitutional failures: Trans identity and the narrowness of the Eighth Amendment "conditions jurisprudence"

The prison hardships that affect trans people are to a large extent invisible at the constitutional level. As widely observed in the literature,[53] the primary constitutional avenue for guaranteeing safe and humane prison conditions, the Eighth Amendment,[54] has often proved insufficient to address trans litigants' claims for gender-affirming safe and humane placement, and limited to redressing only the most egregious abuses.[55] As a result, the generalized (objective risks for) victimization and abuses imposed on trans people in detention due to their misclassification and misplacement lack a consistent constitutional protection.

This failure may be understood as one of the many corollaries of an overarching constitutional approach to prison matters, which is arguably state-oriented and largely indifferent to the harsh reality of incarceration, including the unsafe and inhumane conditions to which incarcerated people are commonly exposed.[56] Such indifference (primarily, albeit not only) manifests in the courts' dominant interpretation and implementation of the Eighth Amendment standard for finding a condition of confinement a cruel and unusual punishment.[57]

Pursuant to the standard set out by the Supreme Court, conditions of confinement (including the living conditions and treatment of people in prison) are "cruel and unusual" when they involve an "unnecessary and wanton infliction of pain."[58] The criteria for determining if such conditions constitute an unnecessary and wanton infliction

[53] *See* Sydney Tarzwell, *The Gender Lines Are Marked by Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 37 Colum. U. Hum. Rts. L. Rev. 167, 171–81 (2006).

[54] *Supra* note 21. Other major constitutional avenues include the Due Process Clause and the Equal Protection Clause, both enshrined in the Fourteenth Amendment.

[55] *But see, e.g.*, Greene v. Bowles, 361 F.3d 290 (6th Cir. 2004); Doe v. Yates, No. 08-CV-01219, 2009 WL 3837261 (E.D. Cal. Nov. 16, 2009), *adopted in full* No. 08-CV-01219, 2010 WL 1287056 (E.D. Cal. Jan. 13, 2010) (both granting Eighth Amendment claims arising out of the plaintiffs' prison classification and housing).

[56] *Compare* Sharon Dolovich, *The Coherence of Prison Law*, 135 Harv. L. Rev. 302, 302 (2022) (making the case that the Supreme Court's prison law jurisprudence is consistently prostate, highly deferential to prison officials' decision-making, and largely insensitive to the harms people experience while incarcerated) *with* Justin Driver and Emma Kaufman, *The Incoherence of Prison Law*, 135 Harv. L. Rev. 515 (2021) (in partial contrast with Dolovich, and noting the Supreme Court's contradictory attitude to the horrors of prisons and prisoners' life, oscillating between outrage and acceptance).

[57] *See* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. Rev. 881 (2009) (analyzing and challenging this issue in depth).

[58] Gregg v. Georgia, 428 U.S. 153, 173 (1976).

of pain require that they result in unquestioned and "serious deprivation[s] of basic human needs"[59] to an extent that they inflict harm or create a "substantial risk of harm"[60] that is objectively serious (the "objective prong" of the standard). Importantly, the Court has established that only "extreme deprivations" are sufficient to support a condition of confinement claim. This requirement is met when the deprivation is sufficiently serious to deny "the minimal civilized measure of life's necessities."[61] Moreover, the Court has interpreted this ban to encompass "deprivations. . . not specifically part of [a] sentence but. . . suffered during imprisonment."[62]

The standard also requires that prison officials must be "deliberately indifferent"[63] to the fact that such conditions inflict or create a risk of inflicting serious harm upon the individual (the "subjective prong" of the standard). Furthermore, conditions of confinement signify an unnecessary and wanton infliction of pain, even though applied in pursuit of a legitimate penological aim of discipline, protection, or prison safety, if they go beyond what is necessary to achieve that aim.[64] Crucially, the overarching criterion for evaluating the "unnecessary and wanton infliction of pain" standard lies in the developing concepts of decency and dignity that mark the progress of a maturing society.[65]

Despite its dynamic nature, the extant standard presents significant barriers for incarcerated people to prove many constitutional violations related to the harmful conditions of detention.[66] These barriers also impede trans litigants from suing prisons for unsafe placements and the lack of gender-affirming care. With sporadic exceptions,[67] courts have often dismissed even valid prison claims brought by trans litigants, mostly finding the evidence introduced insufficient to raise Eighth Amendment violations or that the conditions suffered were not serious enough to meet the standard.[68]

At least three reasons can explain this general lack of constitutional protection. The first reason concerns the courts' general neglect of the objective risk of "serious mental harm" following harsh confinement, in Eighth Amendment conditions jurisprudence. With a few exceptions,[69] courts have tended to interpret the objective prong of the standard by narrowing it down to identifiable physical needs, including

[59] Rhodes v. Chapman, 452 U.S. 337, 347 (1981).
[60] Farmer v. Brennan, 511 U.S. 825, 837 (1994).
[61] Hudson v. McMillian, 503 U.S. 1, 9 (1992).
[62] Wilson v. Seiter, 501 U.S. 294, 297 (1991).
[63] *Id.*; Estelle v. Gamble, 429 U.S. 97, 103 (1991); Farmer v. Brennan, 511 U.S. 825, 837 (1994).
[64] *Estelle*, 429 U.S. at 103 (citing *Gregg*, 428 U.S. at 182–3). This criterion requires prison administrations to assess the need for a given measure through a "balancing test." The test asks prison administration to weight the possible harms associated with a given measure against the penological interests (e.g., safety) at stake. *See, e.g.*, Battista v. Clarke, 645 F.3d 449, 454–55 (1st Cir. 2011).
[65] Trop v. Dulles, 856 U.S. 86, 101 (1958).
[66] *See, e.g.*, Dolovich, *supra* note 57; see also Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual*, 90 Ind. L.J. 741, 770–1 (2015).
[67] *See supra* note 56.
[68] *See, e.g.*, Lamb v. Maschner, 633 F. Supp. 351 (D. Kan. 1986); Farmer v. Carlson, 685 F. Supp. 1335, 1343-44 (M.D. Pa. 1988); Lopez v. N.Y. City, No. 05 Civ. 10321(NRB), 2009 WL 229956 (S.D.N.Y. Jan. 30, 2009).
[69] *See, e.g.*, Perkins v. Kan. Dept. of Corr., 165 F.3d 803, 811 (10th Cir. 1999).

nutrition, sanitation, or shelter,[70] the lack of which may lead to the infliction of physical harm, such as physical disease or death. Accordingly, courts have tended to treat the generalized mental pain that is caused by harsh conditions of confinement as an inadequate ground to trigger Eighth Amendment violations.[71] The exception to the general interpretation of "objectively serious harm" as meaning mostly physical harm is represented by the body of cases that have identified the mental harm following harsh conditions of confinement—notably, solitary confinement—for people with mental disabilities as unconstitutional.[72] As argued elsewhere,[73] although such cases represent key progress in Eighth Amendment jurisprudence, they nevertheless manifest a problematic presumption of the resilience of healthy prison populations to the generalized mental harms deriving from the harsh conditions of confinement.

The second and even more pressing reason concerns the stringent deliberate-indifference requirement. In *Farmer v. Brennan*,[74] the Supreme Court clarified that deliberate indifference is equivalent to criminal recklessness—more than ordinary negligence but less than purpose or knowledge of the resulting harm—indicating the need for proof of knowledge and disregard of a substantial risk of harm to an individual's health and safety on the part of prison staff. Notably, the Court held that "[a] prison official cannot be found to be liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety."[75] Importantly, although the Court also recognized that some risks of harm are so objectively clear that "a fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious,"[76] this state of mind has to be assessed from the prison officials' point of view under the circumstances.[77]

[70] *See, e.g., Wilson*, 501 U.S. at 304–5.

[71] *See The Psychology of Cruelty*, *supra* note 21, at 1252 (likewise observing that "lower courts have only rarely recognized grave mental harm, in the conditions of confinement context, and the Supreme Court has never done so"). *See also* Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. Pa. J. Const. L. 115, 133 (2008). *But see* Hudson v. McMillian, 503 U.S. 1, 16–17 (1992) (Blackmun, J, concurring); Johnson v. Wetzel, 209 F. Supp.3d 766, 778 (2016).

[72] *See, e.g.,* Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995); Jones' El v. Berge, 164 F. Supp. 2d 1096 (W.D. Wis. 2001); Palakovic v. Wetzel, 854 F. 3d 209 (3d Cir. 2017); United States v. D.W. 198 F. Supp. 3d 18 (E.D.N.Y. 2016); Peoples v. Annucci, 180 F. Supp. 3d 294 (S.D.N.Y. 2016); Sanders v. Melvin, 873 F.3d 957 (7th Cir. 2017); Wallace v. Baldwin, 895 F.3d 481 (7th Cir. 2018).

[73] *See* Coppola, *supra* note 41, at 191; *see also* Lobel, *supra* note 72, at 133.

[74] 511 U.S. 825 (1994). *Farmer* is the leading case specifically addressing the circumstances of trans people. Dee Farmer, a trans woman, was beaten and raped by another inmate within two weeks of her transfer to the general male population of the United States Penitentiary (USP) in Terre Haute, Indiana. Farmer filed a complaint alleging that prison officials had placed her in the general population of USP-Terre Haute despite their knowledge that the penitentiary had a history of violent inmate assaults and that Farmer, as a transsexual who "project[ed] feminine characteristics" (*Farmer*, at 831), would be particularly vulnerable to sexual attacks.

[75] *Farmer*, 511 U.S. at 843.

[76] *Id.* at 841–2 (rejecting the argument that a prison official who was unaware of a substantial risk of harm to an inmate should still be held liable under the Eighth Amendment based on an objective assessment that the risk was obvious and a reasonable prison official would have noticed it).

[77] *Id.* at 842.

Against this backdrop, the inherent difficulty for detained individuals, including trans persons, to assert their Eighth Amendment rights in court is obvious. Following *Farmer*, the proviso of this subjective element renders even the detrimental conditions of detention hardly cognizable under the Eighth Amendment. As noted by Dolovich,[78] the Court in *Farmer* problematically narrowed the scope of the Eighth Amendment to only those harmful prison conditions or treatments that prison administration and officials, or staff, recklessly enact. By contrast, conditions or treatments, however degrading and dangerous, that do not result from the reckless conduct of the prison administration (but instead arise from mere negligence or from pathological prison dynamics) appear to fall beyond the scope of the Eighth Amendment clause and, therefore, are not subject to its protection.[79]

From a procedural perspective, the deliberate-indifference requirement is objectively difficult to prove. Indeed, plaintiffs are burdened to provide evidence that the risk of harm to which they were exposed was "obvious," while prison officials consciously disregarded such requisite and acted anyway. Stated succinctly, proving deliberate indifference places the burden of confirming an officer's subjective belief of the situation under the circumstances. Moreover, the test creates an incentive for prison officials to ignore problems:[80] the less they investigate, the fewer recorded facts support an inference that a risk exists.

The third and related reason lies with the excessively deferential attitude of courts toward prison administrations and officials.[81] Lacking any established criteria for assessing the legitimacy of a penological interest in a given prison condition, courts have often "deferr[ed] to prison officials when they claim that a particular condition or treatment is necessary."[82] For instance, in *Farmer v. Moritsugu*,[83] a trans person challenged the use of protective custody (i.e., solitary confinement) under the Eighth Amendment clause. While in protective custody, Farmer experienced the psychological trauma of being placed in isolation. Despite numerous requests to be removed from isolation, correctional staff ignored these requests. Notwithstanding the high risk for serious mental issues, the court held that the prison's penological interest in maintaining safety ranked higher than the trauma she experienced while in isolation. Importantly, this deferential attitude also holds true for litigation involving classification criteria for trans people. As has been observed, "courts are usually very reluctant to limit the discretion of state prison officials to classify prisoners" and are generally

78 *See* Dolovich, *supra* note 57, at 895–906.

79 *See id.*

80 *See id.* at 892. Lower courts have occasionally been more open to expanding deliberate indifference to instances of mere knowledge of the risk of serious harm. *See, e.g.*, Lojan v. Crumbsie, 12 CV. 0320 LAP, 2013 WL 411356, at *4 (S.D.N.Y. Feb. 1, 2013); Green v. Hooks, 6:13-cv-17, 2013 WL 4647493, at *3 (S.D. Ga. Aug 29, 2013).

81 *See* Dolovich, *supra* note 57; Sharon Dolovich, *Canons of Evasion in Constitutional Criminal Law*, *in* The New Criminal Justice Thinking 111, 111–54 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (discussing "deference" as an evasive maneuver to sidestep fundamental constitutional questions in criminal justice matters to affirm the constitutionality of state actions).

82 Brittany Glidden & Laura Rovner, *Requiring the State to Justify Supermax Confinement for Mentally Ill Prisoners: A Disability Discrimination Approach*, 90 Denv. U. L. Rev. 55, 62 (2012).

83 163 F.3d 610 (D.C. Cir. 1998).

"ambivalen[t] toward the issue of housing transgender inmates."[84] Thus, courts hardly ever interfere.[85]

With these expositions in mind, one may easily grasp the struggle for trans litigants to successfully raise Eighth Amendment claims for hazardous placements when prison safety is broached as a penological justification by a prison administration. First, the difficulty for trans litigants in proving Eighth Amendment violations is exacerbated by the fact that they must demonstrate that their trans status was "the catalyst for the increased risk of harm and that the prison officials deliberately disregarded both the increased risk of harm and the specific reason for that increased risk."[86] Such difficulty is further aggravated by the pervasive bias and lack of knowledge about trans people on the part of the courts.[87] Second, the level of discretion that is afforded to prison administrations allows them to escape their responsibility by simply arguing that their facilities lack safe housing options, and that a given placement was the best option available to meet safety needs.

Altogether, although incarcerated (trans) people have an Eighth Amendment right to be protected from unsafe prison conditions, the interpretative narrowness of extant criteria, coupled with the courts' pervasive deference to prison administrations, causes a difficulty in recognizing the need for placement options that provide trans persons with the real possibility of living in safe and humane conditions. As Tarzwell has observed,[88] courts seem unwilling to explore the possibility that placement in either the general population or in segregation may be cruel and unusual punishment for trans people, mostly concluding that if one option is unconstitutional, then the other must be appropriate. "Oddly enough,"[89] however, both placement options presented to trans people are unnecessarily punitive insofar as they also entail a fundamental denial of their gender identity.

4. Broadening extant Eighth Amendment standards

Extant "conditions of confinement" standards pose severe hurdles to incarcerated individuals for successfully challenging even severely harmful conditions of detention. As presently implemented, this framework leaves the majority of the harms

[84] Jessica Szuminski, Note, *Behind the Binary Bars: A Critique of Prison Placement Policies for Transgender, Non-Binary, and Gender Non-Conforming Prisoners*, 105 Minn. L. Rev. 520 (2020).

[85] It is also worth mentioning the administrative barriers for (trans) incarcerated people to file a suit in a federal court and for courts to remedy unconstitutional conditions as a consequence. The Prison Litigation Reform Act (PLRA) (42 U.S.C. § 1997e(a) (1995)), a federal law enacted in 1995 with the aim of decreasing the incidence of prison litigation within the court system, requires incarcerated people to first exhaust available intra-prison administrative remedies prior to bringing suits in federal courts. Importantly, the PLRA, 42 U.S.C. § 1997e(e) (1995), also stipulates that lawsuits for mental or emotional injury cannot be filed without proof of physical injury.

[86] Tammi S. Etheridge, *Safety vs Surgery: Sex Reassignment Surgery and the Housing of Transgender Inmates*, 15 Geo. J. Gender & L. 585, 593 (2014).

[87] *See* Routh, *supra* note 33 and Lloyd, *supra* note 52 (both discussing this issue).

[88] *See* Tarzwell, *supra* note 53, at 185.

[89] *See* Farmer v. Brennan, 511 U.S. 825, 861 n.1 (1994) (Thomas, J., concurring) ("Petitioner's present claim, oddly enough, is essentially that leaving him [*sic*] in general prison population was unconstitutional because it subjected him [*sic*] to a risk of sexual assault").

accrued through incarceration without robust constitutional protection. As noted, a corollary of this generalized constitutional failure is the inability of populations that are otherwise already vulnerable, such as trans persons, to escape the "unnecessary and wanton inflictions of pain" or to demand relatively safe and humane placements that, among other things, respond to gender-identity needs.

In the remainder of this section, I advance two lines of argument addressing this broad constitutional failure. Together, these arguments require the adoption of a more expansive and progressive interpretation of the extant standards for adjudicating Eighth Amendment claims. The proposed interpretive approach relies upon a more consistent consideration of two building blocks of the Eighth Amendment Clause: the evolving concept of dignity and, related to it, the constitutional meaning of punishment, including its major justifications. Hence, I discuss this approach by rethinking the scope of extant Eighth Amendment criteria for finding a condition of confinement unconstitutional, including the implications for prison claims brought by trans litigants to assert their right to adequate, safe, and gender-conforming housing.

4.1. Dignity

Human dignity is the touchstone of the Eighth Amendment. Over the years, the Supreme Court has consistently emphasized that dignity is the value that animates this Clause, referencing the "dignity of man"[90] as its "basic concept"[91] and the government's duty "to respect the dignity of all persons."[92] Accordingly, the "[e]volving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule."[93] In other words, every citizen is entitled to human dignity, against which all sentences and conditions of confinement must be assessed.[94]

Regrettably, the Court has never provided a definition of dignity. Scholars disagree over both the meaning and dimensions of this concept, as well as over how broad it should be understood in the context of the Eighth Amendment.[95] For some authors, the Court has turned the value of human dignity into a mere rhetorical argument rather than a subject of substantial constitutional protections.[96] For others,[97] the Court's constant (however often arguable) reference to human dignity evidences that

[90] Atkins v. Virginia, 536 U.S. 304, 311–12 (2002).
[91] *Id.*
[92] Hall v. Florida, 134 S. Ct. 1986, 1992 (2014).
[93] Kennedy v. Louisiana, 554 U.S. 407, 420 (2008).
[94] Trop v. Dulles, 356 U.S. 86, 100 (1958).
[95] *Compare* Jonathan Simon, Mass Incarceration on Trial: A Remarkable Court Decision and The Future of Prisons in America (2014) *with* Jonathan Simon, *Dignity and Its Discontents: Towards an Abolitionist Rethinking of Dignity*, 18 Eur. J. Criminology 33 (2020).
[96] *See, e.g.*, Eva Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. Davis L. Rev. 111 (2007) (referring, in particular, to the Court's opinions in Gregg v. Georgia, 428 U.S. 153 (1976); Harmelin v. Michigan, 501 U.S. 917 (1991); Solem v. Helm, 463 U.S. 277 (1983); Rummel v. Estelle, 445 U.S. 263 (1980); Ewing v. California, 538 U.S. 11 (2003)).
[97] *See, e.g.*, Meghan Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 5 U. Ill. L. Rev. 2129 (2016).

the Court does attribute substantial value to this concept, which remains the ultimate normative benchmark within Eighth Amendment analyses.[98]

One salient interpretation of the Court's reference to dignity under the latter line of case law analyses rests on the Kantian notion of the intrinsic worth of people as *humans*.[99] This conception of dignity commands that people must be viewed and respected as ends in themselves rather than as means.[100] One facet of this focus on the individual is emphasizing that individuals impacted by the criminal legal system remain human beings, regardless of the worst act they might have committed.[101] Thus, punishment and its methods must never go beyond the universal threshold of humanity.

At least three main articulations of the humanity component of dignity can be envisaged: first, humans are entitled to be recognized as humans;[102] second, they are entitled to have the conditions in which they can experience their own dignity, that is, the conditions that allow them to experience self-worth;[103] and, third, they are to be empowered to exercise the distinctive human capacities that account for their dignity.[104] Accordingly, a violation of a person's right to respect for their dignity can manifest in the following ways: first, if one were treated as having no worth or less than equal worth as a human relative to other humans; second, if one were treated as though one lacked distinctive human capacities, including their autonomy and belongingness; and, third, if one were treated as a mere thing or object. In each case, human dignity is violated because a human is treated as if they are not a human or less than a human.

If this interpretation is correct, then respect for human dignity requires that justice-involved individuals are treated in a manner that empowers them to fully exercise their autonomy and enables them to keep or restore a sense of self-worth and belongingness.[105] To this end, carceral conditions must provide for the genuine fulfilment of the basic individual needs of people, including their health, growth, and flourishing. These needs go beyond mere physical survival and entail a full protection of people's mental well-being, including their sense of personhood, their fundamental need to belong, and the safe expression of their (gender) identity. As a result, carceral conditions

[98] For instance, the Court manifested a robust constitutional conception of human dignity in Roper v. Simmons, 534 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); Brown v. Plata, 563 U.S. 493 (2011). For analyses of the role of dignity in these opinions, see Simon, *supra* note 95; Jonathan Simon, *Dignity and Risk: The* Long Road *from Graham v. Florida to Abolition of* Life without Parole, *in* Life Without Parole: America's New Death Penalty 282 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012).

[99] *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citation omitted).

[100] *See* Ryan, *supra* note 97 (overviewing cases in which the Supreme Court takes on this humanity-centered conception of dignity).

[101] *See also* Simon, *Dignity and Its Discontents: Towards an Abolitionist Rethinking of Dignity*, *supra* note 95, at 38–42 (discussing the influence of *Brown's* "dignity language" on lower courts and emphasizing the reaffirmation of human dignity as a prevailing value over conviction and prison conditions).

[102] Deryck Beyleveld & Roger Brownsword, Human Dignity in Bioethics and Biolaw 17 (1993).

[103] Doron Shultziner & Itai Rabinovici, *Human Dignity, Self-Worth and Humiliation: A Comparative Legal—Psychological Approach*, 18 Psych., Pub. Pol'y & L. 105 (2012).

[104] *Supra* Beyleveld & Brownsword, note 102, at 15.

[105] *See also* Jeffrey Fagan, *Dignity Is the New Legitimacy*, *in* The New Criminal Justice Thinking, *supra* note 81, at 308, 312 ("We assume our dignity because we belong, not simply because we exist").

must be structured in a way that they do not deteriorate the mental autonomy and physical integrity of individuals.[106]

A serious consideration of the humanity component of dignity in the context of the Eighth Amendment requires a broader interpretation of the standard that the Supreme Court has established to find conditions of confinement cruel and unusual under the clause. With regard to the objective prong of the standard, a more robust understanding of human dignity in the terms expressed above entails expanding the category of "basic human needs" beyond physical needs such as food or shelter, to also encompass essential mental needs, including the need for healthy social environments where individuals are and feel physically and psychologically safe to express their (gender) identity and personhood. Tellingly, the empirical literature has unanimously indicated that such mental needs are vital for preserving physiological brain function, mental health, and psychological well-being.[107] Notably, meeting these mental needs is essential for preserving the cognitive, emotional, and social abilities that allow individuals to keep their sense of autonomy, self-worth, and rational capacities that lie at the core of their individuality.[108]

Expanding the scope of the "basic human needs" criterion to also encompass essential mental needs for healthy social environments, in the terms defined above, logically implies assigning constitutional relevance to the harms resulting from the deprivation of such needs. The mental and physical toll that unsafe, anguishing, and abusive social environments can impose upon an individual are widely documented in the literature. An increasing number of studies are significantly emphasizing the positive correlations between abusive and depriving social environments and severe neurobiological, physical, and psychological damage, as well as a higher risk of mortality.[109] Importantly, the effects of such damage in individuals can protract in the long term or even become permanent. These claims suggest that toxic, abusive, and depriving environments can cause a type of harm that is not less serious than "more conventional" physical harms such as those following food or sleep deprivation.[110] Similar to the latter, such harms can be extremely detrimental to the individual and must be afforded equal constitutional worth.

The third implication concerns the abandonment of the "deliberate indifference" requirement. Given the growing institutional and general awareness of the risks of severely unhealthy social environments for physical and mental health, proof that

[106] *See also* Dolovich, *supra* note 57, at 891 (defining these duties as the "state's carceral burden").

[107] For an overview of this body of literature, see Federica Coppola, The Emotional Brain and The Guilty Mind: Novel Paradigms of Culpability and Punishment, chs. 4, 6 (2021). For trans-specific literature, see, e.g., Ellen Riggle et al., *The Positive Aspects of Trans Self-Identification*, 2 Psych. & Sexuality 147 (2011).

[108] Coppola, *supra* note 107, ch. 6. *See* also Tara White & Meghan Gonsalves, *Dignity Neuroscience: Universal Rights Are Rooted in Human Brain Science*, 1505 Annals N.Y. Acad. Sci. 40 (2021), https://doi.org/10.1111/nyas.14670 (understanding autonomy, uniqueness, and self-determination as ineradicable components of human rights and providing strong neurobiological evidence that these abilities "reflect fundamental features of brain structure, functions, and development in humans, with special protections reflecting the lifelong, inherent plasticity of the human brain").

[109] Coppola, *supra* note 107, ch. 4.

[110] *Id. See also* Coppola, *supra* note 41.

a prison official acted with "deliberate indifference" should be inferred from the very act of placing someone in such environments, thereby exposing them to a heightened risk of abuse and victimization. Imposing these conditions on an incarcerated person entails an objectively serious risk of harm; any further subjective inquiry is simply unnecessary. This proposal is consistent with Dolovich's argument for adopting a "modified strict liability" standard for prison administrations which, in this context, would entail "an irrebuttable presumption of constructive knowledge in all cases of sufficiently serious state-created harm."[111] For Dolovich, most prison harms, by the mere fact of being such, fall within the conception of state punishment cognizable under the Eighth Amendment. When people are sentenced to prison, they become "vulnerable to harm at the hands of individual state officers—harm that existing institutions may be ill equipped to prevent."[112] By virtue of state-delegated power, state prison officials are burdened by a positive obligation to protect the people who are under their custody by preventing the occurrence of serious harms. Accordingly, prison officers must ensure that the basic needs of people in prison are met, and they are responsible for any failure to do so. The mere fact that an incarcerated person has been placed in depriving and dehumanizing conditions and exposed to (a serious risk of) harm should be deemed as sufficient to make this condition cognizable under the Eighth Amendment, for the very reason that "when prisoners suffer serious harm at the hands of the state, fault is necessarily present."[113]

The hypothetical abandonment of the subjective requirement might well impose a limit on the strong deference that judges grant to prison administrations regarding the management of facilities and the application of correctional measures.[114] Following the logic of the Supreme Court's opinion in *Brown v. Plata*,[115] the federal courts have a duty to intervene when the government has shirked its obligation to guarantee incarcerated people the human dignity emblematic of a civilized society. Among other factors, "personal safety is one aspect of human dignity to which the Supreme Court referred."[116] Notwithstanding, as noted above,[117] judicial deference is in reality a difficult barrier to overcome in proving and recognizing the subjective culpability of prison officials. By contrast, the approach proposed here would entail that litigants who prove to have suffered, or risked, sufficiently serious prison harm following unsafe and inhumane conditions would have a better chance to see their claims recognized, notwithstanding the alleged penological justifications on the part of individual officers.

Although this (more robust) dignity-based interpretation of "conditions jurisprudence" carries profound constitutional implications for any person impacted by the

[111] Dolovich, *supra* note 57, at 894, 964–72.
[112] *Id.* at 898.
[113] *Id.* at 965.
[114] *See supra* Section 3.
[115] Brown v. Plata, 563 U.S. 493 (2011).
[116] Savage v. Fallin, 2017 WL 9802856, 8 (U.S. Dist. Ct. W.D. Okla. 2017).
[117] *See supra* Section 3.

incarceration system,[118] its hypothetical adoption would also offer a more robust protection to trans people against the risk of ill-placements in prison, including a consistent constitutional acknowledgment of their entitlement to the right to safe and humane placement in view of their self-determined gender identity. The argument highlights that depriving trans people of their right to live in their gender identity and safely express their gender needs when they enter a correctional facility—thereby exposing them to severe risks of abuse and victimization that may follow unsafe placement options—constitutes a fundamental deprivation of the universal basic human need for living in healthy social environments.[119] As evidenced above, the types of physical and mental damages that unsafe placement can inflict (e.g., a heightened risk for abuse, victimization, and harsher and mentally devastating confinement conditions such as protective custody in isolation) are not less serious than the damages that can derive from the denial of access to medical treatments.[120] Admittedly, enforcing the recognition and respect of trans identity is equivalent, or even prodromal to, granting trans people the right to access trans-specific healthcare in prisons.

Stated in this manner, the consistent recognition of self-determined trans identities in prison settings brings constitutional value in three main, and related, respects. First, such a recognition is intrinsically valuable in itself as it fundamentally allows trans persons to keep their sense of humanity that lies at the core of their dignity. Second, it is instrumentally valuable as it allows trans persons to live in safe environments, thereby maintaining their physical and mental integrity. Third, it is functional to the fulfillment of other individual rights (notably, the right to access healthcare).

Importantly, a serious acknowledgment of the objective risks of harm deriving from unsafe and dehumanizing living conditions upsets the purported "balance" between the (objective risk of) harm accrued through gender non-affirming unsafe placement and the "legitimate" penological prison interests of discipline, security, and safety. In fact, the serious harms accrued through the imposition of traumatizing living conditions are too high compared to the safety or protection interests of prison administrations. As explained above, such harms may not be limited to the immediate implications deriving from unsafe conditions, but they may well extend to the long-lasting or even permanent consequences that such conditions may entail for the physical and psychological integrity of individuals. Thus, the risk of undergoing such

[118] Space does not allow me to analyze in depth the generalized implications that might follow from a more extensive interpretation of the extant standard. A glaring sample implication is finding solitary confinement per se as a cruel and unusual punishment. For a more in-depth discussion, see Coppola, *supra* note 41.

[119] *See, e.g.*, Keohane v. Jones, Case No. 4:16cv511-MW/CAS (2018) (holding specifically that social transitioning—i.e., the ability to live as one's own identified gender in daily life—must be granted to trans people in prison, just as it is in the outside world. In arguing for its opinion, the court expressly relied upon the notion that trans people in prison "must be treated with the dignity the Eighth Amendment commands").

[120] *See also* Etheridge, *supra* note 86, at 603 (observing that "the judicial branch has been unwilling to explore the possibility that placement in either general population or protective custody is cruel and unusual punishment for transgender prisoners akin to the outright denial of medical treatment").

damaging effects is an excessive—thus, extremely unbalanced—cost for any legitimate penological interest to allegedly justify it.

Furthermore, the proposal for abandoning altogether the subjective prong of the standard and moving toward a purely objective test would disallow prison officials to disregard gender-identity needs and house trans people in unsafe or more restrictive conditions. Even in this case, the courts would be disincentivized to defer the legitimacy of placement decisions to the judgment of prison administrations and evaluate housing conditions through objective criteria. Without relying on the subjective intent of officers, the courts would more meaningfully address trans people's housing concerns and trans people would have a better chance to see their safety and identity needs recognized.

Altogether, the proposed approach to extant standards would be far more consistent with the possibility of meaningful Eighth Amendment enforcements. With specific regard to trans populations, this progressive interpretation of the standard would facilitate trans litigants in successfully asserting their right to safe placement options that, among other purposes, recognize and address their gender-specific needs. As a result, a broader and dignity-oriented understanding of safe and humane prison conditions—also embracing a consistent recognition of self-determined gender identity—might well and more consistently support safe housing options that value the specific needs of trans people, including allowing them to live in settings where they can freely and safely express their identity. Among other requisites, facilities would have to recognize and guarantee trans people's right to obtain appropriate clothing and grooming products so that they can express their gender identity through clothing, hairstyle, and other means of gender expression. On the extreme side of the end, damaging segregation practices for "protective" purposes would be entirely dismissed.[121]

4.2. Punishment

The relevance of human dignity in the context of the Eighth Amendment is strictly related to another building block of the clause, that is, the concept of punishment and its constitutional justifications of retribution, incapacitation, deterrence, and rehabilitation. To be clear, these broader penological considerations are regrettably uncommon in the analyses of conditions of confinement.[122] Under extant standards, the analyses of the (il)legitimacy of the conditions of confinement discount the (lack of) compliance of such conditions with the governing principles of punishment, but they

[121] *See also* Morgan Mason, Note, *Breaking the Binary: How Shifts in Eighth Amendment Jurisprudence Can Help Ensure Safe Housing and Proper Medical Care for Inmates with Gender Dysphoria*, 71 Vand. L. Rev. En Banc 157, 187–8 (2018) (suggesting that "there are at least two remedies that would be more effective than indefinite segregation: transferring the inmate to an identity corresponding facility or enacting a holistic transgender housing policy. . .. If neither general placement nor segregation is tenable for an inmate, then neither should be condoned").

[122] *But see, e.g.*, Brown v. Plata, 563 U.S. 493, 510 (2011) ("Courts must be sensitive to the State's interest in punishment, deterrence, and rehabilitation. . ..").

are limited to considering their (in)aptitude to meet the prison needs of discipline, security, and protection.[123]

Consistent with other views in the literature,[124] the apparent irrelevance of actual conditions of confinement under the governing goals of punishment is due to a "conceptual dichotomy"[125] that the Supreme Court has been drawing between legal punishment, understood as sentences formally meted out by courts or in statutes, and penal practice—including real prison conditions. Only the former is subject to the constitutional analyses of adequacy with respect to governing penological justifications.[126] By contrast, the latter falls outside the reach of this evaluation because prison conditions are either considered as simply a part of the formal penalty[127] or as "not part of the penalty"[128] that people must pay for their offenses. The result of this conceptual dichotomy is twofold: on the one hand, sentencing determinations do not take account of the qualitative aspects of punishment, including actual prison conditions and the painful effects such conditions may bring to individuals; on the other hand, the harmful conditions of confinement (regardless of whether they are well known, foreseeable, or even *produced* by the dynamics of prison environments) escape broader penological considerations insofar as they are considered incidental corollaries of a legitimately imposed penalty.

Consistent with Alice Ristroph,[129] this (equivocal) conceptual dichotomy is fallacious insofar as it is grounded in an abstract conception of "punishment"—one that embraces punishment *as it ought to be* (temporal or permanent deprivations of liberty under the rule of law) and is artificially divorced from punishment *as it is*, including the (additional) pains that punishment causes in practice.[130] Rather, the assessment of whether a formal penalty (i.e., prison) suits its proclaimed goals of retribution, incapacitation, deterrence, and rehabilitation should consider not only the abstract/normative sentencing stage but also the concrete/positive execution (imprisonment) stage. The qualitative experience of prison, rather than its duration, is the aspect that truly reflects whether this penalty fulfills its proclaimed goals. Furthermore, dignity must stand in the tangible context of facilities as an insurmountable threshold of

[123] By contrast, broader penological considerations under governing principles of punishment factor into Eighth-Amendment proportionality analyses of formal sentences meted out by courts or in statutes (so-called "proportionality jurisprudence"). *See* Fields v. Smith, 653 F.3d 550, 559 (7th Cir. 2011); Kosilek v. Spencer, 889 F Supp. 2d 190 (D. Mass. 2012), *rev'd* F.3d (1st Cir. 2014); Edmo v. Corizon, Inc., 935 F.3d 757, 785–97 (9th Cir. 2019); Hicklin v. Precynthe, No. 4:16-CV-01357-NCC, 2018 WL 806764, at *14 (E.D. Mo. Feb. 9, 2018); Diamond v. Owens, 131 F.Supp. 3d 1346, 1379 (M.D. Ga. 2015); Zollicoffer v, Livingston, 169 F.Supp.3d 687, 691 (S.D. Tex. 2016).

[124] *See, e.g.*, Alice Ristroph, *Sexual Punishments*, 15 Colum. J. Gender & L. 139 (2006); Adam Kolber, *Unintentional Punishment*, 18 Legal Theory 1, 2 (2012); Netanel Dagan, *The Janus Face of Imprisonment: Contrasting Judicial Conceptions of Imprisonment Purposes in the European Court of Human Rights and the Supreme Court of the United States*, 21 Criminology & Crim. Justice 1 (2020); Eve Hanan, *Invisible Prisons*, 54 UC Davis L. Rev. 1185 (2020).

[125] Ristroph, *supra* note 124.

[126] *See The Psychology of Cruelty, supra* note 21, at 1253.

[127] Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

[128] Farmer v. Brennan, 511 U.S. 825, 834 (1994), citing *Rhodes*, 452 U.S.

[129] Ristroph, *supra* note 124.

[130] *See also* Adam Kolber, *The Subjective Experience of Punishment*, 109 Colum. L. Rev. 182 (2009).

proportionality, parsimony, and efficacy of a prison sentence. Thus, a conceptualization of punishment that disregards and obscures the qualitative dimension of prison is as flawed as it is unrealistic.

In line with growing scholarly calls for a holistic conceptualization of punishment that also includes real prison experience,[131] a theoretical discussion on the hypothetical application of broader penological considerations to conditions jurisprudence can provide further normative support for the claim that the failure to ensure safe and humane placement conditions that also conform to self-determined gender needs is a harbinger of violations of the penological purposes of prison sentences. In fact, the denial of gender identity in prison settings, with the practical corollaries it produces, eventually results in the infliction of a "double punishment":[132] gender minority people, including trans persons, are not only forced to see their right to dignity and self-identity fundamentally denied but they are also exposed to severe victimization and denigrating conditions of confinement *because of* such a denial. When those conditions occur, a prison sentence becomes too excessive to find any penological justification.

Beginning with retribution, proportionality in retribution mandates that the punishment inflicted must not cause a pain that exceeds what is deserved for the crime. Desert is measured through the gravity of the offense and the person's degree of culpability at the time of the crime. As currently conceived, proportionality in retribution is limited to the consideration of these factors to establish the legitimate length of prison terms, without also considering the factual intrusions that prison imposes on people and their individual well-being.[133] Arguably, however, a common theme in the retributivist discourses of punishment is that proportionality is met insofar as legal punishment is also structured in a manner that is, at minimum, consistent with respecting[134] the dignity and humanity of justice-involved individuals as rational and autonomous beings.[135] A punishment that imposes gratuitous suffering has the "paradoxical" effect of contradicting this fundamental aspect of retribution because it risks compromising the uniquely human capacities of rationality and self-determination that lie at the core of people's dignity as humans.[136]

Following this rhetoric of retribution, state punishment must guarantee that incarcerated persons are entitled to the right to live in safe and humane conditions that also recognize and value their (gender) identity and where such identity can be

[131] *See generally supra* note 124.

[132] *See* Marie-Claire Van Hout & Des Crowley, *The "Double Punishment" of Transgender Prisoners: A Human Rights Based Commentary on Placement and Conditions of Detention*, 17 Int'l J. Prisoner Health 439 (2021); John Erni, *Legitimating Transphobia*, 27 Cultural Stud. 136, 139 (2013).

[133] *See also* Hanan, *supra* at 124, 1203 ("although the length of a sentence allows for a unified measure to distinguish and rank punishment, it is a thin measure of severity because it obscures the qualitative aspects of prison's cruelties. If one really considers the experience of imprisonment, exclamations like 'He only got four years!' seem preposterous").

[134] *See* Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 Cal. L. Rev. 601, 624–6 (2009).

[135] *See, e.g.*, Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 Stan. L. Rev. 983, 1003 (2004).

[136] Georg W.F. Hegel, Elements of The Philosophy of Right: Abstract Right 125–6 (Allen Wood ed., H.B. Nisbet trans., Cambridge University Press 1991) (1821).

safely expressed with no risk of being violated or abused. Failure to ensure such basic conditions for dignity and humanity renders the pain of prison sentences just grossly disproportionate to any offense committed, regardless of its seriousness. Such an outcome is totally antithetical to mainstream retributive perspectives.

The prison's cruelties accrued on detained (trans) people also violate the parsimony of a punishment designed to incapacitate the punished individual or to deter future crime. Incapacitation mandates the physical separation of a convicted person from society for reasons of public safety. This separation "simply" involves the removal of the relevant persons and their confinement in secure facilities. Arguably, the separation and confinement of punished individuals are (more than) sufficient to serve incapacitating goals. The infliction of additional pains and hurdles within prison environments has nothing to do with rendering punished persons harmless to others. Considerations about incapacitation mutually reinforce deterrence arguments. Classical deterrence theory requires that punishment must inflict no greater pain than what is required to prevent a person from committing further crimes. It perceives the suffering that punishment inflicts as a cost (or a disutility) that perpetrators will consider when deciding whether to break the law. Prison detention, with the losses and deprivations it automatically entails, is already sufficient as a pain to "discourage" a person from committing the same or another crime. Even in this case, the gratuitous infliction of additional suffering on people in prison—including on trans people—does not serve any of such deterrent goals. Moreover, empirical findings have widely confirmed that harsh prison conditions encourage the criminogenic effects of imprisonment, related to both in-prison violence and post-release recidivism.[137] Hence, the imposition of harsh(er) and degrading prison conditions is completely unjustified also on preventative grounds.

Finally, the deprivations imposed on (trans) people in prison are fully incompatible with the spirit of modern rehabilitation. Although rehabilitation in the US criminal legal system remains an altogether secondary goal of punishment,[138] it is still imperative to highlight that the discrimination, abuses, and traumas that characterize the prison experience, including for trans people, largely fail the successful (re)habilitation of incarcerated (trans) people and, thus, they pose an obstacle to the social (re)integration of such people upon their release. Pathological environments, such as prisons, especially when they involve treatments or conditions that deprive people of their identity, personhood, and sense of self-worth, do nothing but precipitate or exacerbate the mechanisms of social exclusion, with the likely risk of failing the individual and social processes of (re)adjustment, (re)acceptance, and (re)integration. The effects of such a failure are particularly adverse for populations that are at a higher risk of marginalization, such as trans people, insofar as they reproduce criminogenic dynamics that are filled with discrimination and inequality, and often hard to interrupt.

[137] *See, e.g.*, Daniel Mears & William Bales, *Supermax Incarceration and Recidivism*, 47 Criminology 1131, 1155 (2009); David M. Bierie, *Is Tougher Better? The Impact of Physical Prison Conditions on Inmate Violence*, 56 Int'l J. Offender Therapy & Comp. Criminology 338 (2012).

[138] *See* Powell v. Texas, 392 U.S. 514 (1968); Rhodes v. Chapman, 452 U.S. 337 (1981); Padgett v. Stein, 406 F. Supp. 287, 296 (MD Pa. 1975) (holding that incarcerated people do not have a right to rehabilitation and government entities are not constitutionally compelled to rehabilitate).

5. Conclusion

This article has advanced constitutional and penal-theory arguments that may offer a more consistent support to the recognition of trans identity within the US prison system. In so doing, the article has sought to underscore that such a recognition is critical to protect trans people against the harms that hyper-gendered prison dynamics commonly impose on people with non-confirming gender. A corollary of the progressive interpretation of the clause that this article has proposed is the recognition of the illegitimacy of sex-segregated prison environments and the demand for an adequate placement for trans persons, including identity-corresponding options that respond to self-determined gender-identity needs.[139]

Admittedly, while such outcomes could meaningfully ameliorate the living conditions of incarcerated (trans) people, the only real resolution to prison hardships involves a massive decarceration process[140] and the implementation of alternative responses that embrace social justice values. Until then, the glaring inadequacy of existing prison conditions and policies remains the most pressing issue requiring urgent institutional reforms. It is imperative that such reforms do not leave behind the gender-motivated injustices that affect incarcerated trans.

[139] Among the many policy change proposals in the literature, see, e.g., Arkles, *supra* note 19; Mason, *supra* note 121, at 187–8; Szuminski, *supra* note 85, pt. III; Dolovich, *supra* note 51.

[140] *See also* D. Dangaran, *Abolition as Lodestar: Rethinking Prison Reform from a Trans Perspective*, 44 Harv. J. L. & Gender 161 (2021).