

2016

A Remedy for Male-to-Female Transgender Inmates: Applying Disparate Impact to Prison Placement

Janei Au

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/jgspl>

 Part of the [Civil Rights and Discrimination Commons](#), [Law and Gender Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Au, Janei (2016) "A Remedy for Male-to-Female Transgender Inmates: Applying Disparate Impact to Prison Placement," *Journal of Gender, Social Policy & the Law*: Vol. 24: Iss. 3, Article 2.

Available at: <http://digitalcommons.wcl.american.edu/jgspl/vol24/iss3/2>

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Journal of Gender, Social Policy & the Law by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

A REMEDY FOR MALE-TO-FEMALE TRANSGENDER INMATES: APPLYING DISPARATE IMPACT TO PRISON PLACEMENT

JANEI AU*

I. Introduction	372
II. Background	373
A. The Prison Rape Elimination Act.....	373
B. Placement According to Genitalia Is the Prevailing Method Used In U.S. State Prisons.....	375
C. Lack of Prison Accountability.....	377
1. Farmer v. Brennan: Deliberate Indifference.....	377
2. Mitchell v. Price.....	378
3. Use of Disparate Treatment and Disparate Impact in Equal Protection Claims	379
III. Analysis	381
A. Transgender Inmates are Extremely Unlikely to Successfully Establish a Deliberate Indifference Claim Before They are Sexually Assaulted Because Constructive Knowledge of a Known Risk Is Not Sufficient to Meet The Burden.	381
B. It is Nearly as Difficult for Individual Transgender Inmates to Bring Disparate Treatment Claims Because They Must Show They are Being Treated Differently Than Others Based on Their Gender Identity.	386
C. Transgender Inmates Should Be Able to Bring Disparate Impact Equal Protection Claims Because Placing Them	

* Note & Comment Editor, Volume 24, *American University Journal of Gender, Social Policy & the Law*, *Juris Doctor* Candidate, May 2016, American University Washington College of Law; B.A. 2011, University of North Carolina-Chapel Hill. Sincere thanks to Professors Carle, Frost, and Polikoff. I truly appreciate your support and guidance this year. I dedicate this comment to my daughter, Elora, whose presence brightens my days.

According to Their Genitalia Has an Adverse Impact on
Them Based On Their Gender Identity 392
IV. Policy Recommendation..... 397
V. Conclusion 399

I. INTRODUCTION

One afternoon, two guards and a sergeant entered the unit They put me in leg chains and chained my wrist to my waist. The three escorted me to a hospital bed within the infirmary I was then chained to the bed and my one-piece overalls were taken down. I was held down by the sergeant and one guard, while the other guard raped me. The men taunted, ‘So you want to be a woman,’ and ‘we’ll show you how to be a woman.’¹

This is just one account of a transgender woman being singled out for sexual violence solely because she identifies as a woman.² A pre-operative transgender woman is a person who was born a man and still has male genitalia, but understands herself to be a woman.³ In an environment already wrought with sexual abuse and violence, transgender women are especially vulnerable to sexual harassment and assault.⁴ In prisons, transgender female inmates become easy targets of sexual violence both because of animosity toward the expression of their gender identity, and because many have slight and effeminate builds.⁵ While not all of these

1. See *Survivor Testimony*, JUST DETENTION INT’L, http://www.justdetention.org/en/survivortestimony/stories/sarah_wa.aspx (last visited Jan. 18, 2015).

2. See *id.* (providing several individual accounts of transgender prisoner sexual assaults).

3. See Brenda V. Smith et al., *Policy Review And Development Guide: Lesbian, Gay, Bisexual Transgender, and Intersex Persons in Custodial Settings*, U.S. DEP’T OF JUST. NAT’L INST. OF CORRECTION, 3 (2013), https://www.wcl.american.edu/endsilence/documents/FINAL_LGBTIPolicyGuideAugust2013.pdf (explaining that many transgender people change their dress and appearance to match their gender identity, but while some undergo sex reassignment surgery, some do not).

4. See *id.* at 7 (finding that more than fifty-nine percent of transgender women reported prison sexual assault, a thirteen percent higher rate than non-transgender inmates).

5. See *Targets for Abuse: Transgender Inmates and Prison Rape*, JUST DETENTION INT’L, 2 (2013), <http://justdetention.org/wp-content/uploads/2015/10/FS-Targets-For-Abuse-Transgender-Inmates-And-Prisoner-Rape.pdf> (explaining that female transgender sexual abuse is fueled by ignorance and hostility).

rapes are perpetrated by correctional staff, rape is frequently used as a form of abuse by correctional officers and is at least tolerated by prison officials who dislike transgender individuals.⁶

This Comment argues that the current prevailing policy of placing pre-operative transgender women in male prisons creates an unequal risk of prison sexual assault.⁷ Part II explains the role transgender rape had on shaping the Prison Rape Elimination Act.⁸ Part III argues that the deliberate indifference standard is currently the only remedy for transgender female inmates who are sexually assaulted, and the standard is too difficult to meet.⁹ This section explains the difference between disparate treatment and disparate impact.¹⁰ It further contends that disparate impact can be used by transgender female inmates only after they have been assaulted, since they must show evidence that they were singled out.¹¹ Part IV suggests that all states should determine transgender inmate placement by using the council process and the Prison Rape Elimination Council recommendations in order to keep prison officials accountable and to protect transgender inmates.¹²

II. BACKGROUND

A. *The Prison Rape Elimination Act*

Congress passed the Prison Rape Elimination Act (PREA) in 2003, recognizing the prevalence of sexual assaults in prison.¹³ The Act created the National Prison Rape Elimination Commission (NPREC), which was charged with conducting a comprehensive study on the prison rape problem

6. *See id.* (stating that many officials disregard abuse complaints because they feel that transgender inmates deserve the abuse).

7. *See infra* Part III (arguing that transgender inmates should be able to bring disparate impact on the basis of their sexual identity).

8. *See infra* Part II (outlining the reasoning, creation, and results of the Prison Rape Elimination Act).

9. *See infra* Part III (explaining that most inmates lose cruel and unusual punishment arguments because they cannot establish that prison officials had actual knowledge of a substantial risk of sexual abuse on female transgender inmates).

10. *See infra* Part III.

11. *See infra* Part III (stating that without evidence of some act which proves the inmate was specifically targeted because of their gender identity, transgender inmates will always lose equal protection claims).

12. *See infra* Part IV (advocating for using a hybrid of two current committees as a model for state prison transgender placement councils).

13. *See* 42 U.S.C. § 15609 (2003) (passing unanimously in both houses of Congress).

and providing recommendations.¹⁴ In 2009, the NPREC released its report, which focused on the need for better intake screening for groups more vulnerable to sexual abuse, noting that male-to-female transgender individuals have a higher risk.¹⁵ The report goes on to discuss the amount of involvement and/or participation of prison officials in transgender sexual harassment and assaults, why they participate, and the effects of their involvement.¹⁶ The NPREC recommended that prisons not rely on isolated custody to protect at-risk inmates and discouraged housing at-risk groups in segregated units.¹⁷ In 2012, after consideration of the NPREC report, the Department of Justice (DOJ) released the first-ever federal rule setting national standards for preventing rape in correctional facilities.¹⁸ The new rule requires all correctional facilities that receive federal funding to screen LGBTI inmates to determine where they should be placed.¹⁹ The rule prohibits placing these inmates in separate facilities designated by their sexual orientation, unless the facility was established pursuant to a consent decree, legal judgment, or the inmates consented.²⁰ The rule does not allow transgender inmate placement solely on the basis of genitalia.²¹ The rule further instructs intake officials to consider the following factors when determining placement: (1) health and safety of the inmate; (2) potential security issues; and (3) consideration of the inmate's views regarding their safety.²² Federally funded facilities were given three years to comply with

14. See *Prison Rape Elimination Act*, NAT'L PREA RESOURCE CTR., <http://www.prearesourcecenter.org/about/prison-rape-elimination-act-prea> (publishing what would become a final Department of Justice Rule in August 2012, which includes required screening for inmates at risk of sexual abuse to inform housing, bed, work, education, and program assignments).

15. NAT'L PRISON RAPE ELIMINATION COMM'N REPORT 73 (2009), <https://www.ncjrs.gov/pdffiles1/226680.pdf> (explaining that gender-nonconforming individuals are often targeted in men's correctional facilities which have extremely masculine cultures).

16. See *id.* (finding that some corrections officials erroneously presume that male-to-female transgender inmates are homosexual and therefore are consenting to the sex).

17. See *id.* at 78 (recommending increased attention to whom at risk inmates were placed with).

18. Press Release, U.S. Dep't of Justice, Justice Department Releases Final Rule to Prevent, Detect and Respond to Prison Rape (May 17, 2012) <http://www.justice.gov/opa/pr/justice-department-releases-final-rule-prevent-detect-and-respond-prison-rape>.

19. National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37106 (Jun. 20, 2012) (to be codified at 28 C.F.R. pt. 115).

20. See *id.* (prohibiting such placement in juvenile facilities).

21. See *id.* (mandating case-by-case placement decisions to ensure inmate health and safety).

22. See *id.* (noting that for too long sexual abuse against prisoners has not been

the rule, expiring in June 2015.²³

B. Placement According to Genitalia Is the Prevailing Method Used In U.S. State Prisons

Although both the NPREC and the DOJ emphasize the importance of considering several factors when placing transgender women prisoners, state prisons continue to take the simplest route by placing inmates according to their genitalia at the time of confinement.²⁴ Five states (Idaho, Texas, Indiana, Utah, and Arizona) have opted to forego federal funds rather than to implement the federal PREA standards.²⁵

In both Illinois and the District of Columbia, committees have been established to evaluate individual inmates and determine the best placement of transgender women prisoners in prisons and jails.²⁶ In 2013, the Illinois Department of Corrections (DOC) instituted a new policy that created an intake committee of twelve people including a chief of mental health and a psychologist who specializes in gender identity issues.²⁷ When a transgender woman comes to the Illinois DOC, the transgender woman is first evaluated by a doctor for a physical and mental health exam.²⁸ The doctor talks to the inmate about his or her anatomy, sexual orientation, and any history of hormone therapy or sex reassignment surgeries.²⁹ Within

taken as serious as sex abuse outside of prison).

23. *See id.* (making the standards immediately binding on all Federal prisons).

24. *See Giraldo v. California Dep't of Corr. & Rehab.*, 168 Cal. App. 4th 231, 237 (Cal. Ct. App. 2008) (telling the story of Alexis Giraldo, a transgender woman, placed in one of the country's most violent male prisons despite a recommendation that she be placed in a woman's prison).

25. *See Rebecca Boone, Some States Refusing to Comply with Law Designed To Reduce Prison Rape*, HUFFINGTON POST (May 24, 2014 10:59 AM), http://www.huffingtonpost.com/2014/05/24/prison-rape-law_n_5383894.html (explaining that these states opted to forego federal funding because they believe it will cost too much money to implement and believing that state programs are sufficient).

26. *See Alison Flowers, A Decade in the Making: Revamped Policy Evaluates Transgender Prisoners in Illinois*, MEDILL JUST. PROJECT, (May 29, 2013), <https://www2.illinois.gov/idoc/news/IDOCintheNews/Documents/2013/Transgender.pdf>; *see also* Amanda Hess, *Trans Slammer: Are D.C.'s Transgender Inmates Still Screwed?*, WASHINGTON CITY PAPER, (Mar. 4, 2009), <http://www.washingtoncitypaper.com/blogs/sexist/2009/03/04/trans-slammer-are-dcs-transgender-inmates-still-screwed/>.

27. *See* Flowers, *supra* note 26, at 3 (explaining that while transgender inmate preference is considered, they will not be placed in any facility simply because that is their preference).

28. *See id.* at 4 (detailing transgender inmate intake procedures).

29. *See id.* (noting that the committee considers the amount of previous gender identity treatment received when deciding placement).

thirty days of the doctor's evaluation, the committee meets to discuss the inmate's placement.³⁰ While few transgender women want to be placed in a female facility, Illinois uses the presumption that placing female transgender inmates in female prisons is the safest housing policy.³¹

The Washington, D.C. committee is slightly more comprehensive, consisting of a doctor, mental health professional, correctional supervisor, a chief case manager, and an approved DOC volunteer who is either transgender or considered an expert in transgender affairs.³² Unlike Illinois, D.C. wardens can assign inmates to facilities inconsistent with the committee's recommendation.³³

Rikers Island is a pre-trial confinement compound in New York City made up of several separate housing units; however, it faces the same issues with transgender placement as state prisons.³⁴ For over thirty years, gay or transgender inmates were automatically segregated from the rest of the jail population.³⁵ This facility, known as "gay housing," was allegedly intended to protect gay and transgender prisoners from sexual violence, but at a cost.³⁶ This unit was shut down in 2005, and replaced with the option of protective custody for those gay and transgender inmates that desire protection, although this meant the inmates were isolated twenty-three hours a day.³⁷ At the end of 2014, the facility opened a housing unit specifically for male-to-female transgender inmates.³⁸ Although the facility has approximately enough beds to accommodate the typical population of transgender women, it will only house those transgender

30. See *id.* at 3 (detailing the committee's quick decision making).

31. See *id.* at 4 (justifying Illinois' preference for placing transgender women in female facilities because "Housing women based on their gender identity is the single most important thing that can be done to protect her from sexual abuse.").

32. Hess, *supra* note 26.

33. See *id.* (allowing a warden to go against the committee's vote so long as there is a written justification sent to the director of the DOC).

34. *Rikers Island Facilities*, CITY OF NEW YORK DEP'T OF CORRECTION, <http://www.nyc.gov/html/doc/html/about/locate-facilities.shtml> (last visited Mar. 8, 2015).

35. Paul von Zielbauer, *New York Set to Close Jail Unit for Gays*, N.Y. TIMES (Dec. 30, 2005), http://www.nytimes.com/2005/12/30/nyregion/30jails.html?_r=0.

36. See *id.* (reporting that the gay housing wing became dangerous because non-gay inmates would request the unit to prey on those they perceived as weak).

37. Christopher Mathias, *New York's Largest Jail to Open Housing Unit For Transgender Women*, HUFFINGTON POST (Nov. 18, 2014), http://www.huffingtonpost.com/2014/11/18/rikers-transgender-women_n_6181552.html.

38. See *id.*

inmates who wish to be moved there.³⁹ This unit will keep the inmates protected from the general population without subjecting them to twenty-three hours a day of isolation.⁴⁰ In addition, the New York City DOC is recruiting new staff that will be specially trained to work with transgender women.⁴¹

C. Lack of Prison Accountability

1. *Farmer v. Brennan: Deliberate Indifference*

The Eighth Amendment gives inmates the right to safe incarceration conditions.⁴² In 1994, Dee Farmer, a pre-operative transsexual woman, brought a landmark cruel and unusual punishment claim to the Supreme Court.⁴³ Under *Farmer*, an inmate has a viable Eighth Amendment claim based on deliberate indifference if the prison officials fail to take reasonable action to protect an inmate who faces a known substantial risk of serious harm.⁴⁴ After being moved several times for protection, Farmer was beaten and raped in her cell.⁴⁵ She lost her deliberate indifference claim because the court required the prison officials to have actual knowledge that she was at a substantial risk of rape.⁴⁶

Placement of transgender women in male facilities also extends to immigrant detention facilities, where the same risk of sexual assault exists.⁴⁷ In *Guzman-Martinez v. Correctional Corp. of America*, a

39. *See id.* (stating that thirty beds is sufficient for the number of transgender women at Riker's Island at any given time).

40. *See id.*

41. Press Release, NYC Dep't of Corr., DOC Opens New Housing Unit for Transgender Women on Rikers Island (Nov. 18, 2014), http://www.nyc.gov/html/doc/downloads/pdf/press/DOC_OPENS_NEW_HOUSING_UNIT_n.pdf. (noting the extra precautions taken to keep transgender women safe).

42. U.S. CONST. amend. VIII.

43. *See Farmer v. Brennan*, 511 U.S. 825, 829 (1994) (arguing that the prison should have known that since she had breast implants, wore her prison uniform in a feminine manner, and had tried to remove her male genitalia, she was especially vulnerable to sexual assault).

44. *See id.* at 837 (rejecting adoption of an objective test which would allow liability whether a risk of serious harm was known or should have been known).

45. *See id.* at 830 (noting that Farmer was transferred from a correctional institute to a penitentiary, which typically has heightened security due to housing more violent prisoners).

46. *See id.* at 837 (finding that since Farmer never expressed safety concerns to the prison officials, they did not have actual knowledge that she was potentially in danger).

47. *See Guzman-Martinez v. Corr. Corp. of Am.*, No. CV 11-02390-PHX-NVW, 2012 U.S. Dist. LEXIS 97356, at *4 (D. Ariz. July 13, 2012).

transgender detainee was housed with male detainees.⁴⁸ While there, a correctional officer sexually abused her and then threatened to “give” her to the male detainees.⁴⁹ Even after she reported the abuse, the facility did not move her to a single occupancy cell.⁵⁰ Similar to *Farmer*, the court found that there was no evidence the detention facility exercised deliberate indifference by placing her in a male facility.⁵¹

In *Inscoc v. Yates*, however, the court did find prison officials were deliberately indifferent.⁵² The difference in this case is that a prison guard actually opened Inscoc’s cell for two male inmates who proceeded to take turns brutally raping her.⁵³ The court found sufficient evidence in the guard’s actions to show that he knew letting two male inmates into a transgender woman’s cell would put her at a substantial risk of sexual assault.⁵⁴

2. *Mitchell v. Price*

Mitchell, a transgender woman held at a Wisconsin jail, brought an equal protection suit against the facility and six corrections officers.⁵⁵ After Mitchell was transferred to the Public Safety Building, inmates began to taunt and harass her.⁵⁶ She complained and was moved to another pod, however, three days later she was being transferred back.⁵⁷ The court found that Mitchell could not substantiate an equal protection claim based on her transfer.⁵⁸ The court stated that both parties agreed that Mitchell’s equal protection claims based on her transgender status should receive

48. *See id.* (noting she was continually sexually harassed by other detainees).

49. *See id.* at *8 (explaining that the correctional officer made Guzman watch as he ejaculated into a cup and made her drink it).

50. *See id.* at *4.

51. *See id.* at *8 (holding that a detainee’s desire to be free from discomfort does not amount to loss of a liberty interest).

52. *See Inscoc v. Yates*, No. 1:08-cv-01588-DLB PC, 2009 U.S. Dist. LEXIS 92012, at *7 (E.D. Cal. Sept. 18, 2009).

53. *See id.* (noting that the two inmates violently raped her and she was denied medical aid for several hours).

54. *See id.* (finding the guard guilty of deliberate indifference).

55. *Mitchell v. Price*, No. 11-cv-260-wmc, 2014 U.S. Dist. LEXIS 171561, at *4 (W.D. Wis. Dec. 10, 2014) (noting that only the correctional officer who treated her differently and called her a hermaphrodite survived summary judgment).

56. *See id.* (detailing three days of inmates calling her a faggot and threatening violence).

57. *See id.* at *9 (citing an incident report in which one deputy told believed the hermaphrodite should return to her original cell).

58. *See id.* at *32 (finding no evidence that Mitchell’s transfer to segregation was any different treatment than received by other inmates who break rules).

heightened scrutiny, although not all courts hold this to be true.⁵⁹ In order to meet her burden in an equal protection claim, a transgender female inmate must prove that: (1) she has been intentionally treated differently from other biologically male inmates; and (2) there is a substantial relationship between the difference in the treatment the two groups received and an important government interest.⁶⁰ The *Mitchell* court found in favor of five out of the six defendants because Mitchell could not establish the requisite discriminatory intent needed for an equal protection claim.⁶¹ However, the court allowed Mitchell to continue with her equal protection claim against one defendant because this defendant's actions demonstrated discriminatory animus.⁶²

3. *Use of Disparate Treatment and Disparate Impact in Equal Protection Claims*

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees because they are part of a protected class.⁶³ In 2012, the EEOC held that discrimination against a transgender person is discrimination because of sex and is prohibited by Title VII.⁶⁴ However, applying this to prison sexual abuse cases has proven difficult.⁶⁵

59. *See id.* at *19-20 (noting that the Seventh Circuit has not yet decided that transgender individuals are entitled to heightened scrutiny). *But see* Glenn v. Brumby, 663 F.3d 1312, 1319 (11th Cir. 2012) (holding that all persons, whether transgender or not, are protected from discrimination based on gender stereotypes); Braninburg v. Coalinag State Hosp., No. 1:08-CV-01457-MHM, 2012 U.S. Dist. LEXIS 127769, at *22 (E.D. Cal. Sept. 6, 2012) (holding that it is not apparent that transgender people are a suspect class).

60. *See Mitchell*, 2014 U.S. Dist. LEXIS 171561, at *22 (requiring a transgender woman to show she was treated differently than others who are similarly situated). *But see* Nabozny v. Podlesny, 92 F.3d 446, 454 (7th Cir. 1996) (holding that defendant negligence is not sufficient to establish intentional disparate treatment).

61. *Mitchell*, 2014 U.S. Dist. LEXIS 171561, at *24 (granting summary judgment because Mitchell had no proof the officers acted based on her transgender status).

62. *See id.* (holding that a jury could reasonably infer that a staff member making decisions about an inmate known to have special needs based on her transgender status would have been aware of a substantial risk to her safety).

63. 2 U.S.C. § 1311 (1964) (prohibiting adverse employment actions based on an individual's race, color, religion, sex, or national origin).

64. *See* Mia Macy, EEOC Appeal No. 0120120821 at *1 (Apr. 20, 2012), <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt> (classifying transgender discrimination as gender identity discrimination); *see also* Exec. Order No. 13152, 65 Fed. Reg. 26,115 (May 2, 2000) (amending Executive Order 11478 to include sexual orientation protection).

65. *See* Braninburg v. Coalina State Hosp., No. 1:08-CV-01457-MHM, 2012 U.S. Dist. LEXIS 127769, at *22 (E.D. Cal. Sept. 6, 2012).

In *Braninburg v. Coalings State Hospital*, a transgender inmate lost her equal protection claim because she did not have evidence of either discrimination or discriminatory intent based on her transgender status.⁶⁶ Although the *Braninburg* court did not agree, many courts have now found that transgender individuals are a protected class, entitled to heightened scrutiny.⁶⁷ However, the *Braninburg* court did concede that transgender inmates could bring an equal protection claim under the rational basis test, but only if they are a member of an identifiable class.⁶⁸ Still, *Braninburg* could not show that she was intentionally treated differently from the other biologically male inmates in the hospital based on her transgender status because the court did not find circumstantial evidence sufficient to establish her claim.⁶⁹

The court refused to consider that *Braninburg*, as the only transgender woman inmate, was the only inmate assaulted by prison guards and was then left alone in an open hospital ward where she was raped.⁷⁰ The court found that these facts were not sufficient to overcome the lack of evidence showing the guards had the requisite discriminatory intent.⁷¹ The court even refused to consider transgender individuals as an identifiable class of inmates.⁷² In fact, the court held that she did not meet any of the elements required to establish an equal protection claim based on her transgender status.⁷³

While disparate treatment claims have historically been brought for

66. *See id.* at *23 (dismissing her claim because she only offered conclusory statements that her sexual abuse was based on discrimination because she is transgender).

67. *See Mitchell*, 2014 U.S. Dist. LEXIS 171561, at *22 (finding transgender inmates a suspect class).

68. *Braninburg*, 2012 U.S. Dist. LEXIS 127769, at *23 (dismissing her claim because she only offered conclusory statements that her sexual abuse was based on discrimination because she is transgender).

69. *See id.* at *23 (holding that when a suspect classification is not present, a plaintiff can establish an equal protection claim by showing that similarly situated individuals were treated differently without a rational relationship to a legitimate state purpose).

70. *See id.* at *22, (dismissing her complaint when *Braninburg* could only offer that she was in fact, a pre-operative transgender woman).

71. *See id.* (holding that *Braninburg* failed to offer any evidence she was targeted with discriminatory intent based on her gender identity).

72. *See id.* (finding she did not show that she was a member of an identifiable class entitled to equal protection).

73. *See id.* at *23 (stating *Braninburg* also did not show she was intentionally treated differently than others similarly situated or that there was no rational reason for the difference in treatment).

employment discrimination, the *Mitchell* court allowed this argument in her prison claim.⁷⁴ Likewise, disparate impact claims are now being extended beyond employment law into fair housing and fair credit reporting claims.⁷⁵ So far, no transgender inmate has brought a disparate impact claim for prison sexual abuse.⁷⁶ Disparate impact claims are traditionally applied to facially neutral employment practices and generally brought on the basis of gender or race, although they have also recently been brought based on transgender status.⁷⁷ To establish a disparate impact claim, a plaintiff must identify a specific discrimination practice; show that the practice has a disparate impact on a protected class; and show the policy causes the disparate impact.⁷⁸ As evidenced by *Mitchell*'s use of disparate treatment outside of the employment context, disparate impact claims are not limited to employment discrimination cases.⁷⁹

III. ANALYSIS

A. Transgender Inmates are Extremely Unlikely to Successfully Establish a Deliberate Indifference Claim Before They are Sexually Assaulted Because Constructive Knowledge of a Known Risk Is Not Sufficient to Meet The Burden.

Prison officials have a constitutional duty to take reasonable measures to guarantee inmate safety.⁸⁰ However, this only requires prison officials to take action to prevent sexual assaults if they have actual knowledge there is a substantial risk to that inmate.⁸¹ Because prisoners are required to present

74. See *Mitchell v. Price*, No. 11-cv-260-wmc, 2014 U.S. Dist. LEXIS 171561, at *23 (W.D. Wis. Dec. 10, 2014) (allowing *Mitchell* to argue disparate treatment in her prison abuse claim).

75. See *Adkins v. Morgan Stanley*, No. 12-CV-7667, 2013 U.S. Dist. LEXIS 104369, at *24 (S.D.N.Y. July 25, 2013) (stating that there is little doubt facially neutral practices resulting in a disparate impact amount to unlawful discrimination under the Fair Housing Act).

76. See *Mitchell*, 2014 U.S. Dist. LEXIS 171561, at *23 (noting that disparate treatment claims are traditionally brought in employment discrimination cases).

77. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (explaining that facially fair employment practices that are discriminatory in application violate Title VII).

78. See 42 U.S.C.S. § 2000e-2(k)(1)(A) (1964).

79. See *Mitchell*, 2014 U.S. Dist. LEXIS 171561, at *22.

80. See *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); see also *Rhodes v. Chapman*, 452 U.S. 337, 347-49 (1981) (holding that although the Constitution does not mandate comfortable prisons, being violently assaulted in prison is not part of the penalty imposed on criminals).

81. See *Farmer*, 511 U.S. at 833 (noting that not every injury suffered by one

evidence both that the prisoner was at a substantial risk of harm and that the prison officials knew of and disregarded this risk, without proof of a previous sexual assault or sexual assaults of other transgender inmates, a transgender woman is likely to lose a deliberate indifference claim.⁸² As in *Farmer*, proving a prison official knew of a significant risk of transgender sexual assault is what disposes of most deliberate indifference claims.⁸³ The *Farmer* court declined to define deliberate indifference under tort recklessness standards, which would have allowed many more transgender inmates to meet their burden.⁸⁴ Instead, the court chose to apply criminal law recklessness, a much higher burden.⁸⁵ The *Farmer* court discarded Farmer's proposed deliberate indifference test because the term "deliberate indifference" is in neither the Constitution nor the statute.⁸⁶ Yet, the court had no issue requiring prison officials to have actual or constructive knowledge of a risk for the inmate to be held liable, despite the fact that, just like deliberate indifference, neither of those terms appear in either the Constitution or PREA.⁸⁷ Therefore, because neither the Constitution nor PREA defines deliberate indifference, the court arbitrarily chose to apply it in a way that burdens prisoner plaintiffs.⁸⁸

Farmer's deliberate indifference claim failed because she could not prove that prison officials knew her specific cell mate was a substantial risk to her.⁸⁹ Although prison officials have a duty to protect inmates from

inmate at the hands of another is constitutionally protected); *see also* *Hudson v. McMillian*, 503 U.S. 1, 6-8 (1992) (holding that a prison official must have a sufficiently culpable state of mind to violate the Eight Amendment).

82. *See Farmer*, 511 U.S. at 838 (stating that a prison official's failure to perceive a significant risk does not amount to punishment, and thus cannot rise to a claim of cruel and unusual punishment).

83. *See D.B. v. Orange Cnty.*, No. 6:13-cv-434-Orl-31DAB, 2014 U.S. Dist. LEXIS 130993, at *14-17 (M.D. Fla. Sept. 18, 2014) (granting summary judgment for the county although the plaintiff reported harassment and fear of sexual assault and finding a reasonable fact finder would not find adequate evidence that a substantial risk existed).

84. *See generally Farmer*, 511 U.S. at 836-41.

85. *See id.* at 842 (rejecting the argument that absent an objective deliberate indifference test, prison officials will be free to ignore prisoner safety risks).

86. *See id.* at 840 (referring to the term as "judicial gloss," which does not necessarily govern).

87. *See id.* at 837, 840; *see also Canton v. Harris*, 489 U.S. 378, 391-92 (1989) (finding liability appropriate when policy makers are on notice of a particular need).

88. *See Farmer*, 511 U.S. at 840-41 (explaining that the court is not required to interpret deliberate indifference under tort recklessness absent a definition in either the Constitution or the statute at issue).

89. *See id.* at 840 (holding that prison officials who lack knowledge of a risk have not inflicted punishment).

other prisoners' violence, Farmer could not show that prison officials consciously disregarded previous threats to her safety by placing her in a cell with her rapist.⁹⁰

Leaving an inmate, like Farmer, in conditions where she is vulnerable to sexual assault is a sufficiently serious deprivation of human needs, which amounts to a violation of an inmate's Eighth Amendment rights.⁹¹ Being protected from any unwanted physical contact, and especially sexual assault, is a basic human need.⁹² A transgender inmate has little ability to protect herself from conditions of confinement which put her at a substantial risk of sexual assault, including being forced to shower, expose formed breasts, and change in front of male inmates.⁹³

This higher burden makes it nearly impossible for any inmate, but especially a transgender inmate, to bring a successful deliberate indifference claim because transgender inmates must show prison officials were actually aware of their higher risk of sexual assault.⁹⁴ By requiring inmates to prove prison officials actually knew of a substantial risk of harm rather than that they *should* have known, the courts have essentially granted prison officials with boundless immunity.⁹⁵

This standard creates a presumption that prison officials are unaware of a substantial risk of sexual assault to transgender inmates which can only be overcome by showing there is no question they were not aware.⁹⁶ In order for Farmer to have established that the prison officials knew there was substantial risk of her being raped, the *Farmer* court would have required some evidence that her cell mate had specifically threatened her prior to her

90. See *id.* at 833 (noting that protection from other inmates is a condition of confinement subject to the Eighth Amendment); see also *Withers v. Levine*, 615 F.2d 158, 161 (4th Cir. 1980) (finding prison officials deliberately indifferent where there was a pervasive risk of harm to inmates from other prisoners and the officials failed to respond).

91. See *Wilson v. Seiter*, 501 U.S. 294, 301-03 (1991) (applying the objective prong of the deliberate indifference test).

92. See *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (noting that a prison official's act or omission must result in the denial of basic life necessities).

93. See *JUST DETENTION INT'L*, *supra* note 5, at 1-2 (explaining that transgender women face extreme danger in male prisons).

94. See *Farmer*, 511 U.S. at 835-36 (requiring an inmate to prove prison officials were aware of facts that infer existence of a substantial risk of harm and for him to draw the inference).

95. See *id.* at 848 (concluding that the district court may have placed decisive weight on the fact that Farmer did not notify prison officials he feared for his safety).

96. See *id.* at 841-42 (refusing to hold prison officials liable if they are unaware of a substantial risk of harm to an inmate, even when the risk is obvious).

being moved into that cell and that she had reported the threat.⁹⁷ Despite the court's contention that requiring the subjective deliberate indifference test would not require inmates to be injured by other inmates in order to obtain an injunction, in application, that is precisely what this test requires for transgender inmates.⁹⁸ Farmer had silicone breast implants, wore her prison issued clothing in a feminine manner and even had a failed operation to remove her male sex organs.⁹⁹ Yet the court maintained that this, combined with known past threats of violence and a transfer to a maximum security prison, was insufficient to establish that she was plainly at risk for sexual assault and that prison officials must have known this.¹⁰⁰

The difference in the outcomes of *Farmer v. Brennan* and *Inscoc v. Yates* demonstrates how difficult this burden is to meet.¹⁰¹ In *Inscoc*, a transgender inmate won her deliberate indifference claim after prison guards actively participated in increasing her risk of sexual assault.¹⁰² After she was finally treated for her first sexual assault, she was moved to a secluded area and assaulted again.¹⁰³ But for the prison guard opening the cell for Inscoc's rapists, the court would likely have granted the defendant's motion for summary judgment.¹⁰⁴ Based on the outcome in *Farmer*, if the prisoners had attacked Inscoc without guard assistance she would have had difficulty demonstrating that the guards had actual

97. See *id.* at 842-43 (explaining that evidence of a longstanding and well-documented risk of inmate attacks would be sufficient for a jury fact finder to infer the official must have known about the risk); see also *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923).

98. See *Farmer*, 511 U.S. at 845 (applying the subjective test does not deny an injunction to prisoners who clearly prove their conditions of confinement are unsafe and life-threatening).

99. See *id.* at 829 (explaining that Farmer had also undergone estrogen therapy and resorted to black market testicle removal).

100. See *id.* (noting that all the parties concede that Farmer projects female characteristics).

101. See *id.* at 829-30 (finding that the prison guards did not have actual knowledge Farmer was at risk of rape); see also *Inscoc v. Yates*, No. 1:08-cv-01588-DLB PC, 2009 U.S. Dist. LEXIS 92012, at *8-9 (E.D. Cal. Sept. 18, 2009) (holding the prison guards liable when Inscoc had already been attacked and a guard opened her cell for other inmates).

102. *Inscoc*, 2009 U.S. Dist. LEXIS 92012, at *8 (delaying Inscoc's medical attention because a supervisor refused to believe a guard aided in her rape after another guard let them into her cell).

103. See *id.* at *8-9 (finding that a corrections officer responded to Inscoc's report by telling her she likely enjoyed it).

104. See *id.* at *7-8 (providing a reminder that prison officials must be subjectively aware of harm for a deliberate indifference claim to proceed).

knowledge that she was at risk of sexual assault.¹⁰⁵ It would be difficult for any court to hold that a prison guard who opened a door to a female transgender inmate's cell for two male inmates did not know his action subjected her to a substantial risk of sexual assault.¹⁰⁶

Although *Farmer* defined deliberate indifference somewhere between negligence and acts or omissions for the purpose of causing harm, in practice, acts or omissions intended to harm transgender inmates are required to survive summary judgment, and ultimately win a claim.¹⁰⁷ Deliberate indifference claims require such a heavy showing of intent that only inmates who, like *Inscoe*, can show prison officials participated in their assault have a chance for their case to reach trial.¹⁰⁸ Had either an inmate or guard assaulted *Inscoe* in the hospital or a corridor, or even if her cell mate had raped her, as in *Farmer* and *Braninburg*, her claim would probably have been dismissed.¹⁰⁹ In both *Farmer* and *Braninburg*, the transgender inmates were assaulted in their sleeping quarters without prison officials being physically present or participating, which is largely why they each lost their lawsuits.¹¹⁰

Short of a prison official actively participating in her assault, a transgender inmate would have to be subjected to repeated sexual assaults without the officials acting to survive summary judgment.¹¹¹ Furthermore, following *Farmer*, courts would likely require written reports of previous sexual assaults or threats of sexual assault to show prison officials were actually aware of a substantial risk of sexual assault.¹¹² This written report

105. See *Farmer*, 511 U.S. at 844-45 (finding insufficient evidence the guards knew *Farmer*'s cell mate would rape her).

106. *Inscoe*, 2009 U.S. Dist. LEXIS 92012, at *8 (holding that *Inscoe* stated a cognizable Eighth Amendment claim against the defendant because he knew of and disregarded an excessive risk to her health and safety).

107. *Farmer*, 511 U.S. at 836 (equating deliberate indifference to criminal law recklessness).

108. See *Inscoe*, 2009 U.S. Dist. LEXIS 92012, at *8 (finding that a guard's participation in her rape was clear evidence of deliberate indifference).

109. See *Farmer*, 511 U.S. at 839, 841 (holding that to act recklessly a prison official must "consciously disregard" a substantial risk of harm to an inmate).

110. See *id.* at 830-31 (noting *Farmer* was assaulted at night in her cell); *Braninburg v. Coalinga State Hosp.*, No. 1:08-cv-01457-MHM, 2012 U.S. Dist. LEXIS 127769, at *8-9 (E.D. Cal. Sept. 6, 2012) (detailing *Braninburg*'s rape in an open prison hospital ward).

111. See *Farmer*, 511 U.S. at 830 (referencing the fact that *Farmer* was placed in the cell she was raped in after previously being segregated for safety concerns).

112. See *Mitchell v. Price*, No. 11-cv-260-wmc, 2014 U.S. Dist. LEXIS 171561, at *28, *31 (W.D. Wis. Dec. 10, 2004) (allowing *Mitchell*'s claim to proceed only against the guard who would have seen reports of threats she received in previous cell assignments and known she was vulnerable to sexual assault).

requirement, however, amounts to precisely the omission the *Farmer* Court insisted was not required to meet the deliberate indifference standard.¹¹³

B. It is Nearly as Difficult for Individual Transgender Inmates to Bring Disparate Treatment Claims Because They Must Show They are Being Treated Differently Than Others Based on Their Gender Identity.

In *Glenn*, a transgender woman was successful in her disparate treatment claim because she had direct evidence that her employer fired her for being transgender.¹¹⁴ Glenn's boss openly admitted the adverse employment action was based on his dislike and discomfort with her transgender transition.¹¹⁵ Though Glenn was fortunate to have direct evidence of her unequal treatment, unlike the prisoners' lawsuits, employment disparate impact claims do not require it.¹¹⁶ In theory, no equal protection claim requires direct evidence of discriminatory treatment.¹¹⁷ For this reason, most disparate treatment employment claims succeed based on circumstantial evidence from which the jury can infer discrimination.¹¹⁸ However, the opposite is true of prison equal protection claims.¹¹⁹ Courts require prisoners to provide direct evidence showing they were discriminated against.¹²⁰

It is not as difficult to establish that a transgender woman is being treated differently than a non-transgender male inmate as it is to prove that she is

113. See *Farmer*, 511 U.S. at 836-37 (stating that failing to act in response to a substantial risk of serious harm is the equivalent of reckless disregard).

114. U.S. CONST. amend. XIV, § 1; *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2012) (finding discrimination based on gender non-conformity is sex-discrimination and protected under the Equal Protection Clause).

115. See *Glenn*, 663 F.3d at 1320 (calling a man wearing women's clothing unnatural and unsettling).

116. See *id.* at 1320 (stating that a plaintiff can offer direct or circumstantial evidence to prove discrimination); see also *Wright v. Southland Corp.*, 187 F.3d 1287, 1300 (11th Cir. 1999).

117. See *Wright*, 187 F.3d at 1293-94 (outlining standards of proof for equal protection claims).

118. See, e.g., *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981) (requiring a plaintiff to produce only enough evidence to allow the trier of fact to infer unequal treatment).

119. See *Mitchell v. Price*, No. 11-cv-260-wmc, 2014 U.S. Dist. LEXIS 171561, at *25, *23 (dismissing her complaint when she could not prove intent). *Contra Burdine*, 450 U.S. at 256 (allowing either a direct showing of unequal treatment or an indirect showing the defendant's proffered reason was pretext).

120. See *generally Mitchell*, 2014 U.S. Dist. LEXIS 171561, at *23 (refusing to accept circumstantial evidence as proof of discrimination).

being treated differently because she is transgender.¹²¹ Inmates, unlike Glenn, do not have access to the same amount of evidence supporting their discrimination as non-imprisoned employees.¹²² The burden for Mitchell was that absent a confession of discriminatory intent from one of her defendants, she had no evidence until an incident report was finally filed.¹²³ Because Mitchell was an inmate rather than an employee, she could not benefit from a presumption of discrimination.¹²⁴ Had she been an employee, she could have (1) argued the elements of her disparate impact claim; (2) the defendant would have had to rebut the presumption; and (3) she would have another chance to show the defendant's reason for his behavior was pretext for discrimination.¹²⁵ Instead, all but one of Mitchell's complaints were dismissed without the opportunity to persuade the trier of fact that she met the elements of her prima facie case.¹²⁶

Mitchell was unable to establish discriminatory intent against all but one defendant because the court would not accept that Mitchell's guards' verbal harassment and apparent mocking of her transgender status, including one telling the other to look at her breasts and another calling her a hermaphrodite, was evidence the guards were treating her adversely *because* she is transgender.¹²⁷ Had this been an employment case, a jury would be allowed to infer that calling a transgender woman a "hermaphrodite," pointing and laughing at her breasts, and transferring her based on perceptions of her transgender status constituted disparate treatment and discrimination because of sex.¹²⁸

121. *See id.* at *24-25 (noting that Mitchell was allowed to bring a disparate treatment claim against one guard for throwing mail at her, but failed to provide evidence showing he did so because she is transgender).

122. *See id.* at *24 (dismissing the complaint against one defendant because Mitchell failed to prove non-transgender inmates were treated better or provide detailed evidence that the defendant humiliated her in front of the other defendants).

123. *See id.* at *27-29 (finding defendant's defense of calling her a "hermaphrodite" evidence of discriminatory intent).

124. *See Burdine*, 450 U.S. at 256 (noting the plaintiff has and maintains the burden of persuasion, not proof).

125. *See id.* at 250 (outlining the burden shifting analysis in employment discrimination disparate treatment claims).

126. *See Mitchell*, 2014 U.S. Dist. LEXIS 171561, at *24-25, *27-28, *32 (dismissing her claims against four prison officials for lack of evidence of discriminatory intent based on her transgender status).

127. *See id.* at *26 (holding that one guard putting his hands in her lunch was unprofessional but did not violate the Constitution because she lacked evidence he touched her food because she is a transgender woman).

128. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-52 (1989) (finding an employer discriminated against Plaintiff based on her gender non-conformity when executives remarked on her manly speech, clothing, and manner and made promotion

However, the *Mitchell* court did hold that a jury could infer discriminatory intent when the guard moved her back into the cell where she was being threatened and was ultimately raped, although there were reports of the harassment and threats reasonably available to the guard.¹²⁹ Notably, this claim only survived after documented threats were recorded, and Mitchell had already been subjected to intense sexual harassment.¹³⁰ But for the written reports, this claim would also have been dismissed.¹³¹

Transgender inmates are uniquely vulnerable, not just to the conditions of confinement, but also because of their inability to protect themselves legally.¹³² While employees complaining of unequal treatment can use other employees, work emails, or statistical evidence to support their claims, inmates generally only have their own testimony.¹³³ After her multiple complaints of sexual harassment were ignored, Mitchell finally filed a written incident report.¹³⁴ This is the only reason she succeeded in her final claim because courts simply do not give circumstantial evidence the same weight in prison claims as they do in a civil employment action.¹³⁵

Braninburg, on the other hand, had no evidence that she was being targeted because of her transgender status.¹³⁶ That, combined with the fact that the Braninburg court did not consider her to be part of a protected class, left her unable to successfully bring a lawsuit on equal protection grounds.¹³⁷ Because the court would not accept circumstantial evidence as

decisions based on these factors).

129. See *Mitchell*, 2014 U.S. Dist. Lexis 171561, at *30-32 (denying summary judgment because the defendant was a staff member making decisions about a special needs inmate and would have seen the threat reports before placing her back in the pod where she was attacked).

130. See *id.* at *30-31 (drawing attention to the fact that the guard voiced his opinions of Mitchell through the presence of a written harassment report).

131. See *id.* at *31.

132. See *id.* at *27-28 (dismissing a separate complaint because Mitchell only presented her own testimony that the defendant was unduly rough when transporting her).

133. See *id.* (noting that Mitchell only had her own testimony to support her claims).

134. See *id.* at *28 (finding no evidence in the record that prison officials ignored a threat to Mitchell's safety).

135. See *id.* at *31-32 (allowing her last claim to proceed based on direct evidence of discriminatory animus).

136. See *Braninburg v. Coalinga State Hosp.*, No. 1:08-cv-01457-MHM, 2012 U.S. Dist. LEXIS 127769, at *22 (E.D. Cal. Sept. 6, 2012) (dismissing her equal protection claim for lack of evidence of transgender discrimination).

137. See *id.* at *22-23 (stating that Braninburg was not a member of a suspect class; therefore, the state only had to meet the rational basis test).

sufficient to establish her equal protection claim, Braninburg could not prove she was intentionally treated differently than other biological males housed in the hospital ward.¹³⁸

Since the intent element is so difficult to establish, inmates who have been repeatedly placed with their rapists or have direct evidence of guard animosity toward their transgender status have the best chance of establishing a viable disparate treatment claim.¹³⁹ Disparate treatment claims are likely to survive summary judgment when the inmate was placed in a cell or area with an increased risk of sexual assault because of the guards' personal feelings toward transgender women.¹⁴⁰ Transgender inmates are also likely to survive summary judgment on their disparate treatment claims when there is a sexual assault or harassment report filed.¹⁴¹

In *Inscoe*, the court held that a transgender woman had been subjected to cruel and unusual punishment when a guard allowed other inmates to enter her cell and rape her.¹⁴² Because the court found that the guards' actions amounted to deliberate indifference to a substantial and known risk of sexual assault, *Inscoe* would also likely succeed on a disparate treatment claim.¹⁴³ *Inscoe* could show that she was targeted because she is a transgender woman when the guard let two males enter her cell and shut the door.¹⁴⁴ The guard did not allow her attackers to enter non-transgender male or even homosexual male cells, which shows she was treated

138. *See id.* at *23 (holding that Braninburg did not show she was treated differently than other biologically male inmates).

139. *See id.* (finding she did not show that she was a member of an identifiable class entitled to equal protection).

140. *See Inscoe v. Yates*, No. 1:08-cv-01588-DLB PC, 2009 U.S. Dist. LEXIS 92012, at *8 (E.D. Cal. Sept. 18, 2009) (finding a cognizable cruel and unusual punishment claim when a guard let two inmates into a transgender woman's cell where they raped and beat her).

141. *See Mitchell v. Price*, No. 11-cv-260-wmc, 2014 U.S. Dist. Lexis 171561, at *31 (W.D. Wis. Dec. 10, 2014) (surviving summary judgment largely because the guard was aware of a written harassment report).

142. *See id.* at *29 (allowing a disparate treatment claim when Mitchell had already been sexually harassed and a guard, who knew this and took issue with her transgender status, moved her back to the cell she was ultimately raped in).

143. *See Farmer v. Brennan*, 511 U.S. 825, 836 (1994) (requiring a purposeful action or inaction); *see also Mitchell*, 2014 U.S. Dist. LEXIS 171561, at *22 (requiring intent to prove disparate impact claim); *Inscoe*, 2009 U.S. Dist. LEXIS 92012, at *8-10 (finding direct evidence of intentional targeting of a transgender inmate).

144. *See Inscoe*, 2009 U.S. Dist. LEXIS 92012, at *8-9 (holding the warden liable when he told her there was nothing he could do and directing her to report any future attacks).

differently than other similarly situated inmates.¹⁴⁵ The guard had reason to know that the other inmates wanted to enter the cell to assault a transgender woman; thus, she can show he intentionally allowed harm to come to her because she is transgender.¹⁴⁶ Therefore, she could have established both that she was treated differently than others who are similarly situated, male inmates, and that she was treated differently because of her transgender status.¹⁴⁷

The facts of *Guzman*, if applied to a non-pretrial detainee, would clearly help establish a disparate treatment claim.¹⁴⁸ *Guzman* could easily show that a detention officer who specifically singled her out for harassment and abuse treated her differently from other biologically male detainees.¹⁴⁹ After reporting the detention officer, she remained in the male housing unit and was sexually assaulted and threatened with retaliation by another detainee.¹⁵⁰ *Guzman* is a perfect example of a transgender inmate being repeatedly targeted because of her transgender status.¹⁵¹ The detention officials knew from her report of the detention officer that she was being targeted as a transgender woman and still did not place her in a single occupancy cell.¹⁵² Therefore, a fact finder could reasonably infer that the detention facility's actions were based on her transgender status.¹⁵³ Her reports of both the guard and detainee attacks and the facility's failure to protect her are evidence of unequal treatment.¹⁵⁴ Of course, she would have to show that male detainees who were vulnerable to attacks were moved to single occupancy cells for their protection, in accordance with the

145. See *id.* at *8 (noting that the guard specifically buzzed Inscoc's attackers into her cell).

146. See *id.*

147. See *id.* at *9. (noting that the Prison Rape Elimination Act does not create a private right of action).

148. See *Guzman-Martinez v. Corr. Corp. of Am.*, No. CV 11-02390-PHX-NVW, 2012 U.S. Dist. LEXIS 97356, at *7 (D. Ariz. July 13, 2012) (noting that the American Correctional Association Standards require that single occupancy cells be available for inmates likely to be exploited or victimized by other inmates).

149. See *id.* at *8 (noting that the officer repeatedly questioned her sexuality and asked whether other detainees saw her breasts before forcing her to drink his ejaculate).

150. See *id.* at *8-9 (grabbing her breasts and watching her urinate and get dressed; threatening more attacks from him and others if she reported him).

151. See *id.* (being continually targeted by both prison officials and other inmates).

152. See *id.* at *9 (noting that *Guzman-Martinez* reported the incident to the facility immediately but delayed reporting it to the police for fear of retaliation since the facility had failed to protect her from other attacks).

153. See *id.* (noting the facility officials did not act after she reported her abuse).

154. See *id.* at *4-9 (accepting as true her accounts of sexual abuse at the detention center).

established standards.¹⁵⁵

Unfortunately, similar to filing deliberate indifference claims, most transgender inmates have to wait to be attacked before they can file a successful disparate treatment claim because the burden of establishing intent is too difficult.¹⁵⁶ Because the courts in practice require direct evidence of intentional discrimination on the basis of their transgender status, inmates are forced to sit and wait to be threatened, humiliated, and assaulted.¹⁵⁷ This scenario is completely the opposite of employment discrimination claims, where disparate treatment claims are considered easier to prove.¹⁵⁸

In contrast to disparate treatment claims brought under Title VII, inmates are not able to rely on the benefit of burden shifting.¹⁵⁹ Instead, a court decides whether the transgender inmate has offered sufficient evidence that shows the prison officials intended to discriminate before allowing the matter to proceed to trial.¹⁶⁰ Inmates lose the use of circumstantial evidence, commonly used in employment discrimination cases, and prison officials are shielded from having to show they were not discriminating on the basis of the inmates' gender non-conformity.¹⁶¹ Practically speaking, this means far fewer inmates will be able to provide a court with sufficient evidence that they are being subjected to unequal treatment because courts seek direct evidence they are being treated differently due to transgender status to even survive summary judgment.¹⁶²

155. See *Collier v. Budd Co.*, 66 F.3d 886, 890 (7th Cir. 1995) (holding that the McDonnell-Douglas frame work only requires a showing that a similarly situated group was treated more favorably than the plaintiff).

156. See *Farmer v. Brennan* 511 U.S. 825, 841-42 (dismissing the claim because there was no evidence guards intentionally placed her in a cell to be sexually assaulted).

157. See *Mitchell v. Price*, No. 11-cv-260-wmc, 2014 U.S. Dist. LEXIS 171561, at *22-30 (W.D. Wis. Dec. 10, 2004) (noting Mitchell's sexual harassment claims were repeatedly ignored and she had to be raped before a court would entertain her claim).

158. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (setting the burden-shifting standard in disparate treatment employment discrimination claims).

159. See *id.* (shifting the burden to defendant to show a legitimate non-discriminatory reason for his action before allowing plaintiff to prove the proffered reason is simply pretext).

160. See *Mitchell*, 2014 U.S. Dist. LEXIS 171561, at *24-25 (deciding Mitchell did not submit sufficient evidence to raise a Constitutional issue and not allowing a jury to infer the prison officials' actions were based on animus toward Mitchell's transgender status).

161. See *id.* (deciding that a jury can infer discrimination without direct evidence).

162. See *id.* (dismissing her claim for insufficient evidence).

C. Transgender Inmates Should Be Able to Bring Disparate Impact Equal Protection Claims Because Placing Them According to Their Genitalia Has an Adverse Impact on Them Based On Their Gender Identity.

Disparate impact actions, like disparate treatment claims, are generally brought for employment or housing claims.¹⁶³ However, since the *Mitchell* court entertained a disparate treatment argument in a prisoner equal protection claim, transgender female inmates should also be able to bring disparate impact claims.¹⁶⁴ It has already been established that transgender individuals are a protected class, the first requirement for a disparate impact claim.¹⁶⁵ Therefore, inmates should be able to argue that placing them in male prisons has a disparate impact on them as transgender women.¹⁶⁶

Equal protection claims brought under a disparate impact theory could potentially be available for many more transgender inmates than are disparate treatment claims.¹⁶⁷ While employment law disparate impact claims are more difficult to prove than disparate treatment claims, the opposite would be true when applied to transgender prison sexual assaults.¹⁶⁸ This is because there is no intent requirement for an equal protection employment discrimination claim.¹⁶⁹ Another reason this is true is because transgender inmates will not have to provide as high statistics as employees.¹⁷⁰ In employment discrimination disparate impact actions, employers are presumed not to have *intentionally* discriminated against an identifiable group of employees, which is why they are required to show strong statistical evidence but not intent.¹⁷¹ While employees are often

163. See *id.* (applying a modified disparate treatment claim to a transgender prison equal protection claim).

164. See *Mitchell*, 2014 U.S. Dist. LEXIS 171561, at *22 (applying a transgender employee's disparate treatment analysis to *Mitchell*'s claim).

165. See *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2012) (agreeing with the Seventh Circuit on transgender status being a protected class).

166. *Id.*

167. See *Inclusive Cmty. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 747 F.3d 275, 281 (5th Cir. 2014), *cert. granted*, (U.S. Jan. 21, 2015) (arguing for disparate impact claims to be extended past employment discrimination).

168. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (holding that a lack of discriminatory intent does not shield facially neutral discriminatory practices).

169. *Contra Glenn*, 663 F.3d at 1296 (stating that an equal protection claim based on sex discrimination will not survive without proving intent).

170. See *Waisome v. Port Auth. of N.Y. & N.J.*, 948 F.2d 1370, 1376 (2d Cir. 1991) (reversing a district court's ruling that a less than 80% statistical difference did not amount to disparate impact as a practical matter).

171. See *Griggs*, 401 U.S. at 432 (noting that Congress used Title VII to target the consequences of unfair employment practices rather than simply motivation).

expected to show a four-fifths ratio or statistical difference of eighty percent between two identifiable groups of employees, they are not faced with the same long-term physical, emotional, and psychological effects that transgender inmates are.¹⁷²

Because transgender women are at a significantly higher risk of sexual assault than are other inmates, placing them in male prisons has a disparate impact on the character of their incarceration.¹⁷³ In employment law, a court generally requires a large statistical percentage, usually eighty percent, to establish disparate impact.¹⁷⁴ However, disparate impact based on practical significance, while harder to prove in employment cases, can be used when strict statistical proof is lacking.¹⁷⁵ Moreover, such a high percentage requirement should not be necessary in prison rape cases because of the violent and persistent nature of the violation.¹⁷⁶ Because transgender inmates have a thirteen percent higher rate of sexual assault than other inmates, transgender women face more serious consequences when incarcerated. The higher risk, combined with the practical consequences of the assault, should substitute for the requisite eighty percent higher firing rate for an identifiable group of employees.¹⁷⁷ It would not make sense to require transgender inmates show that they are eighty percent more likely to be raped in prison than are other inmates to establish disparate impact.¹⁷⁸

172. See Brenda V. Smith, *Responding to Sexual Abuse of Inmates in Custody: Assessing the Needs of Men, Women and Gender Non-Conforming Individuals*, PREA RESOURCE CENTER (Feb. 19, 2013), <http://www.prearesourcecenter.org/sites/default/files/library/webinarslidesgendernonconformingadults21913.pdf> (explaining the systematic infliction of psychological trauma, general distrust, and likelihood of multiple traumas exacerbate symptoms).

173. See *Griggs*, 401 U.S. at 431 (holding that facially discriminatory practices can be unlawfully discriminatory).

174. See *id.* at 430 (holding that employment practices neutral on their face or in their intent cannot be maintained if they operate to freeze the status quo of prior discriminatory employment practices).

175. 29 C.F.R. § 1607.4(D) (1978) (explaining that smaller differences between groups may still constitute adverse impact where they are significant in both practical and statistical terms).

176. See Smith et al., *supra* note 3, at 7 (explaining that disrespect or punishment of transgender individuals' expression of their gender identity can lead to depression and suicide).

177. See *Griggs*, 401 U.S. at 429, 439 (noting that Congress intended to prevent discriminatory employment practices that favored one identifiable group of employees over other groups).

178. Cf. *Bilingual Bicultural Coal. on Mass Media, Inc. v. FCC*, 595 F.2d 621, 642 (D.C. Cir. 1978) (Blalock, J., dissenting) (arguing that showing a statistically significant disparate impact does not prove practical significance because statistical

In employment discrimination law, a seemingly neutral policy violates equal protection if it has a disparate impact on a specific group, be it race, sex, national origin, or religion.¹⁷⁹ In general, transgender women are housed in the same cells and units as the male inmates, which on its face appears to be a neutral policy.¹⁸⁰ However, this placement keeps transgender women at a much higher risk of sexual assault than their male counterparts.¹⁸¹ In addition to sexual trauma, harassment also has a substantial and lasting impact on transgender women's mental health.¹⁸²

When someone is subjected to employment discrimination, they may suffer a difficulty finding future employment, and personal or familial stress.¹⁸³ While these are unfortunate consequences, they are not nearly as serious or as long-lasting as are the consequences of prison sexual assault.¹⁸⁴ Transgender inmates who are sexually assaulted are often subjected to repeated sexual trauma, even when moved to another facility, and this trauma remains with them for a lifetime.¹⁸⁵ Additionally, their discomfort perpetuated by continuous sexual harassment is also exacerbated by this supposed facially neutral placement policy because the policy keeps them in the place of their torment despite ample evidence they are at a higher risk of sexual assault.¹⁸⁶ Transgender prisoner sexual assault does not just cause stress, it causes terrible physical injury and suicidal tendencies.¹⁸⁷

In *Farmer*, Farmer could have brought a successful disparate impact

evidence does not explain the magnitude of the differences).

179. See *Griggs*, 401 U.S. at 428 (finding a policy to have a disparate impact on black employees as a group).

180. See *Farmer v. Brennan*, 511 U.S. 825, 852 (1994) (explaining that Farmer was housed with male inmates); see also *Mitchell v. Price*, No. 11-cv-260-wmc, 2014 U.S. Dist. LEXIS 17161 (W.D. Wis. Dec. 10, 2004) (noting that Mitchell was placed in pods visible to other male inmates).

181. See Smith et al., *supra* note 3, at 7.

182. See *id.* at 10.

183. Wisdom P. Hammond et al., *Workplace Discrimination and Depressive Symptoms: A Study of Multi-Ethnic Hospital Employees*, 1 RACE AND SOC. PROBS. 2, 19-30 (2010) (associating workplace discrimination with depressive symptoms exceeding general job and social stress).

184. See *id.* (finding a one percent variance in stress stemming from workplace discrimination).

185. See Smith, *supra* note 172 (explaining the long-term effects of sexual abuse on transgender inmates who remain in the facilities where they were assaulted).

186. *Id.* (noting that multiple sexual traumas exacerbate symptoms).

187. *Id.* (citing suicide risk as an additional concern of gender non-conforming inmates).

claim.¹⁸⁸ Under *Glenn*, she is a member of a protected class.¹⁸⁹ The prison's facially neutral policy was to house all biological male inmates in the same cells shared by other male inmates.¹⁹⁰ As a transgender female who presented herself in a feminine manner, she was at a significantly higher risk of sexual assault than her fellow inmates.¹⁹¹ The prison policy of placing *Farmer* and other transgender inmates in the general population has a disparate impact on their exposure to sexual assault.¹⁹² Her attack in her cell by the male she shared a cell with is evidence that the policy caused her increased risk of sexual assault.¹⁹³ There is no way to show that she would not have been assaulted had she been housed separately from the male population; however, she would have been at a significantly lower risk.¹⁹⁴ Since *Farmer* is a member of a protected class, the prison had a facially neutral policy, and because that policy caused her increased risk of sexual assault, she should be able to bring a successful disparate impact claim.¹⁹⁵

Braninburg could also have brought a successful disparate impact claim.¹⁹⁶ She is a member of a distinct group, and many courts would agree that she is in a protected class.¹⁹⁷ She was kept, according to hospital policy, with other biologically male inmates.¹⁹⁸ She was then threatened

188. See *Farmer*, 511 U.S. at 825.

189. See *Glenn v. Brumby*, 663 F.3d 1312, 1318 n.5 (11th Cir. 2012) (finding transgender individuals a protected class under Title VII).

190. *Farmer*, 511 U.S. at 829, 830 (noting that following the federal prison authority incarceration policy she was sometimes held in the general population when not segregated).

191. See *id.* at 830 (acknowledging that she was repeatedly placed in segregation because of safety concerns); see also *Sarah*, JUST DETENTION INT'L, <http://justdetention.org/story/sarah/?pageno=9> (last visited on Feb. 14, 2016) (highlighting the increased risk of sexual violence transgender inmates face).

192. See *Smith et al.*, *supra* note 3, at 7 (noting that sexual assault is 13 times more prevalent in transgender inmates).

193. See *Farmer*, 511 U.S. at 839 (noting that *Farmer* was moved according to prison policy into the cell she was raped in).

194. See *id.* at 830 (stating that *Farmer* was raped in her cell within two weeks of being returned to the general population from protective custody).

195. NAT'L PRISON RAPE ELIMINATION COMM'N REPORT, *supra* note 15, at 74 (finding that transgender women in male prisons are frequently targeted because of their gender nonconformity).

195. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431(1971) (outlining the prima facie elements of a disparate impact claim).

196. *Braninburg v. Coaling State Hosp.*, No. 1:08-CV-01457-MHM, 2012 U.S. Dist. LEXIS 127769, at *11 (E.D. Cal. Sept. 6, 2012).

197. *Id.*

198. See *id.* at *10, *11 (explaining that she was repeatedly placed with other male

and assaulted by other inmates and staff.¹⁹⁹ There is ample evidence from the threats for a jury to find that the threats were based on her transgender status.²⁰⁰ But for being housed in the male hospital prison ward, Braninburg would not have had such a high risk of physical and verbal violence.²⁰¹

In order for a prison to defend itself against a transgender inmates' disparate impact claim, it will have to show that the policy of placing transgender women with male inmates is substantially related to an important government interest.²⁰² This requirement parallels the requirement of employers to show their policy is in place for a legitimate non-discriminatory reason.²⁰³ However, state prison officials, unlike private employers, are subject to heightened constitutional scrutiny.²⁰⁴ Following *Glenn*, discrimination based on transgender status makes prison officials liable for discrimination on the basis of sex, and they must, therefore, withstand intermediate scrutiny.²⁰⁵

Prisons most often argue that security is an important penological interest and that their policies support that interest.²⁰⁶ When faced with heightened scrutiny, prisons would likely argue that maintaining secure correctional facilities is an important government interest.²⁰⁷ While prison security is definitely an important government interest, prison officials would have to show that the policy of placing transgender women in men's

inmates despite reporting numerous verbal threats).

199. *See id.* at *7-11 (outlining her reports of written and oral harassments and threats).

200. *See id.* at *24 (detailing her reports of having her breasts groped by a staff member).

201. *See id.* at *10, 11 (listing her multiple housing changes in response to continuous verbal and sexual harassment).

202. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (establishing that once the plaintiff has a prima facie case, the burden shifts to the defendant to show a legitimate non-discriminatory reason for the policy).

203. *See id.* (outlining the employer's burden).

204. *See Glenn v. Brumby*, 663 F.3d 1312, 1315 (11th Cir. 2012) (applying heightened scrutiny in a claim against the Georgia General Assembly, a state legislature).

205. *See id.* at 1320. (finding that firing based on transgender status is sex discrimination).

206. *See Fields v. Smith*, 712 F. Supp. 2d 830, 868 (E.D. Wis. 2010) (holding that prison safety and security are perhaps the most legitimate of penological goals); *see also Snow v. Woodford*, 128 Cal. App. 4th 383, 385 (2005).

207. *See, e.g., Beard v. Banks*, 548 U.S. 521, 539 (2006) (arguing that prison policies support a legitimate prison security interest); *accord Thornburgh v. Abbott*, 490 U.S. 401, 403 (1989).

facilities is substantially related to maintaining a secure prison, which they cannot do.²⁰⁸ The Prison Rape Elimination Act was created, in large part, because of the number of transgender prison rapes.²⁰⁹

In fact, if their goal is to increase or maintain security, prisons cannot justify placing transgender inmates in an area where they are thirteen percent more likely to be assaulted.²¹⁰ Placing transgender inmates in male prisons actually creates security problems by catching the interest of violent sexual predators, including prison guards, and exposing transgender inmates to sexual assault.²¹¹ Housing transgender women in the general population with male inmates is not substantially related to the important government interest of prison safety because their increased risk of sexual violence raises the quantity and severity of inmate on inmate violence.²¹²

IV. POLICY RECOMMENDATION

Both federal and state prisons should adopt a committee approach to transgender inmate placement.²¹³ A hybrid of the Illinois and District of Columbia models would be ideal.²¹⁴ Committees should operate under the presumption that transgender female inmates should be housed in female prisons unless and until there is evidence this would not be the safest and healthiest placement for a specific inmate.²¹⁵ Although many transgender female inmates do not want to be placed in female prisons, these facilities

208. Beard, 548 U.S. at 528.

209. NAT'L PRISON RAPE ELIMINATION COMM'N REPORT, *supra* note 15, at 73 (recalling the story of a transgender client who was deliberately placed in a cell with a convicted sex offender to be raped for more than 24 hours); *see also R.W. v. United States*, 958 A.2d 259, 261-62, 267-68 (D.C. 2008) (upholding a D.C. correctional officer's conviction and ten year sentence for singling out a transgender inmate and forcing her to perform fellatio on him).

210. *See Turner v. Safely*, 482 U.S. 78, 89 (1987) (holding that a policy cannot be sustained where there is no logical relationship between the policy goal and the regulation).

211. *See id.* at 97 (finding a regulation banning inmate marriage not rationally related to a legitimate penological interest when it amounted to an exaggerated response to prison security).

212. *See Brenda V. Smith et al.*, *supra* note 3, at (providing statistics showing transgender women and girls in male prisons are increased security risk).

213. *See supra* Part II (describing transgender placement committees currently being utilized).

214. *See supra* Part II (explaining the Illinois and D.C. transgender placement programs).

215. *See Flowers*, *supra* note 26, at 2 (noting that Illinois prefers to place transgender women in female prisons).

are generally the safest for them.²¹⁶ The inmates' placement preferences and their reasons for them should definitely be considered.²¹⁷ However, their preference should only be one factor in the decision.²¹⁸ The overall health and safety of the inmate should control.²¹⁹

The District of Columbia committee's inclusion of a DOC volunteer who is either transgender or an expert in transgender affairs is a great practice, which should definitely be adopted by prisons.²²⁰ Including such volunteers gives a committee of professionals valuable and necessary perspective on the effects certain placement options will have on a transgender woman.²²¹ However, a warden should not be given the authority to veto a transgender woman's placement once the committee has decided.²²² A warden could perhaps be included on a committee; however, the mental health professional, medical doctor, case manager, and DOC volunteer are in a better position to choose the best placement, especially after taking the time to examine each inmate's situation and conducting a case-by-case analysis.²²³

Besides evaluating placement options on a case-by-case basis, prisons need to focus their resources on increased training for their staff.²²⁴ Prison guards are too often the perpetrators of transgender inmate sexual violence.²²⁵ Transgender awareness as well as anti-harassment and sexual assault training needs to be incorporated into correctional officer training and then rigorously enforced.²²⁶

216. *See id.* at 4 (explaining that while many transgender women do not wish to be placed in female prisons, that is not the determining placement factor).

217. *See id.* (noting that the Illinois committee takes into account the prisoners' placement preference).

218. *See id.*

219. *See id.* (stating that safety of the transgender inmates is the top priority).

220. *See supra* Part II (listing D.C.'s committee participants).

221. *See id.*

222. *Contra* Hess, *supra* note 26, at 1 (noting that D.C. allows wardens to trump a committee decision on placement).

223. *See supra* Part II (explaining the process by which the committee determines each transgender inmate's placement).

224. *See* Mathias, *supra* note 37, at 2 (noting that New York has begun implementing increased correctional officer training on how to deal with transgender and other special risk inmates).

225. *See* JUST DETENTION INT'L, *supra* note 5, at 2 (explaining the prevalence of transgender inmate abuse by correctional officers).

226. *See id.* at 1 (noting that most abuse stems from correctional officers' loathing and lack of knowledge about transgender inmates).

V. CONCLUSION

Protecting transgender inmates from sexual assault was one of the primary forces behind the Prison Rape Elimination Act.²²⁷ The Department of Justice recognized the disproportionate risk of rape to transgender inmates, prison official indifference, and the long-term effects of this abuse.²²⁸ Despite the federal rules and guidance, many states have opted to lose federal funding rather than comply with methods that would increase transgender inmate protection.²²⁹ Even in federal prisons, placement according to genitalia prevails, leaving transgender inmates nearly as vulnerable as they were prior to PREA's inception.²³⁰

Transgender inmates almost always lose deliberate indifference claims.²³¹ Disparate treatment claims have the potential to be slightly more successful, but will still require some sort of sexual violation before an inmate has a viable claim.²³² Transgender women inmates need another remedy.²³³ Disparate impact claims should be expanded from applying only to employment and housing to transgender inmates.²³⁴ Not only could this assist the inmates later with counseling services and sex-reassignment surgery, it would also force prisons to take active measures to ensure transgender safety.²³⁵ While there are flaws in each model of transgender housing, using a committee to determine case-by-case placement is most appropriate to balance the transgender women inmates' psychological needs and placement preferences with their need for safety.²³⁶

227. See *supra* Part II (detailing the events leading up to the passage of PREA).

228. See *supra* Part I (detailing accounts of transgender prisoner sexual abuse).

229. See *supra* Part II (noting that some state prisons disagree with implementing PREA guidelines).

230. See *Rights of Transgender Prisoners*, NAT'L CENTER FOR LESBIAN RIGHTS, 1 (2006), <http://www.nclrights.org/wp-content/uploads/2013/07/RightsOfTransgenderPrisoners.pdf> (stating that transgender people who have not undergone sexual reassignment surgery are generally placed according to their birth gender).

231. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

232. See *supra* Part II (explaining the high deliberate indifference burden).

233. See *supra* Part III (arguing that disparate impact claims should be used by transgender inmates).

234. See *id.* (explaining that disparate impact claims are a better option for transgender inmates placed in unsafe incarceration).

235. See *supra* Part II (arguing that prisons are currently not held accountable because transgender inmates rarely win lawsuits against them).

236. See *Flowers*, *supra* note 26, at 4.