

Spring 2023

Human Rights, Trans Rights, Prisoners' Rights: An International Comparison

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Recommended Citation

Tom Butcher, *Human Rights, Trans Rights, Prisoners' Rights: An International Comparison*, 18 *Nw. J. L. & Soc. POL'Y.* 43 (2023).

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Human Rights, Trans Rights, Prisoners' Rights: An International Comparison

Tom Butcher*

ABSTRACT

In this Note, I conduct an international comparison of the state of trans prisoners' rights to explore how different national legal contexts impact the likelihood of achieving further liberation through appeals to human rights ideals. I examine the United States, Canada, the United Kingdom, Australia, India, Argentina, and Costa Rica and show the degree to which a human rights framework has been successful thus far in advancing trans prisoners' rights. My analysis also indicates that the degree to which a human rights framework is likely to be successful in the future varies greatly between countries. In countries that are hesitant to adopt a legally internationalist orientation, a human rights framework is unlikely to see much success. Additionally, even countries with robust human rights traditions may be unlikely to apply that framework if the needs and identities of imprisoned trans people are not sufficiently visible in the national public consciousness. However, in countries with significant human rights or international law traditions, as well as a high degree of trans visibility, appeals to a human rights framework will likely lead to success in advocating for further protections for trans prisoners' rights.

Keywords: prisoners, prisoners' rights, trans rights, trans prisoners' rights, human rights, international law, comparative law, constitutional law

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* PhD, University of Virginia, 2018; JD, Northwestern Pritzker School of Law, expected 2023. Many thanks are due to the correspondingly many people who have helped create this Note. Thank you to Alan Mills for the initial impetus for the project and for reading over the earliest drafts; thank you to Allie Lee, Shayna Roth, Matt Choi, and all the other excellent eyes at the Journal of Law and Social Policy, whose edits and suggestions have immensely improved the quality of the Note; thank you to Sarah Berkowitz for general excellence and always coming up with the perfect observations to fuel further reflection; thank you to Sheila Bedi, Kara Crutcher, and my fellow students in the Community Justice and Civil Rights Clinic at Northwestern Law for inspiring me and giving me so much to think about; thank you to Evangeline Gargula for friendship and insight; and thank you to Tyrone Daniels for so many intellectual exchanges that have fed the heart of this project.

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INTRODUCTION

“Trans rights are human rights.” In recent years this expression has become something of a rallying cry among those working for trans liberation. Avery R. Everhart, co-founder of the Center for Applied Transgender Studies, traces the slogan’s origins at least as far back as the Stop Trans Pathologization movement in 2007, which was “notable for successfully pushing for revisions to the International Classification of Diseases.”¹ Around the world, the slogan (or similar variations on it) has played a key role in advocating for trans rights. Japanese activists used the slogan when opposing their government’s decision to require surgical sterilization before changing one’s legal gender.² British activists displayed it when protesting the U.K. higher court’s decision not to allow Freddy McConnell to be named as “father” on his child’s birth certificate.³ In Hungary, Amnesty International used the slogan in its campaign opposing a new law that “ban[s] transgender people from having their gender identity [legally] recognised.”⁴ In Canada, in response to a 2017 town hall participant’s comment about the torturous conditions faced by many imprisoned trans people, Prime Minister Trudeau “promised the townhall’s audience and by extension, the national public, that his government would now . . . ‘do right in recognizing that trans rights are human rights.’”⁵ In the United States, the trans-rights–human-rights equation became particularly associated with opposition to North

¹ Avery R. Everhart, *The Limits and the Promise of Trans Rights as Human Rights Claims*, OPENGLOBALRIGHTS (Oct. 6, 2020), <https://www.openglobalrights.org/the-limits-and-the-promise-of-trans-rights-as-human-rights-claims/>; see generally Esther Ortega Arjonilla, *Reframing Care Practices on Transgender Health: The International Campaign Stop Trans Pathologization*, in YEARBOOK 201 OF THE INSTITUTE FOR ADVANCED STUDIES ON SCIENCE, TECHNOLOGY AND SOCIETY 31 (Sept. 2016), https://www.ifz.at/sites/default/files/2022-01/ARJONILLA%2C%20Esther%20Ortega%20%281%29_0.pdf (providing a history of the Stop Trans Pathologization movement). The Stop Trans Pathologization movement is now referred to as the Trans Depathologization movement. See *Calling for Complete Depathologisation of Trans and Gender-Diverse Identities*, TGEU (Oct. 20, 2022), <https://tgeu.org/calling-for-complete-depathologisation-of-trans-and-gender-diverse-identities/> (a statement reflecting the recent priorities of the movement).

² See generally “A Really High Hurdle:” *Japan’s Abusive Transgender Legal Recognition Process*, HUM. RTS. WATCH (Mar. 19, 2019), <https://www.hrw.org/report/2019/03/19/really-high-hurdle/japans-abusive-transgender-legal-recognition-process>.

³ See generally Iliana Magra, *Transgender Man in U.K. Loses Appeal to Be Listed as Father*, N.Y. TIMES (Apr. 29, 2020), <https://www.nytimes.com/2020/04/29/world/europe/transgender-man-uk-mother.html>.

⁴ See generally *Tell Hungary that Trans Rights Are Human Rights*, AMNESTY INT’L (May 28, 2020), <https://www.amnesty.org/en/latest/campaigns/2020/05/hungary-drop33/>. The examples in this sentence were collected by Everhart, *supra* note 1.

⁵ William Hébert, *Trans Rights as Risks: On the Ambivalent Implementation of Canada’s Groundbreaking Trans Prison Reform*, 35 CAN. J.L. & SOC’Y 221, 226 (Dec. 16, 2020) (citing *PM Trudeau Answers a Question on Trans Rights in Prison during a Town Hall in Kingston, Ontario*, CAN: PRIME MINISTER OF CAN. JUSTIN TRUDEAU (Jan. 12, 2017), <https://pm.gc.ca/en/videos/2017/01/12/pm-trudeau-answers-question-trans-rights-prison-during-town-hall-kingston-ontario>).

Carolina’s H.B. 2 (known as “The Bathroom Bill”) in 2016.⁶ More recently, I can attest from personal experience that the slogan popped up as a chant or a sign at several protests of police brutality in the summer of 2020, even when trans rights were not directly related to that specific protest.

In proclaiming that trans rights are human rights, these protestors expressed a belief that a human rights framework provides the best, or at least a workable, moral and legal framework for trans liberation.⁷ In doing so, they displayed an intuition that also animates much international law on the subject. Human rights provide the dominant framework for the Yogyakarta Principles, a set of international principles for respecting sexual orientation and gender identity that the U.N. Human Rights Council adopted in 2007.⁸ Ten years later, the UN Human Rights Council adopted a supplement to the original document, now stylized as the “Yogyakarta Principles plus 10.”⁹ The Principles declare that “[s]exual orientation and gender identity are integral to every person’s dignity and humanity and must not be the basis for discrimination or abuse” and “affirm binding international legal standards with which all States must comply,”¹⁰ although (as we shall see) the reality of international state compliance leaves something to be desired.¹¹ Despite the Principles’ ostensibly mandatory character, no enforcement mechanism for their adherence exists; and awareness of the Principles varies from country to country.¹² The Principles have had some success: Argentina codified them into its laws in 2012—the first country to do so—and

⁶ Molly P. Black, *HB2 and the Bathroom Controversy: Why Trans-Rights Are Human Rights*, ODYSSEY ONLINE: POLS. & ACTIVISM (Apr. 4, 2016), <https://www.theodysseyonline.com/hb2-bathroom-controversy>. The “Bathroom Bill” prevented cities in North Carolina from allowing trans persons to use public restrooms according to their gender preferences. *Id.* After intense backlash, North Carolina repealed most of the bill in 2017, although it left in place a three-year moratorium on passing certain kinds of local anti-discrimination ordinances. Max Millington, *HB2 Is Officially Dead and Gone in NC. Here’s Why That Matters*, CARDINAL & PINE: L. & POL’Y (Dec. 3, 2020, 4:10 PM), <https://cardinalpine.com/story/hb2-is-officially-dead-and-gone-in-nc-heres-why-that-matters/>. That provision lapsed in 2020. *Id.*

⁷ By “human rights framework,” I mean a system of justifying and advocating for trans prisoners’ rights that is grounded in principles of human rights and international human rights law.

⁸ THE YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY (Mar. 2007), http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf [hereinafter YOGYAKARTA PRINCIPLES].

⁹ THE YOGYAKARTA PRINCIPLES PLUS 10: ADDITIONAL PRINCIPLES AND STATE OBLIGATIONS ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION, GENDER IDENTITY, GENDER EXPRESSION AND SEX CHARACTERISTICS TO COMPLEMENT THE YOGYAKARTA PRINCIPLES (Nov. 10, 2017), http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf [hereinafter YOGYAKARTA PRINCIPLES PLUS 10]. For more information on the Principles and the full text of the original document and the 2017 supplement, see generally *The Yogyakarta Principles*, ARC INT’L, <http://yogyakartaprinciples.org/> (last visited Nov. 5, 2021).

¹⁰ YOGYAKARTA PRINCIPLES, *supra* note 8, at 6, 7.

¹¹ Michael O’Flaherty, *The Yogyakarta Principles at Ten*, 33 NORDIC J. HUM. RTS. 280, 288–94 (2015); see also Gloriana Rodriguez Alvarez & Alejandro Fernandez Muñoz, *From Victimization to Incarceration: Transgender Women in Costa Rica*, WOMEN & CRIM. JUST. 1, 26 (2021).

¹² O’Flaherty, *supra* note 11, at 288–94 (concluding, *inter alia*, that “low levels of awareness among lawyers and the judiciary” have kept the Principles from having as large an impact as they might have on national legal systems).

they have since seen broad adoption throughout Europe and South America.¹³ In North America, however, the Principles have been influential only in Canada and Mexico; in the United States, the Caribbean, and Central America, they have had little legal impact.¹⁴

Despite the uneven success of the Yogyakarta Principles, it is safe to say that human rights provide one of the most common frameworks for understanding and advocating for trans rights throughout the world. Even in places where the Principles have had little impact, the linkage between human rights and trans rights remains strong at the activist level. Additionally, human rights campaigns have a long history of protecting the rights of torture victims and imprisoned people.¹⁵ Modern human rights theory emphasizes that human rights are minimalist protections that apply in all situations.¹⁶ Accordingly, human rights campaigns have often focused on prisons because they tend to be places where even the minimum rights to food, water, and dignity, among others, are lacking. It is thus unsurprising that human rights provides one of the most common frameworks for campaigns specifically for trans *prisoners'* rights. In Canada, for example, “between the early 2000s and late 2010s, law reforms led to the adoption of more inclusive requirements for changes to identity documents and to the addition of gender identity and gender expression in human rights legislation.”¹⁷

Still, it remains an open question whether a human rights framework really provides the best opportunity for legal reform, particularly in certain national legal contexts. Even in countries where that framework has seen notable success, such as Canada, the realities of implementation provide cautionary tales for other countries seeking to develop their own domestic trans rights policy.¹⁸

In this Note, I conduct a comparison of the rights afforded to trans prisoners across several different countries and evaluate the likelihood of success in achieving further liberation using a human rights model. I begin with a discussion of what it means to think of trans prisoners' rights (and trans rights in general) within a human rights framework. I next provide a short and general description of the challenges that imprisoned trans people tend to face, regardless of national context. Then, I explore the situation facing trans prisoners in several different countries. I conclude with some thoughts on the future efficacy of using a human rights framework to argue for trans prisoners' rights given different aspects of a particular nation's legal context.

There are many contexts in which a human rights framework could effectively secure rights for imprisoned trans people. But in cases where the country's particular legal

¹³ Everhart, *supra* note 1; O'Flaherty, *supra* note 11, at 291–94; Alvarez & Muñoz, *supra* note 11, at 3.

¹⁴ O'Flaherty, *supra* note 11, at 293; Alvarez & Muñoz, *supra* note 11, at 3.

¹⁵ For example, the U.N. turned its attention to prisoners' human rights as early as 1955—only seven years after the Universal Declaration of Human Rights—when it adopted the Standard Minimum Rules for the Treatment of Prisoners. *Standard Minimum Rules for the Treatment of Prisoners*, UNITED NATIONS HUM. RTS. OFF. HIGH COMMISSIONER, <https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/treatmentprisoners.pdf> (noting that the rules were adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955 and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977); *see also* SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 142–48 (2010).

¹⁶ *Cf.* MOYN, *supra* note 15, at 120–211.

¹⁷ Alvarez & Muñoz, *supra* note 11, at 224–25.

¹⁸ *See generally* Hébert, *supra* note 5.

traditions tend to eschew an internationalist orientation,¹⁹ such a framework is unlikely to make headway in the courts. And even a country with a significant history of human rights protection will be unlikely to use such a framework to advance trans rights unless the country already has significant ground-level support for trans identities. Moreover, care is needed to implement a human rights framework that ensures protected rights remain actual rights. As an American lawyer-in-training, I will admit to being particularly interested in the applicability of these results to the United States; but in general, my focus is international.

* * * * *

A note on terminology: this Note focuses on the rights and plights of imprisoned *trans* people. I use the term “trans” primarily to refer to people assigned female at birth who identify as men and to people assigned male at birth who identify as women.²⁰ This usage contrasts with a broader use of “trans” as an umbrella term for all people with (heavy scare quotes) “non-traditional” gender identities.²¹ I use the term in this narrower sense because there are many non-binary people who do not identify as trans, and although some of the issues they face are similar to those facing trans prisoners, many are not. Imprisoned non-binary people demand their own study, which is unfortunately beyond the bounds of this Note. While large portions of this Note may also be applicable to non-binary prisoners,²² that applicability should not be assumed.

¹⁹ By “internationalist orientation,” I mean a tendency towards looking to other countries, to international organizations, and to international law when determining matters of domestic law and policy.

²⁰ This is not to say that trans men and trans women face identical situations—in penal contexts or otherwise. In particular, trans women imprisoned in male facilities are significantly more likely to suffer violence and sexual assault than are trans men in women’s facilities. *See* Ortlip-Sommers, *infra* note 51, at 361–62. It is thus unsurprising that the percentage of trans women who wish to be transferred to a gender-appropriate facility is much higher than the percentage of trans men who wish the same. Hébert, *supra* note 5, at 231. The common denominator, of course, is hegemonic masculinity; trans men and trans women both fall outside the hegemonic idea of what a man is “supposed” to be. *See* RAEWYN W. CONNELL, *MASCULINITIES* (2005).

However, I believe considering trans men and women together is justifiable in this context because, despite their sociological differences, both groups consist of people who usually identify (at least broadly) with one of the two socially-dominant gender archetypes. *See Transgender FAQ*, GLAAD, <https://www.glaad.org/transgender/transfaq> (last visited Dec. 16, 2021). Thus, many of the solutions to the problems that trans men and trans women face do not necessarily require an upheaval of the bifurcated gender assumptions underlying the prison system. In contrast, the solutions to many of the problems facing non-binary prisoners may demand the construction of new facilities, or else a total rethinking of the prison system. (Of course, such rethinking may be desirable, but that is a separate point.)

²¹ *Cf. What Does Trans Mean?*, STONEWALL (Mar. 27, 2019), <https://www.stonewall.org.uk/what-does-trans-mean>. For definitions of other common LGBTQ+ terms, including the difference between “trans” and “transgender,” *see List of LGBTQ+ Terms*, STONEWALL, <https://www.stonewall.org.uk/help-advice/information-and-resources/faqs-and-glossary/list-lgbtq-terms> (last visited Oct. 13, 2022).

²² Notably, even under the narrower definition used in this Note, *see supra* p. 5 and note 20, the categories “trans” and “non-binary” are not mutually exclusive. Moreover, although most non-binary people do not identify as men or women, some may nevertheless feel themselves “closer” to one of those gender archetypes than the other. *See Understanding Non-Binary People: How to Be Respectful and Supportive*, NAT’L CTR. FOR TRANSGENDER EQUAL. (Jan. 12, 2023), <https://transequality.org/issues/resources/understanding-non-binary-people-how-to-be-respectful-and-supportive>. In such cases,

Additionally, I use the terms “prisoner” and “imprisoned person” because I think that most alternatives (such as “inmate” or “incarcerated person”) tend to sanitize the harsh and often unjust reality that people in prison face. The state has imprisoned them, and we should not paper over that fact. I also use these terms because most imprisoned and formerly imprisoned people that I have spoken with prefer this term, although the sentiment is not universal.

I. HUMAN RIGHTS AS A FRAMEWORK FOR TRANS PRISONERS’ RIGHTS

Human rights provide one of the most common approaches to advocating for trans prisoners’ rights, although both the definition and the utility of human rights in this context have been contested. International agreements, such as the Yogyakarta Principles, and general scholarly development of human rights theory provide a robust legal and philosophical foundation for any trans prisoners’ rights advocate who wishes to draw upon a human rights framework. However, there are those—on both the left and the right—who would question the wisdom of relying on human rights. While this Note cannot resolve that debate, I present here a short summary of these topics.

The meaning of “human rights,” like any other term, has a long history, and has taken many swerves along the way. Depending on who you ask, “human rights” may have been invented with the French Revolution’s Declaration of the Rights of Man and (Male) Citizen [Citoyen],²³ or else more recently with the United Nation’s (UN) aptly-named Universal Declaration of Human Rights (UDHR).²⁴ Others hold that true human rights didn’t emerge until the 1970s, when the post-Vietnam War rise in non-governmental organizations (NGOs) led to an internationalist focus on food, water, shelter, and other basic elements of what is needed for human survival—a minimalist response to the perceived failure of other, earlier utopian ideals.²⁵ At the popular level, it seems to me that when most people say “human rights,” they mean something akin to the idea of *rights that inhere in all people by virtue of their humanity*. The Stanford Encyclopedia of Philosophy offers a similar definition: “Human rights are norms that aspire to protect all people everywhere from severe political, legal, and social abuses.”²⁶

Whatever merit these various definitions of “human rights” have, the consistent thread is an emphasis on universality and, by extension, internationalism.²⁷ There may be a wide array of rights linked to particular societies or governments, but *human* rights belong to, and are the same for, everybody everywhere.

policies supporting imprisoned trans people may also support some non-binary people. But the conceptual distinction between “trans” and “non-binary” remains extremely important for any properly liberatory framework. *Id.*

²³ LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* (2007). For a contemporary commentary on the inherently gendered conceptions underlying the French Declaration, see OLYMPE DE GOUGES, *THE DECLARATION OF THE RIGHTS OF WOMAN* (1791).

²⁴ Mary Ann Glendon, *The Rule of Law in the Universal Declaration of Human Rights*, 2 NW. U. J. INT’L HUM. RTS. ¶¶ 1–4 (2004).

²⁵ MOYN, *supra* note 15, at 120–175.

²⁶ *Human Rights*, STAN. ENCYC. OF PHIL. (Apr. 11, 2019), <https://plato.stanford.edu/entries/rights-human/>.

²⁷ Although the French Revolution only directly created laws for the citizens of France, it had universalist aspirations from the very beginning, and that universalism has remained a consistent theme in French politics ever since. HUNT, *supra* note 23, at 17.

While any specific enumeration of human rights will likely be subject to significant debate, the Stanford Encyclopedia of Philosophy points to UN resolutions as a means of delineating seven general categories of human rights. The first six come directly from the UDHR, while the seventh was codified later:

(1) Security rights that protect people against murder, torture, and genocide; (2) Due process rights that protect people against arbitrary and excessively harsh punishments and require fair and public trials for those accused of crimes; (3) Liberty rights that protect people’s fundamental freedoms in areas such as belief, expression, association, and movement; (4) Political rights that protect people’s liberty to participate in politics by assembling, protesting, voting, and serving in public office; (5) Equality rights that guarantee equal citizenship, equality before the law, and freedom from discrimination; and (6) Social rights that require that governments ensure to all the availability of work, education, health services, and an adequate standard of living. A seventh category, minority and group rights, has been created by subsequent treaties.²⁸

Trans prisoners’ rights could easily fit into several of these categories: imprisoned trans people should be free from murder and torture perpetrated by fellow prisoners or guards (category 1); they should not be subject to harsh or unfair penalties because of their gender identities (categories 2 and 5); they should have the right to express their gender identity freely (category 3); they should have access to healthcare that reflects their particular, individual needs (category 6); and they represent a distinct minority group with particular interests, and in need of particular protection (category 7). It is thus unsurprising that demands for trans prisoners’ rights (and trans rights more generally) are so often framed in human rights terms. As we shall see below, many of the international trans legal movement’s most significant national successes in recent years have come from countries explicitly adopting a human rights framework.

The Yogyakarta Principles represent the most significant articulation of the link between trans rights and human rights within the realm of international law²⁹—albeit in a framework shared with articulations of sexuality rights.³⁰ The Principles open augustly, with language mirroring the Declaration of the Rights of Man and (Male) Citizen: “All human beings are born free and equal in dignity and rights. All human rights are universal, interdependent, indivisible and interrelated. Sexual orientation and gender identity are integral to every person’s dignity and humanity and must not be the basis for discrimination

²⁸ *Human Rights*, *supra* note 26, § 3.

²⁹ Morgan Carpenter, *Intersex Human Rights, Sexual Orientation, Gender Identity, Sex Characteristics and the Yogyakarta Principles plus 10*, 23 *CULTURE, HEALTH & SEXUALITY* 516, 517 (2021) (describing the Principles as “the most authoritative statement of international human rights law obligations for States in promoting and protecting the rights of persons of diverse sexual orientations and gender identities”).

³⁰ Unfortunately, the common acronym LGBT can serve to conflate two issues (namely, sexuality and gender identity) that, although related, are significantly distinct from each other. The Principles’ initial use of a “sexuality and gender identity” framework has also been criticized for ignoring the human rights needs of intersex persons; fortunately, the 2017 update has taken steps to address this problem. *Id.* at 518–23.

or abuse.”³¹ Although the twenty-nine Principles articulated in the original 2007 document mostly relate to social rights, such as the right to social security,³² a few relate directly to prisoners’ rights. The most notable is Principle 9 (“The Right to Treatment With Humanity While in Detention”), which explicitly calls on the countries of the world to “[p]rovide adequate access to medical care and counselling appropriate to the needs of those in custody . . . including with regard to . . . access to hormonal or other therapy as well as to gender-reassignment treatments where desired.”³³ It further demands that countries shall “[e]nsure, to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their . . . gender identity.”³⁴ The 2017 additions to the Principles do not contain any specific calls for prisoners’ rights, but they do demand “The Right to Freedom From Criminalization and Sanction on the Basis of Sexual Orientation, Gender Identity, Gender Expression, or Sex Characteristics.”³⁵ They also call for “The Right to State Protection,” which includes the obligation on countries to “[e]xercise due diligence to prevent, investigate, prosecute, punish and provide remedies for discrimination, violence and other harm [committed on the basis of gender identity or expression], whether committed by State or non-State actors.”³⁶ This right is particularly notable because prisoners are, by definition, in the custody of the State. This declaration thus ought to sound with particular urgency for imprisoned trans people.

Activists, lawyers, and legislators who seek to use a human rights framework to advance trans prisoners’ rights thus have the advantage of drawing on a well-developed and internationally respected body of work. However, this approach is not without its downsides. On the left, many have criticized a human rights approach to trans rights (and by implication trans prisoners’ rights) as insufficient to provide the active protections that trans and nonbinary people need.³⁷ As Professor Samuel Singer notes: “Human rights law reform efforts may divert resources from other pressing legal areas for marginalized trans people, including access to healthcare, the decriminalization of sex work, and the treatment of trans migrants.”³⁸ On the right, human rights may simply not be recognized as a concept with any legal authority at all.³⁹ Even if recognized, some on the right may argue that trans rights are not properly within the ambit of human rights, because trans rights (such as the right to medically transition) are allegedly only relevant for a specific group of people, and

³¹ YOGYAKARTA PRINCIPLES, *supra* note 8, at 6.

³² *Id.* at 19.

³³ *Id.* at 16.

³⁴ *Id.*

³⁵ *Id.* at 11.

³⁶ *Id.*

³⁷ See, e.g., Evan Vipond, *Trans Rights Will Not Protect Us: The Limits of Equal Rights Discourse, Antidiscrimination Laws, and Hate Crime Legislation*, 6 W. J. LEGAL STUD. 1, 8–14 (2015); see also Everhart, *supra* note 1; Hébert, *supra* note 5; Samuel Singer, *Trans Rights Are Not Just Human Rights: Legal Strategies for Trans Justice*, 35 CAN. J.L. & SOC’Y 293 (2020). For a good overview of criticisms of rights discourse within Marxist traditions—and an attempt to overcome such criticisms using Marxist principles—see Paul O’Connell, *On the Human Rights Question*, 40 HUM. RTS. Q. 962 (2018).

³⁸ Singer, *supra* note 37, at 299.

³⁹ See, e.g., Jamal Greene, *The Age of Scalia*, 130 HARV. L. REV. 144, 172–73 (2016) (contrasting Justice Scalia’s jurisprudence with a “proportionality” approach taken by other national courts that accept human rights as legal authorities).

therefore are not in keeping with the universal character of human rights.⁴⁰ There is an easy answer to this last objection: trans rights are only particular expressions of general human rights that have been recognized for decades, much like the right to participate in Holy Communion is not a special right only for Catholics but rather a particular Catholic expression of a universal right to freedom of religion.⁴¹ Resolving this debate is beyond the scope of this Note.⁴² Still, the fact that many, on the left and the right, have significant doubts as to whether a human rights framework should, or even could, include protections for trans prisoners is one downside to its use to protect trans prisoners.

A more practical concern—and one more germane to the topic of this Note—is that international law tends to function by stating ideals rather than requirements. The Principles themselves claim to establish “binding international legal standards with which all States must comply,”⁴³ but they are not, in fact, binding on a country at all unless that country adopts them into its laws.⁴⁴ This leads to a paradox of sorts: international human rights are only likely to be protected in countries that already have respect for international human rights.⁴⁵ Nevertheless, in countries where that respect already exists, campaigns to recognize the rights of trans prisoners as a particular subset of the human rights that are *already protected* will often be successful, as we will see below. In countries where human rights are *not* generally considered as sources of legal authority, other approaches will likely be necessary.

Finally, it should be noted that the analysis of trans prisoners’ rights vis-à-vis human rights in this Note fundamentally concerns the conditions of confinement. Many prison abolitionists might agree in general with a human rights framework but would hold that proper respect for the rights of trans prisoners means that they should not be in prison at all.⁴⁶ Some abolitionists argue that improving the conditions of confinement only gives a veneer of respectability to a fundamentally unjust system.⁴⁷ Speaking personally, I do not believe that improving conditions of confinement is inherently incompatible with reducing the power of the carceral state, or even abolition. But regardless, the analysis of this Note focuses on ameliorating rather than obliterating existing systems. Whether such an

⁴⁰ Cf. Carmen Marsal, *The Yogyakarta Principles: Human Rights at the Service of Gender Ideology*, 20 DÍKAION 119 (June 21, 2011) (arguing that the Principles do not actually articulate human rights but rather entirely new legal principles).

⁴¹ See *supra* p. 7 and note 28.

⁴² For one attempt to do so at a general level (not specifically concerned with trans rights), see O’Connell, *supra* note 37.

⁴³ YOGYAKARTA PRINCIPLES, *supra* note 8, at 17.

⁴⁴ David Brown, Note, *Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles*, 31 MICH. J. INT’L L. 821, 853–67 (2010).

⁴⁵ Glendon, *supra* note 24, ¶ 30 (“The difficulty with international legal remedies, as historian Brian Simpson has pointed out, is that they work best where there is fairly wide acceptance of their legitimacy or a perception that compliance is in the interests of those subject to the system. They are thus apt to be least effective in the situations where the worst violations occur.”).

⁴⁶ For a good general primer on abolitionist thought, see *generally* MARIAME KABA, WE DO THIS ‘TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE (2021).

⁴⁷ Cf. MAYA SCHENWAR & VICTORIA LAW, PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR REFORMS 11–12 (2020) (“Reforms that supposedly improve the current system run the risk of entrenching dangerous, violent, racist, classist, ableist, oppressive institutions—making them even harder to uproot. When captivity is perceived as kinder and gentler, it becomes more acceptable and less of an urgent priority to confront, even though it continues to destroy countless lives.”).

approach is strategically wise is beyond the bounds of this Note; but for those who agree that improving conditions of confinement for trans prisoners can be a goal worth pursuing, I hope that this Note offers some tactical advice.

II. VIOLENT LIVED EXPERIENCES OF TRANS PRISONERS

Prisoners in general suffer from greater rates of poverty compared to the broader population of a country, and they are particularly likely to have been victims of violence, emotional abuse, or sexual abuse—or all three—at some point in their lives.⁴⁸ Prisons do not alleviate these conditions; rather, they exacerbate them, forcing many prisoners to suffer routine incidents of physical, emotional, and sexual abuse, except now under the watchful eye (and, all too often, the participating hand) of prison officials.⁴⁹ These patterns hold across national contexts, with few exceptions.⁵⁰

These trends are even more prevalent for trans prisoners, who are especially likely to have experienced physical, emotional, or sexual abuse.⁵¹ In part, this reflects the greater danger of living as a trans person *outside* of prison;⁵² but once inside, the danger increases dramatically. Imprisoned trans people in the United States are five to six times more likely than cis prisoners to experience sexual assault while behind bars.⁵³ In certain prison systems, that number is much higher.⁵⁴ Moreover, given the notable over-policing of trans

⁴⁸ See generally Abigail A. Fagan, *The Relationship Between Adolescent Physical Abuse and Criminal Offending: Support for an Enduring and Generalized Cycle of Violence*, 20 J. FAM. VIOLENCE 279 (2005) (presenting research demonstrating that suffering physical abuse at a young age immediately and enduringly increases one's likelihood of becoming a criminal offender).

⁴⁹ James M. Byrne & Don Hummer, *Myths and Realities of Prison Violence: A Review of the Evidence*, 2 VICTIMS & OFFENDERS 77, 78–83 (Jan. 23, 2007); SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET, & MA'AYAN ANAFI, NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 191–93 (Dec. 2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [hereinafter 2015 U.S. TRANSGENDER SURVEY].

⁵⁰ For research on prisons that tend to hold themselves to a much higher standard, see generally PENAL EXCEPTIONALISM? NORDIC PRISON POLICY AND PRACTICE (2012).

⁵¹ For a good summary of the alarming statistics concerning trans prisoners' lived experiences in the U.S. context, see Sarah Ortlip-Sommers, Note, *Living Freely Behind Bars: Reframing the Due Process Rights of Transgender Prisoners*, 40 COLUM. J. GENDER & L. 355, 359–64 (2021).

⁵² LAMBDA LEGAL, TRANSGENDER RIGHTS TOOLKIT: A LEGAL GUIDE FOR TRANS PEOPLE AND THEIR ADVOCATES 1 (2016), https://www.lambdalegal.org/sites/default/files/publications/downloads/2016_trans_toolkit_final.pdf.

⁵³ 2015 U.S. TRANSGENDER SURVEY, *supra* note 49, at 192; see also Yvonne Boyer, Ayoola S. Odeyemi, Erin Fletcher, & Jade Fletcher, *Vulnerable Targets: Trans Prisoner Safety, the Law, and Sexual Violence in the Prison System Report*, 31 CAN. J. WOMEN & L. 386, 389–90 (2019) (Canadian trans women prisoners “are often classified under ‘protective custody’ because of their vulnerability to victimization from other prisoners.”).

⁵⁴ See, e.g., Valerie Jenness, Lori Sexton, & Jennifer Macy, *Sexual Victimization against Transgender Women in Prison: Consent and Coercion in Context*, 57 CRIMINOLOGY 603 (2019) (rates of sexual assault higher in California); Valerie Jenness, *The Social Ecology of Sexual Victimization Against Transgender Women Who Are Incarcerated: A Call for (More) Research on Modalities of Housing and Prison Violence*, 20 CRIM. & PUB. POL'Y 3 (2021) (more data on California).

bodies,⁵⁵ trans people are more likely than cis people to become imprisoned.⁵⁶ In other words, trans people are significantly more likely to be imprisoned, and once in prison they are significantly more likely to suffer violence and sexual assault.

Additionally, in countries with significant problems of institutional racism in their justice systems, such as the United States, these dangers become even further exacerbated for trans people of color. In the United States, *half* of all Black trans people have been imprisoned,⁵⁷ compared with one in six trans people of all races,⁵⁸ one in three Black men (cis and trans),⁵⁹ and one in seventeen people in the general population.⁶⁰ In Canada, Indigenous trans and non-binary prisoners (many of whom are two-spirit⁶¹) “are at a greater risk for negative mental and physical health outcomes than their non-Indigenous LGBTQI peers and their non-LGBTQ2SI Indigenous peers.”⁶² While this Note does not focus specifically on race, it should never be forgotten that criminal justice systems are not race neutral.

Imprisoned trans people thus suffer particularly acute versions of the dangers to life, health, and emotional stability common to all prisoners. Like cis prisoners, they possess needs particular to their gender identities; but unlike cis prisoners, those needs are often unmet or outright denied by prison authorities. Most countries sort imprisoned people into facilities either on the basis of sex assigned at birth or genitalia.⁶³ The institutional misgendering that can result can be detrimental to trans prisoners’ health, particularly when accompanied by encounters with prison staff or other imprisoned people who refuse to acknowledge trans gender identities.⁶⁴ Trans women housed with cis male prisoners “are at ‘special risk’ for physical injury, rape, and even death, due to cultural norms within

⁵⁵ See JOEY L. MOGUL, ANDREA J. RITCHIE, & KAY WHITLOCK, *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* 61 (2011) (“Transgender women, particularly transgender women of color, are so frequently perceived to be sex workers by police that the term walking while trans, derivative of the more commonly known term driving while Black, was coined to reflect the reality that transgender women often cannot walk down the street without being stopped, harassed, verbally, sexually and physically abused, and arrested, regardless of what they are doing at the time.”).

⁵⁶ Ortlip-Sommers, *supra* note 51, at 359.

⁵⁷ LAMBDA LEGAL, *supra* note 52, at 5.

⁵⁸ Ortlip-Sommers, *supra* note 51, at 359.

⁵⁹ *Criminal Justice Fact Sheet*, NAACP, <https://naacp.org/resources/criminal-justice-fact-sheet> (last visited Oct. 13, 2022). Note that this statistic reflects a prediction of the percentage of Black men who *will* go to prison at some point in their lives, rather than the number who *have already* been to prison. The statistic also does not distinguish between cis and trans men.

⁶⁰ Ortlip-Sommers, *supra* note 51, at 359.

⁶¹ “Two-spirit” is a term used by some Indigenous people, particularly, but not only, in Canada, “who identifi[y] as having both a masculine and a feminine spirit.” *Two-Spirit Community*, RE:SEARCHING FOR LGBTQ2S+ HEALTH, <https://lgbtqhealth.ca/community/two-spirit.php> (last visited Jan. 23, 2023). The term can describe “sexual, gender and/or spiritual identit[ies]” and as such, should not be considered simply equivalent to Western terms such as trans. *Id.* For more reflections on issues related to differences between modern Western notions of non-binary gender and traditional concepts of gender that do not fit into the modern Western binary, see *infra* p. 24 and notes 159, 166.

⁶² Boyer, Odeyemi, Fletcher, & Fletcher, *supra* note 53, at 388–89.

⁶³ See *infra* Part IV.

⁶⁴ *Hampton v. Baldwin*, No. 3:18-CV-550-NJR-RJD, 2018 WL 5830730, at *6, *7 (S.D. Ill. Nov. 7, 2018) (expert concluding that many of plaintiff’s disciplinary infractions likely stemmed from her placement “in a men’s prison, in segregation, and in close range to those who have assaulted her” and represented attempts to “support [her] own view of her gender identity”).

prison facilities that ‘equate[] femininity with weakness.’”⁶⁵ Unsurprisingly, trans prisoners are also at particular risk of suicide.⁶⁶

Many imprisoned trans people also wish to pursue various medical methods of transition, such as hormone-replacement therapy and gender-affirming surgery.⁶⁷ Although not all trans people wish to medically transition, many do, and those who medically transition overwhelmingly regard the choice as having been a good one.⁶⁸ In the United States—given the very high rates of poverty among trans people generally, the very high rates of trans incarceration, and the lack of a constitutional right to medical care for anyone *except* prisoners⁶⁹—it is possible, ironically, that prison may actually provide the best chance of securing a medical transition that some American trans people will experience. Nevertheless, access to trans medical care in prison, particularly surgery, is a fraught issue, both in the United States and elsewhere, given that gender-affirming procedures are often classified as “elective” or even “vanity” surgeries.⁷⁰

The above presents only the tip of the iceberg with respect to the issues facing trans people behind bars.⁷¹ In short, trans people in prison, like all people in prison, should have the right to live without risks to their lives, bodily integrity, or mental well-being, and in a manner that affirms their gender identity.⁷² The right to physical, sexual, and mental safety is a bedrock concept of human rights, and the affirmation of gender identity is increasingly regarded as an essential component of human rights as well.⁷³ But the extent to which imprisoned trans people will actually have such rights respected differs greatly from country to country, and in highly federated countries, often from one province or state to another.

⁶⁵ Ortlip-Sommers, *supra* note 51, at 362 (quoting Christine Peek, *Breaking Out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 SANTA CLARA L. REV. 1211, 1220 (Jan. 1, 2004)). However, providing gender-conforming prison facilities may not always be the best solution for trans men. Many trans men prisoners would prefer to stay in a women’s prison, rather than suffer from the same violent cultural norms that make life so difficult for trans women prisoners in male facilities. Hébert, *supra* note 5, at 231. Of course, ideally, trans prisoners would be able to both receive gender-affirming care and live without fear of violence.

⁶⁶ See, e.g., Max Read & Niall McCrae, *Preventing Suicide in Lesbian, Gay, Bisexual, and Transgender Prisoners: A Critique of U.K. Policy*, 12 J. FORENSIC NURSING 13, 14 (Jan. 2016) (detailing increased risk of suicide among British LGBTQ prisoners).

⁶⁷ 2015 U.S. TRANSGENDER SURVEY, *supra* note 49, at 93.

⁶⁸ Tim C. van de Grift, Els Elaut, Susanne C. Cerwenka, Peggy T. Cohen-Kettenis, & Baudewijntje P. C. Kreukels, *Surgical Satisfaction, Quality of Life, and Their Association after Gender-Affirming Surgery: A Follow-up Study*, 44 J. SEX & MARITAL THERAPY 138 (2018).

⁶⁹ *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

⁷⁰ Alvarez & Muñoz, *supra* note 11, at 15 (Mexico and Costa Rica); see generally Esinam Agbemenu, *Medical Transgressions in America’s Prisons: Defending Transgender Prisoners’ Access to Transition-Related Care*, 30 COLUM. J. GENDER & L. 1 (2015); see also Kirsty A. Clark, Jaclyn M. White Hughto, & John E. Pachankis, “What’s the Right Thing to Do?” *Correctional Healthcare Providers’ Knowledge, Attitudes and Experiences Caring for Transgender Inmates*, 193 SOC. SCI. & MED. 80 (2017) (study of New England prison healthcare providers demonstrating that trans prisoners consistently fail to receive adequate healthcare and mental care).

⁷¹ For example, prison officials are also significantly more likely to place trans prisoners in solitary confinement—often under the explanatory justification that doing so is necessary for their safety. Ortlip-Sommers, *supra* note 51, at 362–64.

⁷² YOGYAKARTA PRINCIPLES, *supra* note 8, at 16–17.

⁷³ See *supra* Part I.

III. INTERNATIONAL COMPARISONS

Unfortunately, as is the case with almost all social phenomena (especially LGBTQ phenomena), there is a tremendous amount written about trans rights in the United States, a significantly smaller but still sizable amount written about Western Europe and the non-U.S. settler-colonies of Britain (such as Canada or Australia), and very little about most of the rest of the world. In some regions, such as Central Africa, the topic of trans prisoners' rights has received almost no scholarly attention whatsoever.⁷⁴ Consequently, the following case studies do not provide a comprehensive picture of the global state of trans prisoners' rights. I have, however, attempted to draw a sample with a fair amount of cultural and regional variety, given these restraints. In addition, I hope that my focus on different legal contexts—that is, the broader contexts that influence the formation of judicial and legislative law—means that my analysis will be relevant to other countries with similar contexts to those that appear in this Note.

A. *The United States of America*

The amount of scholarship on trans prisoners in the United States easily eclipses that of any other country on the planet, perhaps even every country combined. (Granted, such a situation may be partially justified by the fact that the U.S. prison population similarly exceeds the next several most-carceral countries combined.⁷⁵) While a complete review of trans legal precedents in the United States is beyond the scope of this Note,⁷⁶ I will discuss some of the current strategies, including some claims brought under the Cruel and Unusual Punishment and Equal Protection Clauses, that have found legal success in securing rights for trans prisoners. But these strategies are limited by their need to invoke well-established constitutional rights that have only an incidental relationship to gender identity. The necessity of arguing in these terms means that a human rights framework is not a viable way of achieving trans prisoners' rights in U.S. courts, particularly federal courts.

In the United States of America, a vast majority of the imprisoned population—including the imprisoned trans population—exists within the various state criminal justice systems, rather than the federal system. For this reason, the challenges faced by any given trans person—and the opportunities for legal redress available to them—may differ

⁷⁴ The International Bar Association observes that “[l]aws on gender identity and expression in Africa generally do not exist. Regardless of the strong focus on homosexuality and gay rights, there is a relatively intense silence on gender identity and expression, thus making trans persons, and invariably their rights, invisible broadly in society and even marginalised in human rights advocacy. The consciousness of the existence of trans persons in Africa is lacking, resulting in the absence of social services and policy development for trans persons.” INT’L BAR ASS’N LGBTI L. COMM., RSCH. DIG., MR & MS X: THE RIGHTS OF TRANSGENDER PERSONS GLOBALLY 17 (2015) [hereinafter TRANSGENDER PERSONS GLOBALLY]. With respect to prisons specifically, “[t]rans persons [in Africa] are often assigned to a facility that corresponds with the gender indicated on their national identification card and not their gender identity or expression. Other prison inmates therefore subject trans persons to sexual harassment.” *Id.* at 32.

⁷⁵ See, e.g., Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL’Y INITIATIVE (Sept. 2021), <https://www.prisonpolicy.org/global/2021.html>. Notably, *thirty-four* U.S. states, considered alone, incarcerate at a greater rate than any other country on Earth. *Id.*

⁷⁶ For a more comprehensive overview of U.S. law, see generally Ortlip-Sommers, *supra* note 51.

significantly from one State to another.⁷⁷ One trans prisoner in New Jersey recently found success in claiming that her incarceration in a men’s facility violated her “right to live freely” under the New Jersey Constitution.⁷⁸ But living in a comparatively “progressive” State is no guarantee: a court in California held that a trans prisoner who suffered abuse due to the alleged deliberate indifference of prison guards had no right to sue for damages under the California Constitution’s cruel or unusual punishment clause.⁷⁹ Given that many state constitutions do not offer significant protections for imprisoned trans people, a sizable majority of their suits allege violations of their rights under the federal Constitution (usually through 42 U.S.C. § 1983), and thus frequently occur in federal court.⁸⁰ But this means that invocations of a human rights framework, as opposed to a constitutional rights framework, are unlikely to be persuasive to a federal judge—they want to know how the claimed rights fit into the constellation of rights specifically secured by the Constitution, rather than those determined by a consensus of philosophers and international jurists.

The majority of federal trans prisoners’ rights cases involve Eighth Amendment claims.⁸¹ The Eighth Amendment protects U.S. citizens, *inter alia*, from “cruel and unusual punishment” by the federal and (through the Fourteenth Amendment) State governments.⁸² Exactly what those terms mean is a matter of much dispute, but on the face of the text they seem to refer to something like the basic human rights discussed above. Perhaps the most famous interpretation—albeit still a very loose one—comes from *Trop v. Dulles*, in which Chief Justice Warren declared that the “scope” of the amendment “is not static,” and that it “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁸³ In other words, as our moral understanding changes, so too should our understanding of what is cruel and unusual.

Of course, it is only recently in this country’s history that respect for trans people could be considered part of the national “evolving standards of decency” to which Chief Justice Warren referred.⁸⁴ Thus, even though this interpretation of the Clause potentially allows for the addition of trans prisoners’ rights to those secured by the Eighth Amendment, it is not difficult to imagine that many imprisoned trans people would not take much comfort in the idea that the legal existence of their human rights depends in part on the degree to which a large percentage of Americans care to recognize those rights. Additionally, rooting the legal existence of a right in the recognition of that right would seem to cut against the “self-evident” quality that rights, particularly human rights, are

⁷⁷ See generally, e.g., Jenness, Sexton, & Macy, *supra* note 54; see also Ortlip-Sommers, *supra* note 51, at 382–83. For a good overview of the variety of different state statutes and regulations concerning trans prisoners, see generally Douglas Routh, Gassan Abess, David Makin, Mary K. Stohr, Craig Hemmens, & Jihye Yoo, *Transgender Inmates in Prisons: A Review of Applicable Statutes and Policies*, 61 INT’L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 645 (May 2017).

⁷⁸ *Woman Who Is Transgender Will Be Transferred to Women’s Prison*, ACLU N.J. (Aug. 29, 2019), <https://www.aclu-nj.org/news/2019/08/29/woman-who-transgender-will-be-transferred-womens-prison>.

⁷⁹ *Giraldo v. Dep’t of Corr. & Rehab.*, 168 Cal. App. 4th 231, 255–57 (2008); cf. CAL. CONST. art. I, § 17 (“Cruel or unusual punishment may not be inflicted or excessive fines imposed.”).

⁸⁰ Ortlip-Sommers, *supra* note 51, at 382.

⁸¹ *Id.* at 368.

⁸² U.S. CONST., amend. VIII, XIV.

⁸³ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

⁸⁴ Although our contemporary understanding of transness is relatively new, hatred of those who do not conform to gender and sex norms is an ancient form of prejudice.

commonly held to possess.⁸⁵ Still, sociologically speaking, “evolving standards of decency” arguably encompass rights to gender expression today, and they certainly include the risks to health and bodily integrity suffered at disproportionate rates by trans prisoners. Certain circuit courts have interpreted that phrase in a way that arguably opens the door to trans prisoners’ rights by recognizing that transphobic “conduct that might not have been seen to rise to the severity of an Eighth Amendment violation 18 years ago may now violate community standards of decency.”⁸⁶

Prisons violate the Eighth Amendment when they are “deliberately indifferent” to a prisoner’s health and safety.⁸⁷ Since *Estelle v. Gamble* in 1976, “deliberate indifference” has meant “unnecessary and wanton infliction of pain.”⁸⁸ As it happens, one of the leading cases on “deliberate indifference,” *Farmer v. Brennan*, concerns a trans woman who suffered physical and sexual violence after being transferred to a prison with a history of significant violence.⁸⁹ The Supreme Court unanimously⁹⁰ reversed the Seventh Circuit’s grant of summary judgment against Ms. Farmer and held that a genuine dispute existed as to whether prison officials had been deliberately indifferent to the danger of violence that Ms. Farmer risked as a trans woman in the new prison. *Farmer* did not establish a right specific to trans prisoners, but it did take Ms. Farmer’s status as a trans woman into account when determining whether her Eighth Amendment rights had been violated.⁹¹

Prisoners can also bring “deliberate indifference” suits alleging lack of adequate medical care. To prevail on such a claim, plaintiffs must prove that prison officials knew about a prisoner’s serious medical condition, could reasonably have provided medical care, and chose not to do so.⁹² Trans people frequently have gender dysphoria diagnoses, and if so, they have a legally-cognizable medical condition with established standards of medical care, such as hormone therapy and gender-affirming surgery.⁹³ Many trans people understandably object to their basic reality being thought of as a mental disorder,⁹⁴ but that diagnosis has proven legally useful in several cases. In 1987, the Seventh Circuit affirmed in *Meriwether v. Faulkner* that gender dysphoria (to use the contemporary term) can constitute a serious medical condition and that prisons should treat it accordingly.⁹⁵ Since then, the federal circuits have split various ways in addressing whether gender-affirming

⁸⁵ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Many scholars, particularly within Marxist traditions, have critiqued the notion of legal rights (including human rights) along these lines—i.e., that rights are never “self-evident,” but rather are always invented, and typically only granted to the ruling classes. See O’Connell, *supra* note 37.

⁸⁶ Crawford v. Cuomo, 796 F.3d 252, 260 (2d Cir. 2015).

⁸⁷ *Estelle v. Gamble*, 429 U.S. 97 (1976).

⁸⁸ *Farmer v. Brennan*, 511 U.S. 825 (1994).

⁸⁹ *Id.*

⁹⁰ *Id.* at 848–49. Justice Thomas concurred in judgment but did not join the majority opinion.

⁹¹ *Id.*

⁹² *Estelle*, 429 U.S. at 105–06.

⁹³ Ortlip-Sommers, *supra* note 51, at 356 n.3 (“Gender dysphoria, a condition recognized by the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5), is the ‘severe distress’ a person feels as a result of a discrepancy between sex assigned at birth and gender identity.”).

⁹⁴ See *id.* at 372.

⁹⁵ *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987).

surgery and hormone therapy constitute medical necessities and whether prison officials can be held “deliberately indifferent” for ignoring the medical needs of trans prisoners.⁹⁶

Recently, the Southern District of Illinois has ruled repeatedly in favor of trans prisoners who were denied medical care.⁹⁷ In *Monroe v. Meeks*, a class-action suit seeking redress for “all [prisoners] in the custody of IDOC (Illinois Department of Corrections) who have requested evaluation or treatment for gender dysphoria,” the court granted a preliminary injunction requiring sweeping changes to IDOC’s policies concerning treatment for trans prisoners.⁹⁸ While the court viewed favorably the policies that IDOC had already instituted,⁹⁹ the implementation of those policies was so poor that it violated several court orders.¹⁰⁰ The opinion did not mince words: “This Court has never seen such deliberate indifference to a serious medical need.”¹⁰¹ The Southern District of Illinois’s willingness to recognize the denial of gender dysphoria treatment as a violation of the Eighth Amendment and to demand full compliance from the prison offers hope that this avenue of litigation will continue yielding positive results for trans prisoners across the country.

Nevertheless, this legal strategy has significant drawbacks. In addition to the problem of treating transness as a medical disorder maybe deserving treatment rather than an identity deserving respect, there is the simple fact that not all trans people—even those who wish to medically transition—experience gender dysphoria. That diagnosis requires not only a “discrepancy between [a person’s] assigned [sex at birth] and their gender identity” but also “severe [related] distress.”¹⁰² Without a gender dysphoria diagnosis, courts are unlikely to find that a trans prisoner has the right to gender-affirming medical care. The difficulty of showing “deliberate indifference”—a required element of an Eighth Amendment claim—also means that many acts of cruel and unusual punishment toward trans prisoners will not be actionable. For many years, the broad dearth of knowledge among cis people concerning trans lives meant that *Gamble*’s requirement of “deliberate indifference” could be defeated by simple ignorance of what gender identity means.¹⁰³ While that may no longer be true today, it remains the case that only a strong showing of indifference will secure legal victory.

⁹⁶ See generally Claire Nolasco Braaten & Michael S. Vaughn, *Litigation on Gender Confirmation Surgery and Hormonal Therapy among Trans Women Prisoners: Views from the U.S. Circuit Courts of Appeals*, 32 WOMEN & CRIM. JUST. 1 (Aug. 17, 2021) (providing an overview of circuit court decisions concerning trans prisoners’ medical needs).

⁹⁷ See, e.g., *Hampton v. Baldwin*, No. 3:18-CV-550-NJR-RJD, 2018 WL 5830730 (S.D. Ill. Nov. 7, 2018); *Hampton v. Kink*, No. 18-CV-550-NJR-MAB, 2021 WL 2580267 (S.D. Ill. June 23, 2021); *Monroe v. Meeks*, No. 3:18-CV-00156-NJR, 2021 U.S. Dist. LEXIS 148487 (S.D. Ill. Aug. 9, 2021).

⁹⁸ *Monroe*, 2021 U.S. Dist. LEXIS 148487, at *2–3.

⁹⁹ *Id.* at *9–10.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at *14.

¹⁰² Ortlip-Sommers, *supra* note 51, at 372. Following the definition given in *supra* note 93, a person who acknowledges a “discrepancy between [their] sex assigned at birth and [their] gender identity,” but does not feel “severe distress,” does not have gender dysphoria. The condition is caused not by transness but rather by society’s transphobia.

¹⁰³ Compare *Kosilek v. Maloney (Kosilek I)*, 221 F.Supp.2d 156 (D. Mass. 2002) (case dismissed because warden was ignorant of the risks of harm to trans persons), with *Kosilek v. Spencer (Kosilek II)*, 889 F.Supp.2d 190 (D. Mass. 2012) (“deliberate indifference” met because no longer reasonable to plead ignorance concerning same trans prisoners’ health needs).

More generally, the necessity of such a legal tactic demonstrates the weakness of human rights as a vehicle for securing trans prisoner rights under U.S. law. With few exceptions, imprisoned trans litigants have only been successful when they have framed their demands within the terminology of well-recognized constitutional rights. They do not have success when using a human rights framework. Legally speaking, a trans prisoner with gender dysphoria may be entitled to medical treatment *not* because they are trans or human, but because they have a condition recognized by psychiatrists as deserving of Eighth Amendment protection. As the rest of this subpart shows, an argument that the Constitution guarantees medical therapy to trans prisoners simply by virtue of their human rights would be unlikely to gain any traction in U.S. courts. In America the Constitution, not the UDHR or the Yogyakarta Principles, is the exclusive source of recognized rights.

Trans prisoners can also try to claim that their human-rights-as-trans-rights are protected under the Equal Protection Clause. Women and gay people have been able to secure (some) legal protections using similar strategies.¹⁰⁴ Some imprisoned trans people have successfully argued that a prison's mistreatment constitutes discrimination on the basis of sex,¹⁰⁵ but the difficulty of identifying a "similarly situated" comparator group makes such cases difficult to win. For example, a trans woman in Wisconsin argued that her prison's refusal to give her gender confirmation surgery violated the Equal Protection Clause on the basis of sex because the policy denied medically necessary vaginoplasty surgery to prisoners assigned male at birth, but not to prisoners assigned female at birth.¹⁰⁶ The district court rejected her argument because it found that she was not similarly situated with prisoners assigned female at birth: "[A] vaginoplasty for a transgender female inmate (that is, a biological male) is necessarily a different type of surgical procedure than for a cisgender female inmate (that is, a biological female). The biological female already has a vagina; the biological male doesn't."¹⁰⁷ Such rulings represent a judicial tendency to elevate a falsely binary conception of biological sex over any conception of gender as a basis of comparison.¹⁰⁸

¹⁰⁴ *Cf.* *Craig v. Boren*, 429 U.S. 190 (1976) (holding that an Oklahoma law violated the Equal Protection Clause for discriminating on the basis of sex); *Romer v. Evans*, 517 U.S. 620 (1996) (holding that a Colorado constitutional amendment violated the Equal Protection Clause for discriminating against homosexuals).

¹⁰⁵ *See, e.g.,* *Tay v. Dennison*, 457 F.Supp.3d 657, 680–81 (S.D. Ill. 2020) (holding that where the state department of corrections "houses inmates, by default, in the prison of their gender assigned at birth," "a sex-based classification is used, and intermediate scrutiny will be applied"; further holding that the trans prisoner plaintiff was likely to succeed on the merits of her Equal Protection claim that imprisoning her in a male facility was not substantially related to an important governmental objective).

¹⁰⁶ *Campbell v. Kallas*, No. 16-CV-261-JDP, 2018 WL 2089351, at *10 (W.D. Wis. May 4, 2018), *rev'd on other grounds*, 936 F.3d 536 (7th Cir. 2019).

¹⁰⁷ *Id.*

¹⁰⁸ In general, "gender" refers to an aspect of one's psychological identity and sociological performance, while "sex" refers to categorizations of biology. "Gender" is socially constructed because our understanding of what it means to be a man or anything else will always be informed by meanings attached to that term by society. *See generally* JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 1–46 (2d ed. 1990) (a classic study of the difference between sex and gender). "Sex" is also socially constructed, but in a different manner. While sex derives from biological facts, the grouping of those facts into certain categories (e.g., "male") is also informed by culture. Accordingly, the meaning of

Full recognition of trans rights, for prisoners and otherwise, would likely require the recognition of a new class of protected persons by the Supreme Court. That seems unlikely to occur under the current Court, which by some measures is the most conservative in almost a century.¹⁰⁹ Today, prisoners, including cis prisoners, face a Supreme Court that—at least since the 1980s—has generally been hostile to their rights.¹¹⁰ Recent cases such as *Bostock v. Clayton County*¹¹¹ indicate that some conservative members of the current Court may be friendlier to trans rights than might be expected, at least regarding a question of statutory interpretation. Still, the decision in *Dobbs v. Jackson Women’s Health Organization* (which overturned *Roe v. Wade*) indicates that this Court is unlikely to permit the expansion of Constitutional protections beyond those a majority considers to be “deeply rooted in history.”¹¹² Chief Justice Warren’s progressive approach to the Eighth Amendment now contrasts with the ostensibly originalist¹¹³ jurisprudence favored by much of the Court. In a recent majority opinion, Justice Gorsuch argued that we must adhere to “the original and historical understanding of the Eighth Amendment,” which would only forbid “superadd[ed] pain well beyond what’s needed to effectuate” punishment.¹¹⁴ Needless to say, an understanding of “cruel and unusual punishment” that only prohibits what the Founding Fathers would have characterized as impermissible is unlikely to accommodate a right to free gender expression.

Finally, as noted above, human rights tend to have a strong internationalist character.¹¹⁵ In general, U.S. courts have not been particularly willing to let international

“biological sex” has changed quite significantly over the course of history. *See, e.g.*, THOMAS LAQUEUR, MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD 25–62 (1990) (describing how the ancient Romans and Greeks believed in one sex rather than two); Tom Butcher, Sexual Spectra: Biology and Sexual Politics in Europe, 1896–1933 (2018) (Ph.D. dissertation, University of Virginia) (available at <https://doi.org/10.18130/v3-e3pa-0181>) (detailing that many Europeans in the early twentieth century understood sex to be a spectrum with infinite potential positions).

¹⁰⁹ Amelia Thomson-DeVeaux & Laura Bronner, *The Supreme Court’s Conservative Revolution Is Already Happening*, FIVETHIRTYEIGHT (Oct. 20, 2021, 6:00 AM), <https://fivethirtyeight.com/features/the-robotics-court-vs-the-trump-court/>.

¹¹⁰ *See generally* Christopher E. Smith, *Prisoners’ Right and the Rehnquist Court Era*, 87 PRISON J. 457 (2007); Christopher E. Smith, *The Changing Supreme Court and Prisoners’ Rights*, 44 IND. L. REV. 853 (2011); Rachel Poser, *Why It’s Nearly Impossible for Prisoners to Sue Prisons*, NEW YORKER (May 30, 2016), <https://www.newyorker.com/news/news-desk/why-its-nearly-impossible-for-prisoners-to-sue-prisons>.

¹¹¹ *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731 (2020).

¹¹² *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2258 (2022).

¹¹³ *Cf.* Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1205–23 (arguing that many originalists commit the error of engaging in “history without historicism”); Eric Foner, *The Supreme Court and the History of Reconstruction—and Vice-Versa*, 112 COLUM. L. REV. 1585, 1591 (2012) (“To historians, [the debate over originalism] seems a pointless argument. Few, if any, historians believe that a single intent characterized the laws and amendments of Reconstruction (or, indeed, any other important historical documents).”).

¹¹⁴ *Bucklew v. Precythe*, 139 S. Ct. 1112, 1126–27 (2019); *see also* Blake Allen, *Changing Against the Times: Against an Originalist Cruel and Unusual Jurisprudence*, 18 GEO. J.L. & PUB. POL’Y 583.

¹¹⁵ *See supra* Part II.

law interfere with domestic policy.¹¹⁶ True, certain outliers exist. In *Roper v. Simmons*, a five-Justice majority declared the death penalty unconstitutional for juveniles in part through reference to “the views of the international community in determining whether a punishment is cruel and unusual.”¹¹⁷ However, this is an exception that proves the rule. Justice Kennedy’s opinion carefully noted that “[international] reality does not become controlling.”¹¹⁸ Nevertheless, Justice Scalia dissented scathingly, proclaiming that “the basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.”¹¹⁹ There is every reason to think that a majority of the current Court would endorse Justice Scalia’s dissent.¹²⁰ As a general matter, the United States tends to guard its legal sovereignty zealously. Not only has the United States failed to sign or otherwise legislatively acknowledge the Yogyakarta Principles, including the new, “plus 10” version, but also the Westlaw and Lexis databases contain only *one* court opinion (federal or state) that even *mentions* the Principles—and that one opinion came out only shortly before this Note went to press.¹²¹

Thus, at least for the foreseeable future, I am skeptical of the efficacy of a human rights framework in securing rights for U.S. trans prisoners—at least at the federal level. With the growing polarization of the country, it is possible that greater opportunities for trans prisoners’ rights may develop within more progressive State legal systems, where judges, legislators, and voters may be more supportive of the internationalist character of human rights arguments. Such judges may also be more willing to find protections for human rights within the United States or State constitutions. Given the conservative and originalist bent of the current Supreme Court, it would seem likely that the best prospects for new frameworks for the legal rights of trans prisoners do not lie in the federal courts. And, to the extent that federal court is an option for trans prisoners’ claims, making human rights arguments in federal court is not.

B. Canada

In contrast to the United States, the Canadian government has frequently incorporated international standards of human rights—including those articulated in the Yogyakarta Principles—into its legal systems. This incorporation has resulted in legal protections for the rights of imprisoned trans people that are explicitly grounded in a human

¹¹⁶ See, e.g., *Medellin v. Texas*, 552 U.S. 491 (2008) (international treaties no longer presumed to be self-enforcing); see also Melissa A. Waters, *Justice Scalia on the Use of Foreign Law in Constitutional Interpretation: Unidirectional Monologue or Co-Constitutive Dialogue?*, 12 TULSA J. COMPAR. & INT’L L. 149, 151 (2005) (“Justice Scalia appears to have developed such a keen interest in this debate that he sought out opportunities . . . to keep the issue alive On at least three occasions last Term, Justice Scalia seized the opportunity to declare his unequivocal opposition to any use of foreign sources of law in interpreting the rights granted to Americans under the U.S. Constitution.”).

¹¹⁷ *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 624 (Scalia, J., dissenting) (Chief Justice Rehnquist and Justice Thomas joined Justice Scalia’s dissent; Justice O’Connor submitted a separate dissenting opinion).

¹²⁰ See, e.g., *McDonald v. City of Chi., Ill.*, 561 U.S. 742, 781 n.28 (2010) (Alito, J., joined at least in part in the majority by, *inter alia*, Roberts, C.J., and Thomas, J.) (citing with approval a portion of Justice Scalia’s *Roper* dissent that disavows the use of international law).

¹²¹ *Dimas v. Pecos Indep. Sch. Dist. Bd. of Educ.*, No. 1:21-CV-00978-KWR-JFR, 2023 WL 2573345, at *9 (D.N.M. Mar. 20, 2023).

rights framework. Still, ambiguities in the composition of related Canadian laws have led to implementation difficulties. Thus, Canada demonstrates both the strengths of a human rights framework in achieving legal protections for trans prisoners and also that the use of such a framework does not eliminate the need to pay careful attention to details of implementation.

Initially, Canadian courts led the effort to recognize trans human rights: “Although explicit rights recognition at the federal, provincial, and territorial levels is very recent, human rights tribunals have a history of recognizing discrimination against trans people under the grounds of ‘sex’ and/or ‘disability.’”¹²² But in this millennium, the Canadian legislatures have adopted significant protections for trans rights; at the federal level, these changes often came from bills that modified the Canadian Human Rights Act.¹²³

In Canada, between the early 2000s and late 2010s, law reforms led to the adoption of more inclusive requirements for changes to identity documents and to the addition of gender identity and gender expression in human rights legislation. Trans personhood became a new legal category of difference—distinct from but equal to existing categories such as sex, disability, race, and religion—that the Canadian state promised to affirm and protect. As a result, public institutions were gradually constrained to affirm trans people’s self-determined identities regardless of their anatomy or appearance.¹²⁴

In 2015, Ontario became the first province to explicitly institutionalize trans rights in its domestic prison system.¹²⁵ Parliament followed suit two years later by passing Bill C-16, which added “gender identity” and “gender expression” to the Canadian Human Rights Act.¹²⁶ That bill came shortly after the Correctional Service of Canada (CSC; the national prison system) announced a departure from its old policy of sorting prisoners based on genitalia alone.¹²⁷ The reform, eventually known as “Bulletin 584,” aimed to implement two different principles: first, a “commit[ment] to ensuring a safe, inclusive, and respectful environment for everyone, including staff, offenders, contractors, volunteers, and visitors”;¹²⁸ and second, a “duty to accommodate based on gender identity

¹²² Boyer, Odeyemi, Fletcher, & Fletcher, *supra* note 53, at 405.

¹²³ *Id.* at 404.

¹²⁴ Hébert, *supra* note 5, at 224–25 (citations omitted).

¹²⁵ Solicitor General, *Ontario’s Policy for the Admission, Classification and Placement of Trans Inmates*, ONT. NEWSROOM (Jan. 26, 2015), <https://news.ontario.ca/en/backgrounder/31587/ontarios-policy-for-the-admission-classification-and-placement-of-trans-inmates>. Incidentally, the right-wing backlash to the trans-rights bills passed in Canada in these years provided the initial context for Prof. Jordan Peterson’s rise to alt-right infamy. Jessica Murphy, *Toronto Professor Jordan Peterson Takes on Gender-Neutral Pronouns*, BBC NEWS: US & CAN. (Nov. 4, 2016), <https://www.bbc.com/news/world-us-canada-37875695>.

¹²⁶ An Act to Amend the Canadian Human Rights Act and the Criminal Code, S.C. 2017, c 13 (Can.).

¹²⁷ Hébert, *supra* note 5, at 222. Incidentally, this old system of strict genital sorting meant that gender-appropriate facilities often *were* available for trans prisoners who had undergone “bottom surgery”—but not for anyone else.

¹²⁸ Hébert, *supra* note 5, at 228 (citing Don Head, *Interim Policy Bulletin 584: Bill C-16 (Gender Identity or Expression)*, CORR. SERV. CAN., GOV’T OF CAN. (Dec. 13, 2017), <https://www.csc-scc.gc.ca/policy-and-legislation/584-pb-en.shtml>).

or expression, regardless of the person’s anatomy (i.e. sex) or the gender marker on identification documents.”¹²⁹ In other words, the Bulletin required the CSC to strongly consider a prisoner’s self-gender-identification when determining whether to house them in male or female facilities; however, the prisoner’s gender identity alone would not necessarily be determinative.¹³⁰

William Hébert reports that, although Bulletin 584 represented an objective improvement in trans prisoners’ rights (at least on paper), it was tainted by implementation issues from its inception.¹³¹ For starters, the CSC—apparently concerned primarily with advertising itself as a progressive institution—posted the new policy on its website two full weeks before it informed its staff about the change.¹³² In one staffer’s opinion, this guaranteed a widening of the perceived gap “between staff’s everyday realities and ‘the paper pushers at CSC’s Headquarters’ in Ottawa.”¹³³ More problematic, however, was the “lack of clear policy directives” beyond the overarching principles identified above—a situation that resulted in significantly different implementations of the Bulletin.¹³⁴

Although the CSC’s reforms have likely led to some improvement in trans prisoners’ safety, they also “leave[] room for uncertainty and grant[] discretionary powers to prison officials in their dealings with trans prisoners,” which often results in “situations that amount to abuse of their rights in breach of domestic and international law.”¹³⁵ Indeed, it seems likely that the “policies’ ambiguity effectively made discretion the true guiding principle of CSC’s reform,” rather than respect for human and trans rights.¹³⁶ In Hébert’s view, the central problem with human rights processes such as the Bulletin is that they are “ambivalent balancing acts: they require determining not only whether and when discrimination has taken place, but also whether and when discrimination is justified.”¹³⁷ That last determination means that there will be instances of discrimination that *are* justified, and the result is that human (and trans) rights become, effectively, something more like *general privileges* than *rights* as normally understood.¹³⁸

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 229–30.

¹³² *Id.*

¹³³ *Id.* at 230.

¹³⁴ *Id.*

¹³⁵ Boyer, Odeyemi, Fletcher, and Fletcher., *supra* note 53, at 411.

¹³⁶ Hébert, *supra* note 5, at 230.

¹³⁷ *Id.* at 222.

¹³⁸ By “general privilege,” I mean not an absolute right but a privilege that can be overridden if the balance of factors weighs against it. Of course, few (if any) legal rights are truly absolute. Even particularly strong rights—such as the First Amendment Right to Free Speech in the United States—are typically subject to certain limitations. And, unsurprisingly, those limitations expand significantly in a prison context. *See, e.g.,* Turner v. Safley, 482 U.S. 78, 91–94 (1987) (prisons may flatly forbid correspondence between prisoners at different facilities). But in the United States, even prisoners retain—at least nominally—a significant portion of their rights to free speech. Further restrictions beyond what is regarded as penally necessary must be justified (although, of course, such justification is easily achievable for prison officials). *Id.* at 89 (“[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”). In contrast, the Canadian “right” of an imprisoned person to be housed in a facility with other people of the same gender does not seem to carry anywhere

Given the inherent discretion required to implement vague policies, together with the need for a balancing test in every individual case, it is unsurprising that many administrators opted to essentially stick with the old system of genital sorting. In one such case, the administrators believed that placing trans women who had *not* undergone genital surgery in a women's facility would pose such an extreme risk that the new balancing test *demand*ed that such trans women remain in men's facilities.¹³⁹ “Notably,” Hébert comments dryly, “interviewees did not express the same concern for trans women housed in women's institutions after undergoing genital surgery”; and neither did they show concern for the vulnerability of trans women imprisoned with cis men.¹⁴⁰

Even imprisoned trans people under the authority of more sympathetic administrators discovered themselves under greater perceived scrutiny after the release of Bulletin 584.¹⁴¹ The previous bright line rule may have discriminated against any trans person unable or unwilling to undergo “bottom surgery,”¹⁴² but the presence of a binary condition had some benefits. Under the old system, trans people who *did* have surgery did not have to worry about “proving” their gender identity to a skeptical administrator.¹⁴³ Under the new Bulletin, trans prisoners seeking a transfer now need to worry about the extent to which the administrators believe that their professed gender identity is real.¹⁴⁴

Even with the above considerations, one can still appreciate the changes that Bulletin 584 has brought and the potential embedded within it for policy improvements further down the line. Despite its drawbacks, I imagine that most imprisoned trans people in the United States would look North with jealousy. Even Hébert—certainly a skeptic of the new system—acknowledges that “Canadian trans correctional reforms demonstrate that [human] rights have the potential to force even the most reluctant institutions to change.”¹⁴⁵ And it is here that we see the strength of a human rights framework for achieving advances—even if partial—for trans liberation within certain national legal contexts.

Compared with the traditional isolationism of U.S. law, there are several historical contexts that may make Canada more open to international legal precepts and trends. Foremost among these is Canada's historical integration into the international framework of the British Commonwealth. Canada never had to go to war for, nor zealously guard, its national independence, as the United States did in the American Revolutionary War and the War of 1812. Although this is only my speculation, Canada's much more peaceful birth as an independent country may have led to less neurotic emphasis on guarding national sovereignty—and thus to greater willingness to accept the authority of international human rights law. The fact that Canada is often regarded as being a *multinational* state may also

near the same presumption of legal inviolability as the right to free speech. For these reasons and more, many scholars have criticized the Canadian human rights approach as insufficiently strong to adequately secure trans liberation. *See generally* Singer, *supra* note 37.

¹³⁹ Hébert, *supra* note 5, at 231.

¹⁴⁰ *Id.* On the vulnerability of trans women imprisoned in men's facilities, *see supra* Part II.

¹⁴¹ Hébert, *supra* note 5, at 239.

¹⁴² And, for that matter, may have also discriminated against trans men who might have wanted to have genital surgery, but who also wanted to avoid the greater violence of men's prisons.

¹⁴³ Of course, there presumably still were other forces within the prisons that encouraged “proving” one's gender.

¹⁴⁴ Hébert, *supra* note 5, at 238–39.

¹⁴⁵ *Id.* at 225 n.6.

play a role here,¹⁴⁶ as might the lessened historical detritus associated with interpreting a constitution created in 1867, rather than 1789. In the historico-legal context created by factors such as these, it is perhaps not too surprising that the framework of international human rights was able to achieve a significant—even if limited—improvement in the lives of Canadian trans prisoners.

C. Other Commonwealth Countries

Without going in-depth, some brief comparisons to other Commonwealth countries may be useful.

In the United Kingdom, trans prisoners are generally entitled to free expression of their gender identity.¹⁴⁷ However, the right of an imprisoned trans person to be housed in a gender-conforming facility is subject to a balancing test similar to that used in Canada; consequently, “all local location and transfer decisions must be taken on a case by case basis where discretion may be applied.”¹⁴⁸ That said, a recent high profile case in the English legal system should firmly cement the right to a gender-conforming facility.¹⁴⁹ The case concerned a trans woman who sexually assaulted her cell mate, a cis woman; the victim then sued the government, arguing that being interred with a trans woman violated her (the cis woman’s) human rights. The court rejected that argument; Lord Justice Holroyde responded that “[t]he difficulty which the claimant faces, in my view, is that it is not possible to argue that the [government] should have excluded from women’s prisons all transgender women . . . To do so would be to ignore, impermissibly, the rights of transgender women to live in their chosen gender.”¹⁵⁰ It is also notable that the British government has provided a pathway to changing one’s legal gender since 2004.¹⁵¹ Recently, the Women and Equalities Committee of Parliament has proposed several changes to the Gender Recognition Act of 2004.¹⁵² Although the former Boris Johnson government failed to accept all of the recommendations, some—such as lowering the cost of a name change from £140 to £5—have been enacted.¹⁵³

¹⁴⁶ The multiple nations of Canada, in this reading, would include the Anglo nation that dominates most of the country, the Francophone nation of Québec, and the numerous Indigenous nations. *See generally* WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1996).

¹⁴⁷ *The Care and Management of Transgender Prisoners*, PRISON REFORM TRUST (Jan. 12, 2017), <https://prisonreformtrust.org.uk/the-care-and-management-of-transgender-prisoners>; *see* NAT’L OFFENDER MGMT. SERV., AI 13/2016, PSI 17, 2016 & PI 2016, *THE CARE AND MANAGEMENT OF TRANSGENDER OFFENDERS* 28 annex A (2016).

¹⁴⁸ *See* *THE CARE AND MANAGEMENT OF TRANSGENDER OFFENDERS*, *supra* note 147.

¹⁴⁹ *FDJ v. Sec’y of State for Just.* [2021] EWHC (Admin) 1746 (Eng.). For more information, *see* Haroon Siddique, *Lawful to Imprison Trans Women Sex Offenders in Female Jails, Judge Rules*, *GUARDIAN: PRISONS & PROBATION* (July 2, 2021, 3:26 PM), <http://www.theguardian.com/society/2021/jul/02/trans-women-with-sex-offence-convictions-in-female-jails-lawful-rules-judge>.

¹⁵⁰ *FDJ*, [2021] EWHC (Admin) 1746 at [83].

¹⁵¹ Gender Recognition Act 2004, c. 7 (UK), <https://www.legislation.gov.uk/ukpga/2004/7/contents>.

¹⁵² *See* WOMEN & EQUALITIES COMMITTEE, *REFORM OF THE GENDER RECOGNITION ACT: GOVERNMENT RESPONSE TO THE COMMITTEE’S THIRD REPORT, 2021-2*, HC 129, at 3–4, 6, 8 (UK).

¹⁵³ Press Release, Gov’t UK Equals. Off., Equal. Hub, & The RT Hon. Elizabeth Truss MP, *Gender Recognition Certificate Fee Reduced* (May 4, 2021), <https://www.gov.uk/government/news/gender-recognition-certificate-fee-reduced>.

In Australia, a survey of the literature indicates that the subject of trans prisoners is under-studied compared to the United States.¹⁵⁴ What data exists reveals a system somewhat more like that of the United States than those of Canada and the United Kingdom.¹⁵⁵ As in the United States, Australia takes a plethora of approaches in each of the various states and territories, with New South Wales standing out as “the only jurisdiction where trans prisoners may commence treatment and/or gender reassignment surgery at any time during their incarceration.”¹⁵⁶ Also like the United States, Australia does not have much in the way of national legislative protections for trans prisoners.¹⁵⁷ But the advances of certain Australian states in securing trans prisoners’ rights—and the apparent intention of other states and territories to improve on this matter¹⁵⁸—implies Australia might provide a model to the United States of what can be achieved in a significantly federated system of government.

India, which features *very* different national and cultural contexts from the other countries examined so far, has taken a correspondingly different approach to the subject of trans prisoners’ rights. Its approach demonstrates an alternative, or additional, pathway to protecting trans prisoners’ rights where culturally appropriate: drawing upon traditional non-binary genders. Many of the cultures of India have a gender category known (in Hindi) as *hijras*, who are neither female nor male.¹⁵⁹ In 2014, the Supreme Court of India drew upon that tradition, as well as the tradition of international human rights (including the Yogyakarta Principles), when it ruled that trans people should be recognized as a third gender, entitled to all fundamental rights.¹⁶⁰ The Indian traditions of (what Westerners might call) non-binary genders may also explain why the deeply conservative government of Narendra Modi passed, in 2019, the Transgender Persons (Protection of Rights) Bill, which “prohibits the discrimination against a transgender person.”¹⁶¹ Although the law

¹⁵⁴ Sam Lynch & Lorana Bartels, *Transgender Prisoners in Australia: An Examination of the Issues, Law and Policy*, 19 FLINDERS L.J. 185, 228 (2017).

¹⁵⁵ See generally Rebecca Mann, *The Treatment of Transgender Prisoners, Not Just an American Problem: A Comparative Analysis of American, Australian, and Canadian Prison Policies Concerning the Treatment of Transgender Prisoners and a Universal Recommendation to Improve Treatment*, 15 LAW & SEXUALITY 91 (2006).

¹⁵⁶ Lynch & Bartels, *supra* note 154, at 230. Canada, too, has notable differences in the rights afforded to trans prisoners from one province to another. See Boyer, Odeyemi, Fletcher, & Fletcher, *supra* note 53, at 394–400 (providing a comparison of Canada’s provinces in treatment of trans prisoners). But these differences generally seem to be smaller than the differences between states in the U.S. and in Australia.

¹⁵⁷ Lynch & Bartels, *supra* note 154, at 231.

¹⁵⁸ *Id.* at 230.

¹⁵⁹ Other languages and cultures in India often use other terms, many of which are roughly synonymous with *hijra* but carry different cultural meanings. It should be noted that in older translated sources, the term *hijra* was often rendered in English as “eunuch,” and this translation choice is—for obvious reasons—now disfavored. But it would also be a mistake to simplistically fold *hijras* into Western conceptions of sexuality and gender identity. See generally Evan B. Towle & Lynn Marie Morgan, *Romancing the Transgender Native: Rethinking the Use of the “Third Gender” Concept*, 8 GLQ: J. LESBIAN & GAY STUD. 469, 479–89 (2002). See also *supra* p. 11 and note 61.

¹⁶⁰ Nat’l Legal Servs. Auth. v. Union of India, AIR 2014 SC 1863 (2014) (India); see also Kyle Knight, *India’s Transgender Rights Law Isn’t Worth Celebrating*, HUM. RTS. WATCH (Dec. 5, 2019, 1:30 PM), <https://www.hrw.org/news/2019/12/05/indias-transgender-rights-law-isnt-worth-celebrating>.

¹⁶¹ *The Transgender Persons (Protection of Rights) Bill, 2019*, PRS LEGIS. RSCH., <https://prsindia.org/billtrack/the-transgender-persons-protection-of-rights-bill-2019> (last visited Nov. 6, 2021).

does not specifically address rights of trans *prisoners*, some of its general protections of trans people may apply in a penal context. It also allows Indians to register with the government as simply “transgender”—without any other gender category. Unfortunately, obtaining such registration requires showing proof of having had gender-affirming surgery.¹⁶² Additionally, the law tends to conflate trans and non-binary/third-gender people. Consequently, many trans and third-gender Indian activists denounced the law.¹⁶³ In the view of Avery Everhart, the co-founder of the Center for Applied Transgender Studies, the bill is “wildly out of step with international human rights law that should have informed it.”¹⁶⁴ Everhart also draws on the activist opposition to the bill to argue that it was authored without sufficient input from “those with lived experience who will have to bear the consequences of the law, whether good or bad.”¹⁶⁵

Nevertheless, the fact that the conservative government of India has adopted *any* protections for trans people (and thus implicitly for trans prisoners) demonstrates another pathway to securing trans prisoners’ rights. In countries like India that have traditions of genders outside the Western man/woman binary, appeal to that tradition may be more effective in securing rights than appeals to human rights frameworks alone. But as the criticism of the 2019 bill indicates, appeals to traditional non-binary genders may create issues in an increasingly globalized world. For example, an Indian who identifies more with a Western trans or non-binary gender than a traditional or non-Western gender may be inadequately protected by appeals to *hijra* concepts. And the reverse would be true as well: appeals to international standards of human rights may fail to adequately protect those who identify with traditional or non-Western gender categories because of the difficulty of assimilating those categories into Western ideas of what it means to be trans or non-binary.¹⁶⁶ The important point is that advancing laws without sufficient input from the people they are designed to protect is likely to result in insufficient or even harmful laws—and this is a particularly high risk for a group as marginalized as trans prisoners.

¹⁶² Everhart, *supra* note 1.

¹⁶³ Knight, *supra* note 160.

¹⁶⁴ Everhart, *supra* note 1.

¹⁶⁵ *Id.*

¹⁶⁶ See, e.g., LORENA SOSA, PAULINE JACOBS, MARJOLEIN VAN DEN BRINK, & MINA BURNSIDE, UTRECHT UNIV., NETH., WRITTEN OPINION REGARDING THE REQUEST FOR AN ADVISORY OPINION ON “DIFFERENTIATED APPROACHES TO PERSONS DEPRIVED OF LIBERTY”: THE CASE OF TRANSGENDER PERSONS IN DETENTION 22 (Jan. 15, 2021), https://www.corteidh.or.cr/sitios/observaciones/OC-29/85_Utrecht_Uni.pdf (“[I]n addition to prisons providing differentiated health care based on whether a prisoner is transgender or cisgender, they may also have to further differentiate based on local gender identity. In fact, when applied to other regions, the term “transgender” itself may be an impediment to providing prisoners healthcare, especially to ones that have non-European gender identity formation. For example, in the Latin American context, *travesti* appears in Argentina, Brazil, Peru, and other Latin American contexts as an alternative, *sudaca*, gender identity, with specific health care needs. Alvaro Jarrin’s . . . research shows how the medical industry in Brazil uses Anglophone identity discourses to delegitimize and withhold health care from *travesti* women who might not want the same medical and surgical outcomes as transgender women. Furthermore, a *muje* may still have different health care and medical outcomes than a *travesti* as a third gender.”). See also *supra* p. 11 and note 61.

D. Argentina

Many South American countries feature relatively robust protections for LGBTQ people, including trans prisoners,¹⁶⁷ and Argentina leads the continent. Argentinian law probably contains the most significant general protections for trans people of any country examined in this Note. While that general protection does not always extend to the rights of *imprisoned* trans people, Argentina roots its respect for general trans rights firmly in a human rights framework. Thus, using such a framework to argue for a greater expansion of trans prisoners' rights is likely an effective strategy for Argentina.

In 2012, the Argentinian Senate passed Gender Identity Law Number 26.743,¹⁶⁸ becoming the first country in the world to incorporate the Yogyakarta Principles into domestic law.¹⁶⁹ OutRight Action International, an LGBTIQ human rights advocacy organization, hailed it as “the most progressive gender identity law in history.”¹⁷⁰ Its first article explicitly guarantees:

All persons have the right, a) To the recognition of their gender identity; b) To the free development of their person according to their gender identity; c) To be treated according to their gender identity and, particularly, to be identified in that way in the documents proving their identity in terms of the first name/s, image and sex recorded there.¹⁷¹

Although the bill does not specifically mention prisoners, these rights (along with others in the bill¹⁷²) provide substantial protections for imprisoned trans folks. In particular, the right “to be treated according to [one’s] gender identity” is highly relevant for trans prisoners who may wish to be housed in facilities other than those matching the sex they were assigned at birth.

In at least some cases, the Argentinian penal system appears to assign imprisoned trans people to facilities in accordance with their gender identities. While this represents a

¹⁶⁷ In addition to Argentina, other countries in South America with significant trans legal protections include Colombia, Bolivia, Ecuador, and Uruguay. Alvarez & Muñoz, *supra* note 11, at 3. Although Argentina was the first country in the world to incorporate the Yogyakarta Principles, Uruguay passed a somewhat similar bill two years before Argentina’s Gender Identity Law. TRANSGENDER PERSONS GLOBALLY, *supra* note 74, at 18. The most significant difference between the Argentinian and Uruguayan bills is that the Argentinian bill makes changing one’s legal gender a purely administrative action, while the Uruguayan bill still requires one to convince a court of a person’s gender stability before authorizing the change. *Id.* at 18–19.

¹⁶⁸ Emmanuel Theumer, *The Self-Perceived Gender Identity*, 22 INTERVENTIONS 498, 499 (2020).

¹⁶⁹ O’Flaherty, *supra* note 11, at 291.

¹⁷⁰ Richard Ammon, *Argentina Adopts Landmark Legislation in Recognition of Gender Identity*, INT’L GAY & LESBIAN HUM. RTS. COMM’N (May 15, 2012), <https://archive.globalgayz.com/south-america/argentina/argentina-adopts-landmark-legislation-in-recognition-of-gender-identity/>.

¹⁷¹ GLOB. ACTION FOR TRANS EQUAL., ENGLISH TRANSLATION OF ARGENTINA’S GENDER IDENTITY LAW AS APPROVED BY THE SENATE OF ARGENTINA ON MAY 8, 2012, at 1 (2020), <https://gate.ngo/wp-content/uploads/2020/03/argentina-gender-identity-law.pdf>.

¹⁷² For example, Article 11 guarantees that “[a]ll persons older than eighteen (18) years . . . will be able to access total and partial surgical interventions and/or comprehensive hormonal treatments to adjust their bodies, including their genitalia, to their self-perceived gender identity, without requiring any judicial or administrative authorization”; and Article 12 requires government officials to respect an adopted first name that differs from a legal name. *Id.* at 3.

general judicial recognition of trans identities, it should be noted that such facility assignments are not always in accordance with the wishes of the prisoners in question. Argentina, like many other countries, maintains special prisons for male homosexuals, but trans women are often assigned to those prisons as well.¹⁷³ The International Bar Association reports that some trans women prisoners are relocated to women’s prisons, but that “[i]n many cases, they . . . do not wish to be moved because they sometime [sic] find it a little easier to live (or survive) in a prison with other trans women and gay men, to whom they can turn to for protection, advice or emotional support.”¹⁷⁴ This is a recurring pattern in other countries (although one that more commonly affects trans men),¹⁷⁵ and it demonstrates one limit of a rights-based approach. Without protections from the other sources of violence inflicted by the carceral system, gender identity acknowledgment may—at least for some trans prisoners—rank relatively low on the list of priorities.

Nevertheless, the Argentinian Gender Identity Law represents a major victory for trans rights advocates. To the extent that there remains work to be done to protect trans prisoners, that work probably relates more to the general area of *prisoners’ rights*, rather than *trans rights*.¹⁷⁶ The Argentinian Gender Identity Law is notable not only for the substantive thoroughness of its protections for trans rights but also for the degree of its departure from the previous legal status quo. Prior to 2012, gender-affirmation surgery was illegal in Argentina without the explicit approval of a judge.¹⁷⁷ Between 1989 and 2012, only eighteen such approvals were granted; unsurprisingly, a risky black market and back alley medical treatments proliferated in such an environment.¹⁷⁸ From 1995 to 2010, the Argentinian Congress considered at least five bills that could have liberalized laws governing medical and legal transition; none of them became law.¹⁷⁹

So, what was different about Argentinian Law Number 26.618? According to historian Emmanuel Theumer, the major difference was the presence of the Yogyakarta Principles.¹⁸⁰ It is plausible that this context would have made a significant difference in

¹⁷³ TRANSGENDER PERSONS GLOBALLY, *supra* note 74, at 32. Although segregated prison facilities may seem inherently unjust, *see, e.g.*, *Johnson v. California*, 543 U.S. 499, 507 (2005) (holding that racial segregation in prison is subject to strict constitutional scrutiny), some argue that proper respect for trans and non-binary prisoners’ gender identities requires separate housing facilities to be made available for trans and non-binary people, *see, e.g.*, Jessica Szuminski, Note, *Behind the Binary Bars: A Critique of Prison Placement Policies for Transgender, Non-Binary, and Gender Non-Conforming Prisoners*, 105 MINN. L. REV. 477 (July 2020).

¹⁷⁴ *Id.*

¹⁷⁵ *See, e.g.*, *supra* p. 12 and note 65.

¹⁷⁶ This is not to say that the two categories of rights (trans rights and prisoners’ rights) are entirely separable for trans prisoners (in Argentina or elsewhere). Rather, by calling attention to the work that needs to be done for prisoners’ rights in general, I aim to highlight the intersectionality of the issues afflicting trans prisoners. Until they are protected both as trans people and as prisoners, rights in one category alone may not be worth as much.

¹⁷⁷ TRANSGENDER PERSONS GLOBALLY, *supra* note 74, at 25.

¹⁷⁸ Theumer, *supra* note 168, at 503.

¹⁷⁹ *Id.* at 503–04.

¹⁸⁰ *Id.* at 504. Theumer’s timeline conflicts somewhat with the date of the Principles, which were introduced at a secondary launch event hosted by the governments of Brazil, Uruguay, and Argentina. O’Flaherty, *supra* note 11, at 286. Therefore, it is likely that many legislators were already aware of the

Argentina, a country whose entire contemporary government is significantly associated with international human rights movements.¹⁸¹ As political scientist Alison Brysk notes, during the dictatorships that ruled the country until 1983, “[t]he only sector of Argentine society that consistently and effectively resisted [the] widespread state terror was a human rights movement [It] survived the dictatorship and secured international and social recognition, catalyzing (although not causing) the transition to democracy.”¹⁸² Since then, human rights groups have continued to hold significant sway in Argentina.¹⁸³ Such a politico-legal context could provide the perfect fertile ground for demands for trans prisoners’ rights on the basis of human rights to take root. However, as the final country of my analysis shows, such fertile ground may not be enough on its own to secure rights for trans prisoners.

E. Costa Rica

While many South American countries vigorously protect trans rights, the same cannot be said for most Central American countries, including Costa Rica, the oldest democracy in the region.¹⁸⁴ While Costa Rica is known for its deep commitment to principles of international human rights law, the rights of trans people do not appear salient to the country at large. Thus, Costa Rica indicates that simply respecting human rights may not be enough to protect trans prisoners if trans people are not sufficiently visible in the country’s collective sight.

Although Costa Rica’s incarceration rate is nowhere *near* that of the United States, the trans people who do end up in prison suffer similarly appalling rates of violence and sexual assault.¹⁸⁵ Imprisoned trans people in Costa Rica have no right to healthcare that would enable them to medically transition, nor do they have any right to a gender-conforming prison facility.¹⁸⁶

Despite the dire state that trans Costa Ricans face inside and outside prison walls, the country in general, like Argentina, is noted for its “profound commitment to human rights,”¹⁸⁷ which has resulted in a “record of human rights promotion [that] is enduring and multifaceted.”¹⁸⁸ While those facets in recent years have included the expansion of women’s rights, unfortunately, such expansions have been limited to *cis* women, a

Principles when they introduced the failed 2010 bill. *See supra* p. 27 and note 179. However, it does seem to be the case that Law Number 26.618 was the first to have its legislators self-consciously invoke the Principles as an international legal authority. Theumer, *supra* note 168, at 504–05.

¹⁸¹ Alison Brysk, *From Above and Below: Social Movements, the International System, and Human Rights in Argentina*, 26 COMPAR. POL. STUD. 259, 262 (Oct. 1993).

¹⁸² *Id.*

¹⁸³ For an in-depth examination of two particularly prominent Argentinian human rights organizations, *see generally* Fernando J. Bosco, *Emotions That Build Networks: Geographies of Human Rights Movements in Argentina and Beyond*, 98 J. ECON. & HUM. GEOGRAPHY 545 (2007) (describing the different emotional geographies of the grassroots networks of Madres de Plaza de Mayo and HIJOS).

¹⁸⁴ Alvarez & Muñoz, *supra* note 11, at 3.

¹⁸⁵ *Id.* at 18–20. As in the United States, imprisoned trans people constitute a disproportionately large portion of the trans population. *Id.* at 22.

¹⁸⁶ *Cf. id.* at 15, 21–23.

¹⁸⁷ *Id.* at 23.

¹⁸⁸ Alison Brysk, *Global Good Samaritans? Human Rights Foreign Policy in Costa Rica*, 11 GLOB. GOVERNANCE 445, 447 (2005).

“restrictive legal interpretation [that] stems from a transphobic perspective.”¹⁸⁹ In this regard, an emphasis on human rights might provide an effective strategy for expanding trans prisoners’ rights within Costa Rica. Given the country’s strong history of support for international notions of human rights—including adherence to international human rights treaties governing the matter—an emphasis on human rights may allow sympathetic judges and legislators to work toward a place of support for trans rights from a starting point that they already know. Moreover, Costa Rica already has anti-discrimination laws that, in the view of Latin America scholars Gloriana Rodriguez Alvarez and Alejandro Fernandez Muñoz, should include protections for trans women as well as cis women.¹⁹⁰ Since 2012, trans women have been permitted to “have their image and sexual identity respected at the moment of taking [an ID card] photograph,” regardless of their “legal” gender.¹⁹¹

Nevertheless, Alvarez and Muñoz argue that even these limited legal protections are essentially meaningless without greater cultural support for trans rights and trans lives within Costa Rica. As they put it, “trans-inclusiveness needs to precede the prison system.”¹⁹² Here is where perhaps the greatest contrast emerges between Costa Rica and the other countries examined in this Note. In contrast to the United States, Costa Rica already possesses a legal framework that is potentially more compatible with trans prisoners’ rights. But without any significant grassroots support for trans rights, those potential protections do very little. Thus, Costa Rica presents more or less the opposite situation from the United States, where legal structures are difficult to bend into a trans-rights framework, but where the *idea* of trans rights enjoys rather widespread support among the general population—particularly among young people and members of the broad cultural left, many of whom (anecdotally) view trans rights as the next big civil rights struggle. Another significant contrast is with India, which can draw on traditional understandings of non-binary or third genders to a much greater degree than can Costa Rica. However, the reality of India’s recent attempt at protecting trans rights reveals a similar danger to that faced in Costa Rica—namely, that if a law is passed with the intent to protect certain populations, but in ignorance of their actual needs and identities, then that law is likely to be ineffective or even harmful. In India, this resulted in a trans-protection law that compels surgery for those wishing to identify as trans. In Costa Rica, the recent emphasis on protecting women’s rights has left out trans women who ought to have been included under the aegis of these laws.

CONCLUSION: TRENDS AND IDEAS FOR FURTHER ADVOCACY

In this Note, I analyzed the efficacy of a human rights framework for advancing the rights of trans prisoners in various national contexts. Even given the limited breadth of the comparisons, some significant trends stand out.

¹⁸⁹ Alvarez & Muñoz, *supra* note 11, at 25.

¹⁹⁰ *Id.* at 26. The authors, whose study focuses on trans women, do not mention whether a fair reading of the Costa Rican law ought also to yield protections for trans men or non-binary people.

¹⁹¹ RED LACTRANS, HUMAN RIGHTS VIOLATIONS OF TRANS WOMEN IN COSTA RICA, EL SALVADOR, GUATEMALA, HONDURAS AND PANAMA 9 (2018), <http://redlactrans.org.ar/site/wp-content/uploads/2013/05/ReportREDLACTRANS.pdf>.

¹⁹² Alvarez & Muñoz, *supra* note 11, at 26.

The first is that the countries examined here with relatively robust protections for trans prisoners tend to have gotten to that point through a framework that explicitly centers human rights. This approach is particularly notable in the cases of Canada and Argentina, but can also be seen in the United Kingdom, which has “favorably cited” the Yogyakarta Principles.¹⁹³ In India, where recent efforts at trans protection have seen significant criticism from trans and third-gender activists, the trans-protection bill was at least conceived as a way of both supporting a traditional Indian identity category and also adhering to international norms of human rights.

The example of Costa Rica shows that a human rights framework will likely not be enough to secure trans rights without significant ground level support from the general public—or at least a subsection of the public with significant power. In Costa Rica’s case, the articulation of trans rights has run into definitional conflicts with other established categories of protection. In other words, it is difficult to secure your rights as a woman when there is not a significant force within the country that would regard you as a woman. Although a human rights framework ought still to be applicable, at least in theory, to the problems of violence and sexual assault suffered by Costa Rican trans women in prison, the general invisibility of trans identities likely makes these demands difficult to achieve in practice. In Costa Rica, then—as LGBTQ history has shown in many other countries—it is perhaps the case that legal respect for a given identity can only be achieved *after* that identity has reached a sufficiently prominent level in the awareness of the general public. Or, put more simply: visibility is a prerequisite of acknowledgment.

Canada and Argentina, on the other hand, demonstrate an opposite situation. Both countries feature relatively robust protections for trans people *in general*, but because those trans rights are often insufficiently accompanied by *prisoners’ rights*, they are often inadequate to address many of the most pressing needs facing trans prisoners, such as freedom from physical and sexual assault.

And then there’s the United States, which remains an international outlier. In contrast to the other countries studied here, the United States has not generally taken an internationalist orientation to its politics or laws. Historically speaking, the most common orientations of the U.S. government have been either isolationist or imperialist—but the idea of America as a genuinely equal partner on the stage of nations has not often achieved political prominence.¹⁹⁴ That history, combined with the peculiar and often sclerotic approach of the American judiciary to the interpretation of the United States Constitution, has resulted in a national context that presents few opportunities for using a human rights framework to secure rights for trans prisoners. The success of gaining such rights from the judiciary will depend, first and foremost, on having a Supreme Court that is sympathetic to issues facing people who are both trans and imprisoned; and, second, on the ability of clever lawyers to bend constitutional precedent into a shape cognizable in American law.

If the federal judiciary (and likely also Congress) are out of the picture as sources of broadly established trans prisoners’ rights in the foreseeable future, the example of Australia could perhaps serve as an inspiration for the United States. Like the United States,

¹⁹³ O’Flaherty, *supra* note 11, at 293.

¹⁹⁴ Of course, counterexamples to this general proposition can be found, particularly in the aftermath of the Second World War. But the aftermath of the First World War—where President Wilson created the League of Nations, only for the Senate to refuse to ratify the treaty—illustrates well the prior general trend.

Australia is a heavily federated country (i.e., one where the states remain relatively strong vis-à-vis the national government). Activists in Australia have taken advantage of that fact to secure trans prisoners' rights at the state and territory level, rather than the federal level. In the United States, such an approach will likely only become more feasible as the country continues to polarize and sort itself into predominantly Democratic States and predominantly Republican States. Of course, that dichotomy also reveals the weakness of such an approach: while trans prisoners in so-called "blue" States may be in a position in the near future to expand their rights, the same cannot be said of most so-called "red" States, which collectively contain a very large portion of the country's population. Additionally, there's the problem that voters who are sympathetic to trans rights in general may still be hostile to prisoners' rights of any kind. In this respect, trans prisoners may best be able to advocate for themselves within liberal States by strategically casting their demands primarily in terms of *trans rights* and downplaying the *prisoners' rights* portion of the equation.

While trans rights may indeed be human rights, that framework may not always be the most efficacious one for securing trans prisoners' rights in a given national context. In the absence of an internationalist legal orientation, or reasonably widespread support for trans rights in general, that framework is unlikely to be successful. Conversely, where those elements are present, significant opportunities for the advancement of trans prisoners' rights may exist. However, as the case of Canada demonstrates, improper administration of a human rights framework can still result in insufficient protections. The key issue seems to be whether the rights of imprisoned trans people are truly regarded as *rights*, rather than privileges subject to balancing factors. Absent that commitment to the core principle of human rights, a human rights framework, even where successful, will likely see only limited results.