


2015

# Lived Experiences of Attorneys Who Represent Transgender Clients in Prison Placement

Heidi Jo Green  
*Walden University*

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# Walden University

College of Social and Behavioral Sciences

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Heidi Green

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2015

Abstract

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Transgender Clients in Prison Placement

by

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Graduate Certificate, University of Massachusetts-Boston, 2000

Master of Liberal Arts, Harvard University-Division of Continuing Education, 1998

Bachelor of Science, University of Nebraska-Kearney, 1995

Dissertation Submitted in Partial Fulfillment

of the Requirements for the Degree of

Doctor of Philosophy

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## Abstract

Researchers have indicated that there are no formal guidelines for placing convicted transgender felons in the United States in correctional facilities and addressing their post-placement medical care and treatment. The problem is that inappropriate placement may lead to the discrimination of transgender offenders; it may also put them in situations that threaten their safety. Attorneys are legal advocates assigned to defend and protect the rights of their clients during the trial and sentencing phase when correctional placement is determined. The purpose of this hermeneutic, phenomenological study was to explore the lived experiences of attorneys who represent transgender clients during the legal process of determining their correctional placement. Heider's attribution theory and de Lauretis's queer theory provided a conceptual framework for this study. Participants were 5 attorneys and 1 legal assistant in a large, urban county in Texas. Data were collected using semistructured interviews and analyzed using thematic, linguistic content analysis. The findings from this study suggested that the participant attorneys believed that gender self-identification may reduce the amount of discrimination that transgender clients face in the U.S. prison system and is the first step in determining safe and appropriate housing placement for transgender felons. The findings further suggested that judges and administrators serving in the U.S. criminal justice system need additional education about the transgender population so that sentencing decisions can effectively and safely house the transgender inmate population. The results of this study affect social change by providing wide-ranging administrative changes that should be made in order to address the overall needs of transgender individuals across the U.S. criminal justice system.

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## Dedication

*For Alice Paul and Lucy Burns*

I would like to dedicate this dissertation to Thomas Edison who so eloquently said, “I have not failed...I have just found 10,000 ways that do not work.” Your quote has been a constant source of encouragement throughout my doctoral journey. Each time I felt like failure was just around the corner; I recalled your quote and moved forward. This has been the most difficult process of my life but rather than praying for an easy journey, I have prayed for the strength to endure a difficult one.

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## Chapter 1: Introduction to the Study

### Introduction

There does not appear to be official guidelines established by the Federal Bureau of Prisons (BOP) that address the overall placement of convicted transgender felons who enter the U.S. criminal justice system (BOP, 2012, pp. 4-5). Gender dysphoria is typically a diagnosis given by the medical community to people who have severe discontent with their birth sex and the gender roles associated with that sex (American Psychiatric Association, 2013). Transgender is defined as people whose gender identity or gender expression differs from the sex they were assigned at birth, and a transsexual is a person who psychologically feels that they belong to the opposite sex (Lara, 2010). According to those interviewed, *The Diagnostic Statistical Manual of Mental Disorders* (DSM-5, American Psychiatric Association, 2013) is not the only way to categorize gender dysphoria; therefore, for purposes of my study, I used the terms *transgender* or *transsexual* where appropriate. I preferred not to use the label of *gender dysphoria* because this presumes those who are transgender have a medical disease. Attorney B, who is a transgender woman and interviewed for my study, said

We don't like the word gender dysphoria. It's a pejorative term because dysphoria says that we have a problem. I'm just telling you what the transgender community says. We don't feel that we're doing a gender change. We are correcting to what we were at birth. The brain is our sex organ. And our brain is where our gender is. The DSM was written by non-transgender individuals.

The BOP has two main categories of classification for gender. Men and women are sentenced by a judge to separate facilities (Katen, 2013, p. 312). Typically, preoperative transsexuals are categorized, assigned, and incarcerated in housing units, which include prisons and jails, based on their anatomical sex. Postoperative transsexuals may be assigned with inmates of their recognized gender, but this assignment varies from state-to-state and jails and prisons (Simopoulos & Khin Khin, 2014). There may be a discrepancy between how inmates present their gender and how they are classified. The issue of how an inmate is classified by gender, therefore, is central to accommodating transgender inmates within the U.S. criminal justice system as a whole. If an inmate is misclassified and misplaced in a housing facility, there are potential risk factors affecting their safety, security, dignity, and possibly their constitutional rights (Simopoulos & Khin Khin, 2014).

Although transgender inmates are not routinely tracked by the BOP, a Department of Justice survey in 2012 estimated that there were over 3,200 transgender prisoners in U.S. jails and prisons (Bureau of Justice Statistics, 2014). Of those incarcerated, “39.9% reported being sexually assaulted or abused while incarcerated” (Bureau of Justice Statistics, 2014, p. 3). In addition, Mazza’s (2012) study found that transgender inmates were “13 to 20 times more likely to be raped or assaulted” than incarcerated heterosexuals (p. 47). This research will be discussed further in Chapter 2 under the subheading Transgender Victims and the U.S. Criminal Justice System.

According to Shah (2010), “transsexuals are those whose gender identity, their sense of maleness or femaleness, differs from their anatomical sex” (p. 40). However, the

U.S. criminal justice system categorizes individuals based on their sex at birth and subsequently houses individuals based on biological characteristics of sex (BOP, 2012, pp. 4-5). Biological characteristics are used because there can be a variation on physical markers (Shah, 2010). Based on the tenets of de Lauretis's (as cited in Sedgwick, 1991) queer theory, transgender persons do not always biologically fall in to *male* or *female* categories. The dichotomous classification system used by the U.S. criminal justice system often results in inappropriate housing placement. This placement can sometimes present dangerous situations for transgender individuals.

### **The Responsibility of Correctional Institutions to Protect Inmates**

The U.S. criminal justice system is responsible for protecting inmates from harm while they are incarcerated. However, due to the inherent nature of the correctional system in the United States, inmates are often susceptible to crimes, such as, but not limited to, sexual assault, rape, and murder (Simopolous & Khin Khin, 2014). According to the Prison Rape Elimination Act (PREA, 2003), the prison system, as a whole, has a responsibility to protect inmates. When jails and prisons fail to house inmates appropriately, inmates may be at further risk for abuse. This problem is exacerbated by the fact that housing placement has not been improved or corrected for transgender inmates even though PREA was enacted as law to protect all inmates. PREA, however, does fall short by not addressing psychological abuse. Under Section 10, physical injury must be present for an inmate to file a lawsuit. In general, inmates who do not display a physical injury but suffer from a mental or emotional injury may be barred from filing suit against the BOP and the inmate(s) who assaulted them. This becomes problematic



because of the risks of psychological and emotional abuse faced by inmates who are categorized, classified, and housed incorrectly by gender.

PREA (2003) does provide some protection for inmates who are sexually abused during incarceration. PREA defined *carnal knowledge* as “contact between the penis and the vulva or the penis and the anus, including the penetration of any sort, however slight” (§ 10). In 2004, two cases challenged the definition of carnal knowledge as a violation of the Eighth Amendment shortly after PREA was passed in 2003 (*Greene v. Bowles*, 2004; *Johnson v. Johnson*, 2004). The Eighth Amendment to the United States Constitution (1791) prohibited the federal government from imposing excessive bail, excessive fines, and cruel and unusual punishment, including torture. The United States Supreme Court held an Eighth Amendment violation was found only when the inmate was physically harmed, and the Court did not consider psychological (mental) abuse when establishing a precedent. A precedent is a collective body of judicial principles that a court should consider when interpreting the law (Stearns, 2002). Several court cases have set precedents for the argument that incorrect placement of transgender individuals in the U.S. criminal justice system could be a form of cruel and unusual punishment and thus a violation of the Eighth Amendment.

For example, in *Greene v. Bowles* (2004), the Sixth Circuit Court of Appeals recognized an Eighth Amendment claim of deliberate indifference and conscious disregard of a person’s health or safety under the standard against cruel and unusual punishment. In this case, the warden admitted knowing the plaintiff was placed in protective custody because she was transsexual and that a predatory inmate was being

housed in the same unit. *Deliberate indifference* refers to the conscious or reckless disregard for one's actions or omissions (Stearns, 2002). The court held

A vulnerable [transsexual] prisoner could prove prison officials knew of a substantial risk to her safety by showing the officials knew of the prisoner's vulnerable status and of the general risk to her safety from other prisoners, even if they did not know of any specific danger. (*Greene v. Bowles*, 2004)

In *Johnson v. Johnson* (2004), the Fifth Circuit Court of Appeals upheld an Eighth Amendment claim and found deliberate indifference because prison officials continued to house a gay prisoner in the general population where he was gang raped and sold as a sexual slave for over 18 months.

To safeguard themselves from other inmates or gang-related violence, transgender inmates often resort to sexual activity in exchange for protection (Lara, 2010). According to PREA (2003), "correctional officers are required to assess every inmate during the internal classification process to determine his or her potential to be sexually abused by other inmates and his or her potential to be sexually abusive" (§ 3). While PREA provided some protections to prison inmates, genitalia-based classification policies were not addressed and the Act stopped short of addressing transgender prisoners as a class of inmates.

PREA (2003) also fell short of recognizing, protecting, and ensuring that the medical needs of transgender individuals are addressed. In *Meriwether v. Faulkner* (1987), the Seventh Circuit Court of Appeals ruled "transgenderism" is a psychiatric condition requiring medical treatment and accords a "serious medical need." Despite this

ruling, U.S. correctional institutions have failed in providing the necessary provisions required for protecting the medical needs of transgender inmates (Simopoulos & Khin Khin, 2014). When discussing the overall housing placement and classification of transgender inmates in jails and prisons, it is worth noting Federal Sentencing Guidelines have only focused on the length of the sentence relative to the crime committed (*Mistretta v. United States*, 1989). The guidelines have not addressed the placement of an inmate.

Therefore, Chapter 1 outlines the problem surrounding the classification and categorization of transgender inmates for housing purposes and their representation by attorneys in the U.S. legal system. The remainder of Chapter 1 concentrates on transgender case law, focusing on cases challenging the U.S. criminal justice system's treatment of inmates, specifically transsexuals. The conceptual framework established relies on Heider's (1958) attribution theory, which states society and systems attribute qualities to people that are familiar to them and then behaves on those attributions. For example, if a convicted defendant is in the courtroom and outwardly appears as a man, the judge will assume the defendant will want to be housed in an all-male facility. Equally important is an exploration of de Lauretis's queer theory (as cited in Sedgwick, 1991), which explores the idea that nature has no direct effect on sexual difference and behavior, thus making both a result of social conditioning. Principles of queer theory may assist individuals in the U.S. criminal justice system to advocate the need for the legal system to adopt placement practices that take into consideration a person's gender identity when determining housing placement in correctional facilities.

## Background of the Study

The United States leads the world in the number of imprisoned citizens (Carson & Golinelli, 2013, p. 1). According to Carson and Golinelli (2013), in the United States, “there were 1,570,400 offenders imprisoned in state or federal prison facilities by year end 2012” (p. 1). However, the exact of number of transgender inmates incarcerated in the United States is unknown because the very first step in the legal process is booking, which only allows check boxes for male or female (BOP, 2014, P5800.15). There are no check boxes for those who are transgender or those who do not recognize any gender. All inmates are then strip-searched and segregated based on their genitalia (Simopoulos & Khin Khin, 2014, p. 31). The BOP and state jail systems do not routinely track the number of transgender inmates, particularly preoperative transsexuals, which makes it difficult to analyze problems related to housing placement (BOP, 2012, p. 4). The Bureau of Justice Statistics (2014) can only provide an estimate based on how inmates verbally self-identify upon entering the prison. Thus, exploring specific court cases may illustrate the problem of housing placement based on anatomical sex (BOP, 2012, pp. 4-5).

In 1999, a “Texas court classified [t]ranssexual individuals as either male or female based on chromosomal make up” (*Littleton v. Prague*, 1999). In 2004, the Florida District Court of Appeals ruled “the common meaning of male and female, as those terms are used statutorily to refer to immutable traits determined at birth” (*Kantaras v. Kantaras*, 2004). Based on these court cases and subsequent rulings, courts frequently support placement decisions by the U.S. criminal justice system to house postoperative transsexual women in all-male facilities and postoperative transsexual men in all-female

facilities (Simopoulos & Khin Khin, 2014). Birth chromosomes, which determine sex, remain the basis of placement conditions (BOP, 2012). Therefore, when determining the length of an inmate's sentence, all federal sentencing is subject to federal sentencing guidelines and states use these guidelines as a model when sentencing offenders on a state level (*Mistretta v. United States*, 1989). County jails operate based on state law.

When the guidelines were implemented in 1984, complete segregation or isolation, such as protective custody, were the only two options available to the BOP (*Mistretta v. United States*, 1989). Transsexual inmates were often confined to their cells 23 out of 24 hours per day (Tarzwell, 2006, p. 167). However, a year earlier in *Davenport v. DeRobertis* (1988), the Seventh Circuit Court of Appeals ruled “isolating a human being year after year or even month after month can cause substantial psychological damage.” Thus, the option of housing transsexual inmates in isolation or administrative segregation for lengthy periods of time (beyond 30 days) without a review hearing is no longer an option given to the prisons (*Davenport v. DeRobertis*, 1988).

### **Problem Statement**

According to Simopoulos and Khin Khin (2014), transgender inmates are more likely to suffer maltreatment by prison staff and fellow inmates than heterosexual inmates (p. 26). The abuse stems from things, such as, but not limited to, unnecessary strip searches, inflated punishment for minor infractions, and assault and battery (Lara, 2010, p. 593). Jennes and Maxson (as cited in Lara, 2010) found that “transgender inmates suffered sexual assault at a rate that was many times higher (59%)” than the rest of the inmate population (p. 593). According to Tarzwell (2006), transgender inmates may be

viewed by more domineering inmates as easy targets for sexual assault, or even worse, they may be sold as sexual property of another inmate.

Transgender inmates face unique challenges related to their sexual orientation and gender identity, such as correct housing placement in the correctional system, seeking proper medical care, safety and security concerns, and treatment while incarcerated (Faithful, 2009). Many of these difficulties have not been explored extensively because transgender inmates are not categorized differently or separately than other inmates by the BOP. There has been current literature that explored the topic of managing inmates; however, I did not find research that explored the phenomenon of housing placement practices by the BOP of transgender inmates. Examining this issue from the perspective of attorneys who specialize in representing these clients in the U.S. criminal justice system is a strategy for exploring this issue.

### **Purpose of the Study**

The purpose of this hermeneutic, phenomenological study was to explore the lived experiences of attorneys who represent transgender clients during the legal process of determining their correctional placement. Based on the *Miranda Rule*, the accused are notified by law enforcement that they have the right and access to an attorney, who, in turn, acts as their legal advocate throughout the judicial process. Attorneys then become a viable surrogate voice for their clients (*Miranda v. Arizona*, 1966). The knowledge attorneys have as legal advocates for their clients in their defense and sentencing phase when a housing recommendation is made cast light on the concerns, experiences, and perceived beliefs of transgender inmates.

### **Research Questions**

The following research questions were addressed in this study. *Gender dysphoria* was initially used in the original wording of the questions but was changed to *transgender* during the course of some of the interviews at the behest of the attorneys being interviewed:

1. What are attorneys' perceptions of how the legal system manages the housing of transgender inmates in the U.S. criminal justice system?
2. What challenges do attorneys face when representing transgender clients during the sentencing phase when a recommendation is made for an inmate's housing placement?
3. How do attorneys manage the challenges associated with representing transgender clients in housing placement?

### **Conceptual Framework**

The two theories I have chosen, attribution theory (Heider, 1958) and queer theory (de Lauretis, as cited in Sedgwick, 1991), help explain what representing attorneys face when advocating for their transgender clients. Queer theory (de Lauretis, as cited in Sedgwick, 1991) suggests that there are other settings for examining the social environment. Queer theory also speaks to the social paradigm being used by mainstream society, including the U.S. criminal justice system, which disregards the diversity of gender identity in its planning and operations (BOP, 2014). These two theories are important because I wished to explore how attorneys interpret their clients' needs and social environment within the U.S. criminal justice system.

### **Attribution Theory**

According to the principles of attribution theory, people respond to others by attributing to them characteristics that are familiar to themselves (Heider, 1958). The tendency to attribute qualities or characteristics to others based on one's own experience(s) may limit the abilities of criminal justice administrators to see the problems that transgender inmates face. If there is a natural tendency in attribution theory to attribute one's qualities or characteristics to others based on one's own experience(s), attorneys would rely on the principles of attribution theory to help explain the needs of their clients to others, by suggesting the dilemma faced by their clients when facing incarceration in close quarters with a group of people of another gender. The principles of attribution theory are useful in discovering possible bias against transgender individuals during the court process, classification process, and housing assignment within the prison system. For example, the BOP categorizes and classifies inmates based on anatomical sex (BOP, 2014). Traits, such as genitalia, are easily identifiable but could also lead to misplacement for those inmates who are transgender (Simopoulos & Khin Khin, 2014). Attribution theory will be covered more extensively in Chapter 2.

### **Queer Theory**

The principles of queer theory address the idea that sexual difference and behavior are linked to social conditioning and the social messages about gender identity; that is, what is or what is not appropriate or expected of men and women in society (de Lauretis, as cited in Sedgwick, 1991). Queer theory suggests that criminal justice administrators are influenced by messages in their own social environment. Queer theory



is not specific to gender and addresses any kind of sexual activity or gender identity that falls into the normative and deviant categories. The principles of queer theory may provide a perspective for criminal justice administrators to consider regarding current placement practices by the BOP. The continued exploration of queer theory is important when examining transgender clients. Queer theory may be used to explain the different socialization of genders and the interpretation of the concept of gender, which shed light on how this inmate population is treated. Through this understanding, attorneys may be able to advocate for change in the housing placement practices of their clients by the BOP. Queer theory also helps attorneys explain the perspective of their transgender clients.

### **Nature of the Study**

I chose a qualitative, hermeneutic, phenomenological approach as the most appropriate methodology for carrying out this study. This methodology allowed me to explore the lived experiences of attorneys who represent transgender clients. The phenomenon that I explored was the attorney's defense of clients during the court process and subsequent recommendation for the clients' housing placement. Out of the existing population of approximately 21,083 attorneys in multiple counties in Texas (Texas State Bar Association, 2014), I recruited a sample of five attorneys and one legal assistant from small law firms who specialized in representing transgender clients. There were a limited number of law firms in this geographical area that advertised specifically to the transgender community. Through company websites and advertisements in *Lambda Legal*, I identified these law firms and attorneys because of their working knowledge of

the issues transgender clients face in the U.S. criminal justice system. I will expand further on my recruitment and selection methods in Chapter 3. The five attorneys and one legal assistant selected represented a relatively small sample in relation to the number of attorneys practicing in one large county in Texas. However, according to Moustakas (1994), to begin a study of this nature, a sample of five to six participant attorneys would provide enough data needed to reach saturation of the phenomenon about the placement practices by the BOP of transgender inmates.

### **Definitions**

The following definitions are relevant to this study.

*Administrative segregation*: Isolating prisoners in a particular housing unit for their overall safety and security (Anderson, 2010, p. 8).

*Attribution*: A psychological term associated with people who attribute traits and causes to things they observe (Benfardo, 2010, p. 1341).

*Deliberate indifference*: The reckless or conscious disregard of one's actions or omissions (*Farmer v. Brennan*, 1994).

*Federal Sentencing Guidelines*: A set of federal guidelines that take into account the seriousness of the offense and the offender's criminal history when determining the length of the sentence (Spohn, 2013, p. 77).

*Gender dysphoria*: A diagnosis given by the medical community to people who have severe discontent with their birth sex and the gender roles associated with that sex (American Psychiatric Association, 2013).

*Hermeneutic*: A type of text interpretation (Yilmaz, 2013, p. 312).

*Homosexuality*: An orientation characterized by attraction, love, or sexual desire for another of the same sex (Zvi, 2012, p. 270).

*Transgender*: An umbrella term for people whose gender identity or gender expression differs from the sex they were assigned at birth. The term may include, but is not limited to, transsexuals, cross-dressers, and other people with alternative gender expressions. Transgender people may identify as female-to-male or male-to-female. Transgender people may or may not choose to alter their bodies hormonally or surgically (Lara, 2010).

*Transsexual*: A person who psychologically feels that they belong to the opposite sex (Lara, 2010).

### **Assumptions**

I expected that participant attorneys would be honest, candid, and forthright about their experiences when representing transgender clients. I further expected that they would provide insight on how the U.S. criminal justice system relates to transgender inmates. A third assumption was that attorney interviews would provide enough accurate information relevant to answering the research questions.

### **Scope and Delimitations**

Attorney interviews obtained in this study included the representation of transgender clients. A delimitation of this study was that I was not able to interview transgender inmates due to the protection of privacy and restricted nature of interviewing inmates within the U.S. prison system. Another delimitation was that I did not look at the

law affiliated with the offender's crime(s) and past criminal history, which may also have influenced their placement within the prison system.

### **Limitations**

A limitation of this study was that the sample size selected for my hermeneutic, phenomenological inquiry was very small compared to the approximate overall number of attorneys (21,083) who practiced law in multiple counties in Texas. Thus, the analysis and interpretation of data gathered may not have yielded generalized results compared to a study of a greater magnitude. Also, this hermeneutic, phenomenological study was limited in scope by focusing solely on a few counties in Texas. However, I deliberately selected this research methodology to create the opportunity to hear the stories and interpret the meaning of the experiences of this selected sample. Following the conclusion of my study, I discuss in Chapter 5 the data that support the need for a broader study in the future.

### **Significance**

My interest in doing this qualitative study arose out of the lack of statistical data about the difficulties faced by transgender inmates. The significance of this study is to achieve a better understanding of how the U.S. criminal justice system treats and manages this inmate population through the view of attorneys who represent transgender clients. The BOP and the state's Department of Criminal Justice were made aware of the results of this study. This study may affect social change by assisting and possibly advising the BOP in developing more realistic and manageable administrative guidelines for the state to follow when supervising transgender inmates. Organizations affiliated

with the transgender community were also informed, such as, but not limited to, the National Center for Transgender Equality, GenderPAC, the National Transgender Advocacy Coalition, the Sylvia Rivera Law Project, the Montrose Center, and Lambda Legal. I hope the results assist organizations to advocate for better social policies in the future at the state and local level(s) that help protect the rights of those who are transgender.

### **Summary**

Current legal practice results in transgender inmates being placed in housing situations that are consistent with their physical and genetic sex characteristics (BOP, 2012, pp. 4-5). Due to such placement practices in jails and prisons, transgender inmates often experience higher rates of maltreatment, higher incidents of sexual assault and rape, and higher rates of suicide and self-mutilation than the general prison population (Faithful, 2009). Through the process of interviewing attorneys who represent transgender clients, this study hypothesized whether attribution bias is affected by gender orientation within the U.S. legal and criminal justice systems.

The discussion in Chapter 1 focused on the study's conceptual framework based on Heider's (1958) theory of attribution bias and the current beliefs related to de Lauretis's (as cited in Sedgwick, 1991) queer theory. This chapter also listed operational definitions to provide clarity. The study's assumptions, limitations, and delimitations were discussed. Chapter 1 is followed by a review of pertinent literature related to attribution bias in the U.S. criminal justice system in Chapter 2. Chapter 2 also focuses on transgender case law regarding the medical treatment of transgender inmates and the

legal implications for those who are transgender. Chapter 3 includes information about the research methodology of this study and how a qualitative, hermeneutic, phenomenological study was used to examine the lived experiences of attorneys who represent transgender.

## Chapter 2: Literature Review

### **Introduction**

In this chapter, I will examine literature regarding transgender inmates incarcerated in the U.S. criminal justice system. The research questions addressed the following:

1. What are attorneys' perceptions of how the legal system manages the housing of transgender inmates in the U.S. criminal justice system?
2. What challenges do attorneys face when representing transgender clients during the sentencing phase when a recommendation is made for an inmate's housing placement?
3. How do attorneys manage the challenges associated with representing transgender clients in housing placement?

Transgender inmates are difficult to access; therefore, the attorneys' experience may shed light on the phenomenon of placement practices by the BOP.

The problem was that transgender individuals may face adverse consequences in the U.S. criminal justice system because of their sexual identity. According to the National Transgender Discrimination Survey conducted in 2011, 6,450 transgender and gender nonconforming participants responded from around the United States about their interactions with the criminal justice system (Buist & Stone, 2013; Grant et al., 2011). Twenty percent of respondents said they were denied equal treatment by police officers and the court system. Twenty-nine percent said they were harassed because of their

gender nonconformity, and 6% reported being physically assaulted (Buist & Stone, 2013; Grant et al., 2011).

Transgender inmates may also present classification and logistical problems for the correctional system, such as whether they should be classified as men or women, where they should be housed, and what medical treatment they should receive. Whether an inmate identifies as transsexual is especially important if their self-identification does not correspond with established correctional criteria regarding housing placement (Simopoulos & Khin Khin, 2014). An inmate who self-identifies may not fit within the established housing criteria. Furthermore, the lack of a culturally sensitive judicial system compounds the problems experienced by transgender inmates (Simopoulos & Khin, 2014). The purpose of this hermeneutic, phenomenological study was to explore the lived experiences of attorneys who represent transgender clients during the legal process of determining their correctional placement.

### **Search Strategy**

To begin my search strategy for this hermeneutic, phenomenological study, I looked for primary topics involving gender dysphoria, transgender, attribution theory, and queer theory. In addition, I examined applicable federal law regarding the sentencing and the classification process for housing inmates. Federal law was important to discuss because the federal government has oversight of the BOP, which often sets the example for many county jails and state prison systems to follow. The BOP's classification, designation, and redesignation procedures are consistent with the statutory authority



contained in Federal Bureau of Prisons Imprisonment of a Convicted Person (2014), which apply to this study.

During the keyword search process, I collected historical research on the U.S. correctional system. The historical phase offers a comprehensive look into the progression of the prison system from the 1800s through the present and the development of the modern-day classification process. A brief explanation of the overall correctional system is important because attorneys must consider the categorization and placement process by the BOP when protecting their client's constitutional civil rights and civil liberties. I also searched the following scholarly databases, such as, but not limited to, Ebsco Legal Collection, Project MUSE, JSTOR, Westlaw Campus Research, Academic Search Complete, and CQ Researcher. While searching the databases, I conducted a key word search using the following words: *administrative segregation, anatomical, attribution, Bureau of Prisons, DSM V, federal sentencing guidelines, gender dysphoria, homosexuality, inmate classification, phenomenology, queer theory, sexual orientation, sexual reassignment surgery, transgender, transsexual, and the United States prison system.*

I also searched source materials related to research methodology, specifically qualitative research and hermeneutic phenomenology. For my methodology search, I relied on the use of Walden University coursework and the texts of Moustakas (1994), Groenwald (2004), and Creswell (2012), published writings with accompanying references, reliance upon prior (completed) course materials, and interlibrary loan. These materials were used more specifically for framing my phenomenological study. Although

my overall search yielded valuable information regarding the history of the correctional system and the current classification guidelines used by the BOP, the current literature addressing the housing placement and needs of transgender inmates was limited.

### **Relationship of the Literature to the Problem**

The literature search did provide valuable material related to the development of the U.S. correctional system and the gender classification process currently used in the prison system. However, I could not find empirical data regarding the incarceration of transgender inmates, as data about self-identified transsexuals are not regularly tracked by the BOP (2012). Therefore, attorneys became particularly important to the overall scope of my study because they provided the lens through which issues related to transgender inmates emerged.

### **Transgender Medical Case Law**

While I did not find case precedents dealing with the placement needs of transgender inmates who were incarcerated, there have been a number of court cases related to the medical treatment and needs of incarcerated transgender individuals. Medical case law related to my study because it identified systemic issues present in managing transgender inmates within the confines of incarceration in the U.S. correctional system. Although inmates have a right to health care, this right is not unlimited. “A prison is not required by the Eighth Amendment to give a prisoner medical care that is as good as he [or she] would receive if he [or she] were a free person, let alone an affluent free person” (*Maggert v. Hanks*, 1997). According to Colopy (2012), there is no doubt that inmates are entitled to some form of health care while incarcerated,

but the degree and level of care an inmate should receive is always a matter of judicial discretion. In lieu of empirical studies, of which I could not locate any on my topic of the placement needs of transgender inmates, court precedents served as a form of evidence that could be used to address the specific needs of this inmate population.

In *Phillips v. Michigan Department of Corrections* (1991), the Sixth Circuit Court of Appeals granted a preliminary injunction directing prison officials to provide estrogen therapy to a preoperative transsexual woman who had been taking estrogen for several years prior to her transfer to a new prison. In *South v. Gomez* (2000), the Ninth Circuit Court of Appeals held that prison officials violated the prisoner's Eighth Amendment claim against cruel and unusual punishment by abruptly terminating hormone therapy in the process of transferring the prisoner to a new facility. In contrast, in the same year, in *McCulley v. Angelone* (2000), the Fourth Circuit Court of Appeals upheld a trial court's denial of the plaintiff's request for a preliminary injunction requiring Virginia prison officials to continue to allow the plaintiff to receive hormone injections the inmate received prior to prison. A preliminary injunction is an injunction entered by a court prior to the final determination of the merits of a case.

In *Wolfe v. Horn* (2001), the Pennsylvania state court system held that the abrupt termination of hormone treatments by prison officials who had no clear understanding of the plaintiff's medical condition could constitute deliberate indifference. The legal definition of deliberate indifference is ignoring a situation known to exist (*Farmer v. Brennan*, 1994). In *Kosilek v. Maloney* (2002), the Federal District Court of the Commonwealth of Massachusetts held a plaintiff's transgender status constituted a

serious medical need and instructed prison officials to provide adequate medical treatment for the plaintiff.

In 2003, in *Brooks v. Berg*, the Northern District of New York ruled a state prison may not deny treatment of a prisoner's alleged gender identity disorder solely on the basis that he only initially sought such treatment after his incarceration. The medical diagnosis of gender dysphoria by the American Psychiatric Association (2013) did not exist in 2003, so courts relied on the term *gender identity disorder*. That same year, in *De'Lonta v. Angelone* (2003), the Fourth Circuit Court of Appeals held a transsexual prisoner had alleged facts sufficient to establish that withholding her treatment would only exacerbate her compulsion to mutilate herself and this constituted deliberate indifference under the standard set forth in *Farmer v. Brennan* (1994). However, in *Praylor v. Texas Department of Criminal Justice* (2005), the court ruled the Texas prison system did not violate a transsexual prisoner's constitutional right to adequate medical treatment by denying a request for hormone therapy.

Two years later in *Gammett v. Idaho State Board of Corrections* (2007), the plaintiff, a transgender woman serving a 10-year prison sentence for possession of a stolen car and a failed escape attempt, attempted suicide when she learned prison doctors would not provide any treatment. She eventually removed her own genitals with a disposable razor blade and nearly bled to death. The plaintiff made 75 repeated requests for treatment, but the Idaho Department of Corrections failed to provide her with any appropriate care. Judge Williams ruled that "gender identity disorder, left untreated, is a life-threatening mental health condition" (*Gammett v. Idaho State Board of Corrections*,

2007). The Court further ruled that based on extensive expert medical testimony, the plaintiff was entitled to receive hormone therapy by the Idaho Department of Corrections (*Gammett v. Idaho State Board of Corrections*, 2007).

More recently, in *Kosilek v. Spencer* (2012), the Federal District Court for the Commonwealth of Massachusetts ordered “the Commonwealth to provide sex-reassignment surgery for a transsexual prison inmate, after determining that it was the only adequate treatment for the inmate’s mental illness.” The Court ruled that sex-reassignment surgery was the “only adequate treatment for Kosilek,” and “that there is no less intrusive means to correct the prolonged violation of Kosilek’s Eighth Amendment right to adequate medical care” (*Kosilek v. Spencer*, 2012). However, in January 2014, the First Circuit Court of Appeals overruled the lower court decision (*Kosilek v. Spencer*, 2012); the overall outcome of the *Kosilek* case is still pending further appeal. These court cases may serve as precedent for the need to have classification and placement processes by the BOP that take into account issues related specifically to gender identity, which ultimately may set the standards for the state prison systems to follow.

### **Transgender Victims and the United States Criminal Justice System**

Attorneys provide the insight into the presentation of the needs of the clients they represent. I found little literature that specifically addressed attorneys who represented transgender clients, but there were court cases in the literature about the treatment of those who are transgender, whether as the victim or the accused, by the U.S. criminal justice system. These cases helped illustrate the management and treatment issues that arise when dealing with transgender inmates. The overall treatment of those who are

transgender in other parts of the criminal justice system is pertinent to this current study because the status of this population carries throughout their interactions with the system.

According to Buist and Stone (2013), many transgender people are wary of police interactions. Police interactions are usually the first point of contact for those who are transgender and enter the U.S. criminal justice system. For example, “because transgender individuals may be forced into illegal work to survive in an economic environment that does not protect gender identity in non-discrimination ordinances, this can increase transgender people’s chances of negative interactions with the police” (Buist & Stone, 2013; Grant et al., 2011, p. 38). Transgender clients are often placed in vulnerable positions due to the multiple challenges they face within the U.S. criminal justice system.

Meadow (2010) concluded in a study of 38 federal and state court systems that gender identity classification was relevant to the outcome of the case. This was related to my study because transgender inmates often do not match the established criteria for housing placement in correctional facilities (Simopoulos & Khin Khin, 2014). Furthermore, Meadow discovered because courts often relied on medical experts when trying to determine legal definitions of what makes one “male” or “female” that every court case often used a different definition. Citing the Eighth Amendment (1791) against cruel and unusual punishment, Leach (2007) argued “the criminal justice system should reform its protocol regarding LGBTQ inmates” (p. 818). Leach focused specifically on safely housing transgender inmates within gender-segregated jails and prisons.

According to Shah (2010), transgender prisoners have often been placed in protective custody, often without choice, to avoid violence and sexual assault by other prisoners. In most states, protective custody equates to solitary confinement, which is typically used to punish the most violent and dangerous criminals (BOP, 2014). These criminals are in a cell without human contact for 23 out of 24 hours per day (BOP, 2014). The policy of placing an inmate in administrative segregation as a form of punishment or for protection may be a violation of an inmate's Eighth Amendment right against cruel and unusual punishment. According to Leach (2007), when administrative segregation is applied due to an inmate's gender identification rather than for an offense committed while incarcerated, an inmate's civil rights may be violated.

When examining specific court cases involving transgender victims, the idea that transgender people are not taken seriously as victims and are treated unequally within the U.S. criminal justice system rings true. For example, when a transgender person was assaulted or murdered, the defense often suggested "the defendant acted in a state of violent, temporary insanity" (Garmon, 2010, p. 629) when discovering the person they harmed or killed was lesbian, gay, bisexual, or transgender (LGBT). The provocation defense is also known as *homosexual panic*, *gay panic*, or *trans panic*. This defense is still viable today in a U.S. court of law. In the case of *Hannah v. Commonwealth* (1929), a provocation defense is "one who kills in the heat of passion is less culpable than one who premeditates the killing because the latter is in full control of his actions while the former is not." The gay panic defense has usually been presented as an insanity or diminished capacity defense to homicide (Garmon, 2010, p. 632). In *Mills v. Shepherd*

(1978) and *Schick v. State* (1991), both involved heterosexual males who successfully argued they were provoked to kill because of another man's sexual advances. This summary of court cases illustrates some of the issues and problems transgender offenders and victims face in the U.S. criminal justice system. These cases further helped provide the frame for exploring particular issues related to housing placement.

The provocation defense was also attempted in the case of the assault and homicide of Brandon Teena in 1993 (*State of Nebraska v. John Lotter*, 1998). Teena was a 21-year-old, preoperative transgender man residing in Nebraska who was raped and ultimately murdered. Despite filing a police report and providing physical evidence from a rape kit, local police had no immediate response to the rape allegation made by Teena. The court record revealed the sheriff displayed insensitive treatment toward Teena when initialing questioning him about the rape. The officer made statements such as whether "he helped his rapists get erections before the rape," and "referring to him as it" (*State of Nebraska v. John Lotter*, 1998). Approximately 1 week later, Teena was murdered along with two supposed witnesses to the rape (*State of Nebraska v. John Lotter*, 1998).

In 2002, Gwen Araujo, a 17-year-old, preoperative transgender woman was beaten to death with fists and a shovel at a party by four of her friends who then buried her in the California wilderness. Araujo was forced to expose her genitalia in the bathroom to prove her real sex (Buist & Stone, 2013). During the defendants' trial, the defense argued that the victim, Araujo, was partially to blame for the crimes committed because she purposely deceived the defendants about her "real" sex. Two of the four defendants were charged, tried together, and found guilty of second degree murder. The



jury, however, did not find grounds to convict the defendants of the hate crime enhancement because they did not believe Araujo was killed because of her transgender status (*People v. Merel*, 2009). Under the Hate Crime Sentencing Enhancement Act (1995), penalties increase for crimes in which the victim was selected “because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.” These cases are significant and provide supporting evidence that the U.S. court officials have been perplexed on how to deal with transgender individuals, whether as defendant, inmate, or victim. Court precedents have ultimately fallen short and have not clearly defined how to manage the needs of transgender inmates.

In 2011, CeCe McDonald was convicted of second-degree manslaughter in the death of Dean Schmitz in Minneapolis, Minnesota. McDonald, an African-American, transgender woman, began fighting with Schmitz after he hurled racist, homophobic, and transphobic slurs calling McDonald and her friends “niggers,” “faggots,” and “chicks with dicks” (*State of Minnesota v. Chrishaun Reed McDonald*, 2012). Schmitz’s friend broke a beer bottle across McDonald’s face, resulting in 11 stitches in her cheek. As McDonald attempted to leave, Schmitz followed her and the two began fighting. McDonald pulled out a pair of scissors for self-protection and Schmitz was mortally stabbed. McDonald spent 41 months in an all-male prison where she suffered from sexual and physical abuse at the hands of fellow inmates and guards (*State of Minnesota v. Chrishaun Reed McDonald*, 2012). In a 2005 survey conducted by Kenagy and Bostwick (as cited in Buist & Stone, 2013), “fifty-six percent of male-to-female transgender

individuals felt unsafe in public based on their gender identity, and forty percent expect a shorter life span, in part due to the violence against transgender individuals” (p. 43).

These cases are relevant as evidence for the treatment of transgender offenders, and illustrate the variation in responses within the U.S. criminal justice system.

### **Conceptual Framework**

The conceptual framework for this study is mainly based on two theories: attribution theory (Heider, 1958), which suggests certain attributes are assigned in the decision-making process, and queer theory (de Lauretis, as cited in Sedgwick, 1991), which suggests sexual difference and sexual behavior are products of social conditioning. According to Heider (1958), attribution theory assumes people do what they do by attributing causes to behavior. Attribution theory is important in this study because it relates to how administrators in the U.S. criminal justice system attempt to assign causes and attributes that are familiar to themselves to the behavior of others. To examine the point of view of the attorneys who represent transgender clients in relation to attribution bias, I explored the phenomenon and documented the literature relevant to the U.S. criminal justice system in this chapter. I explained my search strategy by outlining my key word searches and describing the relationship of the literature to the problem. I will further explain the relationship of the study to prior research by exploring attribution theory and theorists, such as Heider (1958), Jones and Davis (1965), and Kelley (1967). Finally, I will provide a brief description of de Lauretis’s (as cited in Sedgwick, 1991) queer theory, which is relevant to this study because it is concerned with factors at odds with the normal, the legitimate, and the dominant in society.

Researchers in the current literature suggest the official state government record of an individual's birth places that individual into one of two categories: male or female (BOP, 2012). Upon incarceration in most county jails and state prisons, transgender inmates are sorted into sex-segregated facilities (all-male or all-female facilities) per the criteria established by the BOP. Transgender inmates are not routinely tracked by the BOP so researchers cannot provide empirical data (only estimates) regarding the placement of these inmates (BOP, 2012).

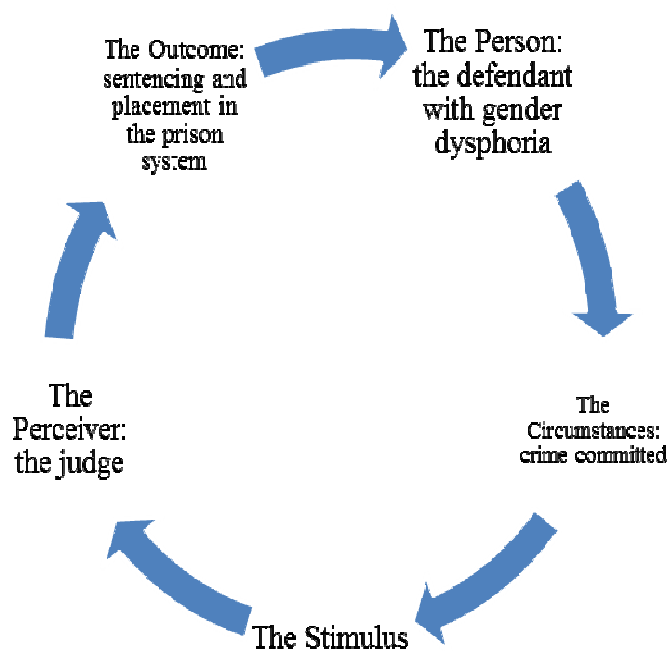
### **Attribution Theory**

To develop a framework for guiding the research process of this study, I explored Heider's (1958) attribution theory. Attribution theory examines an individual's interpretation of and response to specific events occurring in society (Heider, 1958). Qualities are assigned to people who are in the U.S. criminal justice system. These people (administrators) then act on their authority to direct the system to develop processes based on those attributions. The U.S. criminal justice system then behaves on those attributions, which ultimately influences how the system works overall. Attribution theory provides a social understanding of why people behave the way they do and an explanation of how to alter human behavior. Heider coined the term *attribution* by examining the explanations that people in society attribute to individual behavior. Heider credited his overall thinking of casual attributions to a search for understanding the causes of human behavior. In 1967, Kelley (as cited in Weiner, 2008) expanded Heider's interpretation of attribution theory by introducing the *Kelley Cube*, "which systematically analyzed the co-variation antecedents of causal beliefs, specifying the role of social

norms and past history in causal decision-making” (p. 152). Seminal theorists such as Heider and Kelley presented theory on how individuals attribute causes to events and displayed behaviors.

In the U.S. criminal justice system, judges and correctional administrators are responsible for determining the appropriate housing placement of convicted offenders. Therefore, if attribution theory proposes that one interprets the behavior of others by attributing one’s own feelings, beliefs, and motives, then judges and correctional administrators may be attributing their own interpretation in determining the housing placement of the defendant. Although my dissertation does not challenge the verdicts determined by the court system, my dissertation does explore the interpretation of the sentencing decisions and ultimate placement of the offender. In most states judges decide whether to uphold the sentencing recommendation(s) by the jury and sentence the defendant according to the current federal and state sentencing guidelines (*Mistretta v. United States*, 1989). The judge will then make a recommendation on the housing placement of the offender, e.g., jail or prison. Once transferred, the Department of Corrections, who has ultimate authority under the BOP, will classify the offenders and place them in the appropriate available housing unit (Texas Department of Criminal Justice, 2014).

However, internal and external attribution factors also come into play when judges dispense sentencing (see Figure 1: my interpretation of Kelley’s co-variation model that is found in public domain).



*Figure 1.* My interpretation of Kelley's (1967) covariation model of causal attribution. From "Attribution Theory in Social Psychology," by H. H. Kelley, 1967, in D. Levine (ed.), *Nebraska Symposium on Motivation* (vol. 15). Lincoln, NE: University of Nebraska Press.

First, the defendant enters the court system, and the judge examines their initial behavior that brought the offender to the attention of the court. Next, the judge attempts to determine whether a particular behavior instance was internally or externally caused; meaning, whether it was under the personal control of the defendant or the result of situational or outside factors. The judge then categorizes the behavior into three categories: distinctiveness (does the defendant behave this way toward other people or things), consensus (do other people behave in the same way as the defendant in similar situations), and consistency (does the defendant behave this way on other occasions). Finally, the judge assigns a reason for the defendant's behavior and sentences him or her

according to the federal or state sentencing guidelines in place. Figure 1 illustrates Kelley's (1967) model of co-variation and explanation of causal attribution when applied to transgender defendants in the court system.

Kelley's (1967) view of attribution theory calls into question the information used when establishing causal attribution. Kelley advocated separating which effects match which possible set of factors. Depending on the information available to the perceiver [judge], a variety of things can happen. For example, in the first case, the perceiver [judge] perceives the co-variation of an observed effect and its possible causes based on the information initially received.

In the second case, the perceiver [judge] views a single observation and takes into account the composition of factors which may explain the actual causes of the observed effect; meaning, the effect and condition were both present at the same time and the effect is absent when the condition is absent (Kelley, 1967). Several causes work together to produce the overall effect. This principle allows the perceiver [judge] to predict effects from the presence or absence of certain causes, and, given an effect, the perceiver [judge] can generate inferences about its underlying causes. Kelley (1972) believed when there is a lack of information or information is incomplete, causal attribution would help the perceiver [judge] to make attributions.

As Heider (1958) reported in earlier studies, the concept of intentionality is critical to personal causality. The central concept of attribution of intention refers to "the perceiver's [judge] judgment that the actor's [defendant] behavior is caused by, or corresponds to, a particular trait" (Heider, 1958, p. 222), e.g., transgender. The perceiver

[judge] must first decide which effects of an observed action, if any, were intended by the actor. To infer any of the effects of an action were intended, the perceiver must believe the actor knew the consequences of his or her action, and he or she had the ability to perform the action. Jones and Davis (1965) concluded information can be processed backward from the effect, through action, to inferences about knowledge and ability.

However, when examining attribution of dispositions environmental constraints must also be measured. The perceiver [judge] can begin this stage of the attribution process by comparing the consequences of chosen and non-chosen actions then make an inference when the chosen action has a few relatively unique or uncommon consequences. The perceiver [judge] must also take into consideration their own beliefs about what others would do in similar situations. If the consequences of the chosen behavior are socially undesirable then inferences become more profound. Generally, the major contributors to attribution theory are Heider (1958), Jones and Davis (1965), and Kelley (1967). Their theories addressed the information used by individuals in society to determine causality while distinguishing it from the rules utilized for inferring causality. Since 2006, little has been done with attribution theory as it relates directly to transgender individuals in the U.S. criminal justice system, which makes the purpose and outcome of my dissertation even more important.

### **Queer Theory**

De Lauretis's (as cited in Sedgwick, 1991) contribution to queer theory was significant as a base for providing a conceptual understanding of transgender issues regarding placement in correctional institutions. Queer theory evolved from the

postmodern literary theory in the 1950s, the second-wave of feminism in the 1960s, and gay and lesbian studies in the 1980s (de Lauretis, as cited in Sedgwick, 1991). Queer theory often rejects the binary construction of individuals as male or female and heterosexual or homosexual and addresses gender identity that falls into the normative and deviant categories (Meem, Gibson, & Alexander, 2010). More recently, the transgender community started using the basic principles of queer theory to challenge constructions of gender (Meem et al., 2010).

Queer theory explores the idea that nature does not factor into sexual difference and that sexual behavior is a product of social conditioning (de Lauretis, as cited in Sedgwick, 1991). An exploration of queer theory is a vital part of this dissertation because of its direct impact on the U.S. criminal justice system when examining transgender clients and how they are treated. The BOP (2014) categorizes and classifies inmates based on anatomical sex. Identifiable traits, such as genitalia, are easily identifiable but could also lead to misclassification and misplacement for transgender inmates because their outward appearance may not necessarily match their anatomical gender. While queer theory may provide a perspective for criminal justice administrators to consider when examining the housing placements practices by the BOP, it highlights the limitations of administrators in their evaluation of the requirements of offenders for their safety and security and for their mental health.

### **A Brief History of the United States Correctional System**

A brief historical review of the U.S. correctional system informs the current study and sheds light on the understanding of the classification process employed by the BOP.



The rise of prisons in the United States occurred during the modern humanitarian movement [18th and 19th centuries] (Cox, 2009). Following the passage of the Eighth Amendment against cruel and unusual punishment (1791), imprisonment was considered a more humane method of punishment rather than torture. This history enlightens the study because it sets the background for understanding the levels of prison categorization and placement of inmates within the U.S. prison system.

In 1821, under the Auburn System, the United States Congress ordered the classification of inmates into three grades: the most hardened criminals, the less incorrigible, and the most hopeful in terms of rehabilitation (Nilsson, 2003). The BOP adopted earlier features of the Auburn System in the categorization process by forming minimum, medium, maximum, super-maximum, and death row levels of incarceration and types of security. These levels explain the differences in sentence length and security a particular inmate may need. Minimum and medium levels have less security and structure than maximum, super-maximum, and death row levels (Cox, 2009). Today's correctional institutions are categorized into the following systems: minimum security, low security, medium security, maximum security, high security, and administrative security on both the state and federal levels and each houses different types of offenders based on the severity of the crime(s) committed and the violent tendencies of the offender (Ross, 2012). The purpose of the classification process determines the type of restraint an inmate will need (Dolovich, 2011).

## **Housing Placement of Transgender Inmates**

The risks to transgender inmates have been demonstrated through court cases cited in this chapter. According to Shah (2010), in 2003, the Transgender Law Center and National Center for Lesbian Rights reported that “fourteen percent of 150 transgender inmates surveyed experienced some form of discrimination in jail or prison” (p. 42). The U.S. court system has difficulty setting a precedent regarding transgender inmates because there is no set protocol as to where a transgender inmate must be housed. For example, in 1999 a federal jury in California awarded the transsexual woman plaintiff \$750,000 in damages after she was placed with all male prisoners after her arrest and then strip searched to determine her gender (*Schneider v. San Francisco*, No. 97-2203, U.S. Dist. Ct. N.D. Calif., 1999). In *Powell v. Schriver* (No. 97-2851, 175 F. 3d 107, 2<sup>nd</sup> Cir., 1999), the Second Circuit Court of Appeals ruled correctional officers could be liable for assaults on transsexual women prisoners allegedly caused by the disclosure of the prisoner’s condition to other inmates. Thus, the court has had to deal with treatment issues of transgender inmates and liability issues related to officers who fail to protect transgender inmates.

Additional risks have also been identified in housing. The U.S. court system has ruled on the use of segregation as a form of isolating and housing transgender inmates. In *DiMarco v. Wyoming Department of Corrections* (300 F. Supp. 2d 1183, D. Wyo., 2004), the court ruled the placement of an intersexual (hermaphrodite) prisoner with both male and female characteristics in segregated confinement for 438 days with severely limited privileges was not a violation of the Eighth Amendment. The court agreed such

placement was not aimed at punishment, but at protecting the safety of the inmate and other prisoners. When the case was appealed to the Tenth Circuit Court of Appeals in 2007, the court further ruled the placement of a transgender inmate, who lived as a female but had male genitalia, into administrative segregation for 14 months without a hearing did not violate her due process rights under the Fourteenth Amendment (*DiMarco v. Wyoming Department of Corrections*, No. 04-8024, 2007 U.S. App. Lexis 1497, 10<sup>th</sup> Cir.). Currently, the BOP has said the continuation of administrative segregation beyond 30 days must require a review hearing and the prison must attempt to elevate the prisoner's living conditions (BOP, 2014, P5800.15). These cases demonstrate that the courts are struggling with the best practices and strategies for the protection and placement needs of transgender inmates without causing more distress to the inmate (Shah, 2010).

There have also been a number of variations in housing placement and the treatment of transgender inmates. The U.S. correctional system bases housing placement on the dual categorization of all-male and all-female facilities. The court system is often forced to address the issues that arise because there are no appropriate accommodations for those who fall outside a male-female binary (Nader & Pasdach, 2010). The U.S. criminal justice system is trying to balance safety, security, available accommodations, and treatment of this inmate population by setting court precedents for the county jails and state prison systems to follow. According to a 2010 survey of California prisons, "fifty-nine percent of transgender inmates reported being sexually assaulted, compared to just four percent of the general population" (Nader & Pasdach, 2010, p. 77). Nationwide,

“fifteen percent [of transgender inmates] reported being sexually assaulted and sixteen percent reported being physically assaulted” (p. 77). Transsexuals are at a substantially higher risk of sexual assault because of their gender non-conformity yet any option available to the prison system presents constitutional problems. Therefore, correctional placement based on self-identified gender would be an ideal resolution for transgender individuals at the county, state, and federal levels.

### **Summary**

In this chapter I have covered the importance of attribution theory and queer theory as both theories influence the behavior of judges and correctional system administrators when sentencing and housing transgender inmates. I have also covered relevant case law on the current status of transgender inmates. According to Brown (2009), “persons with gender identity disorder are ostracized members of most societies, but those institutionalized in prisons are doubly so” (p. 133). Transgender individuals are disproportionately likely to be arrested and sentenced to jail or prison (Simopoulos & Khin Khin, 2014). Transsexuals usually do not fit within the social norms of society so they seek acceptance in groups also ostracized from society, such as the mentally ill and criminals. This may lead to increased criminal activity, subsequent arrest and lengthy prison sentences.

The U.S. criminal justice system, like any system, is being operated by humans and is therefore subject to human error and influence. This is illustrated by evidence to suggest that pursuant to Federal Bureau of Prisons Imposition of Sentence (2014), judges may sentence transgender inmates to longer sentences. Thus, I examined an attorney’s

perception and understanding of the U.S. criminal justice system when representing transgender inmates in prison housing placement.

## Chapter 3: Research Method

### **Introduction**

The purpose of this hermeneutic, phenomenological study was to explore the lived experiences of attorneys who represent transgender clients during the legal process of determining their correctional placement. Attorneys who represent transgender clients in criminal matters have unique experiences and insight about how the U.S. criminal justice system manages this population and the issues that may arise when representing this group.

In this chapter, I will describe the research design, methodology, and sample selection criteria, method of data collection, analysis, and interpretation of interviews of attorneys. I will also discuss my role as the researcher in the study, limitations and delimitations of the study, and my quality and trustworthiness as the researcher in obtaining informed consent and in the collection of the data. Finally, I will review the ethical considerations. I explored the phenomenon of the attorneys' experiences regarding the court processes and the current housing placement in jail or prison, treatment, and management processes of transgender inmates in a large, urban county in Texas.

### **Research Design and Rationale**

I chose a qualitative, hermeneutic, phenomenological research method (Yilmaz, 2013) of investigation to explore the lived experiences of attorneys who represent transgender clients in regards to their correctional placement.

The research questions are:

1. What are attorneys' perceptions of how the legal system manages the housing of transgender inmates in the U.S. criminal justice system?
2. What challenges do attorneys face when representing transgender clients during the sentencing phase when a recommendation is made for an inmate's housing placement?
3. How do attorneys manage the challenges associated with representing transgender clients in housing placement?

Historically, phenomenology evolved as an alternative to scientific methods used traditionally within the social sciences (Moustakas, 1994). According to Moustakas (1994), Husserl is acknowledged as the father of phenomenology. There are many approaches to phenomenology, such as, but not limited to, hermeneutical and transcendental. I chose the hermeneutic, phenomenological approach for this study, which concentrated on subjective experiences of individuals and groups. My dissertation focused upon the lived experiences of attorneys. Hermeneutic phenomenology attempts to “unveil the world as experienced by the subject through their life world stories” (Kafle, 2011, p. 186). This allowed me to explore the interpretation of the phenomenon and aided in understanding perceptions of members of the U.S. criminal justice system and how it performs overall.

Hermeneutic phenomenology also involves the understanding of texts. According to Kafle (2011), “in this approach the researcher aims to create [a] rich and deep account of a phenomenon through intuition, while focusing on uncovering rather than accuracy, and amplification with avoidance of prior knowledge” (p. 190). The focus is on the way

things appear to the researcher, where the researcher aims to provide a rich textured description of lived experience (p.182). There is a possibility in hermeneutic, phenomenological research that new meanings emerge about a phenomenon.

Guba and Lincoln (1999) cited four standards related to phenomenology: credibility, transferability, dependability and conformability. However, according to Kafle (2011), all of these quality claims may not be suitable for hermeneutic phenomenology (p. 195). Kafle cited orientation, strength, richness, and depth as the major quality concerns (p. 195). Orientation allows the researcher to participate in the world of the participants and their stories. Strength refers to how the text represents the intention of the inherent meanings as expressed through the stories of the participants. Richness is an aesthetic quality that narrates the meanings as perceived by the participants. Depth is the ability of the text to penetrate down and express the intentions of the participants (Kafle, 2011). This form of research appealed to my study because it allowed the “immediate” experience to emerge without being blocked by preconceived notions.

Other qualitative methods I considered included narrative, grounded theory, and case study. Although the narrative research method could prove useful for understanding the lived experiences of attorneys, such an approach may not have provided me with additional information related to the phenomenon as a whole (DePoy & Gitlin, 1998). Grounded theory invokes positivism and interaction by focusing on common themes that emerge from observation. However, I was not trying to generate theory from my research. This methodology would not yield the information I sought because I proposed



detailed interviews to extrapolate experiential data rather than continuous comparisons through observation. Finally, the case study approach could be plausible as a research methodology as the study of an issue is explored through one or more cases (Creswell, 2012). However, a case study would not provide the opportunity to explore this phenomenon in a way that allowed me to interpret the essence of the experience from data collected in interviews provided by attorneys who have direct contact with the clients they represent.

I believed a phenomenological methodology was the best approach for this type of study. Because little is known from an attorney's viewpoint about the phenomenon in question, a qualitative inquiry is the most appropriate for the initial exploration of these attorneys' legal experiences while representing transgender inmates in their prison housing placement. In this study, the issue that merited investigation was how attorneys perceive, understand, respond, and handle unique cultural issues when representing transgender clients who are in conflict with the U.S. criminal justice system about their correctional housing placement. Phenomenological research also focuses less on the interpretations of the researcher and more on the description of the experiences of participants, which would lead to a deeper and better understanding of how attorneys represent transgender clients in criminal matters (Moustakas, 1994).

### **Role of the Researcher**

According to Moustakas (1994), the first step in the phenomenological research is epoch. Epoch allows researchers to bracket out their own personal bias and eliminate personal involvement with the subject matter, thereby allowing them to gain clarity about

preconceptions or biases of the phenomenon. To remove researcher bias, Moustakas stated the first step in phenomenological research is for researchers to bracket their preconceived notions about the research topic. According to Husserl (as cited in Byrne, 2001), “bracketing enables the [r]esearcher to identify the essence...bracketing assumes people can separate their personal knowledge from their life experiences” (para. 7). In this study, I bracketed myself consciously to understand, in terms of the perspectives of the attorneys interviewed, the phenomenon I explored. I kept a detailed journal that specifically recorded my thoughts, feelings, uncertainties, values, beliefs, and assumptions that surfaced throughout the research process. Journaling is part of the process for checking the reliability of the data (Moustakas, 1994).

In my role as the researcher, I had to be aware of my own personal experiences so they would not taint the interview process and data analysis. I planned to journal throughout the course of the data collection and analysis period. During the journaling process, I wrote down my own feelings and suppositions related to the phenomenon so I was aware both prior to and during data collection. These biases are discussed further in Chapter 5. Journaling allowed me to reflect on what I heard and then construct and review my semistructured interview questions and check for bias. Bias can be managed but not completely eliminated. Journaling also helped in the deconstruction of the data that I heard and with my interpretation of what was in the data. Following each interview, I listened repeatedly to the electronic recording so I was familiar with the words used by the attorneys to develop a holistic sense of the phenomenon without interjecting my own thoughts and feelings. Although I had no direct connection to the attorneys sought for the

interview process of this study, per the consent of my committee members, I used my committee members to cross-validate and check for interpretation and analysis errors.

## **Methodology**

### **Participant Recruitment**

As of 2014, there were approximately 21,083 attorneys practicing in multiple counties in Texas (Texas State Bar Association, 2014). I used purposive sampling to recruit five attorneys who specialized in representing transgender clients and one legal assistant who voluntarily chose to participate in the study. I chose to recruit attorneys who practiced in large, urban counties in Texas. When I targeted a law firm, I sought letters of cooperation from each law firm from where I wanted to recruit (Appendix A). These law firms were selected from company websites, advertisements, and literature because of their working knowledge of the issues transgender clients face in the U.S. criminal justice system. A letter of cooperation was not needed if the attorney's contact information was publicly available. In such cases I used a consent form (Appendix B) and requested each attorney to sign the consent form once I received Institutional Review Board (IRB) approval. According to Moustakas's (1994) recommendations, to begin a study of this nature, five attorneys and one legal assistant were interviewed. Interviews continued until I reached data saturation. When the information from the attorney interviews became repetitive, data saturation was reached (Moustakas, 1994). As a show of courtesy and appreciation, participant attorneys were given a \$5.00 gift card to a nationally known coffee shop for taking part in this study. I paid for each gift card.

### **Sampling and Selection Criteria**

When conducting hermeneutic, phenomenological research, data are collected from smaller samples of larger populations to gather data that can be used to address research questions (Moustakas, 1994). While attorneys who manage these cases in Texas were the target sample, focusing on specific criteria made certain the chosen sample was representative of attorneys who specialize in representing transgender clients in criminal matters. Thus, I used a purposive sampling method to identify and recruit participant attorneys for this study. Purposive sampling is a subjective or selective sampling method based on established criteria (Creswell, 2012). I also employed snowball sampling to locate additional participant attorneys in the same large, urban county or nearby county. During the course of the interview process with Attorney D, snowball sampling allowed me to identify a legal assistant who voluntarily presented himself to participate in my study.

Snowballing is a method of expanding the sample by asking one participant to recommend others for interviewing (Babbie, 2004; Groenwald, 2004). By using a snowball technique, there was a possibility of interviewing more than five attorneys if needed and gathering additional data. I requested the participant attorneys to refer at their discretion other attorneys (or a legal assistant) who would contact me directly if they were interested in participating in my study. It was important that I selected not only attorneys who had experience arguing in criminal court but also, more importantly, attorneys who represented mainly transgender clients. Attorneys who argued in criminal

court were important because they represent clients who are sentenced to county jail or state prison.

### **Recruitment Procedures**

After I received approval from Walden University's IRB, I contacted the general office manager or managing partner at each law firm via e-mail to solicit initial participation. Once the firm agreed to participate in the interview process (Appendix A), I sent a formal invitation (Appendix B) to the managing partner to distribute to interested attorneys so they may opt-in for the study. If the attorney's information was publicly available, I sent the consent form to each individual attorney for their review and did not involve the law firm in the process by sending a letter of cooperation. If participant attorneys listed their contact information via public means, I sought their direct consent rather than sending a letter of cooperation. If the participant agreed to participate in the study and gave his or her consent written or verbally, I scheduled a face-to-face meeting at a location of their choice, such as a personal law office, library, or local coffee shop, and conducted a semistructured interview lasting approximately 1 hour each to collect the data. I sent the consent form (Appendix B) to the attorney for their review prior to giving formal consent. The informed consent incorporated the following items: (a) the awareness they were participating in research, (b) the purpose of the research, (c) the procedures of the research, (d) the risk and benefits of the research, (e) the voluntary nature of participation, and (f) the procedures used to protect confidentiality. I personally reviewed the consent form (Appendix B) with each attorney prior to the start of the interview.

## **Instrumentation**

Data were collected through individual face-to-face, semistructured interviews. According to Moustakas (1994), data should be collected in open-ended, semistructured interviews that would lead me as the researcher rather than me leading the participant attorney. Attorneys were asked follow-up questions to probe for more information, which allowed the phenomenon to unfold. The initial questions were outlined in the interview protocol (Appendix C). No more than one interview with each participant took place. I considered that a second interview may be needed to clarify any information from the first interview; however, this was not the case. While I did not conduct a pilot study with attorneys, the preliminary questions were crafted based on a review of current literature and court precedents involving transgender individuals in the U.S. criminal justice system, which was cited in Chapter 2. Also, according to Moustakas (1994), the researcher serves as the instrument, but the interview questions are the outline guide for the conversation (Appendix C). It is not uncommon for research questions to change during the course of the interview as the researcher tries to probe more deeply into the phenomenon (Moustakas, 1994).

## **Data Collection**

I provided each attorney with some questions from the semistructured interview, but I also understood additional questions may arise. Attorneys were asked to answer some predetermined questions but they were not limited to only those questions. Participant attorneys were questioned about their experiences with the phenomenon being addressed (Appendix C). Questions related to the participant attorney's legal education

and years of practice were asked in advance to simplify data collection and dissemination of the results. The demographic questions were also sent via confidential e-mail to the participating attorneys to help expedite the interview process.

As the interview process continued, I scheduled the appointments with the participant attorneys. The appointments took place in their personal offices or place of convenience, such as a library or local coffee shop. With the permission of the participant attorneys and legal assistant, I electronically recorded and documented each interview with a Sony Recorder-Model ICD-SX 733. I created a file for each attorney and one legal assistant. The purpose of the file(s) was to help keep all items related to each specific interview in one central location and organized. The files included the following hard copy documentation:

- Consent form
- Notes from each interview conducted with the attorney
- Any notes made during data analysis
- Draft transcripts
- Any correspondence from the attorneys about the accuracy of the data
- Any general correspondence between me and the attorney.

As each interview progressed, the nature of the interview questions changed based on the initial responses from each attorney interviewed. In a semistructured, phenomenological interview, the questions were changed slightly to grasp the depth of the phenomenon. After each interview concluded, I listened to the electronic recording of the interview and made notes. By keeping notes, I was able to refresh my memory about

the interview when I analyzed the data. As recommended by Auerbach and Silverstein (2003), I categorized these notes into the following categories, which helped with my data analysis:

- Observational notes: what happened during the interview
- Reflective notes: derives meaning as the researcher thinks and reflects on the process
- Methodological notes: reviewing techniques of the researcher
- Analytical memos: summaries and progress notes. (p. 25)

Following the interview process, I used the services of an outside transcriber, who transcribed the electronic recording of each interview by hand. I then created a record for purpose of analysis. Upon receipt, the transcripts were kept in a locked cabinet in a locked office until I forwarded the data analysis to each attorney to participate in member checking, which allowed them the opportunity to offer their opinions on the initial findings and interpretations. The only known associated fees were for photocopies, printing, mailings, and a small token of appreciation (\$5.00 gift card to a nationally known coffee shop).

### **Data Analysis**

According to Hycner (as cited in Groenwald, 2004), data analysis has five important steps: (a) bracketing, (b) delineating units of meaning, (c) clustering of units of meaning to form themes, (d) summarizing each interview, validation, and modifications, and (e) extracting themes (p. 13). Bracketing is used in phenomenological research to mitigate the potentially negative effects of researcher bias and preconceptions that may



taint the research process (Moustakas, 1994). Validation determines whether the research truly measures that which it was intended to measure and examines the truthfulness of the research results (Moustakas, 1994). While rich data are an essential element of phenomenological research, the data are worthless unless properly coded for analysis. Moustakas (1994) recommended the researcher look at every statement relevant to the questions posed in the study via linguistic analysis. “Meaning” units are then created and clustered together in categories. While looking across the categories, only then can themes be created (Auerbach & Silverstein, 2003).

I carefully scrutinized each interview and extrapolated relevant meaning units. To accomplish this task, I listed each question and recorded the responses from the six participants per question. After all questions were answered, I proceeded to the thematic analysis of the dataset I created from the responses. I considered the frequency of the literal content, that is, the number of times a meaning was mentioned and also how it was stated. Clusters of themes are typically formed by grouping units of meaning together (Moustakas, 1994). At this point, I identified significant topics for any themes or clusters of themes that emerged and looked for expressions of an idea (Auerbach & Silverstein, 2003). For purposes of my study, I used thematic content analysis as my specific data analysis technique. I looked particularly for meaning that is derived from values that are attributed to transgender individuals (Heider, 1958) and from cultural interpretations that are based on social norms (de Lauretis, as cited in Sedgwick, 1991). I concentrated on manifest or surface content of the responses (i.e., what the participant actually said) and identified prevalent themes (e.g., process and barriers). I identified an overarching theme

that emerged from all of the responses. Finally, I drew conclusions from the data and reported my findings in Chapter 4.

### **Issues of Trustworthiness**

Quality and trustworthiness are essential in any research project (Auerbach & Silverstein, 2003). There are five components of trustworthiness: confirmability, credibility, consistency, transferability, and dependability (Lincoln & Guba, 1985). To ensure internal validity, confirmability and credibility, I incorporated the following mechanisms: (a) data audit trails, (b) reflexivity and clarification of research bias, and (c) member checking (Creswell, 2012). Data were collected in a neutral manner. For an audit trail, I kept careful documentation of all components of the study, such as, but not limited to, observation notes, interview notes, journals, records, calendars noting important dates and times, various drafts of interviews, and electronic recordings for a length of time (no more than 5 years). To address credibility, I created a hermeneutic spiral loop, which, according to Lincoln and Guba (1985), allowed me to have a closer inspection of the detail. The inspection of the data allowed a broader global perspective to emerge, which led to a deeper understanding of the phenomenon of housing placement practices of transgender inmates.

I also collected data at different times and in different settings, such as a personal law office, coffee shop or library. I also conducted member checking. To address dependability, I used member checking and peer examination. Member checking ensures participants can check the accuracy of the data they provide. I handled this process by sending a confidential e-mail with a short summary of the analysis and results to each

attorney so they could offer their opinions on the data. If attorneys had any questions regarding the transcript, a follow-up interview may have taken place via telephone or in person depending on the attorney's availability. However, follow-up interviews were unnecessary.

Finally, to ensure external validity and transferability, I described in detail the research context and the assumptions that were central to the research. According to Cole and Gardner (1979), it is important for the researcher to convey to the reader the boundaries of the study. At the outset, I disclosed the proposed number of attorneys taking part in the study and specified that these attorneys have a specialization in representing transgender clients. I also disclosed the data collection methods used, the proposed length of the data collection sessions, and the time period over which the data was to be collected (Cole & Gardner, 1979).

### **Ethical Procedures**

Before any human subject contact, I obtained the approval from Walden University's IRB (Walden University's approval number for this study: 06-11-15-0102734) to make sure the interview questions posed no harm to the participant attorneys and were asked in such a way that information flows smoothly and willingly during the interview process (Charmaz, 2006). During the IRB process, I also addressed my recruitment procedures and data collection steps to make sure they were within the ethical guidelines established by Walden University. The IRB further allowed me to identify my stakeholders and the impact my research will have on the community overall. I recruited participant attorneys via publicly available information, such as company

websites and advertisements in *Lambda Legal*. I then personally contacted each participant to set up a semistructured, one-on-one, in-person interview that lasted approximately 1 hour. Participant attorneys chose a location of their choice. I also informed participant attorneys that a follow-up interview of no more than a half hour may be necessary and could occur via telephone. A follow-up interview would only be needed to clarify any information from previous interviews or to ask more specific questions prior to data analysis. Additional details on recruitment procedures are discussed in the section titled Recruitment Procedures in Chapter 3.

Every possible action available was taken to ensure the privacy of the law firms and the confidentiality of the attorneys and the legal assistant. Attorneys were coded as Attorney A, Attorney B, Attorney C, Attorney D, Attorney E and Legal Assistant (to Attorney D). During the interview with Attorney D, Attorney D's Legal Assistant entered the conference room and said he wished to participate in my study. As a transgender man, he said he could offer a unique perspective with knowledge of the legal system. Attorney D's Legal Assistant was informed about my study through Attorney D and was became part of a snowball sampling. Prior to conducting the interview, I reviewed the consent form with Attorney D's Legal Assistant and he agreed to the terms of the study.

Confidentiality in a research study is vital to the integrity of the study. Thus, at the start of the interview process, I discussed the rationale, purpose, and overall goal for the study with each participant attorney and how the results will be disseminated. I then asked each participant attorney (again) whether he or she wished to participate in the study. During all phases of inquiry, every measure was taken to ensure the confidentiality

of the law firms and attorneys being interviewed by omitting their full name from the record.

I reviewed all interview questions with each attorney prior to the start of each interview. With the permission of each Attorney and the Legal Assistant, I electronically recorded all interviews to maintain accuracy of the exact wording. I also offered a debriefing about the process at the conclusion of each interview to allow the attorneys to comment on the process and offer any feedback or suggestions. Data will be maintained for no more than 5 years. After the time frame has elapsed, all electronic recordings will be erased and destroyed.

### **Summary**

This chapter described a qualitative, hermeneutical, phenomenological approach that was used in this study of the phenomenon of attorneys' experiences representing transgender offenders in their placement in the correctional system. I conducted open-ended, face-to-face interviews with five attorneys who primarily represent transgender clients in criminal matters and one legal assistant. Each respective interview generated data that resulted in a completed transcript, which was coded using axial coding in accordance with the chosen phenomenological methodology (Moustakas, 1994). Content was analyzed using linguistic and interpretive content analysis and the results of were organized into themes. The findings will then be presented in Chapter 4 and the interpretation and discussion of the significance will follow in Chapter 5.

## Chapter 4: Results

### **Introduction**

In this chapter, the results of the data collected for this study are presented. The purpose of this hermeneutic, phenomenological study was to explore the lived experiences of attorneys who represent transgender clients during the legal process of determining their correctional housing placement. Primary data were collected from interviews of five participant attorneys and one legal assistant.

The following research questions were addressed in this study:

1. What are attorneys' perceptions of how the legal system manages the housing of transgender inmates in the U.S. criminal justice system?
2. What challenges do attorneys face when representing transgender clients during the sentencing phase when a recommendation is made for an inmate's housing placement?
3. How do attorneys manage the challenges associated with representing transgender clients in housing placement?

### **Setting**

The location for this research was in a large, urban county in Texas. The attorneys interviewed in this study practiced in multiple counties within the state. Interviews were conducted in the privacy of each participant attorney's law office or a public setting; whichever they preferred.

### Demographics

A purposive sample of five attorneys and one legal assistant within a large, urban county in Texas was used in this study. Table 1 presents summary statistics of the demographic data.

Table 1

#### *Demographics of Participants*

Attorney	Gender	Sexual orientation	School of law	Year of graduation	Years of practice in multiple counties	Area of practice
A	Female	Unknown	University of Houston Law Center	2006	9 years approx.	LGBT Family Law Issues
B	Transgender: male to female	Lesbian	University of Houston Law Center	1981	34 years approx.	LGBT Criminal and Civil Law
C	Male	Gay	University of Houston Law Center	2009	6 years approx.	LGBT Property Law
D	Male	Gay	South Texas School of Law	1985	30 years approx.	LGBT Criminal and Civil Law
E	Male	Gay	South Texas School of Law	1997	18 years approx.	LGBT Immigration Law and Criminal and Civil Law
Legal Assistant to Attorney D	Transgender: female to male	Unknown	Not applicable	Not applicable	Not applicable	LGBT Criminal and Civil Law

Three participant attorneys were men, and two participant attorneys were women. One legal assistant was also included per the instruction of Attorney D and was a man. Snowball sampling is a technique that opens the possibility that individuals from outside the targeted sample could be referred by current participants being interviewed. Snowball sampling allowed Attorney D to inform his staff about the nature of my study. Once informed, Attorney D's Legal Assistant voluntarily presented himself and agreed to be a part of the study. His contribution to the study will be explained further in Chapter 4. Finally, two of those interviewed were transgender. Data regarding sexual orientation and gender identification were offered voluntarily by the participant attorneys and legal assistant. Sexual orientation and gender identification were important because they may have had an impact on the types of experiences and perceptions the participant attorneys had while representing transgender clients.

Results from the demographic data revealed that three of the attorneys attended the University of Houston Law Center, and two attended the South College of Texas Law. The college graduation dates of the participants ranged from 1981 to 2009. Two of the attorneys have been practicing attorneys for 30 or more years; the others had practiced from 6 to 18 years. Two attorneys indicated the majority of their practice was in one large, urban county in Texas; the others practiced in multiple southeastern counties.

### **Data Collection**

Data were collected from face-to-face, in-depth, individual interviews of five attorneys and one legal assistant. I developed an interview guide (Appendix C) designed to answer the research questions. I interviewed participant attorneys separately and at a



location that was convenient for them. Each interview took approximately 1 hour, and all six interviews took place over the span of 1 week during the month of June 2015. I recorded the interviews with the permission of each participant attorney and the legal assistant. I used an external transcription service that transcribed each interview. Each interview was sent via confidential e-mail to the transcription service within 24 hours of the interview being conducted, and the transcription process took approximately 2 weeks. After receiving the transcripts and working through multiple drafts of Chapter 4, the data analysis process took approximately 6 weeks, with the final submission of Chapter 4 occurring shortly thereafter. I maintained a journal throughout the interview process and I made notes as I conducted each interview. Attorney B voluntarily provided me with two items during the interview process, which have been retained in a locked file cabinet: (a) a detailed memoir on the history of the University of Houston Law Center, and (b) a zip drive containing articles on the history of the transgender movement within the state. I reviewed both of these items for relevance to my study but found no utility in terms of informing my overall research. Each item provides only a historical reference.

### **Data Analysis**

First, all attorneys interviewed were asked the same six demographic questions. I listed each question and recorded the responses from the five participant attorneys per question. Attorney D's Legal Assistant was asked slightly different questions because he was not a licensed, practicing attorney, but he voluntarily wished to participate in the study. I have included the data from Attorney D's Legal Assistant's interview. I made an evaluation and determined it was important to include these data and not treat them as

discrepant data because the nature of the Legal Assistant's work was in line with the participant attorneys. Attorneys were then asked four client-related representation questions. However, based on the attorney's area of expertise, level of knowledge, and years of practice, some questions were altered slightly. Based on the response of the attorney being interviewed, the iterative flow of the data also influenced the questions in the next attorney interview.

Next, I analyzed responses to the interview questions for themes and patterns of consistency and extrapolated relevant meaning units from the dataset of responses. According to Krippendorf (2012), "content analysis is a research technique for making replicable and valid inferences from texts (or other meaningful matter) to the contexts of their use" (p. 18). I conducted a linguistic content analysis and identified strings of words and phrases. I considered what was said and examined what was meant by each phrase. I further considered the number of times a meaning was mentioned and also how it was stated. I concentrated on manifest or surface content of the responses (i.e., what the participant actually said) and identified prevalent themes (e.g., process and barriers). I identified an overarching theme that emerged from all of the responses. Krippendorf stated, "hermeneutical, interpretive, and ethnographic approaches to reading cherish such open-endedness" (p. 32). To ensure that the analysis was accurate, I asked my dissertation chairperson and committee members to review the themes and provide feedback to me.

### **Evidence of Trustworthiness**

To ensure the four components of qualitative research, confirmability, credibility, dependability, and transferability, I made sure the elements of data audit trails, reflexivity and clarification of research bias, and member checking were present in this research, as recommended by Creswell (2012). For an audit trail, I collected data by keeping careful documentation of all components of the study, such as, but not limited to, observation notes, interview notes, journals, records, calendars notating important dates and times, various drafts of interviews, and electronic recordings. I reflected on the responses to the interview questions to ensure that the data were accurately interpreted and free of researcher bias. To address credibility and dependability, I closely inspected that data and collected data at different times and in different settings, such as a personal law office, coffee shop or library.

I also used member checking and peer examination. I sent a confidential e-mail with a short summary of the analysis and results to each attorney to allow them to give feedback on the data. Finally, to ensure transferability, I described in detail the research context and the assumptions that were central to the research. Transferability refers to the degree to which the results of qualitative research can be generalized or transferred to other contexts or settings (Guba & Lincoln, 1999). The assumptions included the number of attorneys taking part in the study, their specialization in representing transgender clients, the data collection methods, and the length of the interview sessions. From a qualitative perspective, transferability is primarily the responsibility of the one doing the generalizing (Guba & Lincoln, 1999).

## Results

I asked the participants 10 interview questions to explore their lived experiences of representing transgender clients during the legal process of determining their correctional housing placement (Appendix C). Six questions were categorized as demographic and four were categorized as related to client representation. Participants were designated as Attorney A, B, C, D, E, and Legal Assistant (to Attorney D). The results of those interviews are presented next.

### Interview Findings

Questions 1 through 3 of the interview were closed ended. Attorney B was interviewed first. In response to Question 4 (Did you ever take a law school course specifically related to representing clients with gender dysphoria? If so, can you describe the course?), Attorney B responded as follows:

We don't like the word gender dysphoria. It's a pejorative term because dysphoria says that we have a problem. I'm just telling you what the transgender community says. We don't feel that we're doing a gender change. We are correcting to what we were at birth. The brain is our sex organ. And our brain is where our gender is. When I indicated that my dissertation committee preferred the term *gender dysphoria* to match the *DSM-5* (American Psychiatric Association, 2013), Attorney B replied, "I understand where they're coming from, but all this stuff was written by nontransgender people." Attorney B then answered, "No they weren't offered back then," and indicated that such law courses are offered presently. Attorney A responded just as Attorney B that, "No, they weren't offered back then."

When this question was asked of the remaining participant attorneys, the question was rephrased to “Did you ever take a law school course specifically related to representing clients with LBGT issues?” *LBGT* refers to lesbian, gay, bisexual and transgender. Attorney D responded in the negative because, as Attorney B indicated, such courses were not offered at the time. Attorney E also indicated that such courses were not offered at the time; however, Attorney E has taught sexual orientation and gender identification law since 2002 at a law school within the state. The course content consists of exploring issues involving identity, growing up transgender, bullying, and harassment issues. According to Attorney E, “As we move along, [we] actually consider identity in the *Lawrence* case to be critical and very intermingled because of what LGBT people were viewed to be prior [criminal] and after [not criminal]... [In *Lawrence v. Texas* (2003), in a 6-3 decision, the United States Supreme Court struck down the sodomy law in Texas, and by extension, invalidated sodomy laws in thirteen other states].” Attorney C took two courses. The first course, HIV and the Law, focused on individuals with disabilities, specifically HIV, and various legal issues that emerged for HIV positive persons (e.g., estate issues, do not resuscitate, end-of-life care, power of attorney, health care, and workplace discrimination). The second course, Gender and Sexual Discrimination, was similar to that taught by Attorney E and focused on LGBT issues of gender discrimination, sexual orientation discrimination, family law issues, and equal employment.

The responses of Attorneys B and E were most relevant to Question 5 (What made you specialize in the representation of clients with gender dysphoria in a court of

law? As a follow-up, how long have you practiced this specialization?). Attorneys A, C, D, either did not solely specialize in representation of transgender clients or specialized in other areas. Attorneys A, C, and D represented more gay and lesbian clients. As Attorney A noted,

Somebody needs to and there needs to be good representation. When I joined this firm one of the things that attracted me to this firm was that [Attorney B] is trans and is on the cutting edge of the trans movement for decades. It gave me an opportunity to work with LGBT groups....Everything else has been around for a century. But this stuff is really interesting and fun and somebody good has got to be doing this. You can't just throw it to somebody who doesn't take the time to understand the issue.

Attorney B stated, "I'm transgender myself so I knew a lot of the issues....In that time [mid-1980s] the judges didn't know much about us so most of the judges I ran into would not even change the name without full-blown surgeries." Attorney B further elaborated, stating that many judges would not change clients' names if they were preoperative "because they didn't know anything about us." Attorney B also indicated there is currently no statute on gender identification change preoperatively in the state.

Attorney E has done extensive training in the representation of LGBT clients. Attorney E focused more specifically in representing LGBT/HIV positive immigrants, particularly transgender clients. Attorney E recounted a case that was illustrative of the impetus for specializing in working with transgender clients. Two preoperative transgender women immigrants were housed with men in a detention facility. While they

could not afford surgery, they were able to obtain hormones prior to their detention.

However, once in custody, they had no access to hormones and lost their femininity.

In response to Question 6 (Have you ever taken a case on appeal of a client with gender dysphoria who has already been incarcerated?), the answer was in the negative. While some of the attorneys had experience with appellate cases, a client's gender identity was not an issue for the appeal. Attorney D's Legal Assistant was not asked Questions 1 through 6 as he was not a licensed practicing attorney in the state. Attorney D's Legal Assistant was asked the broad question, "As a trans individual, have you experienced discrimination?" As a follow-up, the Legal Assistant was asked the following question, "I know you have no direct experience with the criminal justice system, but as a trans person, what would be your fears or concerns for those who do, either in a court of law or by a jury or by a judge?" To probe more deeply into the issues of ongoing medical treatment, Attorney D's Legal Assistant was asked, "Do you think if a trans individual who is incarcerated who is in the process of transitioning that ongoing medical treatment is absolutely necessary to continue?" Attorney D's Legal Assistant's responses are embedded throughout the emerging themes in Chapter 4 and the discussion in Chapter 5.

### **Client-Related Representation Questions**

Of the four questions asked relative to representing clients, specific data were yielded primarily for Question 1 (Have you ever received any specialized training regarding the representation of clients with gender dysphoria? If so, what did this training include?) Questions 2 and 3 related to representation in criminal court. Attorneys B, D,

and E had vast criminal experience but not specifically with the decision made by the court for correctional housing placement. Attorneys A and C did not have direct criminal court experience. As a result, I had to deviate from the interview protocol and, in several cases, ask questions about hypothetical situations. Therefore, I will report the specific results for Question 1 and identify emergent themes based on participants' responses to additional questions I asked. Question 4 (Can you share if there are any client groups with gender dysphoria that you wish to discuss that we did not cover in the interview?) yielded no results since each interviewee spoke openly about the LGBT population.

I was able to elicit specific responses to Question 1 regarding training or education related to representing LGBT individuals from Attorneys D and E. For Attorneys A, B and C, training occurred primarily on the job. As noted by Attorney A,

I became familiar with the issues by way of having a trans person in the office....What is trans? How do you identify along the spectrum that is trans? How do you address a trans person? What gender should you use when addressing a transgender person? How is the court going to use their gender when addressing a trans person?

According to Attorney D, "I've attended numerous CLEs (continuing legal education courses) on LGBT at different organizations that put them on over time dealing with numerous different subjects connected with LGBT." None of the courses, however, were specific to criminal law. Attorney E further indicated that he had conducted training on LGBT issues related to immigrants and explained:



When I started working on LGBT issues as a lawyer it was tied a lot of ways to that community a lot...I got involved in an immigration rights task force...I ended up working very hard on local issues for them here...to even the playing field [for LGBT/HIV positive immigrants]...I decided maybe I'm going to make my pathway in immigration law...I would go around the country and train officers about issues involving LGBT clientele...much of it was the "T" quotient...We were very focused on trying to work with transgender individuals in particular.

### **Emergent Themes**

Six predominant themes emerged from the analysis of the interviewees' responses to the initial questions (see Table 2). The themes were strengthened by their responses to additional questions that were asked as the interview evolved. Those themes are as follows: (a) attorneys' concerns about discrimination and abuse of transgender inmates in the criminal justice system, (b) the misunderstanding and misinterpretation of transgender clients by judges in the court system and the role of jury members, (c) transgender client self-identification, (d) concerns about preoperative transgender clients regarding their prison placement and continued medical treatment while incarcerated, (e) change of name and change of legal documentation, and (f) attorneys' recommendations and suggested changes that are needed in the U.S. prison system.

Table 2

*Emergent Themes Keywords*

Theme	Keywords
Attorneys' concerns about discrimination and abuse of transgender inmates in the criminal justice system	Respectful treatment of clients; referring to clients by new name and gender; educating judge that transgender is not a disease; continued treatment for preoperative individuals and for individuals with HIV; concerns related to abuse, neglect, and bullying by both guards and other inmates
Misunderstanding and misinterpretation of transgender clients by judges in the court system and the role of jury members.	Unequal treatment of by a judge or a jury because of sexual orientation; judge sentencing client to higher end of the sentencing range; making legal argument for cruel and unusual punishment (placing LGBT persons in populations with other males likely to commit violence or assault against client); educating jurors about what transgender means; respectful treatment of transgender persons
Transgender client self-identification	Should be able to self-identify in prison system and be placed in population with which he or she identifies
Concerns about preoperative transgender clients regarding their prison placement and continued medical treatment while incarcerated.	Attitude toward preoperative persons presentencing; inability of jurors to relate to clients, feel sympathy for them, or understand their point of view of what occurred in the case; violence after placement in prison; continued health care while in prison
Change of name and change of legal documentation	Without legal paperwork attorneys would have to use legal [birth] name until name is changed legally; attorney would address client based on the chosen self-identification gender if the client wished; transgender persons can change their designation as male or female on all official documentation even if they still have anatomical parts of the opposite gender
Attorneys' recommendations and suggested changes that are needed in the United States prison system.	BOP policies should be changed administratively and constitutionally; conservative nature of state's Criminal Court of Appeals slows process of administrative changes; fast-tracking changes requires starting at micro level - local counties, the state, then state by state through various prison bureaus, boards, etc. if couched as a constitutional law issue

**Attorneys' concerns about discrimination and abuse of transgender inmates in the criminal justice system.** The following questions were asked: (a) As an attorney, if you had a transgender client in criminal court and they were facing prison time, what would be your concerns? and (b) If your client were incarcerated, do you have concerns as an attorney once they're incarcerated? These are questions that arose as part of the initial interview. The responses to these questions from four of the five attorneys ran the gamut from concerns about clients being treated with respect to concerns for their health and safety. With regard to being treated with respect, Attorney B explained:

In the criminal courts you've got to remember that judges have appointed me to represent them [the clients]. I've never been hired to represent them. Since I've been appointed, these are judges whom I've worked with in the past and who know and respect me and know I'm transgender and so one of the first things I've done is I've had the judge legally change their [the client's] name. So that in the court even though the arrest record and everything else their name is changed when we deal with them in the court as a courtesy we call them by their new name even though all the names are on there, all the AKAs, even in the jailhouse they're still under the old name, but it is a way of treating people with courtesy, and everybody, including the prosecutor, bailiffs, and everyone else, speak to them with the proper pronouns, including the judge, as a form of respect.

A specific concern of Attorney A was whether the judge would consider "gender dysphoria" to be a disease, and if so, would the client have already lost. Attorney A indicated a responsibility to educate the judge that transgender is not a disease. According

to Attorney A, if a client were incarcerated, Attorney A's main concern would be continued treatment for preoperative individuals. Attorney D expressed concerns related to abuse, neglect, and bullying by both guards and other inmates. Attorney E expressed concerns about continued medical treatment for individuals with HIV and for preoperative transgender immigrants:

I'd have tremendous concerns, but my concerns would be from the perspective of their ability to receive their meds because that it always a problem now whether it's criminal or immigration....A few days without, even one day without, could be devastating to someone's system. One of my biggest concerns was I am presenting a case to the judge that they fear return to their country because of their transgender status and—how do you say this in the proper way—they don't look transgender. They look like other men from the cell because they've been left for 6-7 months to basically have nothing.

**Misunderstanding and misinterpretation of transgender clients by judges in the court system and the role of jury members.** This theme was most prominent in the responses from Attorneys C and D and Attorney D's Legal Assistant. In response to my question, (If you were to represent a [LBGT] client under GLBT, what sort of concerns as an attorney would you have, whether the case be criminal or civil, representing a client who is either gay, lesbian, bisexual, or transgender?), Attorney C was most concerned about unequal treatment by a judge or a jury because of the client's sexual orientation. This question arose during the initial interview with Attorney C. Attorney C acknowledged this concern did not come from firsthand experience but from information

gained from practicing attorneys who represent LGBT clients and from courses in law school that illustrated unequal treatment of LGBT individuals in the prison system. In criminal matters, Attorney C was also concerned about the judge sentencing a client to the higher end of the sentencing range. I then asked, “As an attorney, what could you possibly do or say to try to address those concerns and do you think there would be a claim for a violation of the Eighth Amendment [cruel and unusual punishment]?”

Attorney C responded:

I guess I could make an argument for cruel and unusual punishment, placing those [LGBT persons] in populations with other males where you know there is a likelihood of violence or assault committed against the client. You could also make the argument...let's put them in solitary confinement but that's not fair to them to isolate them from the rest of the population, so again, that could fall under cruel and unusual punishment, that they have an identity thing that should relegate them to solitary confinement just to protect them, where the “easiest” solution would be to put them in with the female population...or vice versa depending on the transition they're making...in with the male population.

When I asked Attorney D the question, (Do you find in the cases that you've discussed biases in the court system related to the sexuality of your client either by a judge or a jury?), Attorney D's perspective at first seemed to differ:

I would say that is extremely rare. That may be because of the world that I live in and the world that I've created and the people that are in it or the people who I

interact with who are not on a personal basis and do not express it to my face. I contend to “pass” as a non-gay person...maybe I can or can't...

However, when I asked the question (Do you feel you would have to educate jurors on what transgender means?), Attorney D's reply was consistent with Attorney A, B and C's perceptions:

I do, but having interacted with a number of people, both gay and straight, it's more than educating because I think that some people have strong feelings or beliefs in a negative way that there is something wrong with a transgender person or they don't believe the transgender person or there's something wrong. That's the bottom line feeling of many people, and some are in the community – gay people feel that way. So to take a conservative religious person who's not used to interacting with transgender people or gay people and get them to understand within a few minutes the perspective of your client seems impossible. And that's what you look for when you try to get a jury, you want people who can relate to your client, and if you have a transgender client I don't see how that's possible.

Attorney D's Legal Assistant's response to the question (As a trans person, what would be your fears or concerns for those who do, either in a court of law or by a jury or by a judge?) was also telling relative to discrimination and treatment of transgender people:

For me, I don't ever want to be in that spot. I have a friend that was stopped on a traffic ticket in West Texas...and they left him in a cell and asked what was in that cell, left him in his undergarments in that cell so everybody could come look at him like he was a freak show. He wasn't physically harmed, so we all feel

lucky, right? At the end of the day we were all just grateful that he came home safe.

**Transgender client self-identification.** Attorneys C, D, and E provided responses that were coded to this theme. In conjunction with the earlier discussion about attorney concerns about transgender clients in the prison system, I asked Attorneys C and D whether they believed transgender individuals involved in the criminal justice should be able to self-identify in terms of prison placement. Their responses were affirmative. I expanded on the question and asked Attorney C, “And then once transitioned, should they be either separated in a separate wing perhaps...not placed in administrative segregation or isolated...with inmates who are similar?” Attorney C replied:

I’d have to know more about the numbers of persons who are identifying as transgender in the prison population before saying they should be in an entirely different wing...obviously it’s going to be a small number so you’re still segregating people. As long as they feel comfortable being with persons of the gender they identify with I think that would be perfectly acceptable. So you’re socializing with a number of other people that are in prison, not just 5 or 10 or 100, that are also transgender.

I also asked Attorney C, “In terms of an appeal, do you think any of these issues that we discussed...if a preoperative transgendered is self-identifying as one gender, placed in a facility of the other gender and perhaps preyed upon or placed in administrative segregation...would serve as an appeal for a reduction in the sentence or is that an

entirely separate issue?” Although Attorney C had never practiced in the appellate area, Attorney C believed:

This would be two separate issues – the crime they are charged with...that’s strictly under the criminal code what punishment can be handed down to them...but if they have a special circumstance...the solution is probably going to be letting them self-identify and go with the proper population for the duration of their time in confinement rather than reducing their sentence...

I asked Attorney E a similar question (Do you believe that the prison system will ultimately change and allow inmates to self-identify or come up with an alternative other than placing an inmate in administrative segregation or protective custody?), and Attorney E’s response was informed by experience in immigration and with Immigration Customs Enforcement (ICE):

For immigration purposes, which is a significant chunk of our detainees in this country that are being held in detention facilities, but that is...to me that quite clearly stresses that self-identification is not only allowed but encouraged and to be protected in ways that show proper respect and dignity for the individual.

**Concerns about preoperative transgender clients regarding their prison placement and continued medical treatment while incarcerated.** The concerns of the interviewees about preoperative transgender persons fell into three main categories: attitude toward preoperative persons presentencing, violence after placement in prison, and continued health care while in prison. The following question arose based on the initial responses from the participant attorneys and legal assistant during the interview



process. When asked, “What do you find to be the case when you have a trans client who is preoperative – how does the court view that trans client?” Attorney A responded:

Actually, I would say that the court has never asked me if they are pre- or postop. It’s the outward appearance and then it comes down to do you have a judge who’s going to be...sympathetic is the wrong word...you have a judge who’s going to be cognizant of the fact that this father is now presenting as a woman and wants to be addressed as “she”, “ma’am”, “her” and I have it work really well and I’ve had it work not so well.

Attorney D was concerned about the inability of jurors to relate to the client’s point of view of what occurred in the case, citing:

In this particular case...I had my client leave the room. Then I said, ‘OK, ladies and gentlemen, my client, you’re going to find out is gay and I need to talk to you now that the gay person has left the room. Let’s talk honestly about how you feel about gay people and who would feel biased or prejudiced, not that there’s anything wrong with it, about a gay person saying one thing and a straight person saying something else and without knowing anything more than that, would you believe one person over the other?’ There were a number of potential jurors who raised their hand and said, ‘I’m sorry but gay people lie because that’s how they live their lives and I would not believe the gay person. I said, ‘thank you very much for your honesty,’ and that person was removed from the jury.

Attorneys B and C were concerned about violence after placement in prison. Attorney C noted, “My concern would be that they would be placed with the male population and are going to be assaulted or killed eventually because of their situation.”

I asked Attorney D’s Legal Assistant, “Do you think if a trans individual who’s incarcerated who’s in process of transitioning that ongoing medical treatment is absolutely necessary to continue....because if it were to abruptly stop what kind of impact would that have?” Attorney D’s Legal Assistant responded:

Definitely. I know you’ll be able to find studies that say it’s not good to go on and off your hormone therapy. As a transgender man, that increases your risk of things like uterine cancer, endometriosis, and things like that if you’re erratic in your hormone therapy....I assume that trans women have some kind of an equivalent risk going on and off estrogen, but I don’t know that. Anytime you mess with your hormones...look at a menopausal age woman...she can tell you that affects your emotions, your mental capabilities, everything...

I asked for further elaboration by prompting with the statement, “Do you think that would be absolutely necessary for the prison to be obligated to continue to do so?” Attorney D’s Legal Assistant responded:

Absolutely. Even if you discount the risks...you’re opening them up to all kinds of social harassment, I would think, because there are changes that come with hormones that when you withdraw them the changes go away. For example, skin texture for a trans woman...So many trans people have worked so hard to mentally and emotionally get to a place where they can say ‘This is my identity,

this is who I am,' and then you take that away from them in a situation where they're already under extreme stress. Nobody's in a great spot when they're put in jail.

As noted previously, Attorney E discussed a case of two preoperative transgender women immigrants who were housed with men in a detention facility without access to hormones who lost their femininity. However, the lack of continued treatments that led to their loss of femininity helped them survive because they were placed among "highly macho males." Thus, Attorney E's and Attorney D's Legal Assistant's responses encompass both issues of violence and harassment after placement in prison, and continued health care while in prison.

**Change of name and change of legal documentation.** This theme emerged from three of the five attorneys' responses and was alluded to in Attorney D's Legal Assistant's response to Question 2 (What is your experience when representing transgender clients during the sentencing phase of a trial?). I asked Attorney A, "If they [clients] outwardly appear as a female, they are anatomically a male, but the legal paperwork....does it go based on their birth name or their chosen name?" Attorney A explained:

I've have only represented people who've gotten their names [legally] changed, but I would say that if somebody came to me and they did not have their legal paperwork I would have to go with their legal name until they got the paperwork done. I would encourage them to do this ASAP, and then I could substitute in their new name.

Attorney B provided a historical perspective about the change of name and change of legal documentation that elucidated aspects of this theme:

When they [transgender persons] applied for a job they'd have to show a form of ID, usually the Texas driver's license, which had their old name and gender, and it was very difficult to get employment of any kind....I began to meet judges who were willing to listen to what we just discussed [change the name without full-blown surgeries....and I was able to start getting names changed. But that was it – names changed – because there was not then, and there still isn't a statute on gender ID change, not even counting gender ID change without surgery....

My entire practice is taking transgender clients through the courts to get their names and IDs changed preoperatively or nonoperatively and to get their birth certificates amended after some stages of surgery.

As a follow-up to the previous question, "If you were to have a client in that situation in criminal court-preoperative transgendered individual who self-identifies as the opposite gender...for example, male to female...initially in a court would you have the court address your client based on the chosen self-identification and the feminine pronouns and the feminine chosen name even though the legal documentation still shows the birth name?" Attorney C stated, "I would as long as those were my client's wishes." I then asked, "Would you go so far as to file documentation to legally change the name?" The response was "Yes – preop." Attorney D's Legal Assistant indicated that one can change his or her gender marker, that is, one's designation as male or female, on all official documentation. He further stated, "I know individuals who've done this."

**Attorneys' recommendations and suggested changes that are needed in the United States prison system.** During the course of the interviews I asked three of the five attorneys whether they believed if the BOP were to change laws regarding housing of transgender prisoners, would this be done administratively or through constitutional challenges to the United States Constitution. Attorney B responded, "I think they'll come up with a policy...I think they'll do it administratively." Attorney D was more familiar with constitutional law and believed changes would be made constitutionally, perhaps under the Eighth Amendment (cruel and unusual punishment). However, Attorney D believed that because of the conservative nature of the state's Criminal Court of Appeals, these changes would need to happen in other states first or through the United States Supreme Court.

Attorney C believed that changing the BOP's policies could occur both administratively and constitutionally. Attorney C's explanation broadened that of Attorney D:

I think the challenge, looking at it on a broad scale, would be if you couched it under administrative law...that could start at a micro level, local counties and go up to the state and then you have to go state by state through the different prison bureaus, boards, or however prison systems are organized in each state versus if you couched it as a constitutional law issue. That might fast-track it up to a court that has jurisdiction all at once over an entire state or a group of states because you're appealing it and then up to the United States Supreme Court, which actually lays out the law of the land.

The response from Attorney C supported Attorney D's belief regarding the conservative nature of the state's Criminal Court of Appeals:

The people that make up the boards of these agencies are overwhelmingly conservative, so if you go from the administrative law standpoint you're probably not going to get anywhere. It's going to take a lot longer to keep on moving up the chain versus if you go to the Texas Court of Criminal of Appeals or the Fifth Circuit that's going to fast-track you to the Supreme Court at the constitutional law level.

### **Overarching Theme related to Systemic Discrimination in the United States**

#### **Criminal Justice System**

An overarching theme that emerged from the interviewees was the systemic discrimination that LGBT clients experience in the criminal justice system due to the misconception of what it means to be transgender. As Attorney D's Legal Assistant noted, "A lot of the discrimination that trans people face is just systemic." The *DSM-5* and medical health profession continues to label transgender as a disorder (American Psychiatric Association, 2013), which is a key component to the maltreatment of transgender clients in the criminal justice system. Because the court system often relies on medical professionals as expert witnesses, the definition of what it means to be transgender is altered from court to court (Meadow, 2010). This creates inconsistency via the states and nationwide on how to treat and manage transgender inmates in the U.S. prison system. The majority of the attorneys in this study believed that a key systemic

issue is regarding transgender as a disease, resulting in individuals in the court system not fully understanding transgender persons.

### **Summary**

In this chapter the results of the data collected for this study are presented. Five attorneys and one legal assistant in a large, urban county in Texas were interviewed. They were asked about their perceptions of how the legal system manages the housing of transgender inmates in the U.S. criminal justice system. They were also asked about the challenges attorneys face when representing transgender clients, and how attorneys manage these challenges. Results of the data analysis were reported in narrative form. Six prevailing themes and one overarching theme were identified from the interview data. Chapter 5 presents an interpretation of the findings to the research questions. Limitations of the study, recommendations for further study, and implications for social change are also discussed in Chapter 5.

## Chapter 5: Discussion, Conclusions, and Recommendations

### **Introduction**

The purpose of this phenomenological, qualitative research study was to explore the lived experiences of attorneys who represent transgender clients during the legal process of determining their correctional placement. Results from my study afforded me a better understanding of what this population identified as the most pressing needs of the transgender inmate population and how the U.S. criminal justice can address those needs overall. Based on my exploration of the literature about LGBT prison populations, transgender prisoners have received the least amount of focus in published articles. There are no official guidelines established by the BOP that would address the overall placement of convicted transgender felons who enter the U.S. criminal justice system (BOP, 2012, pp. 4-5). The results from the data analysis of the participant interviews revealed there has been systemic discrimination that LGBT clients experience, particularly transgender clients, because the judicial system does not fully understand the specific needs of the transgender inmate population. Participant attorneys in the study provided suggestions regarding how the U.S. criminal justice system as a whole can address the discrimination that transgender clients face in a court of law and the maltreatment they experience within the prison system. This information will be discussed further in the Interpretation, Discussion, and Conclusion of Findings section of this chapter.

Recommendations for action will be discussed in this chapter, which will include a discussion of how the U.S. criminal justice system can better accommodate convicted



transgender felons. Implications for social change will also be discussed to include a better explanation of the transgender inmate population. Finally, recommendations for further study will be given in this chapter, followed by reflections on my own personal experience with the research process.

### **Overview**

This qualitative research study gathered information using a phenomenological method of in-depth interviews to examine how attorneys represent transgender clients and to identify the unique challenges transgender clients face in the U.S. criminal justice system. Participants (three male attorneys, two female attorneys, and one male legal assistant) practiced in a large, urban county in Texas. The audiotaped interviews were transcribed by an external transcription service and analyzed using linguistic and interpretive content analysis. The research questions that guided this study were as follows:

1. What are attorneys' perceptions of how the legal system manages the housing of transgender inmates in the U.S. criminal justice system?
2. What challenges do attorneys face when representing transgender clients during the sentencing phase when a recommendation is made for an inmate's housing placement?
3. How do attorneys manage the challenges associated with representing transgender clients in housing placement?

To find the answers to the research questions, participant attorneys discussed their lived experiences regarding the representation of LGBT clients. They were encouraged to

speak as freely as they wanted to speak about each question. Their openness and willingness to share personal experiences allowed me to discover the anticipated themes that emerged. Six predominant themes were identified in this qualitative study. Five themes supported the conceptual framework of this study. A further discussion of the themes will be revealed in a subsequent section of this chapter.

### **Conceptual Framework**

This qualitative research study was based on the conceptual framework of Heider's (1958) attribution bias and de Lauretis's (as cited in Sedgwick, 1991) queer theory. The theory of attribution bias suggests that individuals in society and systems attribute qualities to people that are familiar to them and then behave on those attributions (Heider, 1958). The findings from this study revealed criminal justice administrators in U.S. court system are misinformed and often misinterpret what it means to be transgender. The participant attorneys interviewed often find themselves educating judges and potential jury members.

The *DSM-5* (American Psychiatric Association, 2013) classified "gender dysphoria" as a serious medical disease that requires treatment, and courts often rely on medical experts who use the *DSM-5* when making a medical diagnosis (Meadow, 2010). Attorneys were often concerned about whether the judge hearing the case would consider "transgender" to be a disease. The attorneys further wondered if the judge's attribution of "transgender" as a disease would result in their client losing the case. Four of the five attorneys interviewed revealed that it became their job to educate the judge that "it's not a disease," and thereby change the judge's attribution of transgender. Participant attorneys

were also concerned that judges may sentence transgender clients to the higher end of the sentencing variance. Attorney C noted, “The concerns I would have would be unequal treatment by a judge or a jury because of their sexual orientation or gender identity.” Statements from the participant attorneys’ interviews supported the idea that allowing transgender inmates to self-identify and formally (legally) change their names preoperatively reduces the amount of discrimination and violence these inmates face by impacting the attribution of the identified offenders.

Queer theory suggests that there are other settings for examining the social environment. Queer theory also speaks to the social paradigm being used by mainstream society (de Lauretis, as cited in Sedgwick, 1991), including the U.S. criminal justice system, which disregards the diversity of gender identity in its planning and operations. De Lauretis (as cited in Sedgwick, 1991) further proposed that there are alternate ways of viewing what it means to be transgender in society. According to de Lauretis (as cited in Sedgwick, 1991), the entire idea of gender identity is broken down and reconstructed to allow individuals to live as whatever gender they like regardless of their biological, anatomical makeup. One’s identity does not lie in any sort of physical space, but rather becomes something that is deeply rooted within the individual.

Attorney B, who is a transgender woman, believed the decision to change one’s gender is not conforming so much as adapting or fixing the problem. Attorney B stated, “We don’t feel that we’re doing a gender change. We are correcting to what we were at birth.” Five specific themes are merged together in the section that follows. The themes were identified and paired together because the participant attorneys’ responses to these

themes often intertwined. The themes are also connected because self-identification as a choice relies heavily on the ability to change one's name and legal documentation.

### **Interpretation, Discussion, and Conclusion of the Findings**

#### **Experiences and Perceptions**

Because of the extreme individuality of each participant attorneys' separate lived experience, the question "What is your experience when representing transgender clients?" is difficult to answer. Based on the findings, the attorneys in the study maintained similar thoughts on the discrimination and abuse experienced by transgender clients. Yet numerous factors mediate their respective experiences. Years of experience as a practicing attorney, for instance, provided diverse insight regarding life experience. The years of practice ranged from 6 to 34 years. This distribution was indicative of the sampling processes, purposeful and snowball, employed from this data collection method (Moustakas, 1994). Attorneys with more years of experience were able to provide deeper, richer descriptions of their experiences when representing LGBT clients.

Several of the attorneys interviewed were either gay or lesbian and one attorney and the legal assistant were transgender. The sexual orientation and gender identification of those interviewed may have impacted the types of experiences and perceptions they had while representing transgender clients. Sexual orientation and gender identification were included in the data if the participant attorneys and legal assistant voluntarily offered this information. The interviewees' responses were highly articulate, likely because of the higher level of education among these attorneys. Of the six interviewees, six held undergraduate degrees in various fields of study and five held law degrees (JD).

All five attorneys had areas of specialization in the representation of LGBT clients through either specific course work in law school or on-the-job training. The educational level of Attorney D's Legal Assistant is not known beyond the undergraduate level.

### **Themes**

**Themes 1 and 4: Attorneys' concerns about discrimination and abuse of transgender inmates and concerns about preoperative transgender clients regarding their prison placement and continued medical treatment while incarcerated.** These themes are merged together because they specifically relate to the overall treatment of transgender inmates who are incarcerated in the U.S. prison system. During the classification process, a transgender inmate often does not match the established criteria for housing placement in correctional facilities. According to Shah (2010), in 2003, the Transgender Law Center and National Center for Lesbian Rights reported that "fourteen percent of 150 transgender inmates surveyed experienced some form of discrimination in jail or prison" (p. 42). Overall, the participant attorneys revealed that their experiences in representing transgender clients warranted further explanation to the court of what it means to be transgender, which, in turn, dictates the type of treatment they receive while incarcerated. Meadow (2010) believed because courts often rely on medical experts when trying to determine legal definitions of what makes one "male" or "female" that every court and case often uses a different definition. Attorneys were asked, "As an attorney, if you had a transgender client in criminal court and they were facing prison time, what would be your concerns?" Specific statements to support this theme revealed that participant attorneys were overwhelmingly concerned about their client's continued

medical treatment and the potential of physical abuse while incarcerated. These concerns echoed that of Nader and Pasdach's (2010) survey of the California prison system, which reported that "fifty-nine percent of transgender inmates reported being sexually assaulted, compared to just four percent of the general population," and "nationwide fifteen percent [of transgender inmates] reported being sexually assaulted and sixteen percent reported being physically assaulted" (p. 77).

Attorney E also explained, "I'd have tremendous concerns, but my concerns would be from the perspective of their ability to receive their meds because that is always a problem now." Attorney B noted,

If they're on hormone therapy or anything else that should continue after they become an inmate in the prison system. It shouldn't come to a complete halt because they're incarcerated. You can do other things in prison. You can get degrees in prison...you are exposed to lots of other services. Medical treatment should be one of those, and just because people don't understand all of the ramifications and intricacies identifying as transgender and what causes it doesn't mean that we should just say, oh that's not as important as somebody that has diabetes or a heart condition or HIV. All of those people get continued medical treatment after they enter the system so should someone that's transgender.

This fell in line with the case law quoted in Chapter 2, which showed the U.S. Circuit Courts routinely upheld that the abrupt termination of hormone therapy by the prison system violates the Eighth Amendment against cruel and unusual punishment as cited in

*Phillips v. Michigan Department of Corrections* (1991), *South v. Gomez* (2000), and *Wolf v. Horn* (2001). Attorney E said,

I think that facilities so often seem to have a policy of well, if they bond out then we don't have to worry about it...we have had to threaten federal action on occasion to get them to receive and provide meds.

**Theme 2: Misunderstanding and misinterpretation of transgender clients by judges in the court system and the role of jury members.** Within the U.S. criminal justice system, judges and correctional administrators are responsible for determining the appropriate housing placement of convicted offenders. Participant attorneys' responses were consistent with the idea that judges, juries, and correctional administrators may be attributing their own interpretation in determining the outcome of a transgender client's case. These responses supported attribution theory, which proposes one interprets the behavior of others by attributing one's own feelings, beliefs, and motives. Attribution theory was presented in depth in Chapter 2. Attorney D stated,

From my experience with gay and HIV positive people, my concern would be that the jurors would not be able to relate to the client or feel sympathy for them or understand their point of view of whatever has occurred in the case.

When I prompted further with the question, (Do you feel you would have to educate jurors on what transgender means?), Attorney A's response was similar to Attorney D's:

It's more than educating because I think that some people have strong feelings or beliefs in a negative way that there is something wrong with a transgender person

or they don't believe a transgender person...So to take a conservative religious person who's not used to interacting with transgender people or gay people and get them to understand within a few minutes the perspective of your client seems impossible.

Attorney A reiterated that in representing transgender clients, attorneys want people who can relate to the client and attorneys look for biases in potential jury members. Attorney A also noted the court process goes more smoothly when the judge is informed ahead of time that the client is transgender:

I have found that if I let my judge know ahead of time, then they're much more receptive when they see, 'oh you are both women' versus if I just bring it on the court. I had a full blown trial with mom and dad trying to get custody of their children and dad as a trans woman and I let that judge know a good month ahead of time. Her clerk knew, her bailiff knew, and we were treated with the utmost respect.

I then asked, Can you comment on a situation when your client walked into court and that situation was not known? Attorney A continued,

We were pushed to the back of the list, which was actually a blessing, then the judge called me up first without the client and asked, 'what are you doing?' I had to give the judge the case number...[As an attorney] I was trying to get a divorce, it's not that complicated...and I had to explain to the judge that I can divorce a trans woman. The judge had to take that information back to his clerk. They then had to contact the city attorney to find out if I could do what I told him I could do.



Her client ultimately responded, “Yep, this is how I live, this is life, this is being a trans person.”

**Themes 3, 5, and 6: Transgender client self-identification, safety, change of name, change of legal documentation, and changes needed in the U.S. prison system.**

Within these themes, self-identification within the prison system is important to the overall safety of transgender inmates. The presented themes focused on the relevance of self-identification and appropriate placement of transgender inmates to address their overall safety and personal needs. For example, on June 29, 2015, Immigration Customs Enforcement (ICE) announced a policy of allowing transgender immigrants in the country illegally to be housed in detention centers correlating with their gender identity. ICE Policy 11062.2: Sexual Abuse and Assault Prevention and Intervention falls under the U.S. Department of Homeland Security regulation titled, “Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities (DHS PREA)” (79. Fed. Reg. 13,100, 2014). This policy comes in light of several reports of an increase in physical and sexual abuse among transgender prisoners. This policy is an important step in the right direction because it acknowledged that there was something wrong with the classification system of immigrant detainees who are transgender.

According to a survey conducted in 2013 by the Government Accountability Office (GAO), one in 500 people detained in immigration facilities are transgender. The GAO (2013) noted: “Many of them come from Central and South American countries and seek asylum in the U.S. because of the discrimination they have faced in their native countries” (p. 9). The report also confirmed that “one-fifth of all substantial sexual abuse

and assault cases in ICE facilities between 2009-2013 involved transgender detainees” (p. 15). In January 2015, the province of Ontario, Canada, also announced a policy of allowing inmates to be classified based on self-identification and not physical sex characteristics. These changes now affect the admission, placement, and classification of transgender inmates in Ontario, Canada and specify, “Inmates must be placed in an institution appropriate to their self-identified gender or housing preference” (Yuen, 2015).

To address the changes occurring on a federal level and internationally, participant attorneys were then asked, “Do you believe that the prison system will ultimately change and allow inmates to self-identify or come up with an alternative other than inmates being placed in administrative segregation or protective custody?” According to Leach (2007), when administrative segregation is applied because of an inmate’s gender identification rather than for an offense committed while incarcerated, an inmate’s civil rights may be violated. Attorney E commented on this theme from an immigration perspective:

I think this is part of a move by Immigration because of embarrassment. Trans people have died in custody because of brutal treatment. [T]rans people with HIV have died because they did not get their meds...I really felt there was a cold aloofness like, ‘it’s not our issue,’ or ‘we’re not going to try to understand that,’ we have enough problems trying to deal with people from 97 countries that we’re not going to sit here and figure out who’s got some problem figuring out what their sex is.

Attorney E's comment aligns assertions from Simopoulos and Khin (2014) that stated if an inmate is misclassified and misplaced in a housing facility, there are potential risk factors affecting their safety, security, dignity and possibly their constitutional rights.

Theme 5 was related to changing one's name and change of legal documentation. At present, the state where my study occurred does not have a state statute addressing gender identification change pre- or post-op. Attorneys were asked, "What do you find to be the case when you have a trans client who is preoperative...how does the court view that trans client?" Attorney A responded:

It's the outward appearance and then it comes down to do you have a judge who's going to be...sympathetic is the wrong word...you have a judge who's going to be cognizant of the fact that this father is now presenting as a woman and wants to be addressed as 'she', 'ma'am', 'her', and I have it work really well and I've had it work not so well.

Attorney B said:

I would say that if somebody came to me and they did not have their legal paperwork I would have to go with their legal name until they got the paperwork done, which I would encourage them to do ASAP, and then I could substitute their new name.

All five attorneys interviewed expressed that legally changing one's name is important and forces the court to refer to the transgender client by their new name and chosen pronouns. Case law presented in Chapter 2, such as *State of Minnesota v. Chrishaun Reed McDonald* (2012), show the importance of legally changing one's name in criminal court.

CeCe McDonald was convicted of second-degree manslaughter in the death of Dean Schmitz. McDonald, an African-American, transgender woman, did not legally change her name but was referred as “CeCe” by her friends and family and outwardly presented as female. Once incarcerated in the U.S. prison system, CeCe was housed in an all-male facility where she suffered from sexual and physical abuse at the hands of inmates and guards.

For theme 6, I mentioned that Attorney A discussed the importance of a legal name change, and asked Attorney B, “If you had a client and you legally have their name changed, but they are still in a preoperative state...now I know county jail is different than the prison, but they’re going to be housed in the prison of their anatomical gender...”. Attorney B responded, “That’s gonna change because the Bureau of Prisons is going to make this change. I think they’ll come up with a policy and I think they’ll do it administratively.” Administrative law is a body of law that governs the activities of administrative agencies and can include rulemaking, adjudication, or the enforcement of a specific regulatory agenda (Stearns, 2002). Attorney C also believed the changes should be couched under the argument of administrative law: “That could start at a micro level; local counties and go up to the state and then you have to go state-by-state through the different prison bureaus, boards or however prison systems are organized in each state.” Attorney(s) D and E believed changes would occur constitutionally by fast-tracking cases through state courts that have jurisdiction all at once over the entire state, then to the Circuit courts that have jurisdiction over multiple states, and eventually to the U.S.

Supreme Court, which lays out the supreme law of the land. This is an enhanced understanding of the constitutional case law presented in Chapter 2.

### **Limitations of the Study**

Limitations exist in any research study. The main limitation of my study is related to methodology and data collection. A small sample size of five participant attorneys and one legal assistant contributed to the limited amount of data. Also, my area of focus was so specific that it was difficult to locate attorneys with the specialized knowledge of representing transgender clients in a court of law. There are only a few major law firms in Texas that specialize in the representation of transgender clients. For a study of this magnitude, I was limited to recruiting from these law firms. I also had to deviate slightly from the interview guide and reword questions slightly so they would specifically relate to each attorney's specialization and ask questions based on each attorney's level of experience.

### **Researcher Bias**

I am a political science professor at a local community college with a subfield specialization at a master's level in judicial politics and the U.S. Supreme Court. My involvement in social and political organizations, advocacy work within the field(s) of criminal justice and human services, and extensive interactions with attorneys inspired my interest in this topic area. Although these experiences may aid in access to the population studied, they may also be considered biases, skewing one's objectivity on the topic. Yet my background may have contributed to the credibility of the study results among the participant attorneys. Because of the nature of my professional and academic

background, it was important that I bracketed my thoughts and feelings to alleviate any preconceived notions I had about the U.S. criminal justice system.

### **Recommendations for Action**

The purpose of this study was to explore the lived experiences of attorneys who represent transgender clients. Although the attorneys in this study candidly discussed their experiences while representing LGBT clients, their recommendations for action should not go unnoticed. The participant attorneys' comments were along the lines of Theme 6 (recommendations and suggested changes that are needed in the U.S. prison system). Based on the results of this study, I recommend that the U.S. criminal justice system allow pre-operative, transgender individuals the right to legally change their name and gender identification on all government recognized documents, such as, but not limited to, a driver's license, social security card, passport, and birth certificate.

I further recommend that the BOP revisit their classification guidelines and allow transgender inmates to self-identify in the state and federal prison systems. As discussed in Chapter 2, Buist and Stone (2013); Grant et al., (2011) reported that 29% of transgender inmates out of 6,450 surveyed in the United States said they were harassed because of their gender nonconformity and 6% reported being physically assaulted by law enforcement officers. Jennes and Mason (2007) also found that transgender inmates suffer sexual assault at a rate that was many times higher (59%) than the rest of the inmate population in the United States. Shah (2010) revealed that transgender prisoners are often placed in protective custody, often without choice, to avoid violence and sexual assault by other prisoners. However, in most states, protective custody equates to solitary

confinement, which is typically used to punish the most violent and dangerous criminals. As referenced in Chapter 2, the U.S. Supreme Court ruled in *Davenport v. DeRobertis* (1988), that administrative segregation beyond 30 days without a review hearing violates an inmate's Eighth Amendment right against cruel and unusual punishment. Attorney C responded:

You could make the argument...ok...let's put them in solitary confinement but that's not fair to them to isolate them from the rest of the population, so again, that could fall under cruel and unusual punishment, that they have an identity thing that should relegate them to solitary confinement just to protect them, where the 'easiest' solution would be to put them in with the female populations...or vice versa depending on the transition they're making...in with the male population.

### **Recommendations for Further Study**

Based on this qualitative study, I recommend two areas of research for further study. One area of study may entail interviewing postconvicted transgender individuals. The focus of the study would provide a better understanding of how these inmates were treated while incarcerated. Post convicted transgender inmates could also be asked if they have any thoughts about changes that should be made to accommodate the needs of incarcerated transgender prisoners. The interview(s) could also focus on the type of treatment received while incarcerated and whether the use of feminine or masculine pronouns and preferred names made a positive difference while incarcerated. Such a study may also provide information and insight that may help criminal justice

administrators overhaul the policies in place that address the placement and treatment of transgender inmates.

Another area of further study may be to conduct a comparative study that would allow an exploration of the topic worldwide and look at what is happening in other countries, not just the United States. Furthermore, participant attorneys were split on whether transgender prison policy changes would occur administratively or constitutionally. Attorney B was the first to mention changes occurring administratively, which prompted me to ask the remaining attorneys (C, D, and E) about changes occurring administratively, such as, legislative action by the Board of Pardons and Parole, or constitutionally, such as, suing the BOP in a court of law. All of the participant attorneys raised concerns about the conservative nature of the state I focused upon in my study. Attorneys B, C, D, and E said whether prison policy changes affecting transgender inmates are attempted administratively or constitutionally, those who make up the prison boards or justice on the state-level courts are all highly conservative. The participant attorneys believed changes in prison policy would require more knowledge by administrators in the U.S. criminal justice system about what it means to be transgender.

### **Implications for Social Change**

Findings from my study have several implications for social change. One significant social change would involve raising the level of awareness among criminal justice administrators (i.e., judges, attorneys, prison and parole boards, correctional officers, and wardens) regarding the importance of incorporating policies, such as self-identification and continued access to medical treatment, that specifically address the



unique problems transgender inmates face. Allowing transgender inmates to self-identify and be housed according to their self-identification would minimize the risks of their safety and assaults on their self-esteem. Currently, the BOP does not allow inmates to self-identify in terms of gender. There has been some movement on the county level to allow inmates housed in jail to self-identify, but the state and federal levels do not allow self-identification. For instance, the Los Angeles County Jail announced in 2014 that they have a specific wing to house all transgender detainees (Lopez, 2014). Actions by this facility indicate at least one instance of a correctional system that has established a culturally sensitive policy regarding unique housing needs for transgender individuals. Researchers Simopoulos and Khin Khin (2014) found that the lack of a culturally sensitive judicial system compounds the problems experienced by transgender inmates.

Furthermore, the findings of this study indicate that criminal justice administrators in the U.S. legal system are not thoroughly versed on what it means to be transgender. Criminal justice administrators, such as attorneys, bailiffs, judges, correctional officers and wardens, must challenge themselves to become more educated on the needs of transgender inmates. Requiring continuing education courses and sensitivity training through local civil rights organizations could assist in raising the level of awareness. As more transgender individuals are “coming out” in mainstream society, law schools should offer additional courses or topics on the specific needs of this population. Of the five attorneys who participated in the interviews, four of them indicated that their knowledge of specific needs of transgender individuals in the criminal

justice system care through on-the-job training. Attorney C was the only one who specifically took classes related to discrimination and LGBT issues.

For social change to occur, the U.S. prison system must begin to solicit professional, legal advice from attorneys who represent transgender individuals as a means to hear what their clients need and want from the system overall. Based on the results from this study, it appears nontransgender individuals and practitioners are presenting themselves as experts on transgender issues in a court of law, which only perpetuates the misinformation, stereotypes, and assumptions this study aimed to refute. As Attorney B noted, “I understand where they are coming from, but all this stuff was written by nontransgender people.”

### **Reflections on My Experience**

I learned a great deal from this study. Most importantly, I learned how transgender individuals in society are often misunderstood. The participant attorneys of this study taught me the value and importance of protecting the constitutional rights of LGBT individuals. Attorney A expressed, “Somebody needs to be there and there needs to be good representation.... You just can’t throw it to somebody who doesn’t take the time to understand the issues.” Overall, the interview process went smoothly and without complications. I did have to deviate from the interview protocol slightly to catch the full breadth of the participant attorneys’ experience in representing transgender clients. While all of the participant attorneys had experience representing transgender clients, some had limited experience in criminal court.

The participant attorneys in this study were willing to volunteer information as they had a lot to share regarding their personal experiences with the U.S. legal system. Of the five attorneys and one legal assistant interviewed, three are gay males, one is a transgender woman and lesbian, and the legal assistant is a transgender man. This added credence to the interview process because each one interviewed commented on their own form of discrimination throughout their lives. Choosing a semistructured interview format was the best method for collecting the information I was interested in obtaining. A semistructured format allowed me to depart slightly from the interview protocol to capture the rich data I sought.

If I had more time, one thing I would do differently would be to add to the data collection process a focus group with transgender people who have had experiences with the U.S. criminal justice system. My rationale for this decision would be to get a comparative perspective of those who represent LGBT clients and those who have actually interacted firsthand with the system to see if they have similar concerns, which would allow me to identify common themes from both groups. I believe adding a focus group to the collection of data would have made the results of the study more rich and meaningful.

### **Summary**

In Chapter 5, the conceptual framework of this qualitative study was discussed. Specific questions and statements taken from the participant attorneys' interviews were used to show how the participant attorneys' had similar concerns about the systemic discrimination faced by their clients because of the misconception of what it means to be

transgender. A discussion regarding the criminal justice system overall guided the interpretations of the findings, followed by a discussion on the implications of social change. Recommendations for action(s) were addressed in which it was suggested that the BOP adopt a policy of allowing transgender inmates to self-identify once they enter the prison system. Finally, recommendations for further study and reflections on my own experiences were also addressed.

### **Conclusion**

The results of this qualitative research study established that self-identification in prison can have a positive impact on the overall admission, classification, and housing of transgender inmates. Self-identification would also assist prison administrators in determining the proper course of medical treatment of a transgender inmate. The results from this study may also help researchers and criminal justice administrators understand the importance of addressing the unique challenges transgender inmates face in the prison system, such as continued medical treatment and correct prison placement. Participant attorneys' suggestions in helping the BOP manage and treat a transgender inmate varied. However, participant attorneys unanimously reported that self-identification in prison is the first step in assisting this prison population and combatting the systemic discrimination that transgender clients face overall in the criminal justice system.

Participant attorneys also reported there is a further need to educate the court system on what it means to be transgender. Only one out of five attorneys reported having training and courses in law school that deal specifically with LGBT issues. The

attorneys who did not receive such training attended law school at a time when those courses were not offered. Attorney E offered this support:

I think transgender people are using the courts now because [it] shows that they're moving remarkably fast. Some of these are pretty high profile cases, but they do their job to bring attention to the issue... They took on issues that will bring a new focus that's different from the focus that we saw lead up to the gay and lesbian victories.... I think there'll be cases that deal a lot with issues involving [and] asking the most basic of questions: when is a man a man, when is a woman a woman? To hear judges dealing with that base issue on this, not even to consider the other factors... these are the factors that we're going to hear as this matter goes forward and how that will play out before next year's Supreme Court will be very interesting.

In this qualitative, phenomenological study I found the personal stories of the attorneys enlightening and insightful and informative yet limited because representation of transgender clients is not a heavily focused-upon area of law. All interviews provided meaningful information and were a reflection of each attorney's journey and experiences while representing transgender clients, which made his or her interview process unique. It is my hope that readers may obtain a more realistic viewpoint of transgender clients and inmates. I hope that when the U.S. criminal justice system has a firm grasp of what it means to be transgender, they provide the constitutional safeguards to protect transgender inmates' constitutional rights, particularly their Eighth Amendment right against cruel and unusual punishment.

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## Appendix A: Generic Letter of Cooperation

Community Research Partner Name  
 Contact Information  
 Date

Dear Researcher Name,

Based on my review of your research proposal, I give permission for you to conduct the study entitled, “Lived Experiences of Attorneys Who Represent Transgender Clients in Prison Placement” within the \_\_\_\_\_. As part of this study, I authorize you to recruit, collect data, verify the transcript accuracy of the interview(s), and disseminate the results. Individuals’ participation will be voluntary and at their own discretion.

We understand that our organization’s responsibilities include: \_\_\_\_\_

\_\_\_\_\_. We reserve the right to withdraw from the study at any time if our circumstances change. I confirm that I am authorized to approve research in this setting and that this plan complies with the organization’s policies.

I understand that the data collected will remain entirely confidential and may not be provided to anyone outside of the student’s supervising faculty/staff without permission from Walden University IRB.

Sincerely,

\_\_\_\_\_



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## Appendix C: Interview Guide for Study Participants

The following is a list of questions for utilization during the interview phase of this phenomenological study.

### **Demographic Questions**

1. Where did you attend law school?
2. When did you graduate law school?
3. How many years have you been a practicing attorney in the state?
4. Did you ever take a law school course specifically related to representing [transgender] clients with gender dysphoria? If so, can you describe the course?
5. What made you specialize in the representation of [transgender] clients with gender dysphoria in a court of law? As a follow-up, how long have you practiced this specialization?
6. Have you ever taken a case on appeal of a [transgender] client with gender dysphoria who has already been incarcerated?

### **Client-Related Representation Questions**

1. Have you ever received any specialized training regarding the representation of [transgender] clients with gender dysphoria? If so, what did this training include?

2. What is your experience when representing [transgender] clients with gender dysphoria, particularly transsexuals, during the sentencing phase of the trial where a housing recommendation is made for your client?
3. Can you share your experiences about the classification process by the prison once your client is transferred to the penal system? As a follow-up, have any of these issues ever served as grounds for an appeal?
4. Can you share if there are any client groups with gender dysphoria that you wish to discuss that we did not cover in the interview?