Correctional Facilities

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I. INTRODUCTION

Over the past several decades, there has been an increase in scholarship on gender discrimination, segregation, and abuse in the United States prison system.[1] This article explores a number of the unique legal issues raised by gender disparities and distinctions in correctional facilities. Part I of this article examines the disparate provision of prison services to women, specifically highlighting the courts' reactions to both equal protection and Title IX lawsuits brought by female inmates. Part II focuses on the continuing pervasiveness of prison rape, addressing the prison policies that facilitate sexual abuse in prisons and the legislative impediments faced by rape victims in accessing legal remedies. Part III analyzes the oft-neglected reproductive health needs of female inmates. Part IV addresses the placement and protection of transgender prisoners in correctional facilities. Part V explores the gender disparity in capital sentencing. Finally, Part VI looks into disparate gender treatment in other correctional facilities, namely immigration and juvenile facilities.

II. GENDER DISPARITY IN PRISON PROGRAMS

While females historically constituted a very small percentage of the total inmate population, over the last quarter century, the number of women in prison has risen drastically.[2] In 1980, there were 26,378 incarcerated women in the United States. By 2014, that number had ballooned to 222,061 female inmates—

1. *See* Spencer Beall, *"Lock Her Up!": How Women Have Become the Fastest-Growing Population in the American Carceral State*, 23 BERKELEY J. CRIM. L. 1, 4 (2018) (arguing that women's incarceration is a "unique feature" of American mass incarceration that should be more widely studied); Grace DiLaura, "*Not Susceptible to the Logic of* Turner": Johnson v. California *and the Future of Gender Equal Protection Claims From Prisons*, 60 UCLA L. REV. 506, 510 (2012) (noting that scholars have discussed the potential impact of Johnson v. California on gender equal protection cases); Lara Hoffman, *Separate But Unequal - When Overcrowded: Sex Discrimination in Jail Early Release Policies*, 15 WM. & MARY J. WOMEN & L. 591, 595 (2009) (observing that a number of articles have studied gender differences in prison programming); Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women's Prisons*, 42 HARV. C.R.-C.L. L. REV. 45, 48 (2007) (positing that "gendered racialization of women prisoners informs legal and institutional indifference to their treatment in prison"); Chimène I. Keitner, *Victim or Vamp? Images of Violent Women in the Criminal Justice System*, 11 COLUM. J. GENDER & L. 38, 39 (2002); Martin A. Geer, *Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law—A Case Study of Women in United States Prisons*, 13 HARV. HUM. RTS. J. 71, 87 (2000).

2. *See* Deborah Ahrens, *Incarcerated Childbirth and Broader "Birth Control": Autonomy, Regulation, and the State*, 80 MO. L. REV. 1, 3 (2015); Marie A. Failinger, *Lessons Unlearned: Women Offenders, the Ethics of Care, and the Promise of Restorative Justice*, 33 FORDHAM URB. L.J. 487, 489–90 (2006) (presenting "a number of theories" scholars have put forth for the increase in the number of women in prison, including economic instability, mandatory sentencing for drug offenses, and more prosecution of non-violent offenses that women traditionally engage in, such as larceny or shoplifting); Myrna S. Raeder, *A Primer on Gender-Related Issues That Affect Female Offenders*, 20 CRIM. JUSTICE 4, 4 (2005). *Cf.* Natasha A. Frost, Judith Greene & Kevin Pranis, INSTITUTE ON WOMEN & CRIMINAL JUSTICE, *Hard Hit: The Growth In The Imprisonment Of Women*, 1977–2004, 9 (May 2006), http://www.wpaonline.org/institute/hardhit/HardHitReport4.pdf (noting that the significant increase shows up larger proportionally "in part, due to the small number of women who were incarcerated at the beginning of the boom relative to the number of men").

an increase of more than 700%.[3] Incarceration rates have dropped over the past decade, but most of those decreases are attributable to the male inmate population. The female prison population continued to grow approximately 0.2% annually from 2006 to 2015, while the adult male population decreased at the same annual rate of 0.2%.[4] In 2015–16, the male prison population decreased by 1.3%, while the female prison population increased by 0.7%.[5] Despite the female prison population's growth rate, the actual number of women in prison remains far less than the number of male inmates, at approximately 7% of the total prison population.[6]

Female prisoners generally receive lower quality programs, facilities, and basic conditions of confinement than male prisoners.[7] For example, vocational opportunities that are available to female prisoners are often confined to traditional "female" occupations, such as cosmetology.[8] Despite the fact that female prisoners experience higher rates of medical and mental health conditions than male inmates, studies show that adequate health services are either limited or "lack the trauma focus needed to adequately respond to the complex mental health issues present."[9] Similarly, substance-abuse treatment programs were developed to respond to men's motivations for using drugs—which often differ from women's reasons for using drugs.[10] Scholars note, too, that female inmates are more likely to have been the only parent living with and caring for minor children preceding

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3. THE SENTENCING PROJECT, FACT SHEET: INCARCERATED WOMEN AND GIRLS 1 (last updated Nov. 2015), http://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf.

4. *See* E. Ann Carson, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2016, 5 (revised Aug. 7, 2018), https://www.bjs.gov/content/pub/pdf/p16.pdf.

5. *Id.*

6. *Id.* at 3.

7. *See* Torrey McConnell, Note and Comment, *The War on Women: The Collateral Consequences of Female Incarceration*, 21 LEWIS & CLARK L. REV. 493, 501 (2017); Peter M. Carlson, *Public Policy, Women, and Confinement: A Plea for Reasonableness*, 14 WM. & MARY J. WOMEN & L. 245, 251–52 (2008).

8. *See* Lenox, *infra* note 11, at 295; Jennifer Arnett Lee, Note, *Women Prisoners, Penological Interests, and Gender Stereotyping: An Application of Equal Protection Norms to Female Inmates*, 32 COLUM. HUM. RTS. L. REV. 251, 255 (2000) (citing William C. Collins & Andrew Collins, NAT'L INST. OF CORR., *Women in Jail: Legal Issues* 3 (1996)).

9. *See* Lisa Kanti Sangoi & Lorie Smith Goshin, *Women and Girls' Experiences Before, During, and After Incarceration: A Narrative of Gender-Based Violence, and an Analysis of the Criminal Justice Laws and Policies that Perpetuate this Narrative*, 20 UCLA WOMEN'S L.J. 137, 142–43, 158 (2013); Joseph B. Allen, Note, *Extending Hope into "The Hole": Applying* Graham v. Florida *to Supermax Prisons*, 20 WM. & MARY BILL RTS. J. 217, 226 (2011) (discussing a 2006 *St. Petersburg Times* investigation that found that 77% of women in solitary confinement in Florida were diagnosed as mentally ill, as compared to 33% of men).

10. *See* Robert A. Shearer, *Identifying the Special Needs of Female Offenders*, 67 FED. PROBATION 46, 46–47 (2003) (noting that there are enough rehabilitative programs at correctional facilities for male inmates to assign the men based on their specific "treatment needs," while female offenders are assigned to programs "on the sole basis of gender"); Neal P. Langan & Bernadette M. Pelissier, *Gender Differences Among Prisoners in Drug Treatment*, 13(3) J. SUBST. ABUSE 291, 300 (2001) (presenting a study which found that "women were more likely to report that they had used drugs to alleviate physical or emotional pain").

their arrest.[11] Yet women find it more difficult to visit with their children because the lower number of female correctional facilities means they are often sent farther from home than men for their sentences.[12] These discrepancies are compounded by the "tough on crime" shift in criminal justice policy that has resulted in a tightening of rehabilitative programming across correctional facilities generally.[13]

A. CLAIMS UNDER THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE

The legal standard of review for gender-based prison policies remains in flux.[14] In 1987, the Supreme Court held in *Turner v. Safley* that prison regulations infringing on inmates' constitutional rights are valid if "reasonably related to legitimate penological interests."[15] In 2005, however, the Court limited the scope of *Turner*'s deferential test in *Johnson v. California*, holding that courts must apply a strict scrutiny standard in evaluating race-based prison policies. In that case, the Court stated that an individual's right against racial discrimination "is not a right that need necessarily be compromised for the sake of proper prison administration."[16] Notably, the Court emphasized that it applied *Turner*'s more deferential standard "*only* to rights that are 'inconsistent with proper incarceration,'" and did not cite the right to be free from unlawful gender discrimination as one of those rights.[17] Accordingly, scholars have debated the impact of this

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11. *See* Sarah Wynn, *Mean Women and Misplaced Priorities: Incarcerated Women in Oklahoma*, 27 WIS. J.L. GENDER & SOC'Y 281, 284–85 (2012); Marne L. Lenox, Note, *Neutralizing the Gendered Collateral Consequences of the War on Drugs*, 86 N.Y.U. L. REV. 280, 291 (2008).

12. *See* Deseriee A. Kennedy, *"The Good Mother": Mothering, Feminism, and Incarceration*, 18 WM. & MARY J. WOMEN & L. 161, 171, 178 (2012); Raeder, *supra* note 2, at 18. *But see* Anne E. Jbara, Note, *The Price They Pay: Protecting the Mother-Child Relationship Through the Use of Prison Nurseries and Residential Parenting Programs*, 87 IND. L.J. 1825, 1836, 1838–39 (2012) (describing implementation at both state and federal level of "community-based residential parenting programs," which feature facilities in which women can serve their sentences while living with and caring for their minor children).

13. *See* Martha F. Davis, *Learning to Work: A Functional Approach to Welfare and Higher Education*, 58 BUFF. L. REV. 147, 212–13 (2010) (highlighting the "overlapping relationship of education and work" for prisoners hoping to re-enter society after incarceration); Beth A. Colgan, *Teaching a Prisoner to Fish: Getting Tough on Crime by Preparing Prisoners to Reenter Society*, 5 SEATTLE J. FOR SOC. JUSTICE 293, 293 (2006) (explaining that in response to the perception that education and job training were seen as "coddling prisoners," Congress and state legislatures tightened prison budgets to counter such programming); *see also* Jennifer Arnett Lee, Note, *Women Prisoners, Penological Interests, and Gender Stereotyping: An Application of Equal Protection Norms to Female Inmates*, 32 COLUM. HUM. RTS. L. REV. 251, 251 (2000).

14. The court in Greene v. Tilton, No. 2:09-CV-0793, 2012 WL 691704, at *6-8 (E.D. Cal. Mar. 2, 2012) provides a helpful analysis of the split that exists among the courts on this issue. *See also* DiLaura, *supra* note 1, at 514–18; Hoffman, *supra* note 1, at 594–95; Mark Egerman, Student Article, Roe v. Crawford*: Do Inmates Have an Eighth Amendment Right to Elective Abortions?*, 31 HARV. J. L. & GENDER 423, 428–29 (2008).

15. *See* Turner v. Safley, 482 U.S. 78, 89 (1987).

16. *See* Johnson v. California, 543 U.S. 499, 510 (2005).

17. *Id.* (quoting Overton v. Bazzetta, 539 U.S. 126, 131 (2003)).

decision on the standard of review for equal protection cases based on gender.[18] Some believe that intermediate scrutiny is now required, while others expect little change in the status quo unless the Supreme Court resolves the question.[19] Thus far, the Court has shown minimal interest in addressing prisoners' gender discrimination claims, leaving lower courts divided as to the standard of review that should apply to such cases.[20]

An inmate challenging a gender-based policy may face a threshold hurdle even before a court reaches an analysis of the policy at issue. If the plaintiff is not found "similarly situated" to the individuals receiving favorable treatment, there cannot be an analysis of whether the Equal Protection Clause provides a remedy.[21] Courts have addressed this question inconsistently. In *Klinger v. Department of Corrections*, the Eighth Circuit held, "[d]issimilar treatment of dissimilarly situated persons does not violate equal protection."[22] In his dissenting opinion in *Klinger*, Circuit Judge McMillian relied in part on *Glover v. Johnson*.[23] There, female inmates alleged that the educational and vocational opportunities provided to them were inferior to those provided to male inmates.[24] The district court held that the Equal Protection Clause requires parity of treatment for male and female inmates, notwithstanding "excuses" such as the prisoners' relative population sizes.[25] However, in *Women Prisoners of D.C. Department of Corrections v. District of Columbia*, the D.C. Circuit held that the evidence did not support the conclusion that male and female inmates were similarly situated, highlighting "striking disparities between the sizes of the [male and female] prison populations that were being compared."[26] Yet more recently, in *Sassman v. Brown*, a women-only alternative-custody program was deemed

18. *See* Seham Elmalak, Comment, *Babies Behind Bars: An Evaluation of Prison Nurseries in American Female Prisons and Their Potential Constitutional Challenges*, 35 PACE L. REV. 1080, 1100–01 (2015); DiLaura, *supra* note 1, at 510.

19. *See* Priscilla A. Ocen, *Incapacitating Motherhood*, 51 U.C. Davis L. Rev. 2191, 2230-31 (2018); DiLaura, *supra* note 1, at 510.

20. *See* Roubideaux v. N.D. Dep't of Corr. & Rehab., 570 F.3d 966, 974 (8th Cir. 2009) (applying intermediate scrutiny to gender-based classifications in prisons because men and women are "similarly situated" at the beginning of the prison decision-making inquiry); Veney v. Wyche, 293 F.3d 726, 732–33 (4th Cir. 2002) (applying Turner v. Safley rational basis review to gender discrimination claims by prisoners).

21. *See* Natasha L. Carroll-Ferrary, Note, *Incarcerated Men and Women, The Equal Protection Clause, and the Requirement of "Similarly Situated"*, 51 N.Y.L. SCH. L. REV. 595, 597 (2006); Marsha L. Levick and Francine T. Sherman, *When Individual Differences Demand Equal Treatment: An Equal Rights Approach to the Special Needs of Girls in the Juvenile Justice System*, 18 WIS. WOMEN'S L.J. 9, 26–27 (2003).

22. Klinger v. Dep't of Corr., 31 F.3d 727, 731 (8th Cir. 1994).

23. Glover v. Johnson, 478 F. Supp. 1075, 1085–86 (E.D. Mich. 1979).

24. *See id.*

25. *Id.* at 1078-79.

26. Women Prisoners of D.C. Dep't of Corr. v. District of Columbia, 93 F.3d 910, 925 (D.C. Cir. 1996).

discriminatory against men.[27] The district court found that male inmates could be "similarly situated" to female inmates where both met the gender-neutral criteria for the program.[28] These cases demonstrate the inconsistency with which courts have applied the "similarly situated" analysis, which has given rise to a unique problem for female—and male—inmates, who may or may not be considered similarly situated in gender discrimination cases.[29]

B. CLAIMS UNDER TITLE IX OF THE EDUCATION AMENDMENT OF 1972

Inmates can also bring gender-based claims challenging unequal educational and vocational opportunities under Title IX of the Education Amendment of 1972. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[30] Some scholars have argued that female inmates should have more success bringing gender disparity claims under Title IX, because Title IX is a "mirror image" of Title VI of the Civil Rights Act of 1964, for which courts use a strict scrutiny standard.[31] However, despite Congress' purposeful employment of similar language when constructing Title VI and Title IX,[32] courts have been reluctant to apply strict scrutiny to Title IX challenges in the prison context.[33] When faced with such challenges, courts have held either that Title IX does not extend beyond educational programs, or that penological necessities outweigh compliance with Title IX.[34]

In addition to their equal protection claims, the female inmates in *Women Prisoners of D.C. Department of Corrections v. District of Columbia* requested declaratory and injunctive relief for violations of Title IX.[35] The female inmates claimed that they received inferior health care programs, as well as fewer educational and vocational opportunities, than male prisoners.[36] The D.C. Circuit

27. Sassman v. Brown, 99 F. Supp. 3d 1223, 1241 (E.D. Cal. 2015), *appeal dismissed*, No. 15-17052 (9th Cir. Mar. 14, 2016).

28. *See id.* at 1240*; see also* Carol Strickman, *Gender and Incarceration – Family Relationships and the Right to Be a Parent*, 39 W. NEW ENG. L. REV. 401, 409–14 (2017).

29. *See* Carrol-Ferrary, *supra* note 21, at 597.

30. 20 U.S.C.A. § 1681(a) (West, Westlaw through P.L. 115-281).

31. Rosemary Kennedy, *The Treatment of Women Prisoners After the VMI Decision: Application of a New "Heightened Scrutiny"*, 6 AM. U. J. GENDER SOC. POL'Y & L. 65, 80 (1997) (quoting Christine Safarik, *Constitutional Law – Separate But Equal*: Jeldness v. Pearce *– An Analysis of Title IX Within the Confines of Correctional Facilities*, 18 W. NEW ENG. L. REV. 337, 344 (1996)).

32. *See* Safarik, *supra* note 31, at 344.

33. Kennedy, *supra* note 31, at 81.

34. *See* Roubideaux v. N.D. Dep't of Corr. & Rehab., 570 F.3d 966, 977–78 (8th Cir. 2009) (finding "prison industries program" was not an educational program for Title IX purposes); Women Prisoners of D.C. Dep't of Corr. v. District of Columbia, 93 F.3d 910, 927 (D.C. Cir. 1996) (finding "grave problems with the proposition that work details, prison industries, recreation, and religious services and counseling have anything in common with the equality of *educational* opportunities with which Title IX is concerned").

35. *D.C. Dep't of Corr.*, 93 F.3d at 913–17.

36. *Id.*

applied the same "similarly situated" analysis to the Title IX claims as it had to the equal protection claim,[37] and thus held that the female inmates were not similarly situated to their male counterparts.[38] The court emphasized that the Fourteenth Amendment's Equal Protection Clause requires states to treat similarly situated persons alike.[39] If persons are in dissimilar situations, there is no equal protection violation even if the individuals are treated differently.[40] It can be argued that, inherently, male and female prisons—simply by virtue of their inmates, size, and particular programs—are dissimilar.[41] Thus, it appears that female prisoners face many of the same hurdles in the context of Title IX claims as they do with respect to the Equal Protection Clause.

III. SEXUAL VIOLENCE IN PRISON

Between 2012 and 2013, rape reports made to law enforcement in the United States decreased by 6.3%.[42] However, while reported rapes in the general population are on the decline, rape and other forms of sexual victimization constitute an ever-increasing problem in the United States prison system.[43] State and military prisons have particularly high levels of sexual violence.[44] Furthermore, sexual abuse in correctional facilities presents different problems and implications for each gender that require separate analysis.

In 1996, as part of the Prison Litigation Reform Act ("PLRA"), Congress established a mandatory exhaustion requirement for inmates challenging prison conditions in federal court.[45] Specifically, the PLRA states that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."[46] Prior to the PLRA, inmates seeking to file lawsuits in federal court

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37. *Id.* at 924 ("We believe the same principle should apply in Title IX cases.").

38. *Id.* at 927.

39. *Id.* at 924 (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985)).

40. *Id.* (citing Klinger v. Dep't of Corr., 31 F.3d 727, 731 (8th Cir. 1994)).

41. *Id.*

42. *Crime in the United States 2013*, FEDERAL BUREAU OF INVESTIGATION (2013).

43. *See* Allen J. Beck et al., *Sexual Victimization Reported by Adult Correctional Authorities, 2009-11*, BUREAU OF JUSTICE STATISTICS at 1, 4 (Jan. 2014), http://www.bjs.gov/content/pub/pdf/svraca0911.pdf (reporting that allegations of sexual violence in prison increased 39% between 2005 and 2011); Allen J. Beck et. al., *Sexual Victimization in Prisons and Jails Reported by Inmates*, 2011-12, BUREAU OF JUSTICE STATISTICS at 6 (2013), http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf (reporting in 2011-12, approximately 4.0% of inmates in federal and state prison reported one or more "incidents of sexual victimization" by another inmate or facility staff, a slight decrease from 2007, and 3.2% of jail inmates, the same as 2007, reported incidents of sexual victimization involving another inmate or facility staff).

44. Beck, et al., *supra* note 43, at 6 (noting there are 1.31 substantiated incidents of sexual violence per 1000 inmates in military facilities and 0.45 substantiated incidents of sexual violence per 1000 inmates in state prisons).

45. *See* 42 U.S.C.A. § 1997e(a) (West, Westlaw through P.L. 115-281).

46. *Id.*

were not required to run their complaints through the grievance system that their incarcerating authority had implemented.[47]

In *Woodford v. Ngo*, the Supreme Court held that a prisoner is required to "exhaust all 'available' remedies, not just those that meet federal standards."[48] Exhaustion was held to mean "proper exhaustion," which entails compliance with an agency's deadlines and other critical procedural rules.[49] The exhaustion rule established an extremely difficult hurdle for many inmates, as many brought damage actions without counsel and were frequently unable to navigate cumbersome and confusing grievance procedures.[50] As such, "[d]espite the consensus that prison rape is wrong, redress for that wrong [wa]s complicated by the PLRA," which required a showing of physical injury before an inmate could recover damages.[51] It was unclear after the passage of the act whether a rape victim needed to prove physical injuries from her assault in order to recover damages, or whether proof of an assault was sufficient.[52] While the PLRA's stated purpose was to limit frivolous lawsuits, it ultimately resulted in making civil court remedies for prison rape victims difficult to attain, largely because of confusion about the statutory meaning of physical injury.[53]

In 2003, Congress passed the Prison Rape Elimination Act ("PREA").[54] PREA instituted a zero-tolerance policy for rape and sexual assault within any detention facility run by federal or state governments, including local jails, police lockups, and juvenile facilities.[55] Beyond the zero-tolerance standards for rape in correctional facilities, PREA's most notable purpose was to "develop and implement national standards for the detection, prevention, reduction and punishment of prison rape."[56] The creation of a bipartisan, nine-member National Prison Rape Elimination Commission ("NPREC") to fulfill this obligation resulted in the 2008 release of draft standards and accompanying compliance checklists.[57] The

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47. *See* McCarthy v. Madigan, 503 U.S. 140, 149–50 (1992) (holding that a federal prisoner did not have to administratively exhaust his "constitutional claim for money damages"), *superseded by statute*, Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996); Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 592 (2006).

48. Woodford v. Ngo, 548 U.S. 81, 85 (2006).

49. *Id.* at 90.

50. Schlanger, *supra* note 47, at 592–93.

51. Deborah M. Golden, *It's Not All in My Head: The Harm of Rape and the Prison Litigation Reform Act*, 11 CARDOZO WOMEN'S L.J. 37, 38 (2004).

52. *Id.* at 45.

53. *Id.* at 44–45.

54. The Prison Rape Elimination Act, 34 U.S.C.A. § 30301–09 (2017).

55. *See* Dee Halley, *The Prison Rape Elimination Act of 2003: Addressing Sexual Assault in Correctional Settings*, CORRECTIONS TODAY, June 1, 2005, at 30.

56. *Id.*

57. *See* 34 U.S.C.A. § 30306 (West, Westlaw through P.L. 115-281). PREA provides that "[t]he Commission shall carry out a comprehensive legal and factual study of the penological, physical, mental, medical, social, and economic impacts of prison rape in the United States on (A) Federal, State, and local governments; and (B) communities and social institutions generally." § 30306(d)(1). The Commission has access to any federal department or agency information it deems necessary to carry out

three headings for the compliance checklists corresponded with the major mandates of PREA: (1) prevention; (2) detection and response; and (3) monitoring.[58] The 2009 report of the panel allowed the Department of Justice ("DOJ") to formulate clear standards in a final rule that was codified in 2012.[59]

The standards have three clear goals: to prevent, detect, and respond to sexual abuse.[60] Each facility is audited for compliance at least once every three years,[61] and the regulations bind the Federal Bureau of Prisons ("BOP").[62] Noncompliant states are subject to a 5% reduction in prison funds from the DOJ unless the governor certifies that the 5% will be used to establish compliance in future years.[63] The standards have been published in the Federal Register, and the DOJ also funded the National Resource Center for the Elimination of Prison Rape, to assist facilities and their employees in combatting sexual abuse in confinement.[64] Additionally, the DOJ PREA regulations mitigate the harshness of PLRA's exhaustion requirement. The final rule maintains that agencies cannot impose deadlines on inmates' requests for administrative remedies if the complaints concern allegations of sexual abuse.[65] Inmates are no longer required to use any informal grievance process to resolve an alleged incident of sexual abuse with a staff member, and grievances may not be referred to a staff member who is the subject of the complaint.[66] Finally, with some limits, third parties such as attorneys, staff members, and outside advocates may submit grievances on behalf of inmates.[67] These rules and standards represent a meaningful effort to move the cause of prison rape elimination forward. However, since these regulations are relatively recent, the effects remain to be seen.

In 2017, PREA standards came into full effect.[68] However, Congress's intent to punish the perpetrators of sexual assault and to deter future assaults was thwarted due to the regulation's blanket ban on sexual conduct, which includes

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its functions pursuant to PREA and must issue its report to Congress no later than five years after the date of the initial meeting of the Commission. *See* § 30306(3)(A); *Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Adult Prisons and Jails*, NAT'L PRISON RAPE ELIMINATION COMM'N (Jan. 1, 2009, 12:00 PM), https://www.ncjrs.gov/pdffiles1/226682.pdf.

58. NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 57, at 21, 33, 53.

59. *See* 28 C.F.R. § 115 (2015).

60. *Id.* § 115.11(a).

61. *Id.* § 115.401(a).

62. The rule refers to and defines "agency" as "the unit of a State, local, corporate, or nonprofit authority, or the Department of Justice, with direct responsibility for any facility that confines inmates, detainees, or residents." *Id.* § 115.5.

63. 34 U.S.C.A. § 30307(e)(2) (West, Westlaw through P.L. 115-281).

64. *Justice Department Releases Final Rule to Prevent, Detect and Respond to Prison Rape*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/opa/pr/justice-department-releases-final-rule-prevent-detect-and-respond-prison-rape (last updated Sept. 15, 2014).

65. 28 C.F.R. § 115.52(b)(1).

66. *Id.* § 115.52(b)(3)–(c)(2).

67. *Id.* § 115.52(e)(1).

68. Lena Palacios, *The Prison Rape Elimination Act and the Limits of Liberal Reform*, GENDER POLICY REPORT (Feb. 17, 2017), http://genderpolicyreport.umn.edu/the-prison-rape-elimination-act-and-the-limits-of-liberal-reform/.

consensual sex.[69] This implementation has disincentivized victims of sexual assault from reporting their assaults due to fear of punishment.[70] For example, PREA has allowed prison officials to use gender nonconformity as evidence of consent to a rape.[71] Rather than create the remedies that Congress intended to provide, PREA has led to damaging results "for Black and multiracial people, women of color, LGBTQ people, and disabled people who are more likely to be targeted for prison rape than white heterosexual men, nondisabled people, and cisgender people."[72]

A. PREA IN IMMIGRATION DETENTION FACILITIES

The NPREC reported that large numbers of immigrant detainees are vulnerable to sexual abuse.[73] In its 2012 final rulemaking, the DOJ found that PREA standards applied to Department of Homeland Security ("DHS") detention facilities.[74] Pursuant to this rulemaking, DHS made a PREA compliance final rule in March 2014.[75]

The DHS PREA rules maintain that DHS and each DHS facility should have a "policy mandating zero tolerance toward all forms of sexual abuse."[76] The rules also include standards for staff training, inmate medical and mental health care, and reporting requirements, largely mirroring provisions in the DOJ PREA rules.[77] Given that large numbers of DHS facilities involve private contracts, the rules also require that when contracting for confinement of immigrants in non-DHS facilities, DHS must ensure that the contract has a requirement that the facility comply with DHS's PREA rules.[78] However, DHS cannot force Contract Detention Facilities ("CDFs") to comply with PREA regulations without "altering existing contractual obligations."[79] In addition, private organizations such as the Mexican American Legal Defense Fund have emphasized that there is a "disconnect" between DHS regulations and actual conditions in prisons because private contractors implement the rules (at private detention facilities) and are immune from Freedom of Information Act requirements except when Immigration and Customs Enforcement ("ICE") possesses these documents.[80]

69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. U.S. CIV. RIGHTS COMM'N, WITH LIBERTY AND JUSTICE FOR ALL: THE STATE OF CIVIL RIGHTS AT IMMIGRATION DETENTION FACILITIES (Sept. 2015), at 68, https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2015.pdf [hereinafter WITH LIBERTY AND JUSTICE FOR ALL].
74. 28 C.F.R. § 115.51(b) (applying a reporting requirement to facilities holding individuals "solely for civil immigration purposes").
75. *See* Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities, 79 Fed. Reg. 13,100–01 (Mar. 7, 2014) (codified at 6 C.F.R. § 115 *et seq.*).
76. 6 C.F.R. § 115.11(a), (c).
77. *See* 6 C.F.R. § 115; 28 C.F.R. § 115.
78. *See* 6 C.F.R. § 115.12(a).
79. WITH LIBERTY AND JUSTICE FOR ALL, *supra* note 73, at 75.
80. *Id.* at 77.

Although CDFs assert that they comply with PREA inspection requirements, independent human rights groups have criticized the opaqueness of the CDF internal audit process, and the United States Civil Rights Commission reported that CDFs "lack accountability in complying with PREA inspection policies" because the CDF's compliance reports are unavailable to the public.[81]

1. PREA Standards

ICE requires all employees who have contact with detainees and all detention-center staff to receive sexual abuse training.[82] The agency or facility then provides "refresher information" every two years.[83]

The DHS PREA rules require facilities to alert all detainees to PREA policies, including zero tolerance for sexual assault and protection against retaliation after reporting abuse, and to provide PREA written materials in the detainee's own language.[84] However, the Civil Rights Commission documented ongoing problems, such as challenges in communicating PREA policies to detainees who speak indigenous languages and a lack of employees at detention facilities who can work with detainees who may be too nervous for cultural or other reasons related to the detention setting to make a report of abuse.[85]

The DHS PREA rules for ICE and Customs and Border Protection ("CBP") facilities require that detainees have multiple avenues for reporting sexual assault to both the agency and outside groups, including anonymous reporting.[86] However, outside organizations such as the American Civil Liberties Union ("ACLU") have complained that detainees at CBP holding centers (which house immigration detainees on a short-term basis) often do not have access to a telephone to make reports to outside organizations and frequently cannot make reports about possible sexual assault without a guard's assistance.[87]

After the implementation of PREA, the number of accusations jumped from 8,768 to 24,661.[88] However, correctional officials only corroborated 5,187 reports,[89] and concluded the remaining allegations were either false or lacking evidence.[90] Some experts are skeptical about the high number of fake accusations, because "prisoners have nothing to gain from filing false sex abuse

81. *Id.* at 79–80.
82. 6 C.F.R. § 115.31.
83. *Id.*
84. 6 C.F.R. § 115.33(a)-(b).
85. WITH LIBERTY AND JUSTICE FOR ALL, *supra* note 73, at 90.
86. *See* 6 C.F.R. § 115.51(a)–(b) (ICE immigration detention facilities); 6 C.F.R. § 115.151(a)–(b) (DHS holding facilities).
87. WITH LIBERTY AND JUSTICE FOR ALL, *supra* note 73, at 88.
88. Alysia Santo, *Prison Rape Allegations are on the Rise*, THE MARSHALL PROJECT (Jul. 25, 2018, 8:00 AM), https://www.themarshallproject.org/2018/07/25/prison-rape-allegations-are-on-the-rise.
89. *See id.*
90. *Id.*

reports."[91] Instead, "corrections officials often start with the assumption that a report is false, particularly when it's against a colleague."[92]

B. PREA IN MILITARY DETENTION FACILITIES

All-female military personnel serving criminal sentences under military jurisdiction are housed at the Naval Consolidated Brig Miramar ("NAVACONBRIG Miramar") in San Diego, California.[93] Because all women in military detention are housed at NAVACONBRIG Miramar, citation of the Navy's guidance implementing PREA requirements in its facilities is most relevant, although sexual abuse in military detention facilities is also a significant problem for men.[94] The Navy's interpretation of the DOJ PREA standards largely adopted the DOJ standards, but the Navy did adjust some qualifying language.[95]

The Navy's PREA standards require that when there are staffing deficiencies, "mission priorities" must be considered.[96] "Security and safety" are the top priority, and staffing resources must first be allocated to ensure "all permanent security posts will be staffed at all times," with adequate staffing and video monitoring used to protect inmates from sexual assault and abuse "to the best extent possible."[97] This language is mostly consistent with the DOJ standard, which requires a facility to develop a "staffing plan" that has adequate staffing levels to protect inmates from sexual abuse.[98] The guidance also emphasizes the importance of conducting unannounced and randomized facility checks to "identify and deter" incidents of sexual abuse.[99]

The Navy's guidance requires minimum levels of employee and healthcare-provider training on preventing sexual abuse, consistent with the DOJ standards.[100] Some of the relevant trainings can be conducted online.[101]

Consistent with the DOJ's requirement of gender-informed training,[102] NAVACONBRIG Miramar, the only military correctional facility housing women inmates, will "develop and avail gender-responsive and trauma-informed PREA staff training to all DOD confinement facilities housing women."[103]

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91. *Id.*
92. *Id.*
93. Lois Lausch et al., *Camouflage is the New Pink*, AMERICAN CORRECTIONAL ASS'N at 1 (2014), http://www.aca.org/ACA_PROD_IMIS/Docs/Corrections%20Today/2014%20Articles/Schenck.pdf.
94. *See* Beck et al., *supra* note 43, at 16.
95. DEP'T OF THE NAVY, PRISON RAPE ELIMINATION ACT (PREA); GUIDANCE LETTER #1 (Mar. 20, 2014), https://www.public.navy.mil/bupers-npc/support/correctionprograms/Documents/048-14%20%20Navy%20PREA%20Guidance%20Letter%20-%2020%20Mar%2014.PDF [hereinafter PREA GUIDANCE LETTER].
96. *Id.* at 4.
97. *Id.*
98. 28 C.F.R. § 115.13(a).
99. PREA GUIDANCE LETTER, *supra* note 95, at 4.
100. *See* 28 C.F.R. § 115.35; PREA GUIDANCE LETTER, *supra* note 95, at 7–9.
101. PREA GUIDANCE LETTER, *supra* note 95, at 7.
102. *See* 28 C.F.R. § 115.31(b).
103. PREA GUIDANCE LETTER, *supra* note 95, at 8.

The Navy allows for inmate access to the Department of Defense ("DOD") "Safe Helpline," operated by the Rape, Abuse and Incest National Network ("RAINN"), and posts information about the helpline in "all housing areas."[104] The Helpline is in compliance with the DOJ PREA standards, which require all confinement facilities to provide inmates with access to "outside victim advocates for emotional support services related to sexual abuse."[105] Such "outside victim advocates" include telephone numbers of rape crisis centers, and the Navy considers the RAINN hotline a rape crisis center.[106] DOJ PREA Section 115.53(c) encourages correctional facilities to create relationships with outside community service providers for inmates to contact in the event of a sexual assault.[107]

Finally, the Navy requires naval correctional facilities to "remove" any staff member who commits sexual abuse or assault related to his or her work in the facility if the staff member is not terminated from federal employment (if a civilian) or discharged from military duty (if a member of the military).[108] This policy is largely consistent with DOJ standards, which state "termination shall be the presumptive disciplinary sanction for staff who have engaged in sexual abuse."[109]

In 2013, before the Navy's implementation of DOJ PREA standards, 1,112 sexual assaults were reported in the Navy.[110] In 2016, after the implementation, total reports increased to 1,285.[111]

C. Sexual Abuse of Female Inmates By Prison Guards

In 2015, correctional administrators reported 24,661 sexual victimization allegations, more than half of which involved allegations that staff had sexually victimized inmates.[112] Although international laws and treaties prohibit cross-gender supervision in prison, currently all federal and state prisons in the United States permit male guards to work in female facilities.[113] In *Dothard v. Rawlinson*, which allowed gender exclusion in correctional hiring for "contact" positions, the

104. PREA GUIDANCE LETTER, *supra* note 95, at 6.

105. 28 C.F.R. § 115.53(a).

106. *Id.; see also* PREA GUIDANCE LETTER, *supra* note 95 at 6.

107. *See* 28 C.F.R. § 115.53(c).

108. *See* PREA GUIDANCE LETTER, *supra* note 95, at 12.

109. 28 C.F.R. § 115.76(b).

110. DEP'T OF DEFENSE SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE, REPORTS OF SEXUAL ASSAULT RECEIVED AT MILITARY INSTALLATIONS AND COMBAT AREAS OF INTEREST (Nov. 17, 2017), http://www.esd.whs.mil/Portals/54/Documents/FOID/Reading%20Room/Personnel_Related/16-F-0536_Charts%20_of_Sexual_Assault_Reports_CONUS_OCONUS__2017-11-14.pdf?ver=2017-11-16-134931-450.

111. *Id.*

112. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 251146, SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2012–15 (July 2018), https://www.bjs.gov/content/pub/pdf/svraca1215.pdf.

113. *See* Flyn L. Flesher, *Cross-Gender Supervision in Prisons and the Constitutional Right of Prisoners to Remain Free from Rape*, 13 WM. & MARY J. WOMEN & L. 841, 842–43 (2007). For example, the United Nations has encouraged all of its member nations to implement Rule 53(3) of the Standard Minimum Rules for the Treatment of Prisoners, which states that "[w]omen prisoners shall be attended and supervised only by women officers." *Id.* at 842.

Supreme Court recognized gender as a bona fide occupational qualification to Title VII of the Civil Rights Act of 1964.[114] However, continued fear of further employment discrimination litigation drives prison administrators to continue permitting cross-gender supervision policies.[115] In federal women's correctional facilities, for example, 70% of guards are male.[116]

Pursuant to PREA, the Bureau of Justice Statistics has compiled data on prison rape.[117] The 2009–2011 statistical report for prison rape revealed that in state and federal prisons—where women constitute 7% of sentenced inmates—33% of victims of staff-on-inmate sexual victimization were women, while 46% of the staff perpetrators were male guards.[118] In local jails, where women constitute 13% of inmates, 67% of victims of staff-on-inmate sexual victimization were women while 80% of the staff perpetrators were male guards.[119]

One example of male-staff-on-female-inmate prison rape comes from seven Pennsylvania correction officers who were charged in 2018 with sexually abusing female inmates.[120] The officers reportedly "created a culture of fear" for more than a decade, abusing their authoritative positions to coerce prisoners to submit to sexual acts.[121] The behavior was so widespread that guards developed a warning system to alert other guards to approaching supervisors.[122]

Female prisoners who become pregnant without having had contact with outside parties are often sent to solitary confinement as punishment for having had sexual contact.[123] However, the DOJ only allows disciplinary sanctions for inmates who sexually abuse or have sexual contact with other inmates or with staff "upon a finding that the *staff member* did not consent to such contact."[124] Despite the fact that Congress and forty-nine of the fifty states have criminalized sexual misconduct between guards and prisoners,[125] guards are rarely

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114. Dothard v. Rawlinson, 433 U.S. 321, 335–37 (1977) (finding that female guards in "contact" positions under the existing conditions in Alabama maximum-security male penitentiaries would pose a substantial security problem directly linked to the sex of the prison guard).

115. *See* Flesher, *supra* note 113, at 846.

116. AMNESTY INT'L, WOMEN IN PRISON: A FACT SHEET, (Apr. 11, 2013), http://www.prisonpolicy.org/scans/women_prison.pdf.

117. *See* Flesher, *supra* note 113, at 848.

118. Allen J. Beck et al., *Sexual Victimization Reported by Adult Correctional Authorities, 2009-11*, BUREAU OF JUSTICE STATISTICS at *1, 12 (Jan. 2014), http://www.bjs.gov/content/pub/pdf/svraca0911.pdf.

119. *Id.* at *12.

120. *See* Matthew Haag, *7 Prison Guards in Pennsylvania Charged with Sexually Abusing Inmates*, N.Y. TIMES (Feb. 16, 2018), https://www.nytimes.com/2018/02/16/us/pennsylvania-prison-guards-sexual-abuse.html.

121. *Id.*

122. *See id.*

123. *See* Buchanan, *supra* note 1, at 46 (2007); *see also* Beck et al., *supra* note 118, at 17 (noting that 26% of inmates subjected to staff sexual misconduct were placed in administrative segregation, while 20% were "transferred to another facility").

124. *See* 28 C.F.R. § 115.78 (2015).

125. AMNESTY INT'L, WOMEN IN CUSTODY (Apr. 11, 2013) at *17, http://www.amnestyusa.org/pdf/custodyissues.pdf [hereinafter WOMEN IN CUSTODY].

disciplined.[126] Twelve states have statutes that do not cover all forms of sexual contact.[127] Twenty-eight states and the District of Columbia have statutes that do not cover all individuals working in prisons who may be in a position to mistreat women in custody."[128] For example, Connecticut's statute only applies to perpetrators who have "supervisory or disciplinary authority" over an individual in custody.[129] Florida's statute only applies to correctional facility employees and excludes volunteers and contractors.[130] Additionally, nine states have statutes that

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126. *See* DEP'T OF JUSTICE, DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES (Apr. 2005) at *9, http://www.justice.gov/oig/special/0504/final.pdf (explaining that the majority of federal prison sexual abuse cases investigated by the Office of the Inspector General do not result in prosecution).

127. ARK. CODE ANN. § 5-14-126 (West, Westlaw through 2018 Fiscal Sess.); FLA. STAT. ANN. § 794.011 (West, Westlaw through 2018 2d Reg. Sess.); FLA. STAT. ANN. § 944.35 (West, Westlaw through 2018 2d Reg. Sess.); IDAHO CODE ANN. § 18-6110 (West, Westlaw through 2018 2d Reg. Sess.); IOWA CODE ANN. § 709.16 (West, Westlaw through 2018 Reg. Sess.); ME. REV. STAT. ANN. tit. 17-A, § 253 (West, Westlaw through 2017 2d Reg. Sess.); ME. REV. STAT. ANN. tit. 17-A, § 255-A (West, Westlaw through 2017 2d Reg. Sess.); MISS. CODE ANN. § 97-3-104 (West, Westlaw through 2018 Reg. Sess.); MO. ANN. STAT. § 566.145 (West, Westlaw through 2018 2d Reg. Sess.); N.M. STAT. ANN. § 30-9-11 (West, Westlaw through 2018 2d Reg. Sess.); N.C. GEN. STAT. ANN. § 14-27.31 (West, Westlaw through 2018 Reg. Sess.); R.I. GEN. LAWS ANN. § 11-25-24 (West, Westlaw through ch. 353 of 2018 Jan. Sess.); S.D. CODIFIED LAWS § 24-1-26.1 (West, Westlaw through 2015 Reg. Sess.); Prisons-Workers-Sexual Exploitation, Ch. 193, Sec. 6, 7, § 212.187, 2015 Nev. Legis. Serv. (West, Westlaw through 2015 78th Reg. Sess.).

128. ARK. CODE ANN. § 5-14-126 (West, Westlaw through 2015 Reg. Sess.); COLO. REV. STAT. ANN. § 18-7-701 (West, Westlaw through 2015 1st Reg. Sess.); COLO. REV. STAT. ANN. § 18-3-404 (West, Westlaw through 2015 1st Reg. Sess.); CONN. GEN. STAT. ANN. § 53a-71 (West, Westlaw through 2015 Reg. Sess.); CONN. GEN. STAT. ANN. § 53a-73a (West, Westlaw through 2013 Pub. Acts of 1st Reg. Sess.); DEL. CODE ANN. 11, § 1259 (West, Westlaw through 80 Laws 2015 ch. 193); D.C. CODE § 22-3013 (West, Westlaw through Sept. 29, 2015); D.C. CODE § 22-3014 (West, Westlaw through Sept. 29, 2015); FLA. STAT. ANN. § 794.011 (West, Westlaw through 2015 1st Reg. Sess.); FLA. STAT. ANN. § 944.35 (West, Westlaw through 2015 1st Reg. Sess.); GA. CODE ANN. § 16-6-5.1 (West, Westlaw through 2015 Reg. Sess.); LA. REV. STAT. ANN. Rev. § 14:134 (West, Westlaw through 2015 Reg. Sess.); ME. REV. STAT. ANN. tit. 17-A, § 253 (West, Westlaw through 2015 1st Reg. Sess.); ME. REV. STAT. ANN. Tit. 17-A, § 255-A (West, Westlaw through 2015 1st Reg. Sess.); MD. CODE ANN. CRIM. LAW § 3-314 (West, Westlaw through 2015 Reg. Sess.); MISS. CODE ANN. § 97-3-104 (West, Westlaw through 2015 Reg. Sess.); MO. ANN. STAT. § 566.145 (West, Westlaw through 2015 Veto Sess.); MONT. CODE ANN. § 45-5-502 (West, Westlaw through 2015 Sess.); N.H. REV. STAT. ANN. § 632-A:2 (West, Westlaw through 2015 Reg. Sess.); N.H. REV. STAT. ANN. § 632-A:3 (West, Westlaw through 2015 Reg. Sess.); N.J. STAT. ANN. § 2C:14-2 (West, Westlaw through L.2015); N.M. STAT. ANN. § 30-9-11 (West, Westlaw through 2015 1st Spec. Sess.); N.Y. PENAL LAW § 130.05 (West, Westlaw through 2015); N.D. CENT. CODE. ANN. § 12.1-20-06 (West, Westlaw through 2015 Reg. Sess.); N.D. CENT. CODE ANN. § 12.1-20-07 (West, Westlaw through 2015 Reg. Sess.); OHIO REV. CODE ANN. § 2907.03 (West, Westlaw through 2015 File 29 of 131st GA); OR. REV. STAT. ANN.§ 163.452 (West, Westlaw through 2015 Reg. Sess.); OR. REV. STAT. ANN. § 163.454 (West, Westlaw through 2015 Reg. Sess.); 18 PA. CONS. STAT. ANN. § 3124.2 (West, Westlaw through 2015 Reg. Sess.); R.I. GEN. LAWS. ANN. § 11-25-24 (West, Westlaw through ch. 285 of 2015 Reg. Sess.); S.C. CODE ANN. § 44-23-1150 (West, Westlaw through 2015 Reg. Sess.); S.D. CODIFIED LAWS § 24-1-26.1 (Westlaw through 2015 Reg. Sess.); TENN. CODE ANN. § 39-16-408 (West, Westlaw through 2015 1st Reg. Sess.); TEX. PENAL CODE ANN. § 39.04 (West, Westlaw through 2015 Reg. Sess.); VA. CODE ANN. § 18.2-64.2 (West, Westlaw through 2015 Reg. Sess.); VA. CODE ANN. § 18.2-67.4 (West, Westlaw through 2015 Reg. Sess.); WIS. STAT. ANN. § 940.225 (West, Westlaw through 2015 Act 60); WYO. STAT. ANN. § 6-2-303 (West, Westlaw through 2015 Gen. Sess.).

129. CONN. GEN. STAT. ANN. § 53a-71(5) (West, Westlaw through 2015 Reg. Sess.).

130. FLA. STAT. ANN. § 944.35(3)(b)(1)-(2) (West, Westlaw through 2015 1st Reg. Sess.).

do not cover all locations where staff-on-inmate sexual abuse could take place.[131] For example, Colorado's statute does not cover "private contract prisons;"[132] Nevada's statute excludes from coverage individuals on probation or parole.[133]

Although rape by guards is commonplace in U.S. female correctional facilities, most cases of custodial sexual abuse take forms other than outright rape.[134] Despite the prevalence of rape in U.S. female correctional facilities, other forms of custodial sexual abuse are reported most often. For example, correctional officers subject women to sexual extortion, groping during body searches, and other types of sexual assault.[135] Correctional officers also watch women undress both in the shower and in the toilet.[136] Because prisoners are completely dependent on guards for basic necessities, guards sometimes offer them extra food or personal hygiene products in exchange for sex.[137] Unfortunately, inmates are unlikely to report these abuses because their grievances are rarely kept confidential.[138] Furthermore, when guards find out about the complaint, they often subject inmates to retaliatory harassment and further abuse.[139]

Sexual assault in correctional facilities raises Fourth, Eighth, and Fourteenth Amendment claims.[140] While prisoners in state and federal institutions can utilize the protections of 42 U.S.C. § 1983 to seek redress for their civil rights violations,[141] legal remedies alone will not solve the pervasive problem of sexual assault. The National Institute of Corrections suggests that prevention programs

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131. COLO. REV. STAT. ANN. § 18-7-701 (West, Westlaw through 2015 1st Reg. Sess.); DEL. CODE ANN. TIT. 11, § 1259 (West, Westlaw through 80 laws 2015, ch. 193); MO. STAT. ANN. § 566.145 (West, Westlaw through 2015 Veto Sess.); N.M. STAT. ANN. § 30-9-11 (West, Westlaw through 2015 1st Spec. Sess.); 18 PA. CONS. STAT. ANN. § 3124.2 (West, Westlaw through 2015 Reg. Sess.); S.D. CODIFIED LAWS § 24-1-26.1 (Westlaw through 2015 Reg. Sess.); TENN. CODE ANN. § 39-16-408 (West, Westlaw through 2015 1st Reg. Sess.); TEX. PENAL CODE ANN. § 39.04 (West, Westlaw through 2015 Reg. Sess.); Prisons-Workers-Sexual Exploitation, Ch. 193, Sec. 6, 7, § 212.187, 2015 Nev. Legis. Serv. (West, Westlaw through 2015 78th Reg. Sess.).

132. COLO. REV. STAT. ANN. § 17-1-102 (West, Westlaw 2015 through 2015 1st Reg. Sess.) (definitional section includes "private contract prison"); COLO. REV. STAT. ANN. § 18-7-701 (West, Westlaw through 2015 1st Reg. Sess.) (mentions some types of facilities in the definitional section but not "private contract prisons").

133. Prisons-Workers-Sexual Exploitation, Ch. 193, Sec. 6, 7, § 212.187, 2015 Nev. Legis. Serv. (West, Westlaw 2015 through 78th Reg. Sess.).

134. *See* Buchanan, *supra* note 1, at 55.

135. *See Violence Against Women: A Fact Sheet*, AMNESTY INT'L (Apr. 11, 2012), http://www.amnestyusa.org/sites/default/files/pdfs/vaw_fact_sheet.pdf [hereinafter *Violence Against Women*].

136. *See* Flesher, *supra* note 113, at 843*; see also id.* at 849 ("Although the Supreme Court has never addressed whether cross-gender supervision violates the constitutional rights of prisoners, almost every federal court of appeals has heard at least one case in this area.").

137. *Violence Against Women*, *supra* note 135.

138. *See* Buchanan, *supra* note 1, at 64.

139. *Id.*

140. *See* Flesher, *supra* note 113, at 849–53. These claims do not only involve forcible rape, but also cross-gender pat frisks, surveillance, strip searches, and body cavity searches.

141. *See* 42 U.S.C.A. § 1983 (West, Westlaw through P.L. 114-61 (excluding P.L. 114-52, 114-54, 114-59, and 114-60)); *see also* Flesher, *supra* note 113, at 859; Goodmon v. Rockefeller, 947 F.2d 1186, 1187 (4th Cir. 1991) (the commissioner of a state Department of Corrections and prison officials, each acting in their individual capacities, are "persons" under §1983).

could have a substantive impact in reducing the incidence of prison rape; these might include staff training that "presents clear information on applicable laws, agency policies, and penalties for violating both the policy and applicable state laws."[142] In theory, the new standards that the DOJ set up in 2012 should be helpful in establishing such programs nationwide and remedying the persistent issues of sexual assault in correctional facilities. However, the push to end prison rape appears to have lost its earlier momentum, and the DOJ has been criticized for failing to promote the standards vigorously.[143] Many states have been slow to participate in the implementation of the standards to prevent, detect, and respond to prison rape, and some have actually refused to sign on.[144] In 2014, the first year in which jurisdictions had to show compliance, only two states—New Hampshire and New Jersey—certified full compliance, and the governors of seven states either ignored or refused to comply with the national standards.[145] Fiscal year 2015 saw nine more states certify compliance; four states still refused to comply.[146] The remaining states provided a form "assuring" that funds were being used for the sole purpose of carrying out compliance, but were not actually required to conduct any outside audits prior to making these assurances.[147]

D. Inmate-on-Inmate Sexual Abuse

Sexual abuse by other inmates is also a rampant problem, as demonstrated by recent data collections.[148] Since PREA was enacted in 2003, the Bureau of Justice Statistics has been charged with carrying out a comprehensive statistical review and analysis aimed at identifying the causes of sexual victimization in prisons and the types of inmates who are most vulnerable.[149] According to the most recent National Inmate Survey, "in 2015, there were 295 substantiated inmate-on-inmate nonconsensual sexual acts (the most serious inmate-on-inmate victimization), down from 308 in 2014 but up from 241 in 2012."[150] In 2015, 58% of substantiated incidents were perpetrated by inmates, while 42% were

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142. *See* WOMEN IN CUSTODY, *supra* note 125, at 24.

143. *See* Deborah Sontag, *Push to End Prison Rapes Loses Earlier Momentum*, N.Y. TIMES (May 12, 2015), http://www.nytimes.com/2015/05/13/us/push-to-end-prison-rapes-loses-earlier-momentum.html?_r=0.

144. *See id.*

145. U.S. DEP'T OF JUSTICE, STATES' AND TERRITORIES' RESPONSES TO THE MAY 15, 2014 PRISON RAPE ELIMINATION ACT DEADLINE (2014), https://www.bja.gov/Programs/PREAcompliance.pdf. The governors of Arizona, Florida, Idaho, Indiana, Nebraska, Texas, and Utah declined.

146. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, FY 2015 LIST OF CERTIFICATION AND ASSURANCE SUBMISSIONS (2015), https://www.bja.gov/Programs/15PREA-AssurancesCertifications.pdf. Arizona, Iowa, Maine, Mississippi, Missouri, North Dakota, Oregon, Tennessee, and Washington certified compliance; Alaska, Arkansas, Idaho, and Utah declined to provide either an affirmation or certification of compliance. *Id.*

147. *See* Sontag, *supra* note 143.

148. *See* Allen J. Beck et al., *supra* note 118, at 9.

149. *See id.* at 8.

150. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PREA DATA COLLECTION ACTIVITIES, 2018 (June 2018), https://www.bjs.gov/content/pub/pdf/pdca18.pdf.

perpetrated by staff members, versus 56% by inmates and 44% by staff members in 2011.[151]

Unfortunately, cases involving the sexual abuse of prisoners are generally not a priority for public prosecutors.[152] Prisoners who file civil suits against prison authorities after a rape generally assert that prison officials took inadequate steps to protect them from abuse, therefore violating the Eighth Amendment prohibition on "cruel and unusual punishment."[153] Since 1994, when the Supreme Court decided *Farmer v. Brennan*, the applicable legal standard for Eighth Amendment claims of inmates subjected to sexual violence has been "deliberate indifference."[154] A prison official meets this standard if the official knew that an inmate faced a substantial risk of serious harm and disregarded that risk by denying the inmate humane conditions of confinement.[155] Additionally, prison officials may be found "deliberately indifferent" if they did not provide adequate care to inmates after an incident of sexual violence, including counseling, medical attention, collection of evidence, and/or provision of a rape kit.[156] Officials cannot remain willfully ignorant of inhuman conditions in order to shield themselves from liability.[157]

IV. REPRODUCTIVE RIGHTS OF INCARCERATED WOMEN

Female prison populations present substantial physical and mental health concerns. Women are often in poor health when entering correctional facilities due to high risk factors such as poverty and substance abuse,[158] and many women have been physically or sexually abused prior to incarceration.[159] "Lack of consistent access to health care often means that incarcerated women bring with

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151. *Id.*

152. *See* NO ESCAPE: MALE RAPE IN U.S. PRISONS, HUMAN RIGHTS WATCH (2001), http://www.hrw.org/reports/2001/prison/report1.html ("Few public prosecutors are concerned with prosecuting crimes committed against inmates, preferring to leave internal prison problems to the discretion of the prison authorities; similarly, prison officials themselves rarely push for the prosecution of prisoner-on-prisoner abuses. As a result, perpetrators of prison rape almost never face criminal charges.").

153. *See* Farmer v. Brennan, 511 U.S. 825, 833–34 (1994); Riccardo v. Rausch, 375 F.3d 521, 525 (7th Cir. 2004).

154. *Farmer*, 511 U.S. at 834.

155. *See id.* at 835 ("While *Estelle* establishes that deliberate indifference entails something more than mere negligence, the cases are also clear that it is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result") (citing Estelle v. Gamble, 429 U.S. 97 (1976)).

156. John P. Cronan & Christopher D. Man, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for "Deliberate Indifference,"* 92 J. CRIM. L. & CRIMINOLOGY 127, 146-47 (2002); *see also* LaMarca v. Turner, 995 F.2d 1526, 1544 (11th Cir. 1993).

157. Bennett Capers, *Real Rape Too*, 99 CA. L. REV. 1259, 1271 (2011).

158. Kelly Parker, *Pregnant Women Inmates: Evaluating Their Rights and Identifying Opportunities for Improvements in their Treatment*, 19 J.L. & HEALTH 259, 263 (2005).

159. *Id.* ("Forty-three percent of women in state prisons had been physically or sexually abused—sometimes both—at some time before their incarceration"); ROSEMARY GIDO & LANETTE DALLEY, WOMEN'S MENTAL HEALTH ISSUES ACROSS THE CRIMINAL JUSTICE SYSTEM 6 (2008).

them sexually transmitted diseases and chronic health conditions" that complicate the provision of various health care services to women in prison.[160]

A. PROVISION OF GYNECOLOGICAL AND OBSTETRIC HEALTH CARE

Prisons do not perform routine gynecological exams, often fail to ask appropriate initial screening questions, and typically do not have on-site physicians trained in obstetrics and gynecology.[161] As a result, there is a high risk that women in prisons, many of whom are pregnant or carry a sexually transmitted disease when they enter, have medical conditions that can result in sterility or even death.[162]

The inadequate gynecological and obstetric care received by female prisoners, pregnant or not, may rise to the level of deliberate indifference towards their health care needs sufficient to constitute cruel and unusual punishment[163] under the Eighth Amendment standard laid out in *Estelle v. Gamble*.[164] In *Estelle*, the Supreme Court held that, regardless of how it is evidenced, deliberate indifference to a prisoner's serious health care needs violates the Eighth Amendment and thus constitutes a cause of action under 42 U.S.C. § 1983.[165] Section 1983 provides an avenue for civil claims of constitutional violations, and thus allows both individuals and states to enforce the provisions of the Fourteenth Amendment.[166] The Court found mere "[i]nadvertent failure to provide" sufficient care, however, beyond the statute's proscription.[167]

Todaro v. Ward was the first Section 1983 claim brought to address the medical treatment of female prisoners following the Court's ruling in *Estelle*.[168] The Southern District of New York determined that the prison's failure to properly screen women's health problems and administer prison health services constituted a violation of the Eighth Amendment, as it was a denial of necessary medical care.[169] The *Todaro* rule was narrowed by the Supreme Court's holding in *Farmer v. Brennan*, which clarified that there is deliberate indifference only where there is a showing that the defendant knew of the substantial risk of harm and disregarded the risk by failing to take reasonable measures to address it.[170]

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160. Parker, *supra* note 158, at 263.

161. Kendra D. Arnold, *The Right to Live: A Constitutional Argument for Mandatory Preventative Health Care for Female Prisoners*, 10 WM. & MARY J. WOMEN & L. 343, 360 (2004).

162. *Id.*

163. *See id.* at 365 (arguing that failure to provide female prisoners with preventative care to detect cervical cancer satisfies the deliberate indifference standard).

164. *Id.*; Estelle v. Gamble, 429 U.S. 97, 104–05 (1976).

165. *Estelle*, 429 U.S. at 104–05. Deliberate indifference to a prisoner's serious health care needs violates the Eight Amendment, whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. *Id.*

166. 42 U.S.C. § 1983 (West, Westlaw through P.L. 115-281).

167. *Estelle*, 429 U.S. at 105–06.

168. Todaro v. Ward, 431 F. Supp. 1129 (S.D.N.Y. 1977).

169. *Id.* at 1141, 1146, 1152.

170. *Farmer*, 511 U.S. 825, 835 (1994).

Due to this narrowing, it is now more difficult to make an Eighth Amendment case challenging lack of inmate medical care.[171] Furthermore, as noted earlier, the PLRA has created substantial disincentives and hurdles to such litigation, namely the PLRA's exhaustive administrative remedy requirement.[172]

B. PREGNANCY, CHILDBIRTH, AND CHILD CARE IN CUSTODY

Various surveys report that about 6% of the women entering jail or prison are pregnant, and more may become pregnant after entering prison as a result of rape by prison guards.[173] Other studies indicate that up to 25% of women in correctional facilities are or have been pregnant within the last year.[174] Many incarcerated women's pregnancies are classified as high risk due to drug addiction, sexually transmitted disease, or pelvic inflammatory disease.[175] In the case of pregnant drug addicts, prison health professionals must be careful to provide appropriate detoxification, otherwise the fetus will experience the symptoms of withdrawal as the mother.[176]

Many prisons use restraints on women who are pregnant, are in labor, or have just given birth.[177] However, the practice of shackling can have serious consequences on the health of the mother and her unborn child.[178] The American Congress of Obstetricians and Gynecologists ("ACOG"), the nation's leading experts in maternal, fetal and child health care, have clearly stated their opposition to the practice of shackling.[179] According to ACOG, shackling interferes with the ability of physicians to safely practice medicine and is "demeaning and rarely necessary."[180] For example, the shackling of a pregnant woman makes it difficult for her to walk, increasing the risk that she will fall and making it

171. *See* Parker, *supra* note 158, at 276–77 (citing Coleman v. Rahija, 114 F.3d 778, 781 (8th Cir. 1997)) (finding deliberate indifference where medical staff knew of the woman's history of pregnancy problems and largely dismissed her concerns when she went into early labor).

172. 42 U.S.C. § 1997e(a) ("[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.").

173. Avalon Johnson, *Access to Elective Abortions for Female Prisoners under the Eighth and Fourteenth Amendments*, 37 AM. J.L. & MED. 652, 652, 655 (2011); ACLU BRIEFING PAPER: THE SHACKLING OF PREGNANT WOMEN & GIRLS IN U.S. PRISONS, JAILS & DETENTION CENTERS, AM. CIVIL LIBERTIES UNION, https://www.aclu.org/files/assets/anti-shackling_briefing_paper_stand_alone.pdf (last visited Jan. 19, 2019).

174. Parker, *supra* note 158, at 264 n.26.

175. *Id.* at 265.

176. *Id.*

177. Lilya Dishchyan, *Shackled During Labor: The Cruel and Unusual Truth*, 14 WHITTIER J. CHILD & FAM. ADVOC. 140, 147–48 (2015).

178. THE AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, HEALTH CARE FOR PREGNANT AND POSTPARTUM INCARCERATED WOMEN AND ADOLESCENT FEMALES, COMMITTEE OPINION NO. 511 (2011, *reaff'd* 2016), https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Health-Care-for-Pregnant-and-Postpartum-Incarcerated-Women-and-Adolescent-Females?.

179. *Id.*

180. *Id.*

difficult for her to protect herself and the fetus if she does fall.[181] Furthermore, shackling can be dangerous during childbirth because it compromises the ability of the woman to assume the various positions required to give birth, makes it difficult for a doctor to assess the medical situation, and impedes swift transport to an emergency room.[182] In the case of a caesarean section, a delay of even five minutes could result in brain damage to the infant.[183]

Nelson v. Correctional Medical Services, a 2009 Eighth Circuit decision, held that under the Eighth Amendment, an inmate has a "clearly established" right not to be shackled during labor, absent clear and convincing evidence that she is a security or flight risk.[184] In 2010, partially relying on *Nelson*, a district court in Washington held that the plaintiff had made a sufficient showing that "shackling inmates while they are in labor was clearly established as a violation of the Eighth Amendment's prohibition against cruel and unusual punishment."[185] The court concluded that "[c]ommon sense, and the [Department of Corrections'] own policy, tells us that it is not good practice to shackle women to a hospital bed while they are in labor."[186] Despite such rulings, twenty-four states and the federal government do not limit the shackling of pregnant prisoners,[187]and many state laws that do limit shackling are not strictly enforced.[188] The Ninth and the Sixth Circuits have both addressed the shackling issue in light of *Nelson*, but both courts declined to find that shackling inmates *per se* violated the Eighth Amendment.[189] Further, putting such restraints on pregnant women may violate international standards, such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the United Nations Standard Minimum Rules for the Treatment of Prisoners.[190] Congress has considered bills that aim to curtail shackling and promote better quality pre- and postnatal care of incarcerated persons, including the Pregnant Women in Custody Act,[191] the FIRST STEP Act,[192] and the Dignity for Incarcerated Women Act.[193]

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181. *Id.*
182. ACLU BRIEFING PAPER: THE SHACKLING OF PREGNANT WOMEN & GIRLS IN U.S. PRISONS, JAILS & YOUTH DETENTION CENTERS, AM. CIVIL LIBERTIES UNION (2012), https://www.aclu.org/other/aclu-briefing-paper-shackling-pregnant-women-girls-us-prisons-jails-youth-detention-centers.
183. *Id.*
184. Nelson v. Corr. Med. Servs., 583 F.3d 522, 531 (8th Cir. 2009).
185. Brawley v. Washington, 712 F. Supp. 2d 1208, 1221 (W.D. Wash. 2010).
186. *Id.* at 1219.
187. Amy Fettig, *New Bill Would Ensure No Woman Has to Give Birth in Chains*, AM. CIVIL LIBERTIES UNION (Sept. 19, 2018), https://www.aclu.org/blog/prisoners-rights/women-prison/new-bill-would-ensure-no-woman-forced-give-birth-chains.
188. *See* Dishchyan, *supra* note 177, at 149.
189. *See generally* Mendiola-Martinez v. Arpaio, 836 F.3d 1239 (9th Cir. 2016); Villegas v. Metro. Gov't of Nashville, 709 F.3d 563 (6th Cir. 2013).
190. *See* Dana L. Sichel, *Giving Birth in Shackles: A Constitutional and Human Rights Violation*, 16 AM. U. J. GENDER SOC. POL'Y & L. 223, 242 (2007).
191. Pregnant Women in Custody Act, H.R. 6805, 115th Cong. (2018).
192. FIRST STEP Act, H.R. 5682, 115th Cong. (2018).
193. Dignity for Incarcerated Women Act, S. 1524, 115th Cong. (2018).

Once an incarcerated woman gives birth to her child, she may be forced to immediately give up her child to a family member or foster care center.[194] Recently, however, programs allowing children born to incarcerated mothers to remain in prison for a limited period have become increasingly prevalent.[195] Proponents of prison nursery programs emphasize that these programs benefit both the mother and the child, as the programs allow for early mother-child bonding and help women develop parenting skills.[196] Although the requirements regarding the establishment of prison nursery programs vary by state, most programs allow infants to stay for an average of twelve to twenty-four months, but only if the women meet certain eligibility requirements.[197] In the case of Decatur Correctional Center in Illinois, for example, only women with nonviolent criminal histories can participate; as a result, only a handful of the roughly fifty women who go into labor every year while in prison qualify for placement in the nursery, while the others are transported to a local hospital under guard and have just twenty-four to forty-eight hours before they must relinquish their newborns.[198]

C. ACCESS TO ABORTION

In addition to the constitutional rights of prisoners already discussed, a woman's fundamental right to decide whether to terminate her pregnancy also survives in the prison context.[199] In the federal system, two BOP policies govern female prisoners' access to abortions. First, the "Birth Control, Pregnancy, Child Placement and Abortion" program gives female inmates access to elective abortions after they receive "medical, religious, and social counseling."[200] The policy provides that the "inmate has the responsibility to decide either to have an abortion or to bear the child" and that if the inmate submits a written statement requesting an abortion, "the Clinical Director shall arrange for an abortion to take place."[201] The BOP, however, is only required to pay for the abortion when the procedure is required because of danger to the mother's life or if the pregnancy is

194. *See* Carmen Harper, *Can Life in Prison be in the Best Interests of the Child*?, 41 OHIO N.U. L. REV. 201, 210 (2014).

195. *Id*. at 201. "There are currently prison nursery programs in California, Idaho, Illinois, Indiana, Massachusetts, Nebraska, New York, Ohio, South Dakota, Tennessee, Texas, Washington, and West Virginia." *Id*. at 210.

196. *See id*. at 219; Justin Jouvenal, *Raising Babies Behind Bars*, THE WASH. POST (May 11, 2018), https://www.washingtonpost.com/news/local/wp/2018/05/11/feature/prisons-are-allowing-mothers-to-raise-their-babies-behind-bars-but-is-the-radical-experiment-in-parenting-and-punishment-a-good-idea/?noredirect=on&utm_term=.857c9defa9d2.

197. *See* Harper, *supra* note 194, at 210, 219–20.

198. *See* Colleen Mastony, *Bringing Up Baby While Doing Time*, CHICAGO TRIB. (May 3, 2015), http://www.chicagotribune.com/news/local/ct-decatur-prison-nursery-met-20150501-story.html.

199. *See* Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 349 (3d Cir. 1987) (holding that inmates retain the right to have an abortion under Turner v. Safley, 482 U.S. 78 (1987)); Doe v. Arpaio, 150 P.3d 1258, 1267 (Ariz. Ct. App. 2007) (holding that a transportation pre-payment policy for an abortion was unconstitutional under the Fourteenth Amendment as applied to petitioner, an in-custody indigent inmate).

200. Johnson, *supra* note 173, at 655–56.

201. 28 C.F.R. § 551.23 (2019).

a result of rape.[202] The second policy is the "Religious Beliefs and Practices" program, which offers religious counseling and other services before a pregnant inmate decides to have an abortion.[203]

However, these federal policies do not apply to facilities at the state and county levels, which vary in the standards established to protect the right to an abortion. Furthermore, many facilities abide by their own ad hoc policies, often restricting female prisoners' right to an abortion. A study by the Guttmacher Institute shows that there are discrepancies in internal decision-making regarding the provision of abortion services: for example, while most facilities do allow inmates to obtain "elective abortions," more than one in ten will not provide transportation or arrange appointments.[204] Individual facilities often grant significant discretion to wardens and prison medical care providers, who, depending on their personal perspectives on abortion, may prevent a woman from receiving an abortion through procedural roadblocks, unnecessary delay, or outright refusal.[205]

Two Supreme Court decisions serve as guides to determine the constitutionality of the various state policies and the legal rights of prisoners.[206] In *Turner v. Safley*, the Court rejected strict scrutiny as the standard for evaluating prisoners' rights under the Fourteenth Amendment; the Court instead held that a restriction that is reasonably related to a legitimate penological interest does not violate the prisoner's constitutional rights.[207] This "reasonable relation" standard is much more relaxed than the alternative strict scrutiny standard.[208] In contrast, the Court held in *Estelle v. Gamble* that a failure to respond to an inmate's serious medical need is a violation of the Eighth Amendment's prohibition against cruel and unusual punishment.[209] The Court established a two-prong test to determine whether there has been an Eighth Amendment violation: (1) the inmate must have an objectively serious medical need and (2) the prison must have been deliberately indifferent to that need.[210]

While these two cases have been instrumental in establishing inmates' rights to elective abortions, there is still substantial disagreement about the scope of those rights in the Circuit courts.[211] The Sixth Circuit refused to recognize the "failure

202. Johnson, *supra* note 173, at 656.

203. FEDERAL BUREAU OF PRISONS, PROGRAM STATEMENT: RELIGIOUS BELIEFS AND PRACTICES 8 (2004), http://www.bop.gov/policy/progstat/5360_009.pdf.

204. Carolyn Sufrin et al., *Incarcerated Women and Abortion Provision: A Survey of Correctional Health Providers*, 41 PERSP. ON SEXUAL & REPROD. HEALTH 6, 6 (2009). Specifically, of the 68% of facilities that allow elective abortions, 88% provide transportation, but only 54% help arrange appointments. *Id.*

205. Elizabeth Budnitz, *Not a Part of Her Sentence: Applying the Supreme Court's* Johnson v. California *to Prison Abortion Policies*, 71 BROOK. L. REV. 1291, 1327 (2006).

206. *See* Diane Kasdan, *Abortion Access for Incarcerated Women: Are Correctional Health Practices in Conflict with Constitutional Standards?*, 41 PERSP. ON SEXUAL AND REPROD. HEALTH 59, 60 (2009).

207. Turner v. Safley, 482 U.S. 78, 89 (1987).

208. *Id.*

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

210. *Id.* at 106.

211. Johnson, *supra* note 173, at 659.

to arrange an abortion" as "deliberate indifference to serious medical needs" that violates the Eighth Amendment under *Estelle*.[212] The Third Circuit, however, has come to the opposite conclusion under the *Estelle* framework and held that denying pregnant inmates the right to elective, non-therapeutic abortions violates their Eighth Amendment rights.[213] Additionally, the Third Circuit held that "in the absence of alternative methods of funding, the County must assume the cost of providing its inmates with needed medical care," which includes abortions.[214] Further, regulations that are part of a general policy on elective, or non-emergency, medical procedures have been more difficult to challenge.[215] The Fifth Circuit held that a policy requiring an inmate to obtain a court order to receive transportation offsite for an abortion was permissible because it was part of a general policy requiring court orders for elective medical procedures.[216] Finally, the Eighth Circuit, in *Roe v. Crawford*, found that a Missouri Department of Corrections ("MDC") policy that prohibited transporting inmates for elective abortions violated inmates' Fourteenth Amendment rights under *Turner* but did not violate the Eighth Amendment under *Estelle* because elective abortions are not "serious medical needs."[217] The circuit split over inmates' right to elective abortions may be resolved by the Supreme Court in the coming years, which would make a uniform national policy much more feasible.

Resolution will likely be that denial of elective abortions does not violate the Eighth Amendment, but it is uncertain whether the Court will find the denial violates the Fourteenth Amendment.[218] Justice Kennedy was a key moderate vote regarding Fourteenth Amendment protections of the right to choose.[219] Justice Kavanaugh has stated only that he will adhere to *stare decisis* on questions of abortion rights.[220]

Similarly, it is unclear if the Court will permit pregnant persons detained by immigration authorities to freely obtain abortions. In October 2017, a detained teenager known as Jane Doe obtained an abortion notwithstanding opposition from the Trump administration.[221] An appeals court ordered that Doe be provided the abortion, but the Supreme Court declined to either affirm or reverse the lower

212. Gibson v. Matthews, 926 F.2d 532, 536 (6th Cir. 1991).
213. Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 349 (3d Cir. 1987).
214. *Id.* at 351.
215. *See* Kasdan, *supra* note 206, at 60–61.
216. Victoria W. v. Larpenter, 369 F.3d 475, 488–89 (5th Cir. 2004).
217. Roe v. Crawford, 514 F.3d 789, 801 (8th Cir. 2008).
218. *Id.* at 679.
219. *Id.* at 678.
220. Sarah McCammon, *Brett Kavanaugh's Record on Abortion*, NATIONAL PUBLIC RADIO (Aug. 31, 2018), https://www.npr.org/2018/08/31/643603255/brett-kavanaughs-record-on-abortion.
221. Manny Fernandez, *U.S. Must Let Undocumented Teenager Get Abortion, Appeals Court Says*, N.Y. TIMES (Oct. 24, 2017), https://www.nytimes.com/2017/10/24/us/undocumented-immigrant-abortion.html?_r=0&module=inline.

court decision. The Court opined that the question was moot, thus nullifying any precedential power of the decision.[222]

V. TRANSGENDER PRISONERS

In correctional facilities, transgender individuals are "at the mercy of a hyper-gendered system."[223] Traditionally, prison housing for transgender prisoners who have not had gender-confirmation surgery was generally determined according to gender assigned at birth regardless of other factors.[224] Nine years after the passage of PREA in 2003, the DOJ partially addressed this issue. In its 2012 rule implementing standards that require prisons and jails to assess prisoners for risk of sexual victimization or abuse—risk factors included whether the prisoner was (or was perceived as) lesbian, gay, bisexual, transgender ("LGBT") or gender nonconforming.[225] The rule required further that prisons use the screening results in housing, bed, education, and work assignments, each determination being made on a case-by-case basis in light of the inmate's health and safety amongst other factors.[226] In pursuit of compliance, states have developed more comprehensive internal standards and policies for screening transgender inmates. For example, before the PREA rule, the California Department of Corrections and Rehabilitation, classified inmates for housing based on characteristics such as an inmate's history of violence or nonviolence, mental-health history, age, and repeat offender status but failed to account for sexual orientation, gender, and risk of victimization.[227] After the rule's promulgation, California updated its operation manual so that a classification committee would review all transgender individuals' factors for institutional placement and housing assignment.[228]

While most prison systems currently comply with PREA standards or are working towards compliance,[229] the PREA rule allows for "case-by-case determinations."[230] While "serious consideration" might be given to a "transgender or intersex inmate's own views[,]" a prison system might still assign housing based

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222. Adam Liptak, *Supreme Court Rejects Bid to Discipline ACLU*, N.Y. TIMES (June 4, 2018), https://www.nytimes.com/2018/06/04/us/politics/supreme-court-rejects-bid-to-discipline-aclu.html.

223. Sydney Tarzwell, Note, *The Gender Lines are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 176–77 (2006).

224. *See* Darren Rosenblum, *"Trapped" in Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 522 (2000) (explaining that prisoners are mostly placed in facilities according to their genitalia due to the traditional understanding of gender, which only includes male and female).

225. 28 C.F.R. § 115.41 (2012).

226. *Id.* § 115.42 (2012).

227. Angela Okamura, *Equality Behind Bars: Improving the Legal Protections of Transgender Inmates in the California Prison System*, 8 HASTINGS RACE & POVERTY L. J. 109, 111 (2011).

228. Cal. Code Regs. tit. 15 § 3269 (2018); CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, OPERATIONS MANUAL § 62080.14 (2012).

229. Douglas Rourth et al., *Transgender Inmates in Prison: A Review of Applicable Statutes and Policies*, INT'L J. OF OFFENDER THERAPY & CRIMINOLOGY 1, 10 (2015).

230. 28 C.F.R. § 115.42 (2012).

on its own perception of an "inmate's health and safety . . . [and] management and security problems."[231] The management and safety factors might permit prison systems to justify denying gender-conforming institutional assignments by emphasizing their interest in administrability or in addressing the privacy concerns of incarcerated cis-women.[232] For example, on May 11, 2018 the BOP's Transgender Offender Manual restricted a previously expansive transgender housing policy, explicitly singling out "biological sex" as the initial determination for the assessment.[233] The update made clear that assigning transgender and intersex inmates to federal prisons in conformity with gender identity would "be appropriate only in rare cases" and limited to individuals making "serious progress towards transition as demonstrated by medical and mental health history."[234] This policy fails to specify what medical or mental history is needed to qualify for housing and program assignments conforming with individuals' gender identity.[235] Because a majority of transgender people do not undergo gender-confirmation surgeries,[236] requiring serious progress likely has the effect of barring most transgender individuals housed by the BOP from placements aligned to their gender identity.

Housing transgender prisoners with those who do not share their gender identity, however, might actually increase security concerns. Transgender individuals in institutions incompatible with their gender identity report disproportionate rates of violence and sexual assault.[237] To address this, one solution permissible by PREA standards—and, according to some, commonly used by prison authorities—is to separate transgender prisoners into protective or administrative custody.[238] Although administrative segregation may protect transgender prisoners from abuse at the hands of fellow inmates, it can also isolate prisoners with predatory staff and eliminate the possibility of witnesses who could report abuse.[239] Administrative segregation may also deny transgender prisoners "adequate

231. *Id.*

232. *See* Kosilek v. Spencer, 774 F.3d 63, 93–94 (1st Cir. 2014) (denying a transgender person identifying as female gender reassignment surgery because of security concerns regarding housing a male-to-female transgender prisoner in a woman's prison).

233. FEDERAL BUREAU OF PRISONS, PROGRAM STATEMENT 5200.04 CN-1: TRANSGENDER OFFENDER MANUAL (May 11, 2018) [hereinafter TRANSGENDER OFFENDER MANUAL].

234. *Id.*

235. *Id.*

236. Jaime M. Grant et al., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 78–79, 84 (2011) (finding that only 62% of transgender individuals undergo hormone therapy, while a vast minority undergo surgery).

237. *Compare* BUREAU OF JUSTICE STATISTICS, NCJ 248824, PREA DATA COLLECTION ACTIVITIES, 2015 2 (2015) ("An estimated 35% of transgender inmates held in prisons and 34% held in local jails reported . . . sexual victimization by another inmate or facility staff in the past 12 months or since admission, if less than 12 months."), *with* BUREAU OF JUSTICE STATISTICS, NCJ 241399, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-2012 6 (2013) ("In 2011–2012, an estimated 4% of state and federal prison inmates and 3.2% of jails reported . . . sexual victimization by another inmate or facility staff in the past 12 months or since admission, if less than 12 months.").

238. 28 C.F.R. § 115.43; *see* Rosenblum, *supra* note 224, at 529.

239. Tarzwell, *supra* note 223, at 180.

recreation, living space, educational and occupational rehabilitation opportunities, and associational rights for nonpunitive reasons,"[240] thereby rendering it comparable to punitive segregation and imbuing it with the court-recognized potential for psychological damage.[241] Furthermore, placing transgender prisoners in confinement deprives them of the means to form positive communities and relationships that can help those who are targets of violence to survive.[242]

In *Farmer*, the Supreme Court held that prison officials acted with deliberate indifference to a transgender woman's safety and violated her Eighth Amendment right to be free from cruel and unusual punishment when prison officials incarcerated her according to her sex assigned at birth.[243] Farmer, a transgender woman in a man's prison possessed distinctly female physical characteristics. As a result of her placement in a men's general population prison, she was beaten and raped.[244] The Court recognized that prison officials have a duty under the Eighth Amendment to provide humane conditions of confinement, which includes protecting prisoners from violence at the hands of other prisoners.[245] However, the Court in *Farmer* qualified that a prison official may be held liable *only* "if he [sic] knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."[246] Therefore, prison officials are held to a subjective test of "deliberate indifference" though a factfinder might still find that the official "knew of a substantial risk from the very fact that the risk was obvious."[247] The duty recognized in *Farmer* highlights the dilemma facing prison officials. At present, isolation and single-cell habitation have been the customary course of action. Such treatment raises the same Equal Protection and Title IX questions as the disparity in treatment between men and women and will need to be addressed.[248]

The issue of whether a transgender person is entitled to hormone therapy or sex-reassignment surgery while in prison has been litigated extensively.[249]

240. Meriwether v. H Faulkner, 821 F.2d 408, 416 (7th Cir. 1987).

241. Tarzwell, *supra* note 223, at 180 (citing Davenport v. DeRobertis, 844 F.2d 1310, 1313 (7th Cir. 1988)); *see also* PREA DATA COLLECTION ACTIVITIES, 2015, *supra* note 150 (noting that transgender inmates reported high levels of staff sexual misconduct in prisons (17%) and jails (23%).

242. Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 518 (2009).

243. Farmer v. Brennan, 511 U.S. 825, 829 (1994).

244. *Id*. at 830.

245. *Id*. at 825.

246. *Id*. at 847.

247. *Id*. at 842.

248. *See* Rosenblum, *supra* note 224, at 534.

249. Rosati v. Igbinoso, 791 F.3d 1037, 1040 (9th Cir. 2015) (finding that a transgender inmate plausibly states a claim by alleging that she suffered from severe dysphoria and that prison officials deprived her medically necessary treatment by not providing sex reassignment surgery); *see generally* Kosilek, 774 F.3d 63 (1st Cir. 2014); Fields v. Smith, 653 F.3d 550 (7th Cir. 2011); De'Lonta v. Angelone, 330 F.3d 630 (4th Cir. 2003); Allard v. Gomez, 9 F. App'x 793 (9th Cir. 2001); Cuoco v. Moritsugu, 222 F.3d 99 (2d Cir. 2000); Long v. Nix, 86 F.3d 761 (8th Cir. 1996); Phillips v. Mich. Dept. of Corr., 932 F.2d 969 (6th Cir. 1991).

According to the *Diagnostic and Statistical Manual of Mental Disorders* published by the American Psychiatric Association, Gender Identity Disorder ("GID") is a formal diagnosis used to describe those who experience persistent gender dysphoria and discontent with the traditional gender roles assigned to their biological sex.[250] This definition allows transgender inmates to argue that withholding hormone therapy or sex-confirmation surgery as treatments for GID or gender dysphoria amounts to a violation of the Eighth Amendment because the prison would be acting with "deliberate indifference" to the "serious medical needs" of transgender inmates.[251] However, the circuit courts are varied in their decisions as to when gender dysphoria constitutes a serious medical need. The Seventh Circuit has found that GID on its own could constitute a serious medical need.[252] On the other hand, the Fourth, Eighth and Tenth Circuits "seem[] to require that a serious medical need must consist of more than a diagnosis of GID or another gender-identity related condition."[253]

Regarding what constitutes "deliberate indifference," it seems that most categorical bans on hormonal therapy or SRS violate the Eighth Amendment. The Seventh Circuit overturned an outright statutory ban on hormone therapy and gender confirmation surgery.[254] Similarly, the Ninth Circuit explained that "a blanket rule [against hormone therapy] . . . constituted deliberate indifference" in violation of the Eighth Amendment.[255] However, prison officials are not deliberately indifferent if they provide some individualized treatment for GID such as psychotherapy or counseling but do not provide the specific hormonal or SRS treatment preferred by the inmate.[256]

The legal framework mirrors the landscape of states' Department of Corrections' written policies. While most states recognize GID or gender dysphoria, access to transition-related care remains disparate and inconsistent.[257] A 2015 fifty-state survey found that thirty-seven states allow for counseling and treatment

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250. Tiffany Sanders, *Cruel and Unusual: An Analysis of the Legality of Disallowing Hormone Treatment and Sex Reassignment Surgery to Incarcerated Transgendered Individuals*, 35 WOMEN'S RTS. L. REP. 466, 477–76 (2014).

251. Silpa Maruri, *Hormone Therapy for Inmates: A Metonym for Transgender Rights*, 20 CORNELL J. L. & PUB. POL'Y 807, 810 (2011).

252. Laura R. Givens, Note, *Why the Courts Should Consider Gender Identity Disorder a Per Se Serious Medical Need for Eighth Amendment Purposes*, 16 J. GENDER RACE & JUST. 579, 587 (2013) (citing Fields v. Smith, 653 F.3d 550 (7th Cir. 2011)).

253. *Id.* at 596–97; *see, e.g.*, De'Lonta, 330 F.3d at 634 (holding that a transgender prisoner who felt compulsion to mutilate herself after her hormone treatment was cut off could state a valid claim).

254. Fields v. Smith, 653 F.3d at 558–59.

255. Allard v. Gomez, 9 F. App'x 793, 795 (9th Cir. 2001).

256. Rosati v. Igbinoso, 791 F.3d 1037, 1040 (9th Cir. 2015) (finding that a transgender inmate plausibly states a claim by alleging that she suffered from severe dysphoria and that prison officials deprived her medically necessary treatment by not providing sex reassignment surgery); Long v. Nix, 86 F.3d 761, 765 (8th Cir. 1996) (holding that prisoner diagnosed with gender identity disorder had no right to a specific treatment such as hormone therapy and that prison officials can exercise their own professional judgment).

257. *See* Rourth, *supra* note 229, at 12.

pertaining to the gender identity for transgender individuals.[258] Twenty-eight states do not allow transgender individuals to obtain hormone treatment.[259] Only thirteen states allow transgender inmates to initiate hormone treatment.[260] Twenty-one allow individuals to continue hormone therapy if initiated before incarceration, while twenty do not allow for the continuation of hormone therapy.[261] Only ten states' written policies allow for gender confirmation surgery.[262] Even if a state has a written policy that considers hormone therapy and surgery as treatment options, a state has the discretion to not provide those options if other healthcare options exist.[263]

Unfortunately, the failure to provide transgender prisoners with needed medical treatment has led to autocastration in at least six facilities in four states.[264] Furthermore, some have argued that appealing to GID is a "double-edged sword," as it allows access to hormone therapy but only by describing transgender individuals as "somehow sick or infirm."[265]

VI. GENDER DISPARITY ON DEATH ROW

At the end of 2016, women constituted only 1.8% of all inmates on death row, whereas 98.2% were men.[266] This remains consistent with the U.S.'s longstanding history of gender disparity in capital punishment sentencing and in executions. Half of the jurisdictions that allow capital punishment have not executed a woman in the past 106 years.[267] As of 2006, "ten percent of murder arrests [essentially the only crime still punishable by death] were of women but only two percent of death sentences for murder [we]re of women."[268]

The death penalty has essentially been restricted to "a narrow category of the most serious crimes," namely murders that are committed in particularly egregious circumstances.[269] The Supreme Court in *Atkins v. Virginia* noted that state

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* at 12, 18.

262. Rourth, *supra* note 229, at 18.

263. *See, e.g.*, Kosilek, 774 F.3d 63, 92 (1st Cir. 2014) (finding that the denial of a transgender person's request for gender reassignment surgery did not amount to deliberate indifference because the prison officials provided alternative treatment options); Long v. Nix, 86 F.3d 761, 765 (8th Cir. 1996) (holding that prisoner diagnosed with gender identity disorder had no right to a specific treatment such as hormone therapy and that prison officials can exercise their own professional judgment).

264. Maruri, *supra* note 251, at 812.

265. Maruri, *supra* note 251, at 807.

266. BUREAU OF JUSTICE STATISTICS, NCJ 251430, CAPITAL PUNISHMENT, 2016 7 (2018) [hereinafter BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT].

267. *See* Lorraine Schmall, *Women on Death Row: A Tribute to Dean Victor Streib*, 38 OHIO N.U. L. REV. 441, 441–42 (2012).

268. Victor Streib, *Rare and Inconsistent: The Death Penalty for Women*, 33 FORDHAM URB. L.J. 101, 111–12 (2006) [hereinafter Streib, *Rare and Inconsistent*].

269. Kennedy v. Louisiana, 554 U.S. 407, 420 (2008) (quoting Roper v. Simmons, 543 U.S. 551, 568 (2005)) ("capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes'"); Victor L. Streib, *Rare and Inconsistent*, *supra* note 268, at 107.

and federal statutes typically limit capital punishment sentences to offenders who commit a murder with an aggravating circumstance.[270] During the sentencing hearing, a jury considers aggravating and mitigating circumstances as defined by the jurisdiction.[271] The jurisdiction typically requires the jury to find at least one aggregating factor or circumstance, and mitigating factors do not outweigh those aggravating factors.[272] Judges and juries exercise discretion in considering aggravating and mitigating circumstances, which are weighed in deciding whether to impose a sentence of life in prison or death.[273] Characteristics of a convicted murderer and circumstances surrounding the crime are two such factors often considered.[274] Many of the aggravating and mitigating factors noted in death penalty statutes tend to vary along gender lines.[275]

Certain aggravating circumstances, such as premeditation, prior criminal record, or felony murder conviction, are more likely to lead to a sentence of death than crimes committed absent these aggravating circumstances.[276] Aggravating factors that increase the likelihood of a death sentence, such as a prior criminal history and violent circumstances surrounding the crime, are more likely to affect male murder defendants than female murder defendants.[277] For example, in 2017, the FBI found that men commit a disproportionately higher percentage of violent crimes than do women—accounting for 79.5% of arrestees for violent crimes.[278] Additionally, the Bureau of Justice Statistics found that in 1996, 27% of male felons had no prior convictions in contrast to 42% of female felons.[279]

Emotional disturbance, a common mitigating factor, and domestic circumstances surrounding a crime also contribute to gender disparities in sentencing. Judges and juries are more likely to find emotional distress in homicide cases with female defendants than those with male defendants.[280] Domestic homicide is often seen as less serious than felony murder because the murder of a family member or sexual partner is mitigated by the stresses of domestic life.[281] Of the murders committed by women from 1976 to 1997, over 60% of the victims were family members or fellow intimates, in contrast to the murders committed by

270. Atkins v. Virginia, 536 U.S. 304, 319 (2002) (noting that capital punishment is often limited to offenders who commit a murder in connection with an aggravating circumstance, i.e., a "murder plus," on the theory that these types of murders are thought to be deterred by the death penalty).

271. BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, *supra* note 266, at 1; Streib, *Rare and Inconsistent*, supra note 268 at 108–111.

272. BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, *supra* note 266, at 1.

273. *See* Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Domestic Murder in the Post-*Furman *Era*, 49 SMU LAW REVIEW 1507, 1514 (1996).

274. *See id*. at 1514–15.

275. Streib, *supra* note 268, at 105–06.

276. *Id*. at 108–09.

277. *Id*.

278. CRIMINAL JUSTICE INFORMATION SERVICES DIVISION, 2017 CRIME IN THE U.S (2018).

279. BUREAU OF JUSTICE STATISTICS, NCJ 175688, WOMEN OFFENDERS 5 (1999) [hereinafter BUREAU OF JUSTICE STATISTICS, WOMEN OFFENDERS].

280. *See* Streib, *supra* note 268, at 110.

281. *See* Rapaport, *Domestic Discount*, *supra* note 273, at 1508.

men where family members and fellow intimates only accounted for 20% of victims.[282] Because the victims of female killers are substantially more likely to be family members or other intimates, the tendency to exclude domestic homicides from capital murder contributes to gender disparities in sentencing.[283] Two possible rationales underlying this "domestic discount" include the "heat of passion" doctrine and the "diminished responsibility" defense, both of which create a narrative that the offender acted out of powerful and painful emotions provoked by the victim and was not truly in control.[284] Many of the women on death row who have killed a family member or inmate do not actually fit this narrative, instead motivated by "economics" or greed.[285]

Judges and juries are also generally allowed to consider any other mitigating factor that may make a death sentence inappropriate as long as it is relevant to the circumstances and character of the crime.[286] Judges and juries are generally more likely to find mitigating factors in women's backgrounds than men's.[287] However, some scholars have hypothesized that women are more likely than men to share details of their lives while testifying at sentencing, which enables the decision-maker to connect with them more easily on a human level.[288] Whatever the impetus behind this sympathy trend, many scholars argue that it is widespread and exhibited by judges, elected officials, and members of the public.[289] Some argue further that this dynamic contributes to the greater number of female offenders' successful petitions for clemency than those of male offenders.[290] Scholars also argue that, in considering whether to impose the death penalty, jurors strongly consider the likelihood that the "defendant could be a danger to them personally."[291] Therefore, juries could be less likely to sentence female defendants to capital punishment because they appear smaller or weaker compared to men, rarely kill strangers, and are assumed to be less violent.[292]

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282. BUREAU OF JUSTICE STATISTICS, WOMEN OFFENDERS, *supra* note 279, at 4.

283. Streib, *Rare and Inconsistent*, *supra* note 268, at 107 ("One questionable result of [excluding domestic homicides and, thus, most women's homicides from capital sentencing] is the societal judgment that convenience store robbers who kill store clerks should face the death penalty more often than mothers who kill their children.").

284. *See* Rapaport, *supra* note 273, at 1516–17.

285. *Id.* at 1518.

286. *See* 18 U.S.C.A. § 3592(a) (West, Westlaw through P.L. 114-61 (excluding P.L. 114-52, 114-54, 114-59, and 114-60)); Streib, *supra* note 269, at 110.

287. Streib, *supra* note 268, at 110.

288. *Id.* at 110.

289. Joey L. Mogul, *The Dykier, the Butcher, the Better: The State's Use of Homophobia and Sexism to Execute Women in the United States*, 8 N.Y. CITY L. REV. 473, 481 (2005); Joan W. Howarth, *Executing White Masculinities: Learning from Karla Faye Tucker*, 81 OR. L. REV. 183, 214 (2002).

290. Mogul, *supra* note 289, at 481–82.

291. Steven F. Shatz & Naomi R. Shatz, *Chivalry Is Not Dead: Murder, Gender, and the Death Penalty*, 27 BERKELEY J. GENDER L. & JUST. 64, 107 (2012); *see also* John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 CORNELL L. REV. 397, 398 (2001).

292. Shatz, *supra* note 291, at 107.

Another theory offers a more generalized explanation that the disparity is directly linked to prosecutors' and juries' "chivalry bias."[293] Some argue that female offenders are less likely to receive capital sentences because of accepted stereotypes that imagine women as weak, passive, and in need of protection.[294] Women's perceived dependency on men also leads juries to consider them less rational or less responsible for their decisions.[295] The women who do receive the death penalty, including sex workers, lesbians, and women of color, often do not meet traditional standards of femininity and therefore do not "benefit" from judges' and jurors' "chivalry."[296] Just as stereotypes about femininity may contribute to more favorable treatment of female offenders, negative preconceptions of the gay and lesbian community have the opposite effect for lesbian defendants.[297] Scholars argue that these negative assumptions have led to a "disproportionate number of lesbians and perceived lesbians on death row."[298] Female defendants labeled or implied to be lesbians are more likely to be attributed with traditional, stereotypical masculine characteristics that lead juries to believe they are more violent, aggressive, or criminally inclined than heterosexual women.[299]

Death penalty statutes implicate novel Equal Protection questions that the courts have yet to weigh on.[300] In one exception, the Supreme Court in *McCleskey v. Kemp* rejected a race-based, disparate impact claim under Equal Protection from the death penalty where a statistical study found that the death penalty disproportionately affects black people.[301] The Court relied on a lack of evidence as to the legislature's discriminatory intent in enacting the statute and its intent in maintaining the statute.[302]

An Equal Protection claim based on gender disparity might prove successful and distinguishable from race-based claims because the "statistical disparity" in capital sentencing is much starker for gender than it is for race.[303] Texas's death penalty statute in particular might have an "unconstitutional disparate impact" on male offenders, and the "stark" difference between males and females sentenced to death indicates that there is no gender-neutral explanation.[304] Texas's capital sentencing statute implicitly discriminates against men because aggravating factors apply disproportionately to men. Conversely, the mitigating factors section

293. *Id.* at 106.
294. *Id.*
295. *Id.*
296. *Id.* at 106–07.
297. *Id.*
298. Mogul, *supra* note 289, at 483 ("Forty percent of the women on death row have had some implication of lesbianism used against them at trial regardless of whether or not it was true.").
299. *Id.*; Victor L. Streib, *Death Penalty for Lesbians*, 1 NAT'L J. SEXUAL ORIENTATION L. 104, 110–11 (1995), http://www.ibiblio.org/gaylaw/issue1/streib.html.
300. Jessica Salvucci, Note, *Femininity and the Electric Chair: An Equal Protection Challenge to Texas' Death Penalty Statute*, 31 B.C. THIRD WORLD L.J. 405, 425 (2011).
301. McCleskey v. Kemp, 481 U.S. 279, 280 (1987).
302. *Id.*
303. Salvucci*, supra* note 300, at 432–33.
304. *Id.*

allows juries to consider "impermissible" factors based in "gender-based stereotypes and paternalistic attitudes" when deciding whether to sentence an offender to death.[305]

As Supreme Court Justice Thurgood Marshall noted, "[i]t is difficult to understand why women have received such favored treatment since the purposes allegedly served by capital punishment seemingly are equally applicable to both sexes."[306] One strategy offered to address the gender disparity on death row is to request that legislatures review death penalty statutes with sex bias and disparate impact in mind and implement a federal approach to instructing capital juries about these issues; under this approach, juries would be required to provide written certification to confirm that sex bias is not a factor in their verdict.[307] However, "[i]f capital jurors were asked to avoid sex bias in their deliberations, they might be more likely to treat female defendants as if they were male than to treat male defendants as if they were female."[308]

VII. OTHER TYPES OF CORRECTIONAL FACILITIES

A. IMMIGRATION DETENTION FACILITIES

Although immigrants who enter the United States without proper documentation break federal law, they are considered civil detainees who are in detention for "administrative purposes."[309] The 2002 Homeland Security Act created the Department of Homeland Security ("DHS") and provided that DHS would enforce the Homeland Security Act and have primary enforcement responsibility over other immigration laws.[310] In 2017, Immigration and Customs Enforcement ("ICE"), a federal agency under the jurisdiction of DHS, maintained an average daily population of 38,106 immigrants held in detention facilities.[311] Although facilities housing immigrants are not criminal detention facilities, many have the trappings of such facilities, including barbed wire fences and clothing similar to prison uniforms.[312]

National Detention Standards ("NDS") (2000) and Performance-Based National Detention Standards ("PBNDS") (2008 and 2011)[313] are supposed to be contractually binding on DHS facilities, but these standards lack enforcement mechanisms, and facilities that do not meet the standards are not held

305. *Id.* at 425–26.
306. Furman v. Georgia, 408 U.S. 238, 365 (1972) (Marshall, J., concurring).
307. *See* Streib, *Rare and Inconsistent*, *supra* note 268, at 119.
308. *Id.* at 120.
309. WITH LIBERTY AND JUSTICE FOR ALL, *supra* note 73, at 8.
310. Homeland Security Act of 2002, Pub. L. No. 107-296, § 477(c)(2)(F), 116 Stat. 2135 (2002).
311. DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT AGENCY, BUDGET OVERVIEW, FISCAL YEAR 2018, CONGRESSIONAL JUSTIFICATION, ICE-14, https://www.dhs.gov/sites/default/files/publications/ICE%20FY18%20Budget.pdf.
312. *Id.* at 10–11.
313. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011 [hereinafter PBNDS 2011], http://www.ice.gov/detention-standards/2011.

accountable.[314] The 2011 PBNDS standards aimed to improve conditions of confinement, "including medical and mental health services, access to legal services and religious opportunities, communication with detainees with no or limited English proficiency, the process for reporting and responding to complaints, and recreation and visitation."[315] All ICE-owned detention facilities must comply with these standards, but contract detention facilities with contracts predating the standards may not be currently following them.[316] As of 2017 the PBNDS standards applied to only 60% of ICE's average daily population.[317] The DHS PREA Standards cover 67% of ICE's average daily population, 85% when excluding detainees who are covered by the DOJ PREA regulation.[318]

The 2011 PBNDS medical standards contained specific provisions "related to the preservation of LGBT detainees' rights and, in particular, the dignity of LGBT immigrant detainees."[319] The PBNDS standards require staff to consider the detainee's self-identification and the impact of any housing decision on the detainee's mental health and well-being when making housing and classification determinations for transgender detainees.[320] Medical professionals must be consulted on the appropriate housing decision, and housing decisions should never be made on the basis of physical anatomy or identification documents alone.[321] ICE policy dictates that facilities governed by PREA requirements must allow transgender detainees to shower separately when "operationally feasible," while facilities governed by older standards (PNDBS 2011 and 2008) require a "reasonably private environment" in bathing and toileting facilities.[322]

ICE policy also contains transgender- and female-specific medical requirements. For example, transgender detainees who were taking hormone therapy before entering ICE custody must have the opportunity to continue receiving it once detained.[323] ICE also requires that transgender detainees have access to mental health care and any medically necessary transgender-related care.[324] In addition, ICE maintains policies requiring that women receive "routine,

314. *See* WITH LIBERTY AND JUSTICE FOR ALL, *supra* note 73, at 25

315. *See* PBNDS 2011, *supra* note 313, at i.

316. WITH LIBERTY AND JUSTICE FOR ALL, *supra* note 73, at 29.

317. PROGRESS IN IMPLEMENTING 2011 PBNDS STANDARDS AND DHS PREA REQUIREMENTS AT DETENTION FACILITIES, FISCAL YEAR 2017 REPORT TO CONGRESS 1, 8 (2018) https://www.dhs.gov/sites/default/files/publications/ICE%20-%20Progress%20in%20Implementing%202011%20PBNDS%20Standards%20and%20DHS%20PREA%20Requirements_0.pdf.

318. *Id.* at 3–4.

319. WITH LIBERTY AND JUSTICE FOR ALL, *supra* note 73, at 36.

320. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FURTHER GUIDANCE REGARDING THE CARE OF TRANSGENDER DETAINEES 15 (2015) [hereinafter ICE TRANSGENDER DETAINEES], https://www.ice.gov/sites/default/files/documents/Document/2015/TransgenderCareMemorandum.pdf.

321. *Id.*

322. *Id.*

323. PBNDS 2011, *supra* note 313, at 273.

324. *Id.*

age-appropriate gynecological and obstetric health care" upon intake.[325] Pregnant detainees must be provided with pregnancy services, including prenatal care and counseling on pregnancy planning, including abortion.[326] Pregnant women cannot be shackled unless there are "truly extraordinary circumstances that render restraints absolutely necessary."[327]

ICE maintains segregated housing units in which LGBT detainees may be placed.[328] ICE emphasizes that, in general, detainees placed in non-punitive administrative segregation will have the same basic living environment and receive the same "privileges" as other detainees.[329] However, there is no information about whether transgender detainees in these segregated units receive the same amount of recreation as other detainees.[330]

Although transgender detainees should not be housed based on biological sex or identity documents alone, an immigrant advocacy group reported that transgender detainees are still placed with members of their sex assigned at birth or placed in solitary confinement instead of being housed with detainees who share their gender identity.[331] In addition, despite the high standards for LGBT treatment promulgated in DHS rules, there have been several complaints by LGBT detainees of ill treatment.[332] For example, female transgender detainees were made to shower with men, and guards have verbally and physically assaulted LGBT detainees.[333]

ICE policy, as contained in a directive, allows individuals identified as "vulnerable" to be placed in segregated housing units, although such a placement should only occur as "a last resort and when no other viable housing options exist."[334] "Vulnerable" conditions include pregnancy, nursing, disability, mental illness, or a history of sexual assault, trafficking, or torture.[335] ICE policy dictates that "vulnerabilities" including sexual orientation and gender identity cannot provide the sole basis for placing a detainee in "involuntary segregation."[336] A review process requires monitoring of detainees in segregation for a worsening of their medical or mental health and suicide risk; if such a worsening occurs, medical treatment is

325. *Id*. at 323.

326. *Id*.

327. *Id*. at 322.

328. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, REVIEW OF THE USE OF SEGREGATION FOR ICE DETAINEES 1 (2013) [hereinafter ICE DETAINEES], https://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf.

329. *Id*. at 2; *see also* PBNDS 2011, *supra* note 313, at 179.

330. WITH LIBERTY AND JUSTICE FOR ALL, *supra* note 73, at 37-38.

331. ICE TRANSGENDER DETAINEES, *supra* note 320, at 15; *see also* WITH LIBERTY AND JUSTICE FOR ALL, *supra* note 73, at 38.

332. Guzman-Martinez v. Corr. Corp. of Am., No. CV 11-02390-PHX-NVW, 2012 WL 2873835 (D. Ariz. July 13, 2012); Shaw v. D.C., 944 F. Supp. 2d 43 (D.D.C. 2013).

333. WITH LIBERTY AND JUSTICE FOR ALL, *supra* note 73, at 38.

334. ICE DETAINEES, *supra* note 328, at 8.

335. *Id*. at 2.

336. *Id*. at 4.

required.[337] In addition, if segregation is found to worsen the detainee's mental or physical state, the detention center must find an alternative to segregation.[338] Some have criticized the requirement that detention center staff know that the detainee is "vulnerable," claiming that it incentivizes willful blindness to such vulnerability.[339] Others have expressed concerns that the directive will not be enforced in privately contracted immigration detention facilities and in county-run detention facilities.

The 2014 DHS PREA regulation requires ICE to publish sexual assault data annually, but the agency has never done so, making it extremely difficult to accurately assess the rate of abuse in ICE facilities.[340] However, it is clear that sexual violence is a serious problem in detention centers, particularly for LGBT individuals.[341] New studies reveal that LGBT detainees are 97% more likely to be sexually assaulted than other detainees.[342] In 2017, LGBT individuals accounted for 0.14% of the ICE detainee population but they accounted for 12% of the victims of sexual assault in detention centers.

Immigration continues to be an issue attracting national attention. In May 2018, Attorney General Jeff Sessions announced that border officials would separate parents and children caught illegally crossing the border.[343] The separated parents would then be incarcerated and prosecuted for a federal misdemeanor while their children would be kept in juvenile detention facilities with no clear plan for reunification. This process was a departure from the past practice of using civil deportation rather than criminal prosecution in these instances.[344] In June 2018, President Trump signed an executive order reversing family separation after 2,500 children had been separated from their parents and were being housed in shelter facilities.[345] While the vast majority of separated children have been reunited with their families, children who crossed the border without parents remain in shelters for immigrant youths under questionable conditions.[346] A five-

337. Sarah Dávila-Ruhaak, *ICE's New Policy on Segregation and the Continuing Use of Solitary Confinement Within the Context of International Human Rights*, 47 J. MARSHALL L. REV. 1433, 1442 (2014).

338. *Id.*

339. *Id.* at 1442–43.

340. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, IMMIGRATION ENFORCEMENT; PREA (2018), https://www.ice.gov/prea.

341. Julie Moreau, *LGBTQ migrants 97 times more likely to be sexually assaulted in detention, report says*, CNN (June 6, 2018), https://www.nbcnews.com/feature/nbc-out/lgbtq-migrants-97-times-more-likely-be-sexually-assaulted-detention-n880101.

342. *Id.*

343. Katie Reilly, *Nearly 2,000 Children Have Been Separated From Their Families During Trump Border Crackdown*, TIME (June 16, 2018), http://time.com/5314128/trump-immigration-family-separation-2000-children/.

344. *Id.*

345. *Id.*; Exec. Order No. 13841, 83 FR 29435, 2018 WL 3093128.

346. Associated Press, *Arizona Shelter Shut in Latest Case of Migrant Child Abuse*, TIME (October 11, 2018), http://time.com/5421462/arizona-migrant-children-shelter-abuse/.

year study of immigrant youth centers found that police received 125 calls from immigrant youth shelters to report offenses of a sexual nature.[347]

Focus will remain on these shelters as the Trump administration recently announced it is considering implementing a new policy to address the recent surge in border crossing: the government could detain asylum-seeking families together for up to twenty days; parents would have to then choose to either stay in family detention with their child as their immigration case proceeds or allow their children to be taken to a government shelter so other relatives can seek custody.

B. JUVENILE CORRECTIONAL FACILITIES

While there are still more boys in the U.S. juvenile justice system than girls, girls are a fast-growing section of this population.[348] However, the girls who become involved in the justice system are different from their male counterparts in significant ways.[349] These differences must be taken into account in order to properly reform the juvenile justice system in a way that is responsive to gender-specific needs.

First, girls enter the juvenile justice system with offense histories that differ from those of their male counterparts.[350] In comparison to boys, girls most often enter the juvenile system for status offenses rather than violent or criminal activity.[351] Status offenses are behaviors deemed criminally offensive solely due to the offender's age.[352] Such offenses often include running away, truancy curfew violations, and being unmanageable.[353] The incarceration of girls for status offenses has been criticized as a "gateway" into the juvenile justice system.[354] Although status offenses are a clear sign that a child needs help, incarcerating the child rather than addressing their particular needs may actually increase their

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347. Ailsa Chang, *ProPublica Report Finds Abuse Reported In Immigrant Youth Shelters*, NPR (July 31, 2018), https://www.npr.org/2018/07/31/634369265/abuse-reported-in-immigrant-youth-shelters.

348. Liz Watson & Peter Edelman, GEORGETOWN CTR. ON POVERTY, INEQUALITY AND PUB. POLICY, IMPROVING THE JUVENILE JUSTICE SYSTEM FOR GIRLS: LESSONS FROM THE STATES 1 (2012), https://www.rfkchildren.org/images/stories/jds_v1r4_web_spreads.pdf ("Girls are still far outnumbered by boys in the juvenile justice system. For example, in 2010, 337,450 girls in the United States were arrested and criminally charged, as compared to 816,646 boys . . . . However, the proportion of girls in the juvenile justice system continues to grow . . . . In 2010, boys' arrests had decreased by 26.5 percent since 2001, while girls' arrests had decreased by only 15.5 percent.").

349. *Id.* ("The differences between the profiles and service needs of girls and boys entering the juvenile justice system present a significant challenge for the professionals who serve them.").

350. Wendy S. Heipt, *Girls' Court: A Gender Responsive Juvenile Court Alternative*, 13 SEATTLE J. FOR SOC. JUST. 803, 804 (2014).

351. *Id.* at 812–13.

352. *Id.* at 812.

353. *Id.*

354. *See, e.g.*, Alecia Humphrey, *The Criminalization of Survival Attempts: Locking Up Female Runaways and Other Status Offenders*, 15 HASTINGS WOMEN'S L.J. 165, 172 (2004) ("Female status offenders do not come into the system as pathological criminals, but, without procedural protections and advocates, they are transformed into criminals through their involvement in the system.").

likelihood of committing unlawful acts.[355] Although the Juvenile Justice and Delinquency Prevention Act of 1974 mandated the deinstitutionalization of status offenders, the Valid Court Order exception enacted by Congress in 1980 created a loophole in this prohibition, allowing detention of status offenders for violations of a valid court order.[356] Under that exception, courts have continued to use confinement as a means of dealing with status offenses.[357]

Second, girls enter the criminal justice system with different potential issues than boys. Girls in the criminal justice system are much more likely than their male counterparts to suffer from diagnosable mental illnesses, as well as to have suffered from sexual victimization and struggled academically.[358] Girls in the criminal justice system are also more likely to become pregnant than girls in the general population.[359]

Health-related differences between boys and girls in the criminal justice system are significant, as girls present with health issues that are more complicated than those of boys and tend to be high-need and intensive.[360] These health issues include higher rates of anxiety and depression, experiences of prostitution and sexual victimization, physical safety and trauma, significantly higher rates of physical and emotional abuse, higher rates of sexually transmitted diseases, high rates of eating disorders, a variety of weight issues, and asthma.[361]

Despite these gender-specific burdens, girls who enter the juvenile justice system "are faced with a structure designed to meet the needs of boys" as traditional juvenile justice programs do not specifically address gender-related health, educational and parenting needs.[362] Emerging research suggests that programs designed with a focus on girls' gender-specific needs might lead to better life and education outcomes than programs that are tailored to target male behavior.[363] The 1992 amendments to the JJDPA attempted to address these issues by requiring states to conduct an analysis of gender-specific services for juvenile justice programming and to forge a plan to increase gender-specific services.[364] These amendments served as a catalyst for reform: several states have implemented gender-specific programming, such as special Girl's Courts, which have been

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355. *See, e.g.*, *id.*; Patricia J. Arthur & Regina Waugh, *Status Offenses and the Juvenile Justice and Delinquency Prevention Act: The Exception that Swallowed the Rule*, 7 SEATTLE J. FOR SOC. JUST. 555, 558 (2009) ("Children are exposed to negative behavior models in detention, causing a greater likelihood of future delinquency.").

356. *See* Juvenile Justice and Delinquency Prevention Act, 42 U.S.C.A. § 5601 (1974) (amended 1980); Watson, *supra* note 348, at 2.

357. Arthur, *supra* note 355, at 560.

358. Heipt, *supra* note 350, at 817.

359. *Id.* at 826.

360. *Id.* at 817.

361. *Id.*

362. *Id.* at 806, 833.

363. Heipt, *supra* note 350, at 832.

364. *Id.* at 831–32.

met with some success.[365] However, many of these state-specific programs remain unevaluated for effectiveness by state and federal authorities.[366]

VIII. CONCLUSION

Treatment discrepancies between male and female inmates remain a serious problem in the United States penological system. Gender disparities in cross-state transfer rates; segregation of LGBTQ inmates; implementation of prison rape elimination guidelines; conditions in juvenile, immigration, and military facilities; termination of the custodial rights of incarcerated parents; and the impact of drug sentencing laws on female incarceration rates are just a handful of the issues ripe for skeptical legal inquiry.

Because gender stereotypes often benefit one group at the expense of another in the prison context, Congress and administrative agencies tasked with implementing prisoner protections should focus their efforts on problems that can be addressed without negatively impacting other groups within the prison system. In particular, congressional efforts to reduce mandatory minimum sentences for drug offenders may have positive effects for female prisoners, many of whom are in prison for drug offenses.[367] The DOJ's creation of robust prison rape elimination guidelines holds promise in the ongoing effort to end prison rape in state, federal, military, and immigration facilities, although the effect of these regulations remains to be seen. In addition, increasing societal awareness of the problems associated with a large incarcerated population, particularly for the children of incarcerated parents, and the increased visibility of LGBT and juvenile detainees may further spur legislative and administrative action to reform the penal system and improve conditions for traditionally marginalized groups. However, even if federal legislation is able to attenuate some of these issues, difficulties will likely persist in ensuring consistency across state lines and within different levels of the penal system. For this reason, ongoing consideration and scrutiny of these issues is necessary.

365. *Id.* at 832.

366. Danielle Tepper, Note, *Penalties for Miss Behaving: The Juvenile System's Mistreatment of Female Status Offenders*, 15 GEO. J. GENDER & L. 667, 674 (2014); *see also* Watson, *supra* note 348, at 4–5. In 2008, the Girls Study Group reviewed sixty-one gender-responsive programs across the United States and found only seventeen of these had been evaluated by federal or state authorities, with none meeting the OJJDP's criteria for "effectiveness."

367. *See* Deseriee Kennedy, *supra* note 12, at 169–70.