

# IMPROPER HOUSING AND INADEQUATE MEDICAL TREATMENT FOR TRANSGENDER PRISONERS

BY: MEGAN ROBERTSON\*

## Introduction

As of 2021, there were approximately 1.8 million incarcerated individuals in the United States.<sup>1</sup> Of the total incarcerated population, approximately 5,000 of them identify as transgender.<sup>2</sup> An inmate does not lose their constitutional rights when they are incarcerated, but receive specific protections from both federal law and the United States Constitution. Federal law specifically requires that the placement of transgender inmates is to be evaluated on a case-by-case basis, including giving serious consideration to the feelings of where the individual believes that they will be safest.<sup>3</sup> Yet, in prisons which reported on the placement of transgender inmates, only fifteen transgender individuals are housed according to their gender identity.<sup>4</sup> The rest are housed based on their assigned sex at birth or genitalia. With most transgender inmates being placed into housing units based on their birth sex, serious doubt is created about how seriously the safety concerns of the transgender inmates are being taken by prison officials. Placing transgender inmates in housing units that do not match their gender identity can lead to harassment, assault, and rape of these prisoners.<sup>5</sup> Inmate victims of sexual assault often receive inadequate or no treatment for the mental and physical injuries of these incidents.<sup>6</sup> Transgender inmates also face unique challenges when attempting to gain access to gender affirming medical care, such as hormone therapy. Adequate medical care must be provided to prisoners for all serious medical conditions and failure to do so violates the Eighth Amendment prohibition of cruel and unusual punishment.

The inadequate evaluation of housing and placement of transgender inmates, along with the failure to meet their specific medical needs, raises serious constitutional issues which must be protected. Improvements to the training for prison officials and medical staff are needed to ensure they know how to deal with specific issues that face transgender inmates. Additional oversight is also needed to ensure regulations are being followed and that a remedy is available for transgender inmates when there is a violation of their rights. Further policy improvements are also essential to maintain safety in United States prisons.

## Danger of Improper Placement

Assigning transgender inmates to housing units based solely on their birth sex is detrimental to the health and safety of the individual, violates federal law, and is unconstitutional. Transgender inmates often face increased harassment and abuse when they are forced to be in housing units

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<sup>1</sup>Vera Incarceration Trends, <https://trends.vera.org/> (last visited Oct. 12, 2022).

<sup>2</sup> Kate Sosin, *Trans, Imprisoned – trapped*, MSNBC NEWS (Feb. 26, 2020) <https://www.nbcnews.com/feature/nbc-out/transgender-women-are-nearly-always-incarcerated-men-s-putting-many-n1142436>.

<sup>3</sup> Prison Rape Elimination Act National Standards, 28 C.F.R. § 115.42(e) (2022).

<sup>4</sup> Prison Rape Elimination Act National Standards, 28 C.F.R. § 115.42(c) (2022); Prison Rape Elimination Act, 34 U.S.C. § 30301(6) (2022); Sosin, *supra* note 2.

<sup>5</sup> National Center for Transgender Equality, *LGBTQ People Behind Bars: A Guide to Understanding the Issues Facing Transgender Prisoners and Their Legal Rights* (Oct. 2018) <https://transequality.org/transpeoplebehindbars>.

<sup>6</sup> Prison Rape Elimination Act, 34 U.S.C. § 30301(6) (2022).

based on their birth sex as opposed to their gender identity.<sup>7</sup> An estimated thirty-five percent of transgender inmates reported one or more incident of sexual victimization by another inmate or staff member in the past 12 months of their incarceration.<sup>8</sup> This percentage is much higher than the rate of sexual victimizations for the general population of prisoners, which is estimated at around four percent.<sup>9</sup> Prison rape also frequently goes unreported because of the fear of retaliation or dismissal of the claims by guards, so estimates of sexual assault are most likely much higher than what surveys find.<sup>10</sup> With so few transgender inmates being placed in the housing unit that matched their gender identity, it is difficult to estimate how much the risk of sexual victimization is reduced from when they were housed in the housing unit of their birth sex. Still, many transgender inmates frequently put in requests for transfer to housing units that match their gender identity even after having it be denied multiple times because of how much safer they believe they will be in the housing unit of their gender identity.<sup>11</sup>

### **The Prison Rape Elimination Act**

The overwhelming reports of sexual assault in United States prisons led to the creation of the Prison Rape Elimination Act (PREA) of 2003, which was meant to establish a “zero-tolerance standard” for rape in prisons.<sup>12</sup> PREA required the U.S. Department of Justice to develop standards to address prison’s operations as they relate to preventing, detecting, and responding to sexual abuse.<sup>13</sup> PREA was intended to prevent sexual violence by ensuring proper placement of transgender individuals, but prison rapes continue to occur to approximately one third of transgender prisoners.<sup>14</sup> With sexual assault being an immense danger that transgender prisoners face, PREA was a piece of hopeful legislation, but it falls short of truly protecting these individuals. PREA standards require prisons to make individual determinations about how to ensure the safety of each inmate by evaluating placement on a case-by-case basis, while taking serious consideration of the inmate’s own views with respect to their safety.<sup>15</sup> Officials must reassess the placement twice a year to review any threats to safety experienced by the inmate.<sup>16</sup> Although this standard is binding on federal prisons, and compliance with PREA standards enable funding for state prisons, few states have made any placements based on a transgender inmates gender identity, although many would feel safest here and often request transfers frequently.<sup>17</sup> PREA is meant to prevent systematic placement based on birth sex and genitalia, but in states that reported on the placement of their transgender inmates, most reported all of them being placed in the housing unit based on the individuals birth sex.<sup>18</sup>

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<sup>7</sup> Prison Rape Elimination Act, 34 U.S.C. § 30301(6) (2022).

<sup>8</sup> U.S. Dep’t. of Justice, NCJ 248824, PREA Data Collection Activities, 2015, (June 2015) <https://bjs.ojp.gov/content/pub/pdf/pdca15.pdf>.

<sup>9</sup> Pat Kaufman, *Prison Rape: Research Explores Prevalence, Prevention*, National Institute of Justice (Mar. 17, 2008) <https://nij.ojp.gov/topics/articles/prison-rape-research-explores-prevalence-prevention>.

<sup>10</sup> *See* Prison Rape Elimination Act, 34 U.S.C. § 30301(6) (2022).

<sup>11</sup> *See* Sosin, *supra* note 2.

<sup>12</sup> *See* Prison Rape Elimination Act, 34 U.S.C. § 30302(1) (2022).

<sup>13</sup> National Center for Transgender Equality, *supra* note 5.

<sup>14</sup> *Id.*

<sup>15</sup> Prison Rape Elimination Act National Standards, 28 C.F.R. § 115.42(b)-(e) (2022).

<sup>16</sup> *Id.*

<sup>17</sup> *See* Sosin, *supra* note 2.

<sup>18</sup> *See id.*

In September of 2019, Colorado moved three transgender women to a women’s facilities after a class action lawsuit was filed on behalf of several inmates who had repeatedly been denied this transfer.<sup>19</sup> Although PREA had already been in place for 7 years, this was the first time the state placed a transgender inmate in a facility aligned with their gender identity. Many states have faced similar complaints over how they incarcerate transgender people and some courts have ordered these types of transfers along with additional training on transgender sensitivity.<sup>20</sup> All states claim to follow PREA standards, but the miniscule number of transgender inmates being placed in the housing unit of their gender identity raises concerns of how serious officials are taking the safety concerns of these inmates when making placement decisions. The risk of harm to transgender individuals in their birth sex housing units is substantial and obvious, placing little doubt that when officials place them in these housing units, they are disregarding the safety of those inmates.

### **Duty to Protect and Deliberate Indifference**

Although PREA does not provide prisoners a right to sue if prisons do not follow the standards that are set out, other legal avenues have had limited success in providing a remedy. The United States Supreme Court has carved out some room for transgender inmates claims for disregard of their safety through Eighth Amendment duty to protect claims.<sup>21</sup> Claims that prison officials were deliberately indifferent to the safety of transgender inmates in prisons, where there was an obvious risk of violence towards the inmate, have been found to be a violation of the Eighth Amendment.<sup>22</sup>

Prison officials have a duty to protect prisoners from violence at the hands of other prisoners, because “being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society.”<sup>23</sup> For an Eighth Amendment violation to be a valid failure to protect claim, the prison official must be found to have been deliberately indifferent towards the inmate’s safety.<sup>24</sup> An official is deliberately indifferent when they knew of and disregarded an excessive risk to an inmate’s health, by being “both aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”<sup>25</sup> An official’s knowledge of the risk can be shown simply by establishing that the risk was so obvious that the official must have known.<sup>26</sup> *Farmer v. Brennan* established the standard for deliberate indifference claims of failure to protect an inmate’s health and safety, specifically in the context of a transgender inmate.<sup>27</sup> Deliberate indifference to a prisoner’s health and safety requires there to be an objectively serious risk of harm to the individual, and that the prison official must have subjectively known about the risk to the inmate and been deliberately indifferent about it.<sup>28</sup> In *Farmer*, the Supreme Court held that there was an

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<sup>19</sup> See Sosin, *supra* note 2.

<sup>20</sup> See Sosin, *supra* note 2.

<sup>21</sup> *Farmer v. Brennan*, 511 U.S. 825, 826 (1994).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 833-34.

<sup>24</sup> *Id.* at 825.

<sup>25</sup> *Id.* at 837.

<sup>26</sup> *Id.* at 842.

<sup>27</sup> See generally *Farmer v. Brennan*, 511 U.S. 825 (1994).

<sup>28</sup> *Id.*

obvious risk of harm when placing a transgender woman in the general population of a male prison, and that if the prison official knew the individual was transgender, they could be held liable for deliberate indifference.<sup>29</sup> Most transgender woman are housed in male prisons like in this case and vice versa.<sup>30</sup> Under PREA, screening questions are asked to determine if the inmate identifies as transgender which makes prison officials aware of this if they are following federal law.<sup>31</sup> This alone shows that many prison officials have the knowledge that these transgender inmates are transgender and are placed in an obviously dangerous situation despite this risk, which can constitute a violation of the Eighth Amendment.<sup>32</sup>

In *Zollicoffer v. Livingston*, a transgender inmate was allowed to move forward on a deliberate indifference claim against the director of the prison after enduring a series of assaults and rapes.<sup>33</sup> The director had been present in PREA hearings about prison rape and statistics revealed the facility frequently had high rates of sexual assault.<sup>34</sup> The court stated “nor is it any secret that gay and transgender prisoners are vulnerable to abuse in prison” when reasoning that the director had knowledge of the harm that the inmate faced by being in the general population and not placed based on their gender identity.<sup>35</sup> The inmate was seeking to hold the director liable for his own conduct in failing to train and supervise the personnel of the facility and implement policies to deal with the problem of sexual assault against transgender inmates.<sup>36</sup>

Although the theory of *respondeat superior* is unavailable under section 1983 claims, which are frequently used to address violations of state prisoner’s rights, a plaintiff could hold a defendant liable in their supervisory capacity by alleging their role in a constitutional violation premised on the defendant’s individual conduct as a supervisor, such as their failure to train.<sup>37</sup> Holding prison directors liable for their involvement in placing transgender inmates in housing units where they are in serious danger could ensure that PREA standards are followed and serious consideration is given to where the transgender individual will feel safest. Beyond the general risk of sexual assault towards transgender individuals in confinement, many prison officials do have knowledge of their facility’s high risk of harm towards these individuals and should be held accountable through claims of Eighth Amendment violations for deliberate indifference to inmate safety.

## **Solitary Confinement as Protection**

Improper housing conditions for transgender inmates continue when solitary confinement is used to address the vulnerability of these prisoners to violence. When sexual assault or harassment is reported, solitary confinement is often used to protect the transgender prisoners despite PREA requiring this to only be used when there are no other alternatives to protect the individual.<sup>38</sup>

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<sup>29</sup> *Farmer v. Brennan*, 511 U.S. 825, 847 (1994).

<sup>30</sup> *See Sosin*, *supra* note 2.

<sup>31</sup> *See Sosin*, *supra* note 2; Prison Rape Elimination Act, 34 U.S.C. § 30301(6) (2022).

<sup>32</sup> *See Farmer v. Brennan*, 511 U.S. 825, 847 (1994).

<sup>33</sup> *Zollicoffer v. Livingston*, 169 F.Supp.3d 687 (D.S.D.Tex. 2016).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 696.

<sup>36</sup> *Id.*

<sup>37</sup> *Morgan v Texas Dep’t of Criminal Justice McConnell Unit*, 537 Fed.Appx. 502, 509 (5<sup>th</sup> Cir. 2013).

<sup>38</sup> Prison Rape Elimination Act National Standards, 28 C.F.R. § 115.43(a) (2022).

Solitary confinement for extended periods of time causes extreme suffering, mental illness symptoms, and it impedes rehabilitation and recovery efforts.<sup>39</sup> Inmates at a high risk of sexual victimization, such as transgender inmates, are not to be placed in involuntary segregation unless a determination is made that there is no alternative means to separate them from likely abusers, yet these decisions are highly discretionary and little evidence is required to justify the decision.<sup>40</sup> Placing transgender individuals in solitary confinement can cause behavioral issues and lead to even more violence within the prison facility.

Solitary confinement is improperly used to address the vulnerabilities of transgender inmates and should not be used if prisons are to be safer for all inmates. The American Medical Association has urged that placing transgender inmates in solitary confinement as a way of protecting them is not a viable solution because of the psychological damage that it causes and the punishment that this inflicts.<sup>41</sup> Proper initial placement of transgender inmates into the housing unit of their gender identity or where they feel safest as required by PREA, would help avoid the need to provide this type of additional protection for the inmate altogether. When placed into the housing unit of their gender identity, transgender inmates would face less violence and there would be less reason for prison officials to place these inmates in solitary confinement. Proper placement of transgender inmates is essential to reducing violence in prisons.

### **Inadequate Medical Care and Deliberate Indifference**

As the Eighth Amendment protects inmates from cruel and unusual punishment by ensuring that prison officials cannot be deliberately indifferent to their safety by ignoring abuse by other inmates, it also ensures that they receive adequate medical care.<sup>42</sup> This is specifically important for transgender inmates who may be diagnosed and require treatment for gender dysphoria, which is recognized as a serious medical condition.<sup>43</sup> The Supreme Court has interpreted the Eighth Amendment to impose a duty on prison officials to ensure adequate medical care is received by inmates and decided that an official “violates the Eighth Amendment's prohibition against cruel and unusual punishment when his conduct demonstrates deliberate indifference to a prisoner's serious medical needs, constituting an “unnecessary and wanton infliction of pain.”<sup>44</sup> A common medical treatment that is needed by transgender inmates is gender affirming hormone therapy.<sup>45</sup> Hormone therapy is the minimum treatment necessary for a gender dysphoria diagnosis, but it is often difficult for inmates to receive.<sup>46</sup>

The Texas Correctional Department’s policy used to require that an inmate was already receiving hormone therapy in order for them to continue receiving it while incarcerated, but the policy has recently changed to allow inmates to start hormone therapy while incarcerated after going

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<sup>39</sup> National Alliance on Mental Illness, *Solitary Confinement*, <https://www.nami.org/Advocacy/Policy-Priorities/Stopping-Harmful-Practices/Solitary-Confinement> (last visited Oct. 13, 2022).

<sup>40</sup> Prison Rape Elimination Act National Standards, 28 C.F.R. § 115.43(a); *see* Sosin, *supra* note 2.

<sup>41</sup> *See* National Alliance on Mental Illness, *supra* note 39.

<sup>42</sup> *Estelle v. Gamble* 429 U.S. 97, 105-6 (1976).

<sup>43</sup> National Center for Transgender Equality, *supra* note 5.

<sup>44</sup> *Easter v. Powell*, 467 F.3d 459, 463 (5th Cir. 2006).

<sup>45</sup> National Center for Transgender Equality, *supra* note 5.

<sup>46</sup> The Washington Times, *Transgender Texas Prison Inmates Can Start Hormone Therapy* (Feb. 2015) <https://www.washingtontimes.com/news/2016/feb/5/transgender-texas-prison-inmates-can-start-hormone/>.

through thorough medical examinations by a gender dysphoria specialist.<sup>47</sup> Some states have attempted to place blanket bans on providing hormone therapy to inmates who are diagnosed with gender dysphoria, but courts have held that these blanket bans facially violate the Eighth Amendment and enforcement of these bans constitute deliberate indifference to inmates' serious medical needs.<sup>48</sup> An Illinois judge has required the state's prisons to improve their medical care for transgender inmates after a case was won by several transgender inmates who were being denied hormone therapy and female clothing items.<sup>49</sup> Bans and any attempt to impede the provision of this necessary and often life-saving treatment for transgender inmates creates a substantial threat to their health and denial of this medical treatment violates the Eighth Amendment's protection to adequate medical care.<sup>50</sup>

## Remedy for Harms

When a transgender individual is placed in a housing unit that does not align with their gender identity, there is a high risk that they may face substantial harm because of the deliberate indifference of prison officials in their placement decision.<sup>51</sup> Although a transgender prisoner could possibly win on a claim of deliberate indifference to their safety or inadequate medical care, prison litigation is lengthy and by the time an injunction for a transfer may be entered, severe injuries may already be sustained by the inmate. Courts should remain an open avenue for inmates to file claims such as those for constitutional violations by prison officials. However, a more effective remedy would be proper initial placement of transgender inmates in the housing facility within which they feel safest.

In 2020, California passed the Transgender Respect, Agency, and Dignity Act which requires prisons to house transgender individuals based on their individual preference.<sup>52</sup> The Act further requires that the inmate's perception of safety be given "serious consideration in any bed assignment, placement, or programming decision" including granting them "single-cell status, housing the individual with another incarcerated person of their choice, or removing the individual or individuals who pose a threat from any location where they may have access to the individual who has expressed a safety concern."<sup>53</sup> This provides a significantly higher amount of protection for transgender inmates by allowing their preferences to determine the housing unit they are placed in, but also being able to share concerns about more specific placement within the unit as well. Additionally, the Act requires prison staff to use the preferred names and pronouns of the transgender inmates.<sup>54</sup> This goes beyond the requirements of PREA standards, which only requires that serious consideration be given to the individual's feelings of where they would feel safest. Instead, the Act ensures that the preferences will be respected. The Act also

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<sup>47</sup> The Washington Times, *supra* note 46.

<sup>48</sup> Fields v. Smith, 653 F.3d 550, 559 (7th Cir. 2011).

<sup>49</sup> Angie LeVentis Lourgos, *Federal Judge Orders Sweeping Reforms of Treatment of Transgender Inmates in All Illinois Prisons* (Dec. 2019) <https://www.chicagotribune.com/news/breaking/ct-illinois-judge-orders-reforms-transgender-prisoners-20191221-inz4oo6m3fhotg4h53dgo5khata-story.html>.

<sup>50</sup> See Estelle v. Gamble 429 U.S. 97 (1976).

<sup>51</sup> See generally Farmer v. Brennan, 511 U.S. 825 (1994).

<sup>52</sup> Transgender Respect, Agency, and Dignity Act, Cal. Penal Code § 2606 (West 2022).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

includes non-binary and intersex individuals in the requirements of allowing their preference to determine their housing placement.<sup>55</sup> Other states could adopt similar requirements which would decrease the discretion prison officials have in deciding the placement of the transgender inmates and would mitigate a substantial risk of harm to the individuals. Little progress has been seen through PREA standards to allow transgender inmates to be in the housing unit aligned with their gender identity as most are still in their birth sex housing units, making a less discretionary policy like this Act a hopeful opportunity for transgender inmates to be safe from rape while being incarcerated.

## **Conclusion**

The violence that prison officials allow to be perpetrated against transgender inmates by placing them in housing units based on their birth sex increases health and safety concerns of the entire prison facility. When officials have knowledge of a transgender inmate's identity and still place them in a housing unit that does not align with their gender identity, they are deliberately indifferent to the safety of that inmate and are failing to protect them under the Eighth Amendment. Further Eighth Amendment violations occur when a prison policy does not allow transgender inmates to receive adequate medical care for gender dysphoria. Without serious improvements to the training and policies in place at all prison facilities, the abuse and assault of transgender inmates will continue. Proper placement and treatment of transgender inmates is necessary to ensure the safety of all inmates and improvements must be made.

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<sup>55</sup> Transgender Respect, Agency, and Dignity Act, Cal. Penal Code § 2606 (West 2022).