

CORRECTIONAL FACILITIES

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I. INTRODUCTION

Since the turn of the century, there has been an increase in scholarship on gender discrimination, segregation, and abuse in the United States (U.S.) prison system.¹

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, Comment, “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).

This Article explores a number of the unique legal issues raised by gender disparities and distinctions in correctional facilities. Part II 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 prisoners. Part III focuses on the continuing pervasiveness of prison rape, addressing the prison policies that facilitate sexual abuse in prisons and the legislative impediments rape survivors face in accessing legal remedies. Part IV analyzes the often-neglected reproductive health needs of female prisoners. Part V addresses the placement and protection of transgender prisoners in correctional facilities. Part VI explores the gender disparity in capital sentencing. Finally, Part VII looks into disparate gender treatment in immigration facilities. Part VIII concludes the Article.

II. GENDER DISPARITY IN PRISON PROGRAMS

While females historically constituted a very small percentage of the total prison population, over the last quarter century, the number of females in prison has risen drastically.² Between 1980 and 2020, the number of incarcerated females in the U.S. increased from 26,326 to 152,854—an increase of more than 475%.³ Incarceration rates have dropped over the past decade, but most of these decreases are attributable to male prisoners. The female prison population grew 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 to 2016, while the female prison population increased by 0.7%, the male prison population decreased by 1.3%.⁵ Despite the growth rate of the female prison population, the number of women in prison remains far lower than the number of men, comprising 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 upholstery.⁸ Despite the fact that female prisoners experience higher rates of medical and mental health conditions than male prisoners, studies show that adequate health services are either limited or “lack the

2. See *Incarcerated Women and Girls*, SENTENCING PROJECT 1, <https://perma.cc/X5PS-TUNU> (last updated May 2022) (noting that the number of incarcerated women was nearly five times higher in 2020 than in 1980); Myrna S. Raeder, *A Primer on Gender-Related Issues That Affect Female Offenders*, 20 CRIM. JUST. 4, 4 (2005).

3. See *Incarcerated Women and Girls*, *supra* note 2.

4. See E. ANN CARSON, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 251149, PRISONERS IN 2016, at 3, <https://perma.cc/9MY4-FDTR> (last updated Aug. 7, 2018).

5. *Id.*

6. *Id.*

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 Adam Harris, *Women in Prison Take Home Economics, While Men Take Carpentry*, THE ATLANTIC (Apr. 30, 2018), <https://perma.cc/XZN2-65AX>.

trauma focus needed to adequately respond to the complex mental health issues present.”⁹ Similarly, substance abuse treatment programs were developed in response to men’s motivations for using drugs—which often differ from women’s reasons for using drugs.¹⁰ Scholars also note that female prisoners are more likely to have been the only parent living with and caring for minor children preceding their arrest.¹¹ Yet, women often face greater barriers to visiting with their children because the lower number of female correctional facilities means they are often sent further from home to serve their sentences than their male counterparts.¹² These discrepancies are compounded by the “tough on crime” shift in criminal justice policy that has resulted in a tightening of prison budgets for 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 prisoners’ constitutional rights are valid if they are “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

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 Stacy Calhoun, Nena Messina, Jerome Cartier, & Stephanie Torres, *Implementing Gender-Responsive Treatment for Women in Prison: Client and Staff Perspectives*, FED. PROBATION, <https://perma.cc/EKR6-8LWC> (last visited Mar. 5, 2023).

11. See Sarah Wynn, *Mean Women and Misplaced Priorities: Incarcerated Women in Oklahoma*, 27 WIS. J.L. GENDER & SOC’Y 281, 284–85 (2012); Mame 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); *FY 2019 Performance Budget Congressional Submission Salaries and Expenses*, U.S. DEP’T OF JUST. FED. PRISON SYS., <https://perma.cc/25L4-2CT4> (last visited Mar. 5, 2023).

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.

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

must apply a strict scrutiny standard in evaluating race-based prison policies.¹⁶ In that case, the Court stated that an individual's right to be protected from racial discrimination "is not a right that need necessarily be compromised for the sake of proper prison administration."¹⁷ 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.¹⁸ As a result, the applicable standard of review for equal protection cases based on gender has been the subject of scholarly debate.¹⁹ Some believe that intermediate scrutiny is now required, while others expect little change in the status quo unless the Supreme Court resolves the question.²⁰ Thus far, the Court has shown minimal interest in addressing which standard should apply to prisoners' gender discrimination claims, leaving lower courts divided.²¹

A prisoner challenging a gender-based policy may face a threshold hurdle even before a court reaches an analysis of the policy at issue.²² 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.²³ 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."²⁴ In his dissenting opinion in *Klinger*, Circuit Judge McMillian relied in part on *Glover v. Johnson*.²⁵ There, female prisoners alleged that the educational and vocational opportunities provided to them were inferior to those provided to male prisoners.²⁶ The district court held that the Equal Protection Clause requires parity of treatment for male and female prisoners, notwithstanding "excuses" such as the

16. See *Johnson v. California*, 543 U.S. 499, 506–07 (2005).

17. See *id.* at 510.

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

19. 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.

20. See Priscilla A. Ocen, *Incapacitating Motherhood*, 51 U.C. DAVIS L. REV. 2191, 2230–31 (2018); DiLaura, *supra* note 1, at 510.

21. 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); *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).

22. 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 & 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).

23. See Christopher Zoukis, *The Equal Protection Clause in Prison*, ZOUKIS CONSULTING GRP. (Apr. 7, 2013), <https://perma.cc/5ET4-RVVU>.

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

25. *Id.* at 739 (citing *Glover v. Johnson*, 478 F. Supp. 1075, 1080 (E.D. Mich. 1979)).

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

prisoners' relative population sizes.²⁷ However, in *Women Prisoners of D.C. Department of Corrections v. District of Columbia*, the District of Columbia (D.C.) Circuit held that the evidence did not support the conclusion that male and female prisoners were similarly situated, highlighting “striking disparities between the sizes of the [male and female] prison populations that were being compared.”²⁸ Yet more recently, in *Sassman v. Brown*, a women-only alternative-custody program was deemed discriminatory against men.²⁹ The district court found that male prisoners could be “similarly situated” to female prisoners where both met the gender-neutral criteria for the program.³⁰ 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—prisoners, who may or may not be considered similarly situated in gender discrimination cases.³¹

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

Prisoners 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 U.S. 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.”³² Some scholars have argued that female prisoners might have a better chance of prevailing on their 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.³³ However, despite Congress' purposeful employment of similar language when constructing Title VI and Title IX,³⁴ courts have been reluctant to apply strict scrutiny to Title IX challenges in the prison context.³⁵ When faced with such challenges, courts have held either that Title IX does not extend beyond educational programs, or that correctional facilities' penological interests outweigh the importance of compliance with Title IX.³⁶

27. *Id.* at 1078–79.

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

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

30. *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).

31. *See* Carroll-Ferrary, *supra* note 22, at 597.

32. 20 U.S.C.A. § 1681(a) (West, Westlaw through Pub. L. No. 117-262).

33. 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, Note, *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)).

34. *See* Safarik, *supra* note 33, at 344.

35. *See* Kennedy, *supra* note 33, at 81.

36. *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

In addition to their equal protection claims, the female prisoners in *Women Prisoners of D.C. Department of Corrections v. District of Columbia* alleged violations of Title IX, requesting declaratory and injunctive relief.³⁷ The female prisoners claimed that they received inferior health care programs, as well as fewer educational and vocational opportunities, compared to male prisoners.³⁸ The D.C. Circuit, applying the same “similarly situated” analysis to the Title IX claims as it had to the equal protection claim,³⁹ held that the female prisoners were not similarly situated to their male counterparts.⁴⁰ The court emphasized that the Fourteenth Amendment’s Equal Protection Clause requires states to treat similarly situated persons alike.⁴¹ Individuals can allege and even show disparate treatment, but if they are in dissimilar situations, no equal protection violation will be found.⁴² It can be argued that, inherently, male and female prisons—simply by virtue of their prisoners, size, and particular programs—are dissimilar.⁴³ However, the court did not find this argument convincing because the women prisoners failed to provide evidence that male prisoners “enjoy access to more fulfilling opportunities than the women.”⁴⁴ 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

Rape and other forms of sexual violence constitute an ever-increasing problem in the U.S. prison system.⁴⁵ State and military prisons have particularly high

counseling have anything in common with the equality of *educational* opportunities with which Title IX is concerned”).

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

38. *Id.*

39. *Id.* at 924 (“We believe the same [“similarly situated”] principle should apply in Title IX cases.”).

40. *Id.* at 927.

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

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

43. *Id.*

44. *Id.* at 925–26.

45. See ALLEN J. BECK, RAMONA R. RANTALA, & JESSICA REXROAT, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., NCJ 243904, SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2009-11, at 1, 4 (Jan. 2014), <https://perma.cc/TM5K-XVEB> (reporting that allegations of sexual violence in prison increased 39% between 2005 and 2011); ALLEN J. BECK, MARCUS BERZOFKY, RACHEL CASPAR, & CHRISTOPHER KREBS, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., NCJ 241399, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-12, at 6 (May 2013), <https://perma.cc/7MXE-XYUN> (reporting that in 2011–12, approximately 4% 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% of jail inmates, the same as 2007, reported incidents of sexual victimization involving another inmate or facility staff); EMILY D. BUEHLER, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., NCJ 304834, SUBSTANTIATED INCIDENTS OF SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2016–2018 (Jan. 2023), <https://perma.cc/A4K2-QFV9>.

levels of sexual violence.⁴⁶ Furthermore, sexual abuse in correctional facilities presents different problems and implications for each gender, which require separate analysis.

In 1996, as part of the Prison Litigation Reform Act (PLRA), Congress established a mandatory exhaustion requirement for prisoners challenging prison conditions in federal court.⁴⁷ 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.”⁴⁸ Prior to the PLRA, prisoners seeking to file lawsuits in federal court were not required to exhaust their complaints through the grievance system that their incarcerating authority had implemented.⁴⁹

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.”⁵⁰ Exhaustion was held to mean “proper exhaustion,” which entails compliance with an agency’s deadlines and other critical procedural rules.⁵¹ The exhaustion rule presented a significant hurdle for many prisoners, who often brought damage actions without counsel and were frequently unable to navigate cumbersome and confusing grievance procedures.⁵² Furthermore, the PLRA limited recovery for emotional pain and suffering only to instances in which the incarcerated victim suffered a physical injury.⁵³ It was unclear after the passage of the Act whether a rape victim was required to prove physical injuries from their assault in order to recover damages, or whether proof of an assault was sufficient.⁵⁴ While the PLRA’s stated purpose was to limit frivolous lawsuits, its result was to also bar meritorious lawsuits by making civil court remedies for prison rape victims extremely difficult to attain, partly because of confusion about the statutory meaning of “physical injury.”⁵⁵

46. BECK, RANTALA, & REXROAT, *supra* note 45, at 6 (noting there are 1.31 substantiated incidents of sexual violence per 1,000 inmates in military facilities and 0.45 substantiated incidents of sexual violence per 1,000 inmates in state prisons).

47. See 42 U.S.C.A. § 1997e(a) (West, Westlaw through Pub. L. No. 117-262).

48. *Id.*

49. 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).

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

51. *Id.* at 90.

52. Schlanger, *supra* note 49, at 592–93.

53. Jael Humphrey, *The Prison Litigation Reform Act (PLRA): Shielding Prisons from Accountability for Sexual Abuse*, LAMBDA LEGAL (June 13, 2015), <https://perma.cc/NXR3-UAZN>.

54. *Id.* at 45.

55. *Id.* at 44–45.

In 2003, Congress passed the Prison Rape Elimination Act (PREA).⁵⁶ 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.⁵⁷ Beyond the abstract zero-tolerance standard, PREA's most notable and practical purpose was to "develop and implement national standards for the detection, prevention, reduction and punishment of prison rape."⁵⁸ 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.⁵⁹ The three headings for the compliance checklists corresponded with the major mandates of PREA: (1) prevention; (2) detection and response; and (3) monitoring.⁶⁰ The 2009 panel report allowed the Department of Justice (DOJ) to formulate clear standards in a final rule that was codified in 2012.⁶¹

The standards have three clear goals: to prevent, detect, and respond to sexual abuse.⁶² Each facility is audited for compliance at least once every three years,⁶³ and the regulations bind the Federal Bureau of Prisons (BOP).⁶⁴ 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.⁶⁵ The standards have been published in the Federal Register. The DOJ has also funded the National Resource Center for the Elimination of Prison Rape to assist facilities in combatting sexual abuse in confinement.⁶⁶ 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

56. The Prison Rape Elimination Act, 34 U.S.C.A. § 30301–30309 (West, Westlaw through Pub. L. No. 117-262).

57. 28 CFR § 115.311 (2022).

58. *Id.*

59. See 34 U.S.C.A. § 30306 (West, Westlaw through Pub. L. No. 117-262). 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 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(d)(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 (June 1, 2009), <https://perma.cc/J9YG-PLUH>.

60. NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 59, at 21, 33, 53.

61. See 28 C.F.R. § 115 (2022).

62. *Id.* § 115.11(a).

63. *Id.* § 115.401(a).

64. 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.

65. 34 U.S.C.A. § 30307(e)(2) (West, Westlaw through Pub. L. No. 117-262).

66. *Justice Department Releases Final Rule to Prevent, Detect and Respond to Prison Rape*, U.S. DEP'T OF JUST., <https://perma.cc/XT7N-S5FL> (last updated Mar. 5, 2023).

sexual abuse.⁶⁷ 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.⁶⁸ Finally, with some limits, third parties such as attorneys, staff members, and outside advocates may submit grievances on behalf of inmates.⁶⁹ 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.⁷⁰ 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 consensual sex.⁷¹ This has disincentivized survivors of sexual assault from reporting their assaults due to fear of punishment.⁷² For example, PREA has allowed prison officials to use gender nonconformity as evidence of consent to a rape.⁷³ 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."⁷⁴

A. PREA IN IMMIGRATION DETENTION FACILITIES

The NPREC reported that large numbers of immigrant detainees are vulnerable to sexual abuse.⁷⁵ In its 2012 final rulemaking, the DOJ found that PREA standards applied to Department of Homeland Security (DHS) detention facilities.⁷⁶ Pursuant to this rulemaking, DHS made a PREA compliance final rule in March 2014.⁷⁷

The DHS PREA rules maintain that DHS and each DHS facility should have a "policy mandating zero tolerance toward all forms of sexual abuse."⁷⁸ The rules also include standards for staff training, inmate medical and mental health care, and reporting requirements, largely mirroring provisions in the DOJ PREA

67. 28 C.F.R. § 115.52(b)(1) (2022).

68. *Id.* § 115.52(b)(3)–(c)(2).

69. *Id.* § 115.52(e)(1).

70. Lena Palacios, *The Prison Rape Elimination Act and the Limits of Liberal Reform*, GENDER POL'Y REP. (Feb. 17, 2017), <https://perma.cc/V6WE-QZ2R>.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. See U.S. C.R. COMM'N, WITH LIBERTY AND JUSTICE FOR ALL: THE STATE OF CIVIL RIGHTS AT IMMIGRATION DETENTION FACILITIES 68 (Sept. 2015), <https://perma.cc/WL6F-LXBW> [hereinafter WITH LIBERTY AND JUSTICE FOR ALL].

76. 28 C.F.R. § 115.51(b) (applying a reporting requirement to facilities holding individuals "solely for civil immigration purposes").

77. 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.*).

78. 6 C.F.R. § 115.11(a), (c) (2023).

rules.⁷⁹ Given that large numbers of DHS facilities involve private contracts, the rules also mandate that when contracting for confinement of immigrants in non-DHS facilities, DHS must ensure that the contract requires the facility to comply with DHS's PREA rules.⁸⁰ However, DHS cannot force Contract Detention Facilities (CDFs) to comply with PREA regulations without "altering existing contractual obligations."⁸¹ 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.⁸² 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 U.S. 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.⁸³

ICE requires all employees who have contact with detainees and all detention-center staff to receive sexual abuse training.⁸⁴ The agency or facility then provides "refresher information" every two years.⁸⁵

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 native language.⁸⁶ However, the Civil Rights Commission has documented ongoing problems. The Commission cites challenges in communicating PREA policies to detainees who speak indigenous languages, a lack of employees at detention facilities who can work with detainees with cultural barriers, and reluctance to report abuse because of the detention setting.⁸⁷

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 the option for anonymous reporting.⁸⁸ However, outside organizations such as the American Civil Liberties Union 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

79. See 6 C.F.R. § 115 (2023); 28 C.F.R. § 115 (2022).

80. See 6 C.F.R. § 115.12(a) (2023).

81. WITH LIBERTY AND JUSTICE FOR ALL, *supra* note 75, at 75.

82. *Id.* at 77.

83. *Id.* at 79–80.

84. 6 C.F.R. § 115.31 (2023).

85. *Id.*

86. 6 C.F.R. § 115.33(a)–(b) (2023).

87. WITH LIBERTY AND JUSTICE FOR ALL, *supra* note 75, at 90.

88. See 6 C.F.R. § 115.51(a)–(b) (2023) (ICE immigration detention facilities); 6 C.F.R. § 115.151(a)–(b) (2023) (DHS holding facilities).

to make reports to outside organizations and frequently cannot report a sexual assault without a guard's assistance.⁸⁹

After the implementation of PREA, the number of accusations jumped from 8,768 to 24,661.⁹⁰ However, correctional officials only corroborated 5,187 reports⁹¹ and concluded the remaining allegations were either false or lacking evidence.⁹² Some experts are skeptical about the high number of fake accusations because "prisoners have nothing to gain from filing false sex abuse reports."⁹³ Instead, "[c]orrections officials often start with the assumption [that] a report is false, particularly when it's against a colleague."⁹⁴

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.⁹⁵ Although sexual abuse in military detention facilities is also a significant problem for men, because all women in military detention are housed at NAVACONBRIG Miramar, citation of the Navy's guidance implementing PREA requirements in its facilities is especially important.⁹⁶ The Navy's interpretation of the DOJ PREA standards largely adopted the DOJ standards, but the Navy did add some qualifying language.⁹⁷

The Navy's PREA standards require that when there are staffing deficiencies, "mission priorities" must be considered.⁹⁸ "Security and safety" are the top priority, and staffing resources must first be allocated to ensure "[a]ll permanent security posts will be staffed at all times," with adequate staffing and video monitoring used to protect prisoners from sexual assault and abuse "to the best extent possible."⁹⁹ This language is largely consistent with the DOJ standard, which requires a facility to develop a "staffing plan" that has adequate staffing levels to protect prisoners from sexual abuse.¹⁰⁰ The guidance also emphasizes the importance of conducting unannounced and randomized facility checks to "identify and deter" incidents of sexual abuse.¹⁰¹

89. See WITH LIBERTY AND JUSTICE FOR ALL, *supra* note 75, at 88.

90. Alysia Santo, *Prison Rape Allegations are on the Rise*, MARSHALL PROJECT (July 25, 2018, 8:00 AM), <https://perma.cc/9XLY-WMTA>.

91. *See id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. Brewster Schenck, Lori Turley, Lois Lausch, & Jeffrey Thompson, *Camouflage is the New Pink*, 76 CORRECTIONS TODAY 36, 36 (2014).

96. *See* BECK, BERZOFSKY, CASPAR, & KREBS, *supra* note 45, at 16.

97. U.S. DEP'T OF THE NAVY, PRISON RAPE ELIMINATION ACT (PREA); GUIDANCE LETTER #1 (Mar. 20, 2014), <https://perma.cc/6XF7-TNSV> [hereinafter PREA GUIDANCE LETTER].

98. *Id.* at 4.

99. *Id.*

100. 28 C.F.R. § 115.13(a) (2022).

101. PREA GUIDANCE LETTER, *supra* note 97, at 4.

The Navy's guidance requires minimum levels of employee and healthcare-provider training on preventing sexual abuse, consistent with the DOJ standards.¹⁰² Some of the relevant training can be conducted online.¹⁰³

Consistent with the DOJ's requirement of gender-informed training,¹⁰⁴ NAVACONBRIG Miramar, the only military correctional facility housing women prisoners, will "develop and avail gender-responsive and trauma-informed PREA staff training to all Department of Defense (DOD) confinement facilities housing women."¹⁰⁵

The Navy allows for prisoner access to the DOD Safe Helpline, operated by the Rape, Abuse and Incest National Network (RAINN), and posts information about the helpline in "all housing areas."¹⁰⁶ The Helpline is in compliance with the DOJ PREA standards, which require all confinement facilities to provide prisoners with access to "outside victim advocates for emotional support services related to sexual abuse."¹⁰⁷ Such "outside victim advocates" include telephone numbers of rape crisis centers; the Navy considers the RAINN hotline a rape crisis center.¹⁰⁸ DOJ PREA Section 115.53(c) encourages correctional facilities to create relationships with outside community service providers for prisoners to contact in the event of a sexual assault.¹⁰⁹

Finally, the Navy requires naval correctional facilities to "remove" any staff member who commits sexual abuse or assault related to their 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).¹¹⁰ This policy is largely consistent with DOJ standards, which state that "termination shall be the presumptive disciplinary sanction for staff who have engaged in sexual abuse."¹¹¹ In 2013, before the Navy's implementation of DOJ PREA standards, 1,112 sexual assaults were reported in the Navy.¹¹² In 2020, total reports increased to 1,544.¹¹³

C. SEXUAL ABUSE OF FEMALE PRISONERS BY PRISON GUARDS

In 2015, correctional administrators reported 24,661 sexual victimization allegations, more than half of which involved allegations that staff had sexually

102. See 28 C.F.R. § 115.35 (2022); PREA GUIDANCE LETTER, *supra* note 97, at 7–9.

103. PREA GUIDANCE LETTER, *supra* note 97, at 7.

104. See 28 C.F.R. § 115.31(b) (2022).

105. PREA GUIDANCE LETTER, *supra* note 97, at 8.

106. *Id.* at 6.

107. 28 C.F.R. § 115.53(a) (2022).

108. *Id.*; see also PREA GUIDANCE LETTER, *supra* note 97, at 6.

109. See 28 C.F.R. § 115.53(c) (2022).

110. See PREA GUIDANCE LETTER, *supra* note 97, at 12.

111. 28 C.F.R. § 115.76(b) (2022).

112. U.S. DEP'T OF DEF., SEXUAL ASSAULT PREVENTION AND RESPONSE OFF., REPORTS OF SEXUAL ASSAULT RECEIVED AT MILITARY INSTALLATIONS AND COMBAT AREAS OF INTEREST 12 (Nov. 17, 2017), <https://perma.cc/7RJ5-DLN4>.

113. U.S. DEP'T OF DEF., SEXUAL ASSAULT PREVENTION AND RESPONSE OFF., REPORTS OF SEXUAL ASSAULT RECEIVED AT MILITARY INSTALLATIONS AND COMBAT AREAS OF INTEREST BY FISCAL YEAR 14 (Sept. 1, 2021), <https://perma.cc/6VEC-4JEJ>.

victimized inmates.¹¹⁴ Despite international recommendations against cross-gender supervision in prison, it is currently standard in the U.S. for male correction officers to work in female prisons.¹¹⁵ In *Dothard v. Rawlinson*, which allowed gender exclusion in correctional hiring for “contact” positions, the Supreme Court recognized gender as a bona fide occupational qualification to Title VII of the Civil Rights Act of 1964.¹¹⁶ However, continued fear of further employment discrimination litigation drives prison administrators to continue permitting cross-gender supervision policies despite potential dangers to prisoners.¹¹⁷ In federal women’s correctional facilities, for example, 70% of guards are male.¹¹⁸

Pursuant to PREA, the Bureau of Justice Statistics has compiled data on prison rape.¹¹⁹ The 2009–2011 statistical report for prison rape revealed that in state and federal prisons—where women constitute 7% of sentenced prisoners—32.6% of victims of staff-on-prisoner sexual violence were women, while 45.7% of the staff perpetrators were male guards.¹²⁰ In local jails, 67.2% of victims of staff-on-prisoner sexual victimization were women while 80% of the staff perpetrators were male guards.¹²¹

One example of male-staff-on-female-prisoner prison rape comes from seven Pennsylvania correction officers who were charged in 2018 with sexually abusing female inmates.¹²² 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.¹²³ The behavior was so widespread that guards developed a warning system to alert other guards when supervisors were approaching.¹²⁴

Women prisoners who become pregnant without having had contact with outside parties are often sent to solitary confinement as punishment for having

114. BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2012–15 (July 2018), <https://perma.cc/UU55-XGE6>.

115. See Flynn L. Flesher, Note, *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.

116. *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).

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

118. *Women in Prison: A Fact Sheet*, AMNESTY INT’L, <https://perma.cc/34GB-8C37> (last visited Mar. 9, 2023).

119. See Flesher, *supra* note 115, at 848.

120. BECK, RANTALA, & REXROAT, *supra* note 45, at 1, 12.

121. *Id.* at 12.

122. See Matthew Haag, *7 Prison Guards in Pennsylvania Charged with Sexually Abusing Inmates*, N.Y. TIMES (Feb. 16, 2018), <https://perma.cc/Y8M9-6K7C>.

123. *Id.*

124. See *id.*

had sexual contact.¹²⁵ Despite the fact that Congress has criminalized sexual misconduct between guards and prisoners,¹²⁶ guards are not always successfully prosecuted for sexually abusing prisoners.¹²⁷ Eight states have statutes that do not cover all forms of sexual contact between prisoners and guards.¹²⁸ Twenty-two states have statutes that do not cover all individuals working in prisons who may be in a position to mistreat women in custody.¹²⁹ For example, Connecticut's statute only applies to perpetrators who have "supervisory or disciplinary authority" over individuals in custody.¹³⁰ Florida's statute only applies to correctional facility employees and excludes volunteers and contractors.¹³¹ Additionally, nine

125. See Buchanan, *supra* note 1, at 45; see also BECK, RANTALA, & REXROAT, *supra* note 45, at 17 (noting that 26% of inmates subjected to staff sexual misconduct were placed in administrative segregation, while 20% were "transferred to another facility").

126. See 18 U.S.C. §§ 2241, 2243, 2244; see also Prison Rape Elimination Act, 108 Pub. L. 79, 117 Stat. 972 (2003).

127. See Michael E. Horowitz, Inspector General, *Notification of Concerns Regarding the Federal Bureau of Prisons' (BOP) Treatment of Inmate Statements in Investigations of Alleged Misconduct by BOP Employees*, U.S. DEP'T OF JUST. (Oct. 12, 2022), <https://perma.cc/84RQ-K9SX>; see also BECK, RANTALA, & REXROAT, *supra* note 45, at 16 (noting that between 2009 and 2011, 38% of prison staff sexual misconduct cases across all prison facilities in the U.S. were referred for prosecution).

128. ARK. CODE ANN. § 5-14-126 (West, Westlaw through 2023 Reg. Sess.); FLA. STAT. ANN. § 794.011 (West, Westlaw through 2022 2nd Reg. Sess. & Spec. A, C, & D Sess.); FLA. STAT. ANN. § 944.35 (West, Westlaw through 2022 2nd Reg. Sess. & Spec. A, C, & D Sess.); IDAHO CODE ANN. § 18-6110 (West, Westlaw through Ch. 1 of 2023 1st Reg. Sess.); MISS. CODE ANN. § 97-3-104 (West, Westlaw through 2022 Reg. Sess.); MO. ANN. STAT. § 566.145 (West, Westlaw through 2022 2nd Reg. Sess. & 1st Extra. Sess.); N.M. STAT. ANN. § 30-9-11 (West, Westlaw through 2022 2nd Reg. Sess. & 3rd Spec. Sess.); R.I. GEN. LAWS ANN. § 11-25-24 (West, Westlaw through Ch. 442 of 2022 Reg. Sess.); S.D. CODIFIED LAWS § 24-1-26.1 (West, Westlaw through 2023 Reg. Sess.).

129. ARK. CODE ANN. § 5-14-126 (West, Westlaw through 2023 Reg. Sess.); COLO. REV. STAT. ANN. § 18-3-404 (West, Westlaw through 2022 1st Reg. Sess.); CONN. GEN. STAT. ANN. § 53a-71 (West, Westlaw through 2023 Reg. Sess.); CONN. GEN. STAT. ANN. § 53a-73a (West, Westlaw through 2023 Reg. Sess.); FLA. STAT. ANN. § 794.011 (West, Westlaw through 2022 1st Reg. Sess.); FLA. STAT. ANN. § 944.35 (West, Westlaw through 2022 1st Reg. Sess.); GA. CODE ANN. § 16-6-5.1 (West, Westlaw through 2022 Reg. Sess.); LA. STAT. ANN. § 14:134.1 (West, Westlaw through 2023 Reg. Sess.); ME. REV. STAT. ANN. tit. 17-A, § 253 (West, Westlaw through 2022 1st Reg. Sess.); ME. REV. STAT. ANN. tit. 17-A, § 255-A (West, Westlaw through 2022 1st Reg. Sess.); MD. CODE ANN. CRIM. LAW § 3-314 (West, Westlaw through 2022 Reg. Sess.); MISS. CODE ANN. § 97-3-104 (West, Westlaw through 2022 Reg. Sess.); MO. ANN. STAT. § 566.145 (West, Westlaw through 2022 Reg. Sess.); N.H. REV. STAT. ANN. § 632-A:2 (West, Westlaw through 2023 Reg. Sess.); N.H. REV. STAT. ANN. § 632-A:3 (West, Westlaw through 2023 Reg. Sess.); N.J. STAT. ANN. § 2C:14-2 (West, Westlaw through L. 2023); N.M. STAT. ANN. § 30-9-11 (West, Westlaw through 2022 3rd Spec. Sess.); N.Y. PENAL LAW § 130.05 (West, Westlaw through L. 2022); N.D. CENT. CODE ANN. § 12.1-20-06 (West, Westlaw through 2021 Reg. Sess.); N.D. CENT. CODE ANN. § 12.1-20-07 (West, Westlaw through 2021 Reg. Sess.); OHIO REV. CODE ANN. § 2907.03 (West, Westlaw through 2022 Gen. Assemb.); OR. REV. STAT. ANN. § 163.452 (West, Westlaw through 2022 Reg. Sess.); OR. REV. STAT. ANN. § 163.454 (West, Westlaw through 2022 Reg. Sess.); 18 PA. CONS. STAT. ANN. § 3124.2 (West, Westlaw through 2022 Reg. Sess.); R.I. GEN. LAWS ANN. § 11-25-24 (West, Westlaw through 2022 Reg. Sess.); S.C. CODE ANN. § 44-23-1150 (West, Westlaw through 2022 Reg. Sess.); S.D. CODIFIED LAWS § 24-1-26.1 (Westlaw through 2023 Reg. Sess.); WIS. STAT. ANN. § 940.225 (West, Westlaw through 2022 Act 267).

130. CONN. GEN. STAT. ANN. § 53a-71(a)(5) (West, Westlaw through 2023 Reg. Sess.).

131. FLA. STAT. ANN. § 944.35(3)(b)(1)-(2) (West, Westlaw through 2022 2nd Reg. Sess. & Spec. A, C, & D Sess.).

states have statutes that do not cover all locations where staff-on-inmate sexual abuse could take place.¹³²

Sexual assault and misconduct by prison officials take many forms.¹³³ 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 make sexual comments and grope women in the course of their duties and threaten women with rape if they do not comply with their directions.¹³⁴ Correctional officers also watch women undress both in the shower and in the toilet.¹³⁵ Because prisoners are completely dependent on guards for basic necessities, guards sometimes offer them extra food or personal hygiene products in exchange for sex.¹³⁶ Unfortunately, prisoners are unlikely to report these abuses because their grievances are rarely kept confidential.¹³⁷ Furthermore, when guards find out about the complaint, they often subject prisoners to retaliatory harassment and further abuse.¹³⁸

Sexual assault in correctional facilities raises Fourth, Eighth, and Fourteenth Amendment claims.¹³⁹ While prisoners in state and federal institutions may seek redress for civil rights violations by suing prison officials in their personal capacity under 42 U.S.C. § 1983,¹⁴⁰ legal remedies alone will not solve the pervasive problem of sexual assault. The National Institute of Corrections suggests that prevention programs 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.”¹⁴¹ In theory, the new standards that the DOJ set up in 2012 should be helpful in establishing such programs nationwide and remedying

132. COLO. REV. STAT. ANN. § 18-7-701 (West, Westlaw through 2022 2nd Reg. Sess.); DEL. CODE ANN. tit. 11, § 1259 (West, Westlaw through 2023 152nd Gen. Assemb.); MO. STAT. ANN. § 566.145 (West, Westlaw through 2022 2nd Reg. Sess.); NEV. REV. STAT. ANN. § 212.187 (West, Westlaw through legislation of the 82nd Reg. Sess. (2023)); N.M. STAT. ANN. § 30-9-11 (West, Westlaw through 2022 2nd Reg. Sess.); 18 PA. CONS. STAT. ANN. § 3124.2 (West, Westlaw through 2022 Reg. Sess.); S.D. CODIFIED LAWS § 24-1-26.1 (Westlaw through 2022 Reg. Sess.); TENN. CODE ANN. § 39-16-408 (West, Westlaw through 2022 2nd Reg. Sess.); TEX. PENAL CODE ANN. § 39.04 (West, Westlaw through 2021 Reg. Sess.).

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

134. *Id.*

135. *Id.*; see also Flesher, *supra* note 115, at 843.

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

137. *Id.* at 64.

138. *Id.*

139. See Flesher, *supra* note 115, at 849–53. These claims do not only involve forcible rape, but also cross-gender pat frisks, surveillance, strip searches, and body cavity searches. *Id.*

140. See 42 U.S.C.A. § 1983; see also Flesher, *supra* note 115, at 859; Goodmon v. Rockefeller, 947 F.2d 1186, 1187 (4th Cir. 1991) (holding that the commissioner of a state Department of Corrections and prison officials, each acting in their individual capacities, are “persons” under § 1983).

141. See *Amnesty Report on Abuse of Women Prisoners, 1999*, CRIMINAL LEGAL NEWS 21, <https://perma.cc/523Q-XDXL> (last visited Feb. 21, 2023).

the persistent issues of sexual assault in correctional facilities.¹⁴² 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 While by 2015, forty-six states gave assurances that they were advancing towards compliance, states are not required to conduct any outside audits to confirm their progress.¹⁴⁷

D. INMATE-ON-INMATE SEXUAL ABUSE

Sexual abuse by other prisoners 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 perpetrated by staff members, versus 56% by inmates and 44% by staff members in 2011.¹⁵¹

Historically, cases involving sexual abuse of prisoners have not generally been a priority for public prosecutors, a problem the DOJ is pushing to remedy by

142. See Deborah Sontag, *Push to End Prison Rapes Loses Earlier Momentum*, N.Y. TIMES (May 12, 2015), <https://perma.cc/6NCU-MQKG>.

143. See *id.*

144. See *id.*

145. *States' and Territories' Responses to the May 15, 2014 Prison Rape Elimination Act Deadline*, N.M. COAL. OF SEXUAL ASSAULT PROGRAMS, INC., <https://perma.cc/N2PK-FL8P> (last visited Feb. 23, 2023). The governors of Arizona, Florida, Idaho, Indiana, Nebraska, Texas, and Utah declined to comply. *Id.*

146. *FY 2015 List of Certification and Assurance Submissions*, BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST. (June 29, 2015), <https://perma.cc/EU7W-S4GV>. 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 142.

148. See BECK, RANTALA, & REXROAT, *supra* note 45, at 9.

149. See *id.* at 8.

150. BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 251672, PREA DATA COLLECTION ACTIVITIES, 2018, at 2 (June 2018), <https://perma.cc/BT92-9QUP>.

151. *Id.*

calling for harsher sentences for prison sexual abuse cases.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 prisoners subjected to sexual violence has been “deliberate indifference.”¹⁵⁴ A prison official meets this standard if the official knew that a prisoner faced a substantial risk of serious harm and disregarded that risk by denying the prisoner humane conditions of confinement.¹⁵⁵ Additionally, prison officials may be found “deliberately indifferent” if they did not provide adequate care to prisoners after an incident of sexual violence, including counseling, medical attention, collection of evidence, and/or provision of a rape kit.¹⁵⁶ Prison officials are often not held accountable for disregarding the risk of rape and failing to adequately care for victims.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 substance abuse,¹⁵⁸ and many women have been physically or sexually abused prior to incarceration.¹⁵⁹ “Lack of consistent access to health care prior to incarceration often means that [incarcerated] women bring with them untreated sexually transmitted diseases as well as chronic [health] conditions” that complicate the provision of various health care services to women in prison.¹⁶⁰

152. See *No Escape: Male Rape in U.S. Prisons, I. Summary and Recommendations*, HUM. RTS. WATCH (2001), <https://perma.cc/TM6B-J2LZ> (“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.”); see also Glenn Thrush, *Justice Dept. to Seek Stiffer Sentences in Prisoner Abuse Cases*, N.Y. TIMES (Sept. 29, 2022), <https://perma.cc/5HGM-DXMF>.

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.* (“43% of women in state prisons had been physically or sexually abused—sometimes both—at some time before their incarceration.”).

160. *Id.*

A. PROVISION OF GYNECOLOGICAL AND OBSTETRIC HEALTH CARE

Although some U.S. state prison systems provide cervical cancer screenings upon intake and during routine examinations,¹⁶¹ and the BOP states that pelvic examinations are part of routine physical examinations,¹⁶² there is evidence that 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.¹⁶³ Health care concerns are exacerbated by the fact that incarcerated women are more likely to have no access to healthcare prior to incarceration.¹⁶⁴

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 punishment¹⁶⁵ under the Eighth Amendment standard laid out in *Estelle v. Gamble*.¹⁶⁶ 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. § 1983.¹⁶⁷ 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.¹⁶⁸ The Court found mere "[i]nadvertent failure to provide" sufficient care, however, beyond the statute's proscription.¹⁶⁹

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*.¹⁷⁰ 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.¹⁷¹ However, the *Todaro* rule was narrowed by the Supreme Court's

161. See Alexa N. Kanbergs, Mackenzie W. Sullivan, Morgan Maner, Lauren Brinkley-Rubinstein, Annekathryn Goodman, Michelle Davis, & Sarah Feldman, *Cervical Cancer Screening and Follow-Up Practices in U.S. Prisons*, 64 AM. J. OF PREVENTATIVE MED. 244, 246 (2023).

162. See FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., PS 6031.04, PATIENT CARE 27 (June 3, 2014), <https://perma.cc/LF5D-2VW9>.

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

164. Silvia Mignon, *Health Issues of Incarcerated Women in the United States*, SCILEO (June 2016), <https://perma.cc/94L8-X5FK>.

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

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

167. *Estelle*, 429 U.S. at 104–05. Deliberate indifference to a prisoner's serious health care needs violates the Eighth 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.*

168. 42 U.S.C. § 1983.

169. *Estelle*, 429 U.S. at 105–06.

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

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

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.¹⁷² Furthermore, as noted earlier, the PLRA has created substantial disincentives and hurdles to bringing an Eighth Amendment case, namely the PLRA's exhaustive administrative remedy requirement.¹⁷³

B. PREGNANCY, CHILDBIRTH, AND CHILD CARE IN CUSTODY

According to a recent study, 4% of women prisoners enter prison pregnant, and more may become pregnant after entering prison as a result of rape by prison guards.¹⁷⁴ Other studies indicate that up to 25% of women in correctional facilities are or have been pregnant within the last year.¹⁷⁵ Many incarcerated women's pregnancies are classified as high risk due to drug addiction, sexually transmitted diseases, or pelvic inflammatory disease.¹⁷⁶ In the case of pregnant drug addicts, prison health professionals must be careful to provide appropriate detoxification, otherwise the fetus will experience the same symptoms of withdrawal as the mother.¹⁷⁷

Many prisons use restraints on women who are pregnant, are in labor, or have just given birth.¹⁷⁸ The practice of shackling can have serious consequences on the health of the mother and child.¹⁷⁹ 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.¹⁸⁰ According to ACOG, shackling interferes with the ability of physicians to safely practice medicine and is "demeaning and rarely necessary."¹⁸¹ 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 difficult for her to protect herself and the fetus if she does fall.¹⁸² Furthermore, shackling can be dangerous during

172. *Farmer v. Brennan*, 511 U.S. 825, 835 (1994).

173. 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.").

174. See Carolyn Sufrin, Lauren Beal, Jennifer Clarke, Rachel Jones, & William D. Mosher, *Pregnancy Outcomes in U.S. Prisons, 2016-2017*, 109 AM. J. PUB. HEALTH 799, 804 (2019); see also STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 117TH CONG., *SEXUAL ABUSE OF FEMALE INMATES IN FEDERAL PRISONS* (Dec. 13, 2022), <https://perma.cc/4DZK-3M2S>.

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

176. *Id.* at 265.

177. *Id.*

178. See Camille Kramer, Karena Thomas, Ankita Patil, Crystal M. Hayes, & Carolyn B. Sufrin, *Shackling and Pregnancy Care Policies in U.S. Prisons and Jails*, 27 MATERNAL & CHILD HEALTH J. 186, 187 (2023).

179. *Id.*

180. *Reproductive Health Care For Pregnant and Postpartum Incarcerated Women And Adolescent Females*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS 30 (July 2021), <https://perma.cc/NRV7-GEQT>.

181. *Id.*

182. *Id.* at 31.

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.¹⁸³ In the case of a cesarean section, a delay of even five minutes could result in brain damage to the infant.¹⁸⁴

Nelson v. Correctional Medical Services, a 2009 Eighth Circuit decision, held that under the Eighth Amendment, a prisoner has a “clearly established” right not to be shackled during labor, absent clear and convincing evidence that she is a security or flight risk.¹⁸⁵ 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.”¹⁸⁶ 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.”¹⁸⁷ Despite this, fourteen states and the federal government do not limit shackling of pregnant prisoners,¹⁸⁸ and many state laws that do limit shackling are not strictly enforced.¹⁸⁹ The Ninth and the Sixth Circuits have both addressed the shackling issue in light of *Nelson*, but both courts declined to find that shackling prisoners *per se* violated the Eighth Amendment.¹⁹⁰ Putting pregnant women in restraints is argued to be a human rights violation.¹⁹¹ Congress has considered bills that aim to curtail shackling and promote better quality pre- and post-natal care of incarcerated persons, including the Pregnant Women in Custody Act,¹⁹² the FIRST STEP Act,¹⁹³ and the Dignity for Incarcerated Women Act.¹⁹⁴

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.¹⁹⁵ Programs allowing children born in prison to remain with their incarcerated mothers, known as

183. *ACLU Briefing Paper: The Shackling of Pregnant Women & Girls in U.S. Prisons, Jails & Youth Detention Centers*, AM. C.L. UNION, <https://perma.cc/4EWP-NJVE> (last visited Feb. 23, 2023).

184. *Id.*

185. *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 531 (8th Cir. 2009).

186. *Brawley v. Washington*, 712 F. Supp. 2d 1208, 1221 (W.D. Wash. 2010).

187. *Id.* at 1219.

188. *Reproductive Health Care For Pregnant and Postpartum Incarcerated Women And Adolescent Females*, *supra* note 180, at 30.

189. *See Kramer, Thomas, Patil, Hayes, & Sufrin, supra* note 178, at 187.

190. *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).

191. *ACLU Briefing Paper: The Shackling of Pregnant Women & Girls in U.S. Prisons, Jails & Youth Detention Centers, supra* note 183.

192. Pregnant Women in Custody Act, H.R. 6805, 115th Cong. (2018).

193. FIRST STEP Act, H.R. 5682, 115th Cong. (2018).

194. Dignity for Incarcerated Women Act, S. 1524, 115th Cong. (2018).

195. *See Susan Friedman, Aimee Kaempf, & Sarah Kauffman, The Realities of Pregnancy and Mothering While Incarcerated*, 48 J. AM. ACAD. PSYCHIATRY & L. 365, 370 (2020).

Mother-Baby Units, have become an option in a quarter of states.¹⁹⁶ 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.¹⁹⁷ 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.¹⁹⁸ 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.¹⁹⁹

C. ACCESS TO ABORTION

For now, abortion remains available for prisoners in the federal prison system.²⁰⁰ 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."²⁰¹ 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."²⁰² 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 a result of rape.²⁰³ 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.²⁰⁴

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

196. *Id.* at 368.

197. *See id.* at 369–70; Justin Jouvenal, *Raising Babies Behind Bars*, WASH. POST (May 11, 2018), <https://perma.cc/LUN4-7N4L>.

198. *See* Friedman, Kaempf, & Kauffman, *supra* note 195, at 368.

199. *See* Colleen Mastony, *Bringing Up Baby While Doing Time*, CHI. TRIB. (May 3, 2015, 10:01 AM), <https://perma.cc/SB96-BVNJ>.

200. *See* Joshua Sharfstein, *Jailed and Pregnant: What the Roe Repeal Means for Incarcerated People*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Sept. 21, 2022), <https://perma.cc/PLF3-6WPT>.

201. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., PS 5200.07, FEMALE OFFENDER MANUAL 16–17 (May 12, 2021), <https://perma.cc/H9YZ-3L62>.

202. 28 C.F.R. § 551.23 (2022).

203. *See* PS 5200.07, FEMALE OFFENDER MANUAL, *supra* note 201.

204. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., P5360.09, RELIGIOUS BELIEFS AND PRACTICES 8 (Dec. 31, 2004), <https://perma.cc/G2DD-T57U>.

abortion.²⁰⁵ Furthermore, many facilities abide by their own ad hoc policies, often restricting female prisoners' right to an abortion.²⁰⁶ 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 prisoners to obtain "elective abortions," more than one in ten will not provide transportation or arrange appointments.²⁰⁷ Abortion and contraception access varies amongst facilities; while some states offer abortion, few carry abortion policies, leaving abortions to be relatively uncommon.²⁰⁸ Furthermore, financial barriers and physical distance from abortion caregivers make it more difficult for female prisoners to receive care.²⁰⁹

Two Supreme Court decisions serve as guides to determine the constitutionality of the various state policies and the legal rights of prisoners.²¹⁰ 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.²¹¹ This "reasonable relation" standard is much more relaxed than the alternative strict scrutiny standard.²¹² In *Estelle v. Gamble*, the Court held that a failure to respond to a prisoner's serious medical needs is a violation of the Eighth Amendment's prohibition against cruel and unusual punishment if such failure evidences deliberate indifference.²¹³

While *Estelle* suggests that the deprivation of abortion care in prison could be an Eighth Amendment violation, there remains substantial disagreement about the scope of abortion rights in prison.²¹⁴ The Sixth Circuit refused to recognize the "failure to arrange an abortion" as "deliberate indifference to serious medical needs" that violates the Eighth Amendment under *Estelle*.²¹⁵ The Third Circuit, however, has come to the opposite conclusion under the *Estelle* framework and held that denying pregnant prisoners the right to elective, non-therapeutic

205. Carolyn Sufrin, Mitchell D. Creinin, & Judy C. Chang, *Incarcerated Women and Abortion Provision: A Survey of Correctional Health Providers*, 41 PERSP. ON SEXUAL & REPROD. HEALTH 6, 8 (2009).

206. *Incarcerated Women's Abortion Access Limited by Varying Policies and Practices*, GUTTMACHER INST. (Mar. 9, 2009), <https://perma.cc/M9F9-U5TD>.

207. Sufrin, Creinin, & Chang, *supra* note 205, at 6. Specifically, of the 68% of facilities that allow elective abortions, 88% provide transportation, but only 54% help arrange appointments. *Id.*

208. Katie Rose Quant & Leah Wang, *Recent studies shed light on what reproductive "choice" looks like in prisons and jails*, PRISON POL'Y INITIATIVE (Dec. 8, 2021), <https://perma.cc/5FKF-DTPX>.

209. *Id.*

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

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

212. *Id.*

213. *Estelle v. Gamble*, 429 U.S. 97, 104, 106 (1976).

214. See *Gibson v. Matthews*, 926 F.2d 532, 536 (6th Cir. 1991); *Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 349 (3d Cir. 1987).

215. *Gibson*, 926 F.2d at 536.

abortion violates their Eighth Amendment rights.²¹⁶ 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.²¹⁷ Further, regulations that are part of a general policy on elective, or non-emergency, medical procedures have been more difficult to challenge.²¹⁸ 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.²¹⁹ Finally, the Eighth Circuit, in *Roe v. Crawford*, found that a Missouri Department of Corrections policy that prohibited transporting prisoners for elective abortions violated prisoners’ Fourteenth Amendment rights under *Turner* but did not violate the Eighth Amendment under *Estelle* because elective abortions are not “serious medical needs.”²²⁰ In light of the decision in *Dobbs v. Jackson Women’s Health Organization*, the future of access to abortion in prisons remains unclear.²²¹

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 obtained an abortion notwithstanding opposition from the Trump administration.²²² An appeals court ordered that the teenager be provided the abortion, but the Supreme Court declined to either affirm or reverse the lower court decision. The Court opined that the question was moot, thus nullifying any precedential power of the decision.²²³

V. TRANSGENDER PRISONERS

In correctional facilities, transgender individuals are “exposed to horrific rates of abuse by both staff and their fellow inmates, facing physical and sexual assault at much higher rates than their counterparts.”²²⁴ Traditionally, prison housing for transgender prisoners who have not had gender affirmation surgery was generally determined according to gender assigned at birth regardless of other factors.²²⁵ 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

216. *Monmouth Cnty. Corr. Institutional Inmates*, 834 F.2d at 349.

217. *Id.* at 351.

218. See Kasdan, *supra* note 210, at 60–61.

219. *Victoria W. v. Larpen*, 369 F.3d 475, 488–89 (5th Cir. 2004).

220. *Roe v. Crawford*, 514 F.3d 789, 801 (8th Cir. 2008).

221. 142 S. Ct. 2228 (2022).

222. Manny Fernandez, *U.S. Must Let Undocumented Teenager Get Abortion, Appeals Court Says*, N.Y. TIMES (Oct. 24, 2017), <https://perma.cc/6F57-LMGC>.

223. Adam Liptak, *Supreme Court Rejects Bid to Discipline ACLU*, N.Y. TIMES (June 4, 2018), <https://perma.cc/2ZRV-759K>.

224. *Police, Jails, & Prisons*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/7AF7-WDEH> (last visited Mar. 9, 2023).

225. See Benish A. Shaw, *Lost in the Gender Maze: Placement of Transgender Inmates in the Prison System*, 5 TOURO L. CTR. J. OF RACE, GENDER, & ETHNICITY 39, 42–44 (2010) (describing the “initial booking protocol” used to classify arrestees based on their genitalia).

assess prisoners for risk of sexual victimization or abuse—risk factors included whether the prisoner was (or was perceived as) gay, lesbian, bisexual, transgender, intersex, or gender nonconforming.²²⁶ The rule required further that prisons use the screening results in housing, bed, work, and education assignments, each determination being made on a case-by-case basis in light of the prisoners' health and safety amongst other factors.²²⁷ In pursuit of compliance, states have developed more comprehensive internal standards and policies for screening transgender prisoners. For example, before the PREA rule, the California Department of Corrections and Rehabilitation, classified prisoners for housing based on characteristics such as an inmate's age, history of violence or nonviolence, repeat offender status, and mental-health history but failed to account for sexual orientation, gender, and risk of victimization.²²⁸ 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.²²⁹

While most state prison systems currently comply with PREA standards or are working towards compliance,²³⁰ the PREA rule allows for "case-by-case determinations."²³¹ While "serious consideration" might be given to a "transgender or intersex inmate's own views[.]" a prison system might still assign housing based on its own perception of an "inmate's health and safety . . . [and] management and security problems."²³² The management and safety factors might permit prison systems to justify denying gender-confirming institutional assignments by emphasizing their interest in administrability or in addressing the privacy concerns of incarcerated cis-women.²³³ 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, whereas the previous policy recommended housing by gender identity where appropriate.²³⁴ The update made clear that assigning transgender and intersex prisoners to federal prisons in conformity with gender

226. 28 C.F.R. § 115.41 (2022).

227. 28 C.F.R. § 115.42 (2022).

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

229. CAL. CODE REGS. tit. 15, § 3269 (2018); Cal. Dep't of Corr. and Rehab., Operations Manual § 62080.14 (2022).

230. Douglas Routh, Gassan Abess, David Makin, Mary K. Stohr, Craig Hemmens, & Jihye Yoo, *Transgender Inmates in Prison: A Review of Applicable Statutes and Policies*, 59 INT'L J. OFFENDER THERAPY & CRIMINOLOGY 1, 10 (2015).

231. 28 C.F.R. § 115.42 (2022).

232. *Id.*

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

234. Compare FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., P5200.04 CN-1, CHANGE NOTICE (2018), with FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., P5200.04, TRANSGENDER OFFENDER MANUAL (2017).

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.”²³⁵ This policy and previous policies have failed to specify what medical or mental history is needed to qualify for housing and program assignments conforming with individuals’ gender identity.²³⁶ Because a majority of transgender people do not undergo gender affirmation surgeries,²³⁷ 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 might actually increase security concerns. Transgender individuals report alarming rates of sexual victimizations by other prisoners or facility staff.²³⁸ 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.²³⁹ Although administrative segregation may protect transgender prisoners from abuse at the hands of fellow prisoners, it can also isolate prisoners with predatory staff and eliminate the possibility of witnesses who could report abuse.²⁴⁰ Administrative segregation may also deny transgender prisoners “adequate recreation, living space, educational and occupational rehabilitation opportunities, and associational rights for non-punitive reasons,”²⁴¹ thereby rendering it comparable to punitive segregation and imbuing it with the court-recognized potential for psychological damage.²⁴² Furthermore, placing transgender prisoners in confinement deprives them of the means to form

235. *Id.*

236. *Id.*

237. Jaime M. Grant, Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, & Mara Keisling, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, NAT’L CTR. FOR TRANSGENDER EQUAL. & NAT’L GAY & LESBIAN TASK FORCE 78, 79, 84 (2011), <https://perma.cc/5C6U-V5P2> (finding that only 62% of transgender individuals undergo hormone therapy, while a vast minority undergo surgery).

238. *Compare* BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., NCJ 248824, PREA DATA COLLECTION ACTIVITIES, 2015, at 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 JUST. STAT., U.S. DEP’T OF JUST., NCJ 241399, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-2012, at 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.”).

239. 28 C.F.R. § 115.43 (2022); *see* Darren Rosenblum, “Trapped” in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 529 (2000).

240. Sydney Tarzwell, Note, *The Gender Liens are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 180 (2006).

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

242. Tarzwell, *supra* note 240, at 180 (citing *Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988)); *see also* PREA DATA COLLECTION ACTIVITIES, 2015, *supra* note 238 (noting that transgender inmates reported high levels of staff sexual misconduct in prisons (17%) and jails (23%)).

positive communities and relationships that can help those who are targets of violence to survive.²⁴³

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.²⁴⁴ *Farmer*, a transgender woman in a male prison possessed distinctly female physical characteristics.²⁴⁵ As a result of her placement in a men's general population prison, she was beaten and raped.²⁴⁶ 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.²⁴⁷ 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."²⁴⁸ 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."²⁴⁹ 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.²⁵⁰ Such treatment raises the same Equal Protection and Title IX questions as the disparity in incarceration conditions between genders and will need to be addressed.²⁵¹

The issue of whether a transgender person is entitled to hormone therapy or sex-reassignment surgery (SRS) while in prison has been litigated extensively.²⁵² 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

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

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

245. *Id.*

246. *Id.* at 830.

247. *Id.* at 825.

248. *Id.* at 847.

249. *Id.* at 842.

250. See Rosenblum, *supra* note 239, at 529.

251. *Id.* at 534.

252. *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 v. Spencer*, 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).

biological sex.²⁵³ This definition allows transgender prisoners to argue that withholding hormone therapy or gender affirmation 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 “medical needs” of transgender prisoners.²⁵⁴ 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.²⁵⁵ 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.”²⁵⁶

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.²⁵⁷ Similarly, the Ninth Circuit explained that “a blanket rule [against hormone therapy] . . . constituted deliberate indifference” to a prisoner’s medical needs in violation of the Eighth Amendment.²⁵⁸ 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 prisoner.²⁵⁹

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.²⁶⁰ A 2015 fifty-state survey found that thirty-seven states allow for counseling and some form of a treatment plan for transgender individuals.²⁶¹ Twenty-eight states do not allow transgender individuals to obtain hormone treatment once incarcerated.²⁶² Only thirteen states allow transgender prisoners to initiate hormone treatment.²⁶³ Twenty-one states allow individuals to continue hormone therapy

253. Tiffany Sanders, Note, *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, 477–78 (2014).

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

255. 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, 555 (7th Cir. 2011)).

256. *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).

257. *Fields*, 653 F.3d at 558–59.

258. *Allard v. Gomez*, 9 F. App’x 793, 795 (9th Cir. 2001).

259. *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).

260. See Routh, Abess, Makin, Stohr, Hemmens, & Yoo, *supra* note 230, at 12.

261. *Id.*

262. *Id.*

263. *Id.*

initiated before incarceration, while twenty-two states do not.²⁶⁴ Only seven states allow for gender affirmation surgery.²⁶⁵ Even if a state considers hormone therapy and surgery as treatment options, a state does not violate the Eighth Amendment by providing alternative treatment plans.²⁶⁶

Unfortunately, denying transgender prisoners access to hormone therapy has led to autocastration in at least six facilities in four states.²⁶⁷ 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.”²⁶⁸

VI. GENDER DISPARITY ON DEATH ROW

At the end of 2020, women constituted only 2.1% of all prisoners on death row, whereas 97.9% were men.²⁶⁹ This remains consistent with the U.S.’s long-standing history of gender disparity in capital punishment sentencing and in executions. As of April 2022, of the twenty-four jurisdictions that have the death penalty, only fifteen have women on death row, with over 40% of those women in California.²⁷⁰ As of 2006, “10% of murder arrests [essentially the only crime still punishable by death] were of women but only 2% of death sentences for murder [we]re of women.”²⁷¹

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.²⁷² The Supreme Court in *Atkins v. Virginia* noted that capital punishment sentences are typically limited to those who commit a murder with an aggravating circumstance.²⁷³ During the sentencing hearing, a jury

264. *Id.* at 12, 18.

265. *Id.* at 18.

266. *See, e.g.*, *Kosilek v. Spencer*, 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).

267. Maruri, *supra* note 254, at 812.

268. *Id.* at 807.

269. TRACY L. SNELL, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST. NCJ 302729, CAPITAL PUNISHMENT, 2020 – STATISTICAL Tables 11 (2021); *Size of Death Row By Year*, DEATH PENALTY INFO. CTR., <https://perma.cc/4WZT-ZGNJ> (last visited Mar. 5, 2023).

270. *See States with the Death Penalty, Death Penalty Bans, and Death Penalty Moratoriums*, PROCON (Feb. 22, 2023), <https://perma.cc/8WS5-BQM2>; *Current Female Death Row Prisoners*, DEATH PENALTY INFO. CTR. <https://perma.cc/33JZ-UZMT> (last visited Mar. 9, 2023).

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

272. *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (“capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’” (quoting *Roper v. Simmons*, 543 U.S. 551, 568 (2005))); Streib, *supra* note 271, at 615.

273. *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).

considers aggravating and mitigating circumstances.²⁷⁴ Jurisdictions typically require juries to find at least one aggravating factor or circumstance which is not outweighed by mitigating factors.²⁷⁵ Potential aggravating factors include the relationship between the victim and the defendant, extreme brutality, commission for the felony, multiple murders, and a prior record of violence.²⁷⁶ Many of the aggravating and mitigating factors noted in death penalty statutes tend to vary along gender lines.²⁷⁷

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.²⁷⁸ 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.²⁷⁹ For example, in 2017, the Federal Bureau of Investigation found that men commit a disproportionately higher percentage of violent crimes than do women—accounting for 79.5% of arrestees for violent crimes.²⁸⁰

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.²⁸¹ 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.²⁸² Because the victims of female killers are substantially more likely to be family members or intimate partners, 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

274. TRACY L. SNELL, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST. NCJ 254786, CAPITAL PUNISHMENT, 2018 – STATISTICAL TABLES 1 (2020); Streib, *supra* note 271, at 108–11.

275. CAPITAL PUNISHMENT, 2018 – STATISTICAL TABLES, *supra* note 274, at 1.

276. Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Domestic Murder in the Post-Furman Era*, 49 SMU L. REV. 1507, 1514–15 (1996).

277. Streib, *supra* note 271, at 108–11.

278. *Id.* at 107–18.

279. *Id.* at 108.

280. *Persons Arrested, Crime in the United States 2017*, FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., <https://perma.cc/54L6-KV6P> (last visited Mar. 9, 2023).

281. See Streib, *supra* note 271, at 109–10.

282. See Rapaport, *supra* note 276, at 1508.

283. Streib, *supra* note 271, 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 276, at 1516–17.

family member or intimate partner do not actually fit this narrative, and are 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, including the defendant’s background, record, character, or any other relevant circumstances 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

Another theory offers a more generalized explanation that the disparity is directly linked to prosecutors’ and juries’ “chivalric attitudes.”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

285. *Id.* at 1518.

286. See 18 U.S.C.A. § 3592(a) (West, Westlaw through Pub. L. No. 114-61 (excluding Pub. L. No. 114-52, 114-54, 114-59, and 114-60)); Streib, *supra* note 271, at 110–11.

287. Streib, *supra* note 271, at 111.

288. *Id.*

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.C. 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, Stephen P. Garvey, & Sheri Lynn Johnson, *Future Dangerousness in Capital Cases: Always “At Issue,”* 86 CORNELL L. REV. 397, 398 (2001).

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

293. *Id.* at 106.

294. *Id.*

295. *Id.*

296. *Id.*

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 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 in the state indicates that there is no gender-neutral explanation.³⁰⁴ Conversely, the mitigating factors allow 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

297. Mogul, *supra* note 289, at 483.

298. *Id.* (“Forty percent of the women on death row have had some implication of lesbianism used against them at trial regardless of whether it was true or not.”).

299. *Id.*; see generally Victoria A. Brownworth, *Why are so many lesbian, bi, and transgender women in prison?*, PA. CAP.-STAR (Dec. 19, 2021, 6:30 AM), <https://perma.cc/ALJ9-Y2Y2>.

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, 432 (2011).

301. *McCleskey v. Kemp*, 481 U.S. 279, 280 (1987).

302. *Id.*

303. Salvucci, *supra* note 300, at 433.

304. *Id.* at 425.

305. *Id.* at 425–26.

306. *Furman v. Georgia*, 408 U.S. 238, 365 (1972) (Marshall, J., concurring).

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

Although immigrants who enter the U.S. 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 Bureau of Citizenship and Immigration Services within DHS and provided that DHS would enforce the Homeland Security Act and have primary enforcement responsibility over other immigration laws.³¹⁰ In 2017, ICE, a federal agency under the jurisdiction of DHS, maintained an average daily population of 30,539 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 (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 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

307. See Streib, *supra* note 271, at 627–28.

308. *Id.* at 628.

309. WITH LIBERTY AND JUSTICE FOR ALL, *supra* note 75, at 8.

310. Homeland Security Act of 2002, Pub. L. No. 107-296, § 451(a)(3)(A)–(F), 116 Stat. 2135 (2002).

311. U.S. IMMIGR. & CUSTOMS ENF’T, DEP’T OF HOMELAND SEC., *Fiscal Year 2018 Congressional Justification* 14, <https://perma.cc/4R5B-KSJV>.

312. WITH LIBERTY AND JUSTICE FOR ALL, *supra* note 75, at 10–11.

313. *Id.* at 25; *Performance-Based National Detention Standards 2011*, U.S. IMMIGR. AND CUSTOMS ENF’T (2011), <https://perma.cc/P7DF-Y6EP> [hereinafter PBNDS 2011].

314. See WITH LIBERTY AND JUSTICE FOR ALL, *supra* note 75, at 25.

315. See PBNDS 2011, *supra* note 313, at i; WITH LIBERTY AND JUSTICE FOR ALL, *supra* note 75, at 29.

316. WITH LIBERTY AND JUSTICE FOR ALL, *supra* note 75, at 29.

317. *Progress in Implementing 2011 PBNDS Standards and DHS PREA Requirements at Detention Facilities*, U.S. DEP’T OF HOMELAND SEC., IMMIGR. & CUSTOMS ENF’T 1, 8 (Mar. 19, 2018), <https://perma.cc/UU3P-GKTB>.

standards cover 67% of ICE's average daily population and 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 LGBTQ detainees' rights and, in particular, the dignity of LGBTQ 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, 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

318. *Id.* at 3–4.

319. WITH LIBERTY AND JUSTICE FOR ALL, *supra* note 75, at 36.

320. *Further Guidance Regarding the Care of Transgender Detainees*, U.S. IMMIGR. & CUSTOMS ENF'T 15 (June 19, 2015), <https://perma.cc/TS5K-4647> [hereinafter ICE Transgender Detainees].

321. *Id.*

322. *Id.*

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

324. *Id.* at 273–74.

325. *Id.* at 323.

326. *Id.*

327. *Id.* at 322.

328. *Review of the Use of Segregation for ICE Detainees*, U.S. IMMIGR. & CUSTOMS ENF'T 1 (Sept. 4, 2013), <https://perma.cc/3J9G-BVWD> [hereinafter ICE Detainees].

329. *Id.* at 2.

330. WITH LIBERTY AND JUSTICE FOR ALL, *supra* note 75, at 37–38.

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 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.³⁴⁰

The 2014 DHS PREA regulation requires ICE to publish sexual assault data annually, but the Agency has yet to do so, making it extremely difficult to accurately assess the rate of abuse in ICE facilities.³⁴¹ However, it is clear that sexual violence is a serious problem in detention centers, particularly for LGBTQ

331. ICE Transgender Detainees, *supra* note 320, at 15; *see also* WITH LIBERTY AND JUSTICE FOR ALL, *supra* note 75, at 38.

332. *Guzman-Martinez v. Corr. Corp. of Am.*, No. CV 11-02390-PHX-NVW, 2012 WL 2873835, at *2–3 (D. Ariz. July 13, 2012); *Shaw v. District of Columbia*, 944 F. Supp. 2d 43, 47 (D.D.C. 2013).

333. WITH LIBERTY AND JUSTICE FOR ALL, *supra* note 75, at 38.

334. ICE Detainees, *supra* note 328, at 1.

335. *Id.* at 2.

336. *Id.* at 5.

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. *Id.* at 1443.

341. PREA, U.S. IMMIGR. & CUSTOMS ENF’T, <https://perma.cc/7BNT-E8RV> (last updated Mar. 5, 2023); Alice Sperti, *Detained, Then Violated*, INTERCEPT, (Apr. 11, 2008, 12:11 PM), <https://perma.cc/2EJR-NYL2>.

individuals.³⁴² New studies reveal that LGBTQ detainees are 97% more likely to be sexually assaulted than other detainees.³⁴³ In 2017, LGBTQ individuals accounted for 0.14% of the ICE detainee population but they accounted for 12% of the victims of sexual assault in detention centers.³⁴⁴

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.³⁴⁵ 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.³⁴⁶ This process was a departure from the past practice of using civil deportation rather than criminal prosecution in these instances.³⁴⁷ 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.³⁴⁸ 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.³⁴⁹ A five-year study of immigrant youth centers found that police received 125 calls from immigrant youth shelters to report offenses of a sexual nature.³⁵⁰

VIII. CONCLUSION

Treatment discrepancies between male and female prisoners remain a serious problem in the U.S. penological system. Gender disparities in cross-state transfer rates; segregation of LGBTQ prisoners; implementation of prison rape elimination guidelines; conditions in 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

342. Julie Moreau, *LGBTQ migrants 97 times more likely to be sexually assaulted in detention, report says*, CNN (June 6, 2018, 10:01 AM), <https://perma.cc/5FAT-2Z86>.

343. *Id.*

344. *Id.*

345. Katie Reilly, *Nearly 2,000 Children Have Been Separated From Their Families During Trump Border Crackdown*, TIME (June 16, 2018, 10:56 AM), <https://perma.cc/PVS6-KGQW>.

346. *Id.*

347. *Id.*

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

349. *Arizona Shelter Shut in Latest Case of Migrant Child Abuse*, CBS NEWS (Oct. 11, 2018, 6:22 PM), <https://perma.cc/9XG9-3P6A>.

350. Ailsa Chang, *ProPublica Report Finds Abuse Reported In Immigrant Youth Shelters*, NPR (July 31, 2018, 4:40 PM), <https://perma.cc/S5TJ-AMJ7>.

drug offenders may have positive effects for female prisoners, many of whom are in prison for drug offenses.³⁵¹ 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.

351. See Kennedy, *supra* note 12, at 170.