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CRUEL AND UNUSUAL PUNISHMENT

Stopping the Dangerous Policies
Putting Men in Women's Prisons

MAY MAILMAN & INEZ STEPMAN

Foreward by Amie Ichikawa

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Independent Women is a 501(c)(3) nonprofit organization advancing policies that actually enhance opportunity and well-being.

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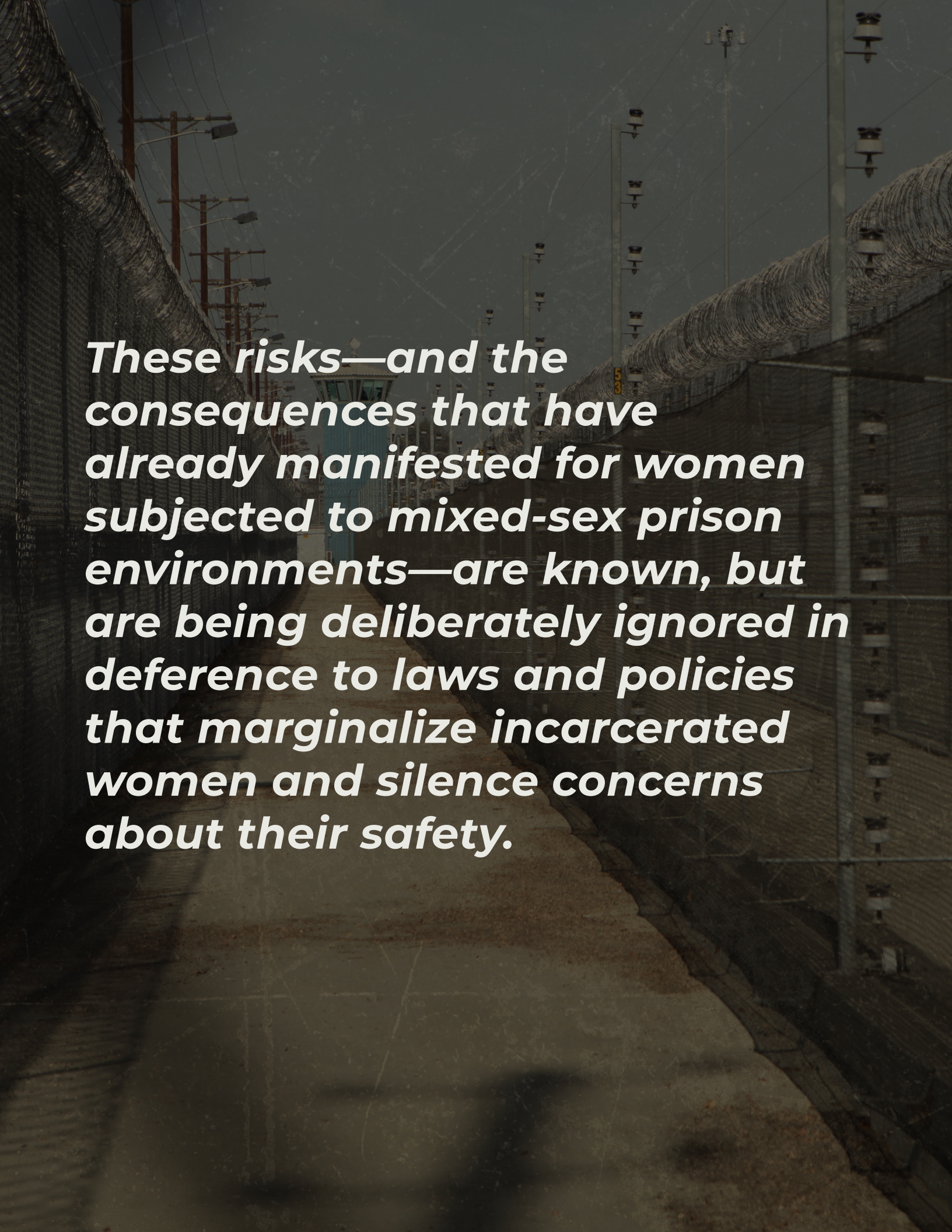
MAY MAILMAN & INEZ STEPMAN

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A photograph of a prison corridor, viewed from a low angle looking down a long, narrow path. The path is flanked on both sides by high walls made of chain-link fencing, topped with multiple layers of barbed wire. Tall, thin poles with several surveillance cameras are spaced along the walls. The lighting is dim and somewhat overcast, creating a somber and institutional atmosphere. The text is overlaid on the left side of the image in a white, bold, italicized font.

These risks—and the consequences that have already manifested for women subjected to mixed-sex prison environments—are known, but are being deliberately ignored in deference to laws and policies that marginalize incarcerated women and silence concerns about their safety.

TABLE OF CONTENTS

| | |
|--|----|
| Foreward | 7 |
| Executive Summary | 9 |
| Introduction | 11 |
| The Risks Are Obvious | 13 |
| Current State Of Law and Policy Regarding Males in Women’s <u>Federal</u> Prisons | 15 |
| Current State Of Law And Policy Regarding Males in Women’s <u>State</u> Prisons | 19 |
| Legal Challenges to Gain Access to Women’s Prisons | 27 |
| Transferring Men to Women’s Prisons Presents Constitutional and Other Legal Concerns | 29 |
| A Note On Sex-Trait Modification Procedures | 35 |
| Policy Recommendations | 37 |
| Further Resources | 39 |
| Endnotes | 41 |

A close-up portrait of a woman with long, dark hair and glasses, looking directly at the camera with a serious expression. The background is dark and out of focus.

“Women’s safety, their mental health, overall well-being, everything has been compromised.”

Amie Ichikawa | Former Inmate and Independent Women Ambassador

FOREWARD

As a formerly incarcerated woman, and an advocate for my sisters inside, I write this foreword with a sense of urgency and responsibility. The Prison Rape Elimination Act (PREA) was enacted with good intent: to protect the dignity, safety, and human rights of the incarcerated. But in practice, it has forgotten women, often incarcerated after years of sexual abuse and violence.

Women must already hurdle cultural indifference and a lack of accountability to find safety from sexual violence in prison. Their challenges have been exacerbated by federal and state policies that forcibly house men inside women's prisons, and censor their complaints. As someone who has been in prison, I know firsthand the challenges women face—both as victims and as nervous warriors navigating a search for help.

As you review this report, remember who hangs in the balance: women whose lives have been full of suffering, and who are mothers, daughters, sisters, wives, and now my family.

Think of Alissa Kamholz, a survivor of child sex trafficking who was given to her stepfather and his biker gang as a wedding present by her mother. Like many incarcerated women, prison was her last safe place. She is now surrounded by men, some of whom strongly resemble her abusers, and have long histories of violence against women. In fact, a man who is affiliated with the same gang as her childhood abusers was placed in her cell. This individual exposed himself to her cellmates and punched a woman in the face in their unit. The staff response was to move the individual to an honor dorm, in a cell with his girlfriend. This proximity has eliminated any chances of Alissa rehabilitating or attaining a livable standard of mental health. No one can heal in a permanent state of hypervigilance.

For every woman forced into silence, let this report restore her voice. For every woman who fears retaliation for speaking out, let these recommendations pave the way for her safety and well-being. And for every woman who dreams of a future beyond the confines of prison walls, let this moment mark a step closer to making her future one of dignity and hope.

Amie Ichikawa

Founder, Women II Women

Ambassador, Independent Women

A photograph of a prison cell with metal bars and a lock on the door. The image is dark and serves as a background for the text.

The state of California spent \$4 million of taxpayer money between 2017 and 2023 on sex-trait modification procedures for trans-identifying male inmates, including breast implants, laser hair removal, and facial feminization surgeries, per records obtained by the Washington Free Beacon. Of this \$4 million in taxpayer funding, \$2.5 million went to vaginoplasties alone.

EXECUTIVE SUMMARY

In recent years, state and federal policies have increasingly permitted or required male inmates, often with histories of violent or sexual offenses, to be transferred to women's facilities based on self-declared gender identity. These practices ignore biological differences and the safety of female inmates, many of whom are survivors of sexual violence. Studies reveal alarming statistics: male inmates identifying as women are disproportionately likely to have committed sexual offenses, and incarcerated women face heightened risks of harassment and assault under these policies.*


This report explores the dubious legal foundations of these practices, including interpretations of the Prison Rape Elimination Act (PREA), the Americans with Disabilities Act (ADA), and the Equal Protection Clause. These laws have been contorted to prioritize the comfort of trans-identifying inmates at the expense of women's safety, dignity, and constitutional rights. Female inmates are left vulnerable in intimate spaces, subject to indignities such as invasive searches and compelled speech, and denied the protective environment single-sex prisons were designed to provide.

The report calls for decisive action through policy and legal reforms, including:

- Amending PREA regulations to prevent gender identity-based transfers to women's prisons.
- Clarifying that the ADA does not mandate "transition" services or mixed-sex housing.
- Protecting incarcerated women's rights to report abuse without retaliation or erasure of their claims.
- Eliminating reliance on activist medical guidelines, such as those from WPATH, which lack scientific consensus.
- Tying federal prison funding to policies that prioritize safety for female inmates.

Ultimately, this report aims to restore fairness, uphold constitutional protections, and prioritize the safety and dignity of incarcerated women in the face of dangerous and ideologically driven policies.

* This report refers to woman as an adult human of the female sex and man as an adult human of the male sex. To the extent this requires further definition, a female is an individual who has, had, or will have through the course of normal development (or would have but for a developmental anomaly, genetic anomaly, or accident) the reproductive system that at some point produces ova. A male is an individual who has, had, or will have through the course of normal development (or would have but for a developmental anomaly, genetic anomaly, or accident) the reproductive system that at some point produces sperm.



“In January 2023, I was sexually assaulted by a ‘transgender woman’ that was physically intact, so didn’t have SRS [sexual reassignment surgery].. It was terrifying, and disgusting, because I knew there was nothing I could do.”

Dana Gray | Current Inmate

INTRODUCTION

Across the country, government officials are knowingly and willingly placing biologically male inmates into women’s prisons on the basis of “gender identity.” Men who claim they identify as women are increasingly allowed into women’s prisons, leaving incarcerated women unable to avoid what are often dangerous situations with men in their proximity, including in living arrangements, showers, toilets, and other intimate spaces.


This unsettling treatment of women stems from the progressive idea that sex—i.e., male or female—is an oppressive category. For progressives, the goal is not to achieve equality between the sexes but to transcend sex altogether by eliminating the concept of sex and replacing it with “gender identity.” But far from decreasing oppression or increasing well-being, the prison context clearly illustrates that the cultural phenomenon of gender identity has painful consequences for the most vulnerable who cannot afford to entertain the idea that there are no innate differences between the sexes. Housing men—many of them with fully intact male genitalia and with criminal histories that include sexual convictions—in women’s prisons is a clear danger to the safety and dignity of female inmates.

Americans generally agree that incarcerating trans-identifying men alongside women in intimate and vulnerable spaces is bad policy. When asked if male criminals should be able to serve their sentences in women’s prisons, 77% of American voters polled responded “no.”¹ Policymakers have not listened.

This report examines federal and state law, including administrative and court-created policies, that push trans-identifying men into women’s prisons. It then presents legal concerns with treating males as women in prisons. Finally, it offers specific policy recommendations to restore equality for incarcerated women.

Percentage of American Voters Who Said Male Criminals Should Not Be Able to Serve Their Sentences in Women’s Prisons





“They’re very honest once they get here. They’ll say, ‘I’ve been down all this time. I’ve exhausted all my appeals. I’m never going home,’ and excuse my language, but they say ‘We just want pussy.’ And so that’s what we’ve been dealing with. I came home from my job and one of the men was in my room.”

Alissa Kamholz | Current Inmate

THE RISKS ARE OBVIOUS

Male Inmates Threaten the Safety of Women

Among the many biological differences between men and women is the propensity and physical ability to commit crimes. Men have higher testosterone levels than women, and testosterone is the chemical that activates the parts of the brain that produce aggression.² Males commit the overwhelming majority of crimes, particularly violent crimes, in the United States.³ For example, men make up 88% of arrests for murder and manslaughter, and 97% of those arrested for rape. The only crime arrests recorded by the FBI for which women make up a majority are in prostitution.⁴

As of October 6, 2024, there are currently 1,487 incarcerated men who identify as women in federal prisons.⁵ Because women make up a small percentage of federal inmates overall, if all of these trans-identifying inmates were transferred to women's prisons, they would represent around 15% of the population, practically ensuring that most female prisoners would have some contact, whether in housing or shared facilities such as showers, with a male. The rest of the United States' approximately 1.9 million-person prison population, also split about 90-10 male to female, is incarcerated in local or state facilities.⁶



86%
of female inmates
have been victims
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or sexual abuse,
most often at the
hands of men

Transferring Trans-Identifying Men to Women's Prisons Harms Women

“The segregation of inmates by sex is unquestionably constitutional,” as the opinion in *Women Prisoners of D.C. Department of Corrections v. District of Columbia* states.⁷ That is because single-sex prisons do not discriminate on the basis of sex, but merely account for innate biological differences between the sexes. Even if differential treatment constituted sex discrimination, single-sex prisons would be legal, as they serve an important government interest to keep female inmates safe from sex-based violence, as well as general violence, from stronger and more violent male prisoners.

The only question is whether trans-identifying men should be viewed as something other than male when it comes to risks for women. The facts are clear: They should not.

First, most of the laws and policies allowing male transfers to women's prisons do not require that those males take cross-sex hormones or receive sex-trait modification surgeries, which means that men with male testosterone levels and fully intact male genitalia can share women's prison spaces. Moreover, there is no evidence that hormones or surgery can eliminate,

or even minimize, factors leading to heightened criminality in males. A Swedish longitudinal study following trans-identifying males with and without various medical interventions found that they retained “a male pattern regarding criminality” regardless of intervention.⁸

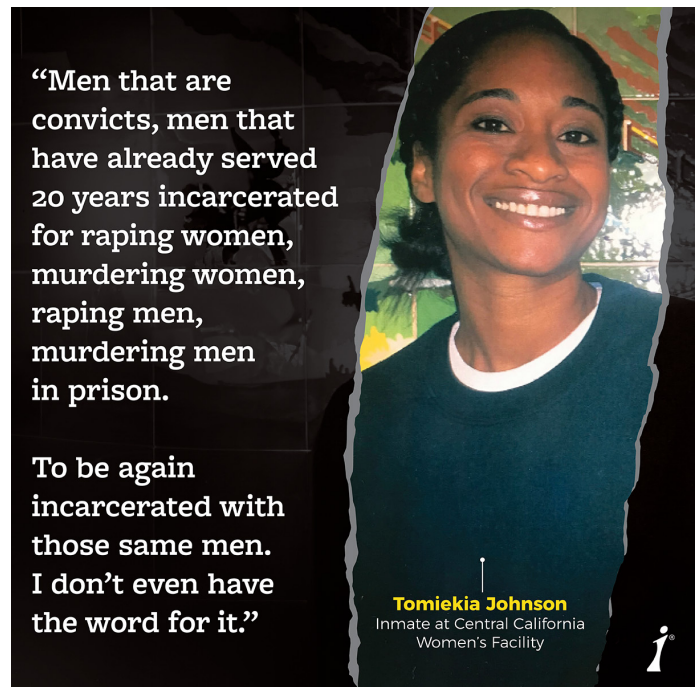
Additionally, a disproportionately large percentage of trans-identifying male inmates looking to transfer to women’s prisons have past sex offenses on their records. In California, for example, more than a third of the male inmates requesting transfer are registered sex offenders.⁹ Nationwide, the Bureau of Federal Prisons acknowledges that nearly half of the trans-identifying male prisoners have sex convictions, compared to just under 12% of the general male prison population.¹⁰

On the other side of the sex equation, the incarcerated female population has an extremely high rate of past sex victimization. Up to 86% of female inmates have been victims of either violence or sexual abuse, most often at the hands of men.¹¹ Many women serving time for violent crimes committed those crimes while in abusive relationships.¹² The absence of a single-sex environment may be particularly difficult for these women, and make rehabilitation or good behavior less likely.

Since the state has begun allowing trans-identifying men into women’s prisons, reports of both consensual sexual activity (illegal in prison) and sexual harassment and assault have been steadily rising.

In addition to the obvious sexual abuse risks, other consequences of introducing men into a single-sex female prison have been documented by a report on male transfers into women’s prisons in California. Male prisons are generally higher-security and must use harsher tactics to prevent and quell frequent violence between inmates. When a man is introduced into a women’s prison, the situation often requires management closer to that in male prisons, which means all female prisoners are subject to restrictions on movement, more invasive bodily searches, and other previously unnecessary indignities.¹³ Perhaps because of these additional invasive measures, the report also documents a spike in female prisoners reporting that these living conditions triggered in them past trauma and abuse.

While the California legislators who passed SB 132 and allowed men to transfer to women’s prisons rhetorically minimized the risk male inmates present to incarcerated women, their legislative record suggests they know the truth: California mandates condom vending machines be placed in women’s prisons.¹⁴



CURRENT STATE OF LAW AND POLICY REGARDING MALES IN WOMEN'S FEDERAL PRISONS

The Prison Rape Elimination Act Has Been Transformed by Regulation

In 2003, Congress responded to a perceived crisis in prison safety, especially with regard to sexual violence in prisons, by passing the Prison Rape Elimination Act (PREA).¹⁵ The PREA was an attempt to hold prison officials responsible for protecting prisoners of both sexes from rape and other sexual violence while they paid their debts to society.

However well-intentioned the act, it has largely failed in its goal of preventing prison rape and holding perpetrators accountable, according to a bipartisan December 2022 report from the Senate Permanent Subcommittee on Investigations.¹⁶ The Subcommittee concluded that the Federal Bureau of Prisons (BOP) “failed to detect or prevent sexual abuse of incarcerated women by male BOP employees. The agency’s poor implementation of the audit program and reporting mechanisms required by PREA allowed serious, repeated sexual abuse in at least four facilities to go undetected. BOP’s internal affairs practices have failed to hold employees accountable, and multiple admitted sexual abusers were not criminally prosecuted as a result. Further, for a decade, BOP failed to respond to this abuse or implement agency-wide reforms.”

Concerningly, in evaluating the risk of victimization, this assessment does not require evaluation of sex, meaning the male risk to females is not part of the risk assessment process.

The PREA requires the Bureau of Justice Statistics to conduct an annual study, based on at least 10% of federal, state, and county prisons, about the rate and effects of prison rape.¹⁷ The Review Panel on Prison Rape conducts annual public hearings, comparing the three prisons with the most prison rape with the two prisons with the least, to understand who commits prison rape, who is victimized by prison rape, and how prisons can improve.¹⁸

Additionally, the PREA established a National Prison Rape Reduction Commission, which recommends national standards for the “detection, prevention, reduction, and punishment” of prison rape. The Attorney General, within one year of receiving the Commission’s report,

had to establish a final rule. The Commission’s report was finalized in 2009, which meant that it was sent to Attorney General Eric Holder in the Obama administration. In 2012, the Obama-era Department of Justice finally released a final rule for the prevention of prison rape.¹⁹

These Obama-era regulations require the agency to screen incoming inmates for their risk of being sexually abused by other inmates or sexually abusive toward other inmates.²⁰ In particular, the regulations require prison officials to consider “whether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming,” in assessing the inmate’s “risk of sexual *victimization*” (emphasis added).²¹ In other words, the Obama Department of Justice was concerned that trans-identifying males might be *victims* of abuse in male company.



A Third of Trans-Identifying Male Inmates Requesting Transfers Are Registered Sex Offenders in CA

The Department of Justice is supposed to use risk information to “separat[e] those inmates at high risk of being sexually victimized from those at high risk of being sexually abusive.”²² When it comes to housing trans-identifying inmates, the Department must consider “the *inmate’s* health and safety, and whether the placement would present management or security problems” in placing trans-identifying prisoners (emphasis added).²³

Concerningly, in evaluating the risk of victimization, this assessment does not require evaluation of sex, meaning the male risk to females is not part of the risk assessment process. These “PREA screenings,” instead of protecting female inmates from sexual assault, have become a process through which incarcerated males gain access to female facilities.

In fact, the Department of Justice has actively encouraged males to live in women’s prisons, requiring it as a step prior to sex-trait modification surgeries and hormonal interventions. According to the BOP, males must experience “full-time real life experience in their preferred gender prior to gender-affirming surgery.”²⁴ The BOP’s chief psychologist says this “full-time” experience is “best fulfilled by living in a facility consistent with one’s gender identity in order to fully experience the full ramifications of adopting the role ultimately, all the social roles, expectations and other aspects of being the other gender from which they were originally assigned at birth.”²⁵

Moreover, these regulations specifically discourage “dedicated facilities” for “lesbian, gay, bisexual, transgender, or intersex” inmates, which could otherwise be a reasonable alternative to transferring males to a women’s prison.²⁶

While regulations could have been amended by future administrations, they were maintained by both the first Trump administration and the Biden-Harris administration.

Department of Justice Policies Prioritize the Comfort of Trans-Identifying Males

In President Obama's final days, the Department of Justice issued Program Statement 5200.04, Transgender Offender Manual (Jan. 18, 2017).²⁷ The manual permitted "housing by gender identity when appropriate," considering the "inmate's health and safety, and whether the placement would present management or security problems," in line with the PREA regulations. The first Trump administration enforced this manual as-is for more than a year.²⁸

In May 2018, the Trump-era Department of Justice modified the manual to "use biological sex as the initial determination" of placement, but ultimately permitted gender identity-based placement "in rare cases" after considering other housing options and the inmate's "progress towards transition."²⁹

In January 2022, the Biden-era Department of Justice updated the manual yet again to eliminate biological sex as the initial determinant of placement in a men's or women's prison.³⁰

Instead, the "Transgender Executive Council," considers factors including the male inmate's "security level, criminal and behavioral/disciplinary history, current gender expression, programming, medical, and mental health needs/information, vulnerability to sexual victimization, and likelihood of perpetrating abuse." Once in the women's facility, the staff ensures his housing unit "does not jeopardize" his "wellbeing."

Women's safety is not a central factor. Instead, in making an initial placement (men's or women's facility), the Council merely considers "the wellbeing of all inmates," but the primary concern is "mitigating risk" to the trans-identifying inmate. Same with the placement in housing units. The staff specifically considers the male's well-being and preferences, and weighs that against general "security concerns."

The lopsided decision criteria continue with regard to shower facilities: there, a trans-identifying male is to be given the option to shower separately and privately if facilities allow, while no similar treatment is afforded to female inmates who feel uncomfortable or endangered showering with a biological male.

The Obama DHS then issued a directive in June 2015 to house trans-identifying inmates "to ensure the detainee's safety," not to ensure the safety of women.

Immigration Detention Centers Also Incorporate Gender Identity Placements

Although the PREA only directs that the Department of Justice issue “national standards” with regard to “prison rape,” in 2014, the Department of Homeland Security (DHS) assumed that DHS should, and perhaps must, issue regulations for immigration detention facilities and holding facilities.³¹

The Obama DHS then issued a directive in June 2015 to house trans-identifying inmates “to ensure the detainee’s safety,” *not* to ensure the safety of women.³² Instead of housing detainees by sex, DHS attempts to find facilities “that demonstrate best practices in the care of Lesbian, Gay, Bi-sexual, Transgender, or Intersex detainees, to include, but not limited to: (1) the availability of medical personnel who have experience providing care and treatment to transgender detainees (to include the delivery of hormone therapy) and (2) detention facility staff who have received LGBTI Sensitivity and Awareness Training.”

This directive remains in force today. During the first Trump administration, Immigration and Customs Enforcement (ICE), within DHS, reported that it kept trans-identifying males in 17 facilities, only four of which were all-male.³³

The Biden-Harris administration reaffirmed that housing illegal migrants would not be based on sex, but could reflect gender identity, and promised that trans-identifying illegal migrants would “have continued access to mental and gender-affirming health care provided by qualified medical professionals.”³⁴

The Biden-Harris administration reaffirmed that housing illegal migrants would not be based on sex, but could reflect gender identity.

CURRENT STATE OF LAW AND POLICY REGARDING MALES IN WOMEN'S STATE PRISONS

The vast majority of incarcerated people are convicted under state law and housed in local or state facilities. The states are not uniform in dealing with trans-identifying male inmates, and state policies range from granting trans-identifying male inmates a full right to transfer to women's prisons upon request, to exclusively housing them based on biological sex, to case-by-case assignments.

State policies that house men in women's prisons are primarily created by each state's prison regulatory body. Prison regulations in all of the states are based upon the federal PREA regulations, giving the administration wide influence: if a state doesn't certify full compliance with the PREA, it can lose up to 5% of any DOJ prison grants it would otherwise receive, unless it is planning to use that 5% to work toward full compliance with the PREA.³⁵ A few states have enacted laws in addition to their prison regulations.

The current number of trans-identifying male prisoners can fill 15% of women's prisons



States That Have Laws Prohibiting Men in Women's Prisons

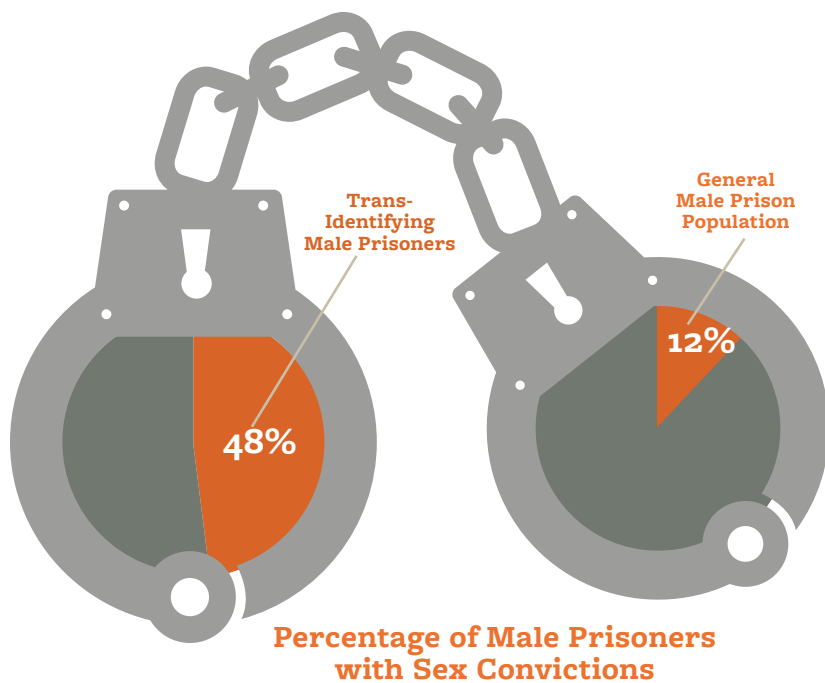
Louisiana

Louisiana Governor Jeff Landry signed HB 608, the “Women’s Safety and Protection Act,” into law, which took effect on August 1, 2024.³⁶ This law fortifies the definition of sex-based words, such as “woman” and “man,” and defines certain spaces preserved for females. The law states that prisons designated as male or female are for the exclusive use of either males or females, respectively. Prior to enactment of this law, Louisiana followed a 2017 regulation that would decide the housing of a “transgender or intersex” inmate on a case-by-case basis.

Utah

Utah has long housed inmates according to their biological sex. Utah has never adopted the federal PREA standards, forgoing federal grant money annually—\$146,000 as of 2016.³⁷

In January 2024, a male inmate filed a complaint against the Utah Department of Corrections (DOC) for failing to house him in a female prison consistent with his gender identity.



The inmate had made several requests to be housed with women, which were denied in writing by the DOC, informing the inmate that “a move to the women’s facilities is not within the perimeter of UDOC’s policies and procedures.” The U.S. Department of Justice investigated the State of Utah’s Department of Corrections and its regulations. Although not bound by PREA, on March 12, 2024, the DOJ found the State of Utah violated a different federal law.³⁸ The DOJ said that the inmate’s gender dysphoria is a

disability under Title II of the Americans with Disabilities Act (ADA) because it is “a physical or mental impairment that substantially limits one or more major life activities.”³⁹ The ADA makes clear, however, that the ADA does not apply to “transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders.”⁴⁰

The DOJ threatened it would commence a lawsuit within 14 days unless Utah’s DOC instituted remedial measures.

Within four days, Utah’s HB 316, “Inmate Assignment Amendments,” was signed into law.⁴¹ The law requires UDOC to assign inmates to housing according to biological sex. However, in an effort to be compliant under the ADA, the bill also provides a pathway for granting a trans-identifying inmate’s request to be housed with inmates of the opposite sex. This exception involves an individualized security analysis, as well as a diagnosis of gender dysphoria. There is little doubt Utah intends the process to be challenging for a male inmate to be placed in a female prison. Apparently the Biden DOJ agrees. It commenced a lawsuit against Utah on April 2, 2024, alleging violations of the ADA.

States That Have Laws Permitting Men in Women’s Prisons

California

The state that elevates gender identity above sex most egregiously is California. Signed into law by Gavin Newsom in 2020, SB 132 (“Transgender Respect, Agency, and Dignity Act”) requires that a “transgender, nonbinary, or intersex” inmate “regardless of anatomy ... be housed at a correctional facility for men or women based on the individuals’ preference.”⁴²

California had already allowed men to request transfers in cases where an individual had undergone sex-trait modification surgery or had been referred to a classification committee following a medical evaluation. SB 132, on the other hand, was specifically meant to ease transfer to a women’s prison for those with male genitalia or, in many cases, very brief histories of “identifying” as women.⁴³

Moreover, SB 132 has been used to silence women: IW Features reported that Cathleen Quinn, an inmate at Central California Women’s Facility, was three weeks away from receiving parole after spending 20 years in prison.⁴⁴ But when she spoke out against a male inmate in the prison who allegedly peeped on her in the women’s restroom, the prison wrote her up, accusing her of having falsely accused the male inmate due to his “transgender status.” The state vacated Quinn’s parole grant before the write-up was adjudicated, and even when she was found “not guilty” of the allegations made against her in the report, her opportunity for parole was gone. When Quinn asked the warden why she had been written up, he told her, “If you didn’t do anything wrong, just keep your head down and be quiet and let the process play out.” SB 132, then, explicitly shut her down from speaking up.

The states consider the inmate’s own view and opinion regarding his safety in placement, but not the safety concerns of the female inmates.

In 2021, four incarcerated women, represented by the Women’s Liberation Front, filed suit against the state, arguing SB 132 violates the Eighth Amendment, First Amendment (by compelling the women to state trans-identifying men are women and failing to respect women’s religious practice), Fourteenth Amendment (by discriminating against women), and provisions of the California state Constitution.⁴⁵ The district court for the Eastern District of California dismissed the complaint in May 2024, in part because it would be too “complex” to “identify, locate, and remove” male prisoners from female prisons. Moreover, the court believed that males would continue to be placed in female prisons under earlier California policy, meaning the court could not remedy the plaintiffs’ injuries by striking down the law.

That same month, a male inmate in a women’s prison in California was charged with raping a female inmate.⁴⁶

Connecticut

Connecticut was the first state to give prisoners the legal right to be housed according to their gender identity. Connecticut differs from California in that male prisoners cannot simply self-identify as female. Connecticut General Statute § 18-81 ii took effect on July 1, 2018, allowing inmates to be housed in a facility consistent with their gender identity if the inmate has a diagnosis of gender dysphoria and has a birth certificate, passport, or driver’s



“They were like kids in the candy store because they knew they were going from a men’s prison to a female’s prison.”

Hector Bravo | Former Prison Guard

license that reflects his gender identity or can meet established standards for obtaining such a document to confirm the inmate’s gender identity.⁴⁷ Since Connecticut state law allows individuals to (falsely) change their sex marker on their license by submitting a basic form, including the option to select a neutral “X” marker, with no additional information, it is a simple process for male inmates to be housed in a female prison.

States That Have Regulations Permitting Men in Women’s Prisons

Maine

Two months after California’s SB 132 took effect, the Maine Legislature introduced a similar bill mandating that incarcerated individuals be housed based upon their gender identity. At the time, decisions regarding inmate housing were made on a case-by-case basis. Although the bill failed, it prompted the Maine Department of Corrections to institute policy changes with respect to inmate housing placement, changing from a case-by-case basis to placement consistent with the inmate’s gender identity.⁴⁸ As of January 23, 2023, male inmates within the Maine DOC are allowed to self-identify into female prisons.

Male inmates within the Maine DOC are allowed to self-identify into female prisons.

New Jersey

Similarly, the New Jersey Department of Corrections has instituted policy changes relative to prisoner gender identity housing. Effective December 15, 2019, the New Jersey DOC introduced a policy to house inmates according to their gender identity. However, the DOC reversed course and revised the policy on October 11, 2022, after two women housed at a female prison became pregnant by a male inmate. Under the new policy, once the New Jersey DOC learns of an incarcerated person’s gender identity, the inmate’s housing assignment is determined with a rebuttable presumption that the inmate will be housed in line with his gender identity.⁴⁹ The rebuttable presumption mandate allows the state’s PREA committee to deviate from the presumptive gender identity housing placement after a hearing.

States That Permit Men in Women’s Prisons on a Case-by-Case Basis

The 44 remaining states permit men to be housed in women’s prisons on a case-by-case basis. Although each state may have variations in regulation verbiage, the factors that are applied to an inmate’s gender identity placement are similar in all states and mirror the federal PREA regulations: “whether a placement would ensure the offender’s health and safety, and whether the placement

would present a management or security concern.” The states consider the inmate’s own view and opinion regarding his safety in placement, but not the safety concerns of the female inmates.

Some variations among individual counties are worth noting.

New York

The State of New York Department of Corrections conducts an individual assessment and gender identity interview for inmates who identify as transgender. If a trans-identifying male inmate requests to be housed in a women’s prison, the request is forwarded to the Central Office Transgender Placement Review Committee for assessment, and housing assignment by gender identity is to be made when appropriate. However, several counties within the state have instituted local policies that go beyond the state’s regulations in prison housing for trans-identifying inmates.⁵⁰

The City of New York, including its five boroughs, adopted a “gender-aligned housing policy” in 2019, becoming one of the first major cities in the nation to house inmates according to their gender identity (San Francisco was the first in 2015). The NYC Commission on Human Rights fought to ensure that NYC DOC’s housing policies were consistent with Executive Order No. 16, issued by then-Mayor Bill de Blasio in March 2016, which required City agencies to permit people to use single-sex facilities consistent with their gender identity.⁵¹ The DOC policy states that an inmate’s self-identification as transgender shall be sufficient for consideration for housing by gender identity, creating a broad city policy that goes beyond New York State PREA standards.⁵²



Steuben County has one of the nation’s most progressive transgender prison policies thanks to a 2019 lawsuit filed against the Steuben County Jail. A trans-identifying male, Jena Faith, housed in a male facility, commenced a lawsuit claiming violations under the NY Civil Rights Law, the NY Human Rights Law, and the Equal Protection Clause of the NY Constitution, for not being housed in a female jail. The County settled with the NYCLU; part of the terms of the settlement included a policy to house inmates according to their gender identity.⁵³

Broome County had a similar lawsuit filed against it in 2022 by Makyyyla Holland, who claimed he had been misgendered in prison. The County settled the case with the NYCLU; part of the terms of the settlement included a policy to house inmates consistent with their gender identity, the right to choose pronouns, and paid access to medical care for “transition.”

The *Holland* case has become the basis for a legislative attempt to extend the terms of that settlement beyond Broome County to the entire state. AB A709, a bill currently in the committee stage in the New York Assembly, explicitly grants gender identity-based rights in prisons.⁵⁴ In addition to providing guarantees of medical care, preferred pronoun use, and other protections, A709 not only requires trans-identifying prisoners to be placed in a correctional facility of their chosen gender identity, it also specifically precludes considering whether that prisoner has undergone medical treatments or surgeries for granting that status. Under the bill, trans-identifying prisoners “shall be presumptively placed in a correctional facility or other institution with persons of the gender that most closely aligns with such person’s self-attested gender identity unless the person opts out of such placement. Placement shall not be conditioned upon the incarcerated individual’s history of, consent to, intention to seek, or refusal to undergo any treatment or intervention regarding their sex characteristics or gender identity.”⁵⁵

Illinois

The Illinois Department of Corrections determines housing assignments on a case-by-case basis for trans-identifying inmates. Illinois, however, goes further than the national PREA standards and implements an additional 12-factor test in determining whether to place a male in a female prison.⁵⁶

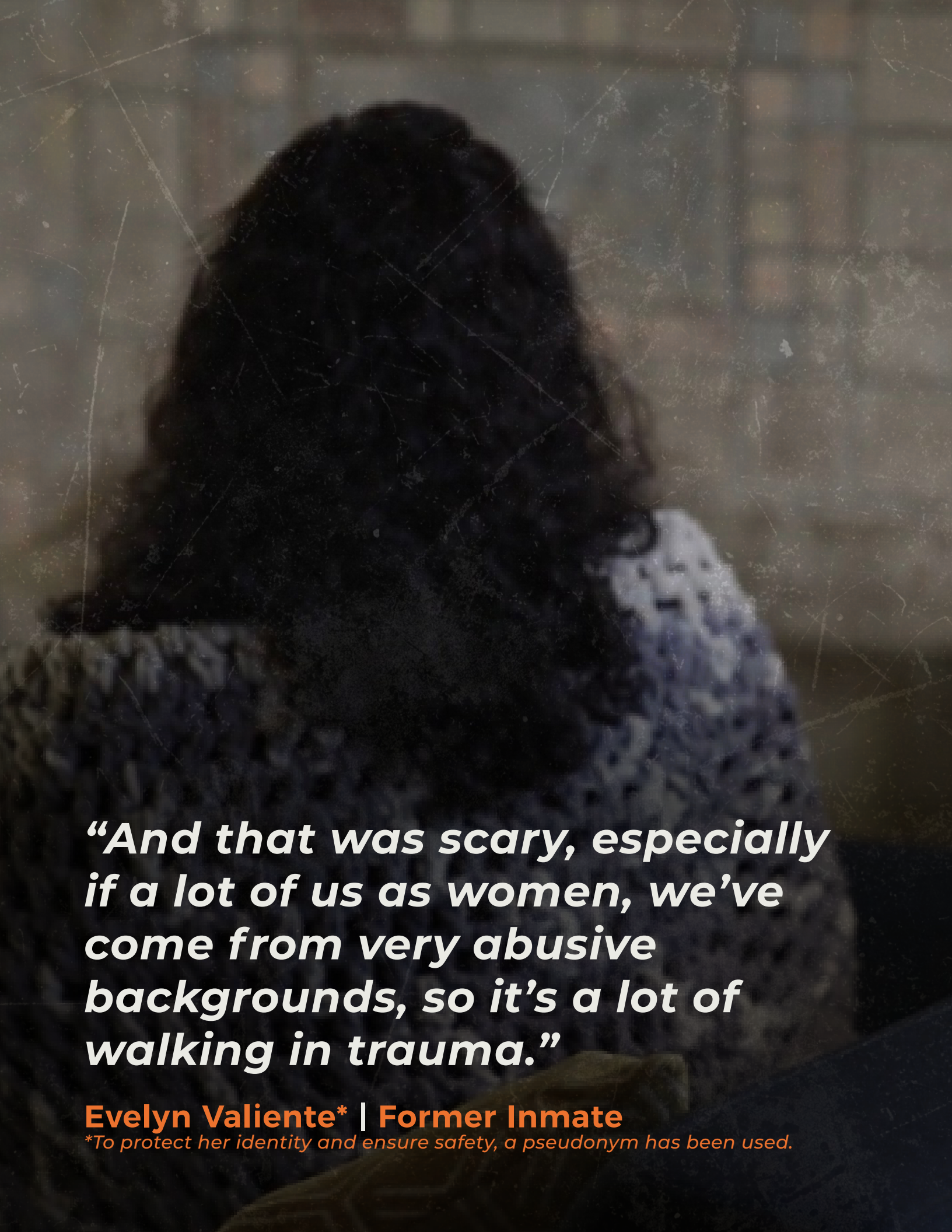
Cook County, the most populated county in Illinois, was the first in Illinois to institute a gender policy for inmates.⁵⁷ Cook County’s policy aligns with PREA guidelines, instituting a two-factor test in determining whether to place a trans-identifying male inmate in a female prison: whether a placement will ensure the inmate’s health and safety; and whether a placement will present significant management challenges.

Florida

Housing for transgender inmates is determined on a case-by-case basis. Inmates who have received a formal diagnosis of gender dysphoria are placed in one of the designated treatment facilities for gender dysphoria.⁵⁸

Miami-Dade County deviates from the state of Florida, most of the other states, and the PREA guidelines by taking into consideration “the health and safety of others” in the case-by-case determination of gender identity housing placement.⁵⁹

A709, a bill currently in the committee stage in the New York Assembly, explicitly grants gender identity-based access in prisons.



“And that was scary, especially if a lot of us as women, we’ve come from very abusive backgrounds, so it’s a lot of walking in trauma.”

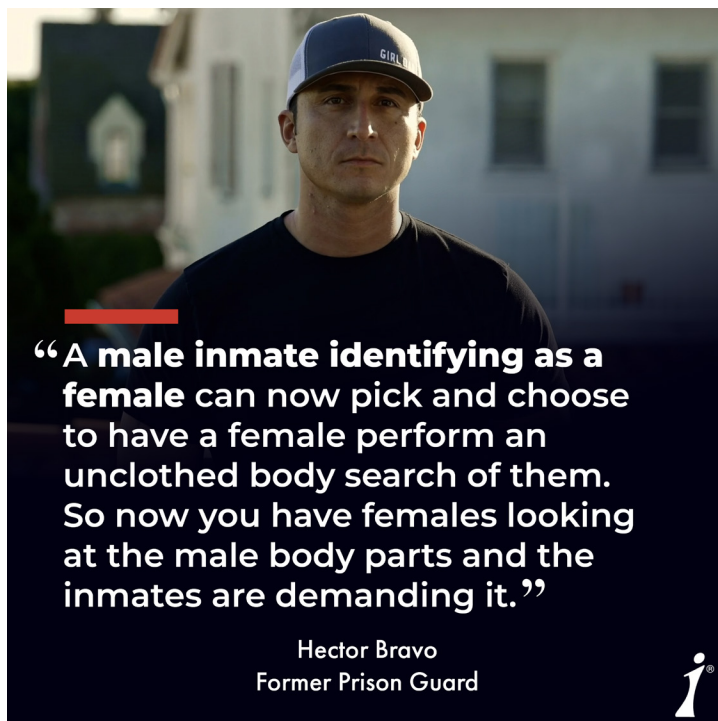
Evelyn Valiente* | Former Inmate

**To protect her identity and ensure safety, a pseudonym has been used.*

LEGAL CHALLENGES TO GAIN ACCESS TO WOMEN’S PRISONS

Prisoners have no constitutional right to be housed in an institution of their choice, and prisons have historically housed inmates according to their sex.

Nevertheless, some inmates challenge the “default” placement into sex-based prisons as a violation of Equal Protection, that is, they claim they are being discriminated against on the basis of sex.⁶⁰ This argument says that classification on the basis of their sex requires an “important government interest,” which could include safety, but the safety justification must be individualized for the inmate.⁶¹ The *Iglesias* court said that the government lacked a sufficient reason to keep the male out of the women’s prison. This reasoning endangers women by requiring serious, proven violence before the government can act.



Prisoners have also challenged their sex-assigned housing as conflicting with the Eighth Amendment’s prohibition against cruel and unusual punishment. They argue that transition is medically necessary to treat gender dysphoria and transition requires the ability to live as a woman, in a women’s prison.

In *JJS v. Piler*, a male incarcerated in federal prison commenced a lawsuit seeking a transfer to a women’s facility and an order compelling the Bureau of Prisons (BOP) to provide him with “gender-affirming surgery.”⁶² U.S. Magistrate Judge Sarah Netburn agreed: “I find that the BOP’s repeated refusals to transfer Petitioner to a women’s facility to further her [sic] gender transition, despite knowing the condition of Petitioner’s physical and mental health, violate Petitioner’s Eighth Amendment rights.”

To prove an Eighth Amendment violation when trying to establish a right to a medical treatment, a prisoner must show two things: (1) an objective proof of a serious medical need, and (2) prison administrators’ deliberate indifference to that need.⁶³

The government has sometimes agreed with the inmate that gender dysphoria constitutes a serious medical need.⁶⁴ But establishing that need is only half of a prisoner’s case. The second half, deliberate indifference, requires some level of purposeful mistreatment of a prisoner’s need. As the court ruled in *Keohane v. Fla. Dep’t of Corr. Sec’y*, “Even if medical care is so inadequate as to satisfy the objective prong, the Eighth Amendment is not violated unless prison administrators also exhibit deliberate indifference to the prisoner’s needs.”⁶⁵ This is because there are more people than an individual prisoner affected when it comes to medical decisions regarding “gender transition” made on a prisoner’s behalf. “When evaluating medical care and deliberate indifference, security considerations inherent in the functioning of a penological institution must be given significant weight.”⁶⁶

“It takes no stretch of the imagination” to understand that placing males in women’s prisons may present security risks.

The court concluded, “[A] denial of care may not amount to an Eighth Amendment violation if that decision is based on legitimate concerns regarding prisoner safety and institutional security.”⁶⁷

The court in *Fisher v. Fed. Bureau of Prisons*, moreover, noted that “it takes no stretch of the imagination” to understand that placing males in women’s prisons may present security risks.⁶⁸ Where the prison officials’ “concern for the safety and well-being of female inmates” is “reasonably balanced” with their concern for the “safety and well-being,” of the trans-identifying male, courts are likely to uphold prison officials’ decision to keep the male in male housing as a “measured and reasoned response to valid security concerns.”⁶⁹

Other courts have taken an activist approach on behalf of trans-identifying men, opining that “responding to an inmate’s acknowledged medical need with what amounts to a shoulder-shrugging refusal even to consider whether a particular course of treatment is appropriate is the very definition of deliberate indifference—anti-medicine, if you will.”⁷⁰ This seems to indicate that a state must always individually consider a male who requests access to a women’s prison, rather than establishing sex-based prisons. But this reasoning is misguided. States can and do make categorical judgments about “the necessity and efficacy of certain medical treatments.”⁷¹ For instance, a prisoner would not receive individualized assessments for drugs the FDA categorically bans—likewise, a trans-identifying male prisoner does not need an individualized assessment to access a women’s prison.

TRANSFERRING MEN TO WOMEN'S PRISONS PRESENTS CONSTITUTIONAL AND OTHER LEGAL CONCERNS

Placing men in women's prisons isn't just bad policy; it potentially violates women's federal and constitutional rights. Getting a legal ruling is its own challenge, as lawsuits against federal and state governments are difficult to pursue given the government's immunity from suit as well as well-intentioned policies that are in place to protect federal and state governments from a flood of prisoner litigation. There are pathways around this, including 42 U.S.C. § 1983, which makes government employees and officials personally liable for money damages if they violate a person's federal constitutional rights.⁷² Another pathway is the Federal Tort Claims Act, which makes it possible to sue the United States for "negligent" or "wrongful acts" that its employees commit while "acting within the scope of their employment."⁷³ Even if plaintiffs can hurdle immunity barriers, the Prison Litigation Reform Act of 1995 (PLRA) states that "No action shall be brought with respect to prison conditions ... by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."⁷⁴ All this makes for protracted litigation.

Placing trans-identifying males...in close quarters with female inmates risks a serious deprivation of the female's rights.

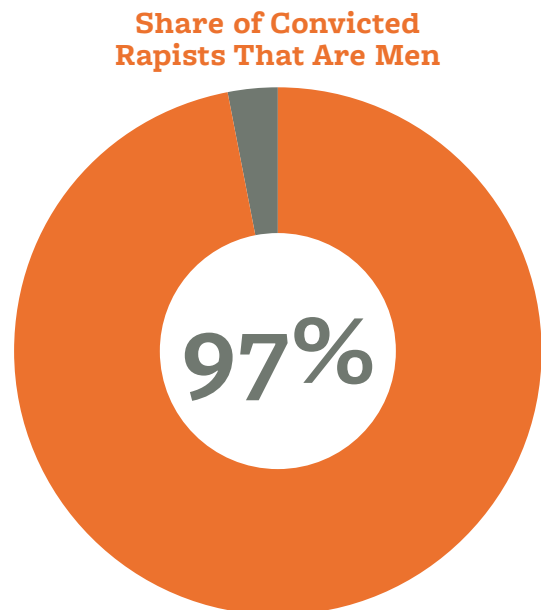
Eighth Amendment

The Eighth Amendment guarantees all Americans protection against cruel and unusual punishment, meaning that prison officials violate the Constitution when they "know[] of and disregard[] an excessive risk to inmate health or safety."⁷⁵ In other words, courts will ask two questions. First, does the government's policy or decision risk subjecting the female prisoners to something *seriously harmful*? Second, did the government actor *know* the female prisoners faced this risk?

Placing trans-identifying males, especially those with fully intact male genitalia or a history of violent sex crimes, in close quarters with female inmates risks a serious deprivation of the female's rights. These risks—and the consequences that have already manifested for women subjected to mixed-sex prison environments—are known, but are being deliberately ignored

in deference to laws and policies that marginalize incarcerated women and silence concerns about their safety.

Women have started to assert Eighth Amendment claims to oppose victimization by male prisoners. But courts have either avoided considering the claims or minimized the substantial risks women face. For example, in *Chandler v. California Department of Corrections and Rehabilitation*, female prisoners claimed California’s SB 132 was facially unconstitutional, “by subjecting them to substantially increased risk of sexual harassment, sexual assault, rape, and physical violence, and to psychological fear of such harms.”⁷⁶ The California trial court dismissed the complaint in part because even if the law were eliminated, trans-identifying males would still make their way into prisons through older California policy.⁷⁷ In *Guy v. Espinoza*, a California federal court dismissed an Eighth Amendment challenge to California’s older policy that placed trans-identifying males with females, finding that although prison officials were aware of threats and intimidation by the male prisoners, this was “insufficient” to meet the Eighth Amendment bar.⁷⁸



Other courts have elevated distaste for prisoner litigation above female prisoners’ concerns. For example, a Texas district court opined: “If action on the part of prison officials was constitutionally required every time an inmate reported a perceived risk of violence, inmates would quickly learn to control the prison environment simply by alleging risks of danger. In the instant case, Plaintiff’s subjective belief that her safety was at risk because of the transgender inmates, without more, does not show that Defendant actually perceived, and ignored, a substantial risk of harm.”⁷⁹

Interestingly, trans-identifying males similarly use the Eighth Amendment and personal safety to avoid male prisons (where feminine-looking men claim they risk sexual abuse).⁸⁰ These claims are commonly unsuccessful. As the D.C. federal district court said in *Richardson*, “The right to be free from deliberate indifference to the risk of assault does not necessarily imply that [a prison guard] need[s] to categorically prevent transgender female [male] inmates from being celled with male inmates who exhibited no particularized red flags when it came to sexual violence.”⁸¹

Fourth Amendment Right to Bodily Privacy

The Fourth Amendment protects against “unreasonable searches.” Although “reasonableness” in the prison context gives the government substantial ability to diminish privacy in one’s

body, prisoners “do not forfeit all constitutional protections by reason of their conviction and confinement in prison.”⁸² The Fourth Amendment thus applies to the invasion of bodily privacy in prisons and jails.⁸³ “[I]ncarcerated prisoners retain a limited right to bodily privacy.”⁸⁴ “Shielding one’s unclothed figure from the view of strangers, particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.”⁸⁵ “An individual has a legitimate and important interest in bodily privacy that is implicated when his or her nude or partially nude body is exposed to others. And this privacy interest is significantly heightened when persons of the opposite biological sex are present, as courts have long recognized.”⁸⁶ This line of cases gives women some rights against government-imposed voyeurism by males.

But courts have either failed to recognize this right as rooted in the Constitution, or found trans-identifying males have rights that outweigh a woman’s need for privacy. In the school bathroom context, for example, courts diminish women’s privacy rights in favor of a school’s “compelling” interest in “protecting transgender students from discrimination.”⁸⁷ Other courts fail to recognize women’s privacy rights at all, dismissing the idea as invented without sufficient basis in the Constitution.⁸⁸

In the face of these challenges, women still have a chance at vindicating bodily privacy. For one, school bathroom cases are not the same as prison cases, as the state’s interest in accommodating trans-identifying boys in girls’ bathrooms might be greater than its interest in accommodating convicted criminals in women’s prisons. Moreover, while the right to bodily privacy in general may not be detailed in the Constitution, the prison context particularly is closely aligned with the Fourth Amendment, given that prisoners are expected to expose their bodies in the nude by showering and using the toilet in the open for safety and surveillance (i.e., search) purposes.

Female inmates, particularly sexual assault survivors, have expressed mental anguish from having to share intimate spaces with males.

Intentional Infliction of Emotional Distress

Female inmates, particularly sexual assault survivors, have expressed mental anguish from having to share intimate spaces with males. This may give rise to an intentional infliction of emotional distress claim which requires prison officials to act intentionally or recklessly, in a manner so outrageous it should not be tolerated by civilized society, that results in serious mental injury.

Emotional distress, however severe, is hard to litigate in the prison context without adjoining physical injury. The Prison Litigation Reform Act provides that “[n]o federal civil action may be brought by a prisoner confined to a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.”⁸⁹

Free Speech

The government “may not compel affirmance of a belief with which the speaker disagrees.”⁹⁰ Part of the barrier for women who challenge being housed with men is that they can’t use language to describe the situation. That is, if the males must be called by their preferred pronouns (called women), this type of compelled speech takes away expression from women seeking to protest their reality. For example, California’s SB 132 requires staff to respect chosen pronouns and honorifics of trans-identifying inmates by stating: “Staff, contractors, and volunteers of the department shall not consistently fail to use the gender pronoun and honorific an individual has specified in all verbal and written communications with or regarding the individual that involve use of a pronoun and honorific.”⁹¹ Staff-level directives constrain inmate speech when, for example, inmate complaints about a “man” are re-written to describe a “woman.” Former inmate and Independent Women Ambassador Amie Ichikawa said, “When you do write an inmate complaint and you say this person put their penis on me... it’s crossed out [by staff] and says, ‘A woman with a penis.’”⁹²

Prisoners have limited First Amendment speech rights. Restrictions on prisoner speech must be “reasonably related” to legitimate penological interests, and cannot be an “exaggerated response” to those interests.⁹³ Court cases have not tested whether prisons have penological interests that require preferred pronoun usage, though such an assertion by a prison would seem unserious.

Moreover, the compelled use of pronouns in the non-prison context has led to First Amendment liability. For example, in *Meriwether v. Hartop*, the Sixth Circuit found that a preferred pronoun policy as applied to a professor violated the professor’s free speech rights.⁹⁴ The professor’s “continued refusal to address” men as women “advanced a viewpoint on gender identity... that sex is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual’s feelings or desires.”⁹⁵ That message, on a topic of public concern, was worthy of protection despite the college’s professed desire to respect gender identity.

If the males must be called by their preferred pronouns (called women), this type of compelled speech takes away expression from women seeking to protest their reality.

Religious Freedom Restoration Act/Free Exercise

Some female prisoners are practitioners of religious faiths that forbid them to be in close quarters or states of undress with the opposite sex. While the Supreme Court has held that neutral, generally applicable laws (like those governing inmate housing) that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause of the First

Amendment, two federal laws, the Religious Freedom Restoration Act of 1993 (RFRA) and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), alongside many state analogs, require prisons to avoid burdening a prisoner’s religious exercise, unless the government can do so extremely narrowly and for very good reason.⁹⁶

Courts have avoided considering this argument by ruling on antecedent issues, including qualified immunity and standing.⁹⁷ Ultimately, the religious liberty argument will not likely eliminate gender identity-based housing but rather create a compromise where individuals, who have been injured by the policy, can assert a sincerely held religious belief for access to single-sex spaces.

Equal Protection Clause Violations

The Fourteenth Amendment’s Equal Protection clause provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”⁹⁸ In today’s context, the Fourteenth Amendment’s mandate for equality means that if the state discriminates on the basis of sex, the law will be struck down unless it closely serves an important governmental interest.

As a preliminary matter, it is unlikely that a policy that is neutral on its face and merely impacts women differently than men (“disparate impact”) is alone an Equal Protection violation. But policies that require reference to an individual’s sex, and dole out preferable treatment on the basis of sex, do trigger constitutional analysis.

Female prisons themselves are undoubtedly acceptable, given that male and female inmates have biological differences that permit differential treatment.⁹⁹ But the favorable treatment of trans-identifying males in female prisons does create an unequal system.

First, if males receive accommodations that females do not receive, including access to medical care such as breast implants, luxuries like makeup, and additional space and privacy, this creates a sex-based classification, for which the government must adequately defend itself. (And, for those who believe the Equal Protection Clause requires heightened review for classifications based on gender identity, these trans-focused policies discriminate against “cisgender” individuals.) Second, if policies do not merely have a disparate impact but treat women worse than males by purposefully subjecting women to a greater risk of harm (for example, rape), this could form another basis for an Equal Protection challenge.

The favorable treatment of trans-identifying males in female prisons creates an unequal system.

Female challengers to California’s SB 132 included equal protection challenges in their complaint, but the reviewing court did not address this claim on the merits.¹⁰⁰

Title IX Violations

Title IX of the Civil Rights Act of 1972 prohibits sex discrimination in “any education program or activity receiving Federal financial assistance.”¹⁰¹ That means Title IX reaches beyond schools and covers educational programming in other federally funded institutions, including prisons. For instance, job training programs in prisons (e.g., vocational courses in cosmetology or plumbing), juvenile justice facilities with educational services for inmates funded through the Elementary and Secondary Education Act (ESEA) Title I,¹⁰² and other educational prison programs that receive federal funds are subject to federal anti-discrimination law (as well as the changing regulatory interpretations of those laws).¹⁰³

In covered contexts, Title IX ought to protect women from discrimination on the basis of sex. Discrimination in this context could encompass a situation in which a juvenile girl is not offered the same housing options as a trans-identifying boy (for example, if girls who go to juvenile prison are mandated to use the communal prison facilities, while trans-identifying inmates get privacy and space), not offered the same level of safety as trans-identifying males in an educational job skill program, or where sex-based harassment prevents her from pursuing educational and rehabilitation options.



With male inmates posing a physical threat to incarcerated women, moreover, single-sex athletics are necessary for incarcerated women in women’s prisons to be able to access the same athletic resources that incarcerated men in men’s prisons have access to without any equivalent physical threat coming from trans-identifying inmates. Additionally, with the vast majority of female inmates being victimized by sexual abuse, rehabilitation for many women inmates often includes working past sexual trauma and depends on their access to female-only spaces for recovery.

A NOTE ON SEX-TRAIT MODIFICATION PROCEDURES

The Bureau of Prisons (BOP) believes it has a “statutory mandate” to provide prisoners with “pharmaceutical interventions (e.g., cross-gender hormone therapy), hair removal and surgery (if individualized assessment indicates surgical intervention is applicable)” if those treatments are “medically necessary.”¹⁰⁴ In claiming this statutory mandate for itself, the BOP goes further than the mandate Congress imposes, which only requires the BOP to “provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States.”¹⁰⁵ Courts have interpreted that to leave the Bureau of Prisons officials “significant discretion to administer their duties as they see fit.”¹⁰⁶

Before 2010, only BOP inmates who received hormone therapy prior to incarceration were eligible to receive hormones while in BOP custody.¹⁰⁷ Following a lawsuit, the BOP changed its policy to provide inmates with gender dysphoria an individual “treatment plan” to “promote the[ir] physical and mental stability.”¹⁰⁸ Prior to October 2021, the BOP had determined that sex-trait modification surgery was not medically necessary for any transgender-identifying inmate. However, following *Langan v. Federal Bureau of Prisons*, an Eighth Amendment lawsuit, the BOP recommended its first sex-trait modification surgery.¹⁰⁹

“The circularity of this [gender-identity treatment] approach may explain why there has been an apparent consensus on key areas of practice despite the evidence being poor.”

Activist groups like the ACLU argue that sex-trait modification procedures are required under the Eighth Amendment, which demands “adequate medical care” for prisoners.¹¹⁰ The Fifth Circuit has categorically rejected this argument: “A state does not inflict cruel and unusual punishment by declining to provide sex reassignment surgery to a transgender inmate.”¹¹¹ The Fifth Circuit reasoned that the Eighth Amendment requires that prison officials act with malicious intent in purposefully inflicting pain on a prisoner.¹¹² Other courts have maintained a similarly high bar for Eighth Amendment violations: a constitutional violation requires treatment that is “so grossly incompetent, inadequate or excessive as to shock the conscience or to be intolerable to fundamental fairness.”¹¹³ Because “robust and substantial good faith disagreement” divides the medical community about how to treat gender dysphoria, the Fifth Circuit has ruled that refusing to provide sex-trait modification surgery does not arise to an Eighth Amendment violation.¹¹⁴

Other courts have opined that sex-trait modification surgery is constitutionally necessary, depending on the circumstances.¹¹⁵ These decisions assume that “sex change” surgery *can* be medically necessary and *is* medically necessary for these prisoners. They rely on the World Professional Association of Transgender Health Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People (“WPATH Standards of Care”) as evidence of medical consensus—a dubious claim.

The Cass Review

Independent review of gender identity services for children and young people



Dr. Hilary Cass, who conducted an independent review of gender-identity medicine for the UK’s National Health Service, concluded that WPATH had written the initial guidelines on gender-identity medicine, which then were used by other organizations, which WPATH then used as evidence of consensus. Cass noted, “The circularity of this approach may explain why there has been an apparent consensus on key areas of practice despite the evidence being poor.”¹¹⁶ Even more incriminating are the WPATH emails that were made public through unsealed court documents. The organization only deemed gender-transition procedures medically necessary because, as one email author put it, “we [at WPATH] needed a tool for our attorneys to use” so that insurance would cover gender-transition procedures.¹¹⁷ Indeed, the WPATH Standards themselves were designed explicitly to conclude that any range of gender-identity treatments

were medically necessary—whether or not the evidence supported such a conclusion was irrelevant.¹¹⁸

While activist organizations like WPATH rely on artificial consensus to influence American courts, there is, in truth, no such medical consensus for treating gender dysphoria through various chemical and surgical interventions.¹¹⁹ Moreover, these interventions are not moored to an original understanding of the Eighth Amendment, and future litigation will certainly challenge whether the original public meaning of “cruel and unusual” required experimental treatments to modify one’s body to align with a false belief of one’s identity.¹²⁰

Cases providing and denying sex-trait modification procedures have been petitioned to the Supreme Court, but the Court has rejected review.

The state of California spent \$4 million of taxpayer money between 2017 and 2023 on sex-trait modification procedures for trans-identifying male inmates, including breast implants, laser hair removal, and facial feminization surgeries, per records obtained by the Washington Free Beacon.¹²¹ Of this \$4 million in taxpayer funding, \$2.5 million went to vaginoplasties alone.

POLICY RECOMMENDATIONS

Amend the PREA Regulations

The Prison Rape Elimination Act simply does not require, even indirectly, that prisons consider placing men in women’s prisons. And yet federal regulations continue to incentivize this practice both federally and locally, by tying federal funding to states putting men in women’s prisons. The regulations should be revised to eliminate this possibility.

Clarify the Americans with Disability Act, Via Regulation and DOJ Practice

The ADA explicitly states that “gender identity disorders” do not qualify as disabilities under the Act, and yet the Biden-Harris administration and federal courts have applied the ADA to mandate “transition” services in prisons. DOJ regulations interpreting the ADA should clarify that gender identity disorders include gender dysphoria.

Protect Women’s Reporting of Abuse

Female inmates should not fear that reporting abuse will lead to retribution or loss of privileges. Prison staff making decisions about PREA reports and managing reports from women about potential instances of physical and sexual abuse should not overlap with staff making decisions about parole, privileges, and other benefits or demerits in the context of incarcerated life. Incarcerated women should be able to report any abuse and be entitled to a fair investigation of those allegations free from fear of consequences. Complaints should not be rewritten to eliminate that a male was involved, by using phrases like “woman with a penis.”

At the State Level, Clarify that Reporting Sexual Abuse Is Not “Discrimination”

Often, especially in case-by-case states, agencies and boards tasked with balancing the needs of trans-identifying males and those of female inmates are inclined to take into account factors like discomfort, past sexual assault history, and complaints from women. But some laws and policies, such as SB 132 in California, or the proposed AB A709 in New York, explicitly forbid prison officers from taking into account some of these elements, under supposed “anti-discrimination” clauses that characterize the concerns of incarcerated women for their safety as mere unjustified bigotry. States should make it clear, through law and policy, that these kinds of concerns are well-grounded in fact, and a perfectly justifiable basis for denying male prisoners transfer.

End Government Reliance on Activist WPATH Guidelines

The Federal Bureau of Prisons guidance on “Gender-Affirming Care of Transgender and Gender Nonbinary Persons” was designed to “closely align” with the World Professional Association for Transgender Health (WPATH) standards. The WPATH standards are not rooted in science. The BOP should make clear that the science is not settled, meaning “transition” cannot be found medically necessary.

End Federal Funding of State Prison Systems That Endanger Women

The federal government provides grant money to states that adopt prison rape elimination policies. Those policies should prevent males from being housed with women.

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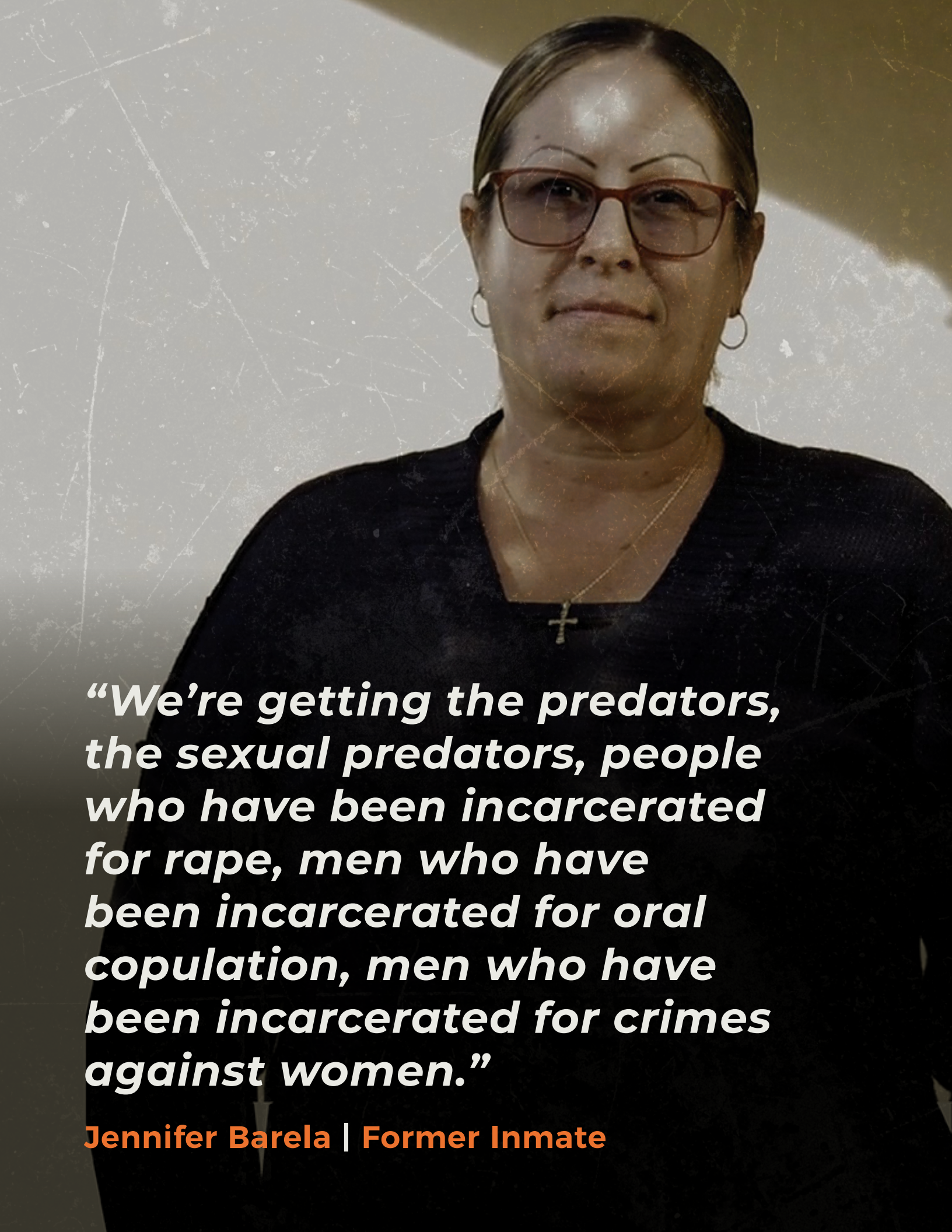
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“We’re getting the predators, the sexual predators, people who have been incarcerated for rape, men who have been incarcerated for oral copulation, men who have been incarcerated for crimes against women.”

Jennifer Barela | Former Inmate

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“What [California’s SB132] does is open the gateway for people who are seeking a way out of the men’s prison for whatever reasons they have to just say, ‘Hey, I identify as a woman,’ and now they are being housed in a woman’s institution.”

Jennifer Barela | Former Inmate

“It’s a really horrible feeling to feel powerlessness and isolation to the extreme. Our sentence wasn’t to be abused. We were supposed to be ... rehabilitated, and so everybody’s turned their back on us.”

Alissa Kamholz | Current Inmate

“To provide these special rights to a small privileged group that includes predators and manipulators has created a huge imbalance in power and an untouchable privileged group that is basically running the prison system right now.”

Amie Ichikawa | Former Inmate

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