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Comments

Ten Years Later, PREA Does Not Live Up to Its Goal: Amending the Statute to Reduce Discriminatory Violence Against Transgender Prisoners

Carla Aveledo*

*“Prison rape not only threatens the lives of those who fall prey to their aggressors, but is potentially devastating to the human spirit. Shame, depression, and a shattering loss of self-esteem accompany the perpetual terror the victim thereafter must endure.”*¹

INTRODUCTION

The United States Constitution ensures the health and safety of prisoners and protects them from “cruel and unusual punishment.”² Further, the Prison Rape Elimination Act (PREA) provides statutory standards to safeguard prison conditions and

* Candidate for Juris Doctor, Roger Williams University School of Law, May 2022. Thank you to the Roger Williams University Law Review Editorial Board for their assistance throughout the writing process. I would also like to thank my four nephews for their consistent joy, which provided me with the encouragement I needed.

1. *Farmer v. Brennan*, 511 U.S. 825, 853 (1994) (Blackmun, J., concurring).

2. U.S. CONST. amend. VIII.

management of prisoners.³ These constitutional and statutory provisions are some of the only protections which transgender inmates can avail themselves while incarcerated.

Life inside prison walls is brutal for transgender inmates. They face the “possibility of violent physical attacks, harassment, and sexual assault by both fellow inmates and correctional staff.”⁴ Prison housing assignments play a large role in determining a person’s safety, especially for a transgender inmate. As a safeguard, PREA requires that housing for transgender inmates be determined on a case-by-case basis while also balancing a facility’s daily operations.⁵ However, despite federal regulation, often times, “transgender people are [automatically] placed in cells according to the sex on their birth certificate rather than their gender identity.”⁶

In Part I, this Comment will discuss the disparate treatment of transgender inmates. Part II will explain PREA’s lofty goals and inevitable shortcomings in preventing prison rape. Part III will walk through the PREA intake process and its failings. Next, Part IV will explain the audit function built into PREA and how an amendment to the audit for the purpose of strengthening transgender housing rights is supported by Eighth Amendment jurisprudence. Finally, Part V will detail how some states have taken transgender prisoner rights into their own hands, which should serve as models for a more robust and protective federal policy.

I. DISPARATE TREATMENT OF TRANSGENDER INMATES

Transgender people are those who identify as a different gender than the one they were assigned at birth.⁷ One’s gender

3. See generally Prison Rape Elimination Act National Standards, 28 C.F.R. § 115 et seq. (2012).

4. GraceAnn Caramico, *Thank You Sophia Buset: A Call on the Federal Bureau of Prisons to Break Free of the Chains of Tradition in Order to Protect Transgender Inmates*, 18 GEO. J. GENDER & L. 81, 86 (2017).

5. See CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, UNJUST: HOW THE BROKEN CRIMINAL JUSTICE SYSTEM FAILS LGBT PEOPLE OF COLOR 29 (2016).

6. *Id.*

7. See *Frequently Asked Questions About Transgender People*, NAT’L CTR. FOR TRANSGENDER EQUAL. (July 9, 2016), <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people> [<https://perma.cc/MJ35-TBKD>]. “Trans” is often used as shorthand. See *id.* Also, some people in the transgender community who identify as neither male nor female, or

identity is, “a person’s internal, personal sense of being a man or a woman.”⁸ For some transgender people, their gender identity cannot be identified as either man or woman.⁹ Though, for all transgender people, “the sex they were assigned at birth and their own internal gender identity do not match.”¹⁰ While some transgender people live their entire lives identifying with a gender that is opposite their genitalia, some undergo medical procedures, which can include prescribed hormonal therapy and sex reassignment surgery.¹¹

The fight for LGBTQ+ equality is ongoing. Discrimination against transgender people is particularly harsh. Some states continue efforts to ban transgender people from public bathrooms, some departments of motor vehicles deny them the issuance of licenses, and disproportionate rates of health care providers deny them care.¹² Discriminatory treatment against transgender people is pervasive throughout society, therefore discriminatory treatment against transgender inmates in prisons should come as no surprise.¹³ Alarming, the rate of violence perpetrated by both fellow inmates and prison staff against transgender people in prisons is staggering compared to cisgender prisoners.¹⁴ A 2015 transgender survey by the National Center for Transgender Equality found that respondents who had been held in detention experienced “high rates of physical and sexual assault by facility staff and other

identify as a combination of the two, may use the terms non-binary and genderqueer to identify themselves. *See id.* For purposes of continuity in this comment, “transgender” will be used throughout.

8. *Transgender FAQ*, GLAAD, <https://www.glaad.org/transgender/trans-faq> [<https://perma.cc/9MBJ-FXK5>] (last visited Feb. 9, 2021).

9. *See id.*

10. *Id.*

11. *Id.*

12. *The Quest for Transgender Equality*, N.Y. TIMES (May 4, 2015, 2:17 PM), <https://www.nytimes.com/2015/05/04/opinion/the-quest-for-transgender-equality.html> [<https://perma.cc/84PU-XDPG>].

13. *See Police, Jails, & Prisons*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/issues/police-jails-prisons> [<https://perma.cc/R8UH-JC34>] (last visited Feb. 12, 2021).

14. *See id.* A cisgender person is a someone whose gender identity corresponds with their sex assigned at birth. *Cisgender*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/cisgender> [<https://perma.cc/Z6R5-WQCK>] (last visited Feb. 12, 2021).

inmates.”¹⁵ In that year alone, almost one-quarter (23 percent) of transgender inmates reported that they were physically assaulted by staff or other inmates,¹⁶ and one in five transgender inmates (20 percent) reported that they were sexually assaulted.¹⁷ The report found that transgender respondents “were over five times more likely to be sexually assaulted by facility staff than the U.S. population in jails and prisons, and over nine times more likely to be sexually assaulted by other inmates.”¹⁸ While violence in U.S. prisons is not uncommon, these staggering figures demonstrate that prison violence experienced by transgender people amounts to a civil rights problem in this country.

A University of California Irvine’s Center for Evidence-Based Corrections performed research to inform its state corrections officials based on scientific findings to “contribute to a main goal of [PREA] to reduce sexual assault, including rape, in detention facilities.”¹⁹ The study of transgender women housing in California’s men’s prisons, aimed at examining sexual violence to general populations and transgender inmates, found that sexual assault among transgender inmates is thirteen times more prevalent “with fifty-nine percent reporting being sexually assaulted while in a California correctional facility.”²⁰ Further, a report by the U.S.

15. SANDY E. JAMES ET AL., NAT’L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 15 (2016). This survey examined the “experiences of transgender people in the United States.” *Id.* at 4. In total, survey respondents amounted to 27,715 from all fifty states. *Id.* The online survey was administered anonymously to adults (eighteen and older). *Id.* Areas surveyed included health, military service, harassment and violence, restroom experiences, and much more. *See id.* at 35.

16. *Id.* at 15.

17. *Id.*

18. *Id.*

19. *See* Valerie Jenness et al., *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault*, UNIV. OF CAL., IRVINE, CTR. FOR EVIDENCE-BASED CORR., (May 16, 2007), <https://ucicorrections.seweb.uci.edu/2007/05/30/violence-in-california-correctional-facilities-an-empirical-examination-of-sexual-assault/> [<https://perma.cc/2HJN-2274>].

20. *See id.* This research study included 322 randomly sampled inmates from six out of the thirty California prisons that house adult males and included thirty-nine purposively sampled transgender inmates from a seventh facility that houses a concentrated population of transgender inmates. *See id.* The results were achieved through a structured interview process including 144 questions regarding daily prison life, fear of victimization in prison, personal victimization from sexual and non-sexual assaults and more. *See id.*

Department of Justice (DOJ) found large differences of reported sexual assault in inmates who identified their sexual orientation as gay, lesbian, bisexual or others reported high rates of sexual misconduct.²¹ More than twelve percent reported being sexually victimized by another inmate.²²

II. PREA'S PROMISES AND FAILURES

Congress enacted PREA in an attempt to “eradicate prisoner rape in all types of correctional facilities.”²³ The statute, which passed unanimously in 2003, provides funding to states to further their efforts in committing to creating safe environments and reducing sexual violence in detention facilities.²⁴ The national standards set forth by PREA are applicable to the Federal Bureau of Prisons.²⁵ In order to determine funding and compliance, the Act established the Prison Rape Elimination Commission, which worked on creating standards to achieve PREA’s goal of eliminating prison rape.²⁶ The standards were finalized in 2009, and following a revisionary process and nearly a decade after its passage, the standards were promulgated by the DOJ in 2012.²⁷

21. ALLEN J. BECK ET AL., BUREAU OF JUST. STAT., SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12 18 (2013). The study, conducted between 2011 and 2012, surveyed 233 state and federal prisons, 358 jails and fifteen special confinement facilities. *Id.* at 32. The survey was administered to 92,449 inmates aged eighteen or older. *Id.* at 8.

22. *Id.* at 18.

23. *Prison Rape Elimination Act (PREA) Overview*, BUREAU OF JUST. ASSISTANCE, <https://bja.ojp.gov/program/prison-rape-elimination-act-prea/overview> [<https://perma.cc/YM9E-24NM>] (last visited Feb. 7, 2021); *accord* Prison Rape Elimination Act, 34 U.S.C. § 30302(1)–(3).

24. U.S. DEP’T OF JUST., BJA FY 21 IMPLEMENTING THE PREA STANDARDS, PROTECTING INMATES, AND SAFEGUARDING COMMUNITIES 6, (2021); *About | Prison Rape Elimination Act*, NAT’L PREA RES. CTR., <https://www.prearesourcecenter.org/about/prison-rape-elimination-act> [<https://perma.cc/V7A2-CTCT>] (last visited Oct. 1, 2021).

25. 34 U.S.C. § 30307(b).

26. *About | Prison Rape Elimination Act*, *supra* note 24. The PREA Resource Center, a collaboration between the Department of Justice and Impact Justice was created to provide guidance to federal, state and local facilities and agencies as well as provide important information on PREA to advocates. *Id.*

27. *Id.*; National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37,106 (Jun. 20, 2012) (to be codified at 28 C.F.R. pt. 115). When created, the PREA Standards were made into four distinct categories because of the varying nature of facility types: “Adult prisons and jails (§§

The PREA standards cover many aspects of prison life and prison management. The standards are divided into three subparts because of the inherent operational differences in different confinement settings: (1) standards for adult prisons and jails; (2) standards for lockups; and (3) standards for community confinement facilities.²⁸ The standards for adult prisons and jails include prevention and responsive planning, training and education, screening, reporting and response, investigations, discipline, medical and mental care, data collection, and audits.²⁹

The DOJ's overview in the Federal Register notes that prison rape or sexual abuse went unaddressed for too long, and, as a consequence, prisoners suffered from sexual violence while serving their time.³⁰ For years, “[prison rape] has been at times dismissed by some as an inevitable—or even deserved—consequence of criminality.”³¹ However, the DOJ acknowledged that rape is no less a crime in prison as it is outside of prison walls by stating, “[i]t is no more tolerable when its victims have committed crimes of their own.”³² PREA not only stood as an acknowledgement of the horrors faced by prisoners by acts experienced inside the facilities, but also intended to serve as a tool to keep prison facilities accountable for the violence.³³

The Commission studied prison rape in the United States for years and developed standards in response to its findings.³⁴ The standards, which are meant to “prevent, detect, and respond to” prison rape, apply to all confinement facilities, including prison and jails, police lockups, and juvenile facilities under the Federal Bureau of Prisons.³⁵ Any state facility that seeks federal funding is

115.11–115.93); lockups (§§ 115.111–115.193); community confinement facilities (§§ 115.211–115.293); and juvenile facilities (§§ 115.311–115.393).” National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. at 37,107.

28. National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. at 37,107. This comment will focus on the standards with respect to adult prisons and jails.

29. *Id.* at 37,107–09.

30. *Id.* at 37,106.

31. *Id.*

32. *Id.*

33. *See id.*

34. *Id.*

35. *Id.*

also subject to the PREA standards. Additionally, facilities that are under the “operational control” of the state’s executive branch are also subject to the standards.³⁶ The success of PREA as a whole, the DOJ notes, is dependent on “effective agency and facility leadership, and the development of an agency culture that prioritizes efforts to combat sexual abuse.”³⁷ While the Commission presented what it determined to be the best practices for PREA standards after its years of research, ultimately, the Attorney General adopted a final rule with limitations that have frustrated the statute’s stated purpose.³⁸ The Attorney General balanced the Commission’s findings with revised standards that did not “impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities.”³⁹ While budget planning is undeniably a critical aspect of governance, this balancing undercut some very important protections that the Commission, after years of research, originally determined were necessary for the commitment to protecting prisoners from sexual abuse. In 2014, former Texas Governor Rick Perry rejected PREA standards and denounced them as “counterproductive and unnecessarily cumbersome and a costly regulatory mess.”⁴⁰ Ultimately, an anti-PREA reaction like Governor Perry’s in 2014 was predictable to the DOJ. In light of that, the DOJ improperly balanced the interest of PREA stakeholders by favoring the interest of those running state agencies and detention facilities with those who the statute was trying to protect. In doing so, however, the DOJ wrongly maintained PREA’s success in the hands of those who were unwilling to jump administrative hoops to see the statute carry out its goals.

Between the Commission’s recommendations and the Attorney General’s review and adoption, prisoner rights advocacy groups were concerned that the national standards “did not go far enough,

36. *Id.* at 37,107.

37. *Id.*

38. *See generally* 34 U.S.C. § 30307.

39. 34 U.S.C. § 30307(a)(3).

40. Deborah Sontag, *U.S. Spars With Texas on Ending Prison Rapes*, N.Y. TIMES (May 22, 2015), <https://www.nytimes.com/2015/05/23/us/texas-and-us-spar-over-rules-to-stop-prison-rape.html> [https://perma.cc/QFW4-JTGX]. While current Texas Governor Greg Abbott publicly rescinded his predecessor’s rejection of the standards, this example illustrates the perils and rejection PREA faces in various states. *See id.*

and, therefore would not fully achieve PREA's goals."⁴¹ The advocates were correct. In order to reach PREA's purpose and guarantee its success, compliance of its standards cannot be voluntary, and it cannot allow so much room for inconsistency from state and facility leaders. Rather, PREA standards must be clear, bold, and mandatory to ensure progress and compliance.

III. HOW PREA'S INTAKE PROCESS WORKS

When initially placed in detention, every prisoner undergoes an intake process.⁴² The intake is a crucial step to evaluate a prisoner's risk of sexual victimization and abuse while in detention.⁴³ PREA requires that an intake occur within the first seventy-two hours of an inmate's arrival and a reassessment of one's risk of sexual abuse or abusiveness toward others not to exceed thirty days from arrival.⁴⁴ This first point of contact with a corrections officer is critical for a transgender prisoner. One of the salient factors of the intake process with respect to LGBTQ+ prisoners is to identify whether an inmate is LGBTQ+ and "[w]hether the inmate is or would be perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming."⁴⁵

The screening information is to "inform housing, bed, work, education, and program assignments with the goal of keeping separate those inmates at high risk of being sexually victimized from those at high risk of being sexually abusive."⁴⁶ The Committee's suggested standard with respect to transgender housing was that the facility consider factors on a case-by-case basis to determine whether a placement "would ensure the inmate's health and safety."⁴⁷ Further, the standard calls for the reexamination of a transgender prisoner's placement twice each year to ensure safety and security, while considering that "a transgender or intersex inmate's own views with respect to [their] own safety shall be given

41. National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. at 37,112.

42. 28 C.F.R. § 115.41(a) (2020).

43. See National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. at 37,149.

44. 28 C.F.R. § 115.41(a)–(b), (f).

45. 28 C.F.R. § 115.41(d)(7).

46. 28 C.F.R. § 115.42(a).

47. 28 C.F.R. § 115.42(b)–(c).

serious consideration.”⁴⁸ Those recommendations were adopted in PREA’s final rule.⁴⁹

Shortly before leaving office, the Obama Administration released a Transgender Offender Manual, strengthening transgender prisoner rights created by the Transgender Executive Council (TEC), part of the Bureau of Prisons (BOP).⁵⁰ The manual, created to bolster PREA and transgender rights, addressed various aspects of prison life and sought to protect transgender people during initial housing designations, medical treatment, proper use of pronouns, pat searches, and more.⁵¹ Notably, the 2017 manual recommended housing transgender prisoners by gender identity.⁵² However, many of the provisions in Obama Administration’s 2017 manual were stripped shortly after in 2018 by the Trump Administration’s updated version.⁵³ In its “Initial Designations” section, the Trump Administration’s version of the manual requires that the TEC “use biological sex as the initial determination for designation.”⁵⁴ It further says, “the inmate’s identified gender would be appropriate only in rare cases” when determining housing destinations.⁵⁵ “Significant progress towards transition as demonstrated by medical and mental health history,”⁵⁶ would be a significant consideration during the case-by-case analysis of one’s housing designation. The newer provisions are in complete contradiction to PREA’s rules.⁵⁷

48. 28 C.F.R. § 115.42(e).

49. *See generally id.*

50. *See generally* U.S. DEP’T OF JUST., FED. BUREAU OF PRISONS, CHANGE NOTICE NO. 5200.04, TRANSGENDER OFFENDER MANUAL (2017).

51. *See generally id.*

52. *Id.* at 6.

53. *See generally* U.S. DEP’T OF JUST., FED. BUREAU OF PRISONS, CHANGE NOTICE NO. 5200.04 CN-1, TRANSGENDER OFFENDER MANUAL (2018). Note that the Trump Administration issued the same version as the 2017 manual; the new 2018 manual visibly struck old language and highlighted new language. *Id.*

54. *Id.* at 2.

55. *Id.*

56. *Id.* As stated in the introduction to this comment, only some transgender people undergo sex reassignment surgery. The procedure can be expensive and inaccessible to many people. *Frequently Asked Questions About Transgender People*, *supra* note 7.

57. *Compare* U.S. DEP’T OF JUST., FED. BUREAU OF PRISONS, *supra* note 53, at 1 *with* Prison Rape Elimination Act National Standards, 28 C.F.R. § 115.42 (2020).

This 2018 manual effectively silences a transgender prisoner's identity and input in their safety while incarcerated. Because PREA only requires that a transgender prisoner's housing be reviewed twice each year,⁵⁸ this new provision provides little solace to a transgender prisoner that their placement will be safe or will be reexamined frequently enough to ensure their safety. The Trump Administration's manual stripped transgender people's rights and voices, and it also demonstrated the vulnerability of transgender people during any given administration.

While PREA seemingly intends to examine each prisoner's placement on a case-by-case basis, the rule's adopted language sets limitations on those determinations. PREA's language notes that facilities are not to place LGBTQ+ inmates in a housing placement solely based on their gender, "unless such placement is [pursuant to a legal requirement] for the purpose of protecting such inmates."⁵⁹ In some prisons, separate units, or pods, house transgender prisoners to reduce the risks involved with comingling with the general population.⁶⁰ However, "these units can also pose some risk of further stigmatizing individuals and making them more vulnerable to harassment and abuse by staff."⁶¹ The standards do provide some limitation to this type of method of housing transgender prisoners, such as its case-by-case analysis of what is best for the prisoner, or if it is voluntary, or "if the unit also houses other groups of vulnerable individuals; or if the unit was established as part of the resolution of a lawsuit to protect LGBT people."⁶² Also, facilities are prohibited from considering prisoners' LGBTQ+ identities as a "predictor of likelihood of being sexually abusive."⁶³ The screening process seeks to determine a person's

58. 28 C.F.R. § 115.42(d).

59. 28 C.F.R. § 115.42(g); A U.S. District Court judge entered a preliminary injunction for the plaintiff, a transgender inmate, and cited this provision when she ordered the corrections facility to develop an individualized plan for the inmate, which prohibited involuntary segregation. *Tay v. Dennison*, 457 F. Supp. 3d 657, 689 (S.D. Ill. 2020).

60. *LGBT People and the Prison Rape Elimination Act*, NAT'L CTR. FOR TRANSGENDER EQUAL. (July 1, 2012), <https://transequality.org/issues/resources/lgbt-people-and-prison-rape-elimination-act> [<https://perma.cc/88M4-B9RK>].

61. *Id.*

62. *Id.*

63. 28 C.F.R. § 115.342(c).

likelihood of being a perpetrator of abuse as a method of reducing abuse committed toward others. Barring a facility from determining a prisoner's placement according to their gender identity is a massive shortcoming of PREA. Consequently, transgender inmates' gender identities are effectively ignored.

Screening is a critical point at which the corrections facility may assess the potential risk toward any inmate. Because transgender inmates are at risk of physical or sexual assault at alarmingly higher rates than the general population, assessing significant safety concerns can mean life or death. The screening, as outlined by PREA, assesses several factors to determine a prisoner's risk of sexual victimization. They include the inmate's physical build, incarceration history, history of violence, and more.⁶⁴ Particularly important factors as it relates to transgender prisoners include whether "the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming," "whether the inmate has previously experienced sexual victimization," and "the inmate's own perception of vulnerability."⁶⁵ At this point in the intake process, it is important to remember the types of discrimination and assault suffered by the transgender community outside of prison previously mentioned in this Comment. With that backdrop, a transgender inmate's perception of vulnerability while inside some high-security settings with potentially violent individuals is extremely important.

For example, Samantha Hill, a transgender woman, was placed in various cells throughout nearly two decades of incarceration in both state and federal prison.⁶⁶ She was assaulted once in 2001, once in 2003, at least four times in 2010, once in 2011, and once in 2013.⁶⁷ Even while in protective custody, she was brutally beaten and raped in a cell she shared with a man serving a life sentence.⁶⁸ "The [BOP] did [not] seem to take many steps to put someone like Hill—who describes herself as 'feminine,' 'meek,' and

64. 28 C.F.R. § 115.41(d).

65. 28 C.F.R. § 115.41 (d)(7)-(9).

66. See German Lopez, *Prison is Horrifying. For Transgender People, it's Hell*, VOX (Apr. 11, 2016, 8:30 AM), <https://www.vox.com/2016/4/11/11355702/prison-transgender> [<https://perma.cc/B9KM-SJLN>].

67. *Id.*

68. *Id.*

‘unintimidating,’—with a cellmate who posed no threat.”⁶⁹ Seeking representation, Hill wrote more than 100 letters to attorneys. She was able to secure a legal team who filed a lawsuit against the BOP in 2014, alleging her treatment violated the Eighth Amendment.⁷⁰ She settled and was transferred to a lower security prison as a result.⁷¹ While a screening intake might seem innocuous for many, for others, a facility’s determination of one’s housing can be extremely significant. For a transgender inmate, this determination could potentially determine the future harassment or violence they will experience.

PREA says facilities should make housing determinations for transgender prisoners on a case-by-case basis to “ensure the inmate’s health and safety.”⁷² The rule further states that a transgender inmate’s “own views with respect to his or her own safety shall be given serious consideration.”⁷³ However, at the same time, it prohibits a transgender prisoner’s housing to be solely based on gender identity. These provisions in PREA are not direct and frankly do not advance protecting the rights of a transgender inmate. A transgender person’s own views with respect to their safety is likely often linked to their identity, thereby making their identity a silent factor in determinations. However, this is not sufficient. PREA should spell out that a transgender person’s gender identity is a concrete factor, allowing them to have a voice separate from what their biological sex or birth certificate might indicate.

A. *PREA’s Intake and Management Shortcomings*

PREA’s housing standards on their face might seem sufficiently thorough and sensitive. However, for non-cisgender people, this rule leaves too much room for facilities to determine what is best for an inmate’s safety. PREA explicitly states that at minimum, housing determination will consider “whether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex,

69. *Id.*

70. *Id.*

71. *Id.* See generally Amended Complaint and Jury Demand, Hill v. U.S. Bureau of Prisons, No. 13-cv-03404-MSK-BNB (D. Colo. Sept 25, 2014).

72. Prison Rape Elimination Act National Standards, 28 C.F.R. § 115.42(c) (2020).

73. 28 C.F.R. § 115.42(e).

or gender nonconforming.”⁷⁴ Experts say “[i]dentifying LGBT prisoners and others who are vulnerable is the first step in decreasing safety risks and addressing concerns of these prisoners.”⁷⁵ Immediately after identifying a prisoner as transgender, certain actions must be taken “to better protect the transgender prisoner’s safety, dignity, and privacy,” which include temporary housing while information is gathered to make a longer-term decision.⁷⁶

While PREA is federal law, it is important to note that many facilities still do not adhere to the standards or fall short of some of the basic protections in the statute.⁷⁷ Some prison advocates have found that “many LGBT prisoners will not feel comfortable disclosing their gender identity to prison or jail officials,” and because of this, “[i]t is best to ask directly . . . rather than guess or try to interpret based on visible traits.”⁷⁸ However, the standards lack guidance to prisons on gathering information on the “sexual orientation and gender identity of prisoners in order to decrease risk of sexual abuse.”⁷⁹

Some prison policies maintain statements “requiring housing of transgender prisoners based on genitalia or birth sex.”⁸⁰ In a facility that does not have a clear policy regarding transgender housing, “transgender prisoners usually end up being placed by default in a men’s or women’s facility or unit based on their genitalia.”⁸¹ There is no language in PREA that prohibits this type of designation after the intake process.⁸² This lack of prohibition is

74. 28 C.F.R. § 115.41(d)(7).

75. JODY MARKSAMER & HERPER JEAN TOBIN, NAT’L CTR. FOR TRANSGENDER EQUAL., *STANDING WITH LGBT PRISONERS: AN ADVOCATE’S GUIDE TO ENDING ABUSE AND COMBATING IMPRISONMENT* 29 (2014).

76. *Id.* at 32.

77. *See generally* U.S. DEP’T OF JUST., NAT’L INST. OF CORR., *POLICY REVIEW AND DEVELOPMENT GUIDE: LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX PERSONS IN CUSTODIAL SETTINGS* 11 (2d ed. 2014).

78. MARKSAMER & TOBIN, *supra* note 75, at 29, 32.

79. *Id.* at 30. Advocates have suggested that before gathering this type of information, prisons consider who will ask the questions, whether the questions will be asked in a private setting, how a facility can make a prisoner feel comfortable in disclosing, and the way in which the questions be asked. *Id.*

80. *Id.* at 35.

81. *Id.* at 37.

82. Prison Rape Elimination Act National Standards, 28 C.F.R. § 115.93 (2020).

one of the largest shortcomings in the statute. That is, this omission effectively allows facilities to strip a transgender inmate from identifying as they are. By urging that housing determinations be made on a case-by-case basis and without this prohibition, “individualized decisions” leave the agency or facility with “a great deal of discretion.”⁸³

Critics point out that a case-by-case approach leaves room for misinformed or even dangerous decisions made by corrections staff, it also allows a “prisoner’s own views of where they should be housed” be considered.⁸⁴ However, PREA could safeguard the case-by-case determinations by prohibiting facilities from placing transgender prisoners in a men’s or women’s facility or unit based solely on their genitalia. Instead, at a minimum, the statute could include a “presumption of housing based on gender identity.”⁸⁵ This distinction would change the traditional bias of housing assignments in facilities with no clear transgender housing policy.

Prisons are inherently gendered institutions.⁸⁶ By design, facilities operate on a binary mechanism: men’s facilities and women’s facilities. Understandably, adapting to a nonbinary system presents administrative, structural, and practical difficulties to the prison industry. Although critics argue this is very much a reality, challenges and obstacles have always stood as a barrier to progress. PREA can be amended to provide clear alternatives to prisons, such as “relocating a perpetrator of abuse, providing heightened supervision, changing housing placement or cellmates, placement in a single occupancy cell within the general population, or transfer from a men’s to a women’s facility or vice versa.”⁸⁷ Transgender prisoners and advocates for transgender rights face an uphill battle to reach equal treatment while in prisons, and we

83. See MARKSAMER & TOBIN, *supra* note 75, at 37.

84. *Id.*

85. *Id.* at 40.

86. Victoria Patrickson, *A ‘Double Punishment’: Placement and Protection of Transgender People in Prison*, PENAL REFORM INT’L (Sept. 30, 2020), <https://www.penalreform.org/blog/transgender-people-in-prison-the-double-punishment/> [https://perma.cc/V734-BBUE].

87. *LGBT People and the Prison Rape Elimination Act*, *supra* note 60.

allow prison rape as an inevitability to serving a prison sentence when we gloss over the stark data and administrative burdens.⁸⁸

Some critics argue that making prisons more gender neutral or adaptive to a progressing world of gender identity makes room for sexual predators who do not actually identify as transgender to take advantage of this system.⁸⁹ While this is a valid concern, prison officials maintain a generous degree of discretion under PREA that would continue under this proposal. The presumption of housing based on gender identity could be overcome if an inmate's purported identity is objectively and manifestly insincere. A set criterion to assess this could reduce the risk of a predatory cisgender man purporting to be transgender with the nefarious intent to be placed in a women's prison facility.

IV. THE AUDIT FUNCTION

Congress created an audit process within PREA to review facilities across the country and assess their prison conditions, management, and treatment toward prisoners. Ideally, a yearly audit serves the function of ensuring that the PREA standards are adhered to, which is determined through a yearly audit.⁹⁰ The regulation provides that at least one-third of each facility must be audited each year and each facility must be reviewed in its entirety every three years.⁹¹ As part of compliance, prisons must first complete a twenty-six-page pre-audit questionnaire prior to a facility visit.⁹² This portion of the audit provides preliminary information and supporting documents before an onsite visit.⁹³ The questionnaire lists the numerous provisions of the PREA statute as

88. *Farmer v. Brennan*, 511 U.S. 825, 852 (1994) (Blackmun, J., concurring). The Court has been clear that prison rape serves zero penological or rehabilitative purpose. *Id.*

89. See Stephanie Saran Rudolph, *A Comparative Analysis of the Treatment of Transgender Prisoners: What the United States Can Learn from Canada and the United Kingdom*, 35 EMORY INT'L L. REV. 95, 131 (2021).

90. See generally Prison Rape Elimination Act National Standards, 28 C.F.R. § 115.401 (2020).

91. 28 C.F.R. § 115.401(a)–(b).

92. NAT'L PREA RES. CTR., PREA-AUDIT: PRE-AUDIT QUESTIONNAIRE, PRISONS AND JAILS (2019).

93. *Core Components of the Audit Instrument*, NAT'L PREA RES. CTR., <https://www.prearesourcecenter.org/audit/instrument/core-components> [<https://perma.cc/9GVB-DZK5>] (last visited Sept. 26, 2021).

checklists, and facilities must mark one-by-one whether the standards are met.⁹⁴ In sum, the pre-audit questionnaire provides a “basis for [an] auditor’s understanding of the facility’s operations, terminology, structure, population, and other important information.”⁹⁵ Following the pre-audit questionnaire, a PREA auditor conducts site visits where he or she can assess the grounds, conduct randomized inmate interviews, and review videotapes or other relevant data.⁹⁶

A. *Audit Amendment & Deliberate Indifferent Test*

An amendment to PREA prohibiting jails and prisons from automatically housing transgender inmates according to their biological sex would add to the audit checklist. Such an amendment would gather support from the Constitution. Specifically, the Eighth Amendment states, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁹⁷ The landmark Supreme Court case *Farmer v. Brennan* laid out what amounts to a violation of prisoners Eighth Amendment rights in regard to prison housing.⁹⁸ The Court held that “[a] prison official’s ‘deliberate indifference’ to a substantial risk of serious harm to an inmate violates the Eighth Amendment.”⁹⁹ The plaintiff in *Farmer* was a transgender woman who was placed in the general male prison population and within two weeks was beaten and raped by another inmate in the plaintiff’s cell.¹⁰⁰ Farmer argued she had been placed in a violent environment with history of inmate assault “despite knowledge that [she] was [transgender] who ‘projects feminine characteristics,’ [who] would be particularly vulnerable to sexual attack” by an inmate.¹⁰¹

94. NAT’L PREA RES. CTR., *supra* note 92. The questionnaire is mostly comprised of “yes” or “no” boxes to assess compliance in the pre-audit form. *Id.*

95. *Core Components of the Audit Instrument*, *supra* note 93.

96. 28 C.F.R. § 115.401(h)-(o) (2020).

97. U.S. CONST. amend. VIII.

98. *Farmer v. Brennan*, 511 U.S. 825, 842 (1994).

99. *Id.* at 828.

100. *Id.* at 830.

101. *Id.* at 830–31. Farmer argued this amounted to deliberate indifference by failing to protect her safety, which violated her Eighth Amendment rights. *Id.* at 831.

While the Constitution does not require “comfortable prisons . . . [it does not] permit inhumane ones.”¹⁰² The “treatment a prisoner received in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.”¹⁰³ The Court in *Farmer* held, though, that the conditions of confinement only amount to cruel and unusual punishment if the official knows of a substantial risk of serious harm and disregards that risk or fails to take reasonable measures to reduce said harm.¹⁰⁴ Farmer argued the Court should find municipalities liable when officials are placed on actual or constructive notice of risk of serious harm, referred to as the “obviousness test.”¹⁰⁵ The obviousness test originated in a case involving a municipality’s failure to adequately train its agents and therefore disregard the city’s “obvious” needs,¹⁰⁶ but the Supreme Court rejected this test believing it was inappropriate in *Farmer*.¹⁰⁷

While Farmer’s argument ultimately failed in creating liability for prison officials in 1994, the obviousness test with respect to a transgender prisoner’s risk of assault or sexual violence has become increasingly relevant. New caselaw has shown that lower courts have recognized the obviousness of risk toward transgender prisoners, which should ultimately trigger a stricter standard with respect to transgender housing in prisons. For example, in *Lojan v. Crumbsie* mere knowledge that the plaintiff was transgender was sufficient to place prison officials on notice that she was susceptible to physical attack.¹⁰⁸ In *Green v. Brown*, the Court held that defendant’s knowledge of transgender prisoners’ vulnerability raised an issue of fact as to the deliberate indifference in failing to take protective measures.¹⁰⁹ Finally, in *Green v. Hooks*, the plaintiff

102. *Id.* at 832.

103. *Id.*

104. *Id.* at 837, 847.

105. *Id.* at 841 (citing *City of Canton v. Harris*, 489 U.S. 378, 396 (1989)).

106. *Harris*, 489 U.S. 378, 390 (1989).

107. *Farmer*, 511 U.S. at 841.

108. Lindsey Ruff, *Trans-cending the Medicalization of Gender: Improving Legal Protections for People Who are Transgender and Incarcerated*, 28 CORNELL J.L. & PUB. POL’Y 127, 150 n.184 (2019).

109. See *Greene v. Bowles*, 361 F.3d 290, 293–95 (6th Cir. 2004) (Transgender prisoner filed a 42 U.S.C. § 1983 action against a corrections facility alleging deliberate indifference to her safety in violation of the Eighth

argued that he had made correctional officers aware he “had a generalized fear for his life” as a transgender inmate when he informed the defendant that he felt unsafe in the prison.¹¹⁰

These examples demonstrate that courts are increasingly considering the level of danger faced by transgender prisoners, and traditional concepts of incarceration may need to evolve to ensure the protection of Eighth Amendment rights. Seemingly, courts are beginning to recognize the mounting research and data that reveal the dangers inside prison walls for transgender inmates. This recent case law and compelling data supports an amendment to PREA’s housing standards, ensuring compliance through its audit function.

In *Farmer*, the Court stated that, “the Eighth Amendment does not outlaw cruel and unusual ‘conditions’; it outlaws cruel and unusual ‘punishments.’”¹¹¹ While this true, more and more data is emerging showing transgender prisoners suffer dangerous physical or sexual assaults at higher rates than cisgender prisoners, indicating their housing can often invite life-threatening conditions. *Farmer* provided that “[a]n act or omission [by a prison official] unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage,” but does not rise to level of liability.¹¹² Critics point to this as one of the largest hurdles for transgender prisoners to overcome when they experience harm at the hands of prison officials.¹¹³ However, this Comment advocates for a less challenging legal fight for prisoners. Amending PREA to recognize a transgender prisoner’s gender identity would make way for a less cumbersome legal fight. Although advocates for the status quo could argue this may open the floodgates to inmate lawsuits, allowing transgender prisoners to experience mental and physical harm is a civil rights violation that should not be tolerated or overlooked.

and Fourteenth Amendment after she was placed in protective custody and later assaulted several times by a predatory inmate).

110. *Green v. Hooks*, 2013 WL 4647493, at *2–3 (S.D. Ga. Aug. 29, 2019).

111. *Farmer*, 511 U.S. at 837.

112. *Id.* at 837–38.

113. *LGBT People and the Prison Rape Elimination Act*, *supra* note 60 (noting the PREA does not allow prisoners to bring a private cause of action against prison officials or institutions for failing to comply with PREA procedures and regulations).

As it exists now, the PREA audit is a weak enforcement tool and must be strengthened if the statute intends to live up to its initial purpose. First, PREA offers no private cause of action as a means of legal recourse for any violation.¹¹⁴ Second, the “main enforcement mechanism for PREA is the threatened loss of five percent of the state’s federal funding for prisons” for failure to pass an audit.¹¹⁵ As one can infer, a five percent loss is “simply too weak a compliance mechanism to create much incentive for some governors to implement the regulations.”¹¹⁶ The built-in audit function of the statute cannot simply be a meaningless, bureaucratic tool. By making sure the PREA audits identify facilities that are failing to properly house transgender inmates, the basic housing rights of transgender inmates could be protected. Amending the PREA audit to, for example, presume a transgender person’s housing according to their gender identity, is supported by a shifting lower court jurisprudence on transgender Eighth Amendment rights.¹¹⁷ Growing research and societal awareness of the dangers of being transgender in prison now could amount to a deliberate indifference by corrections facilities disregarding this known and obvious risk.

V. STATE TRANSGENDER PRISONER HOUSING LAWS

As PREA currently stands, a prisoner may not sue a prison for violating PREA standards.¹¹⁸ The standards and its audit function remain the only way to uphold the hopes of preventing, detecting, and responding to prison rape that Congress had in the early 2000s. While Congress should have included a private cause of action for prisoners who suffer violent abuses in prison, the PREA audit is the only tool to hold facilities accountable. In recognizing the shortcomings of PREA in protecting transgender prisoner rights, some states have begun to enact legislation to address transgender housing in state facilities.¹¹⁹ The following state actions should spur Congress

114. Giovanna Shay, *PREA’s Peril*, 7 NE. UNIV. L.J. 21, 22 (2015).

115. *Id.*

116. *Id.* at 23.

117. *See* *Lojan v. Crumbsie*, 2013 WL 411356, at *4 (S.D.N.Y. Feb. 1, 2013).

118. AM. C.L. UNION & NAT’L CTR. FOR LESBIAN RTS., KNOW YOUR RIGHTS: LAWS, COURT DECISIONS, AND ADVOCACY TIPS TO PROTECT TRANSGENDER PRISONERS 3 (2014).

119. *E.g.*, 2020 Cal. Legis. Serv. Ch. 182 (West).

to reevaluate PREA and could trigger an amendment to PREA housing standards to strengthen transgender rights.

A. *California*

In late 2020, California passed the Transgender Respect, Agency and Dignity Act,¹²⁰ which was “intended to strengthen protections for LGBTQ people”¹²¹ The legislation requires California’s Department of Corrections and Rehabilitation to house someone who is transgender, nonbinary, or intersex, regardless of anatomy, “at a correctional facility designated for men or women based on the individual’s preference.”¹²² Through clear, simple, and direct language, the California legislature now provides transgender inmates the ability to have a voice in where they are housed according to their gender identity. The legislation is a model for how a straightforward amendment to the PREA provision¹²³ would make way for an amendment to the pre-audit questionnaire, which could reflect this state’s law. In a press release, Governor Gavin Newsom elaborated on how the legislation would be carried out in state facilities: “[s]erious consideration to [a transgender prisoner’s] health and safety perceptions for bed assignments...[t]his includes granting single-cell status, housing them with another incarcerated person of their choice, or removing people who pose a safety threat.”¹²⁴ California’s law also requires that prison facilities honor a transgender inmate’s preferred pronoun from the moment of an initial intake and throughout their

120. *Id.*

121. Artemis Moshtaghian & Eric Levenson, *California Requires Correctional Facilities to House Transgender Inmates Based on Gender Identity*, CNN (Sept. 27, 2020, 12:12 PM), <https://www.cnn.com/2020/09/27/us/california-transgender-inmates-trnd/index.html> [<https://perma.cc/7ND4-GJ4Z>].

122. CAL. PENAL CODE § 2606(a)(3) (West 2021). It is important to recognize that the language used in this statute is problematic because transgender people do not prefer one gender over another; a transgender person’s internal sense of being determines their gender identity.

123. Prison Rape Elimination Act National Standards, 28 C.F.R. § 115.42(e) (2020).

124. Terry Thornton, *Governor Newsom Signs Senate Bill 132 to Respect Gender Identity During Incarceration*, CAL. DEP’T OF CORR. & REHAB. (Sept. 29, 2020), <https://www.cdcr.ca.gov/insidecdcr/2020/09/29/governor-newsom-signs-senate-bill-132-to-respect-gender-identity-during-incarceration/> [<https://perma.cc/J9ET-H9L7>].

detention.¹²⁵ This, among a number of other recently adopted legislation in California, embraces an “inclusive and culturally competent effort[t] that uphold[s] dignity . . . regardless of who you are.”¹²⁶

B. *Connecticut*

Connecticut passed a law in 2018, *An Act Concerning The Fair Treatment of Incarcerated Persons*, that ensures medical protections for pregnant women in detention and protections for transgender prisoners.¹²⁷ The legislation, while still creating some barriers for transgender people in prison, requires that they be “placed in a correctional institution with inmates of the gender consistent with the inmate’s gender identity.”¹²⁸ While the legislation is not perfect, it does provide an important step in advancing transgender rights. The law requires adhering to a transgender person’s gender identity only when a transgender person has either a birth certificate, passport, or driver’s license that reflects and confirms their gender identity in order to presumptively be housed in a facility as they identify.¹²⁹ This is a barrier for many transgender people in Connecticut because changing one’s documents can be complicated, expensive, and for some, even impossible depending on the state.¹³⁰ These barriers could potentially make it difficult for a transgender person in Connecticut to adhere to the requirements of this legislation.

Leaving transgender prisoner housing protections up to the individual states is inadequate, and consequently, fails to uniformly protect transgender inmates. Although recognizing some shortcomings, both Connecticut’s and California’s transgender housing laws

125. CAL. PENAL CODE § 2605(a)(3) (West 2021).

126. Moshtaghian & Levenson, *supra* note 121.

127. *S.B. 13, an Act Concerning Fair Treatment of Incarcerated Women*, AM. C.L. UNION CONN., <https://www.acluct.org/en/legislation/sb-13-act-concerning-fair-treatment-incarcerated-women> [<https://perma.cc/Z97M-H9E5>] (last visited Oct. 5, 2021).

128. CONN. GEN. STAT. § 18-81ii (2021).

129. *Id.*

130. *Identity Documents & Privacy*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/issues/identity-documents-privacy> [<https://perma.cc/8C5T-RH36>] (last visited Feb. 10, 2021). Nearly half of states require surgery or court order requirements in order to approve of an updated and accurate identification document that changes one’s gender designation. *Id.*

provide more protections for transgender inmates than PREA does. The Prison Policy Initiative conducted a review on transgender policies and PREA compliance in twenty-one states and found that “[m]ost states’ policies are sparse, and convey a clear discomfort with the ignorance about the trans community.”¹³¹ The review examined eight specific categories and determined if the state facilities complied with the PREA standards.¹³² While states varied in their compliance of each category, eight of the twenty-one states failed in complying with PREA’s case-by-case transgender housing determinations.¹³³ This review demonstrates the inequalities that transgender prisoners experience depending on where they are incarcerated in the country. For example, Pennsylvania was the only state to meet every single standard,¹³⁴ which means that a transgender inmate there “should be able to access basic rights like protection from...their housing safety, [while] someone incarcerated in Oklahoma or Tennessee cannot.”¹³⁵

Curiously, though, and unexplained, despite these states not being in full PREA compliance, only three facilities in the twenty-one states failed their PREA audits in the last five years.¹³⁶ When a state fails a PREA audit, the federal government then revokes grant money. In Texas, for example, the state lost more than \$800,000 in “prison-related federal grant money as a penalty.”¹³⁷ However, the Texas Department of Criminal Justice said the “loss had no effect on its operations, which inmate advocates interpreted as a reality that the PREA penalties were little more than

131. Elliot Oberholtzer, *The Dismal State of Transgender Incarceration Policies*, PRISON POLY INITIATIVE (Nov. 8, 2017), <https://www.prisonpolicy.org/blog/2017/11/08/transgender/> [<https://perma.cc/LY67-C3VE>].

132. *Id.* The categories include whether: (1) intake screening has procedures for people to identify as trans; (2) trans housing decisions are made on a case-by-case basis; (3) trans people’s views are seriously considered in housing decisions; (4) segregated housing or isolation without consent; (5) separate showers; (6) searches to establish genital status; (7) training in respectful communication; (8) incident review considers gender identity/trans status; and (9) facilities that passed their last PREA audit.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. Deborah Sontag, *U.S. Spars with Texas on Ending Prison Rapes*, N.Y. TIMES (May 22, 2015), <https://www.nytimes.com/2015/05/23/us/texas-and-us-spar-over-rules-to-stop-prison-rape.html> [<https://perma.cc/Z285-937W>].

symbolic.”¹³⁸ This reality is problematic. If consequences resulting from PREA violations are ineffective deterrents, then transgender inmates are continually at risk.

Following a lawsuit with the American Civil Liberties Union, Delaware is now touted as the model state in protecting transgender prisoner rights.¹³⁹ Prisons are required “to weigh gender identity, biological sex, and other factors in determining where to house transgender inmates.”¹⁴⁰ Previously, the state made their housing determinations based on biological sex alone.¹⁴¹ While this is a step in the right direction, it is not the same everywhere, and as Harper Jean Tobin, director of policy for the National Center for Transgender Equality in Washington, D.C., stated, “[p]risons that do not consider gender identity when housing transgender people—which are currently in the majority—are putting those people at grave risk and violating federal rules.”¹⁴²

CONCLUSION

Transgender inmates continue to suffer physical, mental, and sexual assault in prison at alarming rates compared to cisgender prisoners. Often, these assaults occur from a failure to safely assign transgender inmates [according to the gender they identify with, rather than the sex assigned at birth]. PREA is currently insufficient in protecting transgender inmates from dangerous or life-threatening housing placements. A proposal to amend the PREA audit function to ensure that prisons are not automatically designating transgender inmates according to their biological sex would be a starting point to recognizing a transgender person’s identity. While this proposed amendment to PREA will not guarantee that a transgender prisoner is protected fully from prison assault, it would recognize a transgender prisoner’s identity and reduce the likelihood of assault. Additionally, the amendment would decrease the

138. *Id.*

139. Margie Fishman, *Delaware Prisons Beef Up Transgender Protections*, DEL. ONLINE (Feb. 15, 2017, 8:02 AM), <https://www.delaware-online.com/story/news/local/2017/02/15/delaware-prisons-beef-up-transgender-protections/97891438/> [<https://perma.cc/49A8-PUHK>].

140. *Id.*

141. *Id.*

142. *Id.*

deference given to facilities to function how they see best fit at the expense of a transgender person's basic human rights.