


2023

## The Violation of Transgender Prisoners: The Violent Impact of Gender Discrimination Experienced by Incarcerated Trans People in the United States of America

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### Recommended Citation

Jennings, Brooklyn Mx. (2023) "The Violation of Transgender Prisoners: The Violent Impact of Gender Discrimination Experienced by Incarcerated Trans People in the United States of America," *Access\*: Interdisciplinary Journal of Student Research and Scholarship*: Vol. 7: Iss. 1, Article 2.  
Available at: <https://digitalcommons.tacoma.uw.edu/access/vol7/iss1/2>

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# The Violation of Transgender Prisoners: The Violent Impact of Gender Discrimination Experienced by Incarcerated Trans People in the United States of America

## Cover Page Footnote

I'd like to acknowledge the United States Transgender Survey for their continually admirable work for the trans community and Dr. Cynthia Howson for her continued support and contributions to the field of gender studies.

## **Abstract**

U.S prison reform policies, such as the Prison Rape Elimination Act, pacify the government and the public into believing that prisons are an equitably safe place for vulnerable inmates. However, transgender inmates in the United States experience extraordinary rates of violence and discrimination based on their gender identity. There are difficulties in determining exact statistics of gender-based incidents of assault due to dueling structures of legal power and questionable support from prison authorities. However, from available information, trans inmates report dehumanizing prison environments that severely impact their wellbeing. This article draws upon the current status of incarcerated trans inmates' protection policies, identifies academic methodology to advocate for better research, and recognizes organizations such as the National Center for Transgender Equality and Black and Pink that are campaigning for better prison conditions. This paper also argues that the federal policies aimed to alleviate the brutal experiences of gendered violence are less effective than the campaigns of the aforementioned organizations. The reader can expect a critique of the current efficacy of policy-based solutions for incarcerated transgender individuals in the United States and will be provided with information about alternative think tanks and organizations that are working to actively reduce the current violence towards transgender individuals in prison.

*Keywords:* gendered violence, transgender discrimination, prison culture, legal pluralism

## **The Violation of Transgender Prisoners: The Violent Impact of Gender Discrimination Experienced by Incarcerated Trans People in the United States of America**

When individuals are detained, jailed, or imprisoned, there are concerns about their overarching human and civil rights as secured by the U.S Constitution. Among those are rights to protection against cruel and unusual punishment, access to adequate food, medicine, housing, and protections against excessive force by detention staff (James et al. 2016). While these rights are seemingly straightforward, the exercised legal protections pertaining to sex and gender identity while imprisoned are more nuanced (Brown and Jenness 2020; Edney 2004). Specifically, when the physical sex of an inmate is incongruent with expressed gender identity (referred to as transgender), their legal rights and protections are not explicit and, therefore, are exposed to subjective interpretation. Simply put, a lack of universal legal rulings places transgender prisoners in vulnerable positions; as a result, they are overrepresented in violent incidents (Acosta 2021). Furthermore, there is a murky junction between the jurisdiction of government and private prisons. For-profit prisons lack the accountability for policy implementation that is required of public prisons, such as a higher ratio of staff to inmates or population control. Administrators are more interested in pursuing profit than the rights of prisoners. This inherently breeds a greater rate of violence and turns a blind eye to the provincial prison culture devoted to “underlying moral commitments, [which] produce an irrational and chaotic system of governance” (Calavita 2016). As a result, the interests of staff do not reflect the basic rights of prisoners; thus, prisons are more dangerous for transgender inmates who are then disproportionately harmed.

This article makes a deliberate comparison of legal pluralism and prison culture. This comparison provides a theoretical framework to support broader claims about the duality of enforceable prison culture housed alongside the public-private jurisdiction of prison law and its impact on transgender rights while in prison. Legal pluralism is a didactic demonstration of the stratum of law coexisting in the same geographic space (e.g., *Washington v Idaho*) with connotations to sociology and legal philosophy. For example, while there are federal anti-discrimination laws addressing gender prejudice, they are not invoked as a right of prisoners (Annas 2004; Peek 2003). Therefore, transgender inmates are denied gender-appropriate accommodations; thus, they endure greater degrees of assault and inadequate medical care. This is particularly prevalent in states with minimal pro-gender identity laws (Tarzwell 2006). As a generalization, prison culture—which may differ from region to region—seeks to protect the regional social sentiment of punishing transgender individuals for their gender identity. If federal efforts to rectify this issue represent one precedent of legal systems, the disconnect between integration and resistance in the public and private contracts of prisons today represents another (Miller et al. 2020). Thus, trans inmates experience dichotomous channels of parallel legal systems, undermining existing policies, prison reform efforts, and increasing the literal and figurative barriers of prison culture. In this article, I argue that federal policies do less to protect transgender prisoners than regional organizations, and in favor of meaningful transitions toward increasing legal rights and reducing harm for incarcerated trans people in the United States.

First, it must be noted that there are two overlapping facets that contribute to the onslaught of cruel behavior towards trans prisoners. The first is a clear relationship

between localized gender identity policies and prisoner harm. Despite the well-intentioned Prison Rape Elimination Act (PREA), there is a notable gap between internal prison violence and a prisoner's ability to pursue legal action (Pederson 2019; Shay 2013). The gap between the intentions of PREA and its practical implementation undercuts the overall acceptance of gender identity and the legitimacy of existing federal policies, while amplifying a sweeping lack of commitment to protection policies. At a foundational level, there is a lack of unified interest in safeguarding prisoners (Routh et al. 2017; Shay 2013). Because these violations occur within the prison system itself, accountability for the perpetrators is difficult (Lenning and Buist 2018; Peek 2003). Facility staff are the most likely to assault transgender prisoners, while simultaneously holding responsibility for their care and safety (National Center for Transgender Equality 2019; Pederson 2019). The inability of trans inmates to accurately report mistreatment represents the critical lack of internal review systems for assessing their safety needs (Lee-Renee 2020; Redcay 2020). Furthermore, perpetual misbehavior from staff responsible for the care of prisoners echoes the poor ethics of prison code (as a whole) and emphasizes the inadequate protections for incarcerated trans people. The staff maintain the relevant factors of the systems of harm towards trans prisoners.

The second component is how, as a default, trans prisoners are separated by gender-assigned-at-birth (Sumner and Jenness 2014). While gender segregation is not considered an infringement of rights, it sets the tone for the nongender-affirming culture of prisons (Blankenship 2018; Jenness 2010), which leads to assault by facility staff and other inmates (James et al. 2016) and substandard medical care and mental health resources (Brömdal et al. 2019; Fay 2020). The risk of physical and/or sexual violence

for transgender individuals is significantly higher when forcibly housed with inmates of the opposite sex. This places incarcerated trans individuals in a precarious position, further imperiling them in an already violently charged prison atmosphere. Furthermore, trans prisoners are routinely denied gender-affirming hormone therapy, gender reassignment surgeries, refused access for medical practitioners educated in trans-specific care, and left with untreated gender dysphoria (King 2019). In connection with the issues previously discussed, the current laws and policies are inapt.

The remainder of this paper is divided into discussing two solution-focused approaches. The first section highlights current efforts by federal law to provide trans inmates with effective tools to understand the overall intent of PREA and the constitutional rights it is meant to protect. This includes an analysis of PREA and the shortcomings of the Eighth Amendment, and a ruling by the Ninth Circuit Court of Appeals. The next section details the work of epistemic communities advocating for improved research methodology and scholarly review. This is relevant for transitioning internal prison culture. The intent of this section is to provide working theories for adequate prison research, theoretical sociological advances on behalf of trans prisoners, and a quick critique on the overall effects of prisons as a habitat for violence. The final section discusses prison and trans-advocacy specific organizations—notably, community partnerships that are collaborating with elected officials in working to hold detention staff accountable, and organizational efforts to provide education and resources for prison guards, prison medical practitioners, and prison administrators. As research has shown, laws and policies regarding the prison system are inadequate without further addressing the toxic culture of prisons themselves. All information in this

section pertains to effective prison laws, beneficial prison management, and reducing harm for incarcerated trans persons.

### **Existing Legal Efforts**

Prison law is not a boundless arena. There are several layers of prevailing legal efforts and ideologies that shape public discourse surrounding prisons and prisoners. The most uncontested tier of prisoner protection rights is the Prison Rape Elimination Act (PREA). Established in 2003, PREA enacts a formal recognition of substandard protections against sexual assault of U.S prisoners by the United States Congress. Federal law requires that adult and youth correctional facilities adopt recommended protection policies and prove their adherence, lest the prisons surrender 5% of their government funding (Browne et al. 2015; Fellner 2009). To facilitate institutional adherence, the PREA Commission instated four directives: prison management strategies, internal monitoring, external oversight, and prison audits (Fellner 2009). These largely pertain to how sexual assault in prison is reported and categorized, how prisoners report incidents, and finally, mitigation strategies. These mandates are problematic for transgender prisoners due to reference to gender segregation by male/female biology and heavy reliance on facility staff to monitor and enforce the regulations (Brown and Jenness 2020). Additionally, despite PREA's status as a federal law, individual states are free to "opt-out" of adhering to the recommended regulations. Thus, the protections that would be afforded to all inmates by PREA are negated. Several states, such as Idaho and Arizona, have chosen to opt out of PREA sanctions (King 2019). While a credible effort to protect incarcerated people from sexual assault,



PREA merely lays the groundwork for more covert methods of harm, particularly for transgender inmates held in correctional detention.

This issue is complicated by the Eighth Amendment because it is often argued as the constitutional umbrella of jurisprudence for transgender inmate health. It states that there shall be no “cruel and unusual punishments inflicted,” and is considered a guarantee of some protections for incarcerated peoples. However, incarcerated transgender people are more frequent targets of harsh punishment, and the current interpretation of the Eighth Amendment does not afford trans inmates an appropriate degree of defense to offset the serious mental and physical harm of the prison environment. Unfortunately, like PREA, it is susceptible to unlawful interpretation by prison administrators and is often disregarded within individual correctional facilities and largely fails to remedy the “imported legal institutions and codes [that] get significantly reshaped to fit the local reality” (Calavita 2016). In short, the Eighth Amendment “ultimately fails to ensure humane conditions for transgender prisoners” (Tarzwell 2006). Specifically, the Eighth Amendment fails to account for the adverse effects of prison culture, such as segregation by gender, routine denial of gender affirming care, and appropriate anti-discrimination care (Fay 2020; King 2019; Pederson 2019). Each of these examples is uniquely correlated to gender-based violence, exponentially experienced by transgender individuals (Acosta 2021; Blankenship and Carter 2018; James et al. 2016; Peek 2003). Again, the Eighth Amendment is a notable effort to sustain protections for individuals in prison but overlooks some of the fundamental needs and resources for incarcerated transgender people.

The Ninth Circuit Court of Appeals represents another existing legal avenue in seeking to protect transgender human rights for those in prison (Peek 2003). In 2019, the Ninth Circuit ruled in favor of gender affirming surgery as a necessary medical procedure for trans inmates. Based on the Eighth Amendment's protection against "cruel and unusual punishment," the court found the denial of said surgeries is often explicitly known by prison officials to result in needless prisoner suffering. Gender-affirming surgeries move the needle forward for a more homogenous law, which could be accessed by the "federal appeals court with a standing ruling ordering gender reassignment surgery" (Johnson 2019). While not a national ruling (and this specific case was later overturned by the full court), this is still a notable legal starting block. Additionally, the Ninth Circuit has also ruled in favor of acknowledging gender identity and setting a legal precedent that gender discrimination is related to gender identity. Furthermore, stronger legal parameters for gender discrimination more firmly define the parameters of anti-discrimination laws (Lenning and Buist 2018). More rulings, like those that favor legally improving the human rights of transgender individuals and transgender prisoners, strengthen the legal potential for prison compliance and provide plausible returns on slow, but hopeful, cultural turnaround.

### **Epistemic Community**

Epistemic communities are networks of professionals, experts, and scholars who share knowledge, values, and a diversity of methodologies from within a specific field of study. The epistemic community for prison reform includes criminologists, legal scholars, sociologists, psychologists, prison administrators, and stakeholders. They play a crucial role in shaping law and policy agendas, influencing decision-making

processes, and contributing to the development of knowledge within their respective domains. Therefore, to better understand why current legal endeavors are insufficient in preventing inordinate violence towards trans prisoners, it is necessary to analyze the standing legal theories generated within the epistemic community and explore prison-specific academic reform.

As an example, legal pluralism exists in the prison system because of an internal for-profit prison culture and the hired staff that enforce the cultural norms. This highlights the necessity for legal systems to operate side-by-side for an effective acceptance and integration of trans protection policies and to advocate for improved research methods (Calavita 2016; Tarzwell 2006). It accomplishes little for researchers to label the legal philosophy of injustice without a clear methodology to support positive effects for the population the research aims to establish. Therefore, in an effort to combat mistreatment and discrimination, scholars of prison policies have presented potential reform solutions such as affirmative law (Faithful 2009) and gender integration (Lamble 2012; Ledesma and Ford 2020). Other solutions range from sociological approaches, such as soft mixed methods, and eventually to abolition and decarceration. These are particularly relevant in states with fewer gender-affirming laws, which also have higher rates of prison violence. A growing body of evidence links better research methods for prison systems to prison reform (Edney 2004; Erni 2013; Fay 2020). Specifically, this information allows organizations to intervene and provide support and advocacy on behalf of trans prisoners in regions where they are more liable to be harmed.

Sociolegal scholarship does not directly confront the day-to-day violence incurred by trans inmates. However, several scholarly veins of ideological reform do provide a bridge between sociological models of reform and local elected officials and politicians, serving as a framework for organizations to build on. For example, the soft mixed methods approach is an idea introduced by Valerie Jenness. Jenness (2010) argues that a more comprehensive, sociological approach to studying transgender people in prison can forge productive policies. Because prison is insulated from society and many of the abuses of trans inmates stem from prison staff and administrators, it is critical to equate trans safety with the interests of the enforcers of prison culture (Brown and Jenness 2020; James et al. 2016; National Center for Transgender Equality 2019; Redcay et al. 2020). Furthermore, prisons are an incubator where cultural prison norms can outweigh the power of federal policies (Calavita 2016). Therefore, the systematic development of soft mixed methods increases visibility of transgender categorization and promotes a more positive relationship between inmates and facility staff (Miller et al. 2020; Routh et al. 2017). Therefore, when research reflects a reality experienced by both trans inmates and staff alike, the likelihood that the internal culture will divert to wardship, rather than exploitation, and dually increase the quality of the experience at the facility.

Another alternative to a top-down legal push is the whole incarceration setting approach (Brömdal et al. 2019; Edney 2004). This concept foregoes the paternalistic approach of soft mixed methods and focuses on a whole metamorphosis inside correctional centers. Under this conversion, staff are still liable for the safety of incarcerated people but in addition to fellow inmates' accountability for prison safety

(Brömdal et al. 2019). The whole incarceration setting approach proposes eliminating the gender binary and gendered isolation altogether (Ledesma and Ford 2020; Sumner and Jenness 2014). As part of providing a safer setting, this course of action would mandate gender affirming medical care and hormone therapy (Lee-Renee 2020) and specialized medical practitioners (Blankenship and Carter 2018; Brown and Jenness 2020; Lenning and Buist 2018). Some of the initiatives recommended by implementing a whole incarceration setting approach include shared responsibilities for the safety of prisoners (James et al. 2016) and, again, a shift in cultural prison norms for all (Brömdal et al. 2019). As evident from these two approaches, solidarity between staff and inmates is crucial for successful protection policies for transgender inmates.

A final, more progressive framework for protecting transgender prisoners from violence is decarceration (Hereth and Bouris 2020). Decarceration is an abolitionist approach to removing all carceral systems. Without the institution of prisons to abuse prisoners, the existence of violence in detention centers is nonexistent. Therefore, law, policymakers, and society focus on addressing the root sources of crime, legal pluralism, and gender-based discrimination. Furthermore, decarceration acts as restorative justice instead of exacting punitive action (Pettus-Davis and Eperson 2015; Pigott 2013). This approach invites a host of commentary outside the scope of this paper. However, decarceration is a notable feminist theory, which includes the scholarly assessment of reducing violence in prisons and overall trans discrimination and gender-based harm. Like previous methods presented, one objective of decarceration is to safeguard the health and well-being of trans individuals and provide a critical analysis of trans protection as a facet of the greater conversation of human rights (Coates 2015).

## **Organizational Strategies, National Associations, and Grassroots Organizations**

Scholarly interpretations are practical for conceptualizing the work that can be done to improve research and theories about transgender inmates. Additional aspects to addressing gender discrimination and its ensuing violence are regional and national organizations. Many of these associations and organizations work with currently incarcerated transgender inmates and advocate for day-to-day rights and protections. They often collaborate directly with trans individuals and target trans specific conflicts to improve prison conditions. Examples include grassroots cooperatives and chapters like Black and Pink, the American Civil Liberties Union (ACLU) Know-Your-Rights campaign, or trans specific agencies such as the National Center for Transgender Equality (Annas 2004; Glezer et al. 2013; James et al. 2016; National Center for Transgender Equality 2019). They can work in tandem with research and propose solutions provided by the scholarly community. Each division in these organizations addresses individual obstacles to transgender prison protections and employs unique methodologies in their advocacy. Some include community partnerships with policy makers, while others focus on informational material for prisoners and educational resources for detention staff (Browne et al. 2015; Faithful 2009; Peek 2003; Routh et al. 2017). All of these resources seek to ameliorate the legal stopgaps of federal laws and decrease the performative optics those policies perpetuate.

An important first step in effective transgender policy is the lobbying of affirmative law. In essence, this law would legally affirm the self-selected gender of any prisoner, allowing them to be treated accordingly (Faithful 2009; Pedersen 2019). The legal recognition of gender identity would allow for the implementation of stronger anti-

discrimination laws, appropriate gender segregated housing, and gender affirming medical care (Erni 2013; Faithful 2009). In addition, affirmative law would work in tandem with currently existing anti-discrimination efforts (Lamble 2012; Lenning and Buist 2018; Tarzwell 2006). This is the basis for several community collaborations between local policy makers and elected officials. While it is not seen on a national level, it is a tangible effort introduced by grassroots organizations and carried on by scholars and civil servants.

On a national level, the ACLU, which relies heavily on PREA as a federal policy, works with regional attorneys to provide services for afflicted trans inmates, as well as educational resources when incidents occur. While they do provide an education-based campaign, they do not outwardly acknowledge the lack of unanimous, lawful execution of existing policies (Annas 2004). Additionally, the ACLU is an accredited organization that is consulted with by larger governmental entities within presidential administrations. They are poised to make substantial legal efforts through the widely recognized prestige and direct conduits of communication to leading political figures.

The National Center for Transgender Equality (NCTE) is a national organization specifically focused on transgender affairs. They collect relatable information and surveys from the transgender community. When polling information about trans individuals in prisons, the NCTE surveyed formerly incarcerated trans inmates, as well as currently imprisoned trans inmates. They publish their findings in a bi-annual report titled the United States Transgender Survey (USTC), which provides critical information about the transgender community in key aspects of society (James et al. 2016). The findings reported by the USTC about transgender inmates call for the use of affirmative

law, higher standards for prison personnel, training and advocacy materials for staff, and audits for security measures in prisons (Blankenship and Carter 2018; Brömdal et al. 2019; National Center for Transgender Equality 2019). Furthermore, the NCTE leverages information obtained during surveys to share with regional politicians to campaign for national advocacy and reforms (James et al. 2016). They are a key factor in linking the violence that occurs between trans inmates and facility staff. Lastly, the USTC has been cited by many community partners and orbital trans-rights organizations as providing cultural cross-over and education for facility staff (Annas 2004).

At a regional level, there are a handful of crucial grassroots initiatives and organizations. Prominent among them are Black and Pink, TGI Justice Project, and the Sylvia Rivera Law Project. While varied in specific mission statements, at the core, these grassroots organizations campaign directly for transgender safety and human rights while incarcerated. Many grassroots organizations are location specific and serve a smaller number of impacted people, often having more direct results with specific individuals (as compared to a national scale). For some, that looks like re-entry programs focused on breaking the unjust cycle of the criminal justice system; education opportunities for personal betterment while detained; and funding for legal support for pursuing legal action for violence incurred while imprisoned. Some organizations heavily target training and educational resources for facility staff (Annas 2004; Blankenship and Carter 2018; Brömdal et al. 2019). These efforts tend to leverage personal experiences and rapport with regional cultures to relate and educate prison staff. Furthermore, local grassroots organizations are the most likely to connect with local elected officials to



encourage politicians to campaign for more humane conditions and to speak on behalf of trans inmates. These are all significant channels for seeking justice for trans individuals in the violent conditions of prison life.

### **Conclusion**

It takes substantial efforts to improve transgender prisoner protections. While federal laws, such as PREA, represent important attempts and acknowledgement, it is not enough for meaningful support. Taken at face value, these national policies only undermine the daily experiences of physical and emotional harm of transgender inmates. Scholarly reform is an important ally in envisioning the potential for reform and a future where transgender individuals are not discriminated against or even incarcerated due to inadequate protections in life outside of prison. However, scholarly recommendations are also scarce, with little understanding of how to staunch the flow of violence found in the criminal justice system. More attempts made by national organizations provide some of the necessary and relevant educational material to reform internal prison culture and connect the plight of trans issues to facility staff. In unison with regional efforts and endless campaigns for donations, community partnerships, and relationships with elected officials, progress is being made at a local level. To extend this progress will require the intent of all three industries—scholars, national associations, and grassroots organizations—to fill the gaps where federal laws fail to meet the protection needs of transgender prisoners and facilitate the eventual reform necessary to precipitate lasting legal change for those most vulnerable.

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