CRUEL AND NOT UNUSUAL – THE TREATMENT OF TRANS DEFENDANTS IN CRIMINAL SENTENCING

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ABSTRACT

Every day in criminal courtrooms throughout this country, defendants face the risk of imprisonment as punishment for crimes they are convicted of. Trans defendants, however, face exponentially greater and more severe risks if incarcerated. These heightened risks include the possibility of being sexually or physically assaulted by either correctional staff or other incarcerated persons at rates five to six times higher than the general population. Trans people are being sentenced to prison with little to no consideration of the gravity of the danger they are exposed to, despite ample data being readily available to support these increased risks. After President Trump's January 2025 executive order—"Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government"—trans people in custody are in even greater danger.

This Article argues that it is unconstitutional cruel and unusual punishment under the Eighth Amendment for a correctional agency to house a trans defendant in a prison it knows has higher rates of sexual or physical assaults of trans people. Prison officials can be found to have violated the Eighth Amendment for deliberate indifference to the safety of persons in custody. This Article argues that the housing of trans people in prisons with known higher rates of sexual and physical assaults

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of trans people constitutes deliberate indifference and unconstitutional punishment. The current makeup of the Supreme Court, along with President Trump's views towards trans people, make this constitutional argument likely to face an uphill battle. Given these challenges, this Article proposes solutions that are based on state law, in addition to best practices for criminal defense attorneys and training of public defenders to ensure the safety of trans defendants is being protected.

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INTRODUCTION

Onyx Claudia Shahbaz[1] faced ten years in prison for a second-degree assault charge. But whether it was one day or ten years, the risks of prison were much higher for Onyx than most as a transgender—or trans[2]—woman. A 2015 survey of incarcerated trans people found that 30% were physically and/or sexually assaulted by correctional staff or other incarcerated persons within the prior year.[3] With regard to sexual assaults specifically, 20% of trans people in custody were sexually assaulted by correctional staff or other incarcerated persons,[4] a rate five to six times higher than the rates of sexual assault reported by the Bureau of Justice Statistics for all people incarcerated in prisons and jails nationwide—4% and 3%, respectively.[5]

Onyx knew firsthand what this heightened risk looked like, having been in prison before. Every time she was in prison, she could not sleep for fear of what might happen to her in her all-male unit. She also could not shower with the general male population for fear of getting raped. She would get permission to shower by herself at a different time than everyone else. She was largely confined to her cell, because leaving her cell placed her at significant risk of harm. And if something happened to her, she could not say anything for fear of being labeled a snitch and suffering further harm in retaliation for reporting her abuse. There were no good options when presented with a choice between risking getting raped or, as she said, getting beaten with a sock filled with a lock or some other blunt object.

Onyx's experiences while incarcerated, including the physical and sexual assault against her, resulted in her having to be placed in protective custody, also known as solitary confinement. Solitary

1. Onyx's real name and life experiences are used with her permission. More information regarding Onyx's case and consent to use her story are on file with the *Rutgers University Law Revie*w.

2. This Article uses the shortened "trans" rather than the longer "transgender," tracking with the language used by advocates. *See Frequently Asked Questions About Transgender People*, ADVOCS. FOR TRANS EQUAL., https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people [https://perma.cc/3ADG-HBDT] (last visited Oct. 16, 2025).

3. SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 191 (2016) [hereinafter USTS REPORT], https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf [https://perma.cc/C9DX-S4KU].

4. *Id.*

5. ALLEN J. BECK ET AL., U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., NCJ 241399, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12, at 8 (Morgan Young & Jill Thomas eds., 2013) [hereinafter NATIONAL INMATE SURVEY], https://www.bjs.ojp.gov/content/pub/pdf/svpjri1112.pdf [https://perma.cc/WLZ3-JXVA].

confinement is commonly used by prison administrators either as a punishment for incarcerated persons not following prison procedures or as a protective measure for high-risk people in custody.[6] For Onyx, prison administrators rationalized this treatment as being "for her own safety" from other people in custody. Solitary confinement did make Onyx safer from others, but at the cost of significant psychological harms—caused by her cell being unlocked for only two hours per day and the lights always remaining on—which alone raise Eighth Amendment cruel and unusual punishment concerns.

Onyx's experience in prison and the risks she faced are risks that trans people in the criminal legal system face every day. There is abundant data to support the conclusion that being trans puts you at much greater risk of being sexually or physically assaulted in prison. The data available can indicate the specific prisons that have higher rates of sexual or physical assaults of trans people.[7] Yet day in and day out, trans defendants are being sentenced to serve prison terms and housed in facilities that we know carry higher risks specifically for trans people.

This Article argues that deliberate indifference to the safety of trans defendants in the prisons where they are housed is unconstitutional cruel and unusual punishment under the Eighth Amendment. For over thirty years, the Supreme Court has recognized that prison officials can be found to have violated the Eighth Amendment for "deliberate indifference" to the safety of a person in custody.[8] "Deliberate indifference" requires an objective showing that a substantial risk of serious harm existed, that a prison official knew of the risk, and that they reacted to the risk in an objectively unreasonable manner; plus a subjective showing that the official was aware of facts from which the inference could be drawn that a risk of serious harm existed, and that the official did draw that inference.[9]

This Article argues that it is unconstitutional under the Eighth Amendment for a correctional agency to know that the specific prison a trans defendant is being housed at has higher rates of sexual or physical violence against trans people, and still house them in that prison, as that action constitutes deliberate indifference to the safety of the individual. This Article proceeds in several Parts. Part I details how housing in most prisons is cruel and unusual for many trans people via numerous sources

6. *See Solitary Confinement*, PENAL REFORM INT'L, https://www.penalreform.org/issues/prison-conditions/key-facts/solitary-confinement/ [https://perma.cc/TY5T-6UN5] (last visited Oct. 16, 2025).

7. *See, e.g.*, NATIONAL INMATE SURVEY, *supra* note 5, at 11–16.

8. Farmer v. Brennan, 511 U.S. 825, 828 (1994).

9. Cassady v. Dozier, No. 18-CV-158, 2022 WL 988315, at *8 (M.D. Ga. Mar. 31, 2022) (citing Marsh v. Butler Cnty., 268 F.3d 1014, 1028–29 (11th Cir. 2001)).

of data that document the heightened risks trans people in prison face. Part II explains how, for many trans people, incarceration in most prisons violates the Eighth Amendment "deliberate indifference" standard, how solitary confinement as a solution is arguably also unconstitutional, and how the policies of states and other countries in housing trans people in prison are relevant under the Eighth Amendment. Part III addresses how existing legislation and polices aimed at protecting incarcerated trans people fail. This Article concludes by proposing state solutions to provide greater protections for trans people in custody, including using state constitutions, state legislation, and public defender training.

I. HOW PRISON IS CRUEL AND UNUSUAL FOR MANY TRANS PEOPLE

Being incarcerated as a trans person carries a significantly greater risk of sexual or physical assault by correctional staff and other incarcerated persons than being incarcerated as a non-trans person. When prison officials are deliberately indifferent to the known risks a trans defendant would face in a specific prison and still choose to house a trans person in that prison, this action represents cruel and unusual punishment. What do these heightened risks of sexual and physical assault for trans people in custody look like?

This Article relies on data from four sources that examine sexual or physical assaults in prisons or jails to provide an understanding of the risks trans people in custody face. The four data sets come from (1) the National Inmate Survey, (2) the 2015 U.S. Transgender Survey, (3) the Survey on Sexual Victimization, and (4) the Advancing Transgender Justice report. The data from all four surveys support the conclusion that trans people in custody in the United States are being sexually assaulted at much higher rates than non-trans people. The data sets are summarized throughout this Part in chronological order from the surveys relying on the oldest data (the National Inmate Survey, data from 2012) to those relying on the most recent data (the Advancing Transgender Justice report, data from 2024). As each survey relies on different numbers, it is useful to have a big-picture understanding of the risks that trans people in custody face before reading the abbreviated summary of each survey.

The chart on the next page attempts to provide this big-picture understanding with relevant data from two of the surveys covered in this Article:

Total Estimated Number of Adults (Including Trans Adults) in Prisons And Jails[10]	1,441,800
Total Estimated Number of **Trans** Adults in Prisons and Jails[11]	4,918 (weighted)
Total Estimated Number of Adults (Including Trans Adults) in Prisons / Jails Sexually Victimized in the Last Twelve Months[12]	4.0% prisons / 3.2% jails
Total Estimated Number of **Trans** Adults in Prisons / Jails Sexually Victimized in the Last Twelve Months[13]	39.9% prisons / 26.8% jails
Total Number of Respondents (All Trans) to the 2015 U.S. Transgender Survey ("USTS")[14]	27,715
Total Percentage of USTS Respondents That Had Been Incarcerated in the Last Year and **Sexually Assaulted by Facility Staff, Who Were Assaulted More Than Once During That Time Period**[15]	51%
Total Percentage of USTS Respondents That Had Been Incarcerated in the Last Year and **Sexually Assaulted by Facility Staff, Who Were Assaulted Eight or More Times During That Time Period**[16]	23%

A. The National Inmate Survey

The National Inmate Survey collects data on sexual assaults in correctional facilities directly from persons in custody.[17] The data are collected as mandated by the Prison Rape Elimination Act ("PREA"),

10. *See* NATIONAL INMATE SURVEY, *supra* note 5, at 32 (accounting for 203,800 federal and 1,238.000 state inmates over eighteen years old).

11. *See* ALLEN J. BECK, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., NCJ 241399, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12, SUPPLEMENTAL TABLES: PREVALENCE OF SEXUAL VICTIMIZATION AMONG TRANSGENDER ADULT INMATES tbl. 1 (2014) [hereinafter NIS SUPPLEMENT], https://bjs.ojp.gov/content/pub/pdf/svpjri1112_st.pdf [https://perma.cc/L73L-TCMJ].

12. NATIONAL INMATE SURVEY, *supra* note 5, at 9 tbl.1.

13. NIS SUPPLEMENT, *supra* note 11, at tbl. 1.

14. USTS REPORT, *supra* note 3, at 4.

15. *See id.* at 192 fig. 14.16.

16. *Id.*

17. *See* NATIONAL INMATE SURVEY, *supra* note 5, at 8.

which requires a ten percent sample of all correctional facilities, with a minimum of one prison from each state.[18] The most recent data available from the National Inmate Survey is from 2012, the year PREA's national prisons and jail standards went into effect.[19] Thus, these numbers represent a baseline to understand how significant the problem of sexual assault against trans people in prisons was and remains to this day.

From February 2011 to May 2012, the National Inmate Survey "was conducted in 233 state and federal prisons, 358 jails, and 15 special facilities (military, Indian country, and Immigration and Customs Enforcement)."[20] A total of 106,532 people in custody voluntarily participated in the National Inmate Survey during this timeframe.[21] The total number of survey participants represented a 60% response rate for persons incarcerated in prisons,[22] and a 61% response rate for persons incarcerated in jails.[23] Based on the survey results, the estimated number of incarcerated people nationwide who experienced sexual victimization within the preceding twelve months was 80,600.[24] This number amounts to 4% of all persons, including those identified as trans, in prisons and 3.2% in jails nationwide.[25] There were an estimated 4,918 trans persons in custody during this period.[26] Of the trans people in custody, an estimated 39.9% of those held in prisons were sexually victimized in the preceding twelve months—and 26.8% in jails.[27]

B. The 2015 U.S. Transgender Survey

In 2015, the National Center for Transgender Equality conducted an anonymous online survey for transgender adults in the United States.[28] There were 27,715 respondents to the 2015 U.S. Transgender Survey ("USTS") "from all fifty states, the District of Columbia, American Samoa, Guam, Puerto Rico, and U.S. military bases overseas," representing the largest survey of trans people ever conducted in the

18. Prison Rape Elimination Act of 2003 § 4(a)(4), 34 U.S.C. § 30303(a)(4).
19. *See* National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37106, 37106 (June 20, 2012) (codified at 28 C.F.R. pt. 115).
20. NATIONAL INMATE SURVEY, *supra* note 5, at 32.
21. *Id.*
22. *Id.* at 34.
23. *Id.* at 35.
24. *See id.* at 8.
25. *Id.*
26. NIS SUPPLEMENT, *supra* note 11, at tbl. 1.
27. *Id.*
28. USTS REPORT, *supra* note 3, at 4.

United States at that time.[29] The survey asked participants about a number of different experiences they may have had.

Two percent of survey participants indicated that they had been incarcerated in jail, prison, or a juvenile detention center in the past year.[30] This specific group was asked if they were ever "physically forced, pressured, or made to feel that [they] had to have sex or sexual contact" with facility staff or another incarcerated person.[31] Twenty percent of this group answered in the affirmative.[32] In comparison, substantially the same question was asked of all people (not just trans people) in prisons and jails—but not juvenile detention centers—in the Bureau of Justice's National Inmate Survey.[33] The USTS number was five to six times higher than the National Inmate Survey's numbers for prisons (4%) or jails (3.2%), and those numbers included the experiences of trans people in custody.[34] Even if you remove sexual assaults committed by facility staff on trans people in custody and only look at the numbers of sexual assaults committed by other people in custody, the numbers only go down slightly to 17%.[35] However, that is still nine to ten times higher than the National Inmate Survey numbers for prisons (2%) and jails (1.6%).[36]

Additionally, survey participants who reported being sexually assaulted by facility staff while incarcerated within the last year were asked how many times it had happened. Fifty-one percent reported being sexually assaulted by facility staff more than once in the last year.[37] Twenty-three percent reported being sexually assaulted by facility staff eight or more times within the last year.[38] Survey participants who

29. *Id.*
30. *Id.* at 190.
31. *Id.* at 196 n.8.
32. *Id.* at 191.
33. *Compare id.* at 196 n.8 ("Respondents were asked . . . whether they were 'physically forced, pressured, or made to feel that [they] had to have sex or sexual contact' with facility staff or with another inmate."), *with* NATIONAL INMATE SURVEY, *supra* note 5, at 42 ("[H]ave any facility staff pressured you or made you feel that you had to let them have sex or sexual contact with you? . . . [H]ave you been physically forced by any facility staff to have sex or sexual contact? . . . [D]id another inmate use physical force, pressure you, or make you feel that you had to have any type of sex or sexual contact?").
34. *Compare* USTS REPORT, *supra* note 3, at 191 ("One in five (20%) respondents reported being sexually assaulted by facility staff or other inmates."), *with* NATIONAL INMATE SURVEY, *supra* note 5, at 8 ("The estimated number of prison and jail inmates experiencing sexual victimization totaled . . . 4.0% of all prison inmates and 3.2% of jail inmates nationwide.").
35. USTS REPORT, *supra* note 3, at 192 fig. 14.17.
36. NATIONAL INMATE SURVEY, *supra* note 5, at 8.
37. *See* USTS REPORT, *supra* note 3, at 192 fig. 14.16.
38. *Id.*

reported being sexually assaulted by other incarcerated persons within the last year were similarly asked how many times this had occurred. Fifty-seven percent reported being sexually assaulted two or more times by another incarcerated person within the last year.[39] Twenty-three percent reported being sexually assaulted eight or more times by another incarcerated person within the last year.[40]

C. Survey on Sexual Victimization

PREA mandated research to be conducted by the Bureau of Justice Statistics.[41] The Bureau of Justice Statistics, the agency that provides data and analysis for the Department of Justice,[42] conducts a Survey of Sexual Victimization that collects data from correctional administrators.[43] The most recently available data are from 2018, six years after PREA's national prison and jail standards went into effect.[44] While the data does not provide a breakdown by gender of the victims, it is helpful to understand how significant the problem of sexual assault of all people in custody is before turning to how much worse it is for trans people in custody. There were 27,826 allegations of sexual victimization in adult correctional facilities out of the 1,252,111 persons in custody on December 31, 2018.[45] This means a little over two percent of the incarcerated population in 2018 reported being sexually victimized in a correctional facility, including all identified trans people in custody.[46]

The Survey on Sexual Victimization provides data from 2012 to 2018. The fact that the start of this seven-year window is when PREA's

39. *Id.* at 193 fig. 14.19.

40. *Id.*

41. Prison Rape Elimination Act of 2003 § 4(a)(1), 34 U.S.C. § 30303(a)(1).

42. *See generally About BJS*, U.S. DEP'T OF JUST.: BUREAU OF JUST. STATS., https://bjs.ojp.gov/about [https://perma.cc/55VB-H9JW] (last visited Oct. 17, 2025) ("The mission of BJS is to collect, analyze, publish, and disseminate information on crime, criminal offenders, victims of crime, and the operation of justice systems at all levels of government.").

43. *See generally Survey of Sexual Victimization (SSV)*, U.S. DEP'T OF JUST.: BUREAU OF JUST. STATS., https://bjs.ojp.gov/data-collection/survey-sexual-victimization-ssv [https://perma.cc/7G55-Q594] (last visited Oct. 17. 2025) (main page for the reports).

44. *See* National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37106, 37106 (June 20, 2012) (codified at 28 C.F.R. pt. 115).

45. *See* LAURA M. MARUSCHAK & EMILY D. BUEHLER, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., NCJ 252836, SURVEY OF SEXUAL VICTIMIZATION IN ADULT CORRECTIONAL FACILITIES, 2012–2018—STATISTICAL TABLES 7, 8 (2021) [hereinafter SURVEY OF SEXUAL VICTIMIZATION], https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ssvacf1218st.pdf [https://perma.cc/8SQK-65EE].

46. Not all trans individuals openly identify themselves as such, largely due to safety concerns.

national prison and jail standards went into effect is helpful to gauge any trends with regard to sexual victimization in correctional facilities. A few of the highlights from the survey speak to the atrocious severity and frequency of sexual assaults in prisons and jails in this country. The number of allegations of sexual victimization reported by prison administrators in 2018 was 18,884, approximately 2.5 times more than the 7,575 reported in 2012.[47] Jail administrators reported 8,651 alleged sexual victimizations in 2018, a number that was 3.5 times greater than the 2,411 reported in 2012.[48] On the juvenile side, the numbers are even worse: "Juvenile justice administrators reported 2,467 allegations of sexual victimization in 2018, an 89% increase from the 1,306 reported in 2013."[49]

The drastic increase in reported sexual assaults can be interpreted not so much as a change in actual sexual assaults *occurring*, but rather as an increase in *reported* sexual assaults stemming from the passage of PREA's national prison and jail standards. In fact, one survey by the Bureau of Justice Statistics reached this same conclusion:

> When the standards were published, it was anticipated that the number of allegations would increase. There was a threefold increase in reported allegations in the 3 years following the release of the national standards. Such increases can indicate either increased sexual abuse or inmates' or youth's increased willingness to report abuse. Likewise, an increase in substantiated incidents can mean a facility either failed to protect inmates or youth from sexual abuse or investigated allegations more effectively.[50]

D. Advancing Transgender Justice

The Vera Institute of Justice partnered with Black and Pink National from 2019 to 2022 to conduct a "survey of currently incarcerated transgender people regarding their experiences in state prisons."[51] The

47. SURVEY OF SEXUAL VICTIMIZATION, *supra* note 45, at 1.

48. *Id.*

49. LAURA M. MARUSCHAK & EMILY D. BUEHLER, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., NCJ 300029, SEXUAL VICTIMIZATION REPORTED BY JUVENILE JUSTICE AUTHORITIES, 2013–2018, at 1 (2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/svrjja1318.pdf [https://perma.cc/3E4C-7APJ]. Note that the time over which these data were collected is slightly different and that it was published in a different report, though still under the Survey on Sexual Victimization. *Id.*

50. *Id.* at 2.

51. KELSIE CHESNUT & JENNIFER PEIRCE, VERA INST. OF JUST., ADVANCING TRANSGENDER JUSTICE: ILLUMINATING TRANS LIVES BEHIND AND BEYOND BARS 7 (2024)

survey was completed by 280 trans people incarcerated in prisons across thirty-one states.[52] Of the 280 survey respondents, seventy-three percent identified as transgender women.[53] Ninety-five percent of the trans women respondents were housed in correctional facilities designated for men.[54] Two-thirds of all respondents, not just trans women, indicated they would prefer to be housed in a women's prison.[55] Eighty-nine percent had at one point or another been housed in solitary confinement by prison staff, either "as a way to harass or target them" or because they had requested it themselves as a "safety strategy."[56] An example of this type of "safety strategy" being employed by a trans person in custody is that of one of the respondents, who stated, "I was being pressured for sex and didn't want to have it, so [I] asked to be locked up."[57]

The risk of sexual violence the survey respondents feared was significant, given the number that reported having already experienced it while incarcerated. Fifty-three percent of respondents reported having experienced a nonconsensual sexual encounter during their current prison sentence.[58] There were many respondents that said PREA was "mostly ineffective in reducing the risk of sexual assault by other incarcerated people, except for its provisions around privacy in showers and bathrooms."[59]

When asked what type of housing they would prefer and why, seventy-eight percent of respondents indicated they would prefer to live in housing specifically for trans people.[60] Overwhelmingly, this stated housing preference was for safety reasons.[61] One respondent noted they would prefer trans-specific housing "because [they] would not have to stress about being touched or felt on."[62] Another respondent said the availability of trans-specific housing was the only way they would feel safe enough to leave solitary confinement.[63]

[hereinafter ADVANCING TRANSGENDER JUSTICE REPORT], https://www.vera.org/downloads/publications/advancing-transgender-justice.pdf [https://perma.cc/JHB4-FNYG].

52. *Id.* at 23.
53. *Id.* at 24.
54. *Id.* at 26.
55. *Id.* at 25.
56. *Id.* at 25–26.
57. *Id.* at 33.
58. *Id.* at 44.
59. *Id.*
60. *Id.* at 31.
61. *See id.*
62. *Id.*
63. *See id.*

The data from all four sources, covering the decade from 2012 to 2022, all support the conclusion that trans people in custody are being sexually assaulted at significantly higher rates than their non-trans counterparts. Because of sexual assault by other incarcerated people and prison staff, it is clear that a prison sentence for a trans person is a wholly different "punishment" than for someone who is not trans. But does this punishment mean the constitutional rights of trans defendants are being violated under the Eighth Amendment?

II. PRISON PUNISHMENT FOR MANY TRANS PEOPLE VIOLATES THE EIGHTH AMENDMENT

A. What is "Cruel and Unusual"?

The Eighth Amendment to the U.S. Constitution prohibits the infliction of "cruel and unusual punishments."[64] How the Court has determined what constitutes "cruel and unusual" has varied over time. In 1878, in *Wilkerson v. Utah*, the Court looked to the common law to help decide whether someone convicted of murder and sentenced to death could be executed by public shooting without violating the Eighth Amendment.[65] The Court in *Wilkerson* acknowledged it was difficult to define what is cruel and unusual, but nonetheless made clear that "punishments of torture" and of "unnecessary cruelty" were unconstitutional.[66]

The Court similarly looked back in time in its Eighth Amendment analysis in the 1890 case *In re Kemmler* when considering what the Framers thought was "cruel and unusual" when the Eighth Amendment was ratified in 1791.[67] Considering whether a death sentence could be carried out by electrocution without being cruel and unusual, the Court suggested in *Kemmler* that present day science should be part of the Eighth Amendment analysis and deferred to the legislature's conclusion, based on the evidence, that electrocution was more humane.[68]

A shift in the Court's Eighth Amendment cruel and unusual jurisprudence started to occur in the early twentieth century. In 1910, in *Weems v. United States*, while the Court still considered what the Framers thought was cruel and unusual,[69] it also noted examples of cases that gave a "more expansive and vital character to the provision," as well

64. U.S. CONST. amend. VIII.
65. *See* 99 U.S. 130, 135, 137 (1878).
66. *See id.* at 135–36.
67. 136 U.S. 436, 446 (1890).
68. *See id.* at 446–49.
69. *See* 217 U.S. 349, 373–74 (1910).

as commentary suggesting the clause is "progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice."[70] At issue in *Weems* was the question of whether a sentence of fifteen years in prison for the crime of falsifying a "public and official document" was cruel and unusual.[71]

Then, in *Trop v. Dulles*, a 1958 case dealing with whether desertion from the military could be punished by revocation of citizenship,[72] the Court made clear that determinations about what is cruel and unusual must take into account whether the challenged practice falls within "the evolving standards of decency that mark the progress of a maturing society."[73] In *Trop*, the Court found loss of citizenship to be cruel and unusual as "[i]t subjects the individual to a fate of ever-increasing fear and distress."[74] The Court also addressed the laws of other countries in support of its cruel and unusual analysis.[75]

Fast forward to the twenty-first century, and you see the Supreme Court shifting away from defining what constitutes cruel and unusual using an "evolving standard" to applying a largely "public opinion"-based standard to decide when capital punishment is an appropriate sentence. In *Atkins v. Virginia*, the Court found the execution of mentally disabled individuals was cruel and unusual.[76] The basis for the *Atkins* decision was a consensus among state laws prohibiting the execution of mentally disabled people.[77] The Court noted, "It is not so much the number of these States that is significant, but the consistency of the direction of change. Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime . . . [it] provides powerful evidence" of the views of our society today "and it is fair to say that a national consensus has developed" against the use of the death penalty for mentally disabled individuals.[78] The *Atkins* Court also considered whether the practice in question—here, executing mentally disabled individuals—served any legitimate penological goal, such as retribution or deterrence,[79] and whether the practice was common in state courts in its Eighth Amendment analysis.[80]

70. *Id.* at 377–78.
71. *See id.* at 357, 359.
72. 356 U.S. 86, 87 (1958).
73. *Id.* at 101.
74. *Id.* at 102–03.
75. *See id.*
76. *See* 536 U.S. 304, 321 (2002).
77. *See id.* at 315–16
78. *Id.*
79. *See id* at 317–20.
80. *See id.* at 316.

Similarly, in *Roper v. Simmons*, the Court relied on a "national consensus" in finding that capital punishment was cruel and unusual when applied to individuals who were under eighteen years of age at the time they committed a capital crime.[81] In *Roper*, the Court cited legislation in the majority of states prohibiting the death penalty for juveniles, in addition to the rarity of the practice in states where it was not expressly prohibited, as evidence of this "national consensus."[82] The *Roper* Court not only cited "national consensus" in its analysis, but it went so far as to hold that any Eighth Amendment analysis must start by considering national consensus: "The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question. These data give us essential instruction."[83] The decision also noted that there was no penological goal served by the practice in question—executing a juvenile.[84] And, like in *Trop*, the *Roper* Court referenced the "laws of other countries . . . as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"[85]

In *Kennedy v. Louisiana,* the Court again outlined a similar cruel and unusual punishment analysis focusing on national consensus[86] and whether penological goals were being served[87] by the practice in question: the execution of someone convicted of rape of a child where the crime did not result in, nor was it intended to result in, the victim's death.[88] And two years later, in *Graham v. Florida*, the Court emphasized that "[a]ctual sentencing practices are an important part of the [its] inquiry into consensus,"[89] and again touched on whether legitimate penological goals were served by the practice in question—sentencing a juvenile who did not commit homicide to life without parole[90]—before considering the laws of other nations.[91]

The contemporary Court's insistence on history and tradition as a judicial philosophy to resolve several recent legal issues suggests that it will not employ an evolving standard for Eighth Amendment claims going forward. In *New York State Rifle & Pistol Ass'n v. Bruen,* the Court

81. *See* 543 U.S. 551, 565–68 (2005).
82. *See id.*
83. *Id.* at 564.
84. *See id.* at 571–72.
85. *Id.* at 575 (citing Trop v. Dulles, 356 U.S. 86, 102–03 (1958)).
86. *See* 554 U.S. 407, 426 (2008).
87. *See id.* at 441–46.
88. *See id.* at 413.
89. *See* 560 U.S. 48, 62 (2010).
90. *See id.* at 71–75.
91. *See id.* at 80–82.

addressed whether a New York law requiring that applicants for unrestricted concealed-carry licenses demonstrate a special need for self-defense violated the Second Amendment.[92] The Court's decision against the New York law emphasized history and tradition in interpreting the Second Amendment.[93] Similarly, in *Dobbs v. Jackson Women's Health Organization*, the Court again turned to history and tradition.[94] The Court took up the question of whether Mississippi's law banning nearly all abortions after fifteen weeks' gestational age was constitutional.[95] In holding that it was, the Court found that abortion was not a constitutionally protected right.[96] A third and final example of the contemporary Court's reliance on history and tradition can be found in its decision in *Kennedy v. Bremerton School District*.[97] The Court in *Kennedy* found that a public school could not prohibit an employee's prayer during school sports activities[98] and relied on "historical practices and understandings" of the Establishment Clause.[99]

In these three cases—dealing with the Second Amendment, fundamental rights questions, and the Establishment Clause—the Court emphasized history and tradition in its interpretation of the Constitution, as opposed to an "evolving standard." Lower courts, however, have not relied on history and tradition in their Eighth Amendment jurisprudence, particularly as it pertains to the denial of medical needs for trans people in custody. Lower courts have followed the lead of the Supreme Court in addressing these types of Eighth Amendment claims with the "deliberate indifference" test.

B. "Deliberate Indifference"

Nearly fifty years ago, in 1976, the Supreme Court decided *Estelle v. Gamble*, addressing the Eighth Amendment's Cruel and Unusual Punishment Clause in the context of medical needs for people in custody.[100] J.W. Gamble had sued the Texas Department of Corrections for subjecting him to cruel and unusual punishment by not properly treating an injury he received doing work in the prison.[101] The Court's analysis noted that what constituted cruel and unusual punishment was

92. *See* 597 U.S. 1, 8–11 (2022).
93. *See id.* at 24–25.
94. *See* 597 U.S. 215, 231(2022).
95. *See id.* at 232–34.
96. *See id.* at 302.
97. *See* 597 U.S. 507, 535 (2022).
98. *See id.* at 543–44.
99. *See id.* at 535.
100. *See* 429 U.S. 97, 101 (1976).
101. *See id.* at 99–101.

subject to the then-recognized "evolving standards" test, and took into consideration whether there was any penological purpose being served by the practice in question, framed as the denial of medical treatment.[102] The government has an "obligation to provide medical care for those whom it is punishing by incarceration."[103] Failure to do so could "produce physical 'torture or a lingering death'" or "result in pain and suffering which no one suggests would serve any penological purpose."[104] Ultimately, the Court held that "deliberate indifference to serious medical needs" of persons in custody violates the Eighth Amendment as cruel and unusual punishment.[105]

Approximately thirty years ago, in 1994, Dee Farmer, a trans woman, sued prison officials after being beaten and raped by another person in custody within two weeks of being transferred to a new prison.[106] Ms. Farmer challenged whether being forced to serve her sentence in a prison that correctional officials knew had a history of inmate assaults, coupled with the officials' knowledge that as a trans woman, she would be at greater risk of sexual assault, constituted deliberate indifference and therefore cruel and unusual punishment.[107] The Court recognized that prison officials must "take reasonable measures to guarantee the safety of the inmates."[108] Furthermore, "allowing the beating or rape of one prisoner by another serves no 'legitimate penological objectiv[e].'"[109] The Court held that a prison official could be found liable under the Eighth Amendment's Cruel and Unusual Punishment Clause by acting with deliberate indifference with regard to the safety of a person in custody.[110]

The Court in *Farmer* defined "deliberate indifference" to mean when a prison official "knows of and disregards an excessive risk to inmate health or safety."[111] More specifically, deliberate indifference claims have both objective and subjective elements. There is a two-part test with regard to the objective element of a deliberate indifference claim. The first part requires someone in custody to "show that 'an objectively

102. *See id.* at 102–03.
103. *Id.* at 103.
104. *Id.* (first citing *In re* Kemmler, 136 U.S. 436, 447 (1890); and then citing Gregg v. Georgia, 428 U.S. 153, 173 (1976)).
105. *Id.* at 104.
106. *See* Farmer v. Brennan, 511 U.S. 825, 830–31 (1994).
107. *See id.*
108. *Id.* at 832 (citing Hudson v. Palmer, 468 U.S. 517, 526–27 (1984)).
109. *Id.* at 833 (citing *Hudson*, 468 U.S. at 548 (Stevens, J., concurring in part and dissenting in part)).
110. *See id.* at 847.
111. *Id.* at 837.

substantial risk of serious harm' existed."[112] Then, after the plaintiff has established that the prison official was aware of this substantial risk, they must show that the prison official reacted to the risk in an "objectively unreasonable manner."[113]

Only after a plaintiff has met the two-part objective element of a deliberate indifference claim can they turn to the required two-part subjective element. First, the plaintiff must prove that the prison official was "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists."[114] Then the plaintiff must show that the prison official made the inference that a substantial risk of serious harm existed.[115] The subjective element is similar to the reckless standard used in criminal law.[116] It is not enough for a prison official to merely know of a risk and fail to act on it; officials have to both be "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and . . . also draw the inference."[117]

The dual objective and subjective elements of the deliberate indifference standard pose significant challenges for plaintiffs to successfully litigate these claims. Trying to prove deliberate indifference by prison officials requires the plaintiffs in custody to rely on the defendant prison officials to provide evidence against themselves—evidence that quite often the person in custody has no record of.[118] Moreover, generally it is only after a sexual assault takes place that a lawsuit is filed. For this reason, this Article argues these cruel and unusual punishment claims need to be made by counsel pre-disposition, before a trans defendant is incarcerated and their safety is jeopardized.

Given the challenges of bringing deliberate indifference claims, it is no surprise that since the Court's decision in *Farmer*, several trans people in custody have brought similar claims against prison officials and have been unsuccessful in their efforts. One example is the case of Dana Marie Cassady, an incarcerated trans woman who had previously been

112. Cassady v. Dozier, No. 18-CV-158, 2022 WL 988315, at *8 (M.D. Ga. Mar. 31, 2022) (citing Marsh v. Butler Cnty., 268 F.3d 1014, 1028–29 (11th Cir. 2001)).

113. *Id.*

114. *Id.* (citing *Farmer*, 511 U.S. at 837–38).

115. *Id.*

116. *See Farmer*, 511 U.S. at 839–40.

117. *Id.* at 837.

118. Incarcerated plaintiffs are necessarily limited in the types of evidence they are able to provide about the specific conduct of the prison officials overseeing them. This problem is exacerbated by the economic realities which make retaining effective counsel difficult for this class. For more color on the problematic dynamic at play, see generally Joel H. Thompson, *Today's Deliberate Indifference: Providing Attention Without Providing Treatment to Prisoners with Serious Medical Needs*, 45 HARV. C.R.-C.L. L. REV. 635 (2010) (describing this evidentiary problem in the specific context of medical indifference).

raped twice while in custody—once by a correctional officer and once by another person in custody.[119] Ms. Cassady sued after being transferred to a higher-security male correctional facility, where she was raped two more times despite her prior pleas to be moved to another unit that was safer for her.[120] Ms. Cassady testified that before she was raped she had written letters to the Warden, Deputy Warden and Mental Health Unit Manager asking to be moved from her unit due to her risk of being raped.[121] All three individuals to whom Ms. Cassady claimed to have written letters denied receiving them, and the letters were not produced as evidence.[122] Among the court's reasons for granting summary judgment for the defendants was its view that Ms. Cassady's testimony was insufficient to demonstrate that the unit was a place "where violence and terror reign."[123] This was in spite of Ms. Cassady's testimony that the unit she was housed in "was a 'dangerous environment' involving inmates making weapons and fighting with each other, and that she was 'being sexually harassed daily and threatened' and 'harassed on a daily basis by inmates demanding sex.'"[124] The court noted Ms. Cassady had to prove prison conditions that "'shock the conscience' to survive summary judgment" and had failed to do so.[125]

In another case, Andrea Richardson—a trans woman—sued after being raped by her male cellmate, despite warning prison officials of her cellmate's sexual harassment and threats of rape and asking to be moved to a different cell.[126] Ms. Richardson testified she had submitted three written grievances prior to being raped by her cellmate, none of which was produced during discovery.[127] Ms. Richardson indicated in her complaint that as soon as she began sharing a cell with the man who ultimately raped her, he "began sexually harassing her, groping her, and even telling her that 'one day I am going to rape you.'"[128] The cellmate who raped Ms. Richardson was later charged with first degree sexual abuse, kidnapping, and threatening to kidnap or injure a person for what happened to Ms. Richardson.[129] Nonetheless, the court granted the

119. *Cassady*, 2022 WL 988315, at *2.
120. *See id.* at *2–6.
121. *See id.* at *3–5.
122. *See id.* at *4–5.
123. *See id.* at *11 (citing Harrison v. Culliver, 746 F.3d 1288, 1299–1300 (11th Cir. 2014)).
124. *Id.*
125. *Id.* (citing Purcell *ex rel.* Est. of Morgan v. Toombs Cnty., 400 F.3d 1313, 1323 (11th Cir. 2005)).
126. *See* Richardson v. District of Columbia, 322 F. Supp. 3d 175, 180–81 (D.D.C. 2018).
127. *Id.* at 181.
128. *Id.* at 180–81
129. *Id.* at 181.

defendant's motion for summary judgment, stating that even though "the record more plausibly supports Richardson's . . . theory: that [the Warden] acted with deliberate indifference by failing to prevent transgender female inmates from being housed with heterosexual inmates," it was forced to find that "even if the Eighth Amendment barred [the Warden] from allowing [Ms.] Richardson to be housed with male inmates generally, [the Warden] is entitled to qualified immunity on a claim to that effect."[130]

Both Ms. Cassady and Ms. Richardson's cases are representative of the challenges trans people in prisons face to maintaining their safety and to successfully litigating Eighth Amendment claims of cruel and unusual punishment under the deliberate indifference standard. While trans people in custody have been largely unsuccessful in deliberate indifference claims pertaining to safety from physical harm, there have been more successful outcomes in deliberate indifference claims pertaining to lack of medical care. In recent years, several courts have addressed the question of whether the denial of hormone treatment or gender-affirming surgery for trans people in custody constitutes deliberate indifference to serious medical needs in violation of the Eighth Amendment. Several courts have found in favor of the trans plaintiffs in these types of suits.

In 2019, the Ninth Circuit Court of Appeals found that the denial of gender-affirming surgery to a trans person in custody violated the person's Eighth Amendment's rights.[131] Adree Edmo, a pre-operative trans woman in custody, suffered from gender dysphoria.[132] According to the Mayo Clinic, "[g]ender dysphoria is a feeling of distress that can happen when a person's gender identity differs from the sex assigned at birth."[133] Ms. Edmo was diagnosed with gender dysphoria—at the time referred to as "gender identity disorder"—and prescribed hormone therapy by prison doctors.[134]

After three years of receiving hormone therapy, Ms. Edmo, still distraught over not having had genital surgery, attempted to castrate herself with a disposable razor blade.[135] Subsequently, a prison doctor evaluated Ms. Edmo for gender-affirming surgery and concluded it was

130. *Id.* at 183–84.
131. Edmo v. Corizon, Inc., 935 F.3d 757, 803 (9th Cir. 2019).
132. *See id.* at 767.
133. *Gender Dysphoria*, MAYO CLINIC (Jan. 1, 2025), https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/symptoms-causes/syc-20475255 [https://perma.cc/282T-3TCA].
134. *See Edmo*, 935 F.3d. at 772.
135. *See id.* at 772–73.

not "medically necessary for her."[136] Months after being denied gender-affirming surgery, Ms. Edmo again tried to castrate herself and removed one of her testicles.[137]

Shortly afterward, Ms. Edmo filed suit against prison officials, alleging that the denial of gender-confirming surgery was a violation of her Eighth Amendment rights as cruel and unusual punishment.[138] After three days of evidentiary hearings—which included testimony from the prison doctors as well as expert witnesses—the district court found that Ms. Edmo had established her Eighth Amendment claim, that she suffered from gender dysphoria, and that gender-affirming surgery was medically necessary to treat her gender dysphoria.[139] The district court found "the State was deliberately indifferent to Edmo's gender dysphoria because it 'fail[ed] to provide her with available treatment that is generally accepted in the field as safe and effective, despite her actual harm and ongoing risk of future harm including self-castration attempts, cutting, and suicidal ideation.'"[140] The Ninth Circuit Court of Appeals affirmed the district court's ruling and noted how significant trans rights are in today's world: "We apply the dictates of the Eighth Amendment today in an area of increased social awareness: transgender health care."[141]

The Ninth Circuit has since reiterated its position on claims of deliberate indifference to serious medical needs by making clear that if a trans person in custody has been diagnosed with gender dysphoria and approved for gender-affirming surgery, it would be a violation of the Eighth Amendment to deny such a surgery, and until the surgery takes place, the court retains jurisdiction over any prior claim for injunctive relief.[142] And within the last couple years, the Ninth Circuit has gone even further, ruling in one case that the Nevada Department of Corrections' blanket policy against providing sex reassignment constituted a cruel and unusual punishment.[143] "[T]he 'blanket, categorical denial of medically indicated surgery solely on the basis of an

136. *See Edmo*, 935 F.3d at 773. For an overview of gender-confirming surgeries, see also Fan Liang, *Gender Affirmation Surgeries*, JOHNS HOPKINS MED., https://www.hopkinsmedicine.org/health/wellness-and-prevention/gender-affirmation-surgeries [https://perma.cc/6ECR-5M37] (last visited Oct. 21, 2025).

137. *See id.* at 774.

138. *See id.* at 775.

139. *See id.* at 780.

140. *Id.* at 781 (quoting Edmo v. Idaho Dep't of Corr., 358 F. Supp. 3d 1103, 1126–27 (D. Idaho 2018)).

141. *Id.* at 803.

142. *See* Stevens v. Beard, No. 19-15838, 2022 WL 17748110, at *3 (9th Cir. Dec. 19, 2022).

143. Hundley v. Aranas, No. 21-15757, 2023 WL 166421, at *1 (9th Cir. Jan. 12, 2023).

administrative policy that "one eye is good enough for prison inmates" is the paradigm of deliberate indifference.'"[144] The court held that the prison had to "make an individualized decision" on whether the plaintiff who had been diagnosed with gender dysphoria should be treated with sex reassignment surgery.[145]

The Seventh Circuit Court of Appeals has similarly ruled in favor of trans people in custody bringing deliberate indifference claims against prison officials for not providing medically necessary treatment. In one Seventh Circuit case, the court found a prison doctor could be liable for violating the Eighth Amendment when he delayed his evaluation by several months and then did not provide hormone therapy that he agreed the trans plaintiff, Lisa Mitchell, needed.[146] The doctor denied treatment based on the fact that Ms. Mitchell was scheduled to be released from prison later that month and it was against prison policy to administer hormone therapy if someone had less than six months left on their sentence.[147] The court cited a rule that is substantively similar to the Ninth Circuit's: "The denial of hormone therapy based on a blanket rule, rather than an individualized medical determination, constitutes deliberate indifference in violation of the Eighth Amendment."[148] The court also noted that the refusal "to provide effective treatment for a serious medical condition serves no valid penological purpose and amounts to torture."[149]

These Ninth and Seventh Circuit cases demonstrate a few relevant takeaways: (1) the focus is on the individual and not broad policies affecting all people; (2) there is a recognition that specific actions taken against individuals in custody should be done with a penological purpose; and (3) it is easier to be successful in deliberate indifference claims when there is scientific support, i.e., medical consensus for treatment. These takeaways support the view that litigating Eighth Amendment deliberate indifference claims based on the risk of physical harm a trans person would face in prison should be done on a case-by-case basis—and not as a class—given the likely differences in risk of harm to trans people facing incarceration in different prisons. Furthermore, hard data supporting claims of the heightened risk trans people face if incarcerated is needed to represent the equivalent of the scientific support used by courts in deciding Eighth Amendment medical needs claims.

144. *Id.* (quoting Rosati v. Igbinoso, 791 F.3d 1037, 1040 (9th Cir. 2015)).
145. *Id.*
146. *See* Mitchell v. Kallas, 895 F.3d 492, 501 (7th Cir. 2018).
147. *Id.*
148. *Id.* (quoting Hicklin v. Precynthe, No. 16–cv–01357, 2018 WL 806764, at *11 (E.D. Mo. Feb. 9, 2018)).
149. *Id.* at 499 (quoting Fields v. Smith, 653 F.3d 550, 556 (7th Cir. 2011)).

C. Solitary Confinement as a Solution Is Cruel and Unusual

Onyx's experience of being put in solitary confinement for "her own safety" is not unusual for trans people in custody. If there is a risk to someone in custody by virtue of having to share a cell with someone that can harm them, then solitary confinement eliminates that risk altogether. However, since the late nineteenth century, courts have questioned whether solitary confinement is constitutional. The Supreme Court's first discussion of solitary confinement was regarding the Ex Post Facto Clause of the Constitution.[150] At issue in *In re Medley* was whether solitary confinement, imposed by a statute enacted after the defendant committed his crime, constituted "additional punishment" in violation of the Ex Post Facto Clause.[151] The Court found the defendant's solitary confinement to be "additional punishment of the most important and painful character" and unconstitutional under the Ex Post Facto Clause, but not per se unconstitutional.[152] The Court highlighted the history of severe psychological effects from the use of solitary confinement in this country, coupled with the lack of correlation shown between solitary confinement and reform for those subjected to such conditions.[153]

In the late 1960s, federal judges started addressing solitary confinement as a potential Eighth Amendment violation. Courts issued injunctions requiring changes in conditions of solitary confinement to meet certain standards of hygiene and sanitation, but again stopped short of saying solitary confinement was per se unconstitutional under the Eighth Amendment.[154] In 2015, Justice Anthony Kennedy issued a concurring opinion in a death sentence case, *Davis v. Ayala*, that suggested the Court should perhaps consider whether solitary confinement was per se unconstitutional.[155] Justice Kennedy cited *In re Medley* as well as articles and studies on solitary confinement to suggest that there should be greater consideration of solitary confinement

150. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law . . . ."). Ex post facto laws are those that retroactively worsen the legal consequences of an act committed before the law was passed. *See generally* Paul D. Reingold & Kimberly Thomas, *Wrong Turn on the Ex Post Facto Clause*, 106 CALIF. L. REV. 593, 595–97 (2018) (giving a brief history of the Ex Post Facto Clause and its application).

151. *See In re* Medley, 134 U.S. 160, 171 (1890).

152. *Id.*

153. *See id.* at 168.

154. *See, e.g.*, Jordan v. Fitzharris, 257 F. Supp. 674, 683 (N.D. Cal. 1966) (state had to provide "a degree of cleanliness compatible with elemental decency in accord with the standards of a civilized community"); Wright v. McMann, 387 F.2d 519, 520–26 (2d Cir. 1967) (unsanitary "strip-cell" conditions would violate the Eighth Amendment).

155. *See* 576 U.S. 257, 286–91 (2015) (Kennedy, J., concurring).

practices.[156] With regard to long-term solitary confinement, Justice Kennedy stated that "the judiciary may be required, within its proper discretion and authority, to determine whether workable alternative systems . . . exist, and if so, whether a correctional system should be required to adopt them."[157]

Despite Justice Kennedy's perceived invitation to advocates for a case in which to consider the question of solitary confinement under the Eighth Amendment, only a few recent cases have led to court opinions. One such example is *Porter v. Clarke*.[158] At issue in *Porter* were the solitary confinement conditions of people on death row.[159] The conditions suffered by people confined on death row included "one hour of outdoor recreation five days a week," "a ten-minute shower three days a week," and having the lighting in their cells always on.[160] The Fourth Circuit ruled that these conditions violated the Eighth Amendment, constituting both "a 'substantial risk' of serious psychological and emotional harm"[161] and deliberate indifference to this risk.[162]

If the current Supreme Court is not likely to follow Justice Kennedy's suggestion to consider whether solitary confinement is cruel and unusual under the Eighth Amendment, the Court may follow the lead of its prior Eighth Amendment jurisprudence and consider whether there is a national consensus for how to house trans people in custody when analyzing their Eighth Amendment claims.

D. "National Consensus" on Housing Trans People in Custody

If the Court is going to continue to rely on "national consensus" in interpreting the Eighth Amendment's Cruel and Unusual Punishment Clause, this begs the question of whether there exists any national consensus on the issue of how trans defendants are being housed when incarcerated. One way to try to answer this question is to look at what states are doing with regard to housing trans people in custody.

States in the U.S. vary in how they choose to house trans people in custody.[163] PREA's prison and jail standards outline a number of procedures prisons and jails should follow in housing decisions; however,

156. *See id.*
157. *Id.* at 290.
158. 923 F.3d 348, 353 (4th Cir. 2019).
159. *Id.*
160. *Id.* at 353–54.
161. *Id.* at 357 (quoting Porter v. Clarke, 290 F. Supp. 3d. 518, 526 (E.D. Va. 2018).
162. *Id.* at 361.
163. *See Resource Guide to Improve Safety in Carceral Housing for Transgender People*, LGBTQ+ BAR, https://lgbtqbar.org/programs/ti-project/ [https://perma.cc/3YW2-S3WS] (last visited Sep. 28, 2025).

many states' correctional facilities do not implement PREA's standards.[164] As discussed below, even states whose policies mirror PREA's standards on paper may not be safe for trans people in practice. The number of incarcerated trans people at any given time is not easy to calculate, and the best estimates are likely too low because of underreporting of trans people not identifying as such. Whatever the total number of incarcerated trans people, it is safe to say that most trans people are not housed in facilities that match their gender identity. In 2020, NBC News investigated the housing of trans people in prisons and they were only able to confirm that fifteen of the 4,890 incarcerated trans people "were housed according to their lived gender."[165]

While the numbers of trans people in custody at any given point in time may not be clear, we can look at how the states that have the largest number of people in custody house trans people, with the expectation that what these states do may affect a large number of trans people in custody. As of 2022, Texas was the state with the largest number of people in custody (139,631), followed by California (97,608) and Florida (84,678).[166]

The Texas Department of Criminal Justice's housing policy makes clear that "[h]ousing determinations shall not be made solely on the basis of LGBTI status."[167] However, the policy also notes that the "risk of being sexually abused," the "perception of the offender as gay, lesbian, bisexual, transgender, intersex or gender nonconforming," and the "offender's own perception of vulnerability" shall be considered in making housing determinations.[168]

In California, the housing of trans people in custody must abide by the Transgender Respect, Agency, and Dignity Act.[169] The Act requires trans people to "[b]e housed at a correctional facility designed for men or women based on the individual's preference."[170] In addition, California prison officials, in their housing determinations, must take a trans

164. See discussion *infra* Section IV.A for more specific analysis of the PREA and its gaps.

165. Kate Sosin, *Trans, Imprisoned—and Trapped*, NBC NEWS (Feb. 26, 2020), https://www.nbcnews.com/feature/nbc-out/transgender-women-are-nearly-always-incarcerated-men-s-putting-many-n1142436 [https://perma.cc/3WMW-DH6A].

166. E. ANN CARSON & RICH KLUCKOW, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., NCJ 307149, PRISONERS IN 2022 – STATISTICAL TABLES, at 7 tbl. 2 (2024), https://bjs.ojp.gov/document/p22st.pdf [https://perma.cc/6B64-SQQB].

167. TEX. DEP'T OF CRIM. JUST., SAFE PRISONS/PREA PLAN 19 (2019), https://www.tdcj.texas.gov/documents/cid/Safe_Prisons_PREA_Plan.pdf [https://perma.cc/KYS8-2P8Y].

168. *Id.* at 16–17.

169. *See* S.B. 132, 2019–2020 State Assemb., Reg. Sess. (Cal. 2021) (enacted at CAL. PENAL CODE §§ 2605–06 (West 2021)).

170. *Id.*

person's self-perception of "health and safety" into account and consider, among other options, "granting single-cell status, housing the individual with another incarcerated person of their choice, or removing the individual or individuals who pose a threat from any location where they may have access to the individual who has expressed a safety concern."[171]

Lastly, Florida's Department of Corrections procedure outlines that housing of trans people in custody "will be determined on a case-by-case basis."[172] More specifically, a trans person's "own view, with respect to their own safety, shall be given serious consideration."[173] Additionally, housing decisions will be based on screening that will "consider the inmate's sexual orientation and gender identity."[174]

In all three of these states, a trans person's personal view of their safety is a factor in housing. This policy, to consider the person's own perception of vulnerability, is consistent with PREA's prisons and jail standards.[175] These three states' policies vary from other states that do not take into consideration an incarcerated person's self-perception of vulnerability to harm. One example is Utah, a state that has at times refused to comply with PREA's standards.[176] Utah has no specific guidelines by which to assign housing for trans people other than outlining what factors can lead to a change in housing assignment, such as "offender classification," "management/safety concerns," "medical needs," or "any administrative need."[177] The Utah Department of Corrections makes clear that their policy rationale with regard to housing is based "on the consider[ation of] all relevant factors necessary to appropriately assign offender housing, ensuring a properly functioning and safe institution."[178] Notice this policy does not speak to the safety of any particular person in custody, but rather the safety of the "institution." Other states, like Louisiana for example, do not explicitly take into consideration a trans person's own views of vulnerability

171. *Id.*

172. FLA. DEP'T. OF CORRS., No. 602.053, PRISON RAPE: PREVENTION, DETECTION, AND RESPONSE 6 (2023), https://lgbtqbar.org/wp-content/uploads/sites/6/sites/8/2024/01/602.053.pdf [https://perma.cc/4NYP-GYRU].

173. *Id.* at 7.

174. *Id.*

175. *See* 28 C.F.R. § 115.41(d)(9) (2025).

176. *Some States Opting Out of Federal Prison Rape Law*, SENTINEL-TRIB. (Mar. 12, 2022), https://www.sent-trib.com/2022/03/12/some-states-opting-out-of-federal-prison-rape-law/ [https://perma.cc/BYM6-DFTY].

177. UTAH DEP'T OF CORRS., No. FC05, INMATE HOUSING ASSIGNMENTS 1–2 (2022), https://public.powerdms.com/UtahDOC/tree/documents/2023047 [https://perma.cc/2QT4-BQ9E].

178. *Id.* at 1.

pursuant to PREA's guidelines, but still make clear that the safety of the specific trans person is considered in housing decisions:

> In deciding whether to assign a transgender or intersex offender to a facility for male or female offenders, and in making other housing and programming assignments, the unit shall consider on a case-by-case basis whether a placement would ensure the offender's health and safety, and whether the placement would present management or security problems.[179]

Notice the safety of trans people in custody is weighed against the potential "management or security problems" their housing placement may present.[180]

While the three states with the largest prison populations consider a trans person's own views about safety, they would appear to be in the minority of states that do so. One study in 2023 found that only nineteen states complied with the PREA requirement to consider an incarcerated trans person's own view of vulnerability in housing decisions.[181] In addition, as of 2018—fifteen years after PREA was passed and six years after it became effective—Indiana was the only state whose policies implemented all thirteen PREA provisions related to trans people.[182] A quarter of states included less than four of the PREA provisions in their prison housing policies.[183]

Given the large number of states that do not comply with PREA's provisions, either in part or in full, relying on a "national consensus" to support an Eighth Amendment cruel and unusual punishment claim seems challenging at best. However, the Court's Eighth Amendment jurisprudence has relied not only on national consensus, but also what other countries are doing with regard to the practice in question. How other countries house trans people in custody is relevant to the Eighth Amendment analysis of a claim brought by a trans person in this country.

179. LA. DEP'T OF PUB. SAFETY AND CORRS., No. C-01-022, FIELD OPERATIONS, PRISON RAPE ELIMINATION ACT (PREA) 18–19 (2017), https://doc.louisiana.gov/wp-content/uploads/2020/06/C-01-022-Prison-Rape-Elimination-Act-PREA.pdf [https://perma.cc/9Q5U-PZ9G].

180. *Id.*

181. CHESNUT & PEIRCE, *supra* note 51, at 22 (citing Nic Cabage, *I'm Not Who I Once Was: The Policies and Treatment of Transgender Individuals in U.S. Correctional Facilities*, *in* HANDBOOK ON PRISONS AND JAILS 285, 290 (Danielle Rudes et al. eds., 2023)).

182. Lauren K. Robinson et al., *The Present State of Housing and Treatment of Transgender Incarcerated Persons*, 52 J. AM. ACAD. PSYCHIATRY & L. 186, 191 (2024), https://jaapl.org/content/52/2/186.

183. *Id.*

E. How Other Countries House Trans People in Custody

The Supreme Court has consistently taken into consideration "the laws of other countries . . . as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"[184] As previously mentioned, in the United States, PREA's guidelines suggest prisons employ case-by-case decisions for housing decisions which include, among other factors, the input of the person being incarcerated. Although not every state adopts PREA's guidelines, they are still instructive in analyzing "best practices" for prison administrators. How do PREA's guidelines compare to what prison administrators in other countries are doing?

Similar to PREA's guidelines, the input of incarcerated trans people is invited as part of the decision regarding their housing placement in Argentina, Columbia, Ecuador, South Australia, Sweden, and England and Wales.[185] In Ontario, Canada, housing decisions for trans people in custody go even further by requiring the trans person to be consulted regarding their housing assignment.[186] Ontario prison housing policy also requires trans people in custody to be housed in facilities based on their gender identity, unless the person in custody requests otherwise or there are safety and/or health concerns that take priority.[187] However, Ontario policy places the burden on prison administrators to prove that any safety and/or health concerns cannot be resolved.[188] The United Kingdom, which is similarly protective, has made the reasoning for its policy clear: "Allowing transgender offenders to experience the system in the gender in which they identify will, in the great majority of cases, represent the most humane and safest way to act. We believe it will also assist successful rehabilitation."[189]

In addition to considering the input of the trans person in custody when deciding where they will be housed, some countries have housing policies that account for a trans person's safety in other ways. In Scotland, England, and Wales, trans people are generally incarcerated in

184. Roper v. Simmons, 543 U.S. 551, 575 (quoting Trop v. Dulles, 356 U.S. 86, 102–03 (1958)).

185. UNITED NATIONS DEVELOPMENT PROGRAMME, MAPPING OF GOOD PRACTICES FOR THE MANAGEMENT OF TRANSGENDER PRISONERS: LITERATURE REVIEW 13 (2020), https://www.undp.org/sites/g/files/zskgke326/files/2023-03/UNDP-TH-the-mapping-of-good-practices-for-the-management-of-transgender-prisoners.pdf [https://perma.cc/YE6D-STX3].

186. *See id.*

187. *Id.* at 14.

188. *Id.* at 15.

189. *Id.* (quoting MINISTRY OF JUSTICE, REVIEW ON THE CARE AND MANAGEMENT OF TRANSGENDER OFFENDERS 4 (2016)).

single cells.[190] And in Malta, if a person in custody requests a single cell based on their "gender identity, gender expression, and/or sex characteristics," their request must be "assessed, recorded and addressed as a priority."[191] Other countries have whole prisons or dedicated wings of prisons to house trans people. In 2010, Italy converted a women's prison into the world's first dedicated prison for incarcerated trans people.[192] Furthermore, in 2013, Argentina repurposed a house to accommodate trans women and allow them to take temporary leave to prepare them for reentry into the community.[193] Thailand opened a special wing of a prison for trans people in 2017.[194] However, not every country believes in special housing units for trans people in prisons. Columbia's prison regulations prohibit using "special units aimed at segregating or excluding persons on the basis of their sexual orientation or gender identity."[195]

While they are only a small sample of other countries, these examples show that PREA's guidelines are merely a baseline for the protection of trans people in custody. Moreover, we see that some countries go beyond what PREA's guidelines suggest and implement more progressive policies to ensure the safety of their trans population. What, if any, penological goals are being addressed by these various housing polices?

In *Atkins*, *Kennedy*, and *Graham*, the Court emphasized whether the practices in question served any legitimate penological goal.[196] The stated purposes of the Prison Rape Elimination Act include protecting the Eighth Amendment rights of incarcerated persons and "increas[ing] the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape."[197] PREA's prison and jail standards, based on the explicit purposes of the Act, meet the penological goals of deterring people from committing a crime (prison rape) while holding those prison officials that are not actively taking measures to "detect, prevent, reduce, and punish prison rape" accountable in hopes of deterring similar future behavior.

When prisons institute housing placement policies that do not take into account a trans person's own perception of vulnerability, what penological goal is that serving? Such policies do not seem to be serving

190. *Id.* at 17.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.* at 18.
196. Atkins v. Virginia, 536 U.S. 304, 317–21 (2002); Kennedy v. Louisiana, 554 U.S. 407, 441–42 (2008); Graham v. Florida, 560 U.S. 48, 71–75 (2010).
197. *See* 34 U.S.C. § 30302(6)–(7).

any deterrent, incapacitative, or rehabilitative goal. Arguably, policies that increase the likelihood of trans people being raped or physically beaten in prisons appear to be retributive in nature, leading one to suspect they are serving as part of the punishment someone receives and are cruel and unusual. Having no trans-specific housing policies may make for less work for prison officials, but this "benefit" is not a penological goal. Furthermore, one could argue that having to address housing assignments after a rape or physical assault that could have been prevented with proactive policies weakens the claimed potential "benefit."

III. LEGISLATION AND POLICIES AIMED AT PROTECTING INCARCERATED TRANS PEOPLE FAIL

A. Prison Rape Elimination Act

The Prison Rape Elimination Act was passed in 2003, with nine enumerated purposes.[198] The defined purposes include "establish[ing] a zero-tolerance standard for the incidence of prison rape in prisons in the United States" and "protect[ing] the Eighth Amendment rights of Federal, State, and local prisoners."[199] Among the Congressional findings in PREA are the following:

> The high incidence of sexual assault within prisons involves actual and potential violations of the United States Constitution. In *Farmer v. Brennan*, the Supreme Court ruled that deliberate indifference to the substantial risk of sexual assault violates prisoners' rights under the Cruel and Unusual Punishments Clause of the Eighth Amendment . . . . States that do not take basic steps to abate prison rape by adopting standards that do not generate significant additional expenditures demonstrate such indifference.[200]

PREA mandated the Bureau of Justice Statistics of the Department of Justice to carry out an annual "comprehensive statistical review and analysis of the incidence and effects of prison rape," which includes a sample of "not less than ten percent of all Federal, State, and county prisons, and a representative sample of municipal prisons."[201] Any

198. *Id.* § 30302.
199. *Id.* § 30302(1), (7).
200. *Id.* § 30301(13) (citation omitted).
201. *Id.* § 30303(a)(1), (4).

federal, state, or local prison or jail that receives a request to participate in the survey is required to comply and provide access to anyone in custody in their respective facility.[202] PREA also established a National Prison Rape Elimination Commission.[203] This commission was mandated to conduct a comprehensive study on prison rape and draft recommended "national standards for reducing prison rape,"[204] which would be provided to the Department of Justice for review and subsequent publishing of a final rule including "national standards for the detection, prevention, reduction, and punishment of prison rape."[205]

The Department of Justice published PREA's standards in 2012.[206] In crafting PREA's national standards for prisons and jails, the Department of Justice realized that housing decisions are a critical component of safety for everyone in prisons, but even more so for trans people. The national standards for prisons and jails include "[s]creening for risk of sexual victimization and abusiveness."[207] The standards for screening for sexual victimization and abusiveness require an assessment during intake and upon transfer to another facility for "risk of being sexually abused by other inmates or sexually abusive toward other inmates."[208] The criteria to assess risk of sexual victimization include considering whether the person in custody "is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming"; whether they have "previously experienced sexual victimization"; and their "own perception of vulnerability."[209] The standards make clear that within thirty days of the person's arrival at a facility, prison officials must reassess the risk of victimization "based upon any additional, relevant information received by the facility since the intake screening."[210] The information gained from the screening for risk of sexual victimization is used to determine housing for all persons in custody.[211] For trans people specifically, in making the decision whether to house a trans person in a male or female facility, the prison "shall consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present

202. *See id.* § 30303(a)(6).
203. *Id.* § 30306(a).
204. *Id.* § 30306(d)(3)(iii).
205. *See id.* § 30307(a)(1).
206. *See* 28 C.F.R. § 115.41 (2012).
207. *Id.*
208. *Id.* § 115.41(a).
209. *Id.* § 115.41(d)(7)–(9).
210. *Id.* § 115.41(f).
211. *Id.* § 115.42(a).

management or security problems."[212] In addition, for trans people in custody specifically, housing placement decisions "shall be reassessed at least twice each year to review any threats to safety experienced" by the person in custody.[213]

The housing decision for trans people in prisons is so important to their safety that the national standards not only require a risk assessment within thirty days after entering a new prison, but also at any point "when warranted due to a referral, request, incident of sexual abuse, or receipt of additional information that bears on the inmate's risk of sexual victimization . . . ."[214] Lastly, the standards make clear that if someone is deemed at high risk for sexual victimization, they "shall not be placed in involuntary segregated housing [solitary confinement] unless an assessment of all available alternatives has been made, and a determination has been made that there is no available alternative means of separation from likely abusers."[215] If someone is placed in segregated housing "for their protection," the facility is required to review every thirty days whether there is a "continuing need for separation from the general population."[216]

Despite all of these provisions in the PREA, the data suggest that sexual assaults are rising, not declining.[217] Furthermore, PREA's standards do not go far enough to ensure the safety of trans people specifically, and thus should be adjusted to take into account the unique and serious risks this population faces while incarcerated. Among the changes to PREA's standards that would provide greater safety to trans people are the following:

1. Reducing the time for intake screening from "within 72 hours of arrival at [a] facility"[218] to 48 hours;
2. Changing the time period for reassessing the victimization risk level from the current maximum of "within . . . 30 days from the [person's] arrival . . . based upon any additional, relevant information received by the facility since the intake screening"[219] to a period of time based on when the information is received—for example, 48 hours from this time;

212. *Id.* § 115.42(c).
213. *Id.* § 115.42(d).
214. *Id.* § 115.41(g).
215. *Id.* § 115.43(a).
216. *Id.* § 115.43(e).
217. *See* discussion *supra* Part I.
218. 28 C.F.R. § 115.41(b).
219. *Id.* § 115.41(f).

3. Removing the language "when warranted" from the regulation's requirement that risk level be reassessed due to a "referral, request, incident of sexual abuse, or receipt of additional information that bears on the [person's] risk of sexual victimization or abusiveness;"[220] and
4. Removing the barrier of only being able to place trans people in dedicated facilities, units, or wings if "such placement is in a dedicated facility, unit, or wing established in connection with a consent decree, legal settlement, or legal judgment for the purpose of protecting such [persons]."[221]

Furthermore, the "mandates" of PREA have little effect if prisons and jails can decide not to implement the standards at all. States can choose to not comply with PREA and accept a five percent reduction in grant funding from two specific Department of Justice grants.[222] Attaching compliance to funding is generally a sufficient way to coerce state action,[223] but if only five percent of funding is at stake for just two specific grants, then the message the Department of Justice is sending is that the prevention of prison rape only matters to an extent. Because the total amount awarded by each grant is significant, having a greater percentage of this award tied to PREA compliance would likely mean more states would choose not to give up this funding. For example, one of the grants, the Edward Byrne Memorial Justice Assistance Grant, awarded over four billion dollars total in fiscal year 2023 .[224] States such as Arizona, Idaho, Indiana, Texas, and Utah have all decided in the past not to comply with PREA for various reasons, despite the loss of grant funding.[225] While there should not exist a money value placed on what the prevention of rape of any person in custody is worth, the evidence suggests that a loss of five percent funding from two grants is not great

220. *Id.* § 115.41(g).

221. *Id.* § 115.42(g).

222. *See Governors' Certification*, NAT'L PREA RES. CTR., https://www.prearesourcecenter.org/audit/governors-compliance-certification [https://perma.cc/5SS5-DHN9] (last visited Sep. 19, 2025).

223. *See generally* South Dakota v. Dole, 483 U.S. 203, 206 (1987) ("Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'").

224. *OJP Awards Since FY 2021 By State and City*, U.S. DEP'T OF JUST., https://charts.ojp.usdoj.gov/t/public/views/OJPAwardsDashboard/AwardsByStateAndCity [https://perma.cc/VW7R-AHEC] (last visited Sep. 28, 2025) (choose "2023" from Fiscal Year dropdown; then search in Keyword Search for "Edward Byrne Memorial Justice Assistance Grant").

225. *See* SENT-TRIB, *supra* note 178.

enough to convince some states to implement PREA's standards. It is also worth noting that the drafters of PREA did in fact place a value on the cost of preventing rape by making clear that the National Prison Rape Elimination Commission, tasked with drafting standards, "shall not propose a recommended standard that would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities."[226]

B. Transgender Offender Manual

In addition to the national standards imposed by PREA, in January 2017, under President Obama, the Department of Justice's Federal Bureau of Prisons published a "Transgender Offender Manual."[227] The manual's stated purposes included providing "guidance to staff in dealing with the unique issues that arise when working with transgender inmates" and supporting "staff's understanding of the increased risk of suicide, mental health issues and victimization of transgender inmates."[228] The manual incorporated the same language outlined in the PREA national standards with regard to housing designations for trans people in custody, and created a Transgender Executive Council consisting of staff from several Bureau of Prisons divisions "to offer advice and guidance on unique measures related to treatment and management needs of transgender inmates and/or inmates with [gender dysphoria], including designation issues."[229] Specifically, the manual outlined that initial housing designations for trans people should take into consideration a number of factors, including "current gender expression, medical and mental health needs/information, [and] vulnerability to sexual victimization."[230] In addition, when designating housing, "a transgender or intersex inmate's own views with respect to his/her own safety must be given serious consideration."[231] The manual also made clear that the Transgender Executive Council "will recommend housing by gender identity when appropriate."[232]

In May 2018, sixteen months after the Transgender Offender Manual was first issued and after President Trump took office, a revised manual

226. 34 U.S.C. § 30306(e)(3).

227. U.S. DEP'T OF JUST., FED. BUREAU OF PRISONS, No. 5200.04, TRANSGENDER OFFENDER MANUAL 1 (2017) [hereinafter 2017 MANUAL], https://www.documentcloud.org/documents/4462232-Transgender-Offender-Manual-01-18-2017/ [https://perma.cc/7U72-RLXF].

228. *Id.*

229. *Id.* at 4.

230. *Id.* at 5.

231. *Id.* at 6.

232. *Id.*

was released with significant changes. Among the key changes was a shift in the stated purpose of the manual, from concern about the increased risk of suicide, mental health issues, and victimization to "maintaining security and good order in Federal prisons."[233] Another fundamental change in the revised manual was that it eliminated the recommendation to assign housing by gender identity, instead recommending the use of "biological sex as the initial determination for designation."[234] The revised manual also eliminated a trans person's own views of safety as a factor to be considered in determining housing.

Fast forward nearly four years to January 2022, after President Biden was elected, and another revised manual was issued that included most of the original language from the 2017 manual.[235] Given the back and forth with regard to the purpose of the manual and how prisons should determine housing for trans people in custody, it is clear that that that the lives of incarcerated trans people are significantly impacted by the political views of whoever is in office at a given moment in time. This recognition of the role of politics in trans lives is of particular concern given President Trump's recent reelection. However, the mere existence of a Transgender Offender Manual suggests that this group should be treated differently in prisons.

Because the Transgender Offender Manual also addresses the safety of incarcerated people and bases much of its language on the standards of PREA, it too should be revised to ensure greater safety for the trans population in custody. These changes should include reinstating the language of the original Transgender Offender Manual that says that the Transgender Executive Council ("TEC") "will recommend housing by gender identity when appropriate."[236] While the current language is vastly improved from the language in the 2018 manual that directed the TEC to "use biological sex as the initial determination for designation,"[237] relying on a prison official's determination of someone's gender expression rather than the individual's actual gender identity creates a

233. *See* U.S. DEP'T OF JUST., FED. BUREAU OF PRISONS, No. 5200.04 CN-1, TRANSGENDER OFFENDER MANUAL 1 (2018) [hereinafter 2018 CHANGES], https://www.documentcloud.org/documents/4459297-BOP-Change-Order-Transgender-Offender-Manual-5.html [https://perma.cc/R4ZY-QNDR]. This is the Change Notice, highlighting changes made to the 2017 manual, rather than the clean, updated version of the manual from 2018. *Id.*

234. *Id.* at 2.

235. *See* U.S. DEP'T OF JUST., FED. BUREAU OF PRISONS, No. 5200.08, TRANSGENDER OFFENDER MANUAL 1–2 (2022) [hereinafter 2022 MANUAL], https://www.documentcloud.org/documents/21192200-2022-transgender-offender-manual/ [https://perma.cc/FZV7-XFVP].

236. *See* 2017 MANUAL, *supra* note 229, at 6.

237. *See* 2018 CHANGES, *supra* note 235, at 2.

standard that is difficult to follow and sends a clear message that trans people, in essence, lose their right to gender self-identification when they enter a correctional facility.

In accordance with the PREA changes recommended above,[238] the restriction that trans people can only be placed in dedicated facilities, units, or wings if "such placement is in a dedicated facility, unit, or wing established in connection with a consent decree, legal settlement, or legal judgment for the purpose of protecting such [persons]" should also be removed from the manual.[239]As the Transgender Offender Manual incorporates the intake screening policies from PREA, the first three recommended changes to PREA apply here as well.[240] However, the Transgender Offender Manual need not follow PREA's guidelines and could seek to provide greater protections for trans people in custody. Thus, I recommend that rather than waiting for Congress to change PREA, the DOJ should change the Transgender Offender Manual immediately by indicating that it incorporates PREA's guidelines, with the exception of these few changes.

The existence of PREA and the Transgender Offender Manual suggest Congress and the executive were aware that trans people in prison face greater risks of sexual assault and thus are worth protecting differently than other incarcerated people. However, as the data provided above suggest, the risk of sexual assault facing trans people in custody was already greater than ever before President Trump was reelected.[241]

C. President's Trump's January 20, 2025 Executive Order

On the day President Trump was inaugurated, he issued several executive orders.[242] Among the priorities he wanted to emphasize by executive order on his first day back in office was his view of trans people and the rights they should have in this country. The executive order titled "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government" makes very clear that trans people will face greater risks and have fewer rights under President Trump.[243] The executive order indicates that going forward, "[i]t is the

238. *See supra* note 223 and accompanying text.
239. *See* 2022 MANUAL, *supra* note 237, at 6.
240. *See supra* notes 220–22 and accompanying text.
241. *See supra* Part I.
242. *See* Lisa Desjardins, *Trump's Day 1 Executive Actions*, PBS NEWS (Jan. 22, 2025, at 15:38 EDT), https://www.pbs.org/newshour/politics/trumps-day-1-executive-actions [https://perma.cc/4Y36-MQ73].
243. *See* Exec. Order No. 14,168, 90 Fed. Reg. 8615, 8615 (Jan. 30, 2025) (Executive Order as of January 20, 2025).

policy of the United States to recognize two sexes, male and female," and that "[t]hese sexes are not changeable and are grounded in fundamental and incontrovertible reality."[244] The order defines "female" as "a person belonging, at conception, to the sex that produces the large reproductive cell" and "male" as "a person belonging, at conception, to the sex that produces the small reproductive cell."[245]

As it relates to trans people specifically in prison, the order instructs "[t]he Attorney General and Secretary of Homeland Security . . . [to] ensure that males are not detained in women's prisons or housed in women's detention centers, including through amendment, as necessary, of Part 115.41 of title 28, Code of Federal Regulations."[246] This section of the Code of Federal Regulations deals with the screening for risk of victimization and abusiveness that is required under PREA.[247] Currently, 28 C.F.R. § 115.41 indicates the screening shall consider, at a minimum, "[w]hether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender non-conforming."[248] It is very likely that the regulations will be amended to remove the required consideration of whether someone is perceived as "gay, lesbian, bisexual, transgender, intersex, or gender non-conforming," which would directly impact trans people's safety in prisons, particularly trans women who would be required to be housed in male facilities.

President Trump's executive order further weakens any protections PREA provides trans people in custody. In fact, within days of its issuance, a trans woman filed a federal suit in Massachusetts claiming that the order unconstitutionally violated her Eighth Amendment rights (among others) by forcing her to be housed in an all-male facility.[249] The lawsuit notes the "extremely high safety risks for transgender people in BOP [Bureau of Prisons] custody"[250] and how the "decision to disregard the known and substantial risks of serious harm violates Maria Moe's rights under the Eighth Amendment."[251] The case was subsequently sealed and transferred to another district where the plaintiff is currently confined.[252]

244. *Id.*
245. *Id.*
246. *Id.* at 8616.
247. *See supra* notes 208–18 and accompanying text.
248. 28 C.F.R. § 115.41(d)(7).
249. Complaint for Declaratory and Injunctive Relief, at 1, 3, Moe v. Trump, No: 1:25-CV-10195 (D. Mass. Jan. 26, 2025).
250. *Id.* at 17.
251. *Id.* at 18.
252. Moe v. Trump, No. 25-10195-GAO, 2025 WL 438730, at *2 (D. Mass. Feb. 7, 2025).

Moreover, a federal judge for the District of Columbia recently granted a temporary restraining order prohibiting enforcement of the sections of President Trump's executive order pertaining to PREA.[253] Three trans women who were housed in women's prisons and who had been diagnosed with gender dysphoria and received hormone therapy sued to prevent their transfer to men's prisons and the stoppage of their hormone therapy under the executive order.[254] The court found that the plaintiffs' Eighth Amendment deliberate indifference claims demonstrated a sufficient likelihood of success to justify a temporary restraining order.[255] The court subsequently granted a preliminary injunction blocking the Bureau of Prisons from enforcing the executive order.[256] After the complaint was amended to add nine additional plaintiffs, all trans women who were informed they would be transferred to men's prisons, the court extended the preliminary injunction to include these additional plaintiffs.[257]

A similar suit was filed in the District Court for the District of Columbia by another trans woman who was transferred from a women's prison to a solitary confinement cell within a men's prison.[258] This complaint also alleges an Eighth Amendment violation—that she was subjected to a known and substantial risk of serious harm as a trans person in custody.[259] The case was subsequently amended to add four new plaintiffs before the court issued an order granting a temporary restraining order and preliminary injunction blocking enforcement of the executive order.[260] It is likely there will be many similar lawsuits filed in the immediate future as trans people are moved to different facilities per President Trump's executive order.

As noted previously, PREA affects both federal and state prisons, because it is binding on federal facilities and receipt of federal grants is tied to compliance for state facilities. However, because many state facilities are already not in compliance with PREA, the effect of President Trump's executive order will be felt to a greater degree at federal facilities. Furthermore, states can and have provided stronger

253. Doe v. McHenry, 763 F. Supp. 3d 81, 84, 90 (D.D.C. 2025).
254. *Id.* at 84, 87.
255. *Id.* at 88–89.
256. Order at 2, Doe v. McHenry, 763 F. Supp. 3d 81 (D.D.C. 2025) (No. 1:25-CV-286-RCL).
257. Doe v. Bondi, No. 1:25-CV-286-RCL, 2025 WL 596653, at *1–2 (D.D.C. Feb. 24, 2025).
258. Complaint for Declaratory and Injunctive Relief at 1–2, Jones v. Trump, No. 1:25-CV-401 (D.D.C. Feb. 10, 2025).
259. *Id.* at 18–19.
260. Order at 1, 5, Jones v. Bondi, No. 1:25-CV-401-RCL (D.D.C. Mar. 3, 2025).

protections than the federal government for trans people in custody, both through state constitutions and state legislation. These measures represent two of this Article's proposed solutions to address the greater risks of sexual and physical assault faced by trans people in custody.

IV. STATES CAN, AND SHOULD, PROVIDE GREATER PROTECTIONS FOR TRANS PEOPLE IN CUSTODY

A. State Constitutions

Trans people in custody face an uphill battle to have their Eighth Amendment rights protected by the Supreme Court, or by federal legislation like PREA given the makeup of the Court and recent election of President Trump. The best recourse for trans people in custody may be to turn to state protections, such as those provided by state constitutions. Although a federal equal rights amendment that would prevent discrimination based on gender has yet to come to fruition, more than half of state constitutions have protections based on gender.[261] States such as Connecticut,[262] Massachusetts,[263] New Hampshire,[264] Texas,[265] and Washington[266] have had such equal rights amendments to their constitutions since the 1970s.[267] Other states, such as Oregon[268] and Nevada,[269] have passed equal rights amendments more recently.[270] It is in these states and others with similar equal rights amendments that trans people in custody have the best chance to ensure their safety is protected.

An example of how state constitutions can protect against gender discrimination is the application of Pennsylvania's and Nevada's equal rights amendments in challenges to Medicaid funding bans for abortion.[271] In *Allegheny Reproductive Health Center v. Pennsylvania*

261. *State-Level Equal Rights Amendments*, BRENNAN CTR. FOR JUST. (Dec. 6, 2022), https://www.brennancenter.org/our-work/research-reports/state-level-equal-rights-amendments [https://perma.cc/G395-XWUC].

262. CONN. CONST. art. I, § 20.

263. MASS. CONST. amend. art. CVI.

264. N.H. CONST. pt. I, art. 2.

265. TEX. CONST. art. I, § 3(a).

266. WASH. CONST. art. XXXI, § 1.

267. *See* BRENNAN CTR. FOR JUST., *supra* note 261.

268. OR. CONST. art. I, § 46(1).

269. NEV. CONST. art. I, § 24.

270. *See* BRENNAN CTR. FOR JUST., *supra* note 261.

271. *See* Ting Ting Cheng & Naomi Young, *Putting State Equal Rights Amendments to Work*, STATE CT. REP. (Dec. 5, 2024), https://statecourtreport.org/our-work/analysis-opinion/putting-state-equal-rights-amendments-work [https://perma.cc/C4T2-DYAV].

Department of Human Services, the Supreme Court of Pennsylvania held that "a challenge to a law as violative of [the state's equal rights amendment] begins with the premise that a sex-based distinction is presumptively unconstitutional."[272] Similarly, in *Silver State Hope Fund v. Nevada Department of Health and Human Services,* a lower court in Nevada held that "the State's exclusion on Medicaid coverage for abortion care discriminates on the basis of sex, in violation of the Nevada Constitution's Equal Rights Amendment."[273]

Trans people in custody could seek protection under state constitutions with equal rights amendments by arguing that state correctional housing policies discriminate based on sex by failing to consider the uniquely heightened risks trans people face in prisons. Another solution to the larger problem of increased rates of sexual and physical assault against trans people in custody is to turn to state legislation, which can specifically address prison housing to protect all trans defendants who face incarceration.

B. State Legislation

If amending their constitutions to protect the legal rights of their citizens, regardless of gender, is too daunting, states can and should pass legislation specifically providing for greater protection of trans people in custody. State legislation regarding trans people in 2024 was largely aimed at reducing or eliminating their legal rights, and almost 600 bills of this type were introduced in state legislatures in that year alone.[274] However, despite the recent national trend in anti-trans state legislation, there are several states that provide trans people with added legal protections in various areas.

Twenty-two states and the District of Columbia have passed legislation protecting trans people from discrimination in housing.[275] Twenty-two states and the District of Columbia have passed legislation protecting trans people from discrimination in employment.[276] Lastly,

272. 309 A.3d 808, 891 (Pa. 2024).

273. Silver State Hope Fund v. Nevada Dep't of Health and Hum. Servs., No. A-23-876702-W, slip op. at 19 (Nev. 8th Jud. Dist. Ct. Aug. 8, 2024).

274. *See* Erin Reed, *Post-Election 2024 Anti-Trans Risk Assessment Map,* ERIN IN THE MORNING (Dec. 11, 2024), https://www.erininthemorning.com/p/post-election-2024-anti-trans-risk [https://perma.cc/YH8B-MF6P].

275. *Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/non_discrimination_laws/housing [https://perma.cc/VV5B-XDRG] (last visited Sep. 16, 2025) (choose the "HOUSING" tab).

276. *Employment Nondiscrimination*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/employment_non_discrimination_laws [https://perma.cc/YZ4Y-VRGD] (last visited Sep. 16, 2025) (choose the "STATE" tab).

and particularly relevant to Eighth Amendment claims brought by trans people in custody for denial of gender affirming care, fourteen states and the District of Columbia have passed legislation protecting medically necessary health care for trans people.[277]

States can and should use PREA and the Transgender Offender Manual, and this Article's suggested edits to both, to model similar state legislation requiring state correctional facilities to implement them. Whereas PREA is not binding on states—and the funding provisions tied to its implementation have not sufficiently encouraged its adoption—state legislation could foreclose this avoidance of measures to protect trans people in custody. However, until such legislation exists, attorneys should be trained to pursue legal remedies under current state correctional housing policies for trans people.

C. Public Defender Training

Trans criminal defendants are represented by both public defenders and private criminal defense attorneys. Consequently, this Article's recommended best practices include suggestions specific to public defender offices as well as practices that can and should be utilized by all criminal defense attorneys. With regard to public defenders, these recommended practices can be divided into four stages: (1) before intake or representation of a trans defendant, (2) during intake of a potential trans defendant, (3) during the pretrial phase of representation, and (4) during sentencing of a trans defendant.

If attorneys acknowledge the reality that trans criminal defendants face greater safety concerns while incarcerated and want to bring Eighth Amendment claims to prevent incarceration, either altogether or in specific prisons, then it is incumbent on them to prove, with hard data, the specific risks their trans client will face in the specific prison where they will be housed. The data from the National Inmate Survey, 2015 U.S. Transgender Survey, Survey on Sexual Victimization, and Advancing Transgender Justice Report is helpful,[278] but is likely not specific enough to support a valid Eighth Amendment claim.

277. *Transgender Healthcare "Shield" Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.mapresearch.org/equality-maps/healthcare/trans_shield_laws [https://perma.cc/RXH3-D4GS] (last visited Sep. 25, 2025) (choose the "SHIELD LAWS ONLY" tab).

278. *See supra* Part I for a more in-depth discussion of these data sources and their findings.

Public defender offices should submit Freedom of Information Act ("FOIA")[279] requests pursuant to their state FOIA laws[280] for all prisons and jails where any trans defendants they may represent are housed to get data that support their Eighth Amendment claims. This requires requesting the total numbers of sexual and physical assaults for each facility, as well as a breakdown by sexual identity or sexual expression of the victims. If a breakdown by sexual identity or sexual expression is not possible, then asking for any data the facility may have submitted via a PREA survey request could be a helpful place to start. It would likewise be helpful to file a FOIA request for the number of PREA investigations into allegations of physical or sexual assaults at the facility, and how many of those were made by trans defendants.

In addition, criminal defense attorneys should know how their state department of corrections houses trans people by default: based on their assigned sex at birth, their gender identity, their gender expression, or by some other means. If a state is using a trans person's sex assigned at birth to house them, attorneys should know whether their trans client has a birth certificate, driver's license, or passport reflecting their gender identity so that the state can make an exception. This information can prevent the horror of prison rape for a trans client who may not have gotten identification reflecting their gender identity but can do so before being incarcerated.

Even if one has strong evidence to show that a specific prison or jail has higher rates of sexual or physical assaults of trans people, and one knows the policies their state department of corrections has with regard to "classifying" or housing trans people, if they haven't been trained to consider raising an Eighth Amendment claim, they likely won't know to do so. Or worse yet, they may have thought to raise an Eighth Amendment claim, but don't feel comfortable doing so because other people in their office are not doing so. All public defender offices should include an explanation of Eighth Amendment claims and tips on how to execute them, instructions for accessing relevant data via FOIA requests, and template motions in both their new attorney trainings and required continued education trainings.

Because trans defendants face unique risks in the criminal legal system, particularly if they are imprisoned, it is important for defense attorneys—both public and private—to ask questions during the intake

279. 5 U.S.C. § 552. FOIA provides that federal agencies, "upon any request for records . . . , shall make the records promptly available to any person." *Id.* § 552(a)(3)(A).

280. *See, e.g.*, N.J. STAT. ANN. § 47:1A-1 (West 2002) ("[G]overnment records shall be readily accessible . . . by the citizens of this State . . . , for the protection of the public interest . . . .").

of a case that raise the issue of gender identity. Like any other personal questions one would ask of a new client, it is important to explain the significance of asking questions like whether a client's gender identity matches their assigned sex at birth. If a client does identify as trans, asking follow-up questions about any transition care they may be receiving—in the form of medication and/or hormones—or are scheduled to receive is equally important. Asking trans clients who are receiving transition care to identify their medical provider and sign a release for the attorney to get records and a letter indicating the harm that discontinuing treatment because of incarceration would cause is key to a deliberate indifference claim.

When a trans client is facing incarceration, it is important to get the client's permission to tell the judge and prosecutor that they are trans and explain why that is relevant. It is equally important to provide data to the judge and prosecutor about the unique dangers prison poses for trans defendants, and to raise an Eighth Amendment claim. If the judge or prosecutor are not receptive to the Eighth Amendment argument, then defense attorneys should file a motion to litigate the matter pretrial.

If the defense attorney has been unsuccessful in persuading a prosecutor or judge not to sentence their trans client to prison, and they believe their client will be housed at a prison known to have higher rates of sexual violence against trans people, then the attorney should seek to stay any sentencing pending the litigation of an Eighth Amendment claim against the correctional facility that will determine their client's prison housing. If the sentencing judge will not stay the sentencing, then the attorney should seek injunctive relief from the federal courts because of a pending constitutional claim.

CONCLUSION

The Supreme Court has recognized that trans people in prisons can have their Eighth Amendment rights violated when they are denied medical care by prison officials with deliberate indifference regarding their safety. The data are overwhelmingly clear that trans defendants face significantly greater risks of sexual violence compared to non-trans people when incarcerated in certain prisons. Thus, on a case-by-case basis, such action could be found to violate the Eighth Amendment's Cruel and Unusual Punishment Clause. Different states and countries have addressed safety concerns regarding housing trans people in prisons in various ways, but all suggest that it is a grave concern and there is no penological goal served by exposing trans people to these greater risks of harm. Raising an Eighth Amendment cruel and unusual punishment claim in federal court is not likely to be a winning tactic given the

Supreme Court's current makeup. Similarly, President Trump's signing of the January 20, 2025 executive order entitled "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government" makes it unlikely that recourse via the executive or Congress is a viable alternative.

It is thus imperative that states provide the protection trans people are lacking federally. States can rely on their constitutions or on legislation to protect trans people in custody. Trans defendants may be sentenced to prison to fulfill a variety of penological goals, but the punishment of imprisonment should not include the likely possibility of prison rape. As Justice Anthony Kennedy noted, "[o]ver 150 years ago, Dostoyevsky wrote, 'The degree of civilization in a society can be judged by entering its prisons.' There is truth to this in our own time."[281]

What happened to Onyx? The judge agreed to a sentence of seven years of prison completely suspended, with three years of probation. In December 2024, Onyx successfully completed her probation without incident.

281. Davis v. Ayala, 576 U.S. 257, 290 (2015) (Kennedy, J., concurring) (citation omitted).