
Abuse and Neglect of Transgender People in Prisons and Jails: A Lawyer's Perspective

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Over fifty years ago, at the Stonewall Inn in NYC, and years earlier at Compton's Cafeteria in San Francisco, the modern movement for lesbian, gay, bisexual, transgender, and queer (LGBTQ+) rights started with riots and rebellion against police violence, and the belief that LGBTQ+ people have the right to live our lives openly. Although some have tried to erase that transgender women were at the forefront of those fights, we are indebted to them as a movement.

Yet the struggle continues: We are currently facing an epidemic of violence against transgender people. This year, there have been over 30 reported deaths of transgender people, the majority of which were Black transgender women—and that is likely an underreporting due to the misgendering of victims by police and the media. We are also facing a crisis in the criminalization and incarceration of transgender people. A shocking [47% of Black transgender people](#), and more than one out of five (21%) transgender women of all ethnicities, are incarcerated during their lifetimes.

And transgender youth in the juvenile justice system are likewise overrepresented. Several surveys indicate that the percentage of LGBTQ+ youth in juvenile facilities is at least double that of LGBTQ+ youth in the general population. Approximately [20% of youth in juvenile facilities](#) identify as LGBTQ+.

As civil rights lawyers [who advocate for the rights and dignity of incarcerated transgender people](#)—and LGBTQ+ people nationwide—we are cognizant of how transgender people's experiences of abuse and neglect in prison, as well as their disproportionate rates of incarceration, are a microcosm of the dehumanization and exclusion they experience in society at large. As lawyers, we also know that dismantling the “discrimination-to-incarceration pipeline” that propels transgender people of color into prisons and jails would help to engineer a better quality of life, not just for transgender people, but for the LGBTQ+ community at large.

[Mapping the Discrimination-to-Incarceration Pipeline](#)

[Protecting the Rights of Transgender People in Prisons and Jails](#)

Mapping the Discrimination-to-Incarceration Pipeline

The discrimination-to-incarceration pipeline is a term we coined to describe the ways that bias and discrimination in [housing, employment, education, and policing](#) thrust transgender people into the criminal justice system at disproportionate rates. Transgender people are frequently incarcerated for [poverty-related offenses](#), like theft and survival sex-work. Transgender people—particularly transgender women of color—are even routinely arrested on [mere suspicion](#) that they are sex workers under antiquated loitering statutes that criminalize people, in essence, for “[walking while trans](#).”

Despite the [Prison Rape Elimination Act's \(PREA\) mandate](#) that prisons and jails take steps to protect transgender people and make housing decisions that ensure their safety, transgender women are almost uniformly placed in men's facilities where they face unconscionable levels of violence. According to data collected by the Bureau of Justice Statistics at the Department of Justice, [40% of incarcerated transgender people](#) have been sexually assaulted—more than ten times the general prison population rate. Incarcerated transgender people also [face an uphill battle](#) accessing gender dysphoria care, such as hormone therapy or gender confirmation surgery, with more than 40% reportedly being denied medically necessary care.

Protecting the Rights of Transgender People in Prisons and Jails

Although incarcerated transgender people face widespread abuse, they have a Constitutional right to gender dysphoria treatment and protection from sexual assault. In [Farmer v. Brennan](#) (1994), a case filed by Dee Farmer, a Black transgender woman, the Supreme Court ruled that incarcerated transgender people have a right to reasonable safekeeping because “[b]eing violently assaulted in prison is simply not ‘part of the penalty that criminal offenders pay for their offenses against society.’”

The [U.S. Department of Justice](#) and [courts across the country](#) have also found that failing to adequately treat gender dysphoria is cruel and unusual punishment that violates the Eighth Amendment. Therefore, transgender people who experience sexual violence or are denied medical treatment for gender dysphoria can seek damages and injunctive relief under the Eighth Amendment. There may also be state constitutional rights and protections available, in addition to [a limited remedy](#) under the Federal Torts Claims Act (FTCA), for people who experience abuse in federal custody.

However, transgender people trying to vindicate their legal rights may face challenges. The Prison Litigation Reform Act (PLRA) forces incarcerated people to navigate a complex web of administrative hurdles that can take months before they can go to court. In addition, the PREA does not provide a private right of action to survivors of assault, despite its robust protections. And recent court decisions have also limited the availability of [Bivens actions](#) and [FTCA claims](#), making it harder for survivors in federal custody to seek damages as redress.

There is a dire need for legal advocacy. As pro bono legal counsel can be difficult to come by, almost all of these cases are filed pro se. Annually, at [Lambda Legal](#), we receive hundreds of letters from incarcerated LGBTQ+ people who are seeking help—almost all of these letters concern either denial of health care or violence, or both.

As advocates, what can we do to address this crisis? First, we must invest in and center transgender people who are the most impacted. Their experiences and expertise should help guide policy reforms. Second, the goal must be to end the incarceration pipeline and discriminatory laws. For example, in [New York](#) and [Washington D.C.](#), activists are pushing to decriminalize sex work and repeal anti-loitering statutes like the [Walking While Trans Ban](#). Third, states must do more to protect incarcerated people from violence. In California, advocates helped to draft and pass a bill requiring transgender people in prison to be housed in accordance with their gender identity. At the federal level, Congress should also consider amending the PREA to give survivors of abuse a private cause of action against prisons and jails that turn a blind eye to sexual abuse.

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For more information, check out Chinyere and Richard's [Transgender Rights in Prison, Jail, or Detention](#) program segment, available from PLI Programs On Demand.

Also available from PLI Programs On Demand:

[Understanding the Intellectual Property License 2020](#)

[The Supreme Court's Ruling Protecting LGBTQ Rights – Reviewing the Bostock Decision](#)

[Prison Law 2020](#)

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