

CRUEL AND UNUSUAL PUNISHMENT

Stopping the Dangerous Policies Putting Men in Women's Prisons

TOP TAKEAWAYS

Legal and Constitutional Challenges

Legal Challenges to Gain Access to Women's Prisons

- Prisoners have no constitutional right to be housed in an institution of their choice, and prisons have historically housed inmates according to their sex.
- Nevertheless, some inmates challenge the “default” placement into sex-based prisons as a violation of Equal Protection, that is, they claim they are being discriminated against on the basis of sex.
- Prisoners have also challenged their sex-assigned housing as conflicting with the Eighth Amendment’s prohibition against cruel and unusual punishment. They argue that transition is medically necessary to treat gender dysphoria and transition requires the ability to live as a woman, in a women’s prison.

Constitutional and Other Legal Concerns

- Placing men in women’s prisons isn’t just bad policy; it potentially violates women’s federal and constitutional rights.
- The Eighth Amendment guarantees all Americans protection against cruel and unusual punishment, meaning that prison officials violate the Constitution when they “know[] of and disregard[] an excessive risk to inmate health or safety.”
- Placing trans-identifying males, especially those with fully intact male genitalia or a history of violent sex crimes, in close quarters with female inmates risks a serious deprivation of the female’s rights. Women have started to assert Eighth Amendment claims to oppose victimization by male prisoners.
- The Fourth Amendment protects against “unreasonable searches” and applies to the invasion of bodily privacy in prisons and jails. This privacy interest is significantly heightened when persons of the opposite sex are present. This line of cases gives women some rights against government-imposed voyeurism by males.
- Female inmates, particularly sexual assault survivors, have expressed mental anguish from having to share intimate spaces with males. This may give rise to an intentional infliction of emotional distress claim.
- The government “may not compel affirmance of a belief with which the speaker disagrees.” If the males must be called by their preferred pronouns (called women), this type of compelled speech takes away expression from women seeking to protest their reality, giving rise to Free Speech claims.
- Some female prisoners are practitioners of religious faiths that forbid them to be in close quarters or states of undress with the opposite sex. This may give rise to religious liberty arguments.
- The favorable treatment of trans-identifying males in female prisons does create an unequal system, giving rise to Equal Protection Clause violations.
- Title IX of the Civil Rights Act of 1972 prohibits sex discrimination in “any education program or activity receiving Federal financial assistance.” That means Title IX reaches beyond schools and covers educational programming in other federally funded institutions, including prisons.

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