

# ELIMINATING AMBIGUITY AND CONFLICT: PROTECTING TRANSGENDER INMATES FROM SEXUAL VIOLENCE IN FEDERAL PRISONS

CATHERINE PERRONE\*

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## INTRODUCTION

Dee Farmer always felt different.<sup>1</sup> Born Douglas Coleman Farmer, she

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\* J.D. Candidate, American University Washington College of Law (2020); B.A., History & Political Science, Tulane University (2016). I would like to thank my family and friends for their unwavering encouragement and support, specifically my Uncle Bruno who taught me that a person's character is not solely defined by a criminal record. Additionally, I would like to thank the staff of the *Administrative Law Review* and everyone else who helped in preparing my Comment for publication. A final thanks to the late Dee Farmer and Dr. Angela Yvonne Davis; their tenacity and drive in the face of adversity and their fight against systems of power and oppression are constant sources of inspiration.

1. See Alison Flowers, *Dee Farmer Won a Landmark Supreme Court Case on Inmate Rights. But That's Not the Half of It*, THE VILLAGE VOICE (Jan. 29, 2014), <https://www.villagevoice.com/2014/01/29/dee-farmer-won-a-landmark-supreme-court-case-on-inmate-rights-but-thats->

did not have the easiest childhood.<sup>2</sup> Other children ridiculed her, as did adults: “I don’t want that little faggot in my car,” one uncle remarked, refusing to drive her.<sup>3</sup> Dee always identified as female, and her transgender status was what made her “different.”<sup>4</sup> Then, in 1986, Dee was sentenced to twenty years in federal prison for credit card fraud.<sup>5</sup> Although identifying as a female, Dee was housed at FCI-Oxford, an all-male facility, in Wisconsin.<sup>6</sup> Dee was not like the other inmates:<sup>7</sup> she had silicone breast implants;<sup>8</sup> she wore makeup;<sup>9</sup> her prison uniform hung off one shoulder;<sup>10</sup> and she took estrogen pills that smoothed her skin.<sup>11</sup> She had even lived through the trauma of a failed black-market operation to remove her testicles.<sup>12</sup> Ultimately, she was a woman living in an all-male facility.

By 1989, the Federal Bureau of Prisons (BOP) transferred Dee, a woman convicted of a nonviolent crime, to USP-Terre Haute in Indiana, a maximum security prison with a violent male population.<sup>13</sup> On April 1, 1989, Dee’s life changed forever.<sup>14</sup> Another inmate approached her and demanded that she have sex with him.<sup>15</sup> Dee refused.<sup>16</sup> When Dee refused, the inmate punched and kicked her repeatedly.<sup>17</sup> The inmate drew a knife hidden in his sneaker.<sup>18</sup> He then ripped off Dee’s clothes, held her down on the bed, and raped her.<sup>19</sup> In 1991, Dee sued the prison.<sup>20</sup> As a result, *Farmer v. Brennan*<sup>21</sup> became a landmark Supreme Court decision creating protections for transgender inmates in federal prisons.<sup>22</sup> But how far do those protections

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not-the-half-of-it/.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*; Brief for Petitioner at 3–4, *Farmer v. Brennan*, 511 U.S. 825 (1994) (No. 92-7247).

7. Flowers, *supra* note 1.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *See* Brief for Petitioner, *supra* note 6, at 3–4 (explaining that Dee was transferred mainly because she stole a credit card and ordered a fruit basket to the prison).

14. *Id.*; Flowers, *supra* note 1.

15. *See* Brief for Petitioner, *supra* note 6, at 3–4.

16. *Id.*; Flowers, *supra* note 1.

17. *See* Brief for Petitioner, *supra* note 6, at 3–4.

18. *Id.*

19. *Id.*; Flowers, *supra* note 1.

20. Flowers, *supra* note 1.

21. 511 U.S. 825 (1994).

22. *Id.*; Chase Strangio, *Dee’s Triumph: One of the Most Important Trans Victories You Never Heard Of*, ACLU (June 6, 2014, 2:43 PM), <https://www.aclu.org/blog/smart-justice/mass->

really go?

Notwithstanding gender and sexuality, prison is a horrific and traumatizing place<sup>23</sup> that does not serve its purpose of rehabilitation.<sup>24</sup> For transgender inmates like Dee Farmer, prison means an increased threat of sexual violence.<sup>25</sup> Transgender inmates are more likely than cisgender<sup>26</sup> inmates to be sexually victimized by fellow inmates and facility staff.<sup>27</sup> While only four percent of all inmates in prison experience sexual violence, just under forty percent (39.9%) of transgender inmates reported experiencing sexual violence in prison.<sup>28</sup>

In the final days of the Obama Administration, in an effort to provide more protections to transgender inmates, the BOP introduced the Transgender Offender Manual (Obama Manual).<sup>29</sup> Most importantly, this manual required transgender inmates in federal prisons to be housed based

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incarceration/dees-triumph-one-most-important-trans-victories-you-never.

23. See Mira Ptacin, *Guards vs. Inmates: Mistreatment and Abuse in the US Prison System*, VICE, <https://partners.vice.com/starz/starzpowers4/news/guards-vs-inmates-mistreatment-and-abuse-in-the-us-prison-system/> (last visited Jan. 23, 2019).

24. See MARIEL ALPER ET AL., OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NCJ 250975, 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005–2014) 1–3 (2018) (explaining that sixty-eight percent of prisoners are arrested for a crime within three years of release, seventy-nine percent within six years, and eighty-three percent within nine years); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 9–10 (Greg Ruggiero ed., 2003) (arguing for abolition because prisons are obsolete and fail to reduce crime rates).

25. See German Lopez, *Prison Is Horrifying. For Transgender People, It's Hell.*, VOX (Apr. 11, 2016, 8:30 AM), <https://www.vox.com/2016/4/11/11355702/prison-transgender>; see also Julia C. Oparah, *Feminism and the (Trans)gender Entrapment of Gender Nonconforming Prisoners*, 18 UCLA WOMEN'S L.J. 239, 263 (2012); Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 556 (2009) (explaining that the only real way to end physical and sexual violence against transgender people in detention is to end detention itself).

26. See *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCHOLOGIST 832, 861–62 (2015) (defining “cisgender” as a person whose gender identity and expression align with the sex they were assigned at birth).

27. See S.E. JAMES ET AL., *The Report of the 2015 U.S. Transgender*, NAT'L CTR. FOR TRANSGENDER EQUALITY 191–92 (2015), <https://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf> (reporting that transgender participants in the survey were more than five times more likely to be sexually assaulted by facility staff than cisgender inmates).

28. Compare ALLEN J. BECK ET AL., OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NCJ 241399, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12 8 (2014) [hereinafter SEXUAL VICTIMIZATION REPORTS] (reporting the sexual victimization statistics for all state and federal prison inmates), with *id.* at 2 (reporting the sexual victimization statistics for transgender state and federal prison inmates).

29. See generally FED. BUREAU OF PRISONS, DEP'T OF JUSTICE, NO. 5200.4, TRANSGENDER OFFENDER MANUAL (2017) [hereinafter OBAMA MANUAL].

on gender identity.<sup>30</sup> In May 2018, a little over a year after President Trump came into office, the BOP amended the Obama Manual and announced that transgender inmates in federal prison would be housed based on biological sex rather than gender identity.<sup>31</sup> While neither the Obama nor the Trump Manual defines “biological sex,” both manuals define “transgender” and “cisgender” in terms of the phrase “biological sex.”<sup>32</sup> As it stands, the phrase “biological sex” is ambiguous without further clarity.<sup>33</sup> With the BOP expecting the transgender-inmate population to grow,<sup>34</sup> an ambiguous policy without clear definitions could make it difficult for there to be consistency in housing transgender inmates, potentially leading to an increased threat of sexual violence.<sup>35</sup>

The BOP must address this ambiguity to protect the health and safety of transgender inmates, especially given the increased rate of sexual violence against transgender inmates.<sup>36</sup> To do so, the BOP, acting under the Department of Justice (DOJ), should engage in notice-and-comment rulemaking and propose a rule that clarifies the aforementioned ambiguities.<sup>37</sup> The rule should define sex in a way that allows gender identity to inform an inmate’s housing designation so as to avoid the increased threat of sexual violence.

Part I of this Comment describes the sexual violence transgender federal inmates experience and assesses two related attempts to curb sexual violence in prisons: the Prison Rape Elimination Act (PREA)<sup>38</sup> and the BOP’s

30. *See id.* at 5–6.

31. *See* FED. BUREAU OF PRISONS, DEP’T OF JUSTICE, NO. 5200.04 CN-1, TRANSGENER OFFENDER MANUAL 6–8 (2018) [hereinafter TRUMP MANUAL]; Dominic Holden, *The Trump Administration Just Rolled Back Rules that Protect Transgender Prisoners*, BUZZFEED NEWS (May 11, 2018, 8:13 PM), [https://www.buzzfeed.com/dominicholden/trump-transgender-prisons-protections?utm\\_term=.nuabgYgN83#.krOzxexLvZ](https://www.buzzfeed.com/dominicholden/trump-transgender-prisons-protections?utm_term=.nuabgYgN83#.krOzxexLvZ).

32. *See* OBAMA MANUAL, *supra* note 29, at 2 (using “transgender” to characterize an individual whose gender identity does not match one’s biological sex and “cisgender” to characterize an individual whose gender identity matches one’s biological sex).

33. *See Gender and Gender Identity*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/sexual-orientation-gender/gender-gender-identity> (last visited Jan. 23, 2019) (“Having only two options (biological male or biological female) might not describe what’s going on inside a person’s body.”).

34. *See* U.S. DEP’T OF JUSTICE, FY 2019 PERFORMANCE BUDGET CONGRESSIONAL SUBMISSION 22 (2018) (failing to explain the expected population growth).

35. *See, e.g.,* Flowers, *supra* note 1.

36. *See* SEXUAL VICTIMIZATION REPORTS, *supra* note 28, at 8–9.

37. *See* Administrative Procedure Act, 5 U.S.C. §§ 551–559, 561–570a, 701–706 (2012). Under the Administrative Procedure Act (APA), 5 U.S.C. § 553, notice-and-comment rulemaking requires federal agencies to provide public notice of a proposed rule followed by an opportunity for public comment before the agency can adopt the rule. *See* Roni A. Elias, *The Legislative History of the Administrative Procedure Act*, 28 FORDHAM ENVTL. L. REV. 207, 207–09 (2016).

38. Prison Rape Elimination Act (PREA), 34 U.S.C. § 303 (2012 & Supp. IV 2017).

Sexually Abusive Behavior Prevention and Intervention Program of 2015 (BOP Sexual Abuse Prevention Program).<sup>39</sup> Part II discusses the ambiguous changes from the Obama Manual to the Trump Manual, and argues that these changes will likely cause transgender federal inmates to experience higher rates of sexual violence. Finally, Part III offers an administrative recommendation to address the problem of an increased threat of sexual violence arguing that (1) the BOP propose a rule defining biological sex, (2) the BOP propose a rule addressing the Transgender Executive Council (TEC), and (3) the BOP ensure that both proposed rules go through the notice-and-comment rulemaking process described in the Administrative Procedure Act (APA).

### I. SEXUAL VIOLENCE IN FEDERAL PRISONS AND ATTEMPTS AT LEGISLATIVE AND ADMINISTRATIVE SOLUTIONS

A phrase as seemingly specific as “sexual violence” can be ambiguous.<sup>40</sup> While there have been several attempts to curb sexual violence in prison,<sup>41</sup> neither PREA nor the BOP Sexual Abuse Prevention Program actually define “sexual violence,”<sup>42</sup> which ultimately gives rise to that ambiguity. Instead of defining sexual violence outright, both PREA and the BOP Sexual Abuse Prevention Program describe prohibited sexual conduct.<sup>43</sup> For example, sexual conduct between inmates is prohibited, and, if reported, sexual

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39. See FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, NO. 5324.12, SEXUALLY ABUSIVE BEHAVIOR PREVENTION AND INTERVENTION PROGRAM 12 (2015) [hereinafter BOP SEXUAL ABUSE PREVENTION PROGRAM].

40. See Gabriel Arkles, *Regulating Prison Sexual Violence*, 7 NE. U. L.J. 66, 78–79 (2015). A term is ambiguous when its use creates a “semantic dichotomy,” giving rise to different but equally possible understandings. See *Ambiguity*, BLACK’S LAW DICTIONARY (10th ed. 2014); see also Sanford Schane, *Ambiguity and Misunderstanding in the Law*, 25 T. JEFFERSON L. REV. 167 (2002) (providing multiple definitions of the word “ambiguity” regarding lexical and syntactic ambiguity rather than statutory ambiguity).

41. See, e.g., PREA, 34 U.S.C. § 30307; see also *Farmer v. Brennan*, 511 U.S. 825, 833–35 (1994) (holding that a prison staffer’s intentional failure to protect transgender inmates from sexual abuse and other violence constitutes cruel and unusual punishment under the Eighth Amendment). Under *Farmer*, there is a two-prong test to determine whether a prison official violates the Eighth Amendment. 511 U.S. at 833–35. First, the alleged deprivation of the right must be both objectively and sufficiently serious. *Id.* Second, the prison official must have known of and willingly disregarded the substantial risk to the inmates’ health and safety. *Id.* at 837–38.

42. See PREA, 34 U.S.C. § 30309; Prison Rape Elimination Act National Standards (PREA National Standards), 28 C.F.R. § 115.6 (2014); BOP SEXUAL ABUSE PREVENTION PROGRAM, *supra* note 39, at 12.

43. See PREA, 34 U.S.C. §§ 30301, 30309; PREA National Standards, 28 C.F.R. § 115.6; BOP SEXUAL ABUSE PREVENTION PROGRAM, *supra* note 39, at 12.

conduct can be considered sexual victimization.<sup>44</sup> Further, any sexual act between an inmate and a staff member, whether consensual or not, constitutes sexual abuse.<sup>45</sup> Any digital penetration of any genital opening, and any penetration by an object or other instrument, “unrelated to official duties,” is also considered sexual abuse.<sup>46</sup>

PREA was the federal government’s first attempt to curb sexual violence and sexual abuse of inmates in all correctional facilities.<sup>47</sup> All correctional facilities—local county jails, maximum security federal prisons, juvenile facilities, Immigration and Customs Enforcement (ICE) detention facilities, and military and Indian county facilities—must comply with PREA.<sup>48</sup> Under PREA, it is unlawful for an agency to assign a transgender inmate to a facility based solely on genital characteristics.<sup>49</sup> In 2012, the DOJ adopted standards with special protections for transgender inmates. In the final days of the Obama Administration, the BOP released the Obama Manual, which complied with PREA by housing transgender inmates based on gender identity.<sup>50</sup>

The BOP also crafted its own sexual abuse prevention policy.<sup>51</sup> The BOP

44. See PREA National Standards, 28 C.F.R. § 115.6.

45. See *id.*

46. See *id.* (emphasis added). *But cf.* Arkles, *supra* note 40, at 79, 85 (arguing that searches, an “official duty” of prison guards, while mostly lawful, are a form of sexual violence); Cathy Pereira, *Strip Searching as Sexual Assault*, 27 *HECATE* 187, 188 (2001) (discussing Australian female inmates’ accounts of strip searches and emphasizing how the inherent power dynamic between prisoners and guards conducting strip searches degrades female inmates). The BOP defines “official duties” in its BOP Sexual Abuse Prevention Program as including any assigned duty to maintain the safety of the prison. See BOP SEXUAL ABUSE PREVENTION PROGRAM, *supra* note 39 (noting that this list is not exhaustive and there may be other official duties outside the scope of this definition).

47. See PREA, 34 U.S.C. § 30307; Robert W. Dumond, *The Impact of Prisoner Sexual Violence: Challenges of Implementing Public Law 108-79 the Prison Rape Elimination Act of 2003*, 32 *J. OF LEGIS.* 142–43 (2006) (emphasizing that until PREA, the sexual abuse of prisoners in the United States was largely ignored).

48. See PREA, 34 U.S.C. § 30307(b); *Prison Rape Elimination Act (Sexual Victimization in Correctional Facilities)*, BUREAU OF JUSTICE STAT., <https://www.bjs.gov/index.cfm?ty=tp&tid=20#summary> (last visited Jan. 23, 2019).

49. See PREA, 34 U.S.C. § 30307(b); PREA National Standards, 28 C.F.R. § 115.42(c); Letter from ACLU of Colo. et al., to Hugh J. Hurwitz, Acting Dir., Fed. Bureau of Prisons (June 19, 2018), <https://www.aclu.org/letter/2018-06-19-letter-bop-re-changes-transgender-offender-manual-final>; *Does a Policy that Houses Transgender or Intersex Inmates Based Exclusively on External Genital Anatomy Violate Standard 115.42(c) & (e)?*, NAT’L PREA RESOURCE CTR. (Mar. 24, 2016), <https://www.prearesourcecenter.org/node/3927>.

50. See OBAMA MANUAL, *supra* note 29, at 1.

51. See FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, NO. 5324.11, SEXUALLY ABUSIVE BEHAVIOR PREVENTION AND INTERVENTION PROGRAM 1 (2014). The purpose of the BOP Sexual Abuse Prevention Program is to provide and implement a zero-tolerance

Sexual Abuse Prevention Program provides guidelines that address sexually abusive behavior between an inmate aggressor against a staff victim, an inmate aggressor against an inmate victim, and a staff aggressor against an inmate victim, and also covers incidents involving outside contractors or volunteers.<sup>52</sup> The BOP requires each of its correctional facilities to have its own supplement to the BOP Sexual Abuse Prevention Program to reflect how each facility complies with the Program.<sup>53</sup>

PREA and the BOP Sexual Abuse Prevention Program require that all employees be trained to recognize and report sexual abuse and harassment tailored to the gender of inmates at the facility.<sup>54</sup> Correctional staff, contractors, and volunteers must be trained on how to communicate effectively with transgender and gender non-conforming inmates.<sup>55</sup> Transgender inmates cannot be searched<sup>56</sup> or physically examined<sup>57</sup> for the sole purpose of determining “genital status;”<sup>58</sup> instead, staff determines an inmate’s genital status through conversations with the inmate, reviewing medical records, or medical examinations.<sup>59</sup> The BOP Sexual Abuse Prevention Program prohibits correctional staff from disciplining inmates for refusing to disclose information regarding gender or sexuality status (gender identity),<sup>60</sup> gender non-conformance,<sup>61</sup> history of sexual victimization, and an inmate’s perception of vulnerability to sexual abuse.<sup>62</sup>

Upon intake and transfer, PREA requires all correctional facilities to

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policy toward all forms of sexual activity within prisons, including sexual abuse and sexual harassment. *See generally* BOP SEXUAL ABUSE PREVENTION PROGRAM, *supra* note 39, at 1.

52. *See* BOP SEXUAL ABUSE PREVENTION PROGRAM, *supra* note 39, at 1.

53. *Id.* at 3; *see, e.g.*, FCI EL RENO, FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, INMATE ADMISSION & ORIENTATION HANDBOOK 2–3 (2017); FCC TERRE HAUTE, IND., FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, A&O HANDBOOK 2 (2017); FCI MORGANTOWN, FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, INMATE ADMISSION & ORIENTATION HANDBOOK 7, 8–9 (2016).

54. *See* BOP SEXUAL ABUSE PREVENTION PROGRAM, *supra* note 39, at 1; PREA National Standards, 28 C.F.R. § 115.34.

55. *See* BOP SEXUAL ABUSE PREVENTION PROGRAM, *supra* note 39, at 25; PREA National Standards, 28 C.F.R. § 115.34.

56. *See* TRUMP MANUAL, *supra* note 31, at 11 (explaining the pat-down procedure for transgender inmates).

57. *Id.* at 11–12 (explaining the visual inspection procedure for transgender inmates).

58. *See* BOP SEXUAL ABUSE PREVENTION PROGRAM, *supra* note 39, at 19.

59. *Id.*

60. *See Guidelines for Psychological Practice*, *supra* note 26, at 861–62 (defining “gender identity” as a person’s internal, inherent sense of their own gender).

61. *See id.* (defining “gender nonconforming” as an umbrella term that describes individuals whose gender identity or expression differ from gender norms associated with their assigned sex).

62. *See* BOP SEXUAL ABUSE PREVENTION PROGRAM, *supra* note 39, 31–32.

assess the risk of an inmate as a target or as an aggressor of sexual abuse.<sup>63</sup> The BOP intake screening considers, at minimum, ten criteria:

(1) Whether the inmate has a mental, physical, or developmental disability; (2) The age of the inmate; (3) The physical build of the inmate; (4) Whether the inmate has previously been incarcerated; (5) Whether the inmate’s criminal history is exclusively nonviolent; (6) Whether the inmate has prior convictions for sex offenses against an adult or child; (7) Whether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender non-conforming; (8) Whether the inmate has previously experienced sexual victimization; (9) The inmate’s own perception of vulnerability; and (10) Whether the inmate is detained solely for civil immigration purposes.<sup>64</sup>

When an inmate meets any combination of these factors, the facility deems the inmate “at risk” and the institution must adequately address that risk.<sup>65</sup> Together, both PREA and the BOP Sexual Abuse Prevention Program provide transgender inmates with protections against sexual violence in prison.

## II. ADDRESSING AMBIGUITIES IN THE BOP’S TRANSGENDER OFFENDER MANUAL

### A. *Understanding the Basis for Change in the Trump Manual*

The Trump Administration changed the Transgender Offender Manual in response to a lawsuit against the federal government.<sup>66</sup> In late 2016, three prisoners at Federal Medical Center Carswell in Fort Worth, Texas, moved to intervene in an ongoing lawsuit against the federal government regarding transgender students using gendered bathrooms in schools.<sup>67</sup> The three cisgender women—Jeanette Driever, Charlsa Little, and Rhonda Flemming—alleged that “[m]en [sic], with penis’ [sic]” were sharing cells, bathrooms, and showers with them.<sup>68</sup> Their motion was grounded in fear of physical violence and fear of rape, and alleged that housing transgender women in a women’s facility infringes on their right to privacy, is discriminatory, and is both physically and emotionally dangerous.<sup>69</sup> Finally, in permitting transgender women to be housed in women’s prisons, the intervening women

63. *Id.* at 29.

64. *Id.* at 31.

65. *Id.* at 32 (noting that inmates are not disciplined for refusing to answer or disclose (1), (7), (8), or (9)).

66. See Julie Moreau, *Bureau of Prisons Rolls Back Obama-Era Transgender Inmate Protections*, NBC NEWS (May 14, 2018, 2:19 PM), <https://www.nbcnews.com/feature/nbc-out/bureau-prisons-rolls-back-obama-era-transgender-inmate-protections-n873966>.

67. See Motion to Intervene at 1, *Texas v. United States*, No. 7:16-cv-00054-O (N.D. Tex. 2016).

68. *Id.* at 2 (misgendering the transgender inmates as men instead of women).

69. *Id.* at 2–3.



argued that the DOJ violated the APA for failing to follow notice-and-comment rulemaking procedures.<sup>70</sup>

These are, to a certain extent, valid and understandable fears. Most women in prison, regardless of gender or sexuality, have been victims of physical or sexual violence at one point in their lives.<sup>71</sup> However, there is no data that suggests that transgender women are a substantial threat to cisgender women in prisons.<sup>72</sup> While Driever, Little, and Flemming's motion alleged that some transgender women have said some crude things to them,<sup>73</sup> that does not mean that every transgender inmate is a threat. Further, transgender individuals experience sexual violence more often than women as a whole.<sup>74</sup> This is not to say, of course, that there is no intersection between the two groups. Logically, and within the framework of the BOP, violence against women means violence against transgender people, and violence against transgender people means violence against women.<sup>75</sup> To talk

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70. *Id.* at 2.

71. See Karen L. Cox, *Most Women in Prison Are Victims of Domestic Violence. That's Nothing New*, TIME (Oct. 2, 2017), <http://time.com/4960309/domestic-violence-women-prison-history/>.

72. See Marcie Bianco, *Statistics Show Exactly How Many Times Trans People Have Attacked You in Bathrooms*, MIC (Apr. 2, 2015), <https://mic.com/articles/114066/statistics-show-exactly-how-many-times-trans-people-have-attacked-you-in-bathrooms#.wKFVutPIJ> (asserting that there are zero reported cases of transgender persons attacking cisgender persons).

73. See Motion to Intervene, *supra* note 67, at 3. In their motion, the cisgender female prisoners alleged that a fellow female transgender inmate threatened to rape the cisgender inmates. *Id.* Another intervener alleged that a transgender inmate threatened to “choke . . . b---hes” with his penis.” *Id.* The motion also alleged that another transgender inmate did not want a roommate and threatened to rape any cisgender female inmates if she was placed in a cell with a roommate. *Id.*

74. Compare *Responding to Transgender Victims of Sexual Assault*, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T. OF JUSTICE (2014), <https://www.ovc.gov/pubs/forge/printerFriendlyPDF/complete-doc.pdf> (reporting that fifty percent of transgender individuals have experienced sexual assault at one point in their life), with U.N. DEP'T OF ECON. & SOC. AFFAIRS, STATISTICS DIV., THE WORLD'S WOMEN 2015, at 144–45, U.N. Doc. ST/ESA/STAT.SER.K/20, U.N. Sales No.E.15.XVII.8 (1993) (reporting that just over nineteen percent of women as a whole experience sexual violence).

75. This sentence reads “violence against transgender people” instead of “violence against transgender women” because limiting this assertion to just transgender women is not logically valid under the circumstances. See *Inmate Gender*, FED. BUREAU OF PRISONS, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_gender.jsp](https://www.bop.gov/about/statistics/statistics_inmate_gender.jsp) (last visited Jan. 23, 2019) (classifying inmates as either male or female in its gender evaluation of federal inmates). Because the federal prison system only classifies inmates as male or female, and because facilities are only housing men and women, a transgender person who may not identify within the gender binary is forcibly classified as male or female. Further, this classification, by itself, increases the rate of violence against transgender inmates. See Marie-Amelie George, *The LGBT Disconnect: Politics and Perils of Legal Movement Formation*, 2018 WIS. L. REV. 503, 583–85 (2018) (explaining that environments that reinforce the gender binary are dangerous to those

about the two groups like they are completely separate dangerously ignores their intersection and is indicative of transphobic biases.<sup>76</sup> As such, the Trump Manual, based in fear of transgender violence against cisgender inmates, is also indicative of transphobic biases.<sup>77</sup>

### B. *The Transgender Executive Council*

The Transgender Executive Council (TEC) existed before the Obama Manual,<sup>78</sup> but with the creation of the Obama Manual, its role became more ambiguous and confusing. The TEC is composed of BOP management personnel tasked with mitigating executive but non-clinical issues, and providing oversight to the BOP Transgender Clinical Care Team (TCCT).<sup>79</sup> The TEC is responsible for an inmate's initial screening and for ultimately determining how to house a transgender inmate.<sup>80</sup> The TCCT, a multidisciplinary group of BOP personnel with expert knowledge, is charged with assisting facility staff and developing clinical treatment recommendations for the transgender population in federal prisons.<sup>81</sup>

While the TEC is not supposed to make clinical decisions,<sup>82</sup> the Obama Manual's description of the TEC's role allowed for the reasonable inference that the TEC could make some clinical decisions.<sup>83</sup> The Trump Manual does not change the TEC itself.<sup>84</sup> The TEC is supposed to be made up of

who do not identify as either male or female); JAMES ET AL., *supra* note 27, at 90 (highlighting that thirty-two percent of transgender individuals whose IDs had a gender that did not reflect how they identified had a greater risk for harassment and violence).

76. See, e.g., *What's Transphobia?*, PLANNED PARENTHOOD (Sep. 29, 2018), <https://www.plannedparenthood.org/learn/sexual-orientation-gender/trans-and-gender-nonconforming-identities/whats-transphobia>.

77. See Moreau, *supra* note 66, at 2.

78. See generally OBAMA MANUAL, *supra* note 29; FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, MEDICAL MANAGEMENT OF TRANSGENDER INMATES: CLINICAL GUIDANCE 1 (2016) [HEREINAFTER BOP CLINICAL GUIDANCE] (referencing the Transgender Executive Council (TEC) before the Obama Manual was published).

79. See BOP CLINICAL GUIDANCE, *supra* note 78, at 1.

80. *Id.* at 6–8.

81. See *id.*; TRUMP MANUAL, *supra* note 31, at 3, 9 (“The [Transgender Clinical Care Team (TCCT)] will offer advice and guidance to health services staff on the medical treatment of transgender inmates . . .”). Unlike the TEC, physicians, psychiatrists, and pharmacists make up the TCCT, and thus are qualified to make clinical decisions.

82. See BOP CLINICAL GUIDANCE, *supra* note 78, at 1. “Clinical” relates to medical observations and treatments of patients. See *Clinical*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/clinical> (last visited Jan. 23, 2019).

83. See OBAMA MANUAL, *supra* note 29, at 6.

84. See *id.* at 4. Members of BOP staff from the Health Services Division, the Women and Special Populations Branch, Psychology Services, the Correctional Programs Division, the Designation and Sentence Computation Center (DSCC), and the Office of General

upper-management officials otherwise not in charge of making clinical decisions.<sup>85</sup> Still, both the Obama and Trump Manuals permit the TEC to give advice and guidance on matters regarding transgender inmates’ “*treatment and management needs . . .*”<sup>86</sup> Neither the Obama nor Trump Manual explicitly defines these terms, but “treatment needs” suggests a clinical evaluation.<sup>87</sup> As such, for the TEC to be properly acting within its authority, a transgender inmate’s treatment and management needs must only be related to non-clinical treatment and management needs.<sup>88</sup> However, there is no public record as to what guidance the TEC provides other than what is explicitly stated in either manual, and neither manual says that its guidelines are exclusive.<sup>89</sup>

Further, there is no public record of who exactly serves on the TEC.<sup>90</sup> Ideally, a transgender person should be on the TEC to offer the appropriate perspective when deciding to house an inmate that identifies as transgender. The TCCT requires that its members have experience with transgender people, but the TEC does not.<sup>91</sup> To the same effect, the TEC actually provides oversight to the TCCT,<sup>92</sup> yet there is no indication that any member of the TEC must have experience with or knowledge about transgender people.<sup>93</sup> Therefore, the TEC is an ambiguous entity that exercises control over the transgender federal prison population.

Section five of the Obama Manual, “Initial Designations,” allowed the TEC to house transgender inmates by gender identity.<sup>94</sup> The Trump Manual now requires that the TEC initially house transgender inmates based on biological sex.<sup>95</sup> Only rarely would gender identity be an appropriate

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Counsel all make up the TEC. *Id.*

85. See BOP CLINICAL GUIDANCE, *supra* note 78, at 1.

86. TRUMP MANUAL, *supra* note 31, at 4; OBAMA MANUAL, *supra* note 29, at 4 (emphasis added).

87. See TRUMP MANUAL, *supra* note 31, at 4. Permitting the TEC to offer guidance on an inmate’s “treatment needs” suggests a clinical decision because, unless specified by a doctor, a member of the TEC would not reasonably know how their decisions would impact a transgender person’s health or medical treatment. Additionally, the Trump Manual expanded the TEC to determine housing designation by determining whether an inmate has demonstrated “significant progress towards transition.” *Id.* at 7–8. This also suggests a clinical decision because the TEC is essentially permitted to determine whether someone is male or female enough to be housed with men or women.

88. See BOP CLINICAL GUIDANCE, *supra* note 78, at 1.

89. See *id.*; OBAMA MANUAL, *supra* note 29.

90. There is no information either on the BOP’s website or the DOJ’s website about the individuals who serve on the TEC other than the main departments that make up the TEC. See generally FED. BUREAU OF PRISONS, [www.bop.gov](http://www.bop.gov) (last visited Jan. 6, 2019).

91. See BOP CLINICAL GUIDANCE, *supra* note 78, at 1–3.

92. See *id.*; TRUMP MANUAL, *supra* note 31, at 6.

93. See generally BOP CLINICAL GUIDANCE, *supra* note 78.

94. See OBAMA MANUAL, *supra* note 29, at 6.

95. See TRUMP MANUAL, *supra* note 31, at 6.

consideration for initial housing designation, specifically where the inmate demonstrated “significant progress towards transition” through medical and mental health history.<sup>96</sup> Finally, the BOP requires that if the TEC reviewed an inmate for designation, this review must be noted in the SENTRY designation notes for that inmate.<sup>97</sup>

Permitting upper-level management to offer treatment guidance and allowing the TEC to determine if an inmate has transitioned enough into male or female is inherently clinical and, thus, in conflict with existing BOP policy.<sup>98</sup>

### III. NOTICE-AND-COMMENT RULEMAKING

In November 2017, former Attorney General Jeff Sessions issued a memorandum stating that the DOJ would no longer issue guidance documents that create rights or obligations binding individuals outside the Executive Branch.<sup>99</sup> On May 11, 2018, the BOP released the Trump Manual, a program statement that serves as an internal agency guideline.<sup>100</sup> The Trump Manual does exactly what former Attorney General Sessions advised against:<sup>101</sup> it is a document with an intended future effect that sidestepped the notice-and-comment rulemaking process under the APA.<sup>102</sup> This Comment argues that the BOP should go through notice-and-comment rulemaking and propose two rules: one defining “sex” and another clarifying the TEC’s purpose and duties.

Under the APA, notice-and-comment rulemaking<sup>103</sup> requires federal

96. *Id.*

97. *Id.*; FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, PRIVACY IMPACT ASSESSMENT FOR THE SENTRY INMATE MANAGEMENT SYSTEM 2 (2012) (explaining that SENTRY is an information system that processes sensitive, yet unclassified inmate information).

98. *See* BOP CLINICAL GUIDANCE, *supra* note 78, at 1 (restricting the TEC to non-clinical decisions).

99. *See* OFFICE OF THE ATT’Y GEN., DEP’T. OF JUSTICE, PROHIBITION ON IMPROPER GUIDANCE DOCUMENTS MEMORANDUM 1–2 (2017) [hereinafter PROHIBITION ON IMPROPER GUIDANCE MEMO].

100. *See* Holden, *supra* note 31.

101. *See* PROHIBITION ON IMPROPER GUIDANCE MEMO, *supra* note 99, at 1–2 (acknowledging that there is some value in guidance documents, such as to “provide non-binding advice on technical issues through examples or practices”; banning guidance documents that are “instruments of future effect” which create rights or obligations on persons or entities not within the Executive Branch).

102. *Id.*; TRUMP MANUAL, *supra* note 31, at 6. *See generally* 5 U.S.C. § 553 (2012). *See also* Elias, *supra* note 37, at 214–15 (discussing the forward-looking nature of rulemaking).

103. The purpose of notice-and-comment rulemaking is to protect the rights of individual citizens against the abuse of power by appointed, unelected officials. *See* Elias, *supra* note 37, at 207–08, 224.

agencies to provide notice of a proposed rule, a comment period, and if a final rule is issued, an explanation incorporating the comments received.<sup>104</sup> The comment period requires agencies to allow the public an opportunity to participate in the rulemaking process through the submission of data, personal views, or arguments, with or without opportunity for oral presentation.<sup>105</sup> In most rulemaking proceedings, agencies rarely receive comments from individuals and organizations; however, when there is mass public support for reform or to maintain the status quo, hundreds of thousands of comments are submitted.<sup>106</sup> Still, most proceedings typically result in less than thirty-five comments per proposed rule.<sup>107</sup> After an agency's comment period closes, the agency will publish its final rule, giving interested persons the right to petition for an amendment or an appeal of the new rule.<sup>108</sup>

#### A. Rule Defining Biological Sex

Reversing changes to the Trump Manual would provide the most protections to transgender inmates, lower the risk of sexual assault, and eliminate the newly added ambiguities.<sup>109</sup> Regardless, a proposed rule that clearly defines the way in which the BOP determines an inmate's biological sex for housing designation would offer a more stable and clear-cut solution, as there would be a potential for a publicly approved definition.<sup>110</sup> Having the public weigh-in would provide the transparency and the opportunity for

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104. See 5 U.S.C. § 553.

105. See *id.* § 553(c).

106. *Id.*; see, e.g., Brian Fung, *FCC Net Neutrality Process 'Corrupted' by Fake Comments and Vanishing Consumer Complaints, Officials Say*, WASH. POST (Nov. 24, 2017), [https://www.washingtonpost.com/news/the-switch/wp/2017/11/24/fcc-net-neutrality-process-corrupted-by-fake-comments-and-vanishing-consumer-complaints-officials-say/?utm\\_term=.d8d2d1fc4629](https://www.washingtonpost.com/news/the-switch/wp/2017/11/24/fcc-net-neutrality-process-corrupted-by-fake-comments-and-vanishing-consumer-complaints-officials-say/?utm_term=.d8d2d1fc4629) (highlighting the mass influx of public comments on the Net Neutrality debate and showing that some people submit fake comments on certain issues).

107. See Stephen M. Johnson, *Beyond the Usual Suspects: ACUS, Rulemaking 2.0, and a Vision For Broader, More Informed, And More Transparent Rulemaking*, 65 ADMIN. L. REV. 77, 82 (2013).

108. See 5 U.S.C. § 553(e).

109. See OBAMA MANUAL, *supra* note 29, at 6 (requiring the TEC to house transgender inmates by gender identity when appropriate to do so). *But cf.* Arkles, *supra* note 25, at 556 (explaining that abolishing detention, and therefore prison itself, would be the only way to provide transgender inmates with sufficient protection against sexual violence in prisons).

110. *But cf.* Erica L. Green et al., *'Transgender' Could Be Defined Out of Existence Under Trump Administration*, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html?smid=fb-nytimes&smtype=cur> (explaining that the Department of Health and Human Services is considering defining biological sex narrowly, "as either male or female, unchangeable, and determined by the genitals that a person is born with"). Adopting this definition of sex would apply to all administrative agencies, including the BOP. This definition would be more harmful to transgender inmates than the Trump Manual.

organizations that fight for transgender protections to participate and provide guidance in a public forum.<sup>111</sup>

First, this Comment suggests that the proposed rule must define the way in which the BOP determines an inmate’s “biological sex” for housing designations. The BOP should not define “biological sex” using only internal and external biological sex characteristics, which is the way it does now in one of its guidance memos,<sup>112</sup> but also allow gender identity<sup>113</sup> and hormone composition,<sup>114</sup> without reducing gender to the traditional binary, to inform the determination of an inmate’s biological sex for housing. Although it may be easy to minimize sex into two categories, male and female, based on internal and external biological sex characteristics, intersex people—those individuals whose biological sex characteristics do not conform to either male or female<sup>115</sup>—exist. Accordingly, their existence alone highlights that biology recognizes more than just the male and female sexes.

Further, biologically, humans are capable of changing their sex.<sup>116</sup> Each human has a gene in their body that, once removed, changes the way that their sex cells reproduce.<sup>117</sup> Considering that humans are genetically programmed to be able to change the way that their sex cells reproduce, placing such an importance on biological sex characteristics alone falls flat—if a male can produce female sex cells, and a female can produce male sex cells, how can either individual be traditionally “male” or “female” based on the BOP’s definition of biological sex?<sup>118</sup> There are no intersex or gender nonconforming prisons.<sup>119</sup> As such, gender identity must inform the BOP’s sex determination because the BOP itself forces inmates into participating in the gender binary anyway.<sup>120</sup> The only way to truly protect transgender inmates in

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111. See *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 248, 251 (2d Cir. 1977). Allowing the public to comment on this issue would force the BOP to respond to any well-researched comments and address its rule’s potential for ambiguity.

112. BOP CLINICAL GUIDANCE, *supra* note 78, at 1.

113. For cisgender people, sex can be defined at birth or before birth (such as during an ultrasound) based on the appearance of external genitalia, an individual’s assigned sex is generally congruent with a person’s gender identity. For transgender people, gender identity differs from sex assigned at birth. See, e.g., *Guidelines for Psychological Practice*, *supra* note 26, at 5–6.

114. Hormone therapy is a significant part of many people’s transitions. See, e.g., *Glossary*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/glossary> (last visited Jan. 5, 2019) (defining “hormone therapy” as a combination of hormones or hormone-blockers commonly used to help transgender individuals develop sex characteristics more representative of their gender identity).

115. TRUMP MANUAL, *supra* note 31, at 2.

116. See *Gonads: X & Y*, Radiolab (June 30, 2018) (downloaded using Spotify).

117. *Id.*

118. See BOP CLINICAL GUIDANCE, *supra* note 78, at 1.

119. See *Inmate Gender*, *supra* note 75.

120. See *id.*

federal prison is to allow an individual's gender identity to inform the BOP's determination of sex. The BOP's definition of "sex"<sup>121</sup> is too restrictive and will likely lead to self-identified transgender inmates who are partially through their transition to be housed with individuals who may target them based on their orientation.

This more inclusive definition will allow transgender inmates who may not have made "significant progress" in their transition to be housed based on their gender identity, thereby placing transgender women with women, and transgender men with men, and potentially curbing the rate of sexual violence by inmates.<sup>122</sup>

### *B. Addressing the TEC*

Ambiguity yields differing results, which leads to unequal administration and practice.<sup>123</sup> The makeup of the TEC is vital, yet presently undisclosed.<sup>124</sup>

Considering former Attorney General Jeff Sessions's newest prohibition against forward-looking guidance documents,<sup>125</sup> this Comment suggests that the BOP propose a new rule strictly defining the TEC through notice-and-comment rulemaking. The new rule should make all information about those who serve on the TEC public. To transgender inmates, the TEC is probably one of the most important BOP bodies. The TEC controls a transgender inmate's entire sentence and, in some cases, for some inmates serving life-sentences, their entire lives. The new rule should also require that at least one medical doctor specializing in gender minority populations serve on the TEC to advise the rest of the TEC on clinical decision making.

Additionally, the proposed rule should mandate that the TEC regularly check on transgender inmates. Currently, the quarterly meetings<sup>126</sup> are too infrequent, and an inmate's medical conditions and BOP facility conditions change regularly.<sup>127</sup> As such, some TEC members, or their representatives, should be tasked with meeting transgender inmates once or twice a month to ensure that their placement is still accurate and to ensure that the facility is

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121. See BOP CLINICAL GUIDANCE, *supra* note 78, at 2.

122. See TRUMP MANUAL, *supra* note 31. See generally SEXUAL VICTIMIZATION REPORTS, *supra* note 28.

123. See Schane, *supra* note at 40, at 167.

124. There is no information anywhere as to who serves on the TEC. See generally FED. BUREAU OF PRISONS, [www.bop.gov](http://www.bop.gov) (last visited Jan. 23, 2019).

125. See PROHIBITION ON IMPROPER GUIDANCE MEMO, *supra* note 99, at 1 (advocating for the use of notice-and-comment rulemaking and arguing against internal policy documents without public notice).

126. See OBAMA MANUAL, *supra* note 29, at 4.

127. See, e.g., *Adams v. Fed. Bureau of Prisons*, 716 F. Supp. 2d 107, 109–10 (D. Mass. 2010) (highlighting how one transgender federal inmate's mental health and medical conditions frequently changed over the course of several years). See generally BOP CLINICAL GUIDANCE, *supra* note 78.

complying with PREA and the BOP Sexual Abuse Prevention Program. These additions would protect transgender inmates from sexual violence, as inmates would often be in the presence of facility staff and could inform the TEC directly of any changes in the facility, or even a change in personal conditions. Finally, the proposed rule should ensure that the facility's PREA coordinator works in conjunction with the TEC to prevent any accidental oversight and to collaborate in protecting transgender inmates from sexual violence.

Civil liberties and Lesbian, Gay, Bisexual, Transgender, Queer or Questioning, Intersex, and Asexual or Allied (LGBTQIA) organizations would offer great insight into providing the best procedures to protect transgender inmates from sexual violence, and they would provide the best understanding as to what a final rule should look like. The notice-and-comment period also permits individuals to make comments, and individuals can provide personal perspectives as to their own treatment in prison. Given that former Attorney General Jeff Sessions issued a guidance document that the DOJ should no longer "circumvent" the notice-and-comment process,<sup>128</sup> the BOP should adhere to the DOJ's recommendation.

#### CONCLUSION

PREA was passed in 2003 with overwhelming support from Congress.<sup>129</sup> It took nearly ten years for the DOJ to pass a rule outlining the national standards for the elimination of sexual violence in prisons. In that timeframe, sexual violence against transgender inmates increased dramatically.<sup>130</sup> Most notably, and perhaps most jarring, is that most violence is under-reported.<sup>131</sup> The United States has consistently housed transgender individuals in prison based on biological sex, and the rate of sexual violence continues to increase. The changes made by the Trump Administration are unsurprising,<sup>132</sup> but that does not mean the BOP must adhere to these practices. Instead, through

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128. See PROHIBITION ON IMPROPER GUIDANCE MEMO, *supra* note 99, at 2.

129. See 34 U.S.C. § 30307 (2012 & Supp. V 2017); see also *Prison Rape Elimination Act*, NAT'L PREA RESOURCE CTR., <https://www.prearesourcecenter.org/about/prison-rape-elimination-act-prea> (last visited Jan. 23, 2019).

130. See generally SEXUAL VICTIMIZATION REPORTS, *supra* note 28.

131. See RAMONA R. RANTALA, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NCJ 251146, SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2012–15 5 (2018) (highlighting how increased protections encourage inmates to report more).

132. See, e.g., Sam Levin, *White House Announces Ban on Transgender People Serving in Military*, THE GUARDIAN (Mar. 24, 2018, 8:41 AM), <https://www.theguardian.com/us-news/2018/mar/23/donald-trump-transgender-military-ban-white-house-memo>; Sandhya Somashekhar et al. *Trump Administration Rolls Back Protections for Transgender Students*, WASH. POST (Feb. 22, 2017), [https://www.washingtonpost.com/local/education/trump-administration-rolls-back-protections-for-transgender-students/2017/02/22/550a83b4-f913-11e6-bf01-d47f8cf9b643\\_story.html?noredirect=on&utm\\_term=.4306405d5a9b](https://www.washingtonpost.com/local/education/trump-administration-rolls-back-protections-for-transgender-students/2017/02/22/550a83b4-f913-11e6-bf01-d47f8cf9b643_story.html?noredirect=on&utm_term=.4306405d5a9b).



notice-and-comment rulemaking, the BOP can make substantial changes to its existing policy to address the threat of sexual violence transgender people face in federal prisons: first, by defining “biological sex” to consider both gender identity and hormone composition; and second, by more clearly defining the TEC’s purpose and duties.