

Naming and Shaming

Violations of the Human Rights of
Transgender Persons with Felonies in Texas



HUMAN RIGHTS CLINIC
THE UNIVERSITY of TEXAS SCHOOL of LAW

NOVEMBER 2020

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I. Executive Summary

“I don’t give a damn what you want to be called.”

THIS IS A direct quote from a TDCJ prison guard to an incarcerated transgender woman after she requested to be called by her preferred name. Similar statements are not uncommon within the TDCJ system and are a direct reflection of the implementation of the Texas Family Code 45.103 (“TFC 45.103”). This code prohibits persons with a felony conviction from applying for a legal change of name unless they have been pardoned, or until two years from the date of the receipt of discharge or completion of community supervision or juvenile probation. TFC 45.103’s application to transgender persons violates several international human rights laws contained

within documents such as the United Nations Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, and the American Declaration on the Rights and Duties of the Man.

The Human Rights Clinic (the “Clinic”), in partnership with the Austin Community Law Center (“ALC”) and Trans Pride Initiative (“TPI”), researched TFC 45.103’s human rights violations and supported this research with a survey.

The Clinic distributed over 370 surveys

to transgender incarcerated persons and received over 150 responses, 132 of which were valid. Survey responses confirmed that TFC 45.103 violates protected human rights, including the right to liberty, right to equality and non-discrimination, right to freedom of expression, right to a name, right to humane treatment and right to a remedy while incarcerated. The refusal to recognize these protected human rights contributes to the psychological and emotional distress that transgender persons experience on a daily basis. Texas is responsible for the



The pictured speaker is Nell Gaither, President of the Trans Pride Initiative.

protection of human rights of all people, including those of transgender incarcerated persons. By contributing to and facilitating an environment where the human rights of transgender persons are repeatedly and callously disregarded, Texas violates international treaties and the Eighth Amendment of the Constitution of the United States. Texas must amend or repeal TFC 45.103 or implement other administrative practices to halt the continuous and systemic human rights violations against transgender incarcerated people.

II. Introduction

***I am being forced to identify myself as someone I am not simply because of the name on my ID card. I must sign everything using a male name, so that leads people to believe that that is who they are dealing with, a male, rather than the female I identify as. This continues to prevent me from being able to get people to see me as I see myself. How can that NOT cause extreme emotional distress?*¹**

TEXAS FAMILY CODE 45.103 (“TFC 45.103”) bars people with a felony conviction from applying for a legal change of name unless they have been pardoned, or until two years from the date of the receipt of discharge or completion of community supervision or juvenile probation.^{2 3} By barring an individual from obtaining a legal change of name, TFC 45.103 violates the rights of transgender persons by depriving them of liberty, the right to equality and non-discrimination, the right to freedom of expression, the right to a name, the right to humane treatment, and the right to a remedy.

While the human rights violations of TFC 45.103 apply to all individuals, transgender persons are particularly impacted by the effects of this statute. The Clinic worked in partnership with ACLC and TPI to gather information on the effects of TFC 45.103 on transgender persons in Texas. Transgender persons who responded to the survey provided supplementary accounts attesting to the harmful effects of the human rights violations of TFC 45.103.

To complement research on the effects of TFC 45.103 for transgender individuals, the Clinic worked with TPI to reach out to currently incarcerated transgender persons. By June 2020, over 120 responses from transgender persons incarcerated in state and federal prisons in Texas had been received. These surveys reveal that transgender persons incarcerated in

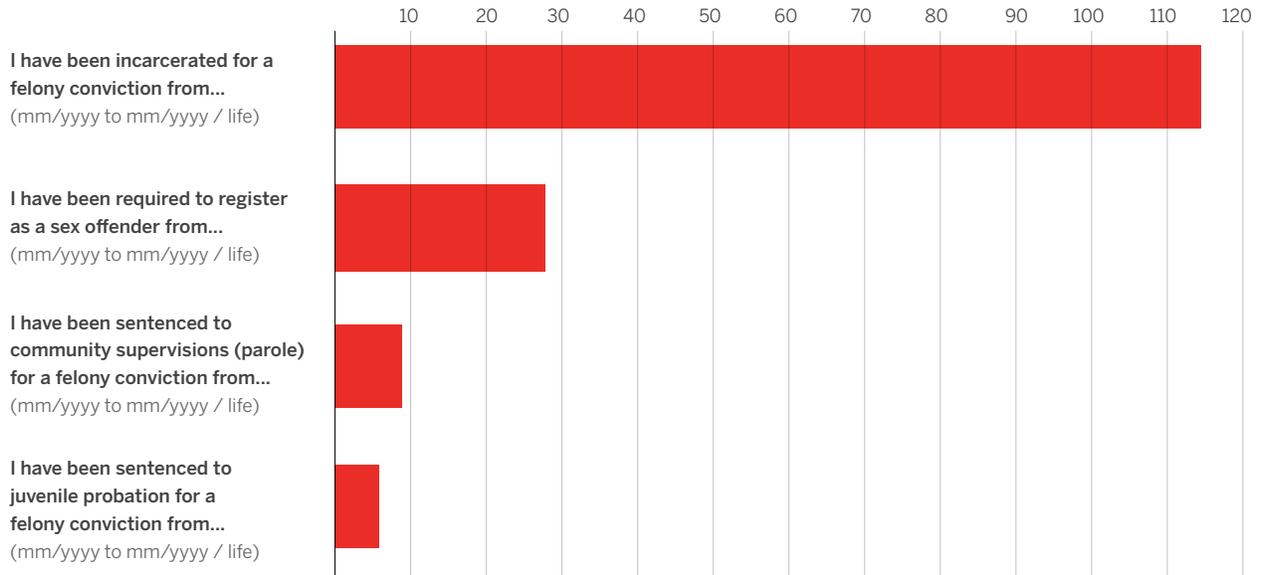
1 Response to Human Rights Clinic survey; see discussion of survey methods *infra* Part III.

2 A parent, managing conservator, or guardian of a minor in Texas may file a change of name petition to the court in whose jurisdiction they reside so long as the minor is not barred by TFC 45.103. If a minor has a felony conviction, TFC 45.103 applies. Tex. Fam. Code § 4; Tex. Fam. Code § 45.103.

3 This means that a person with a felony conviction who is discharged from incarceration in 2020 but then is on parole until 2022 cannot apply for a legal change of name until the two years after the completion of parole, i.e. in 2024. Tex. Fam. Code § 45.103.

Status of Survey Responder

Please select all of the following which apply to you:



Texas are often subject to discrimination and harassment involving the use of their legal, non-affirming name. The surveys further show that of those who experience this mistreatment by members of prison staff and other incarcerated persons, many experience symptoms of mental and emotional distress as identified through wellness screening tools.

The information provided from the surveys supports the determination that TFC 45.103 violates numerous human rights. This report also lays out recommendations for legislative and policy changes that would protect the human rights of transgender individuals. Recommendations include amending TFC 45.103, adding preferred names on prison identification, training prison officials, and improving methods for responding to complaints by incarcerated persons.

III. Methodology

TO UNDERSTAND THE legal background, the authors reviewed various documents on the rights of transgender persons in international human rights law. This included resources compiled by other organizations such as Trans Lifeline, which compares name change restrictions imposed by various states on people with criminal histories.⁴ The Clinic also utilized tools developed for previous social scientific studies to document experiences of anxiety and depression, as detailed above.⁵

In February 2020, the Clinic and its partner organizations also filed a Freedom of Information Act request (FOIA) with the Federal Bureau of Prisons and a Texas Public Information Act (PIA) request with the Texas Department of Criminal Justice. The purpose of these requests was to obtain official counts of transgender persons in federal and state custody and those released on parole during the past ten years, to approximate the number of transgender persons unable to obtain a legal name change because they were incarcerated. Notably, any data collected by these agencies are likely to be inaccurate or incomplete, as transgender persons may choose not to reveal their gender identity to law enforcement or prison officials to avoid segregated housing, or for other reasons. The Federal Bureau of Prisons (BOP) has not yet responded to the FOIA request. The Texas Department of Criminal Justice (TDCJ) provided responsive documents beginning with Fiscal Year 2017. TDCJ also provided policy documents and directives in response to a follow-up request.

We consulted a number of secondary sources to inform the factfinding efforts used to collect data for this report, including previously published reports related to the experiences of incarcerated transgender individuals. Among these was a report by TPI, a Dallas-based advocacy organization, who produced a report in 2018 documenting failures of Texas prisons to meet the standards of the Prison Rape Elimination Act.⁶

The surveys were created to supplement the human rights research that determines how

4 TRANS LIFELINE, NAME CHANGE GUIDE FOR PEOPLE WITH CRIMINAL RECORDS (2017), <https://www.translifeline.org/docs/Name%20Change%20Guide%20for%20People%20with%20Criminal%20Records.pdf>

5 See discussion of these studies *supra* Part III(A)(4).

6 TRANS PRIDE INITIATIVE, "I DON'T BELIEVE YOU, SO YOU MIGHT AS WELL GET USED TO IT" — THE MYTH OF PREA ZERO TOLERANCE IN TEXAS PRISONS (July 2018), https://www.prearesourcecenter.org/sites/default/files/library/Myth_Of_PREA_Zero_Tolerance.pdf.

TFC 45.103 impacted the human rights of transgender individuals. The Clinic partnered with Trans Pride Initiative⁷ to send out 378 mixed-method surveys on March 16, 2020, to transgender people incarcerated in Texas (the “Incarceration Survey” can be found on our website: <https://law.utexas.edu/wp-content/uploads/sites/11/2020/11/2020-HRC-PaperSurveyforIncarceratedPersons.pdf>). The authors also created a survey about the impact of 45.103 on transgender people who were affected by TFC 45.103 but not currently incarcerated (the “Non-Incarceration Survey” can be found on our website: <https://law.utexas.edu/wp-content/uploads/sites/11/2020/11/2020-HRC-PaperSurveyforNON-IncarceratedPersons.pdf>). The surveys were primarily modeled after the 2015 U.S. Transgender Survey which evaluated the perceptions and experiences of racial and ethnic minorities in the British prison population.⁸

TPI and a University of Texas College of Liberal Arts graduate student, who had experience with transgender incarcerated individuals, reviewed each survey for sensitivity and context. The surveys were also reviewed to minimize the risk of retraumatizing any affected individuals. All individuals who responded to the survey were informed of the nature of the survey on the impact of TFC 45.103, the voluntary nature of the survey, and the ways in which data would be collected and potentially used or published. No incentives were offered or provided to transgender incarcerated persons who completed a survey.

- The supplementary surveys started with an opening letter describing the purpose of the survey and asked for consent from individuals to use their stories. The general information section collected characteristic information about the individual, including demographic information and conviction status, in order to determine if the individual was or still is affected by TFC 45.103. The TFC 45.103 effect section asked detailed questions about transgender individuals’ experience living with the effects of TFC 45.103 both in and out of incarceration.
- The wellness screening section contained a mental health assessment for depression and anxiety modeled after a 2015 peer-reviewed evaluation of the psychological well-being of transgender people.⁹ In the conclusion of the surveys, transgender persons were given space to add anything else concerning their experience while in the prison system with regard to their name, gender identity, and inability to seek a legal name change until two years after full completion of their sentence.

7 TRANS PRIDE INITIATIVE is a Dallas-based transgender advocacy group. <https://tpride.org/>

8 NATIONAL CENTER FOR TRANSGENDER EQUALITY, 2015 U.S. TRANSGENDER SURVEY, <http://www.ustranssurvey.org/>.

9 Samantha R Pflum, *Social Support, Trans Community Connectedness, and Mental Health Symptoms Among Transgender and Gender Nonconforming Adults*, *Psychology of Sexual Orientation and Gender Diversity*, 2015, Vol. 2, No. 3 281-286.

The completed Incarceration Surveys, which were composed of the five sections described above, were manually typed into the online Qualtrics Incarceration Survey with the assistance of two undergraduate interns at the University of Texas. It was necessary to input the surveys into Qualtrics for analysis not only to simplify the data organization, but also to accommodate for the fact that all work was completed remotely due to COVID-19 social distancing restrictions.

IV. Framework

A. **Texas Family Code 45.103 contradicts established human rights law by depriving transgender persons of the right to change their name without a legitimate public interest to justify the deprivation.**

TEXAS FAMILY CODE 45.103 (“TFC 45.103”) establishes the procedural and substantive requirements to obtain a court order granting a petition for a change of name in Texas.¹⁰ This code places severe limitations on the ability of a person convicted of a felony to change their name through a court order. Texas Family Code 45.103 states:

- (a) The court shall order a change of name under this subchapter for a person other than a person with a final felony conviction or a person subject to the registration requirements of Chapter 62, Code of Criminal Procedure, if the change is in the interest or to the benefit of the petitioner and in the interest of the public.
- (b) A court may order a change of name under this subchapter for a person with a final felony conviction if:
 - (1) in addition to the requirements of Subsection (a), the person has:
 - (A) received a certificate of discharge by the Texas Department of Criminal Justice or completed a period of community supervision or juvenile probation ordered by a court and not less than two years have passed from the date of the receipt of discharge or completion of community supervision or juvenile probation; or
 - (B) been pardoned; or
 - (2) the person is requesting to change the person’s name to the primary name used in the person’s criminal history record information.
- (c) A court may order a change of name under this subchapter for a person subject to the registration requirements of Chapter 62, Code of Criminal Procedure, if the person:
 - (1) meets the requirements of Subsection (a) or is requesting to change the person’s name to the primary name used in the person’s criminal history record information; and
 - (2) provides the court with proof that the person has notified the appropriate local law enforcement authority of the proposed name change.¹¹

¹⁰ Tex. Fam. Code § 45.103.

¹¹ *Id.*



This image is a sample of the inmate information that is provided on the Texas Department of Criminal Justice website.

TFC 45.103 is severely restrictive. A person convicted of a felony is ineligible for a grant of a name change until two years after discharge. Thus, this law acts as a lifetime ban on ever obtaining a name change for persons serving life sentences or facing the death penalty. Those serving life sentences¹² represent 7.1% of those in Texas Department of Criminal Justice (“TDCJ”) prisons.¹³

This law was amended in 2019 by HB 2623 to include TFC 45.103(b)(2) stating that the court can order a name change if “the person is requesting to change the person’s name to the primary name used in the person’s criminal history record information.”¹⁴ The Bill Analysis for HB 2623 identified that the purpose of the amendment was to alleviate the penalizing effects of the law to certain persons who have used names other than their birth names for the vast majority of their lives. While this does show that the House and Senate are aware that this creates adverse effects on certain persons, many transgender incarcerated persons do not have their preferred names listed on their criminal history record information. Therefore, this amendment does not

12 Including sentences of life, capital life, life without parole, and death, there are 9,531 persons in this situation. Not including those with sentences of 60 years or more, who represent 5,433 of those in TDCJ prisons.

13 TEXAS DEPARTMENT OF CRIMINAL JUSTICE, FY 2018 STATISTICAL REPORT 8 (2019), https://www.tdcj.texas.gov/documents/Statistical_Report_FY2018.pdf. This figure accounts for those in TDCJ prisons only (N=134,152) and does not take into account persons in state jails or SAFF, whose sentences are 2 years or less.

14 Tex. Fam. Code § 45.103(b)(2).

alleviate the severe restrictions placed on transgender incarcerated persons.

In *United States v. Varner* (a.k.a. Kathrine Nicole Jett), the Court of Appeals for the Fifth Circuit recently upheld the district court’s decision not to change a transgender incarcerated woman’s name on her judgment of committal to her preferred name, nor to refer to her using her affirming pronouns.¹⁵ The Fifth Circuit reasoned that the woman’s “request to change the name on [her] judgment was an unauthorized motion that the district court lacked jurisdiction to entertain,” and therefore, she was not entitled to have her judgment corrected to reflect her preferred name.¹⁶ Both the lower court and the Fifth Circuit neglected to consider the constitutional human rights of those affected by this statute.

A court is granted unfettered and undirected discretion in determining whether a name change is “in the interest or to the benefit of the petitioner or the public.” There are no guiding principles set out to make this determination. This requirement is vague and unclear, which may lead to arbitrary application. Courts in Texas have held that the “test for abuse of discretion is . . . whether the court acted without reference to any guiding rules and principles.”¹⁷ Additionally, in Texas, the burden is placed on the person seeking a legal name change to show that their name change is in the interest of the public.

Finally, under the discretionary provision, there is no guarantee that a court will grant a petition for a change of name even if all of the requirements are satisfied. Subsection (b) merely provides that a court “*may*” grant a petition for a change of name for a person convicted of a felony who satisfies all the exception requirements. Compare this language to subsection (a), which mandates that a court “*shall*” order a change of name for persons not convicted of a felony. For persons not convicted of a felony, subsection (a) at least guarantees a right to obtain an order for a name-change, but even that guarantee is subject to problematic requirements. However, for a person convicted of a felony this guarantee is completely stripped away. The court’s complete discretion to deny a change of name petition by a person convicted of a felony, *even when they have satisfied all the restrictive exception requirements*, effectively grants no right to a change of name, as is required under international human rights law.

The importance of transgender persons having identity documents that comport with their gender has been recognized by several human rights bodies. The United Nations High Commissioner for Human Rights has recommended that States “issue legal identity documents, upon request, that reflect the preferred gender of the person concerned,” and “facilitate legal

15 948 F.3d 250, 258 (5th Cir. 2020).

16 *Id.* at 254.

17 *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985).



The Inter-American Court on Human Rights met to release an Advisory Opinion regarding name change law compatibility with the American Convention on Human Rights.

recognition of the preferred gender of transgender persons and establish arrangements to permit relevant identity documents to be reissued reflecting the preferred gender and name, without infringing other human rights.”¹⁸

Additionally, the Inter-American Court of Human Rights (“IACtHR”) establishes the web of human rights which protect the right for a transgender person to legally change their name.¹⁹ The IACtHR previously held that “the right of each person to define his or her sexual and gender identity autonomously and that the *personal information in records and on identity documents should correspond to and coincide with their self-defined identity* is protected by the American Convention on Human Rights under the provisions that ensure the free development

18 United Nations, Report of the United Nations High Commissioner for Human Rights, *Discriminatory laws and practices and acts of violence against persons based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41, ¶ 84.

19 The Republic of Costa Rica sought an advisory opinion (“Advisory Opinion”) from the Inter-American Court of Human Rights (IACtHR) to check if its name-change law was compatible with the provisions of the American Convention on Human Rights (“ACHR”). The United States is a part of the Organization of Americas States (“OAS”). It is not a party to the American Convention on Human Rights (“ACHR”) but is a party to the American Declaration on the Rights and Duties of Man (“American Declaration”). The United States is subject to the Inter-American Commission on Human Rights (“Inter-American Commission”). However, despite not being a party to the IACtHR, the judgments by the IACtHR informs the interpretation of the human rights obligations of the United States in proceedings against it before the Inter-American Commission. Report No. 80/11, Case 12.626, *Jessica Lenahan (Gonzales) et al. v. United States*, July 21, 2011, ¶¶ 118-19. Thus, the reasoning of the Advisory Opinion of the IACtHR applies to the United States.

of the personality (Articles 7 and 11(2)), the right to privacy (Article 11(2)), the recognition of juridical personality (Article 3), and the right to a name (Article 18).”

The IACtHR has also examined what types of restrictions on name changes are permissible. The IACtHR determined that requiring the requestor to provide their police records when applying for a name-change is an impermissible restriction for two reasons. First, requiring name-change applicants to produce police records “unreasonably” requires the applicant to do the job of the State. Second, and far more significantly, the interest of maintaining criminal records does not outweigh the human rights violation that occurs when transgender individuals are denied the ability to have their identity data conform to their self-perceived gender identity. The concern that one might use a name-change to “evade justice” does not outweigh the concern that preventing a transgender person from obtaining a name change “completely affect[s]” several of their “basic human rights” to the extent that they are prevented from fully “participat[ing] in all aspects of life.” Following this analysis, a state would need to cite a further interest in order for a restriction on the name change procedure to comport with international human rights law.

State laws in the United States that restrict legal name changes for people with felony convictions are remarkably unique, and a majority of the conditions or restrictions that do exist are based on concerns that a legal name-change will facilitate evasion of justice. In 2017, thirteen states²⁰ had no restrictions for people with felony convictions. Twenty-two states imposed conditions on individuals petitioning for a change of name based on the person’s criminal record. These conditions ranged from conducting an additional background check to proving that the name change is not fraudulent.²¹ Besides Texas, fifteen states have restrictions that result in situations where a person either must wait a determined amount of time before they can apply for a change of name, or are entirely precluded from changing their name based on their incarceration or probation status, sex offender registration status, and felony record status.²²

States that have additional burdens or complete restrictions on a legal change of name for a person with a felony conviction mistakenly believe that in the interest of “public safety,”

20 Alaska, Maine, Massachusetts, Montana, New Mexico, Rhode Island, South Dakota, Georgia, Kansas, Kentucky, Missouri, Nebraska, and Wyoming have no restrictions for persons with felonies to change their name. Trans Lifeline Microgrants, *Name Change Guide for People with Criminal Records*, TRANSLIFELINE, (Sept. 2017).

21 Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, DC, Idaho, Maryland, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oregon, South Carolina, Vermont, Virginia, and Washington have conditions for petitioning to change your legal name if you have a criminal record to a felony specifically. *Id.*

22 Florida, Hawaii, Illinois, Indiana, Iowa, Louisiana, Mississippi, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, Utah, West Virginia, and Wisconsin all have laws that prevent a person from petitioning for a legal change of name dependent on the person’s criminal background and incarceration, parole, or sex offender registration status. *Id.*

these laws are righteous and fair. However, the Bureau of Prisons (“BOP”) permits a legal name change under the Prison Rape Elimination Act (“PREA”)—a law meant to protect vulnerable populations like transgender persons. The BOP uses an Advisory Opinion to counter the mistaken belief that states can place restrictions on legal name changes in the interest of public safety. According to the Advisory Opinion, which is based on bodies of international human rights law to which the United States belongs, state laws that deny legal name changes for a person with felony convictions are against international human rights law.²³

Applying the analysis from the Advisory Opinion to the restrictions of TFC 45.103 concludes that the name-change restrictions the statute imposes on transgender individuals convicted of a felony are disproportional and impermissible violations of their basic human rights. The purported aim of TFC 45.103—“to protect the ability to identify persons sought on warrant and detainer, and to preserve the criminal history of felons”²⁴—is nearly identical to the goal of the statute in Costa Rica challenged in the Advisory Opinion. The state interest in that statute was to obtain police records to prevent evasions of justice, protect third parties, and promote public order. Due to the similarity of the legislative purposes of TFC 45.103 and the statute challenged in the Advisory Opinion, it is appropriate to assess the proportionality of the means used in pursuit of the aims of TFC 103.45 to the same standard that was applied in the Advisory Opinion. TFC 45.103 places arbitrary concerns of evasion of justice over the human rights of an individual, as illustrated in the case of Katelyn. Katelyn is completing a life sentence and experiences psychological and mental anguish because her legal name is used to deny her gender identity. She feels anxious and depressed when others use her legal name and has unsuccessfully requested for officers and staff to use her preferred name. Even though Katelyn cannot evade justice because she will remain within the custody of the State, she cannot change her name under TFC 45.103, and in the process, she continues to suffer human rights violations.

New York is one of the twenty-two states that permits people with felonies to petition for a legal name change with some conditions.²⁵ Although states like Texas, and Massachusetts²⁶ cite security reasons to justify the continued use of name change restrictions, New York case law

23 *Id.* at 9, 12.

24 *Matthews v. Morales*, 23 F.3d 118, 119 (5th Cir. 1994)

25 Under New York Civil Rights Law § 63, depending on the severity of the felony, a person who is currently incarcerated or on parole must first notify the district attorney of every county in which they received a felony conviction that the person is petitioning for a legal change of name. If the petition is granted, the petitioner must then publish a public notification of their change of name in the county in which they received a felony conviction.

26 In a Massachusetts case regarding a change of name petition by a transgender incarcerated person, a Massachusetts court held that granting a name change will likely cause a risk of confusion in the criminal justice system. This case is currently on appeal. *Riley*, 93 Mass. App. Ct. 1103, 103 N.E.3d 767 (2018).

held that security reasons cannot be the sole reason for name-change restrictions. For example, in the case of *In re Powell*, a Superior Court of New York denied a petition to a legal change of name by a transgender incarcerated person with a felony. The lower court had denied the petitioner's application to change her legal name on the grounds that "the risk of confusion and deception was high, and there was no evidence demonstrating" that the petitioner had completed a gender correction surgery. A New York appellate court reversed, holding that "[c]onfusion is attendant to any change of name and does not, in itself, justify denial."²⁷ This New York Court would require a further state interest than to protect against confusion and deception to allow the state to limit access to a legal name change for a transgender incarcerated person.

In order to track incarcerated people who are in the custody of the State of Texas, each individual must have a TDCJ number. The name on their TDCJ ID does not need to be restricted to their legal name in order to protect the public. Even without a legal change of name, the BOP sets forth guidance stating that "additional names or aliases" can be added to the secure database of incarcerated individuals. While an individual in these circumstances could potentially be granted parole, they would still have to report their location to their parole officer, which could be accomplished with their TDCJ number. The experience of TPI shows that incarcerated persons and those on parole can easily be identified and located with their non-legal name and their TDCJ number. TPI has written more than 140 advocacy letters on behalf of around 50 incarcerated persons using just the TDCJ number and a name different from the name in the systems. These have gone to many different TDCJ offices. Not one time has TPI received a response indicating that the person they were advocating for was unable to be identified by this information. This shows that TFC 45.103 does little to nothing in preventing confusion or deception.

Additionally, Texas has the responsibility to maintain the recordkeeping that would permit the public to find a person's legal change of name or the criminal record of a person who changed their legal name. Amending the law to ensure that the public is able to access the individual's previous name would better inform the public of that individual's criminal history. If, for example, an incarcerated person was granted parole, she would naturally introduce herself to her neighbors and community members using her affirming name, instead of her legal name. Under TFC 45.103, a search for this affirming name would come up empty—with the parolee's record being under her non-affirming, legal name—which TFC 103.45 prevents her from changing to match the name she uses in public. By allowing for this individual to change her legal name, this requires correctional officers to refer to her by her preferred name,

27 *In re Powell*, 95 A.D.3d 1631, 1632, 945 N.Y.S.2d 789, 790 (2012).

which helps alleviate psychological and mental distress. In addition, the above-mentioned process would effectively and efficiently serve the original intent of TFC 45.103, which is to protect the ability of the community to locate criminal records.

Although the state claims that TFC 45.103 is in the interest of the public because it prevents confusion and deception—neither of these interests are legitimate, let alone strong enough to permit the state to violate the human rights of incarcerated transgender persons. The goals of TFC 45.103 can be achieved administratively. In fact, preventing incarcerated persons from changing their name to match the one they use in public creates more confusion than it prevents. With no state interest above and beyond maintaining records and protecting against deception TFC 45.103 is unconstitutional and in violation of international human rights standards.

There is a significant population of transgender people who are affected by TFC 45.103 because they are incarcerated in Texas. In 2014, the TDCJ reported that there were approximately 30 transgender individuals incarcerated in their facilities. However, this number jumped astronomically by 2017, when the TDCJ reported that 663 incarcerated persons in its custody identified as transgender. In 2018, this number grew to 889. By 2019, the TDCJ reported that there were 1,093 transgender persons in its custody.²⁸ This increase is also reflected in records of those paroled: according to TDCJ records, of those released from TDCJ custody and placed on parole during each of these fiscal years, in 2017, 22 parolees identified as transgender; in 2018, 37; and in 2019, 59.²⁹ These numbers do not include persons who were released on parole before the reporting period.³⁰ In addition, many transgender incarcerated persons may not identify themselves in the TDCJ system as transgender because they are afraid of discrimination from prison officials or other incarcerated persons. Therefore, the number of transgender persons impacted by the inability to receive a legal name change under Texas law is assuredly higher than those currently reported as incarcerated or paroled by TDCJ records.³¹

TDCJ reports transgender incarcerated persons as “male” or “female” according to the unit or facility in which they are housed, sometimes even if they have legally changed their gender marker. Housing and other program assignment determinations are set by the Department of Justice (“DOJ”) and the Bureau of Prisons under the Prison Rape Elimination Act in order to reduce the risk of sexual violence against transgender incarcerated persons. Texas began

28 Response to Texas Public Information Act request. Note: It is unclear whether this increase reflects persons who had already been incarcerated during previous reporting periods newly identifying themselves as transgender to TDCJ officials.

29 *Id.*

30 See discussion *infra* Part IV(A).

31 There is no data publicly available on the number of transgender persons in federal custody in Texas. The Clinic has requested this information and has not yet received a response from the Federal Bureau of Prisons.

efforts to comply with the PREA in 2015 and Governor Abbott suggests that he “will work to comply” with the PREA.³²

In 2016, the Department of Justice prohibited assigning a transgender individual to housing and programming assignments based on biological sex.³³ In 2018, the BOP reversed this policy. While, as required under PREA, all determinations will be on a case-by-case basis, biological sex is now the basis for the initial determination of housing, and other programs. The Human Rights Watch condemned the change in policy, stating that there is no “defensible basis” for the decision and that it is part of a “pattern of actions taken by the Trump administration,” to weaken or eliminate protections for transgender individuals.³⁴

Protecting the rights of transgender incarcerated persons is especially critical because transgender persons are convicted at comparatively higher rates than their cisgender³⁵ peers. In the 2015 National Trans Survey found that two percent of transgender survey respondents (n=27,715) were incarcerated (held in jail, prison, or juvenile detention) in the year prior to the survey,³⁶ slightly over twice the rate of incarceration among the general population in 2015 (0.86%).³⁷ Other research suggests that around 21% of transgender women are incarcerated in their lifetime compared to less than 3% of the US general population.³⁸ In addition, many subsets of the transgender population are far more likely than the general population to have been



This photo of TDCJ's Crain Unit in Gatesville, Texas is used with permission of TDCJ.

32 Patrick Svitek, *Abbott: Texas Will Work to Comply with Anti-Prison Rape Law*, THE TEXAS TRIBUNE, (May 22, 2015, 5 PM) <https://www.texastribune.org/2015/05/22/abbott-says-texas-will-follow-prison-rape-law/>.

33 Human Rights Watch, *US Bureau of Prisons Policy Change Endangers Transgender Prisoners*, HUMAN RIGHTS WATCH DISPATCHES (May 14, 2018), <https://www.hrw.org/news/2018/05/14/us-bureau-prisons-policy-change-endangers-transgender-prisoners#>.

34 *Id.*

35 Non-transgender; people whose gender identity corresponds to the sex they were assigned at birth.

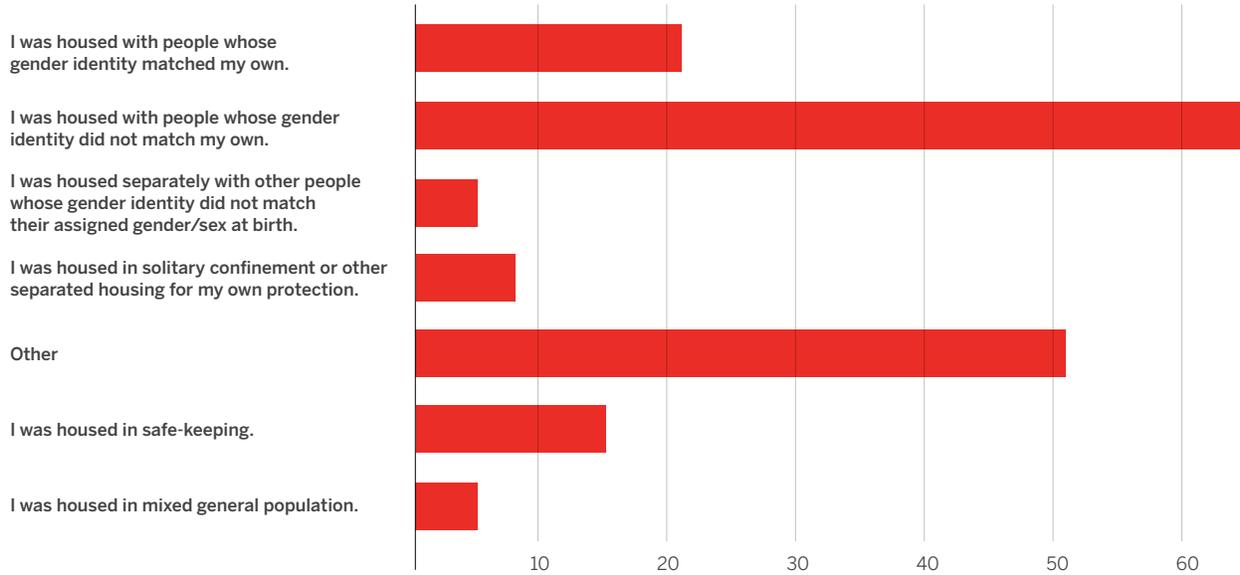
36 NATIONAL CENTER FOR TRANSGENDER EQUALITY, *2015 U.S. Transgender Survey* (last visited May 3, 2020), <http://www.ustranssurvey.org>.

37 *Id.*

38 Jaclyn M. White Hughto et al., *A multisite, longitudinal study of risk factors for incarceration and impact on mental health and substance among young transgender women in the USA*, JOURNAL OF PUBLIC HEALTH, v. 41 no. 1, 2019, at 1.

Where were you housed while in incarceration?

Please check all that apply:



incarcerated in the past year—including undocumented transgender persons, transgender Black women, transgender American Indian women, and transgender homeless persons.³⁹

Transgender people are more likely to be incarcerated, but are also uniquely vulnerable due to their intersectional status as both a transgender person and an incarcerated person. A 2010 study on transgender people in California men’s prisons found that “transgender inmates fare far worse on standard demographic and health measures than their non-transgender counterparts in the US population, the California population, the US prison population, and the California prison population.”⁴⁰ In terms of physical victimization, “. . . as compared to inmates in US and California men’s prisons-by all reports, populations that have also suffered high rates of physical abuse – transgender people experienced more than five times as many incidents of non-sexual physical victimization.”⁴¹

This finding from the California study matched the results found five years later in the 2015 U.S. Transgender Survey. A secondary data report determined that one in six transgender people were physically assaulted by facility staff while incarcerated, while one in six were physically assaulted by another incarcerated person.⁴² The 2015 US Transgender Survey also

39 James et al, *The Report of the 2015 U.S. Transgender Survey*, NATIONAL CENTER FOR TRANSGENDER EQUALITY at 190 (2016). <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>

40 Lori Sexton, Valerie Jenness & Jennifer Macy Sumner, *Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men’s Prisons*, 27 JUST. Q. 835, 835 (2010).

41 *Id.* at 857-58.

42 James et al, *supra* at 191, 192.

found that 11% of transgender incarcerated persons were sexually assaulted by facility staff in the past year while incarcerated, while 17% of transgender incarcerated persons reported that they were sexually assaulted by another incarcerated person.⁴³

The findings from these significant transgender surveys illustrate that transgender persons in incarceration constitute a particularly vulnerable population that experiences higher levels of abuse than the general incarcerated population. For a person who is transgender, a legal name change not only permits a person to more easily “pass” as the gender with which they identify; it also crucial to feeling comfortable in one’s identity.⁴⁴ Though there is currently limited research available about the effect of a legal name change for a transgender person, one 2017 study on low-income trans women of color found that legal name change “may be an important structural intervention . . . providing increased socioeconomic stability and improved access to primary and transition-related health care.”⁴⁵

TFC 45.103 particularly impacts people who are transgender due to transgender people having much higher rates of incarceration than the general population. Texas must recognize the human rights of these persons to help them fully participate in society as their self-defined identity upon release and prevent them from experiencing further discrimination and harm while incarcerated. In order to fulfil this legal responsibility, Texas must amend, repeal, or otherwise mitigate the harm caused by TFC 45.103.



Pictured on the left is Tim, a volunteer for Trans Pride Initiative; in the middle is Mindy Williams, who was released in 2019 but is unable to change her name due to her conviction; and on the right is Nell Gaither the President of Trans Pride Initiative.

43 *Id.*

44 *Id.*

45 Brandon J. Hill et al., *Exploring Transgender Legal Name Change as a Potential Structural Intervention for Mitigating Social Determinants of Health Among Transgender Women of Color*, 15 *SEXUALITY RES. & Soc. POL'Y*: J. NSRC 1, 1 (2017).

V. Distribution of Surveys

THE CLINIC, ACLC and TPI started investigating the impact of TFC 45.103 in January 2020. At the same time that the authors finished their preparatory work and started distributing its supplementary surveys for additional information, Texas began shutting down in response to the COVID-19 pandemic.⁴⁶ We believe that COVID-19 may have significantly and negatively impacted our ability to reach potential transgender incarcerated persons, especially for the online version of the Non-Incarceration Survey. Although we developed survey questions related to experiences

while on parole or while seeking housing or employment, only six responses for these types of surveys had been collected as of April 2020. However, with 132 valid survey responses (a response rate of around 34%), there was sufficient information to supplement the human rights investigation into the effects of TFC 45.103.

PLEASE ANSWER ONLY THOSE QUESTIONS WHICH YOU FEEL COMFORTABLE ANSWERING

15. Did staff and officers where you are/were incarcerated use your preferred name upon request?

Yes, staff and officers generally used my preferred name.

Some staff and officers used my preferred name.

Few or no staff members or officers used my preferred name.

Other:

.....

.....

16. Did other incarcerated people at the facility where you are or were incarcerated use your preferred name upon request?

Yes, other incarcerated people generally used my preferred name

Some used my preferred name

Few or none used my preferred name

Other:

.....

.....

17. Did the staff or officers at the facility where you are incarcerated inform you of your rights because of your gender identity, such as your rights because you are a transgender person?

Yes

No

Not sure

Other:

.....

.....

18. Are there any other incarcerated people, members of the staff, or officers that you especially get/got along with?

Yes

No

Not sure

6

This image is an excerpt of the survey that we sent to 300+ transgender incarcerated individuals. A full sample of the Incarceration Survey (<https://law.utexas.edu/wp-content/uploads/sites/11/2020/11/2020-HRC-PaperSurveyforIncarceratedPersons.pdf>) and the Non-Incarceration Survey (<https://law.utexas.edu/wp-content/uploads/sites/11/2020/11/2020-HRC-PaperSurveyforNON-IncarceratedPersons.pdf>) can be found on our website.

46 Office of the Texas Governor Greg Abbott, *Governor Abbott Extends Disaster Declaration For COVID-19* (Mar. 13, 2020), <https://gov.texas.gov/news/post/governor-abbott-extends-disaster-declaration-for-covid-19>.

VI. Explanation of Human Rights Violations

A. RIGHTS OF PERSONS DEPRIVED OF LIBERTY

THOUGH STATES MAY deprive persons convicted of crimes of their liberty through incarceration, it is well established that states have a duty to protect the other human rights of incarcerated persons. The rights of persons deprived of liberty are specifically outlined through instruments such as the Nelson Mandela Rules (“Mandela Rules”)⁴⁷ and the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.⁴⁸ States must protect such persons from “any hardship or constraint other than that resulting from the deprivation of liberty.”⁴⁹ The IACHR notes that “Persons deprived of liberty not only may not be subjected to torture and cruel, inhuman and degrading treatment, *but neither may they be subjected to hardship or restrictions, except for those that are unavoidably incidental to the deprivation of liberty.*”⁵⁰

The IACtHR explains this principle further, noting that the State’s treatment of a person deprived of liberty must “not subject the detainee to anguish or difficulties that exceed the unavoidable level of suffering intrinsic to the detention, and that, given the practical demands of imprisonment, his health and welfare are adequately insured.”⁵¹ TFC 45.103 directly violates the dignity of transgender persons convicted of a felony as it prohibits State recognition of their actual identity.

Prohibiting a person from changing their name is not “unavoidably incidental to the deprivation of liberty.” The IACtHR held in *Lopez Alvarez v. Honduras* that forcing an inmate to speak in a particular language was not incidental to their deprivation of liberty, even in

47 G.A. Res. 70/175, Dec. 17, 2015.

48 Organization of American States: Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Res. 1/08 (OEA/Ser/L/V/II.131 doc. 26), Mar. 13, 2008.

49 Human Rights Committee, General Comment 21, HRI/GEN/1/Rev.9 (Vol I) 202, ¶ 3.

50 Report on the Human Rights of Persons Deprived of Liberty in the Americas, IACHR (2011), ¶ 336.

51 I/A Court H.R., Case of “Juvenile Reeducation Institute” V. Paraguay. Judgment of September 2, 2004.



The Inter-American Court on Human Rights met to release an Advisory Opinion regarding name change law compatibility with the American Convention on Human Rights.

light of the “security” reasons that rule was supposedly serving.⁵² Forcing an inmate to go by a particular name is likewise not necessitated by the deprivation of liberty because there is no legitimate security concern or other interest that makes the denial of a name change unavoidably incidental to the terms of their incarceration. The IACHR states that there are “special obligations of the State to protect persons deprived of liberty who are at risk of experiencing violations of their human rights, namely: women; children; older persons; persons with disabilities; and lesbians, gays, bisexuals, and trans [persons].”⁵³ Thus, a law like TFC 45.103, which deprives transgender persons of human rights protections while they are incarcerated, is subject to heightened scrutiny in determining if it offends the special protections required by the IACtHR.

TFC 45.103 prevents individuals from using a name that is congruent with their identity, which disparately impacts transgender incarcerated persons. The harms caused by TFC 45.103 disproportionately affects transgender persons because the name on their identity documents does not comport with their actual and presented gender, which leads to discrimination, hardship and violence. By forcing transgender persons convicted of a felony to present incongruent identification documents, TFC 45.103 has the effect of disproportionately interfering with transgender persons’ access to basic services and rights to healthcare, housing, employment, and civic participation, among others. In this way, the effects of TFC 45.103 constitute indirect discrimination against transgender persons convicted of a felony. Every incarcerated person who is transgender is prohibited under TFC 45.103 from *petitioning* for or being granted a legal name change order in Texas. No person in our information gathering

52 Inter-American Court of Human Rights, *Case of López-Álvarez v. Honduras* (February 1, 2006).

53 Report on the Human Rights of Persons Deprived of Liberty in the Americas, IACHR (2011), ¶ 628.

survey had successfully petitioned for a legal name change. The following sections detail the violations of the human rights of transgender incarcerated persons, rights they retain during and following incarceration. None of these violations of transgender incarcerated persons' rights are incidental to their deprivation of liberty, and so TFC 45.103 is in clear violation itself of the rights of persons deprived of liberty.

B. RIGHT TO A NAME

The right to a name is well established both explicitly and implicitly in international human rights law. At the United Nations, it is explicitly recognized by the ICCPR,⁵⁴ the Convention on the Rights of the Child (“CRC”),⁵⁵ the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (“Migrant Workers Convention”),⁵⁶ and the Convention on the Rights of Persons with Disabilities (“CRPD”).⁵⁷ Further, it is also recognized in regional human rights treaties like the American Convention on Human Rights (“ACHR”)⁵⁸ and the African Charter on the Rights and Welfare of the Child.⁵⁹

The right to a name is also connected to other human rights, including dignity, autonomy, and privacy. A person's name plays a crucial role in their identity. The IACtHR has held that “a name, as an attribute of personality, represents an expression of individuality and its ends are to affirm the identity of a person before society and in procedures before the State. Its purpose is to ensure that every individual has a unique and singular sign that distinguishes him or her from everyone else, by which he or she can be identified and recognized.”⁶⁰

Since the name of a person is so integrally connected to their identity, the right to a name includes the right to change one's name when their gender identity is changed from the one assigned to them at birth. The contours of the right to a name are still evolving, and the courts are interpreting this right in different contexts. Most recently, the IACtHR issued an advisory opinion requested by the Republic of Costa Rica. This Advisory Opinion held that “everyone should be able to choose their name freely and change their name as they wish.”⁶¹ In so far

54 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976)

55 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989)

56 2220 U.N.T.S. 93; 30 I.L.M. 1517 (1991)

57 A/RES/61/106, Annex I

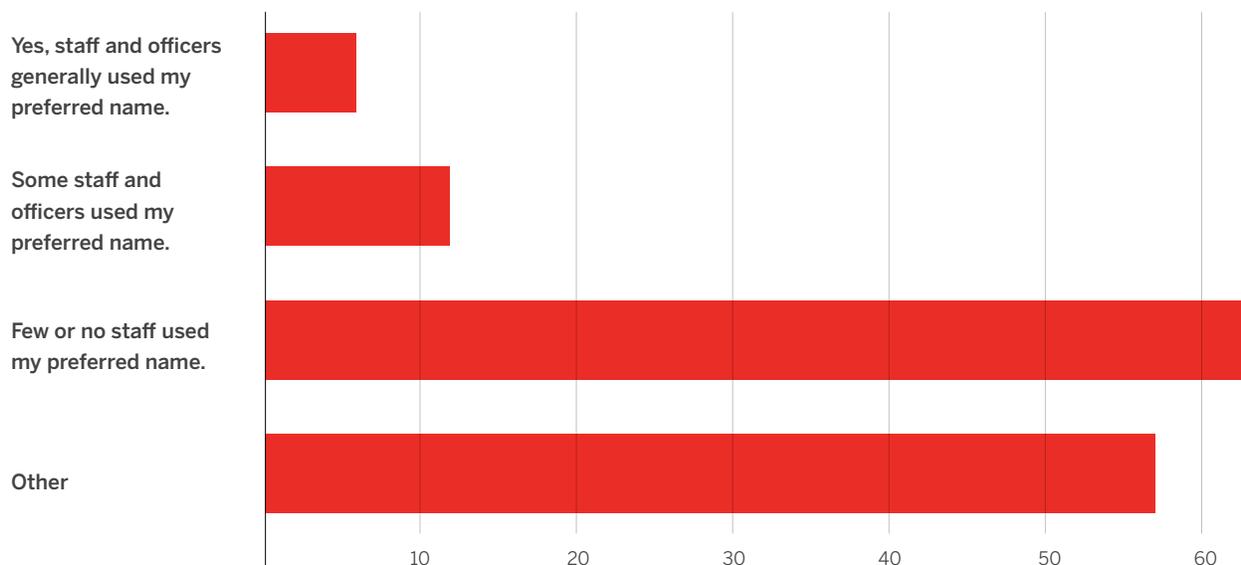
58 S. Treaty Doc. No. 95-21;1144 U.N.T.S.123; O.A.S.T.S. No. 36; 9 I.L.M. 99 (1970).

59 1520 U.N.T.S. 217; 21 I.L.M. 58 (1982).

60 IACHR Advisory Opinion OC-24/17, ¶ 106.

61 *Id.* at ¶ 111.

Did staff and officers where you are/were incarcerated use your preferred name upon request?



as TFC 45.103 prohibits transgender persons from changing their name to comport with their gender identity, it violates the right to a name.

The same IACtHR Advisory Opinion stated that the right of each person to define his or her sexual and gender identity should be protected and that the personal information in records and on identity documents should correspond to and coincide with their self-defined identity. The Court found these protections defined in the ACHR under the provisions that ensure the free development of the personality (Articles 7 and 11(2)), the right to privacy (Article 11(2)), the recognition of juridical personality (Article 3), and the right to a name (Article 18).⁶²

Article 18 of the ACHR provides that “every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary.”⁶³ It is pertinent to note that Article 27 of the Convention makes the right to a name an inalienable right, implying that it cannot be suspended under any circumstances. Article 18 provides that the law shall regulate the manner in which this right shall be ensured but does not explicitly provide the limits of this regulation.

A series of decisions by the IACtHR has upheld the right to a name and linked it with the right to identity, consistently holding that the right to a name “constitutes a basic and essential

⁶² *Id.* at ¶ 115.

⁶³ S. Treaty Doc. No. 95-21;1144 U.N.T.S.123; O.A.S.T.S. No. 36; 9 I.L.M. 99 (1970).

element of the identity of every person, without which an individual cannot be recognized by society or registered before the State.” This recognizes the importance of a person’s name for both their personality identity, but also for their identification by the State. In a dissenting opinion, the IACtHR has articulated the changing nature of a person’s identity. In the case of the *Serrano-Cruz Sisters v. El Salvador*, the IACtHR noted that “personal identity starts from the moment of conception and *its construction continues* throughout the life of the individual.”⁶⁴ The recognition that one’s identity changes over time may imply that one’s name may change along with it.

The IACtHR defines gender identity as “each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function through medical, surgical or other means) and other expressions of gender, including dress, speech, and mannerisms.”⁶⁵ Thus, transgender person’s gender identity is different from the one assigned at their birth. When this gender identity does not reflect the name assigned to them, transgender persons face discrimination, gender dysphoria, and other issues discussed in this report.

The IACtHR has held that the right to a change of name to reflect self-perceived gender identity is protected under Article 18 of the ACHR. The Court has held that “States must respect and ensure to everyone the possibility of registering and/or changing, rectifying or amending their name and the other essential components of their identity such as the image, or the reference to sex or gender *without interference by the public authorities or by third parties*.”⁶⁶ TFC 45.103 is an interference by a public authority that prohibits the change in a person’s identity to be reflected in their name. Because of this law, a transgender person convicted of a felony cannot change their name to reflect the change in their gender identity assigned at birth. As mentioned earlier, permissible restrictions on the right to a name are not explicitly mentioned in Article 18 of the ACHR. The right to a name is connected to the right to privacy, equality, and non-discrimination, as well as the right to identity and autonomy, which protects transgender persons’ rights not just to have a name but to change it to comport with their gender identity. The standards of permissible limitations to *these* rights are specifically enumerated in the ACHR. Permissible restrictions must be made “by law as may be necessary

64 *Serrano-Cruz Sisters v. El Salvador*, Monitoring Compliance with Judgment, Order of the Court, 2005 Rep. Inter-Am. Ct. H.R. “Resolves” ¶ 132 (March 01, 2005).

65 GENDER IDENTITY, AND EQUALITY AND NON-DISCRIMINATION OF SAME-SEX COUPLES, Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. ¶ 16 (Nov. 24, 2017).

66 *Id.* at ¶ 116.

in a democratic society, in the interest of national security, public safety, or public order, or to protect public health or morals or the rights and freedoms of others.”⁶⁷ Because the restrictions of TFC 45.103 constitute impermissible limitations of the right to privacy, equality, and non-discrimination, the same conclusion is likely to be made with respect to the right to a name.

Additionally, Rule 7 of the United Nations’ Mandela Rules requires that the State recognize the actual identity of the person deprived of liberty: “The following information shall be entered in the prisoner file management system upon admission of every prisoner: a) Precise information enabling determination of his or her unique identity, *respecting his or her self-perceived gender*.”⁶⁸ TFC 45.103 sanctions non-compliance with Rule 7 of the Mandela Rules by prohibiting affected transgender persons from changing their names. Similarly, the Bureau of Prisons states that, under PREA:

“An official committed name change while in BOP custody must be done consistent with [policy]. The name entered on the inmate’s Judgement [*sic*] and Commitment Order will remain the official committed name for all Bureau records ... However, any additional names or aliases can be entered into [the prison file management system] as appropriate.”⁶⁹

However, transgender incarcerated persons overwhelmingly indicated that staff and officers do not use their preferred or affirming name upon request. Only eight transgender incarcerated persons included officers or staff as people who respected their right to a name. Diana wrote that “I’ve been called every unkind name known to man by officers.” Dani wrote that “...no officers or staff are allowed to use a first name.” Others, like Charlotte and Cinda, agreed. Charlotte wrote that that staff and officers “usually use our last name if our names at all” while Cinda stated that “certain officers are understanding while others just move on to using only my last name.” Jemma wrote that “There were many of officers who treated me as I were and respected me as a person. Some would ask what do I prefer to be called...” Audrey noted as well that “There have been a couple of COs who, after being corrected, have respect for me. However, rather than use [my] preferred/true name, [they] avoid all situational use of names or pronouns, which is also offensive.”

At least eighteen transgender incarcerated persons reported that staff told them their

67 S. Treaty Doc. No. 95-21;1144 U.N.T.S.123; O.A.S.T.S. No. 36; 9 I.L.M. 99 (1970).

68 UN General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules): resolution / adopted by the General Assembly, 8 January 2016, A/RES/70/175*. <https://www.refworld.org/docid/5698a3a44.html> [accessed 10 July 2020]

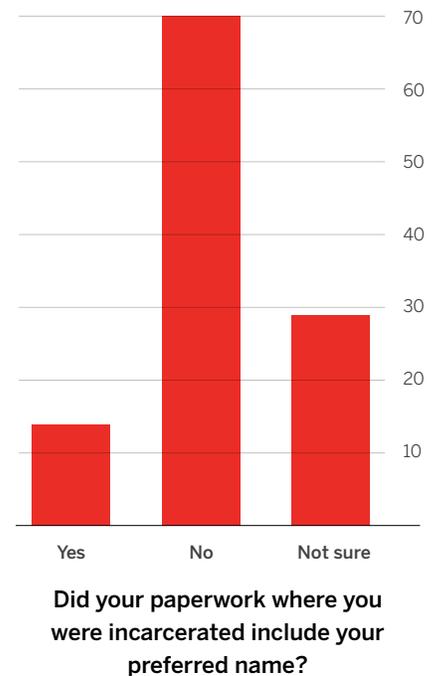
69 U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS, *TRANSFEMER OFFENDER MANUAL* (2018).

preferred name could not be used by staff or officers specifically because it was not on their TDCJ identification. Notably, legal names are not used only on identification documents and interpersonal interactions. They are also used in other contexts. For example, Bailey reported that she had “sent in [a] request to at least have an “AKA” of my preferred name added to my file. But they will not do so. It’s not legal they say. When we send out mail, we have to use our legal names or it won’t go out.”

Some transgender incarcerated persons wrote that the staff were not permitted, per their unit’s policy, to call transgender incarcerated persons by anything other than their last name. This is contrary official Federal Bureau of Prisons (“FBOP”) policy. Current FBOP policy states:

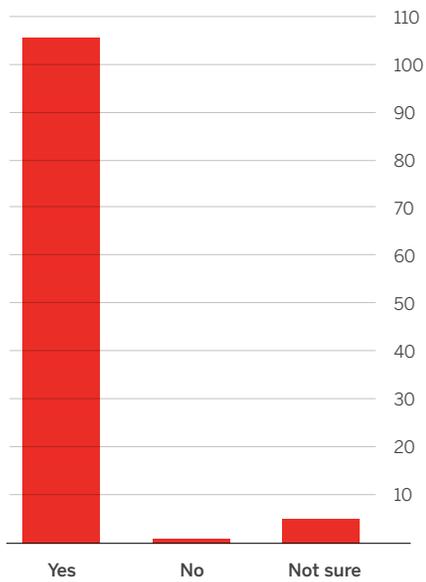
Transgender inmates often prefer to be called by pronouns of their identified gender identity. Staff may choose to use these gender-specific pronouns or salutations per the inmate’s request, and will not be disciplined for doing so.⁷⁰ Texas does not have any overarching state policy which addresses the recognition of incarcerated persons’ preferred or affirming names by staff or officers. While the FBOP permits staff to facilitate administrative name recognition to affirm people’s identities regardless of their legal name, some units prevent TDCJ staff from using anything other than the legal name of the transgender individual.⁷¹

A simple administrative decision to permit the addition of preferred name for persons who identify as transgender to identification documents would allow incarcerated transgender persons to change their name on their official documents and hopefully enjoy the positive impacts associated with the use of their preferred name and accompanying recognition of their gender identity. Once administrative directives permit the use of preferred names on identification documents for transgender people, the administration should follow up with a set of guidelines and requirements for officers and staff to, if using a person’s first name, use their preferred name. One way to ensure guidelines and requirements are followed would be to enfold a directive to add preferred names on TDCJ identification documents would be to add the directive in with PREA policies.



70 FEDERAL BUREAU OF PRISONS, TRANSGENDER OFFENDER MANUAL 9 (2017), <https://www.bop.gov/policy/progstat/5200.04.pdf>.

71 Several transgender incarcerated persons reported that officers refused to call them by anything other than their last name, legal name, or TDCJ number, citing TDCJ policy.



Have you experienced discriminatory treatment by staff or officers because of your gender identity?

Transgender incarcerated persons stated that there was ignorance, dislike, or hatred for transgender people within their unit by staff or officers. An administrative decision to permit the use of preferred names and request staff or officers to use preferred names if the individual is transgender may need to be accompanied by education on why the use of preferred names is important to the well-being of transgender people. The administrative decision should also be accompanied by clear guidelines on when to use a preferred name; transgender incarcerated persons’ answers as to why staff and officers refused to use their preferred names varied from it being determined by higher-ranking officers, prison policy, and personal preference. A uniform policy across all prisons would ensure uniform expectations for both staff, officers, and incarcerated people, and could reduce depression and suicide rates among transgender incarcerated persons.

Preferred names for transgender people are not the same as nicknames, and transgender incarcerated persons recognized the difference between the two. Tabitha, a transgender woman, wrote that she also has a nickname, used out of affection. However, her preferred name remains “Tabitha.” In the case of Tabitha, if the TDCJ and the FBOP permitted the use of preferred names for people who are transgender, her card would have her male-sounding legal name and her preferred name of Tabitha. Her nickname would not be on her ID.

The disproportional effect of TFC 45.103 is seen by the fact that thirty-one transgender incarcerated persons described how the situations that staff contributed to or subjected them to upset them mentally and emotionally. Rosa wrote that “a combination of actions/words that have happened throughout my incarceration . . . has led to me feeling violated and uncomfortable by staff.” One officer told Maria that “I don’t give a damn what you want to be called. You have no rights. What’s on your ID is what I’d call you. You’re not special or will you or anyone else receive special treatment.” Similarly, Fiona said that she was told by unit authorities that whatever “fag name” she “goes by is immaterial.” The only name that the TDCJ cared about, Fiona related, was her legal name. Natalie, when comparing the officers to her fellow incarcerated persons, said “The officers, on the other hand, make fun of me, call me rude and derogatory names, fag, punk, etc.” Conversely, transgender incarcerated persons overwhelming indicated that other incarcerated people generally used their preferred name. Twenty-one transgender incarcerated persons added more information about their

experience with other incarcerated people using their preferred name. The results were mixed. Danielle said that “though it’s common for some prisoners to use male pronouns and to harass transgenders, most here are polite and courteous.” Four other women agreed with her. Others wrote that incarcerated persons who did use gender-congruent names and pronouns were either close friends and acquaintances or a part of the LGBTQ+ community. Isabel said that in her experience, non-LGBTQ+ persons would rarely use her preferred name. However, in her more LGBTQ+ friendly unit, almost everyone called her by her preferred name.

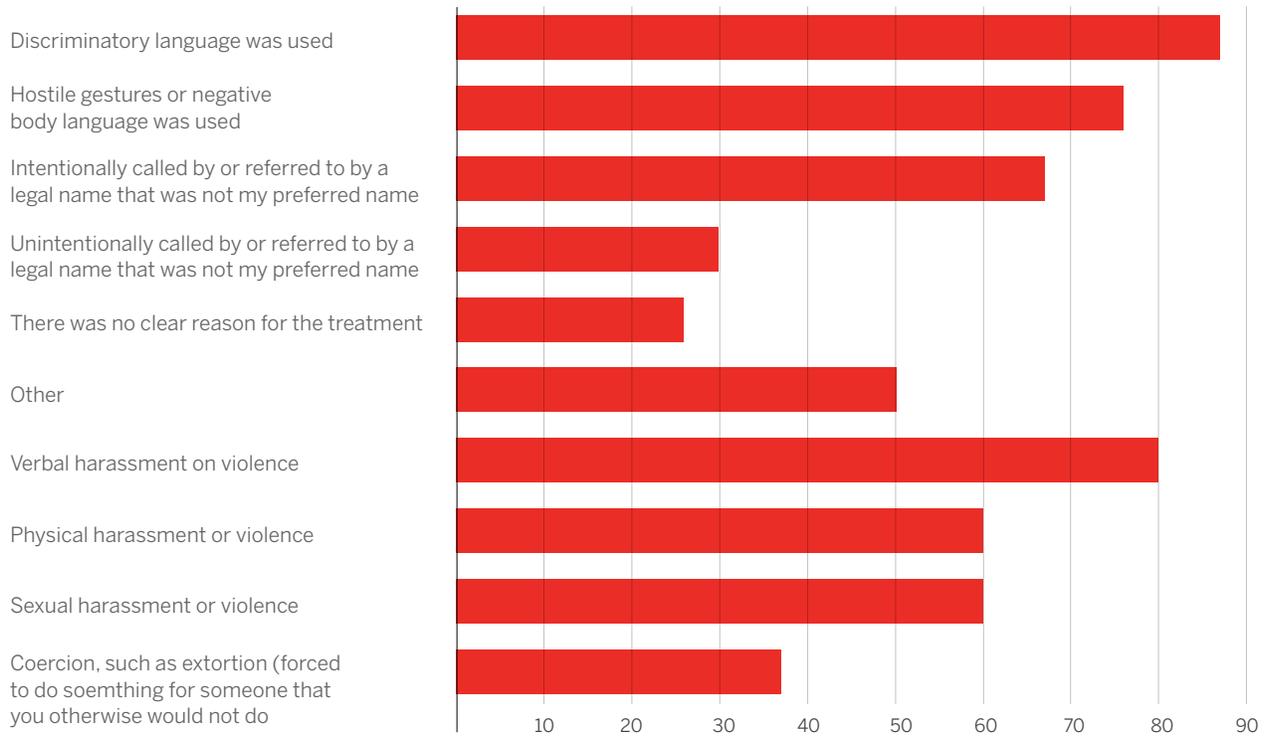
Transgender incarcerated persons also emphasized the positive effect of affirmation of their gender identity. “When people address me by my preferred name,” wrote Kathrine, “it decreases my anxiety and increases my confidence causing positive impact, which allows me to feel free to be who I am.” This was echoed by Nikki, who stated that she felt safer “when my [preferred] name is used [...] because [someone uses it] I feel they acknowledge the conflicts and difficulties clearly [around being transgender].”

Iris wrote that the people with whom she had positive relationships would “call me by MY name and use the proper pro-nouns. This would make me feel affirmed as who I am.” Yazmin noted again that other incarcerated people were more likely to use the respondent’s preferred name. “The fact that offenders call me [my preferred name] and recognize me as a transgender woman, eases the stress and depression I experience when staff members belittle/harass me because I am transgender.” Similarly, Natalie reported that “the majority of men inmates treat me as [Natalie], which makes me feel good at heart and in spirit. The officers, on the other hand, make fun of me, call me rude and derogatory names, fag, punk, etc.”

The use of a legal name and denial of gender identity often led to harmful effects for the respondent. Celeste elaborated on how being called her legal name caused emotional and psychological distress:

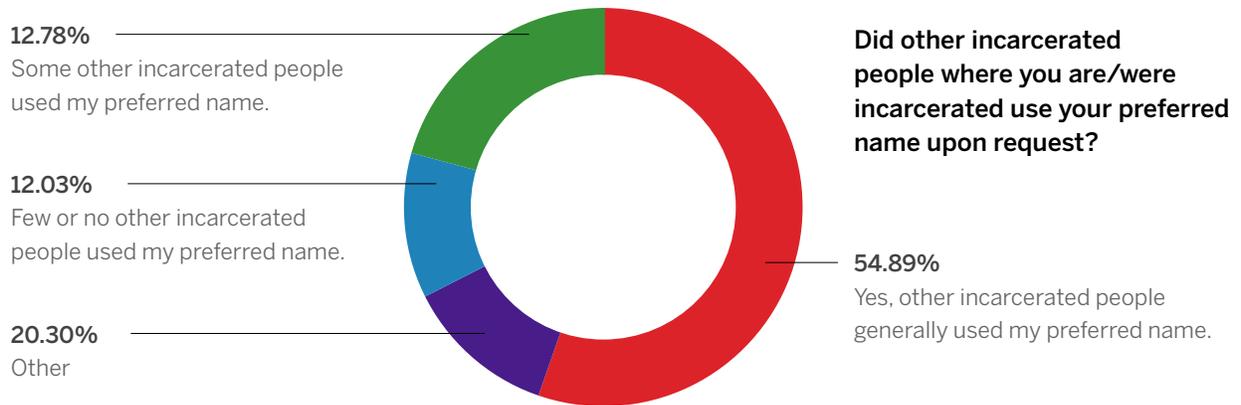
“I hate being called anything other than [Celeste] cause that’s who I am and forever will be. To be called another name than your own makes us feel like a[n] alien. Most times it’s hard to focus on what the person said or does [because] I see the disrespect dealt to me, and it touches a trigger from a lifetime of abuse. Transwomen in Texas Prisons go through hell, to add to the problem we’re made to dress, groom, and look like men while being given hormones and bras. It’s like having surgery and only getting half done. Our names are serious and should be able to connect to who we really are.”

What type of discrimination did you experience on the basis of your gender identity at the hands of prison officials?



This refusal to use a preferred name is not an isolated discriminatory incident. Tabitha wrote that other incarcerated people specifically use her legal name instead of her preferred name to upset and provoke her, demonstrating how the immediate denial of recognition of one’s gender identity through the use of a preferred name can lead to emotional distress. The denial of the use of the preferred name of an individual is a violation of the right to a name.

Devonna was convinced that the recognition of her preferred name would contribute to a better mental state because she would be treated as a person whose human rights were respected. “Being able to change my name immediately would stop/prevent most, if not all, the stigma of correctional staff calling me out my name and harassing me, and it would prevent or slow the depression and negative treatment/feelings I’ve had to experience the last 18 years in prison. Upon entering the free world (as I do in a male prison environment) will be living as a female, not male and will be marrying a man not a woman. The only person’s business it is that I was [born] as male is my husband’s.”



Anne Marie felt as though her right to a name would never be respected due to TFC 45.103; Anne Marie will never be eligible to petition to change her name. “How am I going to complete my transition if I am forced to use a male name for the rest of my life?” Anne Marie asked. She then explained the psychological and emotional distress from the denial of her human rights to expression and non-discrimination. “...Having personally spent most of the last two years on the ragged edge of suicide, I have a better understanding of the pain being forced to live a dual existence can cause, than I might otherwise wish to have. I have, in fact, been placed on suicide watch twice in the last year alone.” Anne Marie summed up her story by relating to how the denial of her human right to a name directly affected her mental health. “The refusal of Texas to allow us to legally change our names is a denial, and theft of, our identity and sense of self,” she wrote. “How can that not irreparably damage a person’s mental and emotional health and stability?”

Celine is in a similar situation to Anne Marie, and due to TFC 45.103, she may not be able to petition for a legal change of name for an extraordinary length of time. She pointed out how the denial of a right to a name relates to the right to freedom of expression. “When I submit any paperwork in my preferred name, it makes me feel alienated when these people force me to use my legal name. ... I am NOT comfortable being anything other than myself. ... It really is like I am lost, when someone calls me by my “legal name.” I didn’t choose that name, it was chosen for me at birth. I should have a choice in my name.”

By preventing transgender incarcerated persons from petitioning for a change of name, TFC 45.103 impedes them from participating in society as their preferred gender. The use of

their legal name by staff and other incarcerated persons causes emotional distress and gender dysphoria. This is a violation of these transgender incarcerated persons' right to a name, and Texas should therefore amend or repeal 45.103 to comply with human rights law.

C. RIGHT TO FREEDOM OF EXPRESSION

The right to freedom of expression is a fundamental human right recognized in many modern societies. The right to freedom of expression is included in international treaties such as the Universal Declaration of Human Rights, the ICCPR, and the American Convention on Human Rights (ACHR). The ICCPR, in particular, states that “everyone shall have the right to freedom of expression.”⁷² The Special Rapporteur for Freedom of Expression of Inter-American Commission on Human Rights clarified that the right of an individual to express themselves as their self-identified gender is a protected and relates to the dignity of an individual.⁷³ The IACtHR held that “the right to identity and, in particular, the manifestation of identity, is also protected by Article 13 [of the American Convention] ... from this standpoint, arbitrarily interfering in the expression of the different attributes of the identity may signify a violation of this right.”⁷⁴

TFC 45.103 prohibits transgender persons convicted of a felony from expressing their gender identity by prohibiting a change of name. Under Article 19 of the ICCPR and Article 13 of the ACHR, these restrictions are justified if they are: i) provided by law; ii) must be necessary to respect the right or reputation of others; or iii) for the protection of national security or of public order, or of public health or morals.

In 1994, the Fifth Circuit Court of Appeals of the United States upheld the constitutionality of the TFC 45.103 when it was challenged by a petitioner whose petition for a legal name change to reflect his conversion to Islam was prevented by this law. In the decision, the Fifth Circuit claimed TFC 45.103 was enacted for “security reasons.”⁷⁵ The court declared that the provision is “intended to protect the ability to identify persons sought on warrant and detainer, and to preserve the criminal history of felons,” and therefore has a “logical connection to legitimate

72 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20; 6 I.L.M. 368 (1967)

73 *Id.* at 37; see also IACHR, Annual Report 2009. Report of the Special Rapporteur for Freedom of Expression, December 30, 2009, Chapter II (Inter-American Legal Framework on the Right to Freedom of Expression), ¶¶ 54-57.

74 GENDER IDENTITY, AND EQUALITY AND NON-DISCRIMINATION OF SAME-SEX COUPLES, Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. ¶ 96 (Nov. 24, 2017).

75 *Matthews v. Morales*, 23 F.3d 118, 131 (5th Cir. 1994).

state penological concerns.”⁷⁶ Although the Fifth Circuit does not reference legislative history, they are likely basing this on the Bill Analysis for CSHB837--the House Companion to SB 334:

“In many cases, convicted felons have simply changed their names through court proceedings, which have kept the police from finding out their previous criminal history. CSHB 837 would keep felons from abusing the system for name changes and assign a correct criminal history to the people who have changed their names.”⁷⁷



Texas Capitol in Austin, Texas

The office of John Whitmire, a Texas Senator who wrote SB 334, has confirmed with the Human Rights Clinic that this characterization of the purpose of the name-change restrictions by the Fifth Circuit is correct. The justification for TFC 45.103 given by courts in Texas suggests that the purpose of the section is for security and public order. However, even if these were legitimate purposes, this can be achieved by less restrictive practices, and the infringement on the fundamental right to freedom of gender expression is unwarranted.

The IACtHR indicates that despite enjoying protection by various provisions of the American Convention, the right to change one’s name is indeed limited with regards to how it may affect the rights of others. “If the State rejects the name change request – *unless it does so because this could affect the rights of third parties* – it would be committing a discriminatory act that violates the rights to a name, personal integrity, protection against arbitrary and abusive interference in private life, and equal protection of the law.”⁷⁸ The IACtHR clarifies that any law that restricts the right to change a name “must be necessary for the purposes of the Convention and conform to the principle of proportionality.”⁷⁹ TFC 45.103, on the other hand, makes a distinction based on the status of whether a person has been convicted of a felony and imposes additional,

76 *Id.*

77 House Research Organization of the Texas House of Representatives, Bill Analysis, 1991-HB837. 108-110, 72(R), at 109 (1991).

78 GENDER IDENTITY, AND EQUALITY AND NON-DISCRIMINATION OF SAME-SEX COUPLES, Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. ¶ 43 (Nov. 24, 2017).

79 GENDER IDENTITY, AND EQUALITY AND NON-DISCRIMINATION OF SAME-SEX COUPLES, Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. ¶ 36 (Nov. 24, 2017).

severe restrictions on those with such status. This is a higher threshold than that set forth by the IACtHR in an Advisory Opinion. The Advisory Opinion examined name-change laws that were less restrictive and disproportional to the value of the relevant state interests than the restrictions and disproportionality of TFC 45.103. The opinion found those name-change laws violated human rights, including the right to freedom of expression.

The ICCPR Article 19(3) allows for certain restrictions by law that are necessary for public order,⁸⁰ but with today's technology, there is little security risk to the public if a transgender individual changes their legal name. In fact, more security is provided because the criminal records of the individual will link to the name the individual uses in daily life. For incarcerated persons who are in the custody of the state and assigned numbers for security purposes, there is absolutely no risk to public safety that would permit the exception to apply. As discussed earlier, TPI has been submitting complaints for some time now using only affirming names, legal last names, and TDCJ numbers. They have submitted 140 such complaints to various offices within TDCJ and there has yet to be a single identification problem. In the case of TFC 45.103, transgender persons in detention have been deprived of liberty and are under strong control of the prison authorities. In these circumstances, any restriction of their other rights must be absolutely necessary to achieve national security or public order. As is clear by TDCJ's ability to identify individuals without using their dead name,⁸¹ restricting incarcerated person's ability to express their gender by changing their name is not a necessary restriction to achieve these objectives. Taking into account all of these human rights documents, the TFC 45.103 imposes impermissible restrictions on several basic human rights of transgender persons convicted of a felony.

Yet, transgender incarcerated persons continually face repeated violations of their right to freedom of expression. Officers in the TDCJ have repeatedly refused to recognize the gender identity of transgender incarcerated individuals.

As Arielle described her experience, "We [transgender women who are incarcerated] are talked down to. Most officers and ranking officers say this is not a women prison and you [transgender women in male prison facilities] don't get special treatment cause you want to be a 'fake woman.'"

⁸⁰ *Id.*

⁸¹ The phrase "dead name" refers to the name that a transgender person was given at birth and no longer uses upon transitioning.

Transgender incarcerated persons like Anne Marie described situations where she experienced “frequent use of male pronouns despite the fact I have repeatedly made it known that I identify as female.” Anne Marie was also “[c]onstantly being told that I don’t ‘look female’ when [staff] refuse to give me access to things I need to do so.” Tabitha reported being told by an officer that “until you get your dick cut off you still a man” and “this is not a women[’s] prison. You don’t get special treatment cause you want to be a ‘fake woman.’” Yet another respondent, Briana, reported a similar situation, that “I’ve had male officers tell me that I’m not a woman . . . because I’m in a men’s prison.”

When transgender incarcerated persons asked staff to use their preferred name as a part of their gender identity expression, transgender incarcerated persons report stories such as Katherine’s.

Katherine reported that “I have been cussed out from asking them to use [Katherine] or refused to use my female identity. [They say] ‘you’re still a male!’ . . . I get very pissed and upset,” she wrote. She has filed grievances on the matter, which were denied.

In addition to having their identities denied by members of prison staff through the denial of use of their preferred name, some transgender incarcerated persons described situations in which officials denied them more fundamental manifestations to the right to freedom of expression.

Natalie said she is “forced to live outwardly as a male in TDCJ, forced to wear men’s clothing, cannot wear any type of makeup, etc. No social transitioning is allowed. TDCJ only states we are males in a male facility and no make-up etc. is allowed.” Cheyanne highlighted why it is important to for her to wear women’s clothing and how the denial of gender identity through freedom of expression can lead to humiliation for the transgender person. “Officers don’t call me by my transgender name,” said Cheyanne. “Then I tell them what my name is. I am a girl – I do the shots, hormone shots, and hormone pills. I do wear a bra . . . and I [have] been on hormones for a long while now and my breast[s] are and do show.” Helene succinctly pointed out that “The stress and continual costs of medical care from my genital mutilation as symptoms of gender dysphoria would be better [spent] as would my health by allowing these non-invasive treatments of transpeople.”

As Katherine noted, the treatment she and other transgender incarcerated persons receive because they desire to have freedom of expression “has not one thing to do with anything criminal with me.” Helene wrote that she experiences distress every time she has to use her non-gender congruent legal name instead of her preferred name.

The denial of the freedom of expression by denial of a legal name change is a human rights violation, and that violation is harmful to affected individuals. The treatment these persons face in prison, in addition to the refusal of the legal system to recognize their affirming names, is not consequential to their incarceration or in furtherance of state interest in protecting national security or public order. TFC 45.103 sanctions the denial of gender expression of transgender persons and violates their right to freedom of expression.

D. RIGHT TO EQUALITY AND NON-DISCRIMINATION

TFC 45.103 further violates the human right to equality and non-discrimination of transgender individuals. The right to equality and non-discrimination is an established human right protected by several international human rights instruments, including the Universal Declaration of Human Rights,⁸² the UN Charter,⁸³ the ICCPR,⁸⁴ the American Declaration,⁸⁵ and repeatedly noted by designated human rights authorities such as the United Nations’ Special Rapporteur

82 Universal Declaration on Human Rights—Art. (2)1: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

83 Art. 1(3): “The Purposes of the United Nations are: ...To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”

84 Art. 2(1): “Each State Party to the present Covenant undertakes to respect and to ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;” Art. 3: The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant;” Art. 26: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article II of the American Declaration of the Rights and Duties of Man: “All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.”

85 Art. III (“All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.”).

on Torture.⁸⁶ TFC 45.103 violates the human right to equality and non-discrimination by disproportionately exposing transgender incarcerated persons who seek are denied of name to demeaning and harmful conduct. Several human rights bodies have recognized that forcing transgender persons to present identification documents incongruous with their gender significantly interferes with their ability to access and exercise several basic social services and rights. In a 2011 report to the UN, the High Commissioner stated, “In many countries, transgender persons are unable to obtain legal recognition of their preferred gender, including a change in recorded sex and first name on State-issued identity documents. As a result, they encounter many practical difficulties, including when applying for employment, housing, bank credit or State benefits, or when traveling abroad.”⁸⁷ The European Commission has recognized that “[i]n daily life, incongruence between one’s gender presentation and gender marker on identification documents causes several problems including inability to marry or enter into a registered partnership with one’s partner, difficulties in accessing or staying in employment, and difficulties in accessing goods and services e.g. difficulty in proving one’s identity when picking up a parcel at the post office, purchasing insurance or boarding an aeroplane.”

The IACtHR also addresses this issue by holding that because “the difference between the sexual gender identity assumed by a person and the one that appears on the ID... can result in rejection and discrimination by others... State recognition of gender identity is critical to ensuring that transgender persons can fully enjoy all human rights, including protection from violence, torture, ill-treatment, the right to health, education, employment, housing, access to social security, and freedom of expression and association.”⁸⁸ Consequently, the IACtHR has demanded that States must ensure that transgender persons “can exercise their rights and contract obligations based on [the gender they identify as], without being obliged to purport another identity that does not represent their individuality, especially so when this involves continuous exposure to the social questioning of that same identity, thus affecting the exercise and enjoyment of the rights recognized by domestic and international law.”⁸⁹

86 “...members of sexual minorities are disproportionately subjected to torture and other forms of ill-treatment because they fail to conform to socially constructed gender expectations. Indeed, discrimination on the grounds of sexual orientation or gender identity may often contribute to the process of dehumanization of the victim, which is often a necessary condition for torture and ill-treatment to take place” UNITED NATIONS GENERAL ASSEMBLY, Question of torture and other cruel, inhuman or degrading treatment or punishment, para. 19 A/56/156 (2001).

87 Discriminatory laws and practices and acts of violence against persons based on their sexual orientation and gender identity, ¶ 71. (2011). https://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/A.HRC.19.41_English.pdf

88 GENDER IDENTITY, AND EQUALITY AND NON-DISCRIMINATION OF SAME-SEX COUPLES, Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. ¶ 101 (Nov. 24, 2017).

89 GENDER IDENTITY, AND EQUALITY AND NON-DISCRIMINATION OF SAME-SEX COUPLES, Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. ¶ 113,115 (Nov. 24, 2017).

TFC 45.103 violates the right to equality and non-discrimination by preventing affected transgender persons from participating in society as their preferred gender identity. TFC 45.103 also permits continuous exposure to social questioning of that same identity by sanctioning the repeated use of a legal name instead of a preferred name that is congruent with the transgender individual's gender identity. The effect of TFC 45.103 violates the standards set forth by the IACtHR on the right to equality and non-discrimination.

In re Barnes was the first court case challenging the constitutionality of TFC 45.103. In that case, the plaintiff was seeking to change his legal name to reflect his religious beliefs following his recent conversion to Islam. However, because he was incarcerated and convicted of a felony, he was unable to do so.⁹⁰ In this case, the Fifth Circuit Court of Appeals ruled that TFC 45.103 was constitutional, and failed to recognize the plaintiff's First Amendment right to religion.⁹¹ This ruling continues to wrongfully support Texas's refusal to recognize the affected individual's right to change their name.

Transgender incarcerated persons noted that even when requested, TDCJ officers would continue the discriminatory use of a legal name that is not congruent with the individual's gender identity and presentation. Despite TDCJ stating that all staff understand their responsibilities to be respectful and use proper terms, TDCJ is not following their own internal policies⁹² by failing to facilitate the recognition of a preferred name of an individual. The TDCJ recognizes in its required PREA training that transgender incarcerated persons may be "at greater risk for abuse" and

"the LGBTI population often encounters biases and negativity when they ... are honest about their self-identification ... or when present themselves in a gender non-conforming manner. The TDCJ Code of Conduct requires staff to treat all offenders with professionalism. ... **Staff will utilize proper terms and respectful language and never use demeaning language or common slurs.**"⁹³ [emphasis added]

Even when TDCJ officers and staff were not using preferred first names, transgender

90 *Id.*

91 *Id.*

92 The TDCJ already, on paper, is against discrimination. Its official policies state that discrimination or harassment is a policy violation. "Discrimination or harassment based on race, color, religion, sex (gender), including sexual harassment, national origin, age (40 or above), disability, or genetic information is prohibited. ...Mistreatment of Offenders - Violation Level 2: Mistreatment usually takes the form of physical abuse, but may also include such actions as threats or unauthorized denial of privileges or entitlements." TEXAS DEPARTMENT OF CRIMINAL JUSTICE: GENERAL RULES OF CONDUCT AND DISCIPLINARY ACTION GUIDELINES FOR EMPLOYEES", P-22 (11/2019).

93 PREA STAFF TRAINING VIDEO, https://www.youtube.com/watch?v=sG2p4M2V6_c (last visited June 18, 2020).

incarcerated persons reported that they used pronouns that were not congruent with the individual's gender identity. Further, as a public authority, the TDCJ's obligation to protect the right to equality and non-discrimination includes ensuring that transgender incarcerated persons have equal access to seats, tables, and common recreational areas. Staff must be provided comprehensive human rights training to ensure that the human rights of transgender incarcerated people are upheld.

What is PREA?

In September 2003, the Prison Rape Elimination Act (PREA) was passed unanimously by both Houses of Congress and signed into law by President George W. Bush. The purpose of the act was to provide for the analysis of the incidence and effects of prison rape in federal, state, and local institutions and provide information, resources, recommendations, and funding to protect individuals from prison rape. The act created the National Prison Rape Elimination Commission and charged it with developing draft standards for the elimination of prison rape. The draft standards were submitted to the Department of Justice for review and passage as a final rule. The final rule, 28 C.F.R. Part §115 became effective in August 2012.

This image comes from the TDCJ website and describes the Prison Rape Elimination Act.

Even if the PREA policy above were followed and the staff respected the human rights of persons affected by TFC 45.103, TFC 45.103 is still unlawful in respect to the clear violation of the human rights of transgender persons, resulting in the continuous social questioning of an individual's gender identity. The Human Rights Committee clarified in *Broeks v. The Netherlands* that Article 26 of the International Covenant on Civil and Political Rights ("ICCPR"), a treaty to which the United States is party, "prohibits discrimination in law or in practice *in any field regulated and protected by public authorities.*"⁹⁴

Krista said that "[Officers and staff] refuse to call me as "Ms." or even my preferred name," while Gabrielle said that officer and staff told her that "[it's] against TDCJ policy for [officers and staff] to call me by a name that is not on my birth certificate." When Katelyn specifically requested to be called by her preferred name, she was refused. "The only way to stop this discrimination," she wrote, "is for me to receive a legal name change."

94 CCPR/C/29/D/172/1984 (9 April 1987) ¶ 12.3 (emphasis added).

Celeste wrote that officers and staff do not “at all” use her preferred name. It’s “always male pronouns and given birth name, Mr. [last name], or Offender or Inmate.” Only six out of the 132 transgender incarcerated persons who wrote to the Clinic said that staff and officers generally used their preferred name.

TFC 45.103 permits the continued discriminatory treatment against the right to equality and non-discrimination for transgender persons both inside and outside of incarceration institutions.

Transgender incarcerated persons explained that verbal harassment or violence, intentional use of a legal name, and discriminatory language were the most common types of discrimination experienced.

Almost all persons surveyed identified incidents of discrimination by staff, officers, and other incarcerated people due to their gender identity. Without a legal name change, these transgender incarcerated persons will continue to be subjected to the demeaning and discriminatory use of a legal name that is not congruent with their gender identity.

The Human Rights Committee in *G v. Australia* unequivocally stated that “the prohibition against discrimination under article 26 [of the ICCPR] encompasses discrimination on the basis of marital status and gender identity, including transgender status.”⁹⁵ Therefore, under the ICCPR, the TDCJ may not discriminate against its transgender incarcerated people. The TDCJ further recognizes its own responsibility to prevent discrimination in its Code of Conduct, where it states that “discrimination or harassment based on race, color, religion, sex (gender), including sexual harassment, national origin, age (40 or above), disability, or genetic information is prohibited.”⁹⁶ This includes the use of words or actions that humiliate or show hostility or animosity towards an individual.⁹⁷

As a public authority, TDCJ must honor the human right of equality and non-discrimination by ensuring that transgender incarcerated people do not experience discriminatory treatment and continuous social questioning of gender identity at the hands of its officers and staff. Despite the requirements from international human rights treaties for humane treatment and the TDCJ’s Code of Conduct that staff must use non-discriminatory language,

95 *G v. Australia*, Human Rights Committee, No. 2172/2012, CCPR/C/131/D/2172/2012 (2017), para 7.12.

96 TEXAS DEPARTMENT OF CRIMINAL JUSTICE: GENERAL RULES OF CONDUCT AND DISCIPLINARY ACTION GUIDELINES FOR EMPLOYEES”, P-22 (11/2019).

97 Excerpt from PD-22, “General Rules of Conduct and Disciplinary Action Guidelines for Employees” (rev. 16) November 1, 2019 Prepared by Human Resources Support Operations.

transgender incarcerated persons were called numerous abusive names and slurs by staff, including “faggot” and “queerbait.” Eight people stated that officers called them “derogatory names” or “unkind names,” while others like Katya specified how officers had called her derogatory and humiliating names based on her gender identity such as “nasty bitch” and “queer.”

Transgender incarcerated persons clearly related the discriminatory treatment to their gender identity. The derogatory names are a large contributor of this discriminatory treatment towards transgender persons. Following this pattern of verbal harassment and abuse, the majority of transgender incarcerated persons informed the organizations that staff would intentionally use their legal name as a way to cause psychological harm and distress.⁹⁸ This is not only against international human rights treaties but also the Code of Conduct set forth by TDCJ in its PREA compliance training videos, which each employee must certify that they have watched for training.⁹⁹ Because TFC 45.103 prevents transgender incarcerated persons from changing their legal name, transgender incarcerated persons must suffer the use of their legal name as a part of an established pattern of discrimination and continuous social questioning of gender identity.

TDCJ similarly must prevent discrimination on the basis of gender identity caused by other incarcerated people. In addition to discrimination from staff and officers, transgender incarcerated persons also face discrimination from other incarcerated people.

When asked, “Have you experienced discriminatory treatment by other incarcerated people because of your gender identity,” 74 out of 92 transgender incarcerated persons answered yes, 15 answered no, and three answered not sure. Of the 74 transgender incarcerated persons who experienced discrimination, 53 stated they were intentionally called by or referred to by a legal name that was not their preferred name. The TDCJ Code of Conduct also requires its staff to report any “alleged acts of discrimination or harassment against persons of a protected class, discourteous conduct of a sexual nature, or retaliation.” This includes acts of discrimination involving intentional use of a legal name, the very same act of discrimination which is protected by TFC 45.103 and perpetrated by the TDCJ.

Transgender incarcerated persons reported that discriminatory language, verbal

98 When asked “Have you experienced discriminatory treatment by staff or officers because of your gender identity,” 109 out of 117 transgender incarcerated persons answered yes, one answered no, and three answered not sure. Of the 109 transgender incarcerated persons who experienced discrimination, 84 stated they were intentionally called by or referred to by a legal name that was not their preferred name.

99 TEXAS DEPARTMENT OF CRIMINAL JUSTICE STANDARD OR SUPPLEMENTAL SAFE PRISONS/PREA TRAINING CONTRACT EMPLOYEE OR INTERN ACKNOWLEDGMENT FORM, PERS 631 (06/17).

harassment or violence, intentional use of a legal name, and physical harassment or violence were the most common types of discrimination experienced. The 60 further written responses on the question of discriminatory incidents involving other incarcerated people would be summarized well by Tasha, who stated that “Other inmates who do not like transgender females call us names, refuse to associate with us, and are often violent towards us.” In addition to physical and sexual assaults, transgender incarcerated persons wrote that other incarcerated people would deny LGBTQ+ people seats at benches or tables in common areas or access to recreation rooms, all of which are areas under the direct control and supervision of TDCJ staff and officers.

Sarah reasoned that “because others who do not understand [transgender people] find that they can’t handle who I am, they call me names or threaten me with harm.” However, Sarah and others like her should not experience harassment and assault to the degree which they do because of their gender identity while in the custody of TDCJ.

In addition to discrimination within incarceration institutions, people whose legal name is not congruent with their gender identity and presentation experience discrimination outside of incarceration institutions.

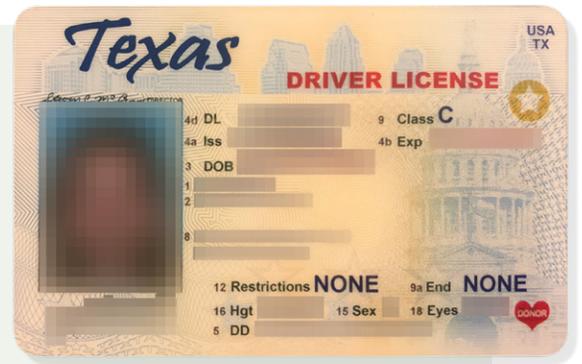
Shawna, who will not be eligible for a name change after she is discharged from incarceration, wrote that:

“Using my legal name will be harder to explain instead of my preferred name. And not to mention finding housing and getting a job. Not having my preferred name on file and changing my legal name worries me everyday because I will most likely end up either homeless or back in prison. Something as simple as a name change can give me peace of mind.”

Shawna was not the only respondent to point out the effects of TFC 45.103 in life beyond incarceration, and their concerns are not unfounded. Being transgender and not being able to pass for cisgender or having congruent legal documents can lead to measurable discrimination. One pilot study found that “[h]ousing providers told transgender testers about fewer units than they told cisgender homeseekers, and they were less likely to tell transgender testers who disclosed their gender status about available units.”¹⁰⁰ Primary data from the 2015 US Transgender Survey found that “32% of transgender incarcerated

100 URBAN INSTITUTE: METROPOLITAN HOUSING AND COMMUNITIES POLICY CENTER, A Paired-Testing Pilot Study of Housing Discrimination against Same-Sex Couples and Transgender Individuals, (June 2017) at 66.

persons who had presented an ID that did not match their gender presentation had a negative experience, including verbal harassment (25%), denial of service (16%), and assault (2%)” when trying to access health care, employment, banking, and other types of social institutions.¹⁰¹



Research supports the conclusion that having non-concordant identification documents with gender presentation results in discrimination.¹⁰²

It is clear that TFC 45.103 disproportionately harms incarcerated transgender persons not only by subjecting them to discrimination while they are incarcerated, but also subjecting them to discrimination beyond the walls of a prison cell. This is a violation of the right to equity and non-discrimination, and Texas must amend, repeal, or at least mitigate the effects of TFC 45.103 to be in compliance with international human rights law.

E. RIGHT TO HUMANE TREATMENT

The right to be free from cruel, inhumane, or degrading treatment is protected by Article 5 of the Universal Declaration of Human Rights,¹⁰³ Articles 7 and 10 of the ICCPR,¹⁰⁴ Article 3 of the European Convention,¹⁰⁵ and Article 5 of the American Convention.¹⁰⁶ The right to humane treatment is fundamentally rooted in the principle of human dignity that is the basis for all human rights and is guaranteed to persons deprived of liberty. The State’s power is limited to actions that do not deny persons basic human dignity. The IACtHR explains:

101 NATIONAL CENTER FOR TRANSGENDER EQUALITY, 2015 U.S. TRANSGENDER SURVEY, <http://www.ustranssurvey.org/>

102 See also Lydia A. Fien et al, *Transitioning Transgender: Investigating the Important Aspects of the Transition: A Brief Report*, INTERNATIONAL JOURNAL OF SEXUAL HEALTH, 2017, Vol. 29, No. 1, 80-88; Jaime M. Grant et al, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, NATIONAL CENTER FOR TRANSGENDER EQUALITY AND NATIONAL GAY AND LESBIAN TASK FORCE, (2011).

103 UDHR Art. 5: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

104 ICCPR Art. 7: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment;” Art. 10(1): “ All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

105 ECHR Art. 3: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

106 ACHR Art. 5(1)-(2): “Every person has the right to have his physical, mental, and moral integrity respected. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.”

“The recognition of the dignity inherent in every person independent of his or her personal conditions or legal situation is the basis of the development and international protection of human rights. Accordingly, the exercise of public power has certain limits that stem from the fact that human rights are attributes inherent to human dignity. The protection of human rights is based on the affirmation of the existence of certain inviolable attributes of the human person that cannot be legally impaired or diminished by the exercise of public authority.”¹⁰⁷

Article 16 of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (“CAT”) states that “[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture¹⁰⁸...”¹⁰⁹ Both the UN Special Rapporteur on Torture and Other Cruel, Inhuman, and Degrading Treatment (“Special Rapporteur”) and the UN Human Rights Committee have established that this extends to the infliction of mental, as well as physical harm. In particular, the Special Rapporteur has stated:

“States fail in their duty to prevent torture and ill-treatment whenever their laws, policies or practices perpetuate harmful gender stereotypes in a manner that enables or authorizes, explicitly or implicitly, prohibited acts to be performed with impunity. States are complicit in violence against women and lesbian, gay, bisexual and transgender persons whenever they create and implement discriminatory laws that trap them in abusive circumstances.”¹¹⁰

The standard for what treatment constitutes “cruel, inhumane, or degrading” treatment is clear.¹¹¹ The Special Rapporteur has not defined what the threshold for cruel, inhuman, or degrading treatment is, but has declared that such treatment inflicts physical or mental suffering that falls short of “severe” suffering that would constitute “torture.”¹¹² Thus, both

107 Report on the Human Rights of Persons Deprived of Liberty in the Americas, IACHR (2011), ¶ 66.

108 CAT Art. 1: “For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person ...”

109 CAT Art. 16.

110 Juan E. Mendez, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC.31/57 (2016), ¶ 10.

111 Moeckli (2010) p. 215.

112 Report of the Special Rapporteur on the question of torture, Manfred Nowak, CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS OF TORTURE AND DETENTION, E/CN.4/2006 (2005) ¶ 35: “Torture is defined in [The Convention Against Torture], article 1, as acts which consist of the intentional infliction of severe pain or suffering (physical or mental), involving a public official (directly or at the instigation or consent or with the acquiescence of a public official, or another person acting in an official capacity), and for a specific purpose (i.e. extracting a confession, obtaining information, punishment, intimidation, discrimination). Acts which fall short of this definition, particularly acts without the elements of intent or acts not carried out for the specific purposes outlined, may comprise CIDT under article 16 of the Convention. Acts aimed at humiliating the victim constitute degrading treatment or punishment even where severe pain has not been inflicted.”

physical and mental suffering can constitute a violation of the right to be protected from cruel, inhumane, or degrading treatment. This is a position also held by the UN Human Rights Committee: “The aim of the provisions of article 7 of the ICCPR is to protect both the dignity and the physical and mental integrity of the individual.”¹¹³

In addition to being against numerous international human rights treaties, the use of a transgender incarcerated person’s legal name as a tool for verbal abuse is against the Detainee Treatment Act of 2005 as described by US representatives to the Committee Against Torture. Based on the act, the verbal abuse constitutes degrading treatment violating the right to equality and non-discrimination.¹¹⁴ This facet of discrimination demonstrates the ostracization of transgender incarcerated people and cultivates a culture where staff, officers, and other incarcerated people can discriminate against transgender incarcerated individuals. A legal name change is a vital part of a transgender person’s process to align gender expression with gender identity.¹¹⁵ By denying a legal change of name, TFC 45.103 effectively permits degrading treatment through discriminatory use of a legal name and continuous social questioning of gender identity.

According to the United States in its response to the United Nations Committee Against Torture, “under the Detainee Treatment Act of 2005...¹¹⁶ every U.S. official, wherever he or she may be, is ... prohibited from engaging in acts that constitute cruel, inhuman or degrading treatment or punishment. This prohibition is enforced at all levels of the U.S. government.”¹¹⁷ The enforcement of TFC 45.103 is contrary to this declaration, as the effects of enforcement result in cruel, inhumane, and degrading punishment under human rights law.

Similar to the prohibition on cruel, inhuman, or degrading treatment or punishment, the United States Constitution’s Eighth Amendment prohibits “cruel and unusual” punishment.¹¹⁸ In *Edmo v. Corizon, Inc.*, Andree Edmo, a transgender incarcerated person, sued the Idaho Department of Corrections (“IDC”), alleging that the IDC’s failure to provide her with gender confirmation surgery violated her Eighth Amendment protection from cruel and unusual punishment. The Ninth Circuit

113 UN HRC General Comment No. 20.

114 COMMITTEE AGAINST TORTURE, Consideration of reports submitted by States parties under article 19 of the Convention pursuant to the optional reporting procedure (United States of America), para. 13, CAT/C/USA/3-5 (2013).

115 In an investigation into which aspects of a transgender person’s transition, or the process of aligning gender expression with gender identity, are considered to be the most important elements of the transition, legal name change was found one of the top four elements. Lydia A. Fien et al, *Transitioning Transgender: Investigating the Important Aspects of the Transition: A Brief Report*, INTERNATIONAL JOURNAL OF SEXUAL HEALTH, 2017, Vol. 29, No. 1, at 82.

116 (DTA) Pub. L. No.109-163, 42 U.S.C. 2000dd (“No individual in the custody or under the physical control of the U.S. Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment”).

117 COMMITTEE AGAINST TORTURE, Consideration of reports submitted by States parties under article 19 of the Convention pursuant to the optional reporting procedure (United States of America), para. 13, CAT/C/USA/3-5 (2013).

118 Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. Const. amend. VIII.

Court held that gender dysphoria is a serious medical need causing clinically significant distress that is sufficient to “trigger the State’s obligations under the Eighth Amendment.

... As Edmo testified, her gender dysphoria causes her to feel “depressed,” “disgusting,” “tormented,” and “hopeless,” and it has caused past efforts and active thoughts of self-castration.¹¹⁹

The Ninth Circuit’s ruling was consistent with established holdings in the Fourth and Seventh Circuit Courts that “denying surgical treatment for gender dysphoria can pose a cognizable Eighth Amendment claim” when the denial of surgical treatment affects the clinically significant distress caused from gender dysphoria.

The Ninth Circuit Court, Seventh Circuit Court, and Fourth Circuit Courts’ establishment of gender dysphoria as a sufficient medical condition to trigger an Eighth Amendment claim are contrary holdings to that of the Fifth Circuit, which the Ninth Circuit labels an “outlier.”¹²⁰ The Fifth Circuit Court, in an opinion using the legal name and male pronouns for a transgender woman, held in the similar case of *Gibson v. Collier* that “[a] state does not inflict cruel and unusual punishment by declining to provide [GCS] to a transgender inmate” because the punishment must be both cruel and unusual, and “[u]nder the plain meaning of the term, a prison policy cannot be “unusual” if it is widely practiced in prisons across the country.”¹²¹ The Ninth Circuit firmly disagreed, noting that “Edmo established her Eighth Amendment claim and that she will suffer irreparable harm—in the form of ongoing mental anguish and possible physical harm [from self-harm attempts]—if [surgical treatment] is not provided.”

In *Langan v. Abbott*, which is currently pending in the Western District of Texas, the plaintiffs raise the argument that the harms imposed upon transgender persons barred from changing their legal name constitutes a punishment that is beyond the terms of their sentence, thus, constituting a cruel and unusual punishment in violation of the Eighth Amendment of the Constitution of the United States.¹²²

Surgical treatment for gender dysphoria is not the only part of a transition that, if prevented,

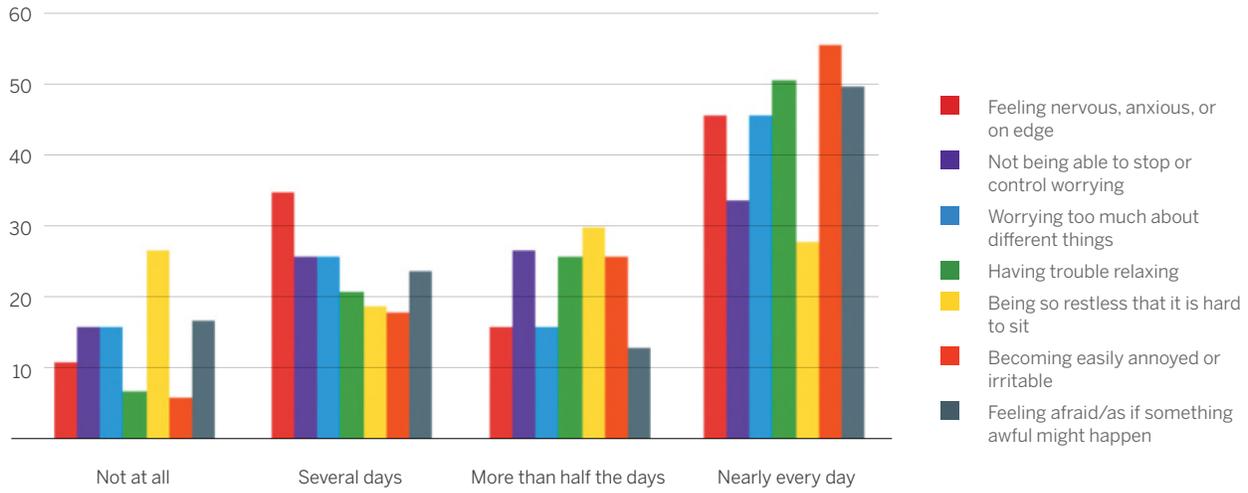
119 See *Rosati v. Igbinoso*, 791 F.3d 1037, 1039–40 (9th Cir. 2015); *Kosilek*, 774 F.3d at 86; *De'lonta*, 708 F.3d at 525; *Battista v. Clarke*, 645 F.3d 449, 452 (1st Cir. 2011); *Allard v. Gomez*, 9 F. App'x 793, 794 (9th Cir. 2001); *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988); *Meriwether v. Faulkner*, 821 F.2d 408, 412 (7th Cir. 1987) (and cases cited therein); *Norsworthy*, 87 F. Supp. 3d at 1187; *Konitzer v. Frank*, 711 F. Supp. 2d 874, 905 (E.D. Wis. 2010).

120 *Edmo v. Corizon, Inc.*, 935 F.3d 757, 795 (9th Cir. 2019).

121 *Gibson v. Collier*, 920 F.3d 212, 226 (5th Cir. 2019), cert. denied, 140 S. Ct. 653, 205 L. Ed. 2d 384 (2019).

122 Complaint at 13-14, *Langan v. Abbott*, 2019 WL 6633213 (W.D.Tex.). The complaint can be accessed at http://103.tpride.org/docs/1-19-cv-1182_document001_complaint.pdf.

**After a discriminatory or uncomfortable incident regarding your legal name,
how often did you experience the following?**



will cause distress. Secondary data analysis of the 2015 US Transgender Survey found that having gender concordant identity documents, such as having a legal name change, resulted in a statistically significant reduction in suicide ideation and planning.¹²³ Though research is scant on the experience of transgender persons and legal name changes, this leads to a reasonable conclusion that a legal name change will also reduce clinically significant distress. Further, clinically significant distress experienced by a transgender person and insufficient remedy thereof resulting in mental anguish and possible physical harm may constitute cruel punishment under the United States' own constitution. Similarly, the mental anguish and possible physical pain caused by a denial of a legal name change as a part of a denial of gender identity is cruel punishment under established international human rights law.

For transgender incarcerated persons, the use of their preferred name was a recognition not only of their gender identity but also the societal barriers and challenges transgender people often face. From the supplementary survey, transgender incarcerated persons related that use of a preferred name was often linked to positive relationships with others and more positive emotions overall. Recognition of a preferred name uplifted the dignity and humanity of the transgender individual. Refusal to use a preferred name, though, generally signaled disrespectful, insulting, and transphobic behavior, as the refusal to use a preferred name is a denial of gender identity expression. Additionally, transgender incarcerated persons appeared

123 Greta R Bauer, G Perez-Brume & Ayden I Scheim, GENDER-CONCORDANT IDENTITY DOCUMENTS AND MENTAL HEALTH AMONG TRANSGENDER ADULTS IN THE USA: A CROSS-SECTIONAL STUDY (2020), [https://www.thelancet.com/journals/lancet/article/PIIS2468-2667\(20\)30032-3/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS2468-2667(20)30032-3/fulltext) (last visited Jun 21, 2020).

to more frequently experience symptoms of anxiety and depression¹²⁴ when their legal name was a part of discrimination than transgender incarcerated persons who did not consider the use of the legal name in discriminatory incidents.¹²⁵

Finally, the right to humane treatment includes access to psychological and medical support. In addition to amending TFC 45.103, recognizing the preferred name of the transgender individual while in incarceration, and providing human rights training to staff, the TDCJ and Texas must ensure that transgender persons have access to mental health treatment and gender-affirming physical health support.

Additionally, Edmo's testimony of her mental anguish and self-harm is similar to that of the transgender incarcerated persons who wrote to the organizations. Many of the transgender incarcerated persons specifically recounted how being unable to change their legal names due to this discriminatory law caused significant distress from gender identity denial.

Katherine said “[a]t previous units, I was humiliated by staff and inmates intentionally (examples: my hair, makeup, physical features, walk, talk) I was threatened to receive disciplinary actions if I did not act as ‘[t]he man I was born to be.’ It caused a lot of anxiety attacks, depression, and social distancing to suicidal thoughts.” Raaya said, “I feel that the inability to seek legal name change until two years after incarceration is a way to create mental abuse and [psychological] harm because if an individual has a life sentence and is never going home then we should be able to change our name legally.” Nikki opined, “I believe if any torture is prohibited then not allowing a name change should be added to that list.”

124 The average of the GAD-7 screening was a score of 21. The average of the GAD-7 screening when the respondent answered they had not considered discriminatory incidents which involved their legal name was 17. The average of the GAD-7 screening when the respondent answered they had considered discriminatory incidents which involved their legal name was 21.96, a significantly higher score. A score of 15 or higher out of the 25 possible points on the GAD-7 indicates that there should be a follow-up severe anxiety. As this score was adapted to evaluate the impact of having a legal name which does not match a respondent's gender identity, it is difficult to ascertain the severity of the anxiety. However, this does follow previous studies of high rates of anxiety among incarcerated people, and the almost five-point difference between transgender incarcerated persons who felt that the use of their legal name impacted their anxiety and those who did not is significant in an evaluation tool which only ranges from 0 to 25. The average of the CESD-10 screening was a score of 25.44. The average of the CESD-10 screening when the respondent answered they had not considered discriminatory incidents which involved their legal name was 22.31. The average of the GAD-7 screening when the respondent answered they had considered discriminatory incidents which involved their legal name was 25.59, not a significantly higher score. A score of 10 or higher out of the 30 possible points on the CESD-10 indicates that there is likely depression present. As this score was adapted to evaluate the impact of having a legal name which does not match a respondent's gender identity, it is difficult to ascertain the frequency of the depression symptoms.

125 The Human Rights Clinic does not possess the expertise to diagnose or conduct psychological, sociological, or medical assessments of persons surveyed or interviewed and does not attempt to do so.

Courtney reported feeling “anxiety, depression, and isolation . . . as if I had to change who I am to be accepted and that my voice did not matter.” Sylvia described how humiliation by a particular member of staff on the basis of her name and gender identity caused “emotional distress, depression, anxiety, [and] thoughts of harming myself.” This pattern repeated, with another respondent, Samantha, experiencing “severe depression, ideation of self-mutilation, temporary refusal to leave the housing quarters in fear of further exacerbation of my dysphoria.”

Divinity wrote that “having a male name [...] but living as the woman (trans) I am and have been will cause me to be an open target[t] for violence and harassment by the public including being discriminated against for being transgender. A name change would prevent 95% of that treatment which causes me depression and anxiety.”

The effects of TFC 45.103 actively deny a transgender person’s gender identity expression, which inhumanely exacerbates the effects of gender dysphoria such as anxiety, depression, and suicidal ideation. Stories such as Katherine’s, combined with indicators of mental and emotional distress, paint a clear picture of systemic violations of the right to humane treatment. Following the reasoning of the Ninth Circuit Court, which is in line with international theories behind the right to humane treatment, TFC 45.103 is a law that harms the dignity and mental integrity of transgender persons in violation of their Eighth Amendment rights and their right to humane treatment.

F. RIGHT TO A REMEDY

The right to a remedy is a protected human right enshrined in numerous international treaties, including the ICCPR, which states that every state party to the convention ensures that “any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity...”¹²⁶ The Human Rights Committee of the UN clarified that states have a duty to take legislative and other measures to ensure and protect human rights, investigate human rights violations, provide effective remedies against violations, bring perpetrators to justice, and

126 Art. 2(3a) of the ICCPR. a

provide reparation.¹²⁷ The IACtHR held that States have a permanent, unconditional obligation to investigate violations and bring perpetrators to justice.¹²⁸ States are responsible for the *continued* human rights violation of the right to a remedy of transgender incarcerated persons for every moment it does not provide the effective remedy that protects their human rights.

Under international human rights law outlined in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (“Draft Articles”), “a breach of international law by a State entails its international responsibility.”¹²⁹ TFC 45.103 and the effects of its enforcement are conduct attributable to the United States for purposes of determining if the United States has breached its obligations under international law.¹³⁰ There are only six exceptions to a breach, including necessity, which only applies if there the breach occurred to prevent an objectively established, not merely apprehended as possible, grave and imminent peril to an essential interest. “Moreover, the course of action taken must be the ‘only way’ available to safeguard that interest.”¹³¹

As established thoroughly, TFC 45.103 violates the human rights of transgender persons. The purpose of TFC 45.103, to protect public safety, violates international law as set forth in treaties such as the Universal Declaration of Human Rights, the American Convention on the Rights of Man, the ICCPR, and other sources of international law such as the IACtHR’s Advisory Opinion and the United Nations Standard Minimum Rules for the Treatment of Prisoners. The United States is responsible for the violations of the human rights of transgender incarcerated persons due to TFC 45.103, and no exceptions to its responsibility under the Draft Articles apply. TFC 45.103’s designated purpose of safeguarding public safety does not rise to a standard of an objectively established grave and imminent peril, and as other states like New York demonstratively show, the restriction is not the only course of action available to safeguard that interest. The United States and Texas must provide an effective remedy to transgender incarcerated persons whose human rights, including the right to a name, the right to equality and non-discrimination, and the right to humane treatment, have been violated, starting with the immediate repeal or amendment of TFC 45.103 in alignment with human rights law.

127 Human Rights Committee, General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UNITED NATIONS, CCPR/C/74/CRP4/Rev.6 (2004).

128 *Garrido y Baigorria v Argentina* (Reparations), Judgment of 27 August 1998, I/ACtHR, , Series C No. 39, para 72.

129 Int’l Law Comm’n, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, U.N. Supplement No. 10 A/56/10, at 32 (2001).

130 *Id.* at 39.

131 *Id.* at 83.

The right to a remedy is a vital human right that would lead to the enforcement of other human rights. In respect to the right to a remedy, fifty-three transgender persons answering our supplementary survey stated that reporting a grievance involving the discriminatory use of a legal name resulted in no satisfactory remedy. The TDCJ's Offender Grievance Pamphlet states that:

Agency policy prohibits retaliation against an offender for filing a grievance. Allegations of this nature are forwarded to the Office of the Inspector General for action that could result in the termination of the offending employee.¹³²

Yet, the responses received showed that retaliation from staff is a widespread problem which has deterred transgender women from making a verbal or written complaint in the first place, let alone complaints about the denial of the human rights which protect a transgender individual's right to gender expression and the use of a preferred name. The repeated violations of the right to a remedy demonstrates enforcement of the prevention of degrading treatment despite the State's internal policies and the assurances made by the United States in front of the Committee Against Torture. Transgender incarcerated persons wrote extensively about fear of retaliation from staff as a deterrent to successfully reporting discriminatory treatment. This fear is not irrational. The TDCJ itself notes that unfounded allegations of sexual assault can and do result in "disciplinary penalties." This means that incarcerated people risk sanctioned retaliation for filing a complaint should the TDCJ determine the complaint was false.¹³³

Transgender incarcerated persons had already appealed to Texas through the TDCJ for their human rights to be protected by permitting the use of their preferred name and not their legal name.



Available from www.tdcj.texas.gov/publications/index.html#arrm

132 Texas Department of Criminal Justice Offender Grievance Program, Administrative Review & Risk Management Division, Grievance Procedure (2015).

133 TEXAS DEPARTMENT OF CRIMINAL JUSTICE. PREA OMBUDSMAN, OFFICE OF THE INSPECTOR GENERAL: SAFE PRISONS/PRISON RAPE ELIMINATION ACT (PREA), November 2019, 27.

Katerina filed multiple complaints to the TDCJ asking for recognition of her gender identity through the use of her preferred name, as is her right under Rule 7 of the Mandela Rules and permission for the TDCJ to do under BOP guidance. The TDCJ denied her request, citing that Katerina is a “male, not a woman, and [she’s] on a male unit. This caused me so much depression,” Katerina wrote, “that I’ve [attempted] suicide more than once because of this issue.” Katerina had been in the process of filing for a name change before her arrest. Another transgender incarcerated person, Kathleen, noted that “The only thing that is going to stop [being called a non-gender congruent legal name] is for me to get a legal name change on my documents in the TDCJ.”

Transgender incarcerated persons generally reported that nothing happened if they sought redress for discriminatory incidents involving the use of their legal name if they were able to make a complaint at all. Victoria wrote that “I’ve tried to use my preferred name on [g]rievances, I-60s [complaints], mail, etc. etc. But the [TDCJ] administration will not accept me using my preferred name. They always deny anything with my preferred name on it.” Many of those who reported that nothing came of their complaints about negative treatment alluded to being told that they could not substantiate their claims – for example, that an officer said the procedure was followed and there was no further evidence, or that although there should have been video evidence of an incident, “even camera footage is only for officers,” as Megan wrote.

Were staff to understand the right to a name, the right to equality and non-discrimination, and the right to humane treatment, staff would be better equipped to recognize violations of these rights and therefore provide the remedy to which affected people are entitled. As it is, TFC 45.103 affected persons like Katerina and Kathleen have no effective means of addressing human rights violations and enacting their human rights like the right to a name. So long as TFC 45.103 remains as is, the United States and Texas have not provided people like Katerina with an effective remedy to their complaint.

VII. Conclusion

TFC 45.103 VIOLATES international human rights law by preventing incarcerated transgender persons from changing their name while incarcerated or until two years from the date of the receipt of discharge or completion of community supervision or juvenile probation. The international human rights that are violated by this law are: the right of persons deprived of liberty; the right to a name; the right to freedom of expression; the right to equality and non-discrimination; the right to humane treatment; and the right to a remedy. This law was enacted in 1991, SB 334, and amended in 2019, HB 2623, by the Texas Legislature but continues to harm incarcerated transgender persons daily. Incarcerated transgender persons suffer unique and additional challenges within the TDCJ, comparatively to cisgender incarcerated persons, and these unique and additional challenges are exacerbated by the implementation of TFC 45.103.

VIII. Recommendations

THE INTER-AMERICAN COMMISSION on Human Rights the IACHR “urges States to adopt comprehensive measures, in legislation and public policies, to effectively guarantee the right to the gender identity of all persons, as a sine qua non condition for the free development of their personality in all fundamental areas of their life plan.”¹³⁴ More specifically, the IACHR has recommended that all States “adopt gender identity laws that recognize the right of trans persons to rectify their name and gender component on birth certificates, identity documents, and other legal documents.”¹³⁵ The IACHR further recommends, “[g]ender identity laws should guarantee expeditious and simple procedures, without the need for medical or psychological/psychiatric evaluations or certificates.”¹³⁶

Emphasizing the importance of identity as a way to safeguard detainees who are transgender, the United Nations Special Rapporteur notes, “equal recognition before the law is a basic element in a well-functioning framework for protection from arbitrary arrest and detention, torture and ill-treatment, as it is well established that in all situations of deprivation of liberty, the proper identification of the individual is the first guarantee of State accountability.”¹³⁷ TFC 45.103 is contrary to the corpus juris of international law contained in the treaties, decisions, guidelines, and opinions of international and regional human rights instruments and bodies, and its impact and harm to transgender incarcerated persons are undeniable.

Texas must comply with international law protecting the human rights of persons with felony convictions who wish to change their legal name. Texas must take action by amending or abolishing the Texas Family Code Section 45.103 in upcoming legislative sessions. In the interim, Texas should provide administrative name recognition within the TDCJ and implement more rigorous training for all state employees on human rights. Additionally, Texas needs to provide further psychological and mental support to the individuals who have been harmed by the implementation of the Texas Family Code Section 45.103.

134 IACHR, Recognition of the Rights of LGBTI Persons (December 7, 2018) ¶ 105.

135 *Id.* ¶ 267.

136 *Id.*

137 Report of the Independent Expert on Protection against violence and discrimination based on Sexual Orientation and gender identity, A/73/152, p. 8.

