

Alexander L. Lee[†]
Boalt Hall School of Law
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Nowhere to Go But Out:
The Collision Between Transgender & Gender-Variant Prisoners
and the Gender Binary in America's Prisons

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[†] Boalt Hall School of Law (UC Berkeley) J.D. candidate, '04. I am also a transgender activist on the female-to-male spectrum, and a transgender community organizer. I would like to thank Professor Ian Haney Lopez and the Boalt Hall social justice writing seminar of Spring 2003. I also want to thank the California state prisoners I have worked with, who have been the best teachers anyone could ask for and who will inspire me for the rest of my days. Additional thanks go to Cynthia Chandler, Robin Levi, Judy Greenspan and Kevin Weaver, without whose input, support, and generosity this comment would never have been written. This comment is dedicated to my partner Mordecai Cohen Ettinger and transgender and gender-variant prisoners everywhere.

In the summer of 2002, Carla Brenner was arrested and jailed in Lorain County, Ohio.^{1[1]} Carla told his jailers he was actually man and that his name was Lemont Fullers, but the county insisted that he was a woman and sentenced him to do time in a women's jail. It was not until after a complaint from a female cellmate did jail doctors examine Lemont/Carla and concluded ze^{2[2]} had "no female reproductive organs."^{3[3]} Eventually, authorities isolated hir^{4[4]} from other prisoners when "confusion" about hir gender arose.^{5[5]}

Lemont/Carla said ze was a "'gay male with female tendencies,'" a description that hardly helped hir navigate through the county's jail system that classified all prisoners according to whether their genitalia was clearly "male" or "female." Lemont/Carla's experience illustrates a key problem we as transgender^{6[6]} and gender-variant^{7[7]} (TG/GV) people confront when we enter systems of government-imposed punishment and which this comment will explore: the

^{1[1]} *Male Inmate Convicted, Jailed as Female: 'Maybe I have some identity issues,'* Cincinnati Enquirer, July 15, 2002, at http://enquirer.com/editions/2002/07/15/loc_male_inmate.html. While this news article describes the housing policy for a county jail, the policy – and the confusion that results from those who do not easily fit into its categories – is common throughout nation's prison systems.

^{2[2]} A gender-neutral pronoun in alternative to "he" or "she." This comment will introduce new vocabulary to readers that may produce confusion because the new words displace the familiar language of gender. This confusion mirrors the confusion that prison authorities and the traditionally-gendered public feel when they interact with people whose genders or bodies and/or bodies do not easily fit into "male" or "female" categories. I encourage readers to embrace this confusion rather than resist it, as this resistance underlies the marginalization and oppression of transgender and gender-variant people.

^{3[3]} *Male Inmate Convicted, Jailed as Female: 'Maybe I have some identity issues,'* *supra* note 2.

^{4[4]} A gender-neutral possessive pronoun in alternative to "his" or "her."

^{5[5]} *Male Inmate Convicted, Jailed as Female: 'Maybe I have some identity issues,'* *supra* note 2.

^{6[6]} The term "transgender" (TG) is used throughout to describe its common, although not exclusive use in the transgender communities use as an umbrella term that encompasses the wide variety of ways individuals defy traditional gender norms, including everyone from butch women (female-bodied and woman-identifying people who prefer to adopt masculine characteristics) to people who have completed sex reassignment surgery (SRS) and are now living "24-7 in the life" of a sex different from the one medical professionals assigned to them at birth (often called "transsexuals"). The term also includes those who locate their gender outside "male" and "female" to some other "third gender." However, the term – like people's genders – is in flux and changes over time. Additionally, "transwoman" or "transgender woman" refers to people on the male-to-female (MTF) transgender spectrum, while "transman" and "transgender men" refers to people on the female-to-male (FTM) transgender spectrum.

^{7[7]} I use "gender-variant" (GV) to encompass the different racial, cultural, and class components of non-traditional gender identity. For example, many masculine-expressive female-bodied people in the black community will call themselves "gressors" (short for "aggressives"), "butches," or "studs" rather than "transgender." Many of these people do not consider themselves transgender, but are discriminated against nonetheless because of their transgressive gender expressions.

collision of a system that relies on gender binaries^{8[8]} to function – both physically in terms of actual concrete and steel structures, and morally as systems of retribution and deterrence – with people whose bodies and minds defy those binaries.^{9[9]}

Prisoners throughout the U.S. are segregated into male and female institutions, initially done for the safety of female prisoners. However, such binary segregation produces particular forms of punishment that enforce stereotypical male and female gender roles, leading to especially horrific abuse of transgender and gender-variant prisoners whose genders and bodies do not conform to these stereotypes. While much abuse comes from other prisoners, prison employees must share the blame because they fail to protect TG/GV prisoners and because they sometimes are the perpetrators themselves. While non-TG/GV prisoners also undoubtedly suffer under these regimes of state-imposed (or at least state-tolerated) gendered discipline, transgender and gender-variant prisoners are especially targeted because our gender identities and non-binary bodies pose even deeper threats to the gendered (dis)orderliness of state punishment.

As a member of the transgender communities and as a person of color concerned with the significantly adverse impact the prison industrial complex has had on communities of color, I am committed to finding a solution to the chamber of horrors my people experience in government systems of incarceration. The immediate safety of transgender/gender-variant prisoners is an urgent concern, but so is the long-term liberation of the various oppressed communities I belong

^{8[8]} “Gender” as I use it should be understood to refer to behaviors that we understand as “masculine” and “feminine,” and which are socially-constructed, while alternately “sex” as used here describes our physiology (most commonly the external reproductive organs). My use of “gender binary” refers to the widespread, systemic societal myth that only two mutually-exclusive, fixed genders are available, male and female, which are beyond anyone’s control.

^{9[9]} Unable to find information on intersexed prisoners, I confine this comment to prisoners who self-identify as transgender or who experience oppression related to their non-traditional gender expressions. For more information on intersexed people, please reference the Intersex Society of North America, at <http://www.isna.org>. However, I acknowledge that just as TG/GV people with physical characteristics that transgress gender norms experience special abuse and harassment while incarcerated, intersexed people who are born with bodies not easily categorized as male or female can experience the same sort of oppression for the same reasons. Therefore, nothing in this comment should be taken to absolutely exclude intersexed prisoners. Additionally, it is likely that some TG/GV prisoners are also intersexed – information that prison systems are far from recognizing or tracking.

to, both inside and outside the prison walls. That is why in this comment I insist that although improving the safety of individual transgender and gender variant prisoners – to the extent possible in a system where no one is really “safe” – should still be an important policy concern, so should alternative solutions that reduce poverty, and therefore criminality, among transgender and gender-variant people. Because this cause is not likely to be taken up by prison and jail authorities in the near future, the fate of transgender and gender-variant prisoners currently lies in the collective hands of prison activist communities who already recognize the need for alternatives to incarceration, but are ignorant of how human rights abuses inside prisons and jails differently impact transgender and gender-variant bodies and psyches. This comment is both intended to inform a wider audience of these abuses and their effects on transgender and gender-variant people, and a call for prison activists to make their movements and communities truly inclusive of transgender and gender-variant people.

I begin by first introducing unfamiliar readers to transgender and gender-variant people, and why some of us end up in prison (Part I). In Part II, I show that conditions of confinement produce particular gendered forms of punishment that reinforce gender roles. I argue that prison systems are so thoroughly gendered that TG/GV prisoners become special targets for abuse because their genders pose greater threats to penal regimes that inculcate gender roles by force. Part III delves into the experiences of TG/GV prisoners in a variety of prison housing settings, and Part IV concludes by offering some immediate recommendations to improve TG/GV prisoner safety and long-term strategies that will resolve the dilemma of TG/GV prisoner abuse by reducing rates of TG/GV incarceration.

I. Who Are Transgender & Gender-Variant Prisoners?: Terminology and Characteristics

Most readers will be unfamiliar with who we transgender and gender-variant people are, and perhaps even more unfamiliar with those among us who are most at risk to become prisoners and why. This section will give readers a quick primer on who TG/GV people are in order to frame our experiences with the criminal justice system as part of other systems of oppression like white supremacy, capitalism and male supremacy.

There is little formal research on transgender and gender-variant prisoners, complicated no doubt by many prison systems' failure to document whether a prisoner is transgender or gender-variant.^{10[10]} However, it has been estimated that transgender prisoners may number in the low thousands nationwide.^{11[11]} The number may even be greater when gender-variant prisoners are included.

Despite the dearth of research, some information regarding TG/GV people's contact with the criminal justice system is available from local studies in San Francisco, where an estimated 15,000 transgender people live and work.^{12[12]} A 2000 report by the Ella Baker Center for Human Rights, a San Francisco-based nonprofit advocacy and activist police accountability organization, entitled "'Walking While Transgender': Law Enforcement Harassment of San Francisco's Transgender/Transsexual Community," describes some contributing factors leading to high rates of contact between transgender/gender-variant people and law enforcement in San Francisco. An additional source of information is a 1997 San Francisco Department of Public Health study of over 500 MTFs and FTMs, which documented rates of participation in the illegal sex economy by study

^{10[10]} Kevin Weaver, member of the Transgender/Gender-Variant in Prison Committee of California Prison Focus, 2002, speaking on California Department of Corrections policy.

^{11[11]} Darren Rosenblum, "Trapped" in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 Mich. J. Gender & L. 499, 516 (2000).

^{12[12]} Margie Mason, *Sex Change Benefits Possible for San Fran Employees*, Associated Press, February 19, 2001, at <http://www.gfn.com/archives/story.phtml?sid=8630> (quoting Susan Stryker, Executive Director of the Gay, Lesbian, Bisexual, Transgender Historical Society of Northern California). This figure does not include gender-variant people, who may or may not identify as transgender. If gender-variant people were included in this figure, the number would likely be much higher.

participants, as well as participants' rates of incarceration.^{13[13]} More recently, the Transgender Law Center in San Francisco and the National Center for Lesbian Rights released a report in 2002 based on 155 survey responses that also described some characteristics of the San Francisco Bay Area's transgender communities.^{14[14]}

The "Walking While Transgender" report is careful to point out that "when discussing law enforcement treatment of transgender people, it is important to also address police attitudes towards sex workers and prostitutes, low-income and homeless people, and immigrants and people of color, since there is a great deal of cross-over between [sic] these groups."^{15[15]} All these factors contribute to how and why transgender people are arrested, prosecuted and sentenced, meaning that at least in part, the reasons why transgender and gender-variant people become prisoners in California are the same reasons why people of color, low-income people, homeless people, prostitutes and immigrants become prisoners. Adding discrimination based on gender identity (or based on intersex^{16[16]} status as the case may be), these multiple layers of oppression can make TG/GV people especially vulnerable to law enforcement profiling, prosecution and incarceration.

The 1997 San Francisco Department of Public Health study further documented the combination of race and gender in the transgender population of San Francisco, finding that a substantial number of transgender people in San Francisco are of color, poor, marginally housed and immigrants. In fact, almost two-thirds of study's participants were non-white, nearly a third were born

^{13[13]} San Francisco Department of Public Health, Transgender Community Health Project, February 18, 1998, at <http://hivinsite.ucsf.edu/InSite.jsp?page=kbr-07-04-16&doc=2098.461e>. Hereinafter "SFDPH."

^{14[14]} National Center for Lesbian Rights and Transgender Law Center, "Trans Realities: A Legal Needs Assessment of San Francisco's Transgender Communities" (2002), available at <http://www.transgenderlawcenter.org>. Hereinafter "Trans Realities." Most survey respondents were found through transgender community groups, and so likely excludes those who may be gender-variant and/or transgender but who do not identify as such or are isolated.

^{15[15]} Ella Baker Center for Human Rights/TransAction, "Walking While Transgender": Law Enforcement Harassment of San Francisco's Transgender/Transsexual Community" (2000). Hereinafter "Walking."

^{16[16]} See *supra* note 9.

outside the U.S., and another third usually spoke another language other than English.^{17[17]} The largest non-white ethnicity in the study was Latino/a, at 24%, with African Americans at 16%, Asian Pacific Islander at 11%, Native Americans at 3%, and mixed race participants at 9%.^{18[18]} The study also documented extreme poverty in the transgender and gender-variant communities of the city. The median monthly income of MTF participants was only \$744, and for FTMs, it was \$1,100.^{19[19]} 64% of survey respondents to the 2002 “Trans Realities” needs assessment survey reported incomes lower than \$25,000 per year.^{20[20]} Indeed, protection from job discrimination was the first- or second-ranked priority of all survey respondents. National data show job discrimination against transgender people is pervasive throughout the nation as well: the national gender advocacy organization GenderPAC found that 13% of transgender people they interviewed had lost their job because of being transgender, while 39% had experienced general economic discrimination due to being TG.^{21[21]} The nationwide unemployment rate for transsexuals in 2000 was an astonishing 70%.^{22[22]}

While transgender, transsexual and gender-variant people experience oppression for many of the same reasons and in many of the same ways that non-transgender people who are poor, of color and immigrants do, forced participation in the underground sex industry is especially common in the lives of many in our communities. Forced sex work by TG/GV people is a direct result of severe job, housing, and education discrimination stemming from our gender status,^{23[23]} exacerbated by racism, sexism and homophobia. In San Francisco, 80% of MTFs interviewed by the city’s Department of

^{17[17]} Kristen Clements, M.P.H. et. al, *HIV Prevention and Health Service Needs of the Transgender Community in San Francisco*, Int’l J. Transgenderism (1999) at http://www.symposium.com/ijt/hiv_risk/clements.htm. Hereinafter “IJT.”

^{18[18]} *Id.*

^{19[19]} San Francisco Department of Public Health, Transgender Community Health Project, February 18, 1998, at <http://hivinsite.ucsf.edu/InSite.jsp?page=kbr-07-04-16&doc=2098.461e>. Hereinafter “SFDPH.”

^{20[20]} “Trans Realities” at 43.

^{21[21]} SFDPH.

^{22[22]} San Francisco Human Rights Commission, “Economic Empowerment for the Lesbian Gay Bisexual Transgender Communities – November 2000,” citing Casebeer, A.G., “Employing Transgendered Employees,” April 2000, available at http://www.sfgov.org/site/uploadedfiles/sfhumanrights/docs/econ.htm#P140_20179.

^{23[23]} “Walking” at vii; IJT.

Health had participated in sex work for economic reasons, termed in the study as “survival sex.”^{24[24]} Additionally, 31% of FTM participants reported forced participation in the sex industry in the past.^{25[25]} Indeed, the “Walking” report characterizes people whose gender presentation does not match their legal sex identification as a form of “‘undocumented’ worker” because of the barriers to legal employment that the lack of documentation imposes, much in the same manner as undocumented immigrants.^{26[26]}

Transgender women experience especially high rates of criminalization because of at least two factors: the criminalization of prostitution and drug addiction related to sex work, and the stereotyping of all transgender women as sex workers.^{27[27]} The former undoubtedly contributes to their arrest, prosecution and incarceration, while the latter causes police to profile transgender women as suspected sex workers.^{28[28]} This not only means transgender women who are sex workers are disproportionately at risk for arrest because they are who the police are looking for, but even transgender women who are not engaged in sex work are sometimes harassed or solicited by undercover officers in sting operations under the assumption they are prostitutes.^{29[29]}

The SFDPH study also recorded a strong correlation between drug use (particularly speed use) and sex work, with some participants reporting that they use drugs to ‘deal with’ sex work, and others reporting that they engage in sex work to support their drug addiction.^{30[30]} The combination of drug use and sex work for many participants inevitably led to incarceration, fueling a cycle of engaging in sex work, being incarcerated, and returning to sex work once released because of a persistent lack of

^{24[24]} SFDPH.

^{25[25]} *Id.*

^{26[26]} “Walking” at vii.

^{27[27]} *Id.* at viii.

^{28[28]} *Id.* at ix.

^{29[29]} *Id.*

^{30[30]} IJT.

legal employment opportunities sufficient to support themselves.^{31[31]} Many of the participants who were currently in jail or recently released were HIV positive and desperately wanted to get job training and into legal employment, but felt unable to escape this cycle of sex work, drugs and incarceration due to the great difficulty in obtaining such job training.^{32[32]} Therefore in addition to being involved with illegal sex work, many transgender people are also involved in the illegal drug trade, and suffer the consequences of our nation's "war on drugs."

It is no coincidence that the city's red light district, known as the Tenderloin, is home and workplace to a large concentration of transgender women, where tourists fuel the city's sex industry.^{33[33]} But despite the symbiotic relationship the underground sex industry has with the city's above-ground tourist industry, the city's numerous attempts over the decades to gentrify the area in efforts to attract more tourists^{34[34]} have resulted in "repressive public safety policies that target sex workers and people assumed to be sex workers, homeless people, and drug dealers and people suspected of being drug dealers," greatly adversely impacting transgender women who live and work in the area.^{35[35]} Transgender people, like all people marginalized from the mainstream economy, are also often caught in the net of "quality of life" police sweeps and crackdowns, as city politicians attempt to win votes.^{36[36]} "Quality of life" law enforcement criminalizes the homeless and marginally-housed, which necessarily includes transgendered people, for engaging in survival activities like sleeping and sitting, which they have no choice but to do in public.^{37[37]} Additionally,

^{31[31]} *Id.*

^{32[32]} *Id.*

^{33[33]} *Id.*

^{34[34]} Cassi Feldman, *Notorious B.I.D.: Mid-Market Theater District Could Threaten Homeless People*, S.F. Bay Guardian, November 19, 2000 at <http://www.sfbg.com/News/35/09/09ogbid.html>; Scott Winokur, *For Down-And-Out, MATRIX was the Good Old Days*, S.F. Chronicle, May 11, 1999 at <http://www.sfgate.com/cgi-bin/article.cgi?file=/examiner/archive/1999/05/11/EDITORIAL2382.dtl>.

^{35[35]} "Walking" at vii.

^{36[36]} "Walking" at ix (internal citations omitted).

^{37[37]} *Id.* at x.

larger-scale sweeps and crackdowns coincide with visits by dignitaries and other high-profile political events like party national conventions.^{38[38]}

Such multiple forms of oppression inevitably lead to high rates of incarceration. The SFDPH study also asked participants questions regarding their incarceration history, and conducted one of their focus groups in a San Francisco county jail.^{39[39]} 65% of MTFs respondents had been incarcerated over one night in a jail or prison, while 29% of FTM respondents had been. Additionally 31% of MTF respondents had been incarcerated in the past year, and 5% of FTMs had spent at least one night in jail.^{40[40]}

To summarize, transgender people are at risk for incarceration because they are often poor, homeless, immigrants, and of color. They are also particularly at risk as a group because of strong anti-transgender discrimination in employment, housing, and education, which forces many transgender people – especially low-income transgender women of color who are additionally discriminated against as poor women of color – to turn to illegal economies like sex work and the drug trade to survive. Transgender women are also particularly at risk for police entrapment because of the strongly-held stereotype of transgender women as sex workers. As poor people they are marginally-housed and homeless, leaving them vulnerable to “quality of life” crackdowns by law enforcement. While no comprehensive study exists of why transgender people become prisoners, these two reports from San Francisco reveal at least some of the factors describing who of the transgender and gender-variant communities are vulnerable to incarceration, and why.

II. Conditions of Confinement as Gendered Punishment

^{38[38]} *Id.*

^{39[39]} IJT.

^{40[40]} *Id.*

In addition to punishment through physical pain and psychological trauma, sex-segregated prisons are sites of particularly gendered forms of punishment, that is, punishment is also experienced as the enforcement of traditional gender roles. In men's prisons, this takes the form of the hyper-masculinized and hierarchical world of prison society, where some prisoners and staff victimize other prisoners who are perceived as "weak," i.e. feminine. Male prison society obviously puts transgender and gender-variant prisoners with feminine characteristics at great risk. Prison staff and authorities must share the blame as well because they create the conditions of confinement that foster and perpetuate this violent prison society, and even go so far as to collude with perpetrators to victimize TG/GV prisoners and others for whom they have particular disdain. In women's prisons, strict systems of surveillance and control enforce gender roles that both punish women for violating traditional female gender stereotypes by committing crimes, and to (re)shape women prisoners into the white, middle class ideals of womanhood. Where this fails because many women prisoners are neither white nor middle class, "reforming" these women into the white middle class ideal of compliant working class "minorities" will often do instead.

This section will set out the particular forms of gendered punishment that operate inside our prison system today and provide a backdrop for my argument in sections III and IV: because modern systems of state punishment are so thoroughly tied to enforcing traditional gender roles, no carceral institution is necessarily safer for transgender and gender-variant prisoners. Acknowledging the reality of this situation puts additional pressure on developing new alternatives to incarceration that can meaningfully reduce TG/GV crime rates, and on redesigning existing incarceration alternatives and drug treatment solutions to be more inclusive of TG/GV people.

A. Men's Prisons

Male prison society is a hostile one for many prisoners and for TG/GV prisoners in particular for a number of reasons. One, the seeds of hierarchical prison society that functions through dominance and power are inherent in masculinity itself. Two, because conditions of confinement itself strips prisoners of control over their lives, it deprives them of other indicia of masculinity such as economic success (and importantly, sexual dominance over women), putting enormous pressure on male prisoners who like everyone else, have been socialized to define themselves according to binary gender roles.^{41[41]} Three, prison staff and authorities either look the other way when a prisoner is at risk for attack or is being attacked,^{42[42]} or they actively participate in victimizing certain “weaker” prisoners^{43[43]} or other prisoners they dislike, like political prisoners and prisoners incarcerated for particularly opprobrious crimes like child molestation.

Male supremacy has defined masculinity through separation from and domination over the feminine and over women. In this sense, hierarchy is built into masculinity. But because masculinity, like all gender expressions, is socially-constructed, individuals and societies can modify expressions of masculinity to dampen the most extreme expressions of male supremacy by emphasizing more constructive rather than destructive expressions of masculinity. Fatherhood can be emphasized over the prize-fighter, for example. However, in the prison world of forced confinement, punishment and control, these more nurturing expressions of masculinity are often scuttled in the daily struggle to maintain one’s dignity by holding onto one’s identity, which for male-socialized people often includes striving to maintain one’s masculinity.^{44[44]} Upon entering systems of incarceration however, prisoners are given a number for a name, and are made dependent on prison staff for the most basic survival needs like eating, bathing, and obtaining adequate toiletries. Modern penal systems also cut

^{41[41]} Christopher D. Man and John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for “Deliberate Indifference*, 92 J. Crim. L. & Criminology 127, 150. See also *supra* note 9 and accompanying text on the gender binary.

^{42[42]} *Id.* at 143, 145-147.

^{43[43]} Stop Prisoner Rape, *Survivor Stories* (2003), at <http://www.spr.org/en/survivorstories/main.html>.

^{44[44]} Man and Cronan at 152.

them off from less violent ways to express masculinity, like economic success.^{45[45]} The state's infantilization and dehumanization of prisoners attempts to strip them of whatever power and agency they had before entering the prison, and many prisoners' natural instincts are to fight to keep their sense of themselves intact throughout the ordeal of imprisonment. For prisoners socialized as men, this means if they cannot be free men, at least they can still be "men." Unfortunately, this too often translates into some prisoners dominating other less powerful or less knowledgeable prisoners through physical and sexual assault and sexual slavery.^{46[46]} TG/GV prisoners who exhibit feminine characteristics are especially at risk to be forced into victim roles.^{47[47]}

While other prisoners are often the direct culprits in attacks on TG/GV prisoners and other prisoners perceived as "weak," like young prisoners, "first-timers" and gay and bisexual prisoners, prison authorities and prison staff create the conditions of confinement that perpetuate the hyper-masculine world of the men's prison. Although nurturing aspects of masculinity are repressed, masculinity as forceful dominance is routinely allowed to be expressed, as it goes to the core of our current theories of "corrections" and control. Inside the prison walls, "traditional moral and humanistic concerns have little relevance; status and power are based on domination and gratification"^{48[48]} – a description that is reflected both in prison society and our current penal systems that place overriding emphasis on incarceration as retribution rather than on rehabilitation or even restitution.

One obvious way some prison staff and administrators help foster the hyper-masculinized prison hierarchy is by facilitating victimizing certain prisoners, either through "deliberate indifference" to prisoner safety or by actually acting in concert with prisoner-perpetrators to victimize other prisoners. Numerous lawsuits by prisoners who were physically attacked or raped in prison filed

^{45[45]} *Id.* at 130.

^{46[46]} *Id.* at 150.

^{47[47]} Rosenblum at 524.

^{48[48]} *Id.* at 152.

against the prisons themselves for creating conditions that allowed for the assaults have created a variety of situations where courts will infer that prison officials have ignored the Eighth Amendment in exposing prisoners to danger they could have reasonably anticipated but ignored.^{49[49]} In fact, the standard for “deliberate indifference” to prisoner safety, which applies the Eight Amendment to prison conditions, was clarified by the Supreme Court in a case brought by a MTF transsexual woman who was beaten and raped by her cellmate when she was housed in a men’s prison.^{50[50]}

Survivors of prison rape and physical assault often point the finger at prison guards who worked in concert with their attackers.^{51[51]} The prison culture of stronger prisoners dominating “weaker” ones so pervades prison life that even prison staff participate. Many report that guards deliberately failed to patrol their cellblocks when they were raped, or that guards opened their cell doors at night to let their attackers in.^{52[52]} A Louisiana prison guard described the situation inside as “sex and bodies become the coin of the realm,” where prison staff trade sexual access to some prisoners for favors from other prisoners.^{53[53]} When prisoners complain to guards of sexual assault by other prisoners, they are often told they must either fight their attackers no matter how futile, or give in and assume one of the several passive “victim” prison roles and consent to virtual sexual slavery – they are told basically to “fuck or fight.”^{54[54]}

^{49[49]} *Id.* at 140–41. The list is long, but some examples are “guards raping or sexually harassing inmates;...prison officials setting inmates up to be raped or attacked by other prisoners as a form of discipline; knowingly placing an inmate in a cell with an HIV positive inmate who has a history of rape;...guards watching a rape in progress and not doing anything to stop it;...where formal requests to be removed from a cell because the inmate is being raped are denied....”

^{50[50]} *Farmer v. Brennan*, 511 U.S. 825 (1994). To show an Eighth Amendment violation, the rape victim must first show that 1) they were imprisoned under conditions that placed them in a substantial risk of serious harm, and 2) show that prison officials showed a “deliberate indifference” to the prisoner’s safety. The Court defined “deliberate indifference” to mean that the prison official “knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” *Farmer* at 837.

^{51[51]} Stop Prisoner Rape, *supra* note 43.

^{52[52]} *Id.*

^{53[53]} Christian Parenti, *Lockdown America: Police & Prisons in the Age of Crisis*, 187 (2000).

^{54[54]} Man and Cronan at 145.

When officials do investigate allegations of rape, they usually do a poor job. Investigators disbelieve complaints of sexual assault reported by gay or bisexual prisoners because they assume any sex they had was consensual.^{55[55]} They also often conclude that no rape actually occurred if the victim shows no wounds from a fight.^{56[56]} When they do conclude a rape occurred, they often do not discipline the rapists appropriately, and when they are disciplined, perpetrators are often sent back into the same housing area with their victim(s), thereby re-exposing the rape survivor(s) to further danger and retaliation.^{57[57]} They also fail to provide adequate medical care to rape victims, including failing to provide rape counseling.^{58[58]}

These factors add up to an environment where super-masculinity is prized and glorified, and dominating others remains one of the only defenses against being forced into the lower submissive levels in the prison society order. Those who exhibit the more extreme aspects of masculinity – aggression, predation, physical strength and size – are less likely to be victimized in prison while those who exhibit traits not in line with these ideals are victimized over and over. This is one of the most brutal ways male-supremacist notions of masculinity can be enforced and inculcated, and the collusion of prison staff only perpetuates this gendered aspect of punishment. Authors and activists who have tackled the issue of placement of TG/GV prisoners^{59[59]} have recognized that because of this intensely gendered environment, prison housing policies that assign feminine-appearing TG/GV prisoners into

^{55[55]} *Id.* at 145.

^{56[56]} *Id.*

^{57[57]} *Id.* at 146.

^{58[58]} *Id.*

^{59[59]} Anita C. Barnes, *The Sexual Continuum: Transsexual Prisoners*, 24 *New Eng. J. on Crim. & Civ. Confinement* 599 (1998); Marjorie Rifkin, *Farmer v. Brennan: Spotlight on an Obvious Risk of Rape in a Hidden World*, 26 *Colum. Hum. Rts. L. Rev.* 273 (1995); Debra Sherman Tedeschi, *The Predicament of the Transsexual Prisoner*, 5 *Temple Pol. & Civ. Rts. L. Rev.* 27 (1995); Darren Rosenblum, “Trapped” in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 *Mich. J. Gender & L.* 499 (2000).

men's prisons because they have not surgically altered their genitalia places them far too often into "virtual torture chamber of incessant sexual humiliation."^{60[60]}

B. Women's Prisons

Feminist critiques of women's prisons also characterize them as sites of gendered punishment – where women are made to pay a price for stepping outside of society's designated roles for them as wives and mothers, and where punishment takes the particular form of attempting to transforming the offending (often non-white and poor) woman into the white, middle class ideal of "proper" femininity.^{61[61]} This particular insistence on reinforcing female gender roles makes women's prisons also a particularly inappropriate place for transgender and gender-variant prisoners who exist in defiance of such strictures, both because those pre-operative or non-operative people on the FTM spectrum dare to be "too masculine," and post-operative people on the MTF spectrum are never allowed to be simply "women."^{62[62]}

Adrian Howe's book *Punish and Critique: Towards a Feminist Analysis of Penalty* overviews critiques of the Western capitalist-state's power to punish and its "differential impact of [this] disciplinary power on lived female bodies."^{63[63]} Howe reviews Pat Carlen's British sociological studies of women prisoners and women's prisons in the 1980s, and "feminist revisionist" critiques of state punishment of women.^{64[64]} Both types of work are instructive in understanding women's prisons as places where female gender roles are reified and reinforced.

Throughout the 1980s, Pat Carlen worked with prisoners in the Scottish women's prison Compton Vale, producing a definitive sociological study of women's imprisonment which "placed the analysis of 'female' imprisonment firmly and irrevocably in the broader context of the social control

^{60[60]} Rosenblum at 517.

^{61[61]} Adrian Howe, *Punish and Critique: Towards a Feminist Analysis of Penalty*, 129, 137 (1994). Hereinafter "Howe."

^{62[62]} Because genital surgeries for people on the FTM spectrum are often prohibitively expensive, most do not alter their genitalia. Upon incarceration therefore, they are classified as "female," no matter how masculine they appear otherwise.

^{63[63]} *Id.* at 3.

^{64[64]} *Id.* at 123, 165.

of women.”^{65[65]} Carlen relocates women’s punishment inside prisons as part of a continuum of socially controlling factors uniquely affecting women that extend beyond the walls of the prison, and within “the conventions of the family and the kirk [church]; within traditional forms of public conviviality and ethics of domesticity and masculinity.”^{66[66]} Carlen observed that the women most likely to be imprisoned are those “who have ‘stepped outwith [Scottish colloquialism meaning ’beyond (out) but not lacking (with)’] domestic discipline...outwith family, sociability, femininity and adulthood.”^{67[67]} Women’s prisons are unique from men’s because their discursive forms and practices incorporate the ways society controls women outside of prison – family life and social isolation – within the prison to “produce a very fine disciplinary web which denies women both personality and full adult status.”^{68[68]} In Carlen’s view, women’s prisons function to pull women back into this “fine disciplinary web” that exists outside of the prison, which they have stepped outside of in breaking the law.^{69[69]} Carlen extends her conclusions beyond Scotland, noting, “invisibility as well as training for domesticity and motherhood have always been dominant features of women’s prison regimes in Great Britain and the United States.”^{70[70]}

The features of women’s prisons as distinct from men’s prisons buttress her conclusions, where hierarchical discipline procedures combine with domestically-focused work programs that emphasize the family and the home, and the organization of women in small “family” cell units of seven women each, “to ensure a mental and bodily surveillance which denudes the prisoners’ daily life of all dignity and independence.”^{71[71]} This surveillance system is akin to the ways

^{65[65]} *Id.* at 127.

^{66[66]} *Id.* at 128 (quoting Carlen’s *Women’s Imprisonment*; internal quotations omitted)

^{67[67]} *Id.*

^{68[68]} *Id.* at 129 (quoting Carlen; internal quotations omitted).

^{69[69]} *Id.* at 129.

^{70[70]} *Id.*

^{71[71]} *Id.* at 129-30 (quoting Carlen, internal quotations omitted).

“women are mentally and emotionally straightjacketed into the same debilitating tension and isolation...in nuclear family situations outside the prison.”^{72[72]} In these ways, Carlen writes, “discourses of family life are incorporated into the state’s penal institutions for women.”^{73[73]} This housing structure is also present in the world’s two largest women’s prisons, the Central California Women’s Facility (CCWF) and its “sister” prison Valley State Prison for Women (VSPW), which is literally across the street.^{74[74]}

“Feminist revisionist” works, so-called by Howe, that trace the histories of women’s prisons also reinforce Carlen’s conclusions that women’s prisons primarily function to “re-educate” offending women into becoming the white, middle class feminine ideal. This “ideal,” however, is more accurately seen as the white, middle class feminine ideal of an exploitable working class female labor pool.

Ante-bellum accounts of the state punishment of women offenders are characterized by how comparatively few women there were in state penal systems – the family and the church played more influential roles in controlling women.^{75[75]} But because they were infrequently subjected to state discipline, very few resources were allocated for women prisoners, and instead “a pattern of overcrowding, harsh treatment, and sexual abuse recurred.”^{76[76]} After the Civil War, middle class white women became involved in prison reform, leading the way for the establishment of separate women’s prisons after 1870 – the “women’s reformatories.”^{77[77]}

^{72[72]} *Id.* at 130.

^{73[73]} *Id.*

^{74[74]} Barbara Owen, *In the Mix: Struggle and Survival in a Women’s Prison*, 1 (1998). Owen’s book is a case study of prisoners at CCWF, which she describes as the world’s largest women’s prison. VSPW, constructed a little later than CCWF, has the exact same architecture but confines slightly more prisoners. Together they form the largest women’s prison complex in the world. According to the California Department of Corrections, VSPW houses 3,700 prisoners, while CCWF is home to 3,109 women. California Department of Corrections, Facilities Home Page, at <http://www.corr.ca.gov/InstitutionsDiv/INSTDIV/facilities/default.asp> (2003).

^{75[75]} Howe at 130.

^{76[76]} *Id.* (internal quotations omitted).

^{77[77]} *Id.* at 135, 137.

Historians Estelle Freedman and Nicole Rafter note that the ideological bases of these institutions centered around recreating the female offender into the white, middle class female ideal, which not only involved “the struggle [over] the definition of gender,” but also efforts to maintain class divisions between the middle-class reformers and the largely working-class women offenders.^{78[78]} Rafter saw the class-ideological underpinnings of the reformer’s movement as helping to “maintain a pool of cheap domestic labour for women like themselves [the reformers], and, by keeping women in the surplus labour force, it undergirded the economic system to which they owed their privileged position.”^{79[79]}

Rafter described the reformatories as major developments in prison history because they “broke radically with male-oriented prison traditions, creating a set of feminised penal practices.”^{80[80]} The reformatories’ retraining programs “remained unique in [their] domestic content,” but were hampered by “the tension between domesticity and discipline,” as “teaching traditional feminine ideals of purity and submissiveness and training women to be self-sufficient” conflicted.^{81[81]} Still, the reformers hoped to “recast offenders in their own image, to have them embrace the values...of the lady,” to cast aside their criminal ways and “learn to be good housewives, helpmates, and mothers.”^{82[82]}

The growing psychiatry movement that accompanied the women’s reformatories also played a role in the particularly gendered subjugation and “re-education” of women prisoners. The penological interest in surveillance and control of women dovetailed nicely with the growing influence of psychiatry in the early twentieth-century as the medical establishment entered the women’s prison walls and found that “the majority of women prisoners were

^{78[78]} *Id.* at 135, 137.

^{79[79]} *Id.* at 137.

^{80[80]} *Id.* at 137.

^{81[81]} *Id.* at 135; Kathryn Watterson, *Women in Prison: Inside the Concrete Womb*, rev. ed., 198 (1996).

^{82[82]} *Id.* at 147.

emotionally disturbed or in need of treatment to a far greater degree than male prisoners.”^{83[83]}

Psychotherapy, like non-rehabilitative goals of punishment and deterrence, also required close control of women and effecting punishment to direct behavior, and with “this double form of control of both the body and the inner person, surveillance and control penetrated still deeper, and confinement for women became even closer.”^{84[84]} Traditional gender roles played a key role in the “development and implementation of this especially oppressive therapeutic-oriented regime,” for the therapeutic model had the purpose of transforming the deviating woman into a “proper woman.”^{85[85]}

Current human rights abuses occurring in American women’s prisons today provide yet more horrific examples of the gendered nature of the penal system. Sexual abuse and assault of prisoners by prison staff is commonplace and pervasive, repeating and amplifying patterns of female subjugation present in the “free world.” Widespread medical neglect and medical malpractice further endanger incarcerated women. From April 1994 to November 1996, Human Rights Watch (HRW), an independent NGO based in the U.S. that investigates reports of human rights abuses all over the world, interviewed over sixty women currently or formerly incarcerated in women’s institutions in five states (California, Georgia, Illinois, Michigan, and New York) and the District of Columbia, as well as correctional officers at such institutions, district attorneys, prisoner aid organizations, and civil and women’s rights lawyers.^{86[86]} What they found were commonplace patterns of sexual assault and abuse of prisoners by, most frequently, male prison staff. The gendered nature of punishment of women prisoners through sexual harassment, sexual assault and sexual abuse by male staff is hard to

^{83[83]} *Id.* at 146.

^{84[84]} *Id.* at 146-148.

^{85[85]} *Id.* at 147.

^{86[86]} Human Rights Watch, Women’s Rights Project, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons*, v, 1 (1996). Hereinafter “All Too Familiar.”

miss, as it is an extension and reflection of the ways men all too often seek to dominate and control women in the “free world.”

Interviewees reported outright sexual assault of women prisoners largely by male prison staff, including vaginal and oral rape, but also more subtle forms of sexual abuse such as using “their near total authority to provide or deny goods and privileges to female prisoners to compel them to have sex or, in other cases, to reward them for having done so.”^{87[87]} In other cases, male prison staff violated professional ethics by engaging in sexual contact with prisoners seemingly absent outright coercion.^{88[88]} Male staff members have also used “mandatory pat-frisks or room searches to grope women’s breasts, buttocks, and vaginal areas and to view them inappropriately while in a state of undress in the housing or bathroom areas.”^{89[89]} The report also documented “regular verbal degradation and harassment of female prisoners” by male prison staff, “contributing to a custodial environment in the state prisons for women which is often highly sexualized and excessively hostile.”^{90[90]} Additionally, while HRW reported that no particular group of prisoners is sexually abused more than any other, they did specify that lesbian and transgendered prisoners have been singled out by prison staff for sexual misconduct.^{91[91]}

The problem is far more than a “few bad apples” wearing prison guard uniforms. HRW found internal prison grievance procedures for handling complaints of rape and sexual abuse of prisoners by guards were inadequate and structured to expose complaining prisoners to further harassment and retaliation from their abusers.^{92[92]} For example, HRW investigators found that in almost every prison they investigated, grievance procedures required the prisoner to

^{87[87]} *Id.*

^{88[88]} *Id.*

^{89[89]} *Id.* at 2.

^{90[90]} *Id.*

^{91[91]} *Id.*

^{92[92]} *Id.* at 5.

informally confront their abusers while they were still in contact positions with the prisoner.^{93[93]} Indeed, virtually every prisoner the investigators interviewed who reported sexual misconduct was retaliated against in some way.^{94[94]} The internal grievance procedures were also often hampered by conflicts of interest and prejudice against believing prisoner testimony, which made meaningful investigations into abuse and discipline nearly impossible.^{95[95]} In nearly every case of alleged sexual misconduct by an officer reported to HRW, prison staff assumed that the prisoner lied and therefore refused to believe prisoner testimony, absent medical reports or witnesses who were not prisoners.^{96[96]} Because of the traditional reluctance of correctional employees to testify against each other, obtaining such evidence is very difficult.^{97[97]}

Additional human rights abuses occurring in women's prisons include medical neglect and medical malpractice.^{98[98]} Women have died needlessly behind bars, and/or experienced extremely painful and undignified last days because of medical neglect and malpractice by prison medical staff.^{99[99]} Much of this medical torture stems from the pervasive and persistent belief that the women are lying about or imagining their conditions to get attention or to obtain drugs.^{100[100]} This is an unfortunate trend that mirrors sexism found in Western "free world" health care, where women are assumed to have fewer "real" health problems than men.^{101[101]} Prison medical staff are not alone in harboring these beliefs; these same assumptions motivate prison authorities to disbelief prisoner allegations of rape or sexual assault by a guard.

^{93[93]} *Id.*

^{94[94]} *Id.*

^{95[95]} *Id.*

^{96[96]} *Id.*

^{97[97]} *Id.*

^{98[98]} Ellen M. Barry, *Bad Medicine: Health Care Inadequacies in Women's Prisons*, 16-SPG Crim. Just. 40 (2001).

^{99[99]} *Id.*

^{100[100]} *Id.* at 40, 42.

^{101[101]} *Id.* See also Padma Prakash, Annie George and Rupande Panalal, *Sexism in Medicine and Women's Rights*, 54 Indian Journal of Social Work, Focus Issue, Patients Rights 199-201 (1993) at <http://www.cehat.org/publications/pc01a11.html>.

Women's prisons also reinforce male supremacy and female subjugation in the systemic disparate treatment of women prisoners as compared to male prisoners. Human Rights Watch found that because women made up a relatively small portion of the overall incarcerated population, there were fewer resources allocated to them, resulting in harsher punishment than their male counterparts. For example, because there are fewer women's facilities overall, women offenders are more likely to be housed in maximum security prisons, where women of all security levels are allowed to mix to some degree.^{102[102]} Men, however, are usually assigned to prisons based on a variety of factors that include the crime they committed, prior criminal history and psychological profile.^{103[103]} Additionally, they found that rules in women's prisons tended to be more numerous and pettier in nature than those in men's prisons, resulting in more severe punishment than what men receive for the same actions.^{104[104]} The investigators noted that women prisoners were more likely to be cited for disciplinary minor infractions typically ignored in men's prisons, and receive a greater number of citations for less serious offenses."^{105[105]}

The investigators also found that in comparison to male prisoners, women prisoners do not receive comparable educational and vocational programs that male prisoners do, and have "fewer opportunities for job-training and work-release, less access to social services, fewer visitors, and are more likely to be treated like children."^{106[106]} When vocational programs exist, they are usually traditionally low-paying female occupations like homemaker, launderer and beautician.^{107[107]}

^{102[102]} All Too Familiar at 23.

^{103[103]} *Id.*

^{104[104]} *Id.*

^{105[105]} *Id.*

^{106[106]} *Id.* at 24.

^{107[107]} Nancy Kurshan, *Behind the Walls: The History and Current Reality of Women's Imprisonment, in Criminal Injustice: Confronting the Prison Crisis*, 155 (Elihu Rosenblatt ed.) (1996). Hereinafter "Kurshan."

Historically, women’s prisons have always been sites for double gender punishment – punishment for violating female gender roles when they committed crimes, and punishment aimed to inculcate “proper” white, middle class female gender roles. The gendered nature of punishment is pervasive – it infects how prison staff behave towards women prisoners, how they (do not) respond to prisoners’ attempts to self-advocate, how they provide or fail to provide medical care, and even how facilities are designed to maximize surveillance and control of women through the creation of housing units that are reminiscent of patriarchal nuclear family structures. Given how central reinforcing traditional gender norms are to women’s prisons, as it is in men’s prisons, it makes little sense to house transgender and gender-variant prisoners over the long term in women’s prisons. The extent to which women’s prisons have been used to house TG/GV inmates has never been examined, but a gender-based analysis of state punishment of non-TG/GV women does not give much hope for TG/GV prisoners.

III. Experiences of Transgender and Gender-Variant Prisoners

Most U.S. prison systems, including the federal system, place prisoners into male or female facilities on the basis of prisoners’ genitalia.^{108[108]} As one can imagine, this poses a serious problem for pre-operative and non-operative TG/GV people who express their genders in ways that seem to be at odds with the sex the medical establishment assigned to them at birth.^{109[109]} This ostensible incongruence makes TG/GV prisoners easy to single out for abuse and mistreatment both by other prisoners and by prison staff.^{110[110]} In men’s prisons, femininity can be a costly liability, and in women’s prisons, prison authorities from the rank and file to bureaucratic administrators implement

^{108[108]} TIP Website; Rosenblum at 522.

^{109[109]} Rosenblum at 522. Binary gender segregation in jails and prisons are also problems for intersexed prisoners who have genitalia that do not precisely fit medical dictates of “male” or “female” anatomy.

^{110[110]} TIP Website; Rosenblum at 522-26.

policies and adopt attitudes that in effect attempt to stamp out any deviations from the white, middle class feminine ideal.

For TG/GV people therefore, prison is its own special kind of horror. While all prisoners experience the gender-oppressive aspects of incarceration and conditions of confinement, TG/GV people's unique genders make them special targets because our bodies and minds defy the gender binary system and therefore pose unique threats to the gender enforcement aspects of state punishment. Unique threats to the prison order, like those posed by political prisoners and others who "don't play by the rules," call for especially harsh punishment: our people have been sexually assaulted, raped, and beaten by fellow prisoners and prison staff; subjected to homophobic and transphobic slurs from staff, forced to submit to frequent and unnecessary demeaning strip searches (that are in truth only performed to satisfy staff curiosity about our genitals), experienced sexual assaults, and have received disproportionate punishment for minor infringements of facility rules.^{111[111]} They are also frequently denied access to hormones and other gender-related medical treatment prescribed by their "free world" doctors that they were receiving before imprisonment.^{112[112]}

In 1999, a white gender-variant woman held in a San Francisco county jail sued San Francisco for violating her civil rights when male jail staff subjected her to an unnecessary and degrading strip search to determine her gender.^{113[113]} The case was brought to trial in federal

^{111[111]} Rosenblum at 523-26; Interview with prisoners at Central California Women's Facility, September-December 2002 (notes on file with author); Ad Hoc Committee for Prison Health Care Reform, Prisoner Activist Resource Center (1998), *Transgender Prisoner Activists Challenge Discrimination*, at <http://www.prisonactivist.org/pipermail/prisonact-list/1998-January/001120.html> Hereinafter "Ad Hoc Committee."

^{112[112]} Readers may feel that access to hormones is closer to "cosmetic" medical treatment than to HIV medication, for example. While not always necessary for physical body function, the changes that hormones can make and maintain are central to many TG/GV people's core identities and the key to self-actualization. The forced discontinuation from hormone treatment is felt to be a very invasive loss of sovereignty over one's own body, and can be extremely psychologically damaging.

^{113[113]} Teresa Dulce, *Victoria Schneider Interview: How San Francisco Messed with the Wrong Hooker*, Danzine, Issue #17, 2002, at <http://www.danzine.org/zine17-victoria.html>.

court, but was settled for three-quarters of a million dollars before the verdict was reached.^{114[114]} In late 2002, another transgender woman of color filed suit against the city and county of San Francisco, once again for repeated sexual assaults by a male Sheriff's deputy against her while she was held in San Francisco County Jail.^{115[115]} According to her attorneys, the deputy isolated her and ordered her to "strip naked, masturbate, and show him her body and dance for his arousal."^{116[116]} Shortly after the suit was filed, the Sheriff's Department fired the implicated officer.^{117[117]} My own personal experiences in Alameda County Jail following an arrest for a civil disobedience in 2001 lend credence to these reports, as I and the other transgender and gender-variant people who were arrested with me were singled out by jail staff, and called derogatory names related to our masculine appearances. Additionally, a transgender and intersexed person on the FTM spectrum who was also the most masculine-appearing one of us (as he neglected to shave that morning), was deliberately separated from the rest of us and placed in general population for no other apparent reason but to expose him to abuse from other detainees.

Experiences of TG/GV prisoners in men's prisons have been relatively well documented^{118[118]} and I described them in section II. By contrast, little attention has been paid to the experiences of TG/GV prisoners in women's prisons, both on the MTF and FTM spectrums. I believe this is because advocates have too narrowly defined who is transgender, preferring to use the word nearly interchangeably with transsexual,^{119[119]} and have not looked

^{114[114]} Conversation with Karen Snell, Esq., Clarence & Snell, lead plaintiff attorney, November 2002.

^{115[115]} Rachel Gordon, *SF Jailer Allegedly Fired in Sex Case – Transgender Person Suing for Assault*, S.F. Chronicle, Nov. 12, 2002, at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2002/11/12/BA147553.DTL>.

^{116[116]} *Id.* (internal quotations omitted).

^{117[117]} *Id.*

^{118[118]} See *supra* note 59.

^{119[119]} Anita Barnes, in "The Sexual Continuum: Transsexual Prisoners," 24 *New Eng. J. on Crim. & Civ. Confinement* 599 (1998), acknowledges that "[the term] transgender embraces all forms of challenging gender identity, of which transsexualism is just one aspect," yet she uses the "transgender" and "transsexual" interchangeably "for purposes of

more broadly at gender-based oppression against those who do not express their genders in traditionally binary ways, or against those intersexed people who are non-dually bodied. Additionally, because images of transgender women are more common in popular lore than are images of people on the FTM spectrum, many female-bodied masculine people are unaware of the possibility of living in the world as something other than women. This is especially true among communities of color, because Western medicine and European-America provide the bases for the modern “transgender” identity as expressed in North America. When one uses a more inclusive lens, gender-variant and transgender people in women’s prisons readily come into view.

A. Women’s Prisons

Because prisoners are housed according to their genitalia, and relatively few transgender women are able to afford genital surgery, there are very few transgender women in women prisons. Those that are there are generally post-op. However, gender-variant prisoners on the FTM spectrum have long been noted in sociological studies of women’s prisons and in popular lore, but usually only in so far as they temporarily take on a gender-variant “little boy” or “male” roles while incarcerated as a way to fit into prison society.^{120[120]} However, among these prisoners exists an unknown number of who were gender-variant or transgender before incarceration, or who have come to feel these expressions are integral components of their identities while in prison, and not just temporary roles. While no formal studies of transgender men in women’s prisons have been done, anecdotal evidence reported by FTM transgender and gender-variant people in women’s prisons suggest that the brunt of the mistreatment they

simplicity.” Unfortunately this choice of terminology erases the experiences of transgender people not in the purview of medical science, thereby limiting her discussion of the abuses of gender-variant prisoners to only those that medicine and psychiatry have defined.

^{120[120]} Owen, *supra* note 73, at 142-43.

experience comes from the prison staff in the form of homophobic harassment, as prison staff often conflate masculine gender expressions with homosexuality, which is strictly forbidden in many prison systems.

Anecdotal evidence from prisoners in women’s prisons indicates that white male correctional officers are most often the culprits of such harassment.^{121[121]} They are quicker to scrutinize physical contact between gender-variant prisoners and other prisoners, under the assumption that any contact by these prisoners is homosexual in nature.^{122[122]} They treat transgender and gender-variant prisoners as potential sexual predators, regardless of the prisoners’ underlying convictions.^{123[123]} Prison staff punish transgender and gender-variant prisoners suspected of violating bans against homosexual contact by being written up for disciplinary infractions, isolated from other prisoners, and ignoring their requests to use earned privileges.^{124[124]} Transgender and gender-variant prisoners are also often verbally harassed by prison staff with homophobic slurs and “wisecracks” about their masculine appearances, and singled out for special mistreatment like frequent, unjustified and destructive cell searches as a form of harassment.^{125[125]} The fact that the overwhelming majority of COs who mistreat gender-variant and transgender prisoners are white men while many transgender and gender-variant prisoners are of color points to the complexity of the oppression felt by this group of prisoners as including sexism and racism as well as transphobia and homophobia.

Although few in number inside women’s prisons, prisoners on the MTF spectrum can still experience abuse and harassment while incarcerated. One transgender woman recently incarcerated at the Central California Women’s Facility was subjected to repeated demeaning

^{121[121]} Reported to author by prisoners at CCWF, Fall 2002-Spring 2003. Identities are concealed to protect these prisoners.

Notes on file with author.

^{122[122]} *Id.*

^{123[123]} *Id.*

^{124[124]} *Id.*

^{125[125]} *Id.*

strip searches to satisfy guards' and medical staff's curiosity about her genitals.^{126[126]} Staff also used homophobic slurs when speaking to her or about her, and even went so far as to set up another prisoner to physically assault her.^{127[127]}

Clearly, TG/GV women in women's prisons can experience the same sort of sexual harassment and abuse that non-TG/GV women prisoners experience, but are among the groups of prisoners that prison staff single-out for special "attention." However, the psychological and physical toll on TG/GV prisoners and former prisoners can be especially drastic because of the ignorance of fellow prisoners who exclude TG/GV women from their own support networks, and the lack of TG/GV-inclusive social services, job training opportunities, and appropriate mental health care services in prison and after release. Further compounding the problem, prisoner advocate organizations already overwhelmed by the tide of human rights violations against non-TG/GV prisoners by and large fail to advocate for TG/GV prisoners, and unfortunately often display transphobic sentiments themselves.

Medical neglect and medical malpractice inside prisons also affect TG/GV prisoners. Like traditionally-gendered women prisoners and as described in section I of this comment, TG/GV prisoners are likely to be low-income and of color, and therefore without adequate health insurance. This means they enter prison with significant health care issues and ailments that occur at higher rates in non-white populations, such as diabetes, high blood pressure, sickle cell anemia, and undetected breast cancer.^{128[128]} Also as described earlier in this comment, many TG/GV women prisoners also share with non-TG/GV women prisoners histories of prostitution

^{126[126]} Reported to Justice Now, a San Francisco Bay Area legal advocacy and direct services organization for women prisoners, located at 1322 Webster Street, Suite 210, Oakland, CA 94612, (510) 839-7654, <http://www.jnow.org>.

^{127[127]} *Id.*

^{128[128]} Barry, *supra* note 97, at 40-42.

and widespread intravenous drug use, creating higher rates of depression, HIV, and hepatitis C than in the adult female “free” population.^{129[129]}

In fact, because of the dependency transgender and gender-variant people are forced to have on the medical establishment to bring their physical bodies into alignment with their identities, transgender and gender-variant prisoners have additional needs for medical attention and follow-up. The long-term effects of hormone therapy are little studied, but some reported effects include increased risk of cancer, liver damage, depression, hypertension, and diabetes as a result of hormone use.^{130[130]} Additionally, anecdotal evidence suggests transgender and gender-variant people have high rates of depression, anxiety and other mental health problems related to the constant stress stemming from simply having highly stigmatized identities. Given the relatively complex and little understood health needs of TG/GV prisoners, it is no surprise that the prison health care systems that fail to adequately treat non-TG/GV prisoners also fail TG/GV prisoners.

In addition to being housed in general population in men’s and women’s prisons, prison authorities have segregated TG/GV prisoners in special wards meant to provide some level of additional safety. Unfortunately, these measures often prove to be additionally punitive. In the next section, I will discuss housing strategies that isolate transgender and gender-variant prisoners from the rest of the prison population. While some solutions hold more potential than others, none are unproblematic.

B. Segregated Wards

Across the U.S., transgender and gender-variant prisoners are housed in several different kinds of segregated facilities, including administrative segregation (“ad-seg”) or wards for

^{129[129]} *Id.*

^{130[130]} LGBT Health Channel, *Transgender Health* (2003), at <http://www.gayhealthchannel.com/transgender/ht.shtml>.

prisoners with heightened medical needs. While these housing situations do indeed provide some protection from other prisoners, they do not protect TG/GV prisoners from predatory prison staff, and they tend to house prisoners in even harsher and more restrictive conditions. Stigma also attaches to prisoners housed in medical wards, compounding their marginalization among other prisoners and exposing them to further persecution from prison staff.

1. Administrative Segregation or “Going to Jail”

Separate from the rest of the prison wards, protective custody (also known as administrative segregation, or “ad-seg”) segregate and isolate prisoners from the general population, ostensibly for only short periods of time.^{131[131]} Ad-seg may be voluntarily entered for a prisoner’s own protection,^{132[132]} but ad-seg is also used to punish prisoners for disciplinary infractions, and is sometimes referred to by prisoners as “the jail” inside the prison.^{133[133]} Prisoners doing terms in ad-seg lose privileges they enjoyed in general population, endure harsher restrictions including reduced space in cells and in their exercise yards, and are isolated from direct contact with all other prisoners besides their cellmates, if they are fortunate enough to have one.^{134[134]} Prisoners in isolation are also at risk from even more severe abuse by prison staff, because ad-seg prisoners are assumed to be more dangerous and because there are few others around to witness their misconduct. All prisoners housed there experience these conditions regardless of why they were sent there.

Courts have recognized the negative effects of administrative segregation; the Supreme Court saw protective custody as akin to solitary confinement and placed restrictions on its

^{131[131]} Barnes, *supra* note 118, at 638.

^{132[132]} *Id.*

^{133[133]} Reported to author by prisoners at Central California Women’s Facility, Fall 2002.

^{134[134]} Barbara Owen, “*In the Mix*”: *Struggle and Survival in Women’s Prison*, 112-115 (1998).

use.^{135[135]} Courts have generally understood that long-term isolation in ad-seg can cause substantial psychological damage, especially adversely impacting those there for protective or administrative reasons, like TG/GV prisoners sent there for their own protection, rather than for disciplinary reasons.^{136[136]} This is because the former have not committed infractions justifying the harsher treatment, and may be required to stay in ad-seg indefinitely, while those there for disciplinary offenses most often receive definite sentences inside ad-seg.^{137[137]}

Administrative segregation is therefore not an acceptable a long-term solution to house transgender and gender-variant prisoners. It is used as punishment for prisoners who commit disciplinary infractions, and prisoners housed there are treated more harshly than those in general population. Indeed, isolating TG/GV prisoners can make them more vulnerable to staff harassment and abuse because witnesses are conspicuously absent.

2. Medical Wards

California State Prison Corcoran, a mixed-level male prison, has an HIV/AIDS ward with a high concentration of transgender women prisoners. Not all the prisoners there are TG/GV or even gay; in fact, most are non-transgender heterosexual men.^{138[138]} Other prisons have special wards for prisoners with mental health needs, and at least one TG/GV prisoner has found herself there after attempting suicide after being unable to endure the continuous harassment from other prisoners and prison staff.^{139[139]}

Separate medical wards that do not additionally punish prisoners housed there can provide at least a temporary refuge for TG/GV prisoners. Such housing may not exist, however for mentally disabled prisoners are yet another group singled out for abuse and attack by prison

^{135[135]} *Id.*

^{136[136]} Barnes at 639 (quoting *Wright v. Enomoto*, 462 F. Supp. 397, 399, 403 (N.D. Cal. 1976), *aff'd*, 434 U.S. 1052 (1978); *Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988); internal quotations omitted).

^{137[137]} *Id.*

^{138[138]} HIV/Hepatitis C in Prison Committee, California Prison Focus.

^{139[139]} Reported to author by prisoner at CCWF, Fall 2002.

staff.^{140[140]} Unfortunately, even if TG/GV prisoners are exempted from the harsh conditions affecting mentally ill prisoners in mental health wards,^{141[141]} being housed in a medical ward still stigmatizes TG/GV prisoners as sick and diseased, a stereotype already widespread in this society. This can lead to further victimization by other prisoners and prison staff, since this society views stigmatized illnesses like HIV/AIDS (and supposed illnesses like transgenderism) as worthy of moral condemnation and ostracization. Additionally, because a prisoner must have severe mental health problems to qualify for residence in mental health wards, TG/GV prisoners housed there must endure the constant threat of being moved back into general population if they are deemed not “mentally ill enough” to stay. This not only perversely encourages TG/GV people to adopt pathological views of their own identities, but also gives prison staff one more tool to harass and intimidate this already vulnerable and despised population.

Housing TG/GV prisoners in mental health wards reinforces societal discrimination against TG/GV people because it perpetuates the myth that our gender identities are symptoms of a sickness. The American Psychological Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) describes transgenderism as pathology, calling it “Gender Identity Dysphoria.”^{142[142]} The diagnosis provides a socially-acceptable container for the potentially radical threat to the gender binary that transgender and gender-variant people can pose. Rather

^{140[140]} *The Prison Discipline Study: Exposing the Myth of Humane Imprisonment in the U.S., in Criminal Injustice: Confronting the Prison Crisis*, 92-93 (Elihu Rosenblatt ed.) (1996).

^{141[141]} In the fall of 2002 I personally observed conditions in a mental health ward at CSP Corcoran, a mixed-level California prison for men. There prisoners were allowed to wear only underwear, were shackled when taken out of their cell for any length of time, and were isolated in their own cells with no one to interact with save indifferent staff on the other side of the steel doors of their cells. Their cells were bare, with only a toilet and a mattress pad to sleep on. The unit itself was very loud, as prisoners were incessantly shouting to passersby, and the floor was strewn with debris. The staff was largely indifferent to prisoners who had legitimate health care needs that they were trying to articulate to staff through the steel doors, and generally had the attitude of total contempt for the prisoners. While this may not be the norm for mental health wards in other prisons, it was clear that prisoners there were subjected to harsher restrictions and had fewer privileges than those in general population.

^{142[142]} *Farmer v. Brennan*, 511 U.S. 825, 829 (1994).

than seeing ourselves as suffering from a “rare disorder,”^{143[143]} many of us transgender and gender-variant people today view our identities as simply part of the rich human diversity of gender that exists in the world, which the gender binary seeks to artificially constrain to serve the interests of the ruling classes, whose genders at least appear to fit the gender binary.

Pathologizing us resolves the crisis of category that triggers so much anxiety felt by many traditionally-gendered people when they encounter a transgender or gender-variant person – we are neither “real men” nor “real women;” we are just “sick.”

Even if TG/GV prisoners are transferred to medical wards for their own safety and not because they are deemed to have an illness, this attitude may not necessarily filter down to the rank and file line staff in the prison. In order to make medical wards safer places to house TG/GV people, conditions would have to improve for all mentally disabled prisoners housed there, and/or staff would have to be well versed in the complexities of transgender and gender-variant identities. Given the tremendous resources and good will this requires from prison administrators and staff, neither solution is likely to occur in the near future.

3. “Transgender Only” Wards or Prisons

No TG/GV-exclusive wards or prisons currently exist, so one can only speculate as to their success at protecting the safety of this very vulnerable prison population.^{144[144]} These separate wards or prisons may hold promise to protect TG/GV prisoners from abuse by other prisoners, but the constant threat of mistreatment from prison staff remains. However, even if

^{143[143]} *Id.*

^{144[144]} Currently the closest to transgender-only wards that I know of are “gay tanks” in Rikers Island (NY), Berkeley City Jail (CA), and San Francisco City Jail (CA), which house TG/GV prisoners and gay and bisexual prisoners. Other jails may have similar housing for prisoners they deem at risk because of their gender expressions. Additionally, California Medical Center at Vacaville houses a number of TG prisoners, who are there because “their transgender status is deemed more of a medical issue” (Cosmo Garvin, *What's She Doing in the Men's Jail?*, Sacramento News & Review, February 13, 2003, at <http://www.newsreview.com/issues/sacto/2003-02-13/cover.asp>). The problems with this medical approach to transgenderism are discussed *infra* Part III.B.2

prison staff in these wards were specially educated about transgender issues, a number of very difficult policy questions arise.

To begin with, who would decide who should be allowed into these special wards? The courts and prison systems have demonstrated a fundamental lack of understanding of the true diversity of transgender and gender-variant people, instead turning to medicalized explanations and “treatments” to reduce TG/GV gender diversity down to mere illness that has little to do with traditionally-gendered “real men” and “real women.”^{145[145]} Ignorant, they remain insensitive to the vast possibilities of gender self-identification that is the reality for many transgender and gender-variant people. For example, while it may be clear that post-operative transsexuals or even those with gender expressions that do not “match” their genitalia (according to the gender binary) qualify for housing in these special wards, gender-variant prisoners would pose a much more complex problem – given the multiple and subtle ways people can be gender-variant, how would jailers decide who is “gender-variant enough” to qualify for the TG/GV ward? After all, the most likely targets for prison rape in men’s prisons are young, white and small-statured,^{146[146]} who some prisoners may perceive as more feminine but who may not appear gender-variant to a judge. Should deciding a prisoner’s transgender or gender-variant status be an objective (e.g. years on hormones, which surgical procedure performed if any, etc.) or subjective (e.g. do they look like “women”) determination? Would this require prison administrators to develop guidelines to judge prisoners’ genders so that the rank and file could identify all gender-variant prisoners before they are victimized? Developing guidelines with this level of detail seems like a daunting task given the ignorance of prison authorities and the larger

^{145[145]} Debra Sherman Tedeschi, *The Predicament of the Transsexual Prisoner*, 5 Temple Pol. & Civ. Rts. L. Rev. 27. 30-44. (1995).

^{146[146]} Man and Cronan at 157-176.

society regarding gender diversity and variance, and the deep level of entrenched transphobia and homophobia among prison authorities, rank and file officers, and society in general.

Additionally, it seems tragic to deny this privilege to the many others endangered in prison. Human Rights Watch's 2001 report on male prison rape contains tragic and moving autobiographical anecdotes by non-transgender male survivors of prison rape who were targeted because of their small stature, their youth, their lack of gang affiliation, their non-aggressive demeanors, or their gay sexual orientations, in addition to sometimes having feminine characteristics.^{147[147]} HRW also chronicled numerous abuses of non-transgender women prisoners, as described earlier. For those concerned with the safety of TG/GV prisoners, it seems absurd and even cruel to argue for separate wards for TG/GV prisoners but leave everyone else in danger.

From the perspective of the transgender and gender-variant liberation movement, segregating TG/GV people into separate prisons or wards deprives transgender and gender-variant people of the power we hold to expose the internal contradictions of the gender binary system operating within the criminal justice system. Segregation would literally lock us up and away from the very institutions that we have the potential to disrupt, in effect doing with concrete and steel what the "Gender Identity Dysphoria" diagnosis does to control our non-binary genders.

IV. Immediate Recommendations & Long-Term Solutions

It is clear that given the gendered nature of prison punishment, there is no real solution to the TG/GV prisoner "problem." Some alternatives are better than others, but because TG/GV people are so varied in their gender expressions, drawing bright-line rules and creating blanket

^{147[147]} Human Rights Watch, *No Escape: Male Rape in U.S. Prisons*, "Prisoner's Voices," at <http://www.hrw.org/reports/2001/prison/voices.html>.

housing policies for this vulnerable population are nearly impossible. Concerning the importance of immediate prisoner safety, I recommend that advocates push for housing decisions on a case-by-case basis, rather than push reforms that necessitate creating extensions of the existing prison industrial complex.

For example, where to house a particular TG/GV prisoner should depend on where ze would be safest. Since there is no place that is absolutely “safe” – after all, this is prison – advocates for TG/GV prisoners should conduct a careful determination of housing options that include investigating staff and prisoner attitudes, as well as services and programs available to the prisoner. Of course, advocates should also take into consideration the prisoner’s own informed choice of where ze would like to go. This may result in surprising housing arrangements: a middle-aged TG/GV woman prisoner might choose to be housed in general population in men’s prison because her age makes her a less inviting target for sexual harassment and she wants to be near her boyfriend. Or a pre-op TG man might want to stay in the mental health ward of a woman’s prison because he has made friends with a counselor there. Housing arrangements may need revising if circumstances change and the placement becomes dangerous; for example, an especially hostile new guard may rotate into the ward. This would require advocates to stay in constant touch with long-term TG/GV prisoners to make sure they are indeed as safe as possible for the duration of their incarceration.

Making case-by-case determinations avoids arguing for expanding the prison industrial complex. U.S. carceral history over the past century illustrates of the dangers of reforms that call for more money to be allocated to prison systems and the criminal justice system. While they were meant to address flagrant human rights abuses, many reforms have now become justifications for astronomically large prison budgets, and combined with new policing and

prosecution strategies (not the least of which was the war on drugs) from the last fifty years, the results have been the constructions of more prisons than ever before, all bursting at the seams with brown, black and poor white bodies.

Because we currently live in an era of ever-expanding prison populations and prison sentences, large-scale reforms like building transgender-only wards and creating new medical policies to treat transgender and gender-variant prisoners should not be advocates' first strategies. The history of prison reform provides a poignant history lesson as to why. In this section, I will first describe the growth of women's prisons as an example, and then describe the socio-political trends that filled them up to overflowing.

A. A. Reform: A Growth Industry in Women's Prisons

Before 1830, there was very little segregation among men, women and children in prisons, and women were “exposed to sexual attacks, floggings, and severe punishments that often led to sickness and death.”^{148[148]} In response to these conditions, Quaker reformists pushed for and won separate facilities for women.^{149[149]} In 1839 the Mount Pleasant Female Prison began operation on the grounds of the Sing Sing prison for men in Ossining, New York, as the first prison where women were segregated from male prisoners and were supervised by women prison staff.^{150[150]} In 1873, the first all-female prison, and the first to be completely operated by female staff, opened in Indianapolis as the Indiana Reformatory Institution for Women and Girls.^{151[151]}

^{148[148]} Kathryn Watterson, *Women in Prison: Inside the Concrete Womb*, rev. ed., 194 (1996). Hereinafter “Watterson.”

^{149[149]} See Part IV.B. *supra*.

^{150[150]} *Id.* at 196

^{151[151]} *Id.* at 198.

Over the next forty years, four more women’s reformatories were to open across the Northeast, and by 1917, fourteen states had their own all-women reformatories.^{152[152]} This number more than doubled to thirty by 1972, including the Federal Reformatory built in 1927.^{153[153]} In addition, by 1972 there were twenty-four state facilities for women under male warden leadership, and one federal prison on Terminal Island in California.^{154[154]} The movement to segregate women prisoners away from men also extended to local county jails, as five separate county jails for women had been established by the 1970s, and 3,000 other local jails segregated women on separate cellblocks away from male prisoners.^{155[155]}

Historian Estelle Freedman notes that the post-Civil War women’s prison reform movement died out by the 1930s even while women’s prisons and jails were booming, and the women’s prisons had become so part of the established criminal justice penal system that they no longer held the promise of human, rehabilitative treatment the reformers had originally envisioned. She observed that “after the 1920s the separate prisons were now run by women who lacked the critical approach to men’s prisons taken by earlier reformers.”^{156[156]} Freedman writes that these prisons “no longer existed to serve women. Rather, they supported the male-dominated system and adopted its values.”^{157[157]} The women’s prison reform movement had been effectively co-opted early-on by conservative penal ideologies and attitudes, “[testifying] to the capacity of the American institutions to accommodate reform for conservative ends.”^{158[158]}

Over the course of the last several decades, the number of women prisoners has skyrocketed. In 1972, women made up only 3% of state prisoners nationwide, but as of 1995

^{152[152]} *Id.*

^{153[153]} *Id.* at 199.

^{154[154]} *Id.*

^{155[155]} *Id.*

^{156[156]} Howe at 135.

^{157[157]} *Id.*

^{158[158]} *Id.* at 136 (internal quotations omitted).

they comprise 6% of the state prisoners and 7% of federal prisoners.^{159[159]} In the early 1970s, penal institutions imprisoned approximately 22,000 women, but by 1995, this figure had grown to more than 108,000 women, a 390% increase.^{160[160]} The 1980s saw a 256% increase in the number of women in prison, compared to a 140% increase in male prisoners.^{161[161]} The rate of growth in the number of women prisoners has outpaced men every year since 1981.^{162[162]} In California alone, the number of women prisoners increased 450% between 1980 and 1993, and by 1995, California had more than 9,000 women prisoners. By contrast, in 1980 the state held only 1,316 women prisoners.^{163[163]} Disproportionately represented among prison populations, the numbers of women of color prisoners continues to mount. In 1995, 40% of incarcerated women were African American and 30% were Latina.^{164[164]} These population explosions contrast sharply with the historically low numbers of women prisoners, which had remained steady for the last fifty years.^{165[165]} Also beginning in the 1970s, seventeen new prisons for women began operation, and states and the federal government built thirty-four new units for women prisoners in the 1980s.^{166[166]} According to the 1994 American Correctional Association Directory, “we now have a total of seventy separately run and operated state prisons for women; twenty-nine women’s prison units that often are referred to as ‘co-ed facilities’ but are housed in state prisons for men; three federal women’s prisons; and nine women’s units in federal (‘co-ed’) prisons for men.”^{167[167]}

B. If We Build Them They Will Come: How They Filled the Prisons Up

^{159[159]} *Id.* at 33.

^{160[160]} *Id.* at xv.

^{161[161]} *Id.*

^{162[162]} Kurshan at 150.

^{163[163]} HRW at 64.

^{164[164]} *Id.*

^{165[165]} Kurshan at 150.

^{166[166]} Watterson, *supra* note 147, at 199.

^{167[167]} *Id.* (quoting the American Correctional Association Directory)

While prison construction boomed in the early part of the twentieth century, overall numbers of prisoners remained low; the incarcerated population of the country remained at a steady 100-120 per 100,000 citizens.^{168[168]} Not until the mid 1970s did the rate of imprisonment begin to skyrocket, as a result of changing economic structures, policing strategies and political priorities.^{169[169]} This great growth in the number of prisoners would not have been possible however, had not reforms pushed through after the Civil War and again in the 1960s – badly needed as they were – made room for more bodies in the growing punishment industry. An unintended consequence of the reformers’ work, these backfiring strategies nonetheless form part of the foundation of the current incarceration crisis.

As discussed above, the post-Civil War reform movement died out by the Depression, largely failing to make long-lasting improvements in state and federal penal systems. But by the 1960s, a new liberal prison reform movement formed in reaction to barbarous prison conditions, especially those in the “warm weather gulags” of the South.^{170[170]} Conditions inside U.S. prisons had become an “international scandal that undermined the moral authority of the American political system in its battle against ‘international communism.’”^{171[171]} Prisoners received little health care or real food, and toiled for ten hours a day, six days a week no matter the weather, on the roads and in cotton fields.^{172[172]} “Bullwhips, sweat boxes, shotguns and electrode torture kept them moving,” and “death and escape rates were astronomical.”^{173[173]} The 1970s reform movement changed all that, giving rise to the ultra-modern, ultra-clean, well-lit concrete and steel monoliths that are modern prisons today. Prison health care, better food, and even (very) low wage paid jobs for prisoners now characterize doing time. Of course these

^{168[168]} Parenti, *supra* note 53, at 163.

^{169[169]} *Id.* at 163, 167.

^{170[170]} *Id.* at 164.

^{171[171]} *Id.*

^{172[172]} *Id.*

^{173[173]} *Id.*

changes required massive resources: new prisons had to be designed built, doctors and medical staff hired and trained, and contracts with corporations looking to make a buck supplying prisons or through cheap prison labor had to be negotiated and implemented. These reforms required prison systems to receive ever-larger shares of the state and federal budgets, which prison authorities used to expand even further. Expansion in turn use served to justify asking for even more money. In this way, the push and pull of reform and institutional inertia has set up a self-perpetuating cycle of growth for the prison industrial complex.

Once “better” prisons had been built to “better house” more prisoners, all that was needed was for the bodies to roll in. Studies show that the huge increase in numbers of incarcerated women, for example, are not due to the increased law-breaking by women, but the increased criminalization of women of color resulting from changes implemented in the 1970s in law enforcement practices, sentencing (i.e. three-strikes laws and mandatory minimums), and the war on drugs.^{174[174]} Drug related offenses represented 55% of the increase in the women’s prison population between 1986 and 1991.^{175[175]} Additionally, violent crimes by women have remained constant over the past several decades.^{176[176]} Changing attitudes by judges and prosecutors towards an increased willingness to prosecute and sentence women to prison time rather than to accept plea bargains and probation are also contributing factors.^{177[177]} In the 1970s, nearly 66% of women convicted of federal felonies were given probation, while in 1991 only 28% were placed on probation.^{178[178]}

Other forces combined with changes in criminal justice policy in the 1960s and 70s to give rise to increased numbers of incarcerated people. The modernization of capitalism resulted

^{174[174]} All Too Familiar at 17.

^{175[175]} *Id.*

^{176[176]} Kurshan at 150.

^{177[177]} Watterson at 42.

^{178[178]} *Id.*

in a makeover of the class and occupational structure of American society, which created a new, larger poverty-stricken underclass made up largely of people of color who stoked urban discontent in the form of radical left political movements.¹⁷⁹ Unable to respond to the multifaceted threats these movements posed, governments responded instead through counterinsurgency that prioritized policing “and other ‘front end’ forms of criminal justice.”¹⁸⁰ In the early 1980s, when these movements had been neutralized, discontent borne of the poverty caused by neo-liberal economics became the threat that needed containment.¹⁸¹ By then prison reforms had cleared the way to more “humanely” punish the poor for stepping out of line, and so the criminal justice system easily became a “bulwark against the new dangerous classes because it [absorbed] and [controlled] them and [extended] its threat onto the street.”¹⁸² Right-wing electoral rhetoric also played a role in increasing the number of incarcerated people.¹⁸³ Because neo-liberal economics hit the working class especially hard, conservative and reactionary politicians needed scapegoats to distract people from the real causes of increased poverty – corporate greed and politicians’ own personal cut.¹⁸⁴ They chose to blame immigrants, the poor, and people of color generally but blacks especially.¹⁸⁵ They were “cast as parasites, and violent predators pilfering middle-class (read white) America by means of such Great Society programs as AFDC and Head Start.”¹⁸⁶ The symbol for all that was wrong with society was “the young dark criminal, the untamed urban duck, running free threatening

¹⁷⁹Parenti at 167-688.
¹⁸⁰*Id.* at 167.
¹⁸¹*Id.*
¹⁸²*Id.* at 168.
¹⁸³*Id.*
¹⁸⁴*Id.*
¹⁸⁵*Id.*
¹⁸⁶*Id.*

order, property and (white) personal safety.”^{187[187]} Thousands of new criminal justice statutes carrying the racist and classist stamp of this rhetoric resulted, establishing harsh mandatory minimums and other laws that led directly to more and more black and brown bodies behind bars for longer and longer periods of time.^{188[188]}

C. Implications of Further Reform to Protect TG/GV Prisoners

Because we are still in a period of high rates of incarceration, large-scale reform on behalf of TG/GV prisoners will likely lead to further expansions of the prison industrial complex while failing to actually protect TG/GV prisoners. The unintended consequences of efforts by well-meaning reformers helped start the staggering growth in the prison industrial complex over the last century. In the women’s prison context, progressive-minded Quaker women sought to protect women prisoners by advocating for separate women’s prisons.^{189[189]} Tragically, this original benevolent idea has turned into a huge warehousing system to control a growing indentured class of poor women of color that are “the frightening result of slapdash policy focused on retribution, not common sense.”^{190[190]} While they won a segregated prison system, they lost the larger goal of protecting women.^{191[191]}

The same can happen if advocates are too eager to press for changes that require even more resources to be allocated to prisons. Ironically, in this political and economic climate, providing resources so prisons can “better” incarcerate TG/GV people means more TG/GV people will be locked up, and given the way penal systems are so fundamentally gendered, large-scale reforms are likely to fail to actually improve the lives of TG/GV prisoners. Conversely, flexible smaller-scale reforms that address specific needs of specific TG/GV prisoners do not

^{187[187]} *Id.*

^{188[188]} *Id.* at 167.

^{189[189]} Watterson at 194, 196.

^{190[190]} *Id.* at 199.

^{191[191]} See Part II *supra* regarding human rights abuses in women’s prisons.

provide justification for an increase in prison budgets. This suggests yet another irony: advocates can help the most by asking the least, at least while the criminal justice system continues to function as a white-supremacist warehousing system for the poor and colored.

D. Long-Term Solutions

Having just argued the superiority of small-scale reforms tailored to meet the needs of individual TG/GV prisoners, I conclude by turning my attention to long-term solutions to the transgender and gender-variant prisoner “problem.” Simply put, policy-makers should create more poverty-reducing opportunities that are sensitive to the needs of TG/GV people, and entities operating existing services that help prisoners win early releases and transition back into the “free world” must make their services TG/GV inclusive. Perhaps most importantly, prisoners rights activists must take themselves to task to unlearn their own biases against TG/GV people, and work to empower and integrate TG/GV prisoners and former prisoners in their work so that they can advocate for themselves.

1. Policies that Address the Root Causes of TG/GV Crime

For long-term solutions that lower the rates of TG/GV incarceration, policy-makers should tailor address the root causes of TG/GV law-breaking. As described in Section I of this comment, poverty resulting from severe job discrimination leads to various crimes committed for survival, such as prostitution, drug use that accompanies sex work, and related crimes.^{192[192]} Police profiling on the basis of race, income-level and transgender status also contributes to high rates of incarceration among TG/GV people and also must be addressed, as well as the larger issues of the criminalization of prostitution and the war on drugs.

Policy-makers should make job training programs more inclusive and more widely available to TG/GV people. This at minimum may require training for job training instructors, other

^{192[192]} E.g. theft to support a drug habit, etc.

participants, and program administrators on TG/GV issues, and active outreach to TG/GV people. Additionally, legal protections against anti-TG/GV job discrimination must be created and enforced. Transgender people are not explicitly covered by Title 7 and are explicitly excluded from the Americans with Disabilities Act (despite the GID “diagnosis”) and so need other forms of protection. These protections should have enough teeth that they do not require a lawsuit to mobilize them, thereby making them truly effective for all TG/GV people and not just for those who can afford lawsuits.

Law enforcement harassment and profiling of TG/GV people must cease immediately. This may mandate additional training for officers to unlearn their own biases, and the creation of an effective disciplinary structure to censure those who trample on the rights of TG/GV people. Realistically, however, police profiling and harassment of TG/GV people will likely not end soon because to do so would require law enforcement to recognize the ways they abuse, neglect and profile people of color, immigrants, and the poor generally.

Long-term changes that affect a multitude of people in addition to TG/GV people include decriminalizing of certain kinds of work, such as sex work and the black market in drugs. Many TG/GV people engage in prostitution and the illegal drug trade to survive because all other legal avenues to make money have been cut off due to various forms of discrimination.^{193[193]} It is cruel to continue to criminalize these forms of work; many TG/GV people have no choice but to earn money in these ways. Steps leading to decriminalizing prostitution and ending the war on drugs are beyond the scope of this comment, but they would undoubtedly decrease TG/GV rates of incarceration.

2. Existing Services Should Be Made TG/GV Inclusive

^{193[193]} For example, racism, sexism and transphobia could play roles in job discrimination against a transgender woman of color.

The services available to prisoners and former prisoners are by and large not TG/GV-inclusive. While acknowledging that the availability of these services are nowhere near adequate to meet the needs of non-TG/GV prisoners and ex-prisoners, the dearth of inclusive services discriminates against TG/GV prisoners as a class. TG/GV exclusion from these programs harks back to the days where these programs were largely unavailable to women. This can sabotage early release options for TG/GV people, for example. A secured placement in a substance abuse program or transitional housing can greatly enhance a prisoner's chances for an early release, but the lack of such services that understand and accept TG/GV people translates into decreased chances for early release for TG/GV prisoners. Compassionate releases are also early release arrangements sometimes granted to terminally ill prisoners at the last stages of their lives. A placement in a hospice greatly enhances the likelihood for a prisoner to receive a compassionate release from the court, but again if no hospice will take a dying TG/GV prisoner out of ignorance and fear, ze is out of luck.

3. Prisoner Rights Activists Bear the Responsibility to Include TG/GV Prisoners and Ex-prisoners

Throughout the discourse on the oppression of transgender prisoners, what is largely missing are the voices of TG/GV people and TG/GV prisoners themselves. Even in the prison activist movements the challenges facing transgender and gender-variant prisoners has received little recognition and even less advocacy. But despite the prejudice even within those who work to help prisoners, transgender prisoners and former prisoners have been resisting on their own by relying on each other and their allies to stay sane and alive, and now they are beginning to pick up the activist toolbox for themselves.

Currently there are very resources for transgender prisoners and former prisoners. However, in late 1997 an informal California advocacy group of prisoners' rights activists calling themselves the Ad Hoc Committee for Prison Health Care Reform launched a campaign to improve health care for transgendered prisoners housed a California Medical Facility at Vacaville.^{194[194]} They issued a press release announcing their campaign, and sent a letter signed by more than twenty-five concerned organizations and individuals to the warden of CMF-Vacaville, demanding a series of reforms including ending correctional officers' acting to "demean, demoralize, humiliate and discriminate against TGs [transgendered people];" improving access to hormone therapy both for those already taking hormones prior to incarceration and those seeking to initiate hormone therapy while incarcerated; protecting transgendered prisoners from physical, verbal and sexual abuse; allowing transgendered prisoners who have developed feminine characteristics to wear bras and make-up; and providing transgender-sensitive mental health services for transgendered prisoners.^{195[195]}

The Ad Hoc Committee has since dissolved, but in June of 2001 by the Trans/Gender-Variant in Prison Committee of California Prison Focus took up the cause.^{196[196]} At its inception, the group was made up entirely of volunteers, some transgender, some transgender former prisoners, and some neither who met during their spare time. Through interviews and correspondence with prisoners, they documented and investigated many abuses of transgender prisoners in California state prisons.^{197[197]} The group advocated for change using public education and protest.^{198[198]} In 2001 the group wrote a letter of protest to the warden at California State Prison – Corcoran, a male facility with a HIV/Hepatitis C ward that houses several transgender and gender-variant prisoners on the MTF

^{194[194]} Ad Hoc Committee, *supra* note 110.

^{195[195]} *Id.*

^{196[196]} Trans/Gender Variant in Prison Committee, California Prison Focus, at <http://www.prisons.org/TIP.htm>. Hereinafter "TIP Website."

^{197[197]} *Id.*

^{198[198]} *Id.*

spectrum, demanding increased access to hormones, clothing appropriate to these prisoners' genders (including bras for the transwomen who had already developed breasts from hormone treatment prior to arrest), and an end to homophobic violence and hate speech by prison guards.^{199[199]} In the summer of 2002 the group coordinated a public education event at the Lesbian, Gay, Bisexual and Transgender Community Center of San Francisco, focusing on the oppression of gay, lesbian, bisexual, and HIV+ prisoners, but also highlighting the gender-specific abuse of transgender and gender-variant prisoners.^{200[200]}

The TIP Committee has unfortunately hit a low-functioning period, and at the time of this writing, none of the former members know when if at all the group will reactivate. However, while in operation, the group's mission was additionally hampered by the ignorance and prejudice from the larger prisoner rights movement.^{201[201]} Pulling no punches, TIP Committee member Kevin Weaver points to unchallenged homophobia and transphobia in the prison activist world, writing that it seems "it may be one thing to advocate for the brother on death row, but the 'faggots, butches, and queens' are on their own or they don't exist."^{202[202]} He believes that larger society is mostly to blame, but attitudes of "former prisoners who carry the disrespect of queer prisoners they learned or perpetuated while in prison out into the outside activist community" are also responsible, as prison activists look to former prisoners who are now prison activists as "ideological barometers of how prison activism should move forward."^{203[203]}

^{199[199]} HIV/Hepatitis C in Prison Committee and Trans/Gender Variant in Prison Committee, California Prison Focus, Letter to California State Prison Corcoran Warden Frederic Brown (2002) at http://www.prisons.org/tip_letter.htm. Hereinafter "TIP Letter."

^{200[200]} TIP Website, "Locked Out," at http://www.prisons.org/locked_out.htm.

^{201[201]} Kevin Weaver, *No Prisoner Left Behind: The Fight for Transgender/Gender-variant Prisoners*, distributed via e-mail listserv "Locked Out," at <http://groups.yahoo.com/group/lockedout/message/157>. Copy also on file with author.

^{202[202]} *Id.*

^{203[203]} *Id.*

Of all the long-term solutions I have discussed, making the prison activist movement more inclusive of TG/GV prisoners and former prisoners may be the most important one, and the most likely to become reality. Prisoners and former-prisoners know that the prison industrial complex very negatively affects TG/GV prisoners – their own experiences inside tell them that. Prison activism that prioritizes developing the leadership of those most affected should have no problem including TG/GV prisoners and ex-prisoners from a political standpoint. The only thing that stands in the way is ignorance and prejudice, which activists can and should work to overcome, just as they can and should work to overcome racism and sexism in their movement. Real inclusion of TG/GV people in the prison activist movement holds the most promise for long-term improvements in the lives of TG/GV prisoners because it builds the capacity for TG/GV prisoners and ex-prisoners to advocate for themselves.

VI. Conclusion

This comment began with a description of how and why many transgender and gender-variant people end up in prisons in the first place. Transphobia, compounded with such “old fashioned” oppressions such as racism, sexism and homophobia in housing, education and employment is largely to blame for creating poverty and forcing transgender and gender-variant people to resort to underground economies to survive. Illegal work like prostitution leads often leads to illegal drugs, which in turn can lead to very serious related crimes. Because so much transgender and gender-variant law-breaking originates in poverty, anti-poverty strategies will reduce the incarceration rates of TG/GV prisoners. However, these strategies must be sensitive to how the gender binary system oppresses everyone, but transgender and gender-variant people more completely. Existing social programs and services that address poverty and provide meaningful opportunities for improvement in poor people’s lives should be made more robust,

and program administrators, anti-poverty advocates, and anti-prison activists need to learn how to make their programs more transgender/gender-variant inclusive.

However, the most promising way to reduce poverty and resulting criminality among transgender and gender-variant people is to work to empower transgender and gender-variant people themselves in this struggle. Black, Latina/o and low-income transgender and gender-variant persons of all races and genders, both former prisoners and those at risk for incarceration, should be in the leadership as those in the transgender and gender-variant communities most affected by the growing prison industrial complex. Additionally, given the multitude of intersecting oppressions they face, existing movement leaders should mentor and support them so they may also assume their rightful place at the prison activist table.

Fundamentally, this calls for mass unlearning of transphobia and homophobia among prison and poverty activists, and a recognition that transgender and gender-variant prisoners and prison activists can bring refreshing new perspectives on how governments also use gender to control and punish those who break the law, beyond how such control is extended over non-transgender women. Women prisoners and women prisoner advocates expose female subjugation as part and parcel of government ideologies of the punishment of women law-breakers, but transgender and gender-variant prisoners can extend this analysis to highlight the gender binary as one source of this subjugation. This in turn extends gender analysis of state penalty to include male prisoners as well.

Activists have much more work to do to begin to alleviate the chamber of horrors transgender and gender-variant prisoners experience. However, this work complements and enhances existing efforts to develop more alternatives to incarceration and programs that attack the reasons why poor people of color are marginalized from legal economies in general. Taking

a look at gender oppression through the lens of transgender and gender-variant prisoners benefits us all because doing so will advance the struggle to reverse the current “frenzied and brutal lockup binge.”^{204[204]}

^{204[204]} Parenti at 163.