Carceral Normativities:
Sex, Security, and the Penal Management of Gender Nonconformity

A DISSERTATION
SUBMITTED TO THE FACULTY OF
UNIVERSITY OF MINNESOTA
BY

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IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

Regina Kunzel, Advisor

November 2014

Acknowledgements

Like most endeavors, this dissertation is the product of much more than my individualized labor. I am indebted to numerous people's support, knowledge, criticism, community, mentorship, and other forms of labor and love. Without their support, I would not have been able to complete, or even conceive of, this project.

This project is deeply rooted in my activism and my commitments to helping envision and create a better world. My intellectual curiosity about and ability to articulate the interconnections between race, gender, sexuality, class, violence, oppression, and state control and how the histories of oppression and resistance continue to live with us was first cultivated outside of the university setting, in anti-war activist communities. As an excited, angry, idealistic 19-year-old, I grew up both politically and intellectually in these activist communities. Being mentored by older activists who argued for a complex understanding of how capitalism and living histories of US imperialism, white supremacy, and patriarchy produce current oppressive conditions, state violence, and unending war while also valuing the study of history, theory, and criticism and self-criticism as part of activist work has fundamentally shaped who I am as a scholar and activist today. My involvement with trans, queer, and anti-prison activism over the past decade has also deeply influenced this project, and I am particularly indebted to the work of the Sylvia Rivera Law Project and the Transformative Justice Law Project of Illinois.

I have also been incredibly fortunate to have found myself within academic spaces that value social justice, critical interdisciplinarity, and anti-racist, queer, and feminist politics and scholarship for most of my post-secondary education. I am

particularly indebted to John D'Emilio, who agreed to advise a random undergrad who wandered into his office one winter day in 2005. He was not only a fantastic mentor to me but has served as a model scholar-activist, teacher, and mentor.

So, too, have I been fortunate to have brilliant mentors in graduate school, whose scholarship, teaching, and mentorship have fundamentally shaped who I have become as a scholar. Throughout my time at the University of Minnesota, Rod Ferguson has had the uncanny ability to talk me out of my confusion, articulating my thoughts (generally significantly better than I could) when I was stuck or too confused to move forward. I can't even describe how lucky I was to find Regina Kunzel when I began at the UMN and have had her as an advisor since my second year. She has provided unyielding support, constantly pushed me to do better, and patiently answered my many questions. Her work as a scholar has provided an example of careful research and analysis that I hope to live up to. Her thoughtfulness and generosity are part of every page that I've written here. Beyond what they've done for me as their advisee, both Rod and Reg's scholarship is foundational to my thinking about sexuality, race, prisons, gender, materiality, etc. The rest of my committee, Kevin Murphy, Lisa Park, and David Valentine, similarly has provided invaluable advise and critical feedback, which has been vital to this dissertation. Their scholarship, too, has influenced and been a model for my own. It's been a privilege to work with and learn from scholars whose work I so deeply respect.

I've also benefitted in innumerable ways from being among so many brilliant graduate students in American Studies, Gender, Women's, and Sexuality Studies, and beyond, from whom I've learned so much: Steve Dillon, AJ Lewis, Myrl Beam, Jesús

Estrada-Peréz, Karisa Butler-Wall, Angela Carter, Raechel Tiffe, Kasey Keeler, and Elizabeth Williams.

Dean Spade provided much needed support, including generously offering me his time and helping me access legal documents. Gabriel Arkles, Alisha Williams, Chase Strangio, Owen Daniel-McCarter, and Jason Lydon also generously gave me some of their time and knowledge.

I've received generous financial support from the Kinsey Institute for Sex, Gender, and Reproduction's John Money Fellowship for Scholars of Sexology, the University of Minnesota Graduate School, and the Department of American Studies at the University of Minnesota. Just as (and perhaps more) important to this project was the labor from librarians at the Kinsey Institute, the New York Public Library, the Northeastern University, and the California State Archives, who assisted my archival research. Colleen Hennen and Melanie Steinman have also provided invaluable administrative support for over five years of graduate school.

The insanity of graduate school was also a time of queer-family-making. Queerworld, Jesús Estrada-Peréz, Karisa Butler-Wall, Angela Carter, Raechel Tiffe, Elizabeth Williams, and Libby Sharrow: your love, brilliance, support, and queerness made me grow as a scholar and a person. My non-grad student friends, particularly E.G. Nelson, Nina Metsovaara, and Melvin Whitehead, also provided love, support, distraction, and additional forms of intellectual support and engagement and helped get me through this process.

I'm also incredibly fortunate to have a loving and supportive family, even when they aren't quite sure what I was doing. I've been immensely lucky and privileged to

have two supportive (in all senses of the word) parents who encouraged me to read, critically think, form strong opinions (even when they were different from theirs), and care about politics, other people, and our communities. Thanks are also due to my grandmother, whose quiet intelligence, strong convictions, creativity, and investment in social justice (although, she might not use the word) I like to think that I inherited.

Finally, beyond individual support, I am indebted to the overwhelming number of people who have envisioned a better world, a world without violence and oppression, and struggled to make that vision a reality. Thank you to CeCe McDonald for teaching me so much about strength, love, and for continuing to fight for a better world. Thank you also to all the incarcerated people whose lives and legal work I discuss in this dissertation. There are also many, many people—other activists and scholars inside and outside prison—that I cannot name in these acknowledgements but from whom I have directly and indirectly learned so much. I hope that this project, in its own small way, adds to the infrastructure of resistance to carceral violence and the prison industrial complex, helping us better understand the function and nature of the US prison system and, in doing so, pushing us ever so slightly toward its abolition.

Abstract

"Carceral Normativities: Sex, Security, and the Penal Management of Gender Nonconformity" examines the history of the incarceration of transgender and gender nonconforming people in the US from the early twentieth century to the present. While rarely discussed in prison scholarship and activism, gender nonconforming and transgender prisoners have garnered intense scrutiny from prison administrators and have experienced persistent and pervasive violence. Through archival and legal research, I historicize this violence, arguing that for the last century prison administrators have labeled gender nonconformity as a threat to institutional security or, as I call it, as queer dangerousness, which has structured penal practices and policies used to manage these prisoners and normalized violence against them. I argue that this construction of gender nonconformity as security threat is produced from a set of institutionalized logics, which I call racialized gender normativity.

"Carceral Normativities" examines often overlooked and continually evolving prison policies and practices to trace the history of the construction of gender nonconformity as queer dangerousness and institutional security threat as well as how racialized gender normativity has been constructed and reconstructed as a constitutive logic of the prison system. Chapter One examines the history of the construction of penal sex-segregation alongside newspaper stories from the mid-twentieth century of penal administrators "discovering" sexually "misclassified" prisoners in their institutions, in order to argue that the prison system's programmatic design and core understandings of rehabilitation and incorrigibility have been deeply shaped by racialized gender normativity, which produced the imperative to sex-segregate and constructed sexual ambiguity as administrative disorder. Chapter Two traces the history of the systematic segregation of gender nonconforming and transgender prisoners, which began in the early twentieth century and continues into the present, and argues that this segregation was created as a management tool as prison administrators began to identify gender nonconformity as a threat to institutional security, or as queer dangerousness. Chapter Three examines the relationship between dominant penological, social scientific, and legal narratives about sexual violence in penal institutions and the use of sexual violence as a tool of control—a practice I call carceral sexual violence. I argue that narratives, which portray prisons as sites of rampant sexual violence entirely perpetrated by prisoners, construct transgender and gender nonconforming prisoners as simultaneously unrapable and constantly subject to sexual violence, which justifies and obscures many quotidian forms of carceral sexual violence that target gender nonconformity. Chapter Four examines federal civil rights litigation regarding access to hormone therapy and sex reassignment surgery for transgender women and argues that carceral necropower, or the production of the prison as a space of death and prisoners as socially dead, and the racialized gender normative construction of gender nonconformity as queer dangerousness securitizes gender-affirming medical treatment in prisons, constructing security concerns as a primary factor determining access to such treatment. Most broadly, "Carceral Normativities" expands our understanding of how the intersection of race, gender, and sexuality shapes carceral constructions of deviance and dangerousness as well as penal policies and practices.

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Introduction

[The Minnesota Department of Corrections] wanted me to hate myself as a trans woman. They wanted to force me to be someone that I wasn't. They wanted me to pretty much delegitimize myself as a trans woman. And, I was not taking that. As a trans woman, as a proud black trans woman, I was not going to allow the system to delegitimize and hypersexualize and take my identity away from me. – CeCe McDonald[1]

Prisons in general are not safe for anyone. – CeCe McDonald[2]

One night in June 2011, as they walked through a South Minneapolis neighborhood to the grocery story, CeCe McDonald, a 23-year-old African American trans woman, and a group of her friends, all also African American and queer, were attacked by a group of white people yelling racist and transphobic slurs. This verbal attack escalated into a physical one when one of McDonald's attackers smashed a glass into her face. During the ensuing fight, McDonald took a pair of fabric scissors out of her purse to defend herself. When one of her attackers ran at her, she stabbed him. This man, Dean Schmidt, later died from the stab wound. When police arrived on the scene, they arrested only McDonald. She was initially confined in the Hennepin County men's jail.[3]

Prosecutors eventually charged McDonald with two counts of second-degree murder, for which she could be sentenced to forty years in prison. In May 2012, just before opening arguments in her trial, McDonald decided to accept a plea agreement in which she pled guilty to a charge of second-degree manslaughter and was sentenced to prison for forty-one months. In June, she was transferred to the Minnesota Correctional Facility at St. Cloud, a closed-security men's prison, which serves as the facility where

[1] "No One Can 'Take My Identity Away From Me," *Melissa Harris-Perry* (*MSNBC*, January 19, 2014).
[2] Ibid.
[3] For a description of what happened that night from McDonald, see Michelangelo Signorile, "CeCe McDonald, Transgender Activist, Recalls Hate Attack, Manslaughter Case," *Huffington Post*, February 22, 2014, http://www.huffingtonpost.com/2014/02/22/cece-mcdonald-manslaughter-case_n_4831677.html. See also her support committee's site and her blog at http://supportcece.wordpress.com.

new prisoners are processed into the Minnesota Department of Corrections (MNDOC). Along with the standard processing procedures for all prisoners, MNDOC officials convened a committee to determine McDonald's sex, a decision that could impact her placement, whether her hormone treatment would be continued, the sex of the staff who searched her (including pat-down, strip, and body cavity searches), and whether she would receive bras and feminine hygiene products. A MNDOC representative explained to the media that they would "intake him [sic] as a male at St. Cloud prison" and that the state's determination of her sex would involve "any and all collateral documentation and a physical and psychological evaluation."[4] Prison administrators ultimately affirmed their initial decision that McDonald was male, and she remained at St. Cloud for most of her incarceration. In January 2014, she was released after serving nineteen months in prison.

McDonald's experiences stitch together a web of racialized, gendered, and sexualized punitive violence and criminalization that many trans and gender nonconforming people, especially trans women of color, experience daily. The hate violence perpetrated by strangers in the street, the police targeting her for arrest, the prosecutor's aggressive prosecution and refusal to recognize her actions as self-defense, and her experiences in jail and prison are intimately interconnected. At the heart of McDonald's story is the violent negation of her gender identity and her gendered and racialized dehumanization in the hands of white, heterosexual strangers and the US state.[5]

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[4] Quoted in Jorge Rivas, "Black Transgender Woman CeCe McDonald to be Housed in Male Prison," *Colorlines*, June 4, 2012, http://colorlines.com/archives/2012/06/cece_mcdonald--young_black_transgender_woman--to_be_housed_in_male_prison.html. See also, Abby Simons and Paul Walsh, "Transgender Defendant Gets 3 Years for Killing Bar Patron," *Star Tribune*, June 5, 2012, http://www.startribune.com/local/157000805.html.

[5] In fact, the state and the individuals who attacked her cannot be separated. For example, an important factor in McDonald's decision about whether or not to go to trial was that the court ruled that McDonald's

Yet, out of these experiences of violence, McDonald has emerged as a powerful transgender and anti-prison activist, using her story to speak and write about the multiple and intersecting violences that trans women of color face daily.[6] In the epigraph that opens this introduction, McDonald describes the gendered and sexualized violence that trans women experience within the US prison system, violence that is institutionalized and systemic. It is a violence, as McDonald explains, that at its core works to dehumanize trans and gender nonconforming prisoners who must constantly struggle to live and express their gender identities.

"Carceral Normativities: Sex, Security, and the Penal Management of Gender Nonconformity" examines the forms and logics of state-sanctioned racialized, gendered, and sexualized punitive violence that targets trans and gender nonconforming people in US prisons and jails. McDonald's experiences are just one example of the persistent and pervasive violence that trans and gender nonconforming people experience within the US prison system. Starting from the premise that this violence is not just the product of

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defense could not introduce key evidence about Schmidt, including his swastika tattoo, his history of violence, and his intoxication that night, nor could they introduce testimony detailing the general atmosphere of violence against trans women of color to contextualize the incident for the jury. The court's decision to exclude this evidence functions as collusion between the state and her attackers to perpetrate violence against her. In addition, Schmitz's brother explained that Schmitz got his swastika tattoo while he was incarcerated in St. Cloud, where McDonald would eventually be imprisoned. His brother explained that he "f[e]ll into a certain group, that ended up being white supremacist people, in order to survive. You know, you gotta pick a group." Quoted in Andy Mannix, "The CeCe McDonald Murder Trial," *CityPages*, May 9, 2012, http://www.citypages.com/2012-05-09/news/cece-mcdonald-murder-trial/. See also, Mary Emily O'Hara, "'My Struggle Started When I Entered This World': VICE News Interviews CeCe McDonald," *VICE News*, April 25, 2014, https://news.vice.com/article/my-struggle-started-when-i-entered-this-world-vice-news-interviews-cece-mcdonald; Akiba Solomon, "Where Will CeCe McDonald Serve Her Time? The Devil is in the Details," *Colorlines*, June 8, 2012, http://colorlines.com/archives/2012/06/when_it_comes_to_where_cece_mcdonald_will_serve_her_time_the_devil_is_in_the_details.html.

[6] In response to her arrest and incarceration, McDonald organized a support committee that at first attempted to get the district attorney to drop the charges against her, largely through bringing public awareness to her case, and then continued to monitor and advocate for her throughout her incarceration. This campaign eventually garnered national and even international media attention. Since she was released, McDonald has remained an outspoken transgender and anti-prison activist.

individual transphobic prison staff and administrators, this dissertation investigates the history of the policies and practices used to manage this population of prisoners over the past century, looking to history to understand why this violence has been so persistent and pervasive. Contributing to recent scholarship that investigates the US prison system as an central site of state violence, social control, and the production of marginality and insecurity in US society, I argue that the US prison system is deeply invested in and helps produce normative, naturalized constructions of binary sex and gender and is fundamentally structured by racialized gender normativity—or the ideological investment in white heterosexual-gender norms and naturalized binary sex as valuable and key to rehabilitation and freedom in opposition to black and brown sexual and gender nonnormativity, dangerousness, and criminality. Carceral racialized gender normative logics construct gender nonconformity as dangerous and as a threat to institutional security and produce the imperative to punitively regulate and contain gender nonconformity. In doing so, these logics justify and normalize carceral violence against trans and gender nonconforming prisoners. While scholars of the US prison system have largely overlooked trans and gender nonconforming prisoners and trans and queer studies scholars have paid too little attention to prisons, I argue that trans and gender nonconforming prisoners are a primary target of carceral power, knowledge production, and violence.

Violence on the outside, violence on the inside

My struggle didn't start when I went to prison. My struggle started when I entered this world.

– CeCe McDonald[7]

That night in June 2011 was not the first time that McDonald was targeted for violence and criminalization. In her writings, she describes a lifetime of such experiences.[8] Indeed, trans and gender nonconforming lives are far too often marked by multiple forms of violence—physical, sexual, economic, and structural. Trans and gender nonconforming people experience high rates of family rejection; discrimination in employment, education, housing, public accommodations, and other areas of life; and violence committed by family, partners, and strangers. We are disproportionately poor, homeless, and unemployed. Many turn to illegal economies, especially sex work, to earn money and survive. Police often profile and target trans people for harassment, violence, and arrest.[9] Trans women of color are especially subject to police scrutiny, often because they are assumed be to sex workers, a phenomenon referred to as "walking while trans." Race-based policing, racial profiling, and racial hate violence not only make trans and gender nonconforming people of color more visible and at risk of police scrutiny but

[7] Quoted in O'Hara, "'My Struggle Started When I entered this World.'"
[8] See for example, CeCe McDonald, "Pursuit of Happiness," *CeCe's Blog*, November 5, 2011, http://supportcece.wordpress.com/2011/11/05/pursuit-of-happiness-3; CeCe McDonald, "As Long as We Live in Fear,…We Live in Ignorance…" *CeCe's Blog*, November 20, 2011, http://supportcece.wordpress.com/2011/11/20/as-long-as-we-live-in-fear-we-live-in-ignorance.
[9] Jaime M. Grant, et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (Washington, DC: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011); D. Morgan Bassichis, *"It's War in Here": A Report on the Treatment of Transgender and Intersex People in New York State Men's Prisons* (New York: Sylvia Rivera Law Project, 2007); Leslie J. Moran and Andrew N. Sharpe, "Violence, Identity and Policing: The Case of Violence Against Transgender People," *Criminal Justice* 4 (2004); Eric C. Wilson, et al., "Transgender Female Youth and Sex Work: HIV Risk and a Comparison of Life Factors Related to Engagement in Sex Work," *AIDS and Behavior* 13, no. 5 (2009); Masen Davis and Kristina Wertz, "When Laws are Not Enough: A Study of the Economic Health of Transgender People and the Need for a Multidisciplinary Approach to Economic Justice," *Seattle Journal for Social Justice* 8, no. 2 (2010).

amplify profiling based on trans status, as McDonald's experiences demonstrate. These various forms of individual and structural violence funnel trans and gender nonconforming people into the criminal legal system, a system that has been designed to target and contain people of color, poor people, and sexual and gender nonconforming people by producing nonwhiteness (especially blackness), poverty, and gender and sexual nonnormativity as dangerous and deviant to white, heteronormative, gender normative life and citizenry. Although they constitute a small percentage of the total incarcerated population, trans and gender nonconforming people, particularly low-income trans women of color like McDonald, may be the most overincarcerated group in the US.[10]

But, of course, experiences of criminalization and state and carceral violence are uneven across different trans populations and are deeply enmeshed with racial, class-based, and other forms of violence. My own experiences as a white, queer transmasculine person from an upper class background in contrast to McDonald's illustrates this point well. When McDonald was arrested, I lived in Minneapolis, less than two miles from where she was attacked and arrested. While I, too, identify as trans, as a white, resourced,

[10] The most representative survey of trans people in the US found that 16% of respondents reported a history of incarceration, which is nearly six times the national rate of 2.7%. As this study shows trans people of color, especially black and Latina/o people, were much more likely to report histories of incarceration. While 12% of white respondents reported histories of incarceration, 13% of Asian respondents, 21% of multiracial respondents, 25% of Latina/o respondents, 30% of American Indian respondents, and 47% of Black respondents did so. Trans women were a little over twice as likely to have histories of incarceration than trans men: 21% and 10%, respectively. Twelve percent of gender nonconforming respondents also reported histories of incarceration. In addition, trans people of color, especially black trans people, and trans women were more likely to have spent more time in jail and prison. For example, 15% of black respondents had served more than five years in comparison to 4% of all respondents. These numbers are most likely low estimates because surveys of this kind tend to be able to access wealthier and more educated people and have a hard time accessing homeless and/or poor people (and trans people are disproportionately poor and homeless). Moreover, survey respondents did not include incarcerated people. Grant, et al., *Injustice at Every Turn*. I should also note that I participated in the writing of this survey as a Vaid Fellow at the Policy Institute of the National Gay and Lesbian Task Force in 2007-2008.

male-looking person, my experiences of walking the streets in Minneapolis were generally free from violence, harassment, and police scrutiny, and my trans experience does not include being targeted by criminalization and punitive violence. In other words, my whiteness, monetary and educational resources, and masculinity insulate me from many of the most violent forms of transphobia. If I had been walking down that street that night in 2011, it is highly unlikely that I would have ended up in prison, now facing a "free" life with a felony record, as McDonald is.

Yet, McDonald and I ostensibly share a community, and we share commitments to prison abolitionist, anti-racist, and radical trans politics. Soon after McDonald's arrest, I became a member of her support committee and continued to work with the committee for the next year, through her plea agreement, sentencing, and transfer to St. Cloud. The coalition that came together to support McDonald was diverse. People came to the work with different investments, different life experiences, and different relationships to the US prison system. This diversity of life experience and investments was important to creating a broad coalition but also bred misunderstandings and contention, and I was constantly reminded that that while I could say I was part of McDonald's community when it was most broadly defined, I am not a part of her everyday community and that our experiences as trans people are strikingly different. For me, these political commitments are ethical and about envisioning a better world but are not about immediate survival (my survival is generally ensured by a white supremacist, capitalist state and prison system), but for McDonald and trans women of color like her these commitments are about survival, as well as ethics and envisioning a better world.

This fundamental and quite profound fracturing of trans experience—largely but not entirely because of race—structures how the criminalization of trans and gender nonconforming people functions. While I am not a target of the US prison system, McDonald and trans women of color in general—as well as other trans and gender nonconforming people of color to a slightly lesser extent—are primary targets. Not only does racialized policing and mass incarceration heighten the criminalization of trans and gender nonconforming people of color but proximity to and involvement with systems of social control designed for poor people increases state involvement in and regulation of certain trans and gender nonconforming people's lives, increasing their criminalization and risk of incarceration. As legal scholar and activist Dean Spade has argued, sex segregation and gendered surveillance and regulation are "central organizing strategies" of these systems of social control, which means that in systems already designed to marginalize and regulate, trans and gender nonconforming people are further marginalized and subject to state control and violence.[11] Again, poverty and racialization not are not additive factors in criminalization but exponentially increase the risk of criminalization because of trans and gender nonconforming status. These factors create a situation where the vast majority of trans and gender nonconforming people who are incarcerated are people of color.[12]

This criminalization and overincarceration is not new. As Joey L. Mogul, Andrea J. Ritchie, and Kay Whitlock argue in *Queer (In)Justice: The Criminalization of LGBT*

[11] Dean Spade, "Compliance is Gendered," in *Transgender Rights*, ed. Paisley Currah, Richard M. Juang, and Shannon Minter Price (Minneapolis, MN: University of Minnesota Press, 2006).
[12] Alisha Williams, interview by author, August 19, 2013, New York, NY, on file with author; Owen Daniel-McCarter, interview by author, September 5, 2013, Chicago, IL, on file with author. See also Grant, et al., *Injustice at Every Turn*.

People in the United States, the policing and punishment of gender and sexual deviance have existed for centuries in the US and have been integral aspects of systems of racial violence and control, including colonization and chattel slavery.[13] As same-sex desire and gender nonconformity became supposedly stable traits of specific types of people and as homosexual communities began to emerge in the latter half of the nineteenth century, police and the criminal legal system developed laws and methods to systematically target gender nonconformity and public displays of cross-gender living for arrest and imprisonment. Indeed, trans and LGBT studies scholars have argued that policing and criminalization have deeply affected queer and trans lives and helped shape identities and communities from the late nineteenth century to the present.[14] Despite the important historical scholarship on the criminalization and policing of homosexuality, sexual nonnormativity, gender nonconformity, and cross-gender identity, little scholarship has substantively examined what happened to gender and sexual nonnormative people after their arrests.[15] Yet, as this dissertation argues, the criminalization and violent punishment

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[13] Joey L. Mogul, Andrea J. Ritchie, and Kay Whitlock, *Queer (In)Justice: The Criminalization of LGBT People in the United States* (Boston, MA: Beacon Press, 2010).

[14] See for example, Susan Stryker, *Transgender History* (Berkeley, CA: Seal Press, 2008); Nan Alamilla Boyd, *Wide Open Town: A History of Queer San Francisco to 1965* (Berkeley, CA: University of California Press, 2003); George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World 189-1940* (New York: BasicBooks, 1994); Mogul, et al., *Queer (In)Justice*; Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth Century America* (Princeton, NJ: Princeton University Press, 2009).

[15] Historian Regina Kunzel's brilliant study of the history of same-sex sexuality in US prisons is the primary exception here. Regina Kunzel, *Criminal Intimacy: Prison and the Uneven History of Modern American Sexuality* (Chicago: University of Chicago Press, 2008). George Chauncey also briefly discusses the experiences of homosexuals, especially gender nonconforming homosexuals, in the penitentiary on Welfare Island in his study of New York City gay history. Chauncey, *Gay New York.*

An increasing number of scholars have begun to examine the experiences of incarceration of trans and gender nonconforming people currently. See for example, Mogul, et al., *Queer (In)Justice*; Eric A. Stanley and Nat Smith, ed., *Captive Genders: Trans Embodiment and the Prison Industrial Complex* (Oakland, CA: AK Press, 2011); Gabriel Arkles, "Safety and Solidarity across Gender Lines: Rethinking Segregation of Transgender People in Detention," *Temple Political and Civil Rights Law Review* 18, no. 2 (Spring

of gender and sexual deviance by the state outside of penal institutions extended into penal institutions, shaping how jail and prison administrators managed gender nonconformity.

Once incarcerated, trans and gender nonconforming people encounter a system that is designed to strip all imprisoned people of choice, agency, and bodily integrity, while also targeting certain populations for specific forms of racialized, gendered, and sexualized violence and control. As such, trans and gender nonconforming prisoners experience particular formations of carceral power and violence that are directed towards gender nonconformity. While the specific features of these formations have changed somewhat over the last century or so, the broad outlines have remained largely consistent.

At the core of carceral violence targeting gender nonconformity is sex segregation and sex classification. Upon imprisonment, people enter a sex-segregated system that sorts prisoners into male or female institutions and actively and punitively regulates gender within them. Trans and gender nonconforming people are stripped of their ability to determine their own sex, and in almost all cases, prisoners are classified based on their genital status, regardless of their gender identity or expression. Because few trans people have genital surgery—either because they do not want to or are unable to access such treatment—nearly all trans women are housed in men's institutions and trans men in women's institutions.[16] Perhaps the most basic, mundane, and invisible form of carceral

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2009); Gabriel Arkles, "Correcting Race and Gender: Prison Regulations of Social Hierarchy through Dress," *New York University Law Review* 87, no. 4 (October 2012).

[16] The inability to access adequate gender-affirming medical treatment is a huge problem for trans and gender nonconforming communities and people, especially those most likely to be incarcerated. Rampant discrimination continues to exist among healthcare providers throughout the US. Transgender-related medical treatment is exempt from most health insurance plans, including Medicaid. Hormones and, especially, surgical treatment are very expensive and out of reach for most who live in poverty as well as

violence is the prison system's nearly totalizing authority to determine prisoners' sex. For most prisoners, this determination is automatic and conforms to their gender identity, and therefore remains invisible, but for trans and gender nonconforming prisoners, like McDonald, this process is usually violent, antagonistic, and dehumanizing.

McDonald's experience is instructive here. McDonald was processed into the Minnesota prison system as male, despite her gender identity and lived experience as a woman. Like all departments of corrections, MNDOC places prisoners in sexed facilities based on their genital status. MNDOC's official policy regarding the placement of trans prisoners authorizes a "Transgender Committee," made up of medical and security staff, to determine trans prisoners' sex and related placement and treatment.[17] While the policy allows the committee to, "at its discretion, consult with the offender," the prisoner's gender identity is neither determinative nor even a required factor in the committee's decision-making process. Instead, medical and security staff utilize physical and psychological evaluations and medical and security knowledge to make their determination. This policy constructs medical and carceral knowledge as determinative, delegitimizing trans prisoners' knowledge about their own identities and needs.[18] While not all departments of corrections have official policies that dictate protocol for managing

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many working-class and middle-class people. Grant, et al, *Injustice at Every Turn*; Pooja S. Gehi and Gabriel Arkles, "Unraveling Injustice: Race and Class Impact of Medicaid Exclusions of Transition-Related Health Care for Transgender People," *Sexuality Research and Social Policy* 4, no. 4 (December 2007); Spade, "Compliance is Gendered."

[17] Minnesota Department of Corrections, "Evaluation and Placement of Transgender Offenders," 202.045 (May 7, 2007).

[18] In discussing the policy and the general practice of the Committee, Katie Burgess—the executive director of the Trans Youth Support Network in Minneapolis and a core member of CeCe's Support Committee—explains, "The committee process is remarkably abusive and just disgusting…Generally, they're made up of all non-transgender people with absolutely no cultural sensitivity." Quoted in Solomon, "Where Will CeCe McDonald Serve Her Time?"

trans prisoners, in practice they all have the authority to decide trans and gender nonconforming prisoners' sex and use a similar calculus in making that decision. Prisoners are never authorized to self-determine their sex, and their gender identity is rarely taken into account.

Sex classification is also deeply interconnected with the (often violent) regulation of gender within penal institutions. All prisons and jails regulate gendered appearance, access to clothing and grooming products, and access to gender-affirming medical treatment. For example, people in men's prisons are usually not allowed to have clothing and grooming produces designated as female, such as bras, dresses, "feminine-cut" pants, and makeup. While prisons may provide certain medical treatment when it is not transgender-related, they restrict or prohibit the same or very similar treatment when it is transgender-related. For instance, prisoners in men's institutions may be provided with testosterone hormone therapy, when prescribed, but denied estrogen hormone therapy. As such, trans and gender nonconforming prisoners' access to gender-appropriate grooming products, clothing, and gender-affirming medical treatment are routinely restricted or denied in penal institutions around the US. While prison administrators usually claim that such hygiene products, clothing, or medical treatments are threats to institutional security, these restrictions aim to negate trans and gender nonconforming prisoners' gender identity, to, as McDonald explained in the first epigraph that began this introduction, "take [their] identit[ies] away from" them, and are an important source of carceral violence targeting trans and gender nonconforming prisoners.[19]

[19] McDonald also experienced problems with medical treatment while incarcerated. While she received her hormones while she was in jail, she received inadequate medical treatment for the stab wound in her cheek,

Put another way, the prison system is a site of sex formation as it classifies the sex of millions of people every year. In doing so, the prison system (re)produces sex as natural, immutable, and binary and inextricably tied to gender norms. As trans studies scholars have shown, sex classification is a primary function of the state and is one of the most common and naturalized ways that the state identifies and regulates populations.[20] But, the work of sex classification is distributed across multiple state and federal agencies and sites that have created hundreds of formal and informal policies, most of which identify different methods of classifying a person's sex, although all of which provide only two options (male and female). A few allow (re)classification based on gender identity, others (much more commonly) require a doctor's letter with proof of varying forms of medical intervention (from none to genital surgery), while a few others only recognize birth-assigned sex.[21] While the heterogeneity and inconsistency of this sex classification "rule matrix," as Spade calls it, produces a situation in which many trans people have multiple "legal sexes," sex is still generally constructed as inherently and naturally binary and the binaristic classification of sex is constructed as a

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which was the result of the glass that was smashed in her face during the fight. The wound would eventually become seriously infected. While the court that sentenced her mandated that she continue to receive hormone treatment at the dosage she was prescribed pre-incarceration, it took three weeks for her to begin receiving them and her initial doses were substantially lower than what she was prescribed on the outside. Only after she organized a call-in campaign through her support committee did MNDOC administrators give her the appropriate dose. Low dosage is, in fact, a common problem for trans people who are receiving hormone therapy in prisons and jails around the US. "Update from CeCe in St. Cloud: July, 2012," *SupportCeCe*, August 2, 2012, http://supportcece.wordpress.com/2012/08/02/update-from-cece-in-st-cloud-july-2012; Williams, interview; Gabriel Arkles, interview by author, August 12, 2013, Boston, MA, on file with author.

[20] Dean Spade, "Documenting Gender," *Hastings Law Journal* 59 (2008); Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Brooklyn: South End Press, 2011); Paisley Currah, "The State," *Transgender Studies Quarterly* 1, no. 1-2 (May 2014); Tey Meadow, "'A Rose Is a Rose': On Producing Legal Gender Classifications," *Gender & Society* 24, no. 6 (December 2010).

[21] For the most thorough explanation of these requirements, see Spade, "Documenting Gender."

commonsensical and essential function of the state.[22] Yet, as Spade and others have argued, the state regulation and classification of sex is a primary site of the social construction of sex and produces vulnerability and insecurity—including contributing to under- and unemployment, homelessness and housing insecurity, various forms of discrimination, criminalization, and state, street-based, and interpersonal violence—for those who do not conform to normative (birth-assigned) sex. Thus, the multiple forms of vulnerability and violence that trans people experience outlined at the beginning of this section are intimately tied to the state and to state sex formation and regulation.

As Spade explains, this sex classification rule matrix does not simply classify sex according to some natural or neutral criteria but is fundamentally structured by social norms and systems of oppression. In so arguing, Spade draws on scholarship in critical race studies, queer studies, feminist studies, and trans studies, which has long argued against liberal notions of the state as a neutral arbiter of difference and instead argued that the state is fundamentally structured by and (re)produces white supremacy, heteropatriarchy, settler colonialism, ableism, and other systems of oppression.[23] As Michael Omi and Howard Winant argue in their seminal book *Racial Formations in the United States*, the state is a racial formation and a racial project as it simultaneously

[22] Spade, "Documenting Gender." See also Spade, *Normal Life*; Spade, "Compliance is Gendered."
[23] See for example, Michael Omi and Howard Winant, *Racial Formation in the United States: From the 1960s to the 1990s* (New York: Routledge, 1994); David Theo Goldberg, *The Racial State* (Oxford: Blackwell Publishing, 2002); Charles Mills, *The Racial Contract* (Ithaca, NY: Cornell University Press, 1997); Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, ed., *Critical Race Theory: The Key Writings that Formed the Movement* (New York: The New Press, 1995); Joy James, *Resisting State Violence: Radicalism, Gender, and Race in U.S. Culture* (Minneapolis, MN: University of Minnesota Press, 1996); Chandan Reddy, *Freedom With Violence: Race, Sexuality, and the US State* (Durham: Duke University Press, 2011); Katherine MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989).

produces meaning about race and distributes resources in racialized ways.[24] In this regard, the state is also (and interconnectedly) a sexed and gendered project. Put another way, the state helps produce the epistemological and material conditions of US society, producing (racialized, gendered, and sexed) normativities and deviances across multiple, dispersed administrative and other sites, including the prison system. These constructions of the normative and deviant define which populations' lives should be enhanced and which populations should be targeted for containment and violence. In doing so, as Spade argues, the state helps distribute life chances, vulnerability, and security/insecurity.[25] The prison system is one such state arbiter of (racialized, gendered, and sexed) life chances and security/insecurity as it subjects those it targets to spectacular forms of violence while securing and extending the life of the (normative) populations it purportedly serves to protect. While Spade identifies the prison system as doing this work, few other scholars have explicitly done so. "Carceral Normativities," therefore, helps us better understand how the prison system as a primary site of state sex formation produces insecurity for and has devastating effects on the life chances of trans and gender nonconforming people.

Sex classification is a central component of state administrative functions that produce vulnerability and insecurity for trans and gender nonconforming populations, but sex classification and the vulnerability and insecurity that it produces are intimately interconnected with other forms of racial, gender, and sex formation and regulation,

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[24] Omi and Winant, *Racial Formations*.
[25] Spade, *Normal Life*. See also, Michel Foucault, *The History of Sexuality: An Introduction* (New York: Vintage Books, 1978); Michel Foucault, *"Society Must Be Defended": Lectures at the Collége de France, 1975-1976* (New York: Picador, 1997).

especially the management, control, and eradication of sexual nonnormativity, including but not limited to homosexuality. In fact, the modern US state has long conflated gender, sexed, and sexual nonnormativity—especially homosexuality and gender nonconformity or cross-gender identity—and frequently racialized it. Historian Regina Kunzel's recent study of the history of same-sex sexuality in the US prison system demonstrates both the prison system's investment in regulating sexuality and the conflation of gender and sexual nonnormativity.[26] Arguing that sexuality has both helped shape the modern prison system since its inception in the early nineteenth century and that the prison system was an important site of the construction of modern sexuality, Kunzel describes how sex segregation and the supposedly single-sex nature of prisons produced both complex gendered and sexual prisoner cultures and a great deal of anxiety about (homo)sexuality for prison administrators. In describing that anxiety, Kunzel previews how gender nonconformity was a nearly constant component of the construction and regulation of (homo)sexuality. Extending Kunzel's important work by attending more specifically to gender nonconformity, I show that this conflation of homosexuality and gender nonconforming or cross-gender identity has long structured responses to, management strategies for, and carceral violence against trans and gender nonconforming prisoners.[27] Prison administrators in both policy and practice have long addressed the dangers of gender nonconformity as dangerous (homo)sexuality. They have identified homosexuals

[26] Kunzel, *Criminal Intimacy*.
[27] This conflation of gender and sexual nonnormativity was and is reflective and deeply interconnected with social scientific and medical constructions of homosexuality and gender nonconformity as well as homosexual and gender nonconforming people's own conceptualizations of identity and community. See, Kunzel, *Criminal Intimacy*; Jennifer Terry, *An American Obsession: Science, Medicine, and Homosexuality in Modern Society* (Chicago: The University of Chicago Press, 1999).

through performances and embodiments of gender nonconformity and cross-gender identity. As such, throughout this dissertation there is frequent slippage between sexuality and gender, homosexuality and gender nonconformity. I am deliberately imprecise in this regard.

We should, therefore, understand carceral violence targeting trans and gender nonconforming prisoners as about sex, gender, and sexual (non)normativity, which also helps us understand that while sex classification is an important source and type of carceral violence, simply changing placement policies and practices will not eradicate carceral violence targeting trans and gender nonconforming prisoners. McDonald repeatedly emphasized this point throughout her incarceration. While many supporters sought to concentrate their energy on getting her transferred to a women's prison as a way to keep her safe, McDonald resisted that strategy, deciding not to advocate for a transfer to a women's prison because, as McDonald repeatedly pointed out, she would not have been safe or free from violence had she been classified as female and placed in a women's prison. Of course, MNDOC's classification of McDonald as male was both a type and source of carceral violence—both violently stripping her of gender self-determination and making her vulnerable to other forms of violence from the regulation of her gender to sexual violence.[28] Nevertheless, in deciding not to advocate for her sex reclassification, she shifted the focus back to the problem of carceral violence and mass

[28] McDonald did, in fact, experience many common forms of carceral violence while she was incarcerated, including the regulation of her appearance and gendered body, repeated segregation, and difficulty accessing her hormone treatment, and her supporters were constantly fearful of her experiencing sexual violence.

incarceration itself, arguing that "all prisons are fucked up…Prisons aren't safe for anybody."[29]

Violence is rampant in women's prisons as well as men's prisons, and McDonald, in fact, might have been safer in a men's prison than a women's prison because men's prisons are currently and historically where trans women are incarcerated. McDonald was, therefore, more likely to encounter other trans women and be familiar with certain parts of the culture and cultural norms among the prisoners in a men's prison than in a women's prison. Because of this familiarity, she would be better able to navigate the space and culture of a men's prison and develop relationships and community with other prisoners to keep herself safe, not only from violence perpetrated by other prisoners but also violence perpetrated by staff. In fact, trans and gender nonconforming prisoners and their advocates often report that the majority of violence they experience is perpetrated or facilitated by staff and that certain housing placements, especially segregation, can increase the risk of staff-perpetrated violence by severing them from the potential safety of developing relationship with other prisoners. Indeed, McDonald reported that at St. Cloud, "she easily [got] along with other prisoners; it's the guards and administration that are fucking with her relentlessly—and they say it's for her 'safety' against the rest of the prison population. All of her issues thus far are with guards and administrators trying to control and regulate her gender as if it is outlaw."[30]

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[29] Quoted in O'Hara, "'My Struggle Started When I entered this World.'" See also, "Update from CeCe in St. Cloud: July, 2012."

While other incarcerated trans woman do want to be transferred to a women's prison, including safety, others like McDonald prefer to be housed in a men's institution for various reasons, including because the culture is more familiar to them and therefore feels safer.

[30] CeCe's Support Committee, "Dear CeCe Supporters," *FreeCeCe*, July 9, 2012, http://freececemcdonald.tumblr.com/post/26834960331/dear-cece-supporters-two-of-ceces-friends.

While she could not be safe, there were certainly *safer* places for her to be housed, and McDonald determined that the safer place for her, at least most of the time, was general population in a men's prison. This determination is somewhat counterintuitive to many people who have not experienced similar incarceration and indicates that no single, uniform placement policy can address the numerous complexities of violence and unsafety in prison, especially for trans women.[31] Thus, we can understand the violence that McDonald experienced as fundamentally structural, as deeply embedded within the administrative functions and order of the US prison system.

The Productivity of Carceral Violence

Violence is the defining feature of the US prison system. Incarceration itself—or the forced removal of people from their homes and communities, their confinement in cages, and the denial of many of their basic forms of agency and bodily integrity—is inherently violent and a type of "state terror."[32] While carceral violence is often a blunt instrument of bodily domination and repression, it is also complex and productive epistemologically. Dylan Rodríguez argues that a theory of carceral violence must "comprehend[] it as a complex *production* rather than utilitarian application of power and racially gendered bodily domination, and…attempt[] to comprehend carceral violence in its specificity as both spectacle and routine, and across the intensities of its production on

[31] Indeed, advocates generally argue against a uniform policy and argue for taking the imprisoned person's understanding of where they will be safest as the primary determining factor for placement. This strategy would, of course, allow for choice and self-determination, which are generally foreclosed by prison administrations.

[32] Dylan Rodríguez*, Forced Passages: Imprisoned Radical Intellectuals and the U.S. Prison Regime* (Minneapolis, University of Minnesota Press, 2006). See also Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (Berkeley, CA: University of California Press, 2007).

the bodies and subjectivities of people in prison."[33] In conversations with Rodríguez's theory of carceral violence, this dissertation examines how carceral violence and penal policies and practices that target trans and gender nonconforming prisoners discipline, punish, and attempt to eradicate gender nonconformity—from the mundane, quotidian work of sex classification to spectacular forms of isolation, sexual violence, and the denial of medical treatment—and produce gender nonconformity as dangerous and threatening to institutional security.

Understanding the complexities of carceral violence—particularly the ways that it is materially and discursively productive—has been a central project of critical prison studies. Rodríguez argues that carceral violence is a "fundamental organizing logic" of the US.[34] More than just prisons and jails, the US prison system is a web of power that produces knowledge about people and populations, social categories, and social, state, and economic relations that are deeply integrated into and constitutive of US society.[35] This web of power—which extends throughout US society via auxiliary institutions such as the legal system, academia, the media, the economy, and others—helps produce the material relations of US society, infrastructures of social hierarchy and inequality, and relationships of protection or violence between populations and the state.

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[33] Dylan Rodríguez, "I Would Wish Death on You…:Race, Gender, and Immigration in the Globality of the U.S. Prison Regime," *The Scholar and Feminist* Online 6:3 (2008), 3.

[34] Rodríguez, *Forced Passages*, 7. See also, Joy James, ed., *Warfare in the American Homeland: Policing and Prisons in a Penal Democracy* (Durham, NC: Duke University Press, 2007).

[35] See a similar explanation of the US prison system, or prison industrial complex, see Rodríguez, *Forced Passages*; Angela Y. Davis, *Are Prisons Obsolete?* (New York: Seven Stories Press, 2003); Eric A. Stanley and Nat Smith, ed. *Captive Genders: Trans Embodiment and the Prison Industrial Complex* (Oakland, CA: AK Press, 2011); Julia Sudbury, "Celling Black Bodies: Black Women in the Global Prison Industrial Complex." *Feminist Review* 80 (2005); Spade, *Normal Life*.
See also Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1995).

Critical prison studies scholars, like Rodríguez, have primarily articulated carceral violence and incarceration itself as a racial project, as produced from white supremacist—particularly antiblack—logics and technologies. In order to do so, scholars have often looked to the history of the prison system and related social and state institutions to argue that white supremacist and antiblack systems of control, including chattel slavery, Jim Crow, and other formations of racial segregation, produced hegemonic, racialized understandings of personhood, freedom, unfreedom, and captivity as well as an enduring relationship between blackness, sexual nonnormativity and dangerousness, and criminality, whose discursive and material legacies—or, as Saidiya Hartman phrased this, "afterlife"—continue in the contemporary prison system.[36] Central to these systems of racial control were technologies of racial, gender, and sexual violence designed as tools of domination and control as well as a material and discursive means of producing racialized populations as dangerous and gender and sexually nonnormative.

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[36] Saidiya Hartman, *Lose Your Mother: A Journey Along the Atlantic Slave Route* (New York: Farrar, Strause and Giroux, 2007), 6. Hartman explains, "This is the afterlife of slavery—skewed life chances, limited access to health and education, premature death, incarceration, and impoverishment." See also, Rodríguez, *Forced Passages*; Dylan Rodríguez, "(Non)Scenes of Captivity: The Common Sense of Punishment and Death," *Radical History Review* 96 (2006); Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2010); Angela Y. Davis, "Race and Criminalization: Black Americans and the Punishment Industry," in *The Angela Y. Davis Reader*, ed. Joy James (Oxford: Blackwell Publishing, 1998); Angela Y. Davis, "From the Prison of Slavery to the Slavery of Prison: Frederick Douglass and the Convict Lease System," in *The Angela Y. Davis Reader*; Angela Y. Davis, "Racialized Punishment and Prison Abolition," in *The Angela Y. Davis Reader*; Davis, *Are Prisons Obsolete?*; Michael Hames-García, *Fugitive Thought: Prison Movements, Race, and the Meaning of Justice* (Minneapolis: University of Minnesota Press, 2004); Robert Perkinson, *Texas Tough: The Rise of America's Prison Empire* (New York: Picador, 2010); Loïc Wacquant, "The New 'Peculiar Institution': On the Prison as Surrogate Ghetto," *Theoretical Criminology* 4 (2000); Loïc Wacquant, "Deadly Symbiosis: When Ghetto and Prison Meet and Mesh," *Punishment and Society* 3 (2001); Loïc Wacquant, "From Slavery to Mass Incarceration: Rethinking the 'Race Question' in the US," *New Left Review* 13 (January/February 2002); Ethan Blue and Patrick Timmons, "Editor's Introduction," *Radical History Review* 96 (2006); David Oshinsky, *"Worse than Slavery": Parchman Farm and the Ordeal of Jim Crow Justice* (New York: Free Press, 1996). Caleb Smith expands this to argue that Western expansion and the reservation system are also part of the genealogy of the contemporary prison system. Caleb Smith, *The Prison and the American Imagination* (New Haven, CT: Yale University Press, 2009).

Criminality and dangerousness, in other words, have long been important technologies and discourses of white supremacy that helped sustain, legitimize, and naturalize systems of racial control and violence. While taking different forms across racialized populations, geographies, and time periods, racialized criminality has marked certain bodies and populations as undesirable, threatening to the national body politic, and inherently dangerous, producing the imperative to control and, ultimately, to imprison criminalized populations and authorizing state violence against them. As Lisa Cacho argues, criminalized populations become "ineligible for personhood," as the law and punishment target their bodies and beings, not their behavior. Criminality "takes away the right to have rights."[37] In other words, criminality dehumanizes. Dehumanization of criminalized populations and prisoners is necessary to justify and normalize imprisonment, which strips a person of their freedom, bodily integrity, and safety, or as Colin Dayan explains, reduces prisoners to subjectivity-less bodies, or "depersonalized persons."[38] White supremacy and racialization are key to this dehumanization, as people of color are produced as inherently fungible and violatable; as Grace Hong explains, "to be racialized is to not own oneself."[39] Put another way, as Ruth Wilson Gilmore argues, (racialized) dehumanization is "the very premise of the American prison."[40]

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[37] Lisa Cacho, *Social Death: Racialized Rightlessness and the Criminalization of the Unprotected* (New York: New York University Press, 2012), 6. See also, Sudbury, "Celling Black Bodies."
[38] Colin Dayan, *The Law is a White Dog: How Legal Rituals Make and Unmake Persons* (Princeton, NJ: Princeton University Press, 2011), 32.
[39] Grace Kyungwon Hong, *The Ruptures of American Capital: Women of Color Feminism and the Culture of Immigrant Labor* (Minneapolis, MN: University of Minnesota Press, 2006), 8.
[40] Gilmore, *Golden Gulag,* 29. Hames-García similarly argues that rehabilitation is actually a process of dehumanization. Hames-García, *Fugitive Thought*.

While racialization structures this web of criminalization, dehumanization, incarceration, and carceral violence, so do gender and sexuality. The criminal legal system has long produced gender and sexual deviance as markers of criminality and dangerousness and targeted those who exhibit or embody sexual and gender deviance—including but not limited to gender nonconformity, cross-gender identity, and same-sex desire—for policing and incarceration. White supremacist and racialized systems of control have constructed people and communities of color as gender and sexually nonnormative, which has supported and structured many forms of racialized criminality, and the policing of sexual and gender deviance has been used as a tool to target people of color for policing, incarceration, and punishment.[41] As Joy James has argued, criminality and deviancy are "embodied in the black because both sexual and social pathology are branded by skin color (as well as by gender and sexual orientation)."[42] Dominant constructions of incorrigibility and criminality are centered on the spectacle of the threat of black masculinity, particularly embodied in the black rapist, and the pathologization of black femininity. Penologists have also long linked racial deviance with gender and sexual deviance. Early prison reform tied rehabilitation to whiteness and gender and sexual normativity while blackness and gender and sexual nonnormativity were produced as signs of incorrigibility. In other words, as I will argue in Chapter One, racialized gender normativity was foundational to the construction and internal logics of the US

[41] Mogul, et al, *Queer (In)Justice*; Reddy, *Freedom With Violence*; Nayan Shah, *Stranger Intimacy: Contesting Race, Sexuality, and the Law in the North American West* (Berkeley, CA: University of California Press, 2011); Cacho, *Social Death*.
[42] James, *Resisting State Violence*, 26.

prison system and continues to structure the discursive and material impact of the prison system, including constructions of criminality and dangerousness.

Put another way, criminality is both a marker and a producer of deviancy. It helps construct the boundaries of national social membership and which populations represent normative citizenship. Criminality, therefore, also works to decriminalize, humanize, and secure whiteness, heteronormativity, and gender normativity and the populations that embody these norms, as it constructs normative citizenship as white, hetero- and gender normative.[43] Criminality works to define the relationship between marginalized people and the US state and mainstream society, ensuring their subordinate status and legitimizing, naturalizing, and normalizing imprisonment and carceral violence. Criminality also makes certain people and populations dangerous within penal institutions, particularly to penal security. Within the prison system, certain populations—especially gang members, terrorists, prison activists, and, as I will argue in the following chapters, trans and gender nonconforming people—are marked as inherently dangerous and threatening to security.

"Security" is, arguably, the central organizing principle of US carceral power and organization and, more generally, the liberal state. Security justifies the existence of penal institutions (keeping the US state and normative US society secure), and it is the central purpose of prison administrators (keeping the penal institution secure). As Michel Foucault argues in *Security, Territory, and Population*, modern Western society is a

[43] Ibid.; Rodríguez, *Forced Passages*.

"society of security."[44] A "pact of security" binds the state to its citizenry by calculating risk and danger across the normal and the abnormal. Security, in other words, is a productive discourse and a biopolitical and necropolitical technology that produces and is organized by normativity.[45] Security orients certain populations—those deemed normative, specifically white and hetero- and gender normative—towards life, freedom, safety, and mobility, while orienting others—the "abnormal," or populations of color, sexual and gender nonnormative, and disabled—toward death, immobility, and violence.[46] As Didier Bigo explains, security constructs an "environment of life" for normative populations while abnormalizing the margins, producing insecurity and exclusion for the marginalized.[47] Security both marginalizes certain nonnormative populations and marks them for incarceration, punishment, and various forms of carceral containment. Security functions as the basis for, to paraphrase Max Weber's well-known phrase, the state's monopoly of the legitimate use of violence.[48]

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[44] Michel Foucault, *Security, Territory, Population: Lectures at the Collége de France, 1977-1978* (New York: Picador, 2009).

[45] Foucault argues that security mechanisms are central to biopower's purpose of regularizing, maximizing, and taking control of life for certain populations. As Michael Dillon has argued, "The war for life which biopolitics wages on behalf of its understanding of life, and in relentless pursuit of appropriate power relations to enact that understanding, is translated into biopolitical peace through an obsession with security. Biopolitically it is 'life' which has to be secured. Life is a continuous war against whatever threatens life. Life is thus a permanent security problem for biopolitics." Michael Dillon, "Security, Race and War," in *Foucault on Politics, Security and War*, ed. Michael Dillon and Andrew W. Neals (New York: Palgrave Macmillon, 2008), 168. On biopolitics, see Foucault, *"Society Must Be Defended"*; Foucault, *History of Sexuality*. On necropolitics, see Achille Mbembe, "Necropolitics," *Public Culture* 15 (2003).

[46] On "orientations," see Sarah Ahmed, *Queer Phenomenology: Orientations, Objects, Others* (Durham, NC: Duke University Press, 2006).

[47] Didier Bigo, "Security: A Field Left Fallow," in *Foucault on Politics, Security and War*, ed. Michael Dillon and Andrew W. Neals (New York: Palgrave Macmillon, 2008), 97.

[48] Max Weber, "Politics as a Vocation," in *From Max Weber: Essays in Sociology*, ed. Hans Heinrich Gerth and C. Wright Mills (London: Routledge, 1991).

The margins and marginalized are therefore marked by dangerousness and criminality, which work as the counterparts to security. As I have been discussing, dangerousness has long been produced as a trait of certain populations, describing more than behavior or acts but being. Foucault argues that dangerousness was an important technology of emerging penal regimes in the nineteenth century, that criminalization and penal regimes aimed to control dangerousness, becoming "a control not so much over what individuals did…as over what they might do, what they were capable of doing, what they were liable to do, what they were imminently about to do…The idea of *dangerousness* meant that the individual must be considered by society at the level of his potentialities, and not at the level of his actions; not at the level of the actual violations of an actual law, but *at the level of the behavioral potentialities they represented.*"[49] Both dangerousness and security anticipate danger, locating its source in certain populations that must be contained, destroyed, or (under the best circumstances) normalized. For Foucault, the theory of dangerousness and security forged links between the prison, law, and auxiliary institutions, such as psychiatry and social science, which helped locate, diagnose, and explain dangerousness and dangerous people and populations. In doing so, these institutions use security and dangerousness to normalize state violence and incarceration against the abnormal or deviant and dangerous, the security threats.

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[49] Michel Foucault, "Truth and Juridical Forms." in *Power: Essential Works of Foucault, 1954-1980*, ed. James D. Faubion (New York: The New Press, 1994), 56-7. His emphasis. See also Ricky Wichum, "Security as Dispositif: Michel Foucault in the Field of Security," *Foucault Studies* 15 (February 2013).

While Foucault locates the emergence of dangerousness in criminal psychiatry in the early nineteenth century, the constructions of certain populations as inherently dangerous were foundational to racialized, gendered, and sexual systems of control. Michel Foucault, "About the Concept of the 'Dangerous Individual' in Nineteenth-century Legal Psychiatry, " in *Power: Essential Works of Foucault, 1954-1980*, ed. James D. Faubion (New York: The New Press, 1994); Michel Foucault, *Abnormal: Lectures at the Collége de France, 1974-1975* (New York: Picador, 1999).

Even within prisons, prisoners marked as more normative and secure are given greater relative freedom, while those marked as security threats—the racialized (especially "gang members" and "terrorists"), sexually and gender nonnormative (especially gender nonconforming, trans, and queer people), and bodily and cognitively nonnormative (the disabled)—are isolated, immobilized, and subjected to greater carceral violence. Classification, including sex classification, is a primary means of maintaining security within the prison system, as it is a technology of surveillance, knowledge production, segregation, and control.[50] Security, therefore, normalizes many forms of carceral violence.

In other words, the negation of trans and gender nonconforming people's gender identities and the carceral system of sex classification is and long has been a part of the security apparatus and an important productive piece of carceral violence. Sex classification, as it is defined through racialized gender normativity, also produces gender nonconformity as inherently dangerous and threatening to the institution. I argue that this production of "queer dangerousness" informs all policies and practices used to manage gender nonconforming and trans prisoners. I use "queer" to modify dangerousness to mark how this construction of the inherent danger of gender nonconformity is not only about gender but also about sexuality and race. Drawing from queer of color critique in particular, queer, here, is not a synonym for LGBT or an identity category but describes

[50] Foucault argues that while security is primarily biopolitical, disciplinary mechanisms, such as classification and the correction of prisoners, can be part of security. He explains, "For in order actually to guarantee this security one has to appeal, to take just one example, to a whole series of techniques for the surveillance of individuals, the diagnosis of what they are, the classification of their mental structure, of their specific pathology, and so on; in short one has to appeal to a whole disciplinary series that proliferates under mechanisms of security and is necessary to make them work." Foucault, *Security, Territory, Population*, 8.

nonnormativity, particularly gender and sexual nonnormativity and deviance.[51] It also marks the ways that historically and currently throughout US society, but especially in the prison system, (homo)sexuality and gender nonconformity cannot be disaggregated. Gender nonconforming and trans prisoners become dangerous and security threats in part because they are believed to be sexually dangerous, that they elicit sexual desire and sexual violence from other prisoners. "Queer," thus, accounts for the slippage between homosexuality and gender nonconformity in carceral discourses and practices. These notions of sexual and gender deviance and dangerousness are deeply enmeshed in the antiblackness of the prison system, in constructions of the prison space as black and of blackness as (sexually) dangerous and criminal. Racialized criminality and deviance that pervade and structure the prison leaves an indelible mark on gender nonconformity and trans-ness within that space, having an especially devastating impact on black trans and gender nonconforming people and other trans and gender nonconforming people of color, who constitute the overwhelming majority of the incarcerated trans and gender nonconforming population. Queer dangerousness, therefore, is inextricably connected to racialization and antiblackness. Within the prison space, queer dangerousness devalues and dehumanizes. It deauthorizes trans and gender nonconforming prisoners as knowing

[51] In *Aberrations in Black: Toward a Queer of Color Critique* Roderick Ferguson coined the phrase "queer of color critique" to describe a mode of epistemological intervention and a reading practice that deploys an intersectional account of race, gender, sexuality, and class as mutually constitutive. Roderick Ferguson, *Aberrations in Black: Toward a Queer of Color Critique* (Minneapolis, MN: University of Minnesota Press, 2004). See also, Cathy J. Cohen, "Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?" *GLQ* 3 (1997); Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham: Duke University Press, 2007); José Esteban Muñoz, *Disidentifications: Queers of Color and the Performance of Politics* (Minneapolis, MN: University of Minnesota Press, 1999); E. Patrick Johnson, "'Quare' Studies, Or (Almost) Everything I know About Queer Studies I learned from My Grandmother," in *Black Queer Studies: A Critical Anthology*, ed. E. Patrick Johnson and Mae G. Henderson (Durham: Duke University Press, 2005).

subjects, taking away self-determination and producing them as "depersonalized persons." It produces and authorizes carceral violence that target gender nonconformity.

Overview

"Carceral Normativities" examines the circuits of power within and around the US prison system that produce knowledge about gender nonconformity, gender normativity, sex classification, and queer dangerousness. In keeping with this understanding of carceral power and violence as productive, I examine how prison administrators, social scientists, the law, and medical establishment have produced trans and gender nonconforming prisoners as security threats, dangerous, and, therefore, subject to legitimate violence and violation.

Because the experience of carceral violence targeting trans and gender nonconforming people is a national problem, I examine the national context. This breadth, which aims to think about how US carceral power and the penal policies and practices that it produces engage with gender nonconformity through violence, necessarily comes at the price of local specificity. There is enormous variation in the conditions and experiences of prisoners around the US, and while some of that variation is between states, much of it is within state systems. This dissertation contends that carceral logics in general construct gender nonconformity as a security threat and therefore manages it with violence; however, not every individual trans or gender nonconforming person's experience is the same. While I would contend that all trans and gender nonconforming prisoners experience violence—since the confinement of humans

in cages is itself a form of violence—not all prisoners experience the specific forms of violence that I describe throughout the dissertation. Moreover, not every individual staff member wishes to perpetrate violence against trans and gender nonconforming prisoners. The national, large-scale focus obscures some of the individual nuances both in terms of individual prisoners experiences as well as staff actions. Nevertheless, there is a great deal of consistency in the violent treatment of trans and gender nonconforming prisoner, and this national focus allows me to examine overarching carceral power and logics.

I also want to make note of the language that I use throughout this dissertation. The slippage and messiness of the relationship between gender and sexual nonconformity as well as the long historical time period that I discuss produces a difficulty of language. The prisoners that I describe and who are targeted by penal policies and practices are often quite diverse in their gender nonconformity. I use the term "gender nonconforming" to describe people who do not conform to birth-assigned-sex/gender norms, in gender expression and/or identification. Some are cross-gender identified and seek to medically transition, others are feminine male-identified people or masculine female-identified people who have always identified as their birth-assigned sex but eschew the gender norms associated with that sex in various ways. Many identify as gay or homosexual and nearly all are identified by prison administrators as such. Moreover, the language and ways of identifying have dramatically changed during the time period that I discuss in this dissertation. In the early and mid-twentieth century, gender nonconformity and even cross-gender identity and homosexuality were understood widely as two aspects of the same phenomenon, and they continue to be understood as such in significant ways.

"Transsexuality" as an identificatory category describing people who use medical technologies to "change sex" is a relatively recent phenomenon. Sex-reassignment medical technologies began to be produced in the early twentieth century, and "transsexuality" as a term was not coined until the mid-twentieth century. "Transgender" did not come into wide use until the 1990s. I, therefore, utilize the terms "gender nonconforming" to cast a wide net and acknowledge the historical specificity of the language of "trans," "transgender," and "transsexual," and only use the latter terms when describing people or policies that specifically use that language.[52] Moreover, I use the term "queer" to dissolve the often artificial boundaries between gender and sexual nonconformity and homosexuality, gender nonconformity, and trans status or cross-gender identity. Queer functions throughout this text to describe the interconnectivity of gender and sexual nonnormativity in how prisoners identify themselves and how they are identified by carceral power.[53]

Chapter One, "'Trouble Over Sex': Racialized Gender Normativity and the Construction of Sex-Segregation," examines the history of the construction of the modern sex-segregated prison system, arguing that over the course of the nineteenth and well into the twentieth century, prison administrators and reformers constructed a prison system

[52] I also sometime use "trans" along with "gender nonconformity" when discussing the last few decades. To a certain extent, "trans" and "gender nonconforming" can be seen as synonyms. However, "trans" comes with historical specificity and identificatory implications that I find inappropriate to use in many circumstances. For a discussion of the emergence and use of "transgender," see David Valentine, *Imagining Transgender: An Ethnography of a Category* (Durham, NC: Duke University Press, 2007).

[53] The relationship between "queer" and "trans" is complex and I am erasing some of the tensions here. However, I find the use of both terms vital to this project because of the complexity and messiness of how gender and sexuality function in regards to both how prisoners identify themselves and how they are identified by carceral power. For some discussion of these complexities, see Heather Love, "Queer," *Transgender Studies Quarterly* 1, no. 1-2 (May 2014); Ki Namaste, "'Tragic Misreadings': Queer Theory's Erasure of Transgender Subjectivity," in *Queer Studies: A Lesbian, Gay, Bisexual, and Transgender Anthology*, ed. Brett Beemyn and Mickey Eliason (New York: New York University Press, 1996).

whose architecture, programmatic design, and core understandings of rehabilitation and incorrigibility were deeply shaped by racialized gender normativity. By historicizing racialized gender normativity as a constitutive logic of the US prison system, I argue that sex segregation was and is more than a natural, commonsensical feature of the prison system but was produced from and is interconnected with the prison system's investments in racialized, gendered, and sexual control. I juxtapose this history with newspaper stories from the mid-twentieth century of penal administrators "discovering" sexually "misclassified" prisoners in their institutions to reveal the "work" of sex segregation, arguing that the development and maintenance of sex segregation necessitated the (often unspoken) production of methods to classify sex. Sexual ambiguity within penal spaces, while generally explicitly articulate as a bizarre but simple fix (moving the "misclassified" prisoner to the "correct" sexed institution), actually produced anxiety and administrative disorder.

Chapter Two, "'A Means of Assuring the Safe and Efficient Operation of a Prison': Segregation, Security, and Queer Dangerousness," examines one of the primary ways that prison administrators have managed the sexed administrative disorder produced by gender nonconformity and cross-gender identity: the systematic segregation of gender nonconforming prisoners. Begun in the early twentieth century and continuing into the present, the practice of segregating gender nonconforming prisoners remains a prominent feature of penal management today. I argue that this segregation emerged in the early twentieth century as prison administrators and researchers identified gender nonconformity as a threat to institutional security. Segregation became an important tool

of containing gender nonconforming and eventually trans prisoners' queer security threat—or as I call it, queer dangerousness.

The construction of queer dangerousness and of gender nonconformity as institutional security threat was usually explicitly sexual. As they constructed gender nonconforming prisoners as security threats, prison administrators and social scientists depicted them as hypersexual, as inciters of sexual violence, and therefore unrapable. In Chapter Three, "'Designed to Abuse': Queer Deviance and Carceral Sexual Violence," I examine the relationship between dominant penological, social scientific, and legal narratives about sexual violence in penal institutions and the use of sexual violence as a tool of control—which I call carceral sexual violence. I argue that dominant narratives about prisons as sites of rampant sexual violence entirely perpetrated by prisoners portray gender nonconforming and trans prisoners as simultaneously unrapable and constantly subject to sexual violence. This narrative about the impossibility and inevitability of sexual violence, coupled with discourses of queer dangerousness, justifies and obscures many mundane forms of carceral sexual violence that target gender conforming and trans prisoners.

Chapter Four, "'A Serious Medical Need?': Carceral Necropower and Access to Gender-Affirming Medical Treatment," examines another important form of carceral violence that trans and gender nonconforming prisoners experience: the denial of gender-affirming medical treatment. Examining federal civil rights litigation regarding access to hormone therapy and sex reassignment surgery for trans women in men's prisons, I argue that carceral necropower, or the production of the prison as a death world and the

imprisoned as the living dead, and the racialized gender normative construction of gender nonconformity as queer dangerousness securitizes gender-affirming medical treatment in prisons, constructing security concerns as a legitimate—even determinative—factor in determining access to such treatment.

By focusing on the history of the four primary policy areas that have the greatest effect on trans and gender nonconforming prisoners as gender nonconforming—sex segregation and classification, administrative segregation, carceral sexual violence, and access to gender-affirming medical treatment—"Carceral Normativities" argues that sex-and-gender-based carceral violence and the logics of racialized gender normativity are constitutive of the US prison system. In other words, this violence is not new and is deeply and inextricably enmeshed in the structure and organizing logics of the US prison system.

Chapter One

"Trouble Over Sex": Racialized Gender Normativity and the Construction of Sex Segregation

In the summer of 1953, a white man named Vernon Bradshaw was arrested for embezzlement in Kenova, West Virginia. He was held for three days in the county jail then released on bond. The following February, Bradshaw was tried and convicted in an Ohio court and sentenced to the Ohio Penitentiary, the state prison for men. Following his sentencing, a court spectator stood and proclaimed: "My name is Patrick Bradshaw and I'm the defendant's brother. You've made a terrible mistake. Vernon is really Violet, and she is a woman."[1] Newspaper stories of this event recount that this revelation was met with astonishment and confusion from the judge and spectators. In order to determine Bradshaw's sex, the judge ordered a matron and a physician to physically examine him. Upon later receiving their report that Bradshaw was "a woman," the judge resentenced him to the Marysville Reformatory for Women.[2]

Bradshaw had lived nearly his entire life as a man. He marked "male" whenever asked about his sex. He was married to a woman, who, according to reports, "found out about his past in court," and his brother claimed that everyone in their family considered him to be male. Nevertheless, the judge, matron, and physician classified him as a woman, and news report portrayed his life as a man as a masquerade, claiming that in

[1] "Double Life Befuddles Ohio Court," *Schenectady Gazette*, February 11, 1954.
[2] According to the press, the judge characterized the situation as "the most amazing case I've ever heard in my years on the bench." "Prisoner Sentenced, Revealed to Be Woman," n.d. Box 3, Series IIIA, folder 1, Louise Lawrence Collection, Kinsey Institute Library and Special Collections, Indiana University.

court he was "unmasked as a woman."[3] In response, Bradshaw continued to assert his maleness. Wearing "grey trousers, red socks, blue suede shoes, a green shirt, and red, black, and white checked flannel jacket" to court, he told a reporter, "I was not masquerading. I always have considered myself a man…I have dressed, acted and worked like a man ever since I can remember."[4] When asked what name he wanted to be called by reporters, he replied, "My name is Vernon Bradshaw."[5]

Bradshaw's experience was not an isolated incident. Similar stories of people being arrested, incarcerated, and later "discovered" to be the opposite sex appeared occasionally in the popular press, in the memoirs of prison administrators, and in some social scientific literature in the early and especially mid-twentieth century.[6] As in Bradshaw's story, "discovery" always involved a physical inspection that revealed the "truth" of these people's sex via their bodies, presumably, specifically their genitals. In these stories, prison administrators and medical personnel would determine a prisoner's sex and, accordingly, house them in a men's or women's institution.

During Bradshaw's resentencing, the sheriff was asked why Bradshaw "was not searched and her [*sic*] sex determined at the time she [*sic*] was taken to jail." In response,

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[3] "Woman, Who Dressed as Male, Receives Sentence," *Times Daily*, February 11, 1954; "'Vernon' Becomes 'Violet' in Court Masquerade," *Spartanburg Herald*, February 12, 1954.
[4] "35-Year Masquerade as Man Revealed in Court by Woman," *The Daily Telegraph* (Eau Claire, WI), February 11, 1954; "Jail Makes Woman of Man," *Pittsburgh Post-Gazette*, February 11, 1954.
[5] "Jail Makes Woman of Man."
[6] See for example, Walter Wilson, *Hell in Nebraska: A Tale of the Nebraska Penitentiary* (Lincoln, NE: The Bankers Publishing Company, 1913); Frederick S. Baldi, *My Unwelcome Guests* (Philadelphia: J. B. Lippincott Company, 1959); Harvey Bluestone, Edward P. O'Malley, and Sydney Connell, "Homosexuals in Prison," *Corrective Psychiatry and Journal of Social Therapy* 12 (1966); Perry M. Lichtenstein, "The "Fairy" and the Lady Lover," *Medical Review of Reviews* 27 (August 1921); John M. Murtagh and Sara Harris, *Cast the First Stone* (New York: McGraw-Hill Book Company, Inc., 2012); James Melvin Reinhardt, *Sex Perversions and Sex Crimes* (Springfield, IL: C.C. Thomas, 1957); David A. Ward and Gene G. Kassebaum, *Women's Prison: Sex and Social Structure* (Chicago: Aldine Publishing Co., 1965). See below for newspaper citations.

he explained, "It's a matter of not having enough room in the jail; we cannot look after everything."[7] This simple exchange reveals how penal administrators dealt with and continue to deal with sex. Sex is assumed to be self-evident and therefore does not require investigation (beyond a glance or the reading of a name) until confronted with sex ambiguity or confusion. The sheriff and his staff did not think it necessary to expend the labor to inspect Bradshaw's genitals when he was first arrested because they believed his sex to be self-evidently male. This lack of inspection would not have been a "problem" for the court if Bradshaw's brother had not disclosed his birth-assigned sex. Yet, despite the sheriff's claim to the contrary, Bradshaw's sex was determined by jail staff the moment he was taken to the men's jail. Stories of "misclassification," like Bradshaw's, help us think about the work of sex segregation and the classification of prisoners into two completely separate sexed categories, perhaps the most normalized and invisibilized work of penal management.[8] They show that sex classification is indeed constructed, not just natural and self-evident.

Sex segregation is one of the most basic elements of prison organization and architecture, so basic that it is rarely remarked upon. But like all elements of the US prison system, it has a history. Prison reformers of the nineteenth and early twentieth centuries viewed sex segregation as a key feature of a modern prison system. These reformers sought to create a criminal punishment system that featured imprisonment and correction for certain prisoners deemed capable of reform. White sexual difference was a key element of the design of these new correction-oriented prison systems and white

[7] "Prisoner Sentenced, Revealed to Be Woman."
[8] I use the term "misclassification" throughout this chapter to mark how prison administrators thought of situations like Bradshaw's, not to make a judgment about how these prisoners should have been classified.

gender normative prisoners were their primary targets. Blackness and gender and sexual deviance were constructed as irredeemable and in need of containment. In other words, racialized gender normativity—understood here as the ideological investment in a naturalized binary sex system inextricably tied to white hetero-gender norms as valuable and key to rehabilitation and freedom in opposition to black and brown sexual and gender nonnormativity, dangerousness, and criminality—shaped the design of the modern prison system. Through its valuation of binary sex, racialized gender normativity produced the imperative to sex-segregate.

Despite the centrality of sex segregation to the modern prison system, the historical literature on the US prison system rarely remarks upon it. Most histories of state or regional prison systems, especially those that do not explicitly focus on women's prisons, pay little-to-no attention to gender and sex. Instead, they assume an unmarked male subject and overwhelmingly focus on the history of men's prisons.[9] Histories of women's prisons, on the other hand, treat gender as a central theme, something that was vitally important to the development of women's prisons.[10] Because the history of

[9] See, for example, W. David Lewis, *From Newgate to Dannemora: The Rise of the Penitentiary in New York, 1796-1848* (Ithaca, NY: Cornell University Press, 1965); Michael Stephen Hindus, *Prison and Plantation: Crime, Justice, and Authority in Massachusetts and South Carolina, 1767-1878* (Chapel Hill, NC: The University of North Carolina Press, 1980); David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic*, rev. ed. (New York: Aldine de Gruyter, 1990); Adam Jay Hirsch, *The Rise of the Penitentiary: Prisons and Punishment in Early America* (New Haven: Yale University Press, 1992); David M. Oshinsky, *"Worse Than Slavery": Parchman Farm and the Ordeal of Jim Crow Justice* (New York: Free Press Paperbacks, 1996); Robert Perkinson, *Texas Tough: The Rise of America's Prison Empire* (New York: Picador, 2010). Lewis discusses women the most out of all these sources; he devotes one chapter to them.

[10] See, for example, Estelle B. Freedman, *Their Sisters' Keepers: Women's Prison Reform in America, 1830-1930* (Ann Arbor, MI: The University of Michigan Press, 1981); Nicole Hahn Rafter, *Partial Justice: Women, Prisons, and Social Control*, 2nd ed. (New Brunswick, NJ: Transaction Publishers, 1990); Anne M. Butler, *Gendered Justice in the American West: Women Prisoners in Men's Penitentiaries* (Urbana, IL: University of Illinois Press, 1999); Kathryn Watterson, *Women in Prison: Inside the Concrete Womb*, rev. ed. (Boston: Northeastern University, 1996); Nancy Kurshan, "Behind the Walls: The History and Current

women's prisons is a history of the separation of female prisoners from male prisoners, they also describe the construction of sex segregation. However, they do not discuss sex classification. This absence of any consideration of sex classification or cross-gender identity naturalizes a binary sex system and the segregation of all people by sex into binaristic institutions.

This chapter reexamines prison history from its modern beginnings at the end of the eighteenth century to the mid-twentieth century, focusing specifically on the construction of sex segregation, in order to argue that racialized gender normativity is a constitutive logic of the US prison system and has produced, designed, and maintained sex segregation. I reexamine this history alongside stories of "misclassified" prisoners, such as Bradshaw, from the early to mid-twentieth century, to think about how prison administrators managed the administrative sex disorder that these prisoners created. While these stories denaturalize sex classification and sex segregation, I argue that prison administrators produced discursive and management tools to explain away this denaturalization, working to (re)consolidate a (racialized gender normative) sex binary. Examining this history of the carceral investment in racialized gender normativity also helps us understand administrators' reactions to "misclassified" prisoners, or, for example, why an admission in court that Bradshaw was "really female" would cause anxiety and concern when his sex had not caused problems during his prior incarceration.

Reality of Women's Imprisonment," in *Criminal Injustice: Confronting the Prison Crisis*, ed. Elihu Rosenblatt (Boston: South End Press, 1996); Esther Heffernan, "Gendered Perceptions of Dangerous and Dependent Women: 'Gun Molls ' and 'Fallen Women,'" in *Women in Prison: Gender and Social Control*, ed. Barbara H. Zaitzow and Jim Thomas (Boulder, CA: Lynne Rienner Publishers, 2003).

Put another way, why did it matter to prison administrators and the judge what Bradshaw's genitals looked like or what sex he was assigned at birth?

Racialized Gender Normativity and the Construction of Sex Segregation

As historians of prisons have long shown, prisons and the use of imprisonment as criminal punishment is a relatively recent phenomenon.[11] States began to build prisons and regularly sentence people convicted of crimes to terms of imprisonment in them at the end of the eighteenth century. The late eighteenth through late nineteenth centuries saw sweeping and relatively rapid criminal punishment reform throughout the United States, driven by changing economic and social conditions and by reformers who sought to create more humane and "civilized" criminal punishment. However, the implementation of imprisonment as the primary criminal punishment and the establishment of prisons was a long and uneven process, often looking strikingly different regionally and for different populations. The process and forms that criminal punishment reforms took were structured by the racial and economic landscape of regions and states as well as the race, gender, sexuality, dis/ability, and class of targeted populations. Nevertheless, the development and refinement of the modern prison system across the US followed similar logics of white, sexual and gender normative correction and black dangerousness, irredeemability, and sexual nonnormativity. By the early to mid-twentieth century, prisons had become a normalized feature of the US landscape and a primary vehicle for racialized, gendered, and sexualized state violence and control.

[11] See for example, Lewis, *From Newgate to Dannemora*; Hirsch, *The Rise of the Penitentiary*; Rothman, *The Discovery of the Asylum*; Freedman, *Their Sisters' Keepers*.

A central concern of prison reform throughout the nineteenth and into the twentieth century was sex segregation. In early prisons in the Northeast and Midwest, male- and female-classified prisoners were placed in the same institutions and lived in very similar conditions. While at least some sex segregation existed in almost all early penal institutions, it was frequently imperfect and hinged, in part, on race. While men and women were usually held in different cells or wings at least at night, they might share common areas and mingle together at least part of the time. In prisons and penitentiaries, prison farms, and convict labor in the South and West during the nineteenth and early twentieth century, male- and female-classified prisoners were often held in even closer proximity to one another.[12] Prison reformers and penologists viewed sex segregation as a vital feature of "modernizing" criminal punishment systems.[13] However, implementing sex segregation, like other reforms, was an uneven process, influenced by racial and economic conditions. Whiteness and white correction often drove sex segregation as it drove most reforms, while blackness and other markings of irredeemability produced less concern about it, as those marked by irredeemability were incarcerated in greater numbers but generally subjects of correction. As scholars have shown, prison reform was

[12] The overwhelming majority of these prisoners, especially after Emancipation, were black, especially among female-classified populations. In the South, especially, and the West, white women were often sparred from imprisonment. Sometimes all of the female-classified people in mixed sex confinement were black. *Second Report of the Prison Association of New York (1845)* (New York: Prison Association of New York, 1846); *Prison Progress: The Sixty-Ninth Annual Report of the Prison Association of New York (1913)* (Albany: J. B. Lyons Company, 1914).

[13] As the American Correctional Association explained in 1954, "Women prisoners should not be kept on the same property with male prisoners. In modern times, there has been no disagreement on the proposition that male and female prisoners of all ages should be kept separate form each other." *A Manual of Correctional Standards* (New York: American Correctional Association, 1954), 171.

fundamentally structured by white supremacy and capitalist labor needs.[14] Less often discussed is that it was also structured by heteropatriarchy and, as I will argue here, by racialized gender normativity.[15] Racialized gender normativity produced the imperative to segregate prisoners by sex, especially among correction-oriented reformers. Sex segregation was understood as vital to rehabilitation—and the production of normative citizens—and eventually penal management in general.

The segregation of different types of prisoners has long been an important tool of penal management. As historian Regina Kunzel has argued, early prison administrators were very concerned with the "promiscuous" mixing of different types of prisoners, including by age, criminal history, race, potential for rehabilitation, and sex.[16] Kunzel explains that this intermixing was believed to have perverting effects and dangerous and disorderly consequences. This concern, arguably, has continued into the present. The history of prison reform is, in many ways, a history of different forms of segregation: younger from older, first-time offenders from recidivists, white from black from other people of color, gender nonconforming and homosexual from gender conforming (as I

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[14] See for example, Caleb Smith, *The Prison and the American Imagination* (New Haven, CT: Yale University Press, 2009); Hindus, *Prison and Plantation*; Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2010); Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (Berkeley, CA: University of California Press, 2007); Oshinsky, *"Worse than Slavery."*

[15] See Freedman, *Their Sisters' Keepers*; Rafter, *Partial Justice*; Angela Y. Davis, "Race and Criminalization: Black Americans and the Punishment Industry," in *The Angela Y. Davis Reader*, ed. Joy James (Oxford: Blackwell Publishing, 1998); Angela Y. Davis, *Are Prisons Obsolete?* (New York: Seven Stories Press, 2003); Julia Sudbury, "Celling Black Bodies: Black Women in the Global Prison Industrial Complex," *Feminist Review* 80 (2005); Beth E. Richie, *Compelled to Crime: The Gender Entrapment of Battered Black Women* (New York: Routledge, 1996); Joey L. Mogul, Andrea J. Ritchie, and Kay Whitlock, *Queer (In)Justice: The Criminalization of LGBT People in the United States* (Boston, MA: Beacon Press, 2010). For recent discussion of gender normativity and the US prison system, see Eric A. Stanley and Nat Smith, ed., *Captive Genders: Trans Embodiment and the Prison Industrial Complex* (Oakland, CA: AK Press, 2011).

[16] Regina Kunzel, *Criminal Intimacy: Prison and the Uneven History of Modern American Sexuality* (Chicago: University of Chicago Press, 2008).

will discuss in the next chapter), and male-classified from female-classified.[17] These different forms of segregation had two general purposes: to facilitate the correction of certain prisoners and to manage deviant populations in order to reduce violence, disorder, and (often) sex. Sex segregation also followed these logics. Reformers and penologists argued that the mixing of men and women would "have a disturbing influence upon both groups."[18] This disturbing influence was primarily about sexuality. Male prison reformers and penologists believed that women's sexuality was potentially dangerous and uncontrollable and could incite men to lust and potentially violence.[19] Women prison reformers, too, were especially concerned with female sexual immorality and, therefore, wanted them separated from men, including male staff and guards, who might lead them astray.

In the nineteenth and early twentieth century, sex segregation not only separated men and women (or, to be more specific, male- and female-classified people) but also created different types of institutions, marked by sex, that addressed the supposedly different natures of men and women. Sex segregation, in other words, was produced from dominant understandings of sexual difference, which constructed men and women as two separate, essential categories of human, not only physically but also mentally,

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[17] This concern about intermixing helped produce the juvenile justice system. It also facilitated a long history of racial segregation in prison systems throughout the country. Prisons often remained segregated long after desegregation started elsewhere. In some states, especially in the South, entire prisons were racially segregated well into the 1960s and 1970s. For example, Texas prisons were completely segregated by race until 1965. In 1965, prisons were desegregated on the unit level, but not cells, cellblocks, or work squads. Texas was forced to desegregate its prisons by court order in 1977. After resisting the order, Texas finally agreed to submit to a plan for in-cell desegregation in 1991. Chad R. Trulson, et al., "Racial Desegregation in Prisons," *The Prison Journal* 88, no. 2 (June 2008). Racial segregation continues in some systems. See Johnson v. California 125 S. Ct. 2419 (2005).

[18] Fred E. Haynes, *The American Prison System* (New York: McGraw-Hill Book Company, Inc., 1939), 88.

[19] Esther Heffernan, "Gendered Perceptions of Dangerous and Dependent Women."

psychologically, and morally. Throughout most of the nineteenth and into the twentieth century, sexual difference was also explicitly linked to "civilization" and progress, and white people were constructed as fundamentally more sexually divergent than people of color, especially black people. Racialized sexual difference, therefore, also helped determine who should be subject to correction-oriented imprisonment or custodial-oriented imprisonment by determining who was rehabilitatable and who was fundamentally criminal and irredeemable.

As sex segregation became a fundamental feature of penal institutions, sex classification became a basic part of penal administration. Like most people, prison administrators and reformers took for granted that they would naturally "know" who was male and who was female. While there was often disagreement and struggle over the inherent nature of men and women, the notion that they constituted two separate, mutually exclusive types of person was not in dispute. Historians of the US prison system have generally reproduced this assumption. The work of sex classification is, therefore, absent from narratives about the construction of the modern prison system in historical literature. Yet, sex classification was a constant but invisible part of the work of managing prisoners and only became visible when cross-gender identified people entered the prison system. Ideologies of racialized gender normativity produced the valuation of sexual difference and the imperative to sex-segregate, shaping the architecture, management systems, and assumptions about prisoners.

The earliest prison reform movements began in the Northeast and Midwest—two regions whose populations were mostly white and that were in the midst of the Industrial

Revolution—in order to create a punishment system that would promote the rehabilitation of white male (and later female) citizens. Although the use of imprisonment as a criminal punishment and the development of prisons began slightly earlier, the first major prison reform movement was the penitentiary movement of the early to mid-nineteenth century.[20] The penitentiary was a new type of penal institution, one that featured massive walls and individual cells and was designed to "correct" white male criminals. This correction aimed to produce a normative, economically productive, obedient white male citizen through silent penitence, isolation, regimentation, and labor.[21] Identifying only this subset of the population as capable of rehabilitation and socially valuable enough to invest state resources in, the penitentiary system of penal management and correction was organized by and reproduced white heteropatriarchy, gender normativity, and sexual difference.

The penitentiary was vital to establishing our current models of prisons that feature cells, high walls, and armed guards, but its model of correction through penitence

[20] This work began at the end of the eighteenth century. However, the earliest prisons looked dramatically different from penitentiaries our current ones. They were co-correctional facilities that resembled large houses and held prisoners in groups in large rooms. Male- and female-classified prisoners were usually, although not always, housed in separate rooms or wings. For example, New York's Newgate Prison, which opened in 1797 in Greenwich Village and was the first prison that held only people convicted of felonies, held both men and women and featured small cells for eight people. Female- and male-classified prisoners were separated in different wings, but they were able to mingle at times and were held in very similar conditions except for being required to perform different gendered labor: women washed and sewed while the men made shoes and did other manufacturing. Despite similar treatment, early prisons, like Newgate, were constructed and designed for men; women occupied them but drew little attention from prison reformers. Rafter, *Partial Justice*; Lewis, *From Newgate to Dannemora*; Rothman, *The Discovery of the Asylum*; *Second Report of the Prison Association of New York*.

[21] Unlike the first state prisons, which held several prisoners together in a room, penitentiaries separated male prisoners into individual cells to prevent them from morally contaminating one another. Two primary models of the penitentiary emerged in the early nineteenth century: New York's Auburn model and the Pennsylvania model. The two systems held prisoners in slightly different forms of isolation but both adhered to similar models of correction. See Rafter, *Partial Justice*; Lewis, *From Newgate to Dannemora*; Hirsch, *The Rise of the Penitentiary*; Rothman, *The Discovery of the Asylum.*

and silence was short-lived. By the second half of the nineteenth century, the penitentiary movement began to decline, and penitentiaries lost their rehabilitative focus. Administrators' ability to maintain silence and isolation between male prisoners was undermined as institutions experienced overcrowding and became increasingly filled with "hardened criminals" and Southern and Eastern European immigrants, who administrators and reformers deemed to be less racially capable of rehabilitation and worthy of state investment.[22] Penitentiaries increasingly became sites of custody and control of deviant populations instead of sites of (white male) correction. As prison reformers lost faith in the penitentiary system, a new system of white, male correction emerged: the men's reformatory. Instead of focusing on white men in general, men's reformatories focused on the correction of young, generally first-time white male prisoners through education, vocational training, religion, and a system of rewarding good behavior.[23]

These criminal punishment systems designed around white, male correction also produced shadow systems that were designed to warehouse populations deemed incorrigible, the detritus of the new prison system. Women were one such population. Consistent with dominant constructions of womanhood and femininity during the

[22] The construction of whiteness, or who counts as white, has changed over the last two centuries. During the nineteenth century and into the twentieth, Southern and Eastern European people were considered off-white at best, lower on the racial hierarchy than Northern and Western Europeans, who represented its pinnacle. Beginning in the mid-nineteenth century, the US experienced a massive influx of immigration from Europe, especially Ireland, Eastern, and Southern Europe, which increased racial anxieties and caused "a fracturing of whiteness into a hierarchy of plural and scientifically determined white races." Matthew Frye Jacobson, *Whiteness of a Different Color* (Cambridge, MA: Harvard University Press, 1998), 7. White supremacist and nativist sentiment in the US viewed these European immigrants as prone to criminality, feeblemindedness, and other undesireable traits. This immigration and the greater numbers of these less "desirable" white people in the Northeast, especially, and the Midwest, impacted prison reform as well. See also, David R. Roediger, *Working Toward Whiteness: How America's Immigrants Became White: The Strange Journey from Ellis Island to the Suburbs* (New York: Basic Books, 2005).

[23] Rothman, *The Discovery of the Asylum*; Rafter, *Partial Justice*.

nineteenth century, prison administrators and reformers believed that women were fundamentally less capable and less rehabilitatable than men and, therefore, were not proper subjects for penitentiary treatment.[24] Because nineteenth century racialized gender ideology constructed white women as inherently morally superior to men, most prison reformers believed that white female criminality was more injurious to society than male criminality.[25] A white female criminal not only had "further to fall" than male criminals but transcended or fell out of womanhood. Reformers believed that criminality was a natural, if negative and aberrant, feature of men's role in society, since crimes were understood as public acts of aggression and men were viewed as naturally aggressive. Therefore, most (white) men—especially young, white, first-time offenders—were reformable. White women who committed crimes, on the other hand, "had gone against [their] very nature."[26] While black women were also considered irredeemable, this irredeemability was primarily produced from their race. Black women were believed to be outside the domain of true womanhood by racial inheritance. They were, therefore, also considered incorrigible, not because they had fallen, but because they were black.[27]

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[24] (White) women's relationship to labor, which was a primary concern for prison administrator, was also a factor in their determination that penitentiary treatment was not appropriate for women. They believed that women did not need the same sort of physical exertion as men did; that it was not appropriate for women to perform maintenance, heavy work, and industry, like male prisoners; and that women's labor did not add economic value to the prison, a central concern of prison administrators in the nineteenth century. "The Sexual Segregation of American Prisons" *The Yale Law Journal* 82, no. 6 (May 1973); John Bartlow Martin, *Break Down the Walls* (New York: Ballantine Books, 1954); Freedman, *Their Sisters' Keepers*; Rafter, *Partial Justice;* Eugenia Cornelia Lekkerkerker, *Reformatories for Women in the United States* (Groningen: BIJ J.B. Wolters' Uitgevers Maatschappij, 1931).

[25] Rafter, *Partial Justice*; Louise Michele Newman, *White Women's Rights: The Racial Origins of Feminism in the United States* (New York: Oxford University Press, 1999).

[26] Lewis, *From Newgate to Dannemora*, 157.

[27] Newman, *White Women's Rights*. Importantly, fallen white women did not become equivalent to black women in prison administrators and reformers' eyes; they remained superior. White women were often protected from incarceration in ways that black women were not and in prison often lived in better (if still horrible) conditions. Black women were disproportionately incarcerated compared to white women. In fact,

This intersection of black criminality and female criminality put black women at greater risk for imprisonment, and while female-classified prison populations were predominantly white because the general populations of the Northeast and Midwest were overwhelmingly white, black women were disproportionately represented in prison populations, usually in greater proportion than black men.

Female-classified criminals, therefore, were condemned more harshly and considered uncorrectable by most reformers and penologists during the nineteenth century. For example, in their 1845 report, the Prison Association of New York described the female prisoners housed in the New York City House of Detention's tier for vagrants and intoxicated women as "the most disgusting exhibitions of degradation that any city affords. At any hour of the day may be seen, lolling on their filthy beds, or on benches in the hall, in rags, brutish with sensuality, or consuming with the consequences of reckless indulgence, old, young, bleared, bloated, deformed—the wrecks of what were once bright, happy girls."[28] While the report describes male prisoners in the House of Detention as well, it does not use the same kind of condemnatory, disgusted language. Over sixty years later, the keeper at the Erie County Penitentiary in Buffalo described female prisoners to the Prison Association of New York as "a class utterly insusceptible to reformatory treatment." He explained that "the only way to cure them would be to cut their heads off."[29]

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black women constituted a greater proportion of female prisoners than black men did of male prisoners. For example, between 1797 and 1801, 44% of women in New York were black compared to 24% of men. At the Ohio Penitentiary in 1840, 49% of women were black, while 10% of men were black. Rafter, *Partial Justice.*

[28] *Second Report of the Prison Association of New York*, 67.

[29] *Sixty-First Annual Report of the Prison Association of New York (1905-1906)* (Albany: Brandow Printing Company, 1906), quoted on 88-89. Female criminals were seen as especially depraved and

Because female-classified prisoners were constructed as irredeemable and not worth state investment, they were crowded into a corner of early and mid-nineteenth century penitentiaries—a one-room attic over the kitchen at New York's Auburn Prison, for example—where they lived in horrible, violent, and often unsanitary and dangerous conditions, generally in a single cell or room. The core provisions of the penitentiary system—solitary confinement, silence, and labor—were not applied to them, and they were usually almost entirely ignored.[30] While sex segregation was built into the design and logic of the penitentiary, the burden of that segregation was generally borne by women, as their movement and access to programming, resources, and even air and light were restricted.[31] In other words, the increased separation of male- and female-classified people physically was contingent on conceptualizations of racially and sexually different criminal natures, which also produced different penal conditions.

Despite the emphasis on supposed differences between male- and female-classified prisoners, writings by reformers and administrators as well as publications outlining correctional standards, like the ones published by the Prison Association of

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irredeemable if her "offense" was sexual in nature, which was a common offense category for female prisoners in the nineteenth century. Many prison reformers and researchers in the nineteenth and well into the twentieth century believed that sexual immorality was the greatest and most important source of corruption among women. Lekkerkerker, *Reformatories for Women*.

[30] Before the construction of a women's prison in 1893, women—who could number as many as thirty—imprisoned at Auburn suffered extreme neglect and crowding in this attic. The windows were sealed to prevent communication with the men, which made the attic dark and stifling. Before a matron was hired in 1832, they had no supervision. Once a day, a male prisoner delivered food and removed waste; otherwise, they were alone. There were also a number of cases of women prisoners becoming pregnant, which indicates that sexual coercion and rape were not uncommon experiences. While Auburn and its system of imprisonment for men was lauded and became a model upon which prisons throughout much of the US were based, in a 1832 report, inspectors argued that the women's quarters at Auburn presented "a specimen of the most disgusting and appalling features of the old system of prison management, at the worst period of its history." Lewis, *From Newgate to Dannemora*, quoted on 163-64. See also, Kurshan, "Behind the Walls"; Rafter, *Partial Justice*.

[31] While the conditions were horrible for all women, they were often worse for black women than white women. Freedman, *Their Sisters' Keepers*; Rafter, *Partial Justice*; Watterson, *Women in Prison.*

New York, mentioned above, did not outline how to classify prisoners by sex nor mention sex classification at all. This absence, however, does work, naturalizing binary sex as the architects of penal management and institutions produced the supposed sexual difference between male and female prisoners as natural, self evident, and mutually exclusive. Ideologies of sexual difference—within and outside of the penal context—did not allow for the possibility of cross-gender-identity or sexual ambiguity. Despite marking certain peoples—particularly people of color, disabled people, and other people marked as inferior—as gender nonnormative and less sexually dimorphic than white people, they were still assumed to fall into the two binaristic categories of sex: male and female. Yet, sexually ambiguous prisoners—either those who were intersex and whose bodies were visibly sexually ambiguous or who lived as the sex opposite their birth assignment—certainly existed in penal institutions in the nineteenth century. Their ability to exist was constantly erased by the material and discursive management techniques of penal administrators and reformers.

The increased physical separation of male- and female-classified prisoners—an important component of prison reform throughout the nineteenth and early twentieth centuries—was one important technique in this regard as it materially and symbolically formed normative binaristic sexual difference, reinforcing the erasure of sexual ambiguity in penal institutions. By the 1830s, a few states began to further separate male- and female-classified prisoners by creating separate buildings for women. At first these buildings were located within the walls of the main penitentiaries, but through the nineteenth century and into the twentieth century, prison administrators put increasing

distance between men's and women's buildings as some states opened semiautonomous women's institutions, usually located immediately adjacent or within a few miles of the men's prison, and then autonomous institutions.[32] The early separate women's institutions were created mainly by male reformers and administrators not because of a concern for women but because of supposed management problems. Male prison officials generally viewed women as a source of trouble and annoyance and did not want them in their institutions. In particular, women were seen as a source of sexual trouble. The proximity of women to men was thought to drive men to the "unhealthy" practices of masturbation and could lead to scandals when they became pregnant or staff were discovered to be facilitating prostitution.[33]

This increased separation of female-classified prisoners from male-classified prisoners was also driven by a women's prison reform movement that began in the 1930s with small groups of women in New York, Massachusetts, and Indiana and, by the 1860s, had gained enough momentum and clout to effect change in the Northeast and Midwest. Women prison reformers challenged the construction of (certain) female criminals as irredeemable and argued that the traditional prison structure was unsuitable for women, who required a gentler environment and training in femininity and domesticity. The movement advocated for the creation of entirely independent women's institutions whose architecture and treatment programs suited what they saw as women's unique nature and

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[32] In most cases, especially in the non-autonomous units, conditions for female-classified prisoners changed little as women continued to be largely neglected and the units were generally severely overcrowded and featured terrible unsanitary conditions. By the end of the nineteenth century, nearly every state operated a unit for women of some kind. Freedman, *Their Sisters' Keepers*; Rafter, *Partial Justice*; Lewis, *From Newgate to Dannemora;* Watterson, *Women in Prison*.

[33] Lewis, *From Newgate to Dannemora*; Haynes, *The American Prison System*; Butler, *Gendered Justice in the American West*; Rafter, *Partial Justice*.

needs and which featured complete segregation from men, even male staff, who were seen as not only not able to attend to women's needs but also as contaminating or "exciting" influences.[34]

The women's prison reform movement was one piece of a larger women's movement, which also advocated for suffrage and temperance and against sexual immorality and delinquency, that emerged after the Civil War. While women's activism was complex, diverse, and exceeded any singular "movement" during this time, the women's movement—often referred to as the first wave—was primarily organized by middle-class white women and shared the normative investment in white sexual difference but used the understanding of women's uniqueness to shape their conceptualizations of social change.[35] They envisioned a shifting of sex roles that

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[34] For example, at a hearing on separate prison for women in the early 1870s before the Prison Committee of Massachusetts state legislature, one women argued that women "needed to be governed by kindness. It was necessary to make them feel that their rulers were their friends, in order to get the best result." "A Separate Prison for Women," *The Women's Journal* 5, no. 9 (February 28, 1874). In 1827, Elizabeth Fry, a leading British women's prison reformer, argued that one matron will be able to maintain greater order than several male guards in part because "her influence is less exciting." Elizabeth Fry, *Observations in Visiting, Superintendence, and Government of Female Prisoners* (London: John and Arthur Arch, 1827), 27.

[35] For example, in her 1827 essay on women prisoners, Fry explained the aim of her reform work for her "own sex":

> Far be it from me to attempt to persuade women to forsake their right province. My only desire is, that they should *fill that province well*; and, although their calling, in many respects, materially differs from that of the other sex, and may not perhaps be so exalted an one – yet a minute observation will prove that, if adequately filled, it has nearly, if not quite, an equal influence on society at large.

Fry, *Observations*, 2.

Nineteenth and early twentieth century feminist activism was, of course, more complex than I am describing here. The women's movement that I describe was the most visible. Even within it there were disagreements and complexity, both around the essential nature of women and men as well as around race. Not all feminists believed in sexual difference nor were all involved in this woman's movement. Many white feminists were centrally involved in the abolitionist movement—although the belief in abolition and white supremacy was not mutually exclusive. Black women were even more important to abolition and black feminists were also highly active throughout the nineteenth century, although often separately from the central woman's movement. Angela Y. Davis, *Women, Race, and Class* (New York: Vintage Books, 1981); Paula Giddings, *When and Where I enter: The Impact of Black Women on Race and Sex in America* (New York: Bantam Books, 1984); Rosalind Rosenberg, *Beyond Separate Spheres: Intellectual Roots of Modern Feminism* (New Haven, CT: Yale University Press, 1982).

allowed women to enter and remain in the public sphere, primarily by arguing that (white) women's supposed innate moral superiority made them uniquely qualified to do public work to aid the poor, especially poor women. Sexual difference and sex segregation were central to the women's movement, and the movement created separate women's public spheres—women's colleges, settlement houses, women's clubs, and eventually women's prisons—where white middle-class women taught "true womanhood" by promoting (white) domesticity and piety to poor and deviant white women. Importantly, white women reformers linked their supposedly innate morality not only to their sex but also to white racial superiority, which both made them racially similar to white men and authorized their reform work. Conforming to and perpetuating the dominant racial narratives of the time, which imagined sexual difference as a sign of civilization and racial superiority, many reformers viewed sexual difference and white supremacy as central to both the reforms they sought and their justifications for the public work.[36]

Women's prison reformers shared these understandings of white womanhood and sexual difference and endeavored to inscribe them in the penal architecture and management of (certain) female-classified prisoners. For these reformers, rehabilitation for women required both separating women into their own institutions run entirely by female staff and teaching conformity to white, middle-class domesticity, the ideals of "true womanhood."[37] As the Women's Prison Association explained in their 1864 annual

[36] Newman, *White Women's Rights*; Freedman, *Their Sisters' Keepers*; Rosenberg, *Beyond Separate Spheres*.
[37] Freedman, *Their Sisters' Keepers*; Butler, *Gendered Justice in the American West*; Fry, *Observations*; "A Separate Prison for Women."

report, "We would take [the fallen woman] by the hand, lift her from her degradation, whisper hope to her amid her despair, teach her lessons of self-control, instill into her ideas of purity and industry, and send her forth to work her own way upward to her final destiny."[38] In order to fulfill their goals, women prison reformers created a new kind of penal institution: the woman's reformatory.

The first women's reformatory was built in Indiana in 1871 and over the next three decades four more were built in Massachusetts and New York.[39] Throughout these decades, women reformers and penologists developed the unique architecture and correction treatment of the women's reformatory. By the twentieth century, women's reformatories generally featured a cottage system on a large rural campus without walls where women lived in private rooms and shared a kitchen and living room, which was made homelike with rugs, pictures, plants, and sometimes a piano. As Nicole Hahn Rafter has argued, the cottage system was "an architectural embodiment of the notion that criminal women could be reformed through domestic training."[40] Women's reformatories developed a program of rehabilitation that promoted white, middle-class femininity as "the ideal of female behavior" by fostering sexual morality, sobriety, obedience, and conformity to the roles of mother and homemaker. Reformatories primarily taught domestic skills, feminine labor, and featured few industries, usually only sewing, laundry,

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[38] Freedman, *Their Sisters' Keepers*, quoted on 32.
[39] For a discussion of women's reformatories see, Rafter, *Partial Justice*; Freedman, *Their Sisters' Keepers*; Lekkerkerker, *Reformatories for Women*; Rose Giallombardo, *Society of Women: A Study of a Women's Prison* (New York: John Wiley and Sons, Inc., 1966); Elizabeth Gurley Flynn, *The Alderson Story: My Life as a Political Prisoner* (New York: International Publishers, 1963); Watterson, *Women in Prison*; "The Sexual Segregation of American Prisons"; Murtagh and Harris, *Cast the First Stone*; Haynes, *The American Prison System*; Barbara H. Zaitzow, "'Doing Gender' in a Women's Prison," in *Women in Prison: Gender and Social Control*, ed. Barbara H. Zaitzow and Jim Thomas (Boulder, CA: Lynne Rienner Publishers, 2003).
[40] Rafter, *Partial Justice*, 33.

or farm work.[41] Constructing reformatories as "homes" was of vital importance to this mission. In their 1851 report, the Female Department of the Prison Association of New York envisioned such a women's institution:

> A home, in the widest sense of the word, is the very heart of the undertaking on behalf of female convicts. Household influences, including those of industry, order, self-restraint, temperance, kindness and religion, are the anchors of our hope. These require space, utensils, suitable furniture, opportunities for classification and separation.[42]

Reformers and administrators often described women's reformatories not as places of punishment and forced confinement but as "a happy mingling of kindness and firmness," "pleasant," or like boarding schools.[43]

Women's reformatories were designed for young, native-born white women who were convicted of minor offenses, usually moral offenses related to sexuality. Women's prison reformers saw their mission as correcting potentially normative women who had

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[41] For example, the Iowa Women's Reformatory offered classes in domestic science, canning, millinery, common school subjects, rug making, basket weaving, embroidery, typewriting, and stenography. The institution's chief industries were power sewing, which manufactured clothing for other state institutions, and farm work. Lekkerkerker, *Reformatories for Women*. From its opening in 1928 through at least the mid-twentieth century, the Federal Industrial Institution for Women in Alderson, West Virginia, taught women sewing, dressmaking and millinery, "Laundry Theory," poultry raising, cooking, as well as "more advanced" courses in typing, stenography, filing, business English, appreciation of art and literature, travel, table service, household decoration, and candymaking. The reformatory also had a garment factory where women made clothing for other federal prisoners. According to one of the superintendents of Alderson, learning domestic skills would "equip women to make life happier and so lead away from antisocial acts." Haynes, *The American Prison System*, 90. See also, Mary B. Harris, *I Knew Them in Prison* (New York: The Viking Press, 1936); Watterson, *Women in Prison*. While these institutions aimed to teach women to become homemakers, in reality, because most of the women were working-class or poor, they generally taught them to be domestic servants. Some women were even sent to labor in middle-class homes as domestic servants upon parole. Rafter, *Partial Justice.* In contrast, men's reformatories, which similarly centered education, vocational training, and moral uplift, featured more varied industries and education that supposedly promoted (white) masculinity. Rothman, *The Discovery of the Asylum*; Rafter, *Partial Justice*.

[42] S*ixth Report of the Prison Association of New York* (Albany: Charles Van Benthuysen, 1851), 53-54.

[43] *Sixty-First Annual Report of the Prison Association of New York*, 93; Murtagh and Harris, *Cast the First Stone*, 274. See also, *A Manual of Correctional Standards* (New York: American Correctional Association, 1959), 467-68.

In fact, none of the early statues establishing women's reformatories mentioned punishment, instead emphasizing rehabilitation. For example, the Indiana statute said, "to reform the character (of the inmates), preserve the health, secure fixed habits of industry and morality, to the end that the inmates shall be rendered intelligent, industrious and useful citizens." The Iowa statute said: "for the purpose of preparing the inmates to lead orderly and virtuous lives and to become self-supporting and useful embers of society." Lekkerkerker, *Reformatories for Women*, quoted on 162.

slipped off the path of respectability. To fulfill this mission, they sought to extend imprisonment for a group of women who had never been previously subject to prison sentences, such as vagrants, unwed mothers, prostituted, and wayward women, and argued that these women should stay in prison for as long as it took to rehabilitate them. As states passed legislation establishing women's reformatories, many also passed special indeterminate sentencing laws for women. These indeterminate sentences enabled the state to incarcerate women for pettier offenses than those for which men could be held and greatly extended women's prison terms by making it possible to imprison women for misdemeanors and other minor offenses for years. This legislation established a category of female state prisoners that had no male counterpart, extending the sexually divergent nature of the developing prison system.[44] Black women and immigrant women, even those convicted of minor offenses, were generally considered unsuitable for reformatories because they were less or even incapable (especially black women) of chastity, purity, and moral virtue, of achieving "true womanhood."[45]

Because sex segregation was produced from rehabilitation organized around white sexual difference, its development was less important for criminal punishment systems that did not center white correction. These other criminal punishment systems, which housed populations deemed racially, sexually, gender, bodily or mentally, or otherwise incorrigible, featured the warehousing or forced labor of these deviant populations.

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[44] Legal challenges to this system in the early and mid-twentieth century generally failed, producing legal precedent that sanctioned and normalized sex segregation and sexually different criminal punishment. See State v. Heitman, 105 Kan. 139 (1919).

[45] Newman, *White Women's Rights*; Rafter, *Partial Justice;* Kurshan, "Behind the Walls"; Lekkerkerker, *Reformatories for Women*.

In the Northeast and Midwest, women were not the only cast offs of the penitentiary and (men's) reformatory movements; people of color, Southern and Eastern European immigrants, many poor people, disabled people, older men and women, and recidivists were also subjected to neglect, abuse, and warehousing as they increasingly inhabited a separate system of criminal punishment and imprisonment that developed and matured coterminously with the penitentiary and reformatory movements. This other criminal punishment system was made up of custodial prisons, most of which held both men and women. While the prison reform movements helped facilitate the expansion of these custodial prisons by developing legal codes that centered imprisonment as the primary criminal punishment in these regions, the prison reform movements' rehabilitative work had little impact on them.[46]

While the new prison system in the Northeast and Midwest was primarily organized around white sexual difference and gender and sexual normative correction, in the South and West criminal punishment systems were primarily organized around punitive, forced labor systems that centered black criminality and irredeemability. While the Northeast and Midwest had industrialized economies and nearly all white populations, which helped facilitate criminal punishment reforms that centered rehabilitation (for some), the South and parts of the West featured slavery and/or

[46] The women's reformatory movement, therefore, did not impact the vast majority of the female prisoners who were held in custodial prisons. Most women's custodial units remained within or attached to central state (men's) prisons, although a few separate custodial women's prisons, which largely resembled men's prisons, also opened. In these custodial prisons, women continued to live in horrible conditions, often worse than men's conditions, and like earlier the burdens of sex segregation were borne by female-classified prisoners. For example, Kate Richards O'Hare, who served time in the Missouri state penitentiary during World War I, described how the windows in the women's unit were covered with gray paint, excluding all natural light, "to prevent the women flirting with the men on the other side of the wall." Kate Richards O'Hare, *In Prison* (New York: Alfred A. Knopf, 1923), 64.

agrarian-based economies and had significant populations of color, which produced criminal punishment systems with little-to-no interest in rehabilitation. The nineteenth century was also a time of Western expansion, Indian removal, and wars with Mexico and various American Indian nations that, alongside slavery, helped construct racialized understandings of captivity, violence, and criminality that deeply impacted state criminal punishment systems.[47] This racial and economic context produced criminal punishment systems that featured corporal punishments, brutal (non-correction oriented) forced labor systems, and extra-legal "justice."[48]

As the Northeast and Midwest developed the penitentiary system in the early twentieth century, in the South and much of the West chattel slavery served as the primary criminal punishment institution. Chattel slavery was a form of imprisonment and site of containing a supposedly socially and criminally deviant population. A central aspect of the racist justifications for the enslavement of black people was the belief that black people were inherently prone to criminality and violence. Slavery was viewed as a way to contain a population that could harm white society.[49] In contrast, few white men and almost no white women were subject to criminal punishment for most of the

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[47] Smith, *The Prison and the American Imagination*.

[48] This narrative, of course, erases a lot of complexity in all four region, especially differences between the Midwest and Northeast, and South and West.

[49] Slavery also literally functioned as a criminal punishment system. Most crimes committed by enslaved black people were responded to by "plantation justice"; only the most serious, such as capital crimes or crimes that crossed plantation boundaries, were dealt with by the state. Despite this, in many states, enslaved black people were prosecuted by the state at higher rates than white people. While a small percentage of the population, free black people were prosecuted at much higher rates than enslaved black people. While free black people might be imprisoned, very few enslaved people were jailed because it negatively affected the wealth of the white people who owned them. When convicted by the state, they were, therefore, most commonly whipped. Enslaved black people were also subject to execution. When they were executed by the state, their owners were compensated. In southwest states, such as Texas, Mexican people were disproportionately incarcerated as well. Hindus, *Prison and Plantation*; Perkinson, *Texas Tough*; Oshinsky, *"Worse Than Slavery."*

nineteenth century. Nevertheless, in the early and mid-nineteenth century, most Southern and Western states embarked on state-wide criminal punishment reforms, which usually aimed to create a more humane and moral criminal punishment system for white men through instituting imprisonment as their primary punishment. By the Civil War, the prison became the primary site of punishment for white men.[50] Despite the centrality of white maleness in the motivations for the construction of these prisons, few, if any, were designed for or interested in rehabilitation. Instead, most Southern and Western prisons were sites of secure confinement.[51]

After Emancipation, prisons and state criminal punishment systems became an important site of the containment and, in many respects, reenslavement of black populations. First through black codes then through Jim Crow, most Southern and some Western states created an explicitly racially stratified criminal legal system that continued to be structured around black criminality and irredeemability. These systems led to a swift racial demographic shift in Southern and some Western prisons from nearly all white to predominantly black and to rapidly rising penal populations, driven almost entirely by the imprisonment of formerly enslaved black people.[52] Instead of building more prisons, Southern and some Western states began to lease their prisoners to private

[50] The border states, such as Virginia, Kentucky, Georgia, Maryland, and Tennessee, were the first to build prisons. In the late 1830s and 1840s, most other Southern states did so as well. Florida, South Carolina, and North Carolina were the only Southern states that did not build a prison until after the Civil War. Perkinson, *Texas Tough*; Oshinsky, *"Worse Than Slavery"*; Hindus, *Prison and Plantation*.

[51] In most Western states, early penitentiaries were little more than stockades when they first opened. It took years for prisoners to built permanent, stone prisons. Butler, *Gendered Justice in the American West*; Perkinson, *Texas Tough;* Oshinsky, *"Worse Than Slavery"*; Hindus, *Prison and Plantation.*

[52] For example, many black codes required that black people not only have a job but have written proof of the job. If any black person was found without this proof, they would be deemed vagrant and fined, often around $50. If he could not pay this fine, which was very likely, he would be imprisoned and hired out to any white person willing to pay it for him. In some states, such as Mississippi, preference would be given to formerly enslaved people's former owners. Oshinsky, *"Worse Than Slavery."*

companies and individuals, many of whom were former slave owners, and convict leasing became the dominant form of criminal punishment in the South and parts of the West from the late nineteenth into the twentieth century. While prisons continued to exist during the system of convict leasing, they remained of secondary importance to state criminal punishment systems, housing the majority of white male prisoners, who were usually convicted of serious crimes. Most black people, both men and women, the vast majority of whom were convicted of low-level offenses, were leased.[53] In the early twentieth century, states abolished convict leasing but continued forced convict labor in fields on state-run prison farms and chain gangs.[54]

Like in the Northeast and Midwest, the racial stratification of criminal punishment was usually even more stark among female-classified prisoners than male-classified prisoners. Black women were more likely to be prosecuted, more likely to receive

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[53] Modeled on chattel slavery, convict leasing was a corrupt, cruel, and incredibly violent system that targeted black men and women. Formerly enslaved people found themselves back on former slave-holding plantations, sometimes the plantations where they had been enslaved. As historian David M. Oshinsky points out, convict leasing was often "worse than slavery" because lessees had no incentive to keep prisoners alive; if a leased prisoner was hurt or killed, they could be easily replaced with no additional cost. Hundreds to thousands of prisoners died or were permanently disfigured because of the horrible conditions each year throughout the South, the vast majority of whom were black. Scholars estimate that between 1866 and 1920 over 30,000 people died throughout the South because of convict leasing. Oshinsky, *"Worse Than Slavery"*; Perkinson, *Texas Tough*. However, while convict leasing is associated with the South, as Heather Ann Thompson notes, it originated in the North in the penitentiary system when some prisons leased their prisoners to private manufacturers. Heather Ann Thompson, "Blinded by a 'Barbaric' South: Prison Horrors, Inmate Abuse, and the Ironic History of American Penal Reform," in *the Myth of Southern Exceptionalism*, ed. Matthew D. Lassiter and Joseph Crespino (New York: Oxford University Press, 2010).

[54] The abolition of convict leasing was the result of prison reformers interested in curbing its abuses by providing greater state control. As Jane Zimmerman explained in her history of this reform movement, with the end of leasing, prison administrators "had to find new methods of employment for their convicts," so they generally turned to road building and farm work. Jane Zimmerman, "The Penal Reform Movement in the South During the Progressive Era, 1890-1917," *The Journal of Southern History* 17, no. 4 (Nov 1951).

Once again, prison farms and especially chain gangs were predominantly black. For example, of the 1,521 prisoners the examined in Jesse F. Steiner and Roy M. Brown 1927 study of chain gangs, 1,036 were black, 469 white, and 12 American Indian. Jesse F. Steiner and Roy M. Brown, *The North Carolina Chain Gang: A Study of County Convict Road Work* (Westport, CT: Negro Universities Press, 1970 [1927]).

imprisonment as a sentence, and less likely to get early release or a pardon than white women. Like before Emancipation, white women were rarely imprisoned because the criminal legal system in most, if not all, Southern and Western states tended to protect white women from imprisonment through lack of prosecution, pardons, or short sentences.[55] This racialized gendered dynamic often produced state female prison populations that were almost entirely—and sometimes all—black.[56] In other words, Southern and Western criminal punishment systems shared the dominant investment in white sexual difference, which effectively saved most white women from punishment while enfolding black women into a system of racialized punishment and forced labor. Prisons and the forced labor of leasing, chain gangs, and prison farms were generally considered too horrible—and masculine—for white women because of their (white) womanhood but not for black women. As black women were confined to state prisons and forced to work in fields and on chain gangs with men, state and prison officials confirmed and reconstructed black women as inherently masculine and deviant.[57]

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[55] Some judges never sent a white woman to prison, even those convicted of murder. Even when white women were convicted and imprisoned for murder, they often received shorter sentences than black women convicted of property crimes. Oshinsky, *"Worse Than Slavery"*; Kurshan, "Behind the Walls."

[56] In Arkansas, in 1910, all female prisoners were black. Butler, *Gendered Justice in the American West*. When the women's camp at Parchman Farm in Mississippi opened in 1915, all 26 prisoners were black. Ten years later, the forty-eight female-classified prisoners were still all black. Oshinsky, *"Worse Than Slavery."* In Texas in the early twentieth century, 94% of female prisoners were black. Perkinson, *Texas Tough*. See also, Heffernan, "Gendered Perceptions of Dangerous and Dependent Women"; Kurshan, "Behind the Walls"; Rafter, *Partial Justice*; Butler, *Gendered Justice in the American West*.

[57] Sarah Haley's analysis of the racialized gender dynamics of Georgia's 1908 law establishing chain gangs to replace the convict lease system illustrates this point well. This law allowed judges to exclude women from the chain gang and instead confine them to the women's prison. While the law was race-blind, Haley argues that judges understood the racial specificity of the gendered directive. Between 1908 and 1938, only four white women were sent to labor on chain gangs, compared to nearly 2000 black women. Haley argues that this law and Georgia's prison system codified woman and female as white, reinforced gendered and racialized constructions of labor, and upheld the prominent symbolic rationale for Jim Crow, the protection of women women's bodies. Sarah Haley, "'Like I Was a Man': Chain Gangs, Gender, and the Domestic Carceral Sphere in Jim Crow Georgia," *Signs* 39, no. 1 (Autumn 2013): 53-77.

Convict leasing, prison farms, and chain gangs were a continuation of racialized forced captivity and labor. Under these systems, like their predecessor, chattel slavery, sexual difference meant little when it came to black people. While sex segregation existed in Southern and Western penal systems, it tended to be much less strict, especially for black women and men, than in the Northeast and Midwest. In many Southern and Western states, women, usually black women, joined men, usually black men, on lease and on chain gangs to labor in fields, in mines, and on railroads. Women usually slept in separate rooms or tents but were otherwise not segregated from men and were even chained to them.[58] Sex segregation might be stricter on prison farms because they tended to have more permanent locations and structures, but women, especially black women, continued to labor alongside men at least some of the time.[59]

Within central state prisons, especially in the West, women and men also mingled. Prior to the late nineteenth and early twentieth century, most prison administrators did not develop separate policies, programs, and even units for men and women. For example, in the 1860s, men and women in Arkansas shared cells and common waste buckets. Arizona's territorial prison, originally little more than an adobe building and two stone cells, accepted its first fifteen prisoners in 1876 but did not provide any kind of a female ward until 1897. Before 1915, no Western state had built a

[58] Sometimes instead of doing the same work, women would cook and wash for the men but still stayed in the same camp. Black women were also leased to white families to work as domestic servants. Perkinson, *Texas Tough*; Haley, "'Like I Was a Man.'"

[59] Under these circumstances, women and men experienced similar violence and horrifying labor and living conditions, but gender still impacted their experiences of violence as women were also subjected to sexual coercion, rape, and forced prostitution by penal administrators, overseers, and other prisoners. Rafter, *Partial Justice*; Butler, *Gendered Justice in the American West;* Kurshan, "Behind the Walls"; Perkinson, *Texas Tough*.

separate institution for women, and only one women's prison was built before the 1960s.[60]

Despite regional differences, criminal punishment systems throughout the US constructed sex segregation through shared understandings of black incorrigibility, white supremacy, sexual difference, and racialized gender normativity. Scholars have argued that antiblackness produced criminal punishment systems that eschewed rehabilitation and centered captivity and warehousing of deviant populations; it also produced systems that were much less invested in sexual difference.[61] In other words, criminal punishment systems throughout the US helped produce sexual difference as central to white racialized gender normativity. Racialized gender normativity also produced a certainty about sexual difference and gendered nature that obscured the work of sex-classification, constructing it as not work at all. Yet, some prisoners challenged this administrative certainty as they entered the prison system as one sex and were later "discovered" to be another.

"Man Prisoner Really Woman, Court Finds"

As prison reformers and administrators constructed sex segregation and gendered prison architecture, labor, and programming throughout the nineteenth and into the twentieth centuries, they took for granted that they would be able to easily and

[60] Eventually, sex segregation and some gendered programming was developed in Southern and Western prisons as part of their processes of modernizing their prison systems. For example, in 1905, Idaho made a concerted effort to sex segregate, building a women's prison surrounded by a high, thick wall inside the main prison. As part of this effort to sex segregate, they devised a work program for the women, including a domestic program of cleaning, washing, and cooking for themselves and future plans for women to make shirts for male prisoners. Butler, *Gendered Justice in the American West*.

[61] See, for example, Smith, *The Prison and the American Imagination*; Dylan Rodríguez, *Forced Passages: Imprisoned Radical Intellectuals and the U.S. Prison Regime* (Minneapolis, University of Minnesota Press, 2006); Hindus, *Prison and Plantation*.

unquestionably "know" which prisoners should be housed in men's prisons and which should go to women's prisons or units. This assumption was, of course, consistent with understandings of sexual difference, which constructed women and men as essential, unchanging, self-evident, and mutually exclusive categories. However, as we saw with Vernon Bradshaw, sex classification was not always so simple, and Bradshaw's story of "misclassification" was not unique. In the early and, especially, mid-twentieth century, prison administrators, social scientists, and the press began to occasionally describe other instances of "misclassified" prisoners and administrative sex confusion.

Discussions and treatment of these "misclassified" prisoners were deeply interconnected with changing understandings of gender and sexual deviance in the early twentieth century, as gender and sexual nonconformity began to be regarded as traits of particular "types" of people, homosexuals and later transvestites and transsexuals. For example, in 1921, Perry M. Lichtenstein, a physician in New York City's City Prison and House of Detention, published an article describing the "fairies," "fags," and "lady lovers"—or gender nonconforming homosexuals—that he encountered in New York City penal institutions, two of whom were initially housed in the women's prison and later "discovered" to be "men." In his recounting of one of these prisoners' stories, Lichtenstein explained that after being arrested for solicitation as a woman and brought to the women's prison, the prisoner was strip searched by a matron, who "found that we were dealing with a male."[62] Lichtenstein described this person as feminine in mannerism and body—including having "small…genitals" covered with "very little hair"—

[62] Lichtenstein, "The 'Fairy' and the Lady Lover," 371.

recounting that, when questioned, s/he stated that s/he "was effeminately inclined."[63] In the face of this sex trouble, prison administrators isolated hir, presumably after transferring hir to a men's prison. Before s/he was released, they cut off hir hair and dressed hir in men's clothing. Throughout his discussion of this prisoner, Lichtenstein—in agreement with prison administrators—asserts that this person was really male, implying that hir femininity was a deception that hid hir true sex (male), which was eventually "discovered" by prison staff. This narrative and analysis—deception and discovery of true sex through bodily examination—would become common in later descriptions of such "misclassified" prisoners. Yet, as I will argue, despite Lichtenstein's and prison administrators' attempt to restabilize sexual difference in the face of administrative sex confusion, this story of "misclassification" destabilizes and contests the naturalness and commonsensical nature of sex segregation.

Lichtenstein's article was on the vanguard of a flood of penological, social scientific, and popular writing on sex in prison and prison sexual culture.[64] As Kunzel has documented, sex between prisoners had long been a concern for prison reformers and administrators, and throughout the nineteenth century prisons were viewed as sites of rampant perversion. By the early twentieth century, influenced by the emergence of homosexual communities and identities in major cities such as New York and sexological

[63] Ibid, 371. Here and for the rest of the chapter, I will use the gender-neutral pronouns "s/he" (instead of he/she) and "hir" (instead of her/his) when referring to gender nonconforming people whose gender identity or pronoun preference was unclear or perhaps fluid.

[64] As a physician in New York City's City Prison and House of Detention, Lichtenstein was well situated to observe this new "type" of person—indeed, he claimed to have, in his "official capacity," "come in contact with several hundred of such individuals." Lichtenstein, "The 'Fairy' and the Lady Lover," 369. As historian George Chauncey has shown, New York City was home to early, often visible homosexual communities, and this visibility spawned policing, criminalization, and sometimes imprisonment. George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World 189-1940* (New York: BasicBooks, 1994).

research that named homosexuals as a specific "type" of person, prison administrators and researchers began to view prisons as, to borrow Kunzel's words, a "home to perverts," as containing a distinct, and deviant, sexual culture.[65] In turn, the focus on (homo)sexuality in prisons deeply influenced the continued development of homosexuality as a sexual identity. Kunzel argues that prison administrators' preoccupation with (homo)sex—including changing understandings of sexual identity and type—shaped the space of the prison.

Early understandings of homosexuality inextricably tied together same-sex desire and gender nonconformity, and writings on prison homosexuality reflected this understanding. For example, Lichtenstein described the fairies and fags—the homosexuals—who he encountered as "freak[s] of nature who in every way attempt[] to imitate woman."[66] To Lichtenstein, their femininity or gender nonconformity marked them as homosexual just as much as their sexual desire for other men. Lichtenstein's description was consistent—and probably deeply influenced by—contemporary sexology. In the mid-nineteenth century and into the beginning of the twentieth, sexologists who studied same-sex desire and sexuality labeled it "inversion," referring to inversion of gender. To many sexologists, the primary aspect of inversion was an identification with or embodiment of the opposite sex or gender from their birth-assigned sex, which could be psychological, social, or physical. Some even considered inverts a kind of "third sex." Same-sex desire was one aspect of a much larger constellation of gender inversion: desire for men was considered fundamentally a woman's desire and

[65] Kunzel, *Criminal Intimacy*, 12.
[66] Lichtenstein, "The 'Fairy' and the Lady Lover," 369.

desire for women was a man's desire. In this conceptualization, a "true" male homosexual was a feminine man who preferred the passive or "female" position in sex and a "true" lesbian was a masculine woman who preferred the active or "male" role. In contrast, the men who engaged in sex with other homosexual men and played the "male" role were not considered homosexual nor were the women who had sex with lesbians and played the "female" role.[67] In the early and mid-twentieth century, same-sex desire and gender nonconformity began to be disaggregated as sexologists constructed new categories for people who exhibited gender nonconformity or cross-gender identity but not same-sex desire: transvestites and, by the late 1940s and 1950s, transsexuals.[68] However, gender nonconformity and homosexuality remained deeply interconnected throughout the twentieth century and into the present, especially within penal institutions.

While homosexuals or inverts only became a "species," to use Foucault's famous phrase, in the late nineteenth and early twentieth century, people had been living as the sex opposite their birth assignment in the West for centuries.[69] Historical accounts of

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[67] See for example, Havelock Ellis and John Addington Symonds, *Sexual Inversion* (New York: Arno Press, 1975 [1897]); Richard von Krafft-Ebing, *Psychopathia Sexualis* (New York: Bell Publishing Company, 1965 [1894]); Magnus Hirschfeld, *The Homosexuality of Men and Women* (New York: Prometheus Books, 2000 [1922]). See also Jennifer Terry, *An American Obsession: Science, Medicine, and Homosexuality in Modern Society* (Chicago: The University of Chicago Press, 1999); Siobhan Somerville, *Queering the Color Line: Race and the Invention of Homosexuality in American Culture* (Durham, NC: Duke University Press, 2000); Kunzel, *Criminal Intimacy*; Chauncey, *Gay New York*.

[68] Magnus Hirschfeld, *Transvestites* (New York: Prometheus Books, 1991); David O. Cauldwell, "Psychopathia Transexualis," *Sexology* 16 (1949); Harry Benjamin, *The Transsexual Phenomenon* (New York: The Julian Press, Inc., 1966).The emergence of these new identity categories was, of course, deeply influenced by the people who would eventually be included in them. See Susan Stryker, *Transgender History* (Berkeley, CA: Seal Press, 2008); Robert Hill, "'We Share a Sacred Secret': Gender, Domesticity, and Containment in *Transvestia's* Histories and Letters form Crossdressers and Their Wives," *Journal of Social History* 44, no. 3 (Spring 2011).

[69] Michel Foucault, *The History of Sexuality: An Introduction* (New York: Vintage Books, 1978), 43. For a discussion of people who lived as the opposite sex of their birth assignment in the past, see for example, Jonathan Katz, *Gay American History: Lesbians and Gay Men in the USA* (New York: Thomas Y. Crowell Company, 1976); Theresa Braunschneider, "Acting the Lover: Gender and Desire in Narratives of Passing Women," *The Eighteenth Century* 45, no. 3 (Fall 2004); Lillian Faderman, *Odd Girls and Twilight Lovers:*

these people—which primarily focused on female-assigned people living as male, who have been referred to by historians as "passing women"—sometimes describe people, like Bradshaw, living for decades without being "discovered." Others only changed sex for short periods, and some changed sex a number of times throughout their lives. Some did it for economic opportunities (most likely those who lived as men), some for love or sex, and some because they seemed to identify as the sex opposite their birth assignment. Some of these people ended up in prison.[70] However, prior to the late nineteenth century, little state infrastructure existed to identify and target these people for regulation, criminalization, and imprisonment, in large part because gender nonconformity was not understood as indicating an identity or particular type of person. Instead, it was often seen as a sign of illness or degeneracy. Therefore, cross-gender-identified people who entered prison throughout most of the nineteenth century would have been interpreted and dealt with differently than they were in the twentieth century. For example, in his history of the penitentiary system in New York, historian W. David Lewis briefly discusses a prisoner who dressed in "feminine apparel" prior to hir imprisonment in Sing Sing in the early or mid-nineteenth century.[71] Lewis describes this person as "insane," and he explains that prison administrators labeled hir an "idiot," continually tortured hir, and confined hir to a

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A History of Lesbian Life in Twentieth-Century America (New York: Columbia University Press, 1991); Jason Cromwell, *Transmen and FTMs: Identities, Bodies, Genders, and Sexualities* (Urbana, IL: University of Illinois Press); Nan Alamilla Boyd, "Bodies in Motion: Lesbian and Transsexual Histories," in *The Transgender Studies Reader*, ed. Susan Stryker and Stephen Whittle (New York: Routledge, 2006). Identifying these people has often been a recuperative project of finding same-sex desire and cross-gender identity in the past for gay and lesbian and trans scholars, and this work has one source of tensions between gay and lesbian studies and trans studies.

[70] In fact, one of Jonathan Katz's examples of "passing women" was a person named Frank Blunt or Anna Morris, who was tried and sentenced to a penitentiary in Wisconsin in 1894 and later "discovered" to be a woman. Katz, *Gay American History.*

[71] Lewis, *From Newgate to Dannemora*, 151.

cell, where s/he later died. In his discussion of this prisoner, Lewis never describes hir as a homosexual or a particular sexual type—in fact, he showed little interest in hir gender nonconformity, identifying it as part if hir insanity—which most likely reflects how prison administrators discussed hir. In other words, while this prisoner's gender nonconformity was met with violence and pathologization by prison administrators, responses that continue into the present, they did not view hir as a particular gendered or sexual type of person—such as a homosexual—but as insane or mentally "defective." It is likely that other prison administrators treated gender nonconformity similarly during the nineteenth century.

The increased visibility of gender nonconformity and same-sex desire—which drove the growth in research on and changing attitudes toward them—was deeply interconnected with social and economic phenomena that also drove prison reform, including industrialization, urbanization, and changing familial structures and gender norms. While opening new opportunities for new gender and sexual formations, these changing economic and social conditions in the US also helped build state bureaucracies and produced new methods for targeting and regulating deviance—from immigration regulations to a welfare bureaucracy to criminal legal systems, including prisons. Greater visibility of homosexual and gender nonconforming people marked them as a somewhat new target for state regulation, and policing was central to this in the early and mid-twentieth century.[72] For example, in the mid-nineteenth century, many cities began to pass anti-cross-dressing ordinances that would be used for well over the next century to

[72] Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth Century America* (Princeton, NJ: Princeton University Press, 2009); Chauncey, *Gay New York*; Terry, *An American Obsession*.

police—and in some cases imprison—gender nonconforming people, especially those assigned male at birth.[73] The increased policing outside of prisons was interconnected with the growing anxiety about "perverts" inside of prisons. These stories of misclassification, therefore, emerged in a context of heightened anxiety and attention to gender and sexual nonnormativity, which likely prompted the press to publish accounts of them. These media accounts, in turn, amplified the visibility of gender and sexual nonnormativity.

As historian Joanne Meyerowitz has documented, in the 1930s, stories of "sex change" or sex confusion began to appear in US newspapers and magazine, generally in marginal publications such as tabloids, sensationalist magazines, or popular scientific publications. Meyerowitz argues that early articles usually described sexual metamorphosis, rare biological problems, and surgical change and often presented cross-gender behavior, intersexuality, homosexuality, and transvestism as interrelated problems or pathologies in need of medical cure. Appearing during a time when surgical "sex changes" began to be performed in Western Europe but not yet the US, many of these stories portrayed "sex change surgery as unveiling a true but hidden physiological sex," which "tied the change to a biological mooring that justified surgical intervention."[74]

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[73] Stryker, *Transgender History*.

[74] Joanne Meyerowitz, "Sex Change and the Popular Press: Historical Notes on Transsexuality in the United States, 1930-1955," *GLQ* 4, no. 2 (1998), 164. While surgical and hormonal sex reassignment had been going on in Europe for a decade or two, these stories were the US public's first introduction to what would become transsexuality in the next decades. In the late 1940s and 1950s, transsexuality emerged in the West as a medical conditions with particular medical, hormonal, and surgical interventions, after doctors David Cauldwell and Harry Benjamin coined, publicized, and advocated for the term. See Cauldwell, "Psychopathia Transexualis"; Benjamin, *The Transsexual Phenomenon*. Doctors in the US, however, did not begin to publicly perform surgical sex changes until the 1960s.

As Meyerowitz documents, the media played a vital role in publicizing the possibility of medical "sex changes" and the existence of cross-gender identified people and later transsexuals and changing US

A related, but slightly different, kind of news story describing gender nonconforming or cross-gender identified people's interactions with the criminal legal system emerged during the same period. In contrast to the stories that Meyerowitz focused on, stories involving the criminal legal system identified the truth of these people's sex in their birth assignments or their genital configuration, a "truth" waiting to be discovered by criminal legal actors—police, judges, and prison administrators or medical staff. These "discoveries" were usually at or immediately before arrest and resulted in charges related to their gender (or sexual) nonconformity—such as cross-dressing—and in confinement for at least some time in a men's or women's section of a jail, in accordance with their police-designated sex.[75] For many male-assigned people who lived or presented as female part or all of their lives, encounters with police became a primary site of "discovery."

A small but significant subset of these stories were of people, like Bradshaw and the prisoners that Lichtenstein discusses, who were not "discovered" until after they were imprisoned. These articles about "misclassification" seem to have been primarily

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medical opinion. No story was more important to this work than Christine Jorgensen, whose sex change (performed in Denmark) was first publicized in December 1952, a little over a year before newspapers covered Bradshaw's story. The coverage of Jorgensen—a white, blond transsexual woman with a normative Cold War beauty, who was often called a "blond bombshell"—far exceeded the previous reporting on sex changes, and her story introduced cross-gender identity and transsexuality to a much wider US audience. Meyerowitz, "Sex Change and the Popular Press"; Meyerowitz, *How Sex Changed*.

[75] See for example, "Police Unmask Blond as Man," *Oakland Tribune*, December 2, 1943, Box 5, Series IIIA, Folder 3, Louise Lawrence Collection; "(S)He's Troubled: 'Blond' Faces Holdup Quiz," *Oakland Post Enquirer*, December 2, 1943, Ibid.; "Female Impersonator Trial Set for March 11," n.d., Ibid.; "She Battles Arrest as He," *San Francisco Examiner*, August 3, 1956, Box 5, Series IV, Folder 2, Louise Lawrence Collection; "Man In Woman's Attire (and Wig) Given Probation," *San Mateo Times*, April 1951, Ibid.; "Falsie Step Lands Colonel in Court," n.d.; "California's War on Transvestites," n.d., Box 6, Series IV, Folder 8, Louise Lawrence Collection; Bob Robertson, "Jurors' 'Diana' Verdict," *San Francisco Chronicle*, March 11, 1966, Box 6, Series IV, Folder 16, Louise Lawrence Collection; Bob Robertson, "New Arrest of Sex Changeling," *San Francisco Chronicle*, March 8, 1966, Ibid.; "Cops Catch Queer Cavorting Dressed in Women's Clothes" *Midnight*, June 11, 1962, Box 6, Series IV, Folder 17, Louise Lawrence Collection.

published in small local newspapers, and while they often featured sensationalist titles—such as "L.A. Police Arrest Pretty Girl on Street, Find 'She's' Boy, 18," "'Josephine' Is Man, Prison Check Discloses," "Chase Woman Bandit, Catch Her, Jail Him," and "Oakland Jail Has Trouble Over Sex"—the articles tended to be short and not overly sensationalistic.[76] Nevertheless, their authors seemed to aim to titillate readers with stories of men who looked like women being confined in women's prisons or women who passed as men in men's prisons, and they described sex confusion and anxiety.

For example, in 1950, the same short article, featuring different headlines, appeared in small local newspapers from Reading, Pennsylvania, to St. Petersburg, Florida, to Ardmore, Oklahoma, to Kalispell, Montana, describing the "misclassification" of Josephine Montgomery, a prisoner in California.[77] Montgomery was incarcerated in

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[76] See for example, "L.A. Police Arrest Pretty Girl on Street, Find 'She's' Boy, 18," *San Francisco Examiner*, October 8, 1942, Box 3, Series IIIA, Folder 3, Louise Lawrence Collection; "'Josephine' Is Man, Prison Check Discloses," *Reading Eagle*, August 10, 1950; "Chase Woman Bandit, Catch Her, Jail Him," n.d., Box 6, Series IV, Folder 8, Louise Lawrence Collection; "Oakland Jail Has Trouble Over Sex," *San Fransisco News-Call Bulletin*, September 17, 1959, Box 6, Series IV, Folder 7, Louise Lawrence Collection; "'Girl' Prisoner Found to Be Man" *Los Angeles Times*, October 8, 1942, Box 3, Series IIIA, Folder 3, Louise Lawrence Collection; "'Girl' Keeps Secret Even While in Jail," n.d., Box 6, Series IV, Folder 9, Louise Lawrence Collection; "Just a Wolf in Girl's Attire," n.d., Ibid.; "This Hooker is a 'He,'" November 15, 1964; "Posed as Woman for Ten Years," n.d., Ibid.; "Discovers Barroom Blonde Ain't No Lady," *Mirror*, January 20, 1947, Ibid.; "Court Frees Prostitute…Because She's a He," *Inside News*, April 7, 1968, Box 6, Series IV, Folder 8, Louise Lawrence Collection; "Cops Nab Gun Moll—Find Out She's a Gunman," *Inside News*, August 2, 1964, Box 6, Series IV, Folder 11, Louise Lawrence Collection; Charlene Rivers, "'I Spent 30 Days in a Women's Prison,'" *Inside News*, November 21, 1965, Box 6, Series IV, Folder 17, Louise Lawrence Collection.

[77] "'Girl' Keeps Secret Even While in Jail"; "'Josephine' Is Man, Prison Check Discloses," *Reading Eagle* (Reading, PA), August 10, 1950, 9; "'Josephine' Sent to Men's Prison" *The Evening Independent* (St. Petersburg, FL), August 15, 1950; "Miscellany," *Time Magazine*, September 4, 1950; "'She' Was No Lady, Prison Heads Find," *The Daily Inter Lake* (Kalispell, MT), August 10, 1950; "Some Fun, Eh, Josie?" *The Paris News* (Paris, TX), August 11, 1950; "Discover Woman Prisoner was Man," *Biloxi Daily Herald* (Biloxi, MS), August 10, 1950; Unknown title, *Tucson Daily Citizen* (Tucson, AZ), August 10, 1950; "Woman Convict Turns Out Man," *Ardmore Daily Ardmoreite* (Ardmore, OK), August 10, 1950; "Jailbird Josephine is Moved to Men's Cell," *Big Spring Daily Herald* (Big Spring, TX), August 10, 1950, 5.

This list undoubtedly does not include all the articles published about Montgomery. I initially found her story in a scrap book of news articles featuring trans and cross-gender identified people created by Louise Lawrence, a transvestite activist who maintained an extensive correspondence with other transvestites around the US as well as researchers and doctors like Alfred Kinsey and Harry Benjamin in

the women's wing of Imperial County Jail for two months and at the California Prison for Women at Tehachapi for at least one night until "a routine physical examination disclosed that 'Josephine'…was a man." Following this discovery, California prison administrators "rushed [Montgomery] to a men's cell at San Quentin prison." The article portrays this transfer to San Quentin as a quick, simple, and commonsensical "fix" to the (strange) problem of Montgomery's "misclassification." However, the use of "rushed" indicates that the discovery of Montgomery's supposed maleness caused administrative disorder and anxiety. While this anxiety would have been at least in part because of the concern about housing a "man" among "women" (and related concerns about consensual sex and sexual violence), her "misclassification" also reveals an administrative error in one of the most automatic and unquestioned functions of the management of prisoners. The article explains this error by describing Montgomery as "disguised as a woman when arrested" and maintaining a "feminine identity" through conviction. Montgomery is produced as deceptive and untrustworthy, as actively thwarting prison administrator's attempts to manage her and their institutions, as a threat to institutional security.

"Disguise" and "masquerade" were frequent descriptors in similar stories. For example, numerous articles described Bradshaw as "masquerading as a man" or "unmasked as a woman."[78] The use of such language implies deception of a (hidden)

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the mid-twentieth century, that is held in the Kinsey Institute's special collections. I found other articles through searching digitalized newspaper databases.

[78] For the language of "masquerade," see "Prisoner Sentenced, Revealed to Be Woman"; "Masqueraded as a Man From Her Early Childhood," *Daily Journal* (Fergus Falls, MN), February 11, 1954; "'Vernon' Becomes 'Violet'"; "Woman Revealed as Man Masquerade is Disclosed in Columbus Court Case," *The Marion Star* (Marion, OH), February 11, 1950. For the language of "unmasked," see "Woman, Who Dressed as Male, Receives Sentence"; "Woman Revealed as Man Masquerade is Disclosed in Columbus Court Case"; "Prisoner Sentenced, Revealed to Be Woman," *Brainerd Daily Dispatch* (Brainerd, MN), February 11, 1954. See also, "This Hooker is a 'He'"; "Posed as Woman for Ten Years."

truth, in this case "true" sex. This supposed "truth" of sex worked to restabilize immutable binary sex, waiting to be discovered through inspection (of the person's body/genitals). This language also produces these prisoners' gender expressions—and perhaps identities—as illegitimate, fake, and treacherous and (re)produces these prisoners as criminal and potentially dangerous.

Like in the case of Montgomery, the discussion of the "discoveries" of misclassification portrayed the problem as fixed by transferring the prisoner to the "correct" penal institution. The moment of "discovery" in these stories implies a moment of learning the truth about who a prisoner is naturally, essentially, and unalterably. While "disguise" produces prisoners' self-determination as illegitimate and treacherous, this "discovery" of truth invests the power of identification in prison officials and doctors, who decide a prisoner's "real" sex, no matter how the prisoner identifies. Because these discoveries involved physical examination—usually during a medical exam or strip search—true sex is resecured to genital configuration. In other words, the truth of sex for prison administrators was found in the visual economy of the body, particularly the genitals.

As Robyn Wiegman has argued, vision and observation are central to modern investigation and constructions of race and sex. Economies of visibility "produce the network of meanings attached to bodies."[79] The visible defines the essentialized truths of sex and race and renders those truths "real." The visual economy of bodies was particularly important to nineteenth century constructions of sexual difference and race,

[79] Robyn Wiegman, *American Anatomies: Theorizing Race and Gender* (Durham, NC: Duke University Press, 1995), 4.

via comparative anatomy, scientific racism, and sexology. Not only did these racial/sexual sciences produced methods of visibly and scientifically measuring bodies to better "know" human nature and racial and sexual difference, but they also invested new authority in doctors and scientists to know the "truth" about people, especially those considered racially and sexually inferior.[80] This was previewed in Lichtenstein's discussion of the misclassified prisoner when he described hir as having small genitals with little pubic hair. Not only does this indicate that Lichtenstein performed a bodily, genital investigation to discover hir true sex, but secures hir gender nonconformity as produced from hir nonnormative body. This link of nonnormative body and nonnormative sexuality or gender expression was a common theme in sexology and scientific racism of the time, as sexual and gender deviance were linked to bodily and mental underdevelopment.

These racial and sexual sciences also helped to shape and substantiate the racialized gender normative logics of prison reformers and the prison system, and therefore helped shape penal sex segregation and sex classification. During the nineteenth and early twentieth centuries, as they produced and reformed penal management, rehabilitation, and warehousing techniques, prison administrators drew liberally from (and contributed to) these racial/sexual sciences as they developed measuring methods to better "know" criminals, for example measuring prisoners' bodies often in minute detail and giving them intelligence and other tests. But administrators also drew on these racial/sexual sciences (often unconsciously) to determine the sex of all prisoners. By

[80] Terry, *An American Obsession*; Somerville, *Queering the Color Line*; Rosenberg, *Beyond Separate Spheres*.

seeing prisoners' bodies and determining their sex, prison administrators reproduced sex as visibly self-evident and natural, and, as they classified prisoners, they physically separated them into a binary sex system, producing a visible economy.

The construction of these prisoners as "masquerading" and the investment in the authority of penal "discoveries" of their true sex also connected the experience of these prisoners to those policed and criminalized because of gender nonconformity and, especially, cross-dressing outside of penal institutions. Cross-dressing laws often utilized anti-masquerading statutes, designed to keep people from hiding their "true" identities for the purpose of illegal activity. While the people who I am discussing here were not originally arrested for cross-dressing or any other explicitly gender- or sexuality-related offense, the language of "masquerading" connects them to this other "crime," resecuring their gender expression to criminality and dangerous deception.

This construction of misclassified prisoners as "masquerading" allowed reporters, as well as prison administrators, to not engage with the implications about the nature of sex posed by these misclassifications and prisoners. If sex is so obvious and immutable, how could prison administrators misclassify prisoners in the first place? What of gender identity and expression? Many of these people continued to be gender nonconforming and even cross-gender identified in the supposedly correctly sexed institutions, a "problem" that these articles never discussed. Instead, framing these prisoners as deceptive but fixed with a transfer to the "correctly" sexed facility reinvisibilized the work and contradictions of sex classification and sex segregation.

Despite the certainty of prison officials in their sex reclassifications, these stories reveal moments of crisis for a penal system based on an immutable sex binary, which posed challenges to prison organization and management. In some cases, people would spend days and even weeks or months in one sexed facility until they were "discovered" and moved to another.[81] These lengthy stays prior to "discovery" allow us to imagine that there were probably some prisoners who were never "discovered." Reclassifications often placed female-identified or female-presenting people in men's prisons and male-identified or male-presenting prisoners in women's prisons. Within these institutions, these prisoners would likely not have been the only gender nonconforming or even cross-gender identified prisoners. As Kunzel has documented, by the late nineteenth and early twentieth century, many penal institutions featured complex sexual and gendered cultures, in which gender nonconforming prisoners played a prominent role.[82] The deep

[81] Baldi, *My Unwelcome Guests*; Rivers, "'I Spent 30 Days in a Women's Prison'"; "'Girl' Keeps Secret Even While in Jail"; "Oakland Jail Has Trouble Over Sex."

[82] Kunzel, *Criminal Intimacy*. See also, Chauncey, *Gay New York*; Estelle B. Freedman, "The Prison Lesbian: Race, Class, and the Construction of the Aggressive Female Homosexual," *Feminist Studies* 22, no. 2 (Summer 1996). For contemporaneous descriptions of these prisoners in men's prisons written by social scientists, prison administrators, and other prisoners, see Lichtenstein, "The 'Fairy' and the Lady Lover"; Samuel Roth, *Stone Walls Do Not: The Chronicle of a Captivity* (New York: William Faro, Inc., 1931); Berg, *Revelations of a Prison Doctor*; Joseph Fulling Fishman, *Sex in Prison: Revealing Sex Conditions in American Prisons* (National Library Press, 1934); Samuel Kahn, *Mentality and Homosexuality* (Boston: Meador Publishing Company, 1937); Lewis M. Terman and Catherine Cox Miles, *Sex and Personality: Studies in Masculinity and Femininity* (New York: Russell & Russell, 1936); Joseph G. Wilson and Michael J. Prescor, *Problems in Prison Psychiatry* (Caldwell, ID: The Caxton Printers, Ltd., 1939); Charles E. Smith, "The Homosexual Federal Offender: A Study of 100 Cases," *Journal of Criminal Law, Criminology and Police Science* 44 (1954); George Sylvester Viereck, *Men into Beasts* (New York: Fawcett Publications, Inc., 1952); Paul Warren, *Next Time Is for Life* (New York: Dell Publishing Company, Inc., 1953); Lawrence Baulch, *Return to the World* (Valley Forge, PA: The Judson Press, 1968); Prisoner X, *Prison Confidential* (Los Angeles: Medco Books, 1969); Christopher Teale, *Behind these Walls* (New York: Frederick Fell, Inc., Publishers, 1957); Jim Johnson, *Crime Around the Clock* (New York: Vantage Press, 1968); Lowell S. Selling, "The Pseudo Family," *American Journal of Sociology* 37 (Sept 1931); George Deveureux and Malcolm C. Moss, "The Social Structures of Prisons and the Organic Tensions," *Journal of Criminal Psychopathology* 4, no. 2 (October 1942); Alexander Berkman, *Prison Memoirs of an Anarchist* (New York: Mother Earth Publishing Association, 1912); Tom Runyon, *In for Life: A Convict's Story* (London: Andre Deutsch Limited, 1953); Gresham M. Sykes, *The Society of*

irony—of which prison administrators were at least somewhat aware—was that sex segregation helped produce and make more visible these gendered sexual subcultures.

The construction of gender nonconforming and cross-gender-identified prisoners as masquerading and misclassified also produced cross-gender-identity as not real or at least incomprehensible within the (racialized gender normative) prison space. Cross-gender-identified prisoners become incoherent, administratively disorderly, actually unclassifiable. Their continued existence in penal institutions was a visible reminder that sex segregation was never complete, always in negotiation. Gender nonconforming and cross-gender-identified prisoners were, therefore, administratively and otherwise dangerous. This queer dangerousness was generally managed through the violent negation of their gender identity and expression—as was previewed by Lichtenstein who described how jail staff not only transferred the person who was originally classified as female to the man's jail but also cut off hir hair and dressed hir in men's clothing—and segregation, as I will discuss in the next chapter.

One interesting, if complicated, exception to the general rule of management through violence was described by Florence Monahan—who headed a number of women's penal institutions in Minnesota, Illinois, and California during the early to mid-twentieth century—as she discussed a "misclassified" prisoner in her 1941 memoir.

Captives: A Study of a Maximum Security Prison (Princeton, NJ: Princeton University Press, 1958). For discussions of women's prisons, see Florence Monahan, *Women in Crime* (New York: Ives Washburn, Inc, 1941); Lichtenstein, "The 'Fairy' and the Lady Lover"; Russ Trainer, *Prison: School for Lesbians* (Van Nuys, CA: Triumph News Company, 1968); Elizabeth Gurley Flynn, *The Alderson Story: My Life as a Political Prisoner* (New York: International Publishers, 1963); David A. Ward and Gene G. Kassebaum, *Women's Prison: Sex and Social Structure* (Chicago: Aldine Publishing Co., 1965); Rose Giallombardo, *Society of Women: A Study of a Women's Prison* (New York: John Wiley and Sons, Inc., 1966); Sara Harris, *Hellhole: The Shocking Story of the Inmates and Life in the New York City House of Detention for Women* (New York: E.P. Dutton & Co., Inc., 1967).

Monahan explained, perhaps somewhat jokingly, that in 1938 "a *young man* was sentenced to the California Institution for Women [at Tehachapi]."[83] Originally arrested and confined in a men's jail, where doctors "discovered" him "to be a woman," this prisoner was reclassified and later sentenced to Tehachapi, where Monahan was superintendent. She described him as "an individual with an entirely masculine background," who "had always lived as a boy or a man."[84] While Monahan literally identified this person as a "man," she did not challenge his classification as female and confinement in a women's prison. Nevertheless, Monahan seemed to understand this prisoner as fundamentally, unalterably masculine, if also essentially female, implicitly drawing on sexological constructions of the invert as a particular type of person. Indeed, Monahan discussed this prisoner in a chapter called "The Sex Problem," which focused on the problem of homosexuality and "perversion" in prisons. Describing a changing of the times from secret discussions of sex between prisoners by prison administrators when she began her career in the late 1910s and 1920s, to open discussions of homosexuality a decade or two later, along with the increased visibility of gender nonconformity—or prisoners "flaunt[ing] their abnormality" by "dress[ing] like a man"—Monahan's ability to see this prisoner's masculinity as innate and at least somewhat benign was likely the result of changing understandings of gender and sexual nonconformity.[85] While Monahan was sympathetic to his masculinity and accommodated his gender expression by giving

[83] Monahan, *Women in Crime*, 231.
[84] Ibid., 231.
[85] For example, Monahan explained, "In the 1920's, when I was at Shakopee, we recognized the problem but did not talk much about it. Then inmates did not flaunt their abnormality as they do today, nor was the subject discussed so sympathetically on the outside…I do not recall one woman at Shakopee who dressed like a man, nor one who arrived without a single feminine article of clothing. Now possessors of homosexuality are brazen about it." Ibid., 224.

him a job in the garden where he could wear overalls for most of the day, she still viewed him as essentially female and, therefore, awkwardly and somewhat problematically but rightly confined in a women's prison and legitimately subject to feminine requirements. Modeled on the women's reformatories in the Northeast and Midwest, Tehachapi featured feminine management and rehabilitation, including requiring prisoners to wear dresses most of the time. Monahan required staff to refer to this prisoner as "she/her" and by his birth name—although most of the other prisoners called him "Bud"—and forced him to wear dresses in the dining room and in the cottage because "after all, she [*sic*] was living in a women's institution and she [*sic*] had to adhere to our rules."[86]

While Monahan did not seek to correct this person's gender identity nor did she seem interested in "correcting" him in any way, she still required him to conform to certain female gender norms while in the presence of other prisoners. This required conformity to gender norms was likely for the benefit of other prisoners' feminine rehabilitation, as the presence of masculinity would cause gender and sexual disorder and work again the racialized gender normative carceral correction of a women's reformatory. Indeed, Monahan described how she "dreaded having such a person come to Tehachapi" because of the seemingly inevitable "free-for alls among the women who doubtless would fight for her [*sic*] favors."[87] Put another way, she was concerned about the (sexual) disorder that gender nonconformity would cause. Monahan describes her concerns as "groundless" as this prisoner had no interest in interacting with other

[86] Ibid., 233. Interestingly, Monahan explains that she "dreaded having such a person come to Tehachapi," indicating that, while rare, this was common enough that it was a well known "problem" for prison administrators. Ibid., 231.
[87] Ibid., 231.

prisoners. Monahan's sympathy toward this prisoner was likely aided—and even contingent on—his disinterest in engaging sexually or in any other way with other prisoners. Despite the accommodations, this prisoner was still subject to gendered regulation and suspicion.

As these stories show, sex segregation was fragile and often incomplete. Not only could prisoners who might later be reclassified as the opposite sex reside in these penal institutions, waiting to be "discovered" by prison administrators or medical staff, but prisoners who prison administrators believed were correctly reclassified could identify as and even look like the opposite sex. In other words, misclassified prisoners, such as Montgomery who maintained a "feminine identity" through conviction and initial imprisonment and probably continued to identify as feminine in San Quentin, destabilized sex segregation both prior to their "discovery" and after they were transferred to the "correct" institution.[88]

By the mid-twentieth century, sex segregation had become the norm in penal institutions throughout the US. While women's and men's institutions continued to feature some differently gendered programming and architecture, as the prison system became less and less interested in correction and more and more focused on warehousing and retribution, many of the earlier differences between sexed institutions disappeared.

[88] Indeed, some of these stories described people who continued to assert their gender identity despite prison or medical decisions otherwise. For example, in 1964, June Pollet was arrested with another woman for prostitution after being entrapped by police. At the precinct, police decided that she was a man, but Pollet "steadfastly insisted" that she was a woman and should go to the Women's House of Detention. Despite her protest, she was sent to the Tombs, even while she was still wearing women's clothing. In addition, while her companion was charged with prostitution, she was charged with masquerading, since, as the article notes, "naturally 'June' couldn't be prosecuted as a prostitute." "This Hooker is a 'He.'"

While sex segregation was initially produced as vital to (white) rehabilitation, it eventually became a way to manage deviant populations. Today, when sex segregation is discussed, it is viewed as vital to reducing violence, especially sexual violence against female-classified prisoners and institutional disorder, as male and female prisoners continue to be viewed as inherently different.[89] Put another way, racialized gender normativity and naturalized sexual difference continues to produce an imperative to sex segregate and obscure the work of sex classification, even as normative constructions of sex and gender have dramatically changed and the investment in rehabilitation has almost entirely disappeared.

Prison administrators have encountered and managed cross-gender-identified or "misclassified" prisoners through the racialized gender normative logics that had structured penal administration since the prison system's modern inception. These "misclassified" prisoners created administrative disorder that prison administrators attempted to invisibilize by claiming that these were simple cases of mistaken identity or that they initially fell for these prisoners' gender deception but corrected through bodily investigation and reclassification. Prisons became a site of state administration that reified the sex binary and secured it to racialized gender normative constructions of correction, rehabilitation, dangerousness, and criminality, producing the prison system as a legitimate site of sex classification and prison administrators as classification authorities. These racialized gender normative logics produced cross-gender identified

[89] My use of "female-classified" is especially important here because prison administrators often argue against housing trans women, who are almost always classified as male, in women's institutions because of supposed fear of sexual violence (perpetrated by the trans woman). Moreover, this concern about sexual violence against woman does not lead to prison administrators understanding trans women as particularly at risk for sexual violence as women.

and gender nonconforming prisoners as dangerous and threatening to the prison, in need of (often violent) containment, as the following chapters will argue, and laid the foundation for the management of gender nonconforming and trans prisoners into the present. While prison administrators did not begin to publically "recognize" that cross-gender identified or trans people existed in their populations until the 1970s and 1980s, these media reports as well as the stories from a few prison administrators that I have discussed, indicate that many—although certainly not all—prison administrators were aware of these "types" of prisoners much earlier. In particular, the work of managing "misclassified" prisoners helped construct bodily investigation as the key to penal administration of sex disorder, creating procedures to classify ambiguously sexed prisoners that endured as transsexual prisoners began to challenge their sex classifications in the 1970s and 1980s and continue into current ubiquitous policies of placing prisoners based on genital status.

Chapter Two

"A Means of Assuring the Safe and Efficient Operation of a Prison": Segregation, Security, and Queer Dangerousness

"I was a 'disruptive influence' because of my physical feminization."
– Trans woman in the Texas prison system, describing the reasoning for her placement in segregation[1]

"The stated purpose of administrative segregation is that people being confined within it are a proven danger to themselves, staff, or other inmates. By using this classification for transgender prisoners, the message is being sent that a person's gender identity itself is threatening to the institution and that person must be locked away in a prison within the prison."
– Christopher Daley, former Executive Director of the Transgender Law Center[2]

During the early 2000s, four trans women separately sued the Sacramento County Jail.[3] All were former or current prisoners at the jail, and all told similar stories of mistreatment and extreme segregation. The jail automatically housed trans women as in the jail's most restrictive housing classification in the men's wing, known as "total separation," or "T-Sep," "to protect [them] from other prisoners and the County from possible liability."[4] Prisoners in T-Sep were severely isolated; they were forbidden from having any physical or verbal contact with or even being in the same room as other prisoners. T-Sep prisoners spent twenty-three to twenty-four hours per day in their cells, and their access to programming, religious services, recreation, exercise, the law library, and even showers and telephones were severely limited, if not denied. They were also required to be shackled and manacled whenever they left their cells, including during

[1] "Transsexuals Harassed," *Coalition for Prisoners' Rights Newsletter* 10, no. 6 (July 1985): 5. Box 2, Bromfield Street Education Foundation Prisoner Newsletters, Northeastern University Libraries.
[2] Christopher Daley, Written testimony submitted to the National Prison Rape Elimination Commission, August 15, 2005, http://www.prearesourcecenter.org/sites/default/files/library/transgenderlawcenterpreatestimony05.pdf.
[3] *Tates v. Blanas* (No. 00-2539, E.D. Cal.); *Medina-Tejada v. Sacramento County* (No. 04-00138, , E.D. Cal.); *Sanders v. Sacramento County* (No. 03-2506, E.D. Cal.); *McAllister v. Sacramento County* (No. 03-2009, E.D. Cal.).
[4] Tates v. Blanas, No. 00-2539, 2002 U.S. Dist. LEXIS 27633 (E.D. Cal. Sept. 4, 2002), at *2.

court appearances. The classification was generally reserved for prisoners with "disciplinary problems," gang members, and trans women. While jail policy required that each prisoner's classification be periodically re-examined, in practice an exception was made for trans women.[5]

Jackie Tates was one of these prisoners. An African American trans woman then in her mid-30s, Tates was a pretrial detainee in the jail from October 2000 to April 2001 and again in 2002. She sued, challenging these conditions and asking for an injunction ordering her transfer to general population. Tates reported not only harsh, restrictive, and isolating conditions but also ridicule, harassment, and abuse from staff and other prisoners because of her trans status, including being called "he/she," "it," and "faggot." She reported that staff served trans prisoners' meals on the floor, commented on their bodies, grabbed their breasts, sexually harassed them, and threatened rape and other violence. Tates was forced to live in a filthy cell and received delayed and inadequate medical treatment. While jail policy stated that T-Sep prisoners were supposed to have at least one hour of dayroom time every day, Tates received far less, often only ten to fifteen minutes between 11:00pm and 4:00am. Tates claimed that staff frequently falsified logbook records, either recording that she had been in the dayroom for an hour when she really received far less time or claiming that she refused dayroom time when she did not. The lack of access to the dayroom not only denied her a vital means to relieve the mental and emotional torture of being locked in a small cell alone, but also severely restricted her access telephones and showers, which were only accessible

[5] Cosmo Garvin, "What's She Doing in the Men's Jail?" *Sacramento News and Review*, February 13, 2002; *Tates*, 2002 U.S. Dist. LEXIS 27633; Tates v. Blanas, No. 00-2539, 2003 U.S. Dist. LEXIS 26029 (E.D. Cal. Mar. 6, 2003).

through the dayroom.[6] Tates and other trans prisoners often went two or three days and sometimes a week without a shower and were usually prevented from using a phone during normal business hours.[7] Finally, Tates and other trans prisoners described being forced to walk through the jail bare-breasted, with only a towel around their waist, in order to get clean clothing during the weekly laundry call.[8] During these laundry calls, which she described as "very humiliating as well as cruel," they were catcalled, propositioned, ridiculed, and threatened by other prisoners and staff.[9] In her communications with the district court, she interpreted these conditions as discrimination against and punishment for her gender identity. Because of the isolation, harassment, and violence she experienced at the jail, Tates suffered from severe depression and other emotional distress. Tates told a reporter, "I started having suicidal thoughts. I started to hate the fact that I was transgender."[10]

Unlike most cases brought by incarcerated trans women, the district court was sympathetic to Tates and ultimately ruled in her favor, finding "serious discrimination…against transgenders [*sic*]" at the jail and ordering the jail to create a new housing policy for trans prisoners that did not automatically classify them as T-Sep.[11] While jail officials complied with the order, creating a new policy that automatically classified trans women to protective custody housing and stated that they would "not tolerate" any discrimination, harassment, or abuse of trans women by other prisoners or

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[6] Tates was not allowed in the dayroom with other prisoners, even other trans women.
[7] This restricted access to telephones caused her to often be unable to talk to her family or her lawyer.
[8] *Tates*, 2002 U.S. Dist. LEXIS 27633; *Tates*, 2003 U.S. Dist. LEXIS 26029. Defendants' Status Report, Tates v. Sacramento County, No. 03-1950, (E.D. Cal. Sept 16, 2005).
[9] Jackie Tates, "Letter to Judge" (Nov. 22, 2002), Attached to Order, *Tates* (No. 00-2539), Dec. 4, 2002. Her emphasis.
[10] Garvin, "What's She Doing in the Men's Jail?"
[11] *Tates*, 2003 U.S. Dist. LEXIS 26029, at *26.

staff (although they did not institute any training or other policies to prevent these actions), they continued to assert that T-Sep was the only "safe" option for trans women. In their proposed plan, jail administrators stated that they "continue[] to believe that transgender inmates are highly susceptible to physical assaults and injury due to their unique circumstances. As such, in order to protect the transgender inmate from injury and the Department from liability, [jail administrators] believe[] that Total Separation (T-Sep) is the most appropriate classification to protect all interests."[12] By understanding T-Sep as "protective" and "safe," jail officials render only prisoner-perpetrated violence legible as violence, while staff-perpetrated violence and the institutionalized violence of T-Sep officially become protection.

Despite ruling in Tates' favor, the district court similarly rendered T-Sep conditions illegible as (unconstitutional) violence as they affirmed these conditions, which are quite common in similar maximum security housing around the US, as a legitimate security-management strategy. While the *Tates* court found these conditions too restrictive for classification based solely on gender identity, the court upheld their use for prisoners for other reasons, even affirming T-Sep placement for trans women if the jail provided an additional reason. In finding that the jail "discriminated" against trans women, the court argued that by automatically classifying them as T-Sep, jail administrators treated them as "inherently more dangerous than most other inmates."[13] While arguing that trans women should not be seen as "inherently dangerous" or as a security threat, the court constructed the problem as "a failure of [jail administrators] to

[12] "Defendant's Proposed Plan re Classification of Transgender Inmates," *Tates* (No. 00-2539), April 1, 2003.
[13] *Tates*, 2003 U.S. Dist. LEXIS 26029, at *11.

promulgate rules and discipline to protect transgenders [*sic*] from discrimination."[14] In other words, the discrimination was isolated and individual. However, the jail's policy of automatically classifying trans women in maximum security housing was the logical outcome of a larger set of prison logics that construct trans women as security threats, as I will argue in this chapter. By focusing only on this policy, the court did not address this larger dynamic, which causes trans women to frequently be targeted for disciplinary punishment that could lead to their confinement in T-Sep. These conditions, therefore, became constitutional and legitimate for trans women, as long as their placement is not based solely and explicitly on their gender identity, as well as other problem prisoners, most notably "gang members," the other "type" of prisoner who was specifically targeted for T-Sep placement. "Gang members" are a group overly determined by race, especially within the California prison system, as "gang" often functions as a racialized code word and many black and brown prisoners are targeted for discipline and segregation in prisons as gang members.[15] By upholding T-Sep classification for gang members as a group, the court also constructs them as "inherently more dangerous than most other inmates," affirming the portrayal of black and brown men as inherently violent and dangerous. In other words, despite ruling in Tates' favor, the court upholds the racialized and gendered use of T-Sep and similar administrative segregation.

Since the early twentieth century, jail and prison officials around the US systematically segregated homosexual, gender nonconforming, and trans prisoners in

[14] Ibid. at *26.
[15] See for example, Johnson v. California, 543 U.S. 499 (2005). See also, Lisa Cacho's discussion of gang member as a racialized category in *Social Death: Racialized Rightlessness and the Criminalization of the Unprotected* (New York: New York University Press, 2012).

often violent and isolating conditions similar to T-Sep. They justified these policies and practices by portraying these prisoners as dangerous, as threats to both other prisoners and to institutional security because of their gender and sexual deviance. This chapter examines the history of this segregation, a history that shows that Sacramento County Jail administrators' actions are consistent with the treatment of these prisoners over the past century. During the first half of the twentieth century, recommendations for segregation focused on protecting otherwise "normal" prisoners in the general population from sexually and gender deviant prisoners. To its advocates, segregation represented the only effective means of "controlling" gender nonconforming prisoners, stopping sex in prisons, and eliminating a major source of prison disorder and as necessary to keep gender and sexually deviant prisoners from corrupting or contaminating others. During the second half of the twentieth century, prison officials continued to segregate gender nonconforming prisoners, but they increasingly justified this action by claiming that segregation was for their protection from violence perpetrated by heterosexual, gender conforming prisoners.

Today, trans and gender nonconforming prisoners are frequently segregated throughout the US for reasons directly and indirectly related to their trans status and gender expression, especially in men's institutions. Like all prisoners, trans and gender nonconforming prisoners usually experience a number of different housing classifications throughout their incarceration, including general population. Housing is often complicated, quick to change, and arbitrary.[16] Segregation can also take different forms,

[16] Describing New York City and state placement decisions, Gabriel Arkles explained, "frankly it didn't make any sense to me. I can't really say how they figured it out." Gabriel Arkles, interview by author,

including protective custody, administrative segregation, and disciplinary segregation. While the former two classifications are not supposed to be punitive in nature, all three classifications frequently result in similar housing conditions and are sometimes housed in the same unit. Like at Sacramento County Jail, these housing classifications can involve extreme, prolonged isolation that can destroy a persons' mental health. Prisoners in both disciplinary segregation and protective custody usually lose access to recreation and educational, vocational, and treatment programs. These programs are not only important to break up the isolation and boredom of incarceration but can be the only way that prisoners make money in order to buy basic necessities or to pay debts they owe because of their convictions. Not being able to participate in programs can also negatively affect a prisoner's parole or conditional release, which means that segregated prisoners can end up incarcerated longer than they would have if they were not segregated.[17] Another form of segregation is in units specifically designed for gay, gender

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August 12, 2013, Boston, MA, on file with author. Gender nonconforming and trans prisoners are rarely given serious input into their housing, and they are frequently placed in housing that they believe is not the safest option. Talking about his experiences advocating for clients incarcerated in New York state, Chase Strangio, a former staff attorney at the Sylvia Rivera Law Project and current attorney at the American Civil Liberties Union, explained that prison administrators "usually plac[ed trans people] in the exact opposite situation of what they wanted. Anyone who wanted to be in general population was almost always in involuntary protective custody. Anyone who wanted to be in protective custody was almost always in general population." Chase Strangio, interview by author, August 20, 2013, New York, NY, on file with author. Similarly, Arkles explained, "Most of my clients whatever their gender identity, whatever the gender they were assigned at birth, got placed wherever they didn't want to be." Arkles, interview. While many prisoners prefer general population because they are not isolated, can build community with other prisoners, and can access official programs and underground economies, which they are cut off from in segregation, some prefer segregation because they view it as safer. However, when a trans or gender nonconforming prisoner is in general population, it is often very hard for them to access protective custody. Arkles, interview; Owen Daniel-McCarter, interview by author, September 5, 2013, Chicago, IL, on file with author.

[17] Chase Strangio and Z Gabriel Arkles, Sylvia Rivera Law Project written comments on the National Standards to Prevent, Detect, and Respond to Prison Rape, May 10, 2010; Sarah Bergen, et al., "Protecting Lesbian, Gay, Bisexual, Transgender, Intersex, and Gender Nonconforming People from Sexual Abuse and Harassment In Correctional Settings: Comments Submitted in Response to National Standards to Prevent, Detect, and Respond to Prison Rape," April 4, 2011,

nonconforming, and trans prisoners. Today these units only exist in a few institutions, primarily large city jails, but they seem to have been more common in the past.[18]

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http://transequality.org/PDFs/PREA_Comments_April_2011.pdf; Gabriel Arkles, "Safety and Solidarity across Gender Lines: Rethinking Segregation of Transgender People in Detention," *Temple Political and Civil Rights Law Review* 18, no. 2 (Spring 2009). However, the conditions do vary greatly across and within departments of corrections.

Not only can disciplinary and protective segregation have similar conditions, but they can sometimes overlap to keep trans and gender nonconforming prisoners in isolating conditions for prolonged periods. For example, Arkles and Williams both described an incarcerated Puerto Rican trans woman, who had initially been segregated for disciplinary reasons but had been kept in segregation "for her protection," despite her protests, for over a decade. Williams explained that on paper the reasons for her needing protection had to do with a potential gang-related threat—another prisoner believed she was in a gang and had threatened her. Yet, Williams and Arkles both described the actual reasons as transphobia, and prior to the ten years in segregation and before there was any concern about gangs, she had been placed in isolation because she was trans. This woman and her advocates had tried to get her out of protective custody for years. Arkles, interview; Alisha Williams, interview by author, August 19, 2013, New York, NY, on file with author.

Protective, administrative, and disciplinary segregation can also factor into security classification, and repeated segregation can lead to higher security classification. Maximum security placement also potentially makes prisoners more vulnerable to violence from both staff and other prisoners, at least in part because maximum security prisons tend to have more violently racist, homophobic, and transphobic institutional cultures. Both Daniel-McCarter, talking about Illinois, and Gabriel Arkles, talking about New York, said that most of their trans women clients were housed in maximum security facilities. Arkles, interview; Daniel-McCarter, interview. In addition, a study of trans women incarcerated in California found that they were more likely to be classified as needing the highest level of security, even while they were more likely to be convicted of a non-violent crime, in comparison to non-trans prisoners. Lori Sexton, Valerie Jenness, and Jennifer Sumner, "Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men's Prisons," *Justice Quarterly* 27, no. 6 (December 2010).

[18] The LA County Jail and San Francisco County Jail have units for house gay men and trans women together, and the Cook County Jail has a new unit specifically for trans women. Rikers Island also had a unit that was opened in the 1970s and closed in 2005. Gay, gender nonconforming, and trans prisoners in the California state system are frequently housed in the California Medical Facility at Vacaville. For discussion of the LA County Jail unit, see Russell K. Robinson, "Masculinity as Prison: Sexual Identity, Race, and Incarceration," *California Law Review* 99 (2011); Sharon Dolovich, "Strategic Segregation in the Modern Prison," *American Criminal Law Review* 48, no. 1 (2011); Sharon Dolovich, "Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail," *The Journal of Criminal Law & Criminality* 102, no. 4 (2013). For a discussion of the Rikers Island unit, Benish A. Shah, "Lost in the Gender Maze: Placement of Transgender Inmates in the Prison System," *Journal of Race, Gender and Ethnicity* 5, no. 1 (February 2010); Paul von Zielbauer, "New York Set to Close Jail Unit for Gays," *New York Times*, December 30, 2005. For a discussion of the trans unit at Cook County Jail, Kate Sosin, "Cook County Jail Works on Transgender Policy," *Windy City Times*, May 22, 2013, http://www.windycitymediagroup.com/lgbt/Cook-County-Jail-works-on-transgender-policies-/42906.html; Daniel-McCarter interview.

In most cases, these units are in men's facilities. One recent exception is the Fluvanna Correctional Center for Women in Virginia, a maximum security prison and the state's largest women's prison, which made headlines in 2009 when it was reported that prison administrators had created a segregation wing for gender nonconforming and lesbian prisoners. While ostensibly created to segregate lesbians, prison staff, who "derisively" named this unit the "butch wing," targeted any prisoners who did not conform to feminine gender norms and subjected them to verbal harassment. "Virginia Women's Prison Segregated Lesbians in

Prison officials often justify segregation by claiming that gender nonconforming and trans prisoners are vulnerable to violence from other prisoners and therefore need to be protected or that segregation is unrelated to their trans status. In practice, trans and gender nonconforming prisoners are segregated for a variety of reasons directly and indirectly related to their gender identities and expressions. Legal scholar Gabriel Arkles explains that "a lot of profiling goes on" within prisons that can lead to both administrative and disciplinary segregation; some, but not all, of which is obviously related to gender and sex.[19] In many men's and women's facilities, prisoners are punished for being too feminine or too masculine. They are required to conform to the gender norms of a sex that they do not identify with and can be punished when they fail or refuse to comply. It is not uncommon for trans women and gender nonconforming people in men's facilities to receive disciplinary tickets and punishment for offenses such as having contraband (like makeup or bras) or for "destroying state property" when they alter state-

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'Butch Wing,'" *Fox News*, June 10, 2009, http://www.foxnews.com/story/2009/06/10/virginia-women-prison-segregated-lesbians-in-butch-wing; Arkles, "Safety and Solidarity across Gender Lines."

These units tend to be less isolating and less restrictive than other forms of protective custody, and prisoners often report that there is less violence in these units, largely because guards tend to be less homophobic and transphobic. Nevertheless, violence still happens, both perpetrated by prisoners and guards and programming is often restricted, although not as severely as other forms of segregation. Many trans women seem to prefer these units because they tend to be safer and less restrictive than the alternatives, while others do not. Arkles, interview; Strangio, interview; Daniel-McCarter, interview. Arkles, "Safety and Solidarity across Gender Lines"; Cynthia Lea Ann, letter to the editor, *GIC TIP Journal* 1, no. 4 (Fall 2001).

[19] Arkles, interview. Trans and gender nonconforming prisoners can also be segregated for other reasons that are seemingly disconnected from their gender identity or expression, including because of mental illness, because prison officials believe they are in gangs or would be targets for gang violence, or because they were seen as participating in sex so often that they needed to be isolated. Arkles, interview; Daniel-McCarter, interview. While not explicitly about their gender expression or trans status, these latter reasons are often deeply connected to prisoners' gender, racial, and sexual identities and can be used as indirect justifications for segregating prisoners because they are trans. Alisha Williams, a staff attorney with the Sylvia Rivera Law Project, explains that prison staff often avoid officially justifying placement in protective custody based on a prisoners' gender identity or trans status because it is much harder for a prisoner and their advocates to challenge their placement without an explicit justification related to their gender. Williams, interview.

issued clothing to make them more feminine. Trans men and gender nonconforming people in women's facilities can be punished for refusing to wear skirts, for cutting their hair short, or for shaving or refusing to shave their facial hair. In both men's and women's facilities, trans and gender nonconforming prisoners are punished for sexual activity, which remains a disciplinary offense throughout the US, and many prison officials in men's and women's facilities target trans and gender nonconforming prisoners as hypersexual and more likely to engage in or initiate sexual activity. They are also punished for infractions such as insolence or physical altercations with another person when they try to protect themselves from violence and harassment. Like all prisoners, trans and gender nonconforming prisoners live in conditions that render behaviors that are considered normal in the outside world criminal and punishable. Because they are constructed as sexually and gender deviant, they are targeted for punishment for particular kinds of "infractions," such as having sex or wearing makeup. Moreover, because the vast majority of trans and gender nonconforming prisoners are people of color, constructions of racialized deviance and criminality compound their perceived sexual and gender dangerousness, including being viewed as sexually excessive or threatening, unruly, potentially violent, and disrespectful or insolent, which puts them at even greater risk for being targeted for disciplinary segregation.[20] While this profiling can lead to disciplinary segregation, trans and gender nonconforming prisoners and their advocates emphasize that administrative segregation and protective custody are

[20] Arkles, "Safety and Solidarity across Gender Lines;" Arkles, interview; Daniel-McCarter, interview; Jody Marksamer, testimony to National Prison Rape Elimination Commission's hearing At Risk: Sexual Abuse and Vulnerable Groups Behind Bars, San Francisco, CA, August 19, 2005.

also violent and punitive.[21] In other words, while the practice of segregation can be messy and inconsistent, it generally conforms to a punitive logic.

I argue that the seeming dissonance between official justifications for segregation (to protect trans and gender nonconforming prisoners) and their punitive and violent practices can be explained by looking at the systematic segregation of gender nonconforming prisoners in the early and mid-twentieth century, which reveals the punitive and violent roots of purportedly "protective" housing. As I've argued, the modern prison system was built on an edifice of organizational and management practices grounded in (racialized) sexual difference. Sexual ambiguity shakes this edifice. Security—the primary mission of penal management—is centrally focused on prison administrators' ability to maintain order and control over prisoners, not only their actions or behaviors but also classificatory or administrative control. Gender nonconforming and trans prisoners often exceed their (gender normative, sexually binary) classificatory system, creating administrative disorder, which many prison administrators inextricably link to the creation of physical (sexual) disorder. Thus, these prisoners become threats to institutional security, or queerly dangerous, and segregation is used to control and punish this disorder. By historicizing current practices of segregation, I argue that the logics of queer dangerousness that constructed gender nonconforming prisoners as a security threat and in need of punishment and isolation were the foundation for segregation throughout

[21] Valjean Royal, Written testimony to the National Prison Rape Elimination Commission, *Black and Pink Newsletter* (June 2010); Kim Shayo Buchanan, "Our Prisons, Ourselves: Race, Gender and the Rule of Law," *Yale Law and Policy Review* 29, no 1 (2010); Daley, Written Testimony; Arkles, "Safety and Solidarity across Gender Lines"; *Stories from the Inside: Prisoner Rape and the War on Drugs* (Los Angeles: Stop Prisoner Rape, 2007); "Eyeman Arizona Sister," *GIC TIP Journal* 3, no. 1 (Winter 2002); Strangio and Arkles, Sylvia Rivera Law Project written comments; Arkles, interview; Daniel-McCarter, interview. See also the Chapter 3.

the twentieth century and continue to inform current segregation practices. The threat of queer dangerousness facilitates and justifies the violent and isolating conditions that trans and gender nonconforming prisoners often experience in segregation, turning protection into punishment.

Isolating Queerness

Since the modern prison system's creation in the nineteenth century, segregation and solitary confinement have been important tools of control for jail and prison administrators. In the earliest prisons, segregation was thought to be an central aspect of rehabilitation, forcing prisoners to reflect on their behavior, hopefully leading to remorse and change or at least breaking their spirit and making them docile and submissive. Over the course of the nineteenth century, researchers began to notice that solitary conditions broke prisoners in ways that made them lose their mental and physical health, and solitary confinement lost favor as a tool for rehabilitation. This change, coupled with the demands of a growing prison population, led prison administrators to reserve segregation and solitary confinement for only the most troublesome prisoners, transforming a practice that was originally for correction to a tool for punishment and containment of particularly threatening types of prisoners.[22]

In the early twentieth century, some prison and jail administrators began to target gender nonconforming and homosexual prisoners for segregation. This segregation was first documented in New York City men's jails and penitentiaries in the 1910s when

[22] Caleb Smith, *The Prison and the American Imagination* (New Haven, CT: Yale University Press, 2009); Joan Dayan, "Legal Slaves and Civil Bodies," in *Materializing Democracy*, ed. Russ Castronovo and Dana D. Nelson (Durham, NC: Duke University Press, 2002).

some homosexual prisoners were segregated in a cellblock called "the Annex" in the New York City House of Detention.[23] The practice spread throughout the US over the next few decades, and by the 1930s, segregation of homosexual prisoners was becoming a common practice in many US men's jails and prisons.[24] In 1934, Joseph Fishman, who was the nation's first and only federal inspector of prisons, claimed that every major men's penitentiary tried to segregate homosexuals from the general population.[25] Some prisons and jails, like the NYC House of Detention, created separate homosexual units; others placed homosexual and gender nonconforming prisoners in other isolating housing including maximum security or disciplinary segregation units.

While prison administrators and researchers had expressed anxiety about sex between prisoners long before the 1910s, they viewed deviant sexuality as a product of the abnormal conditions of prisons, as something any prisoner could potentially engage

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[23] It is possible that sexually and gender deviant prisoners were segregated earlier either in New York City or elsewhere, but I have not found evidence of it. Perry M. Lichtenstein, "The 'Fairy' and the Lady Lover," *Medical Review of Reviews* 27 (August 1921); George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World 189-1940* (New York: BasicBooks, 1994).

Perry Lichtenstein described the type of homosexuals who were segregated in the Annex as gender nonconforming: "In every respect they resembled the female. The names they used in calling one another were feminine…They had a typical feminine walk. One of these prisoners was taken with indigestion, and when I questioned him as to the cause of his ailment, one of the others suggested that he was probably having his period. They all wore bow ties, some of which were brightly colored. They invited the keepers and myself to their 'rooms,' and were not at all insulted when one of the trustees called them 'fags.' Many of these unfortunates are diseased and may readily infect others." Lichtenstein, "The 'Fairy' and the Lady Lover," 370.

[24] Regina Kunzel, *Criminal Intimacy: Prison and the Uneven History of Modern American Sexuality* (Chicago: University of Chicago Press, 2008), 62. Throughout this chapter, I pay little attention to regional differences or specificities. While the segregation of homosexual, gender nonconforming, and transgender prisoners, especially in the early and mid-twentieth century, seems to have been pioneered in New York City and state and California, there is evidence of this segregation in most other parts of the country, including the Midwest. The exception to this is the South. A large portion of my historical research relies on prison memoirs and research, very little of which was written about the South, which had a very different looking penal system during the early and into the mid-twentieth century. The literature that does mention the South never mentions homosexuality or gender nonconformity. I, therefore, do not have evidence that gender nonconforming people were segregated nor do I have evidence that they were not segregated.

[25] Joseph Fulling Fishman, *Sex in Prison: Revealing Sex Conditions in American Prisons* (National Library Press, 1934).

in.[26] This belief that any prisoner could engage in "perversions" reflected dominant understandings of sexuality at the time, which viewed same-sex sexuality as deviant, pathological, and/or sinful *acts* but not as indicating anything about the inherent nature of the person. As I discussed in the previous chapter, in the late nineteenth and early twentieth centuries, ideas about sex and sexuality began to shift. During this time, sexologists developed a new taxonomy of sexual types and argued that people who engaged in same-sex sexuality constituted a distinct type of person: variously termed the homosexual, the pervert, or the invert. According to sexologists, the homosexual's same-sex desire was an inherent part of their person—inborn or "natural," if also pathological, defective, and even criminal. Early constructions of homosexuality not only described a person's sexual desire but also their gender. Same-sex desire was believed to be part of or even the consequence of the larger problem of "sex inversion;" homosexual men had feminine or female souls and homosexual women had masculine or male souls. This construction of sex inversion deeply and inextricably tied together same-sex sexuality and gender nonconformity.[27]

As historian Regina Kunzel has shown, these new articulations of sexual/gender types deeply influenced penologists, who in turn influenced prison administrators, who used this knowledge to alter prison space in various ways, including instituting new

[26] Kunzel, *Criminal Intimacy*.
[27] See for example, Havelock Ellis and John Addington Symonds, *Sexual Inversion* (New York: Arno Press, 1975 [1897]); Richard von Krafft-Ebing, *Psychopathia Sexualis* (New York: Bell Publishing Company, 1965 [1894]); Magnus Hirschfeld, *The Homosexuality of Men and Women* (New York: Prometheus Books, 2000 [1922]). See also Jennifer Terry, *An American Obsession: Science, Medicine, and Homosexuality in Modern Society* (Chicago: The University of Chicago Press, 1999); Kunzel, *Criminal Intimacy*.

segregation policies.[28] In other words, the development of segregation was tied to the construction of modern notions of homosexuality. The key to segregation was the development of a (sexually) deviant type of person to identify and remove from the general population. By the early twentieth century, prison observers identified prisons as "sites in which *perverts* could be found in abundance," which caused them great anxiety and led to segregation.[29]

Reflecting and informing sexological and popular understandings, prison officials described and treated homosexuality and gender nonconformity as criminal, dangerous, destructive, contaminating, and immoral. They viewed isolation as the only way to keep otherwise normal prisoners safe from homosexual and gender nonconforming prisoners. Throughout most of the US, gender nonconforming homosexuals in many men's institutions were kept in separate cellblocks or wings, and they generally ate and worked by themselves, usually working in the laundry because it was considered women's work. In a few cases, departments of corrections attempted to segregate homosexual prisoners in a specific facility in order to rid entire institutions of them. As early as the mid-1910s, the New York State Department of Corrections assigned "perverts" to Clinton Prison because, according to the New York Prison Association, "they usually required a rigid form of discipline and close supervision."[30] By the mid-twentieth century, the Federal Bureau of Prisons placed all known homosexual prisoners at the Medical Center at

[28] Kunzel also argues that prison administrators and penologists helped construct modern sexuality, not just inside prison walls but also outside them. Kunzel, *Criminal Intimacy*.
[29] Ibid., 48.
[30] Ibid., quoted on 62.

Springfield, Missouri.[31] Beginning in the 1950s, the California Department of Correction mandated that all homosexual prisoners in the California system should be transferred to Soledad Prison's Wing Z.[32] For many prison administrators, total segregation—no contact between "normal" and gender/sexual deviant prisoners—was the aim.[33]

The original rationale and practical implementation of segregation were also clearly punitive.[34] Sex was a disciplinary offense in all penal institutions throughout the twentieth century.[35] While the systematic segregation of homosexuals was linked to this designation of (homo)sex as a disciplinary infraction, the practice went beyond this to target a specific type of person believed to be most likely to engage in or illicit the desire

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[31] John Bartlow Martin, *Break Down the Walls: American Prisons: Present, Past, and Future* (New York: Ballantine Books, 1954); Charles E. Smith, "The Homosexual Federal Offender: A Study of 100 Cases," *Journal of Criminal Law, Criminology and Police Science* 44 (1954); Charles E. Smith, "Some Problems in Dealing with Homosexuals in the Prison Situation," *Journal of Social Therapy* 2 (1956).

[32] Richard A. McGee to All Institutions, "Transfer of Homosexuals and Potential Homosexuals," July 16, 1954, Folder: California Medical Facility, 1954-64, Kinsey Era Correspondence Collection, Kinsey Institute Library and Special Collections, Indiana University.

[33] For example, describing the segregation at New York City's penitentiary on Welfare Island, Samuel Kahn, who was a psychiatrist at the penitentiary in the early twentieth century, explained that prison officials attempted to ensure "that there shall be no chance for the homosexuals to mingle with the nonhomosexuals." Samuel Kahn, *Mentality and Homosexuality* (Boston: Meador Publishing Company, 1937), 24. See also, Louis Berg, *Revelations of a Prison Doctor* (New York: Minton, Balch & Company, 1934); Fishman, *Sex in Prison*.

[34] Joan W. Howarth points out that segregation was also justified with a therapeutic rational. Joan W. Howarth, "The Rights of Gay Prisoners: A Challenge to Protective Custody," *Southern California Law Review* 53 (1980). Indeed, throughout most of the twentieth century, most correctional and social scientific literature characterized homosexuality as a psychological or medical problem. See Terry, *An American Obsession*. One manifestation of this "therapeutic" rationale was that homosexual, trans, and gender nonconforming prisoners were and are sometimes segregated in medical wings of institutions or in the system's security hospital. For example, once the California Medical Facility at Vacaville was opened in 1955, the California Department of Corrections and Rehabilitation segregated gender nonconforming and homosexual prisoners there. Over the next few decades, Vacaville became known as the prison with a large trans and gay population. A report by *Join Hands* in 1974 describes the segregated unit at Vacaville as exclusively for "flamboyant homosexuals," mainly drag queens or pre-op transsexuals. *A00494* Join Hands – *San Francisco, 6/18/74*. International Gay Information Center collection – (Audiovisual Materials), New York Public Library, New York, NY. See also Edwin Johnson, "The Homosexual in Prison," *Social Theory and Practice* 1, no. 4 (1971).

[35] Kunzel, *Criminal Intimacy*. The American Correctional Association's 1954 *Manual of Correctional Standards* designates "sex perversion" in a short list of necessary disciplinary offenses, alongside larceny and assault. *Manual of Correctional Standards* (New York: The American Correctional Association, 1954). Sexual activity continues to be a disciplinary offense in most, if not all, jails and prisons in the US.

to engage in sex. Instead of marking all people who engaged in sex in prisons as dangerous and needing isolation, the practice marked only a specific subset of this group, one usually identified by their gender nonconformity.

In practice and rhetoric, prison officials targeted gender nonconforming prisoners for segregation. While institutions relied on a number of tactics to identify homosexuals, including disciplinary reports regarding sexual activity, psychological examinations, and criminal and social histories, most institutions "rel[ied] upon dress, mannerisms, and the stereotyped manner of speech as their diagnostic tool."[36] In other words, they relied on some display of gender nonconformity. For example, in 1954, Richard McGee, who was the first director of the California Department of Corrections, sent a memo mandating that "inmates who have homosexual tendencies" in the California system should be transferred to Soledad Prison's Wing Z. McGee specifically singled out "inmates who have definite effeminate characteristics and/or who consistently play the feminine role in sex relationships" as those prisoners who should be segregated.[37] McGee's mandate

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[36] Richard W. Nice, "The Problem of Homosexuality in Corrections," *American Journal of Correction* 28 (June 1966): 31.

[37] While McGee did not specify that he is talking about men's prisons and prisoner classified as male, he was clearly only concerned with these prisoners. He never mentioned women's prisons or female prisoners, nor did he mention masculinity as problematic. This absence reflected the anxieties of the time period, which focused on men's prisons. McGee, "Transfer of Homosexuals and Potential Homosexuals."

Homosexuality and the segregation of homosexuals would remain important administrative concerns for California prison administrators throughout the 1950s. In the late 1950s, the department held a Departmental Management and Clinical Seminar on Homosexuality, after which administrators appointed a Special Committee on Homosexuality to address the "problem" of homosexuality in men's institutions and develop a long-term "plan for handling the male homosexual to include Departmental placement, control and treatment." *Final Report of the Special Committee Regarding Homosexuality* (State of California Department of Corrections, June 15, 1959), Corrections Administration – Reports and Studies – Homosexuality, 1959, F3717: 1692, Department of Corrections Records, California State Archives. The committee seemed to be tasked specifically with addressing the segregation of homosexuality and recommending best practices for that segregation. See also, John P. Conrad (Supervisor of Inmate Classification) to Milton Burdman (Chief Classification and Treatment Division), "Report of Special Committee on Homosexuality" (December 29, 1959), Corrections Administration – Reports and Studies – Homosexuality, 1959, F3717: 1692, Department of Corrections Records, California State Archives.

reflected the common practice at the time: most of the "known homosexuals" who were segregated were "known" because of their gender nonconformity, reflecting dominant understandings of sex inversion.[38] Put another way, prison administrators viewed gender nonconformity as an act of homosexuality (and, by extension, homosexuality as an act of gender nonconformity). For example, in a 1959 report by the Special Committee Regarding Homosexuals, California prison administrators described that their policy for many years had been to segregate "all homosexuals whose conduct involves the assumption of the female role in institutional settings." Explaining that they did not segregate those who might have "a homosexual orientation" but who were "sufficiently able to control their conduct that they do not become involved in overt acts," administrators framed femininity among a male-classified population was an "overt act" of homosexuality.[39] Elsewhere they explain that segregation was "the predominant method of managing the troublesome homosexual within the correctional setting."[40] Prison administrators, therefore, understood femininity as "an overt act" of homosexuality as a problem for institutional management. This troublesome gender nonconformity included a wide variety of gender expressions, from men with slightly effeminate mannerisms or speech patterns who were otherwise masculine and gender conforming to male-assigned people who dressed, acted, and looked female and clearly

[38] By the 1950s, same-sex desire and gender nonconforming had begun to disaggregate in sexological, medical, and popular understandings. While "inversion" was no longer the dominant model of homosexuality, same-sex desire and gender nonconformity continued to be strongly linked, especially within penal institutions.
[39] *Final Report of the Special Committee Regarding Homosexuality*, 2.
[40] Ibid., 5. In their recommendations, they further explain that only those groups of homosexuals who "present severe problems to management of the institution should be segregated." They identified these groups as: "Inmates who request segregation if such requests are supported by documentation and/or clinical findings," "those with obviously provocative effeminate mannerisms," and "those who have been specifically recommended by staff for homosexual segregation." Ibid., 5.

articulated a female identity. Prisoners who were aggressive, masculine, and only took the role of the "man" in sex were generally not considered true homosexuals and seemed not to be segregated as often, particularly in the first half of the twentieth century.[41] Therefore, while not all segregated homosexuals were feminine or gender nonconforming, the vast majority were.

Because of the targeting of gender nonconforming prisoners, segregation practices and policies exceeded a state interest in ending (homo)sexual activity in penal institutions and isolating those who participated in it. The disciplining of gender—more specifically the isolation and punishment of gender nonconformity and cross-gender identification, which decades later would often be called transgender or transsexuality—was central to the systematic segregation of homosexual prisoners. As segregation practices and policies were formed, articulated, and justified, they helped construct and reinforce the dominant view that gender nonconformity was abnormal, dangerous, and in need of containment and punishment, which also dehumanized gender nonconforming prisoners, further justifying their isolation and often violent segregation.

As they justified this segregation, prison administrators and researchers described gender nonconformity as not only a threat to other prisoners but also a threat to the security of the institution as a whole. By the early twentieth century, many prison administrators and researchers described gender and sexual nonnormativity as a central problem contributing to disorder and challenging security. By the mid-twentieth century, this "threat" was clearly articulated in correctional standards. For example, in the 1954

[41] These men were often considered "situational homosexual." In other words, men who were pushed into homosexuality by their abnormal single sex environment. See Kunzel, *Criminal Intimacy*; Terry, *An American Obsession*.

edition of their *Manual of Correctional Standards*, the American Correctional Association designated homosexual prisoners as "a serious problem," who should be "segregated immediately, promptly and completely from other inmates in the jail. The jailer should be under no illusions about the homosexual or a sex deviate. Complete isolation and at least segregation from other prisoners is the only method by which they may be rendered harmless within the jail."[42] As prison administrators and researchers continued to link sexual and gender nonconformity well into the second half of the twentieth century, this "security threat" that homosexuals posed was deeply rooted in anxieties about both sexual and gender deviance.

Administrators and researchers expressed serious concerns about the supposed physical dangers of homosexuality, including homosexual assault and rape, violence over sexual frustration, competition, and spurned advances, and potential venereal disease infection. Many claimed that a significant percentage, if not most, of the violence between prisoners was because of sex. Clinton Duffy, who was warden of California's San Quentin Prison from 1940 to 1952, called homosexuality "a nightmare for years" in San Quentin. Before he became warden, homosexuals were not segregated. He claims that they "fomented more violence, engaged in more feuds, and perhaps cost more lives than all other prisoners put together. In the old days most of the fights which drew shots from the gun towers had arisen over what are known in prison parlance as 'queens.'"[43] In

[42] *Manual of Correctional Standards*, 116.
[43] Clinton T. Duffy, *The San Quentin Story* (New York: Doubleday, 1950), 150. This hyperbolic rhetoric continued well into the latter half of the twentieth century. For example, Ellis C. MacDougall, the commissioner of the Connecticut DOC in the 1970s, explained that homosexuals "are actually running" penal institutions. Carl Weiss and David James Friar, *Terror in the Prisons: Homosexual Rape and Why Society Condones It* (Indianapolis, IN: The Bobbs-Merrill Company, 1974), quoted on 163. He claimed that 80-90% of murders are "a result of homosexual situations." Ibid, 163.

his memoir, Duffy explained that having witnessed this dynamic while he was an assistant to a previous warden, he "naturally" was convinced that homosexuals "needed special attention."[44] Within a year or two of becoming warden, he instituted a policy of segregating homosexual prisoners.

While Duffy seemed to mark all homosexuals as problems, no matter their gender expression, he specifically mentioned "queens," who were homosexuals both inside and outside prison and who were usually gender nonconforming and sometimes cross-gender-identified, as those who incite violence. Like Duffy, early-twentieth-century prison administrators and researchers focused most of their attention on the supposed dangers of feminine prisoners, not because they actively perpetrated violence, which in few cases they did; in fact, like gender nonconforming and trans prisoners today, they were more likely to be the victims of violence.[45] Instead, prison officials and researchers believed

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[44] Duffy, *The San Quentin Story*, 150.

[45] In fact, researchers and officials frequently acknowledged that the people who perpetrated almost all the (homosexuality-related) violence were gender conforming, masculine, and usually heterosexual (although often labeled "situational homosexuals"). Despite this acknowledgement—which was often implicit rather than explicit or at least buried within a great deal of anxiety about homosexuality—administrators and researchers placed much less emphasis on their segregation than gender nonconforming prisoners' segregation, unless it was as a (temporary) punishment.

While these gender conforming male prisoners were pathologized and considered perverse and dangerous, many writers extended some sympathy to them because it was assumed that their need for sex was a fundamental part of manhood and therefore they were almost forced into perverted sexual practices by both the abnormal conditions of incarceration and the temptations of the femininity of the queens and, to a lesser extent, other less masculine, often younger prisoners, often called "punks." Masculine male prisoners, who engaged in sexual activity, were considered dangerous because they deployed violence that could cause problems for the prison administration (but, importantly, this was a masculine violence) and because they forced some otherwise "normal" men to submit to sex, thereby feminizing and perverting them. For many writers, however, the *most* dangerous and perverse prisoners were the gender nonconforming prisoners.

A few social scientists believed that gender conforming prisoners who engaged in same-sex sexuality were actually more dangerous because they "mask[ed] their abnormal inclinations under a cloak of outwardly normal behavior" and were therefore harder to spot and control. Joseph G. Wilson, *Are Prisons Necessary?* (Philadelphia: Dorrance and Company Publishers, 1950), 201. As I will discuss, by the 1950s and 1960s, more researchers focused on the danger of aggressive masculine homosexuals, which partially reflects the ways that definitions of homosexuality outside prisons changed over time. By the second half of

that their femininity elicited strong desire and inflamed the violent passions and jealousies of some masculine prisoners. For example, in his 1951 study of sex in prisons, psychologist and popular author Robert Lindner dramatically claimed that the "feminine-type homosexuals" become "a storm-center, a veritable vortex of sex disquiet" and often left "a trail of blood and cracked heads along with broken hearts."[46]

Many prison officials and researchers expressed concerns that the presence of gender nonconforming people was "a serious menace to discipline" and could "impair the general welfare of the whole prison population."[47] Their queer dangerousness manifested in a number of ways. First, officials and researchers argued that the mere presence of desirable (queer) femininity incited violence as other prisoners fought over them. Officials and researchers also frequently complained that gender nonconforming prisoners would manipulate other prisoners in order to intentionally cause violence and disorder, describing gender nonconforming prisoners as treacherous, untrustworthy, and reveling in the violence that they supposedly caused.[48] In doing so, they described gender nonconforming prisoners' queer dangerousness using feminized rhetoric. Rarely claiming that they physically participated in the fights (that was the province of masculine male

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the twentieth century, scientific, medical and even popular models of homosexuality separated same-sex desire from gender nonconformity, and therefore some social scientists began to mark masculine prisoners who engaged in same-sex sexuality as also fundamentally homosexual. Nevertheless, through the mid-twentieth century, most discussions of the dangers of homosexuality focused on gender nonconforming prisoners.

[46] Robert M. Lindner, "Sex in Prison," *Complex* 6 (1951): 10-11.

[47] Fishman *Sex in Prison*, 69; Smith, "The Homosexual Federal Offender."

[48] One major concern was sex work, which was linked to excessive sexuality, untrustworthiness, and violence. Many prison administrators and researchers believed that homosexuals were very likely to engage in sex work of some kind. For example, in describing how some "fags" engaged in sex work, Leo Carroll explained, "The common knowledge that 'fags' are treacherous in this manner further crowds the relationship with mistrust and suspicion, adding to its instability." Leo Carroll, *Hacks, Blacks, and Cons: Race Relations in a Maximum Security Prison* (Lexington: D.C. Heath and Co., 1974), 79.

prisoners), officials and researchers claimed they intentionally manipulated men through their promiscuous sexuality in order to create violent chaos within prisons and jails.

Finally, administrators and researchers often described the dangers of queer sexuality and gender as "contaminating," "contagious," and "invidious."[49] In their 1954 edition of the *Manual of Correctional Standards*, the American Correctional Association strongly urged prison and jail administrators to segregate "sex deviated from normal inmates" in order to "prevent moral contamination…[and] custody risks."[50] They advocated their confinement in closed custody units, which are an institution's "most secure housing units" and in which they can be "under constant supervision."[51] The 1964 *Jail Practices and Procedures Manual*, published by the California State Peace Officers Association, used similar language, stating that "overt homosexuals," who could usually be picked out by their mannerisms, "should be segregated in a separate part of the institution where there will be no opportunity to contaminate other prisoners."[52]

While administrators and researchers were concerned that otherwise sexually normal prisoners would be drawn into participating in queer sexuality because of the allure of queer femininity in the ostensibly sex-segregated male prison environment, thereby being contaminated and sexually perverted, they also frequently expressed concern beyond the sexual. This queerness was potentially morally and psychologically corrupting, leading to further criminality and immorality. As Louis Berg explained in

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[49] Joseph G. Wilson and Michael James Pescor, *Problems in Prison Psychiatry* (Caxton Printers, 1939), 199. See also Victor Folke Nelson, *Prison Days and Nights* (Boston: Little, Brown, and Company, 1933); Martin, *Break Down the Walls*; Fishman, *Sex in Prison*. See also, Kunzel, *Criminal Intimacy*.
[50] *Manual of Correctional Standards*, 177.
[51] Ibid., 199.
[52] Howarth, "The Rights of Gay Prisoners," quoted on 1232.

1934, "the homosexual" was a "menace…to general prison morality."[53] Of course, prisons were not considered particularly moral places, which was part of the problem. The danger of this queer contamination was heightened because of the setting in which it existed, or more specifically because the supposedly "normal" prisoners that could be contaminated were not really normal at all. They were "criminals," abnormal in their behaviors, their inclinations, and even their very constitution. Because prisoners are already *queered*, they were considered particularly ripe for sexual and gender queer contamination. They were, as Berg explained, "a ready source for pollution to a soil eager for the seed of abnormality."[54] In other words, total segregation was the only way that prison officials could prevent queer contamination in a site prone to moral contamination, which they feared could permanently pervert otherwise "normal" prisoners, leading to violence and disorder in penal institutions as well as danger to outside communities.[55]

For researchers and administrators describing women's institutions in the early twentieth century, queer sexuality produced a *racial* anxiety. While only a handful of

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[53] Berg, *Revelations of a Prison Doctor*, 163.

[54] Ibid., 140-41. See, also, Kunzel's discussion of the prison's "apparent queering affects." Kunzel, *Criminal Intimacy*, 14.

[55] See for example, Fishman, *Sex in Prison*; Nelson, *Prison Days and Nights*; Benjamin Karpman, "Sex Life in Prison," *Journal of Criminal Law, Criminology, and Police Science* 38 (February 1948); Roger S. Mitchell, *The Homosexual and the Law* (New York: Arco Publishing, 1969); Justin K. Fuller, "Medical Services," in *Contemporary Correction*, ed. Paul W. Tappan (New York: McGraw-Hill Book Company, Inc., 1951); Donald Webster Cory, "Homosexuality in Prison" 1, no. 3 (April 1955); Daniel Lee, "Seduction of the Guilty: Homosexuality in American Prisons," *Fact* 2 (December 1965). Permanent perversion or abnormality was also the concern for female prisoners sometimes. See Florence Monahan, *Women in Crime* (New York: Ives Washburn, Inc., 1941); Katharine Sullivan, *Girls on Parole* (Boston: Houghton Mifflin Company, 1956); Sara Harris, *Hellhole: The Shocking Story of the Inmates and Life in the New York City House of Detention for Women* (New York: E.P. Dutton & Co., Inc., 1967).

Interestingly, none of the officials and researchers describing men's institutions expressed an explicit concern that queer contamination would cause gender nonconformity in other prisoners. The only prison writer I found who mentioned this expressed this concern only in relation to women's institution, claiming that in the Woman's Workhouse in New York City many women learn the "art" of "taking the part of a man," including dressing like a man and living with a woman. Kahn, *Mentality and Homosexuality*, 124.

articles by researchers and books by prison administrators addressing women's institutions were published before the 1960s, most of them focused on what they saw as the rampant "perversion" of black and white women engaging in interracial sexual relationships. Black women were often described as sexual aggressors, as sometimes "excit[ing] the white girls into perverted behavior," and as usually taking the masculine role in relationships with white women.[56] Writers argued that racial difference took "the place of difference in sex" and that white women interpreted black women's dominance and sexual knowledge as "maleness."[57] As historian Estelle Freedman explained, this literature racialized the sexual pathology of inversion, often blaming black women for homosexuality and the sexual perversion of white women. This construction of racialized queer sexuality in women's institutions confirmed the contemporary belief that black women were unable to conform to proper femininity and exhibited greater criminality, which was linked to their supposedly innate aggression, sexual excess, and gender nonnormativity.[58] This interracial queer sexuality led some institutions to racially

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[56] Spencer Stockwell, "Sexual Experiences of Adolescent Delinquent Girls," *International Journal of Sexology* 7 (1953): 25.

[57] Margaret Otis, "A Perversion Not Commonly Noted," *Journal of Abnormal Psychology* 8 (July 1913): 113. For example, according to a matron at the State Training School for Girls at Geneva in Illinois, "in every case in which colored and white girls become attached to each other, the colored girl is considered the male, and is called 'daddy' or sometimes 'uncle.'" Clifford R. Shaw and Earl D. Meyers, "The Juvenile Delinquent," in *The Illinois Crime Survey* (Chicago: Illinois Association for Criminal Justice, 1929), 720. See also Edith Rogers Spaulding, *An Experimental Study of Psychopathic Delinquent Women* (Da Capo Press, 1983); Charles A. Ford, "Homosexual Practices of Institutionalized Females," *Journal of Abnormal Psychology* 23 (March 1929); Fishman, *Sex in Prison*; Kahn, *Mentality and Homosexuality*; Theodora M. Abel, "Negro-White Interpersonal Relationships Among Institutionalized Sub-Normal Girls," *American Journal of Mental Deficiency* 46 (1942). However, a few claimed that white girls could also be the aggressors. Otis, "A Perversion Not Commonly Noted"; Monahan, *Women in Crime*.

[58] Estelle B. Freedman, "The Prison Lesbian: Race, Class, and the Construction of the Aggressive Female Homosexual," *Feminist Studies* 22, no. 2 (Summer 1996). See also, Kunzel, *Criminal Intimacy*; Siobhan Somerville, *Queering the Color Line: Race and the Invention of Homosexuality in American Culture* (Durham, NC: Duke University Press, 2000).

segregate prisoners. So, in some women's institutions, racial segregation became a proxy for the segregation of gender and sexual deviance.[59]

Segregation of homosexuals and gender nonconforming prisoners was rare in women's institutions throughout the twentieth century. I found no documented evidence showing that administrators in women's institutions created separate cellblocks or wings for lesbians and gender nonconforming prisoners prior to the 1960s. However, at least one prison administrator, Florence Monahan, who headed a number of female penal institutions in the early twentieth century, reported that she tried to segregate "the [sexually] abnormally inclined from the normal" because of the danger of "permanent injury both physically and psychologically."[60] While her reasoning echoed the anxiety of administrators of men's institutions, Monahan was an outlier in her call for segregating homosexual prisoners in women's institutions before the 1960s. Most administrators and researchers in the first half of the twentieth century viewed homosexuality as less corrupting and dangerous, more temporary and also more rampant in women's institutions than men's. For most, it was more easily dismissed but also much more difficult to control because it was so common. The exception to this largely dismissive attitude was interracial relationships, which included the added concern of racial

[59] In contrast, before the late 1960s, writers discussing men's prisons rarely mentioned race. In keeping with the norms of racial segregation in US society at large and with the differences in racialized criminality, most men's prisons were racially segregated in the early and mid-twentieth century. Some systems, especially in the South, were racially segregated long past desegregation elsewhere in US society. In fact, racial segregation still exists to varying degrees in some prison systems. Chad R. Trulson, James W. Marquart, Craig Hemmens, and Leo Carroll, "Racial Desegregation in Prisons," *The Prison Journal* 88, no. 2 (June 2008). Racial segregation in men's institutions was not explicitly justified by concern over interracial sex. In fact, anecdotal evidence shows that at least in a few men's penal institutions in the early twentieth century, the only or one of the only units that was desegregated was the homosexual unit. Louis Berg, *Revelations of a Prison Doctor*.

[60] Monahan, *Women in Crime*, 224.

corruption, which heightened concerns about sexual corruption.[61] Indeed, Monahan echoed these concerns as she noted that her "biggest difficulty" was with interracial relationships, which she addressed by racially segregating prisoners.[62]

By the 1950s and 1960s, more administrators and researchers began to discuss sexual and gender deviance in women's institutions in similar language as writing on men's institutions. While some writers continued to express concern about interracial relationships and racialized sexual/gender deviance, most adopted the race-neutral language that writers discussing men's prisons had long used. This new generation of writers expressed concern about sexual perverts corrupting younger, innocent girls. Like in men's institutions, his corruption was not only sexual but also moral; it could lead to the creation of more hardened criminals and to recidivism.[63] In 1956, social worker Katharine Sullivan explained that homosexuality in women's prisons "is widespread and an extremely serious moral and administrative problem."[64] In 1950, psychiatrist Joseph G. Wilson even recommended "strict segregation" for lesbians so that they "cannot corrupt others."[65] A few writers echoed some of the dramatic language used in earlier writings on men's institutions, arguing that lesbianism and gender nonconformity caused violence, murder, and even "mayhem."[66] Nevertheless, the anxiety about gender and

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[61] In her reading of this literature, Kunzel similarly notes that intraracial relationships remained largely invisible to researchers because they probably viewed them as friendships or as benign. Kunzel, *Criminal Intimacy*.
[62] Monahan, *Women in Crime*, 224.
[63] See Frank Samuel Caprio, *Female Homosexuality: A Psychodynamic Study of Lesbianism* (New York: The Citadel Press, 1954); Frederick S. Baldi, *My Unwelcome Guests* (Philadelphia: J. B. Lippincott Company, 1959); Russ Trainer, *Prison: School for Lesbians* (Van Nuys, CA: Triumph News Company, 1968); Wilson, *Are Prisons Necessary?*; Sullivan, *Girls on Parole*; Harris, *Hellhole*.
[64] Sullivan, *Girls on Parole*, 123.
[65] Wilson, *Are Prisons Necessary?*, 219.
[66] Trainer, *Prison*, 8. See also Harris, *Hellhole*.

sexual deviance in women's institutions was never as urgent and consistent nor was the rhetoric as dramatic and condemnatory as in men's institutions. This difference in rhetoric reflected assumptions about the inherently sexually different natures of women and men. Administrators and researchers believed that women were less violent, more docile, and more easily controlled in general. Even when writers discussed violence in women's institutions, they rarely claimed that homosexuality led to widespread disorder, chaos, and murder, like it could in men's prisons.

By the late 1960s, at least one women's institution segregated lesbian and gender nonconforming prisoners in a similar manner as many men's institutions. Following an incident in 1965 in which a lesbian attacked another woman, the Sybil Brand Institute, a women's county jail in Los Angeles, created the "Daddy Tank," a maximum security wing where they placed lesbian and masculine prisoners. Women were segregated if they admitted to being a lesbian, if they were the aggressor in a known sexual encounter or relationship (apparently the "passive" partner was not segregated), or if they were masculine or otherwise gender nonconforming. If a person arrived at the jail in men's clothing, prison officials would automatically place them in the Daddy Tank. Reports indicate that most people in the unit were gender nonconforming. Jail officials claimed that segregation was necessary both for the protection of others from lesbians as well as for the protections of the lesbians themselves.[67] However, a writer for *Lesbian Tide* argued that jail officials assumed that lesbians had to be segregated because they believed

[67] "No Touching, No Human Contact—In Cell Block 4200" *Lesbian Tide* 6, no. 3 (Nov/Dec 1976); Jeanne Cordova, "Prison Reform—New Freedoms for Daddy-Tanked Lesbians" *Lesbian Tide* 6, no. 5 (March/April 1977); Kelly, "Cell Block 4200" *Lesbian Tide* 1, no 10 (May 1972), LGBT Periodical Collection, New York Public Library.

that lesbians would "automatically prey upon other inmates, offending them and disrupting the institution."[68]

As prison administrators created and institutionalized policies and practices of systematic segregation of homosexual and gender nonconforming people, they also created and institutionalized a punitive relationship between penal institutions and this "type" of prisoner, which continues to inform current policies and practices. Penal administrators in the first half of the twentieth century constructed homosexuality and gender nonconformity as dangerous and threatening to institutional security and as contrary to rehabilitation. Segregation, isolation, and punishment became the logical and acceptable means of addressing queer dangerousness.

Conditions of Punishment

Sybil Brand Institute officials' argument that segregation was for the protection of both other prisoners and the lesbians themselves reflected a shift in rhetoric that began during that time. In the 1960s and 1970s, prison officials began to argue that the segregation of homosexual and gender nonconforming prisoners was for *their own* protection. More concern began to be placed on the "dangers" of aggressive gender conforming prisoners (in men's institutions), who sexually assaulted other prisoners or coerced them into sexual relations, and researchers and officials began to admit that homosexual and gender nonconforming prisoners were targets of violence from other prisoners. Over the following decades, prison officials' explicit justifications for

[68] "No Touching, No Human Contact."

segregation became increasingly focused on protecting these prisoners from straight, gender conforming prisoners, especially in men's institutions.[69]

Despite the rhetorical change, the practice and experience of segregation and the conditions in which homosexual, gender nonconforming, and trans prisoners live have changed little. Conditions within segregation have long been harsh, violent, and significantly more restrictive than conditions in general population. Throughout the twentieth century, segregated homosexual, gender nonconforming, and transgender prisoners were often forced into extreme isolation and subjected to intense surveillance, both in homosexual units as well as other forms of segregation. At the Federal Medical Center at Springfield in the mid-twentieth century, segregated homosexual prisoners were housed alone in cells, closely supervised, and explicitly prohibited from having physical contact with other prisoners. They were also given only work assignments in which they could be closely surveilled. Segregated federal prisoners complained that they lost privileges and access to programs, which was and remains a common problem for those who were segregated in other institutions.[70] John Bartlow Martin, who was imprisoned in the State Prison of Southern Michigan at Jackson in the early 1950s, wrote in his memoir that homosexual prisoners were segregated in the disciplinary cellblock where they were on the highest restriction and forced to stay in their cells all the time except for a three-

[69] While the rhetoric about the danger of violence perpetrated by prisoners has been mostly used in the context of men's prisons then and now, it has been used occasionally in the contact of women's institutions as well, including as a justification for not placing a trans women in a women's prison. For example, responding to a lawsuit filed by a trans woman who was a federal prisoner in the 1980s challenging her placement in a men's prison, prison administrators argued that if she was placed with women she'd "be in grave danger from the very persons she seeks to imitate." Quoted in Sharon Reynolds, "Wrong Body, Wrong Jail," n.d. Bromfield Street Education Foundation Records, box 13, folder 53. Northeastern University.

[70] Smith, "The Homosexual Federal Offender"; Smith, "Some Problems in Dealing with Homosexuals."

minute bath once a week. They were allowed radio earphones, books, and newspapers but were not allowed to participate in recreation, go to the cafeteria, or participate in other programming.[71] Many prisons, such as the Ohio Penitentiary and San Quentin, housed the homosexual segregation units in the oldest and dirtiest cellblocks.[72] These conditions were often accompanied by harassment, discrimination, and violence from staff and other prisoners.

Prison officials justified these conditions by describing homosexual and gender nonconforming prisoners as dangerous. Their explicit logic was that it was "better for society to let [homosexual prisoners] rot alone, then to turn [them] loose to rot others."[73] Yet, segregation conditions largely remained the same even as jail and prison officials described homosexual, gender nonconforming, and trans prisoners as dangerous increasingly less often. By the 1970s, as officials were regularly justifying segregation at least in part by claiming that gay, gender nonconforming, and trans prisoners had to be protected, these prisoners described experiencing endemic discrimination, violence, and punishment for their queerness.[74] In protective custody, prisoners continued to faced

[71] This cellblock held both "aggressive homosexuals" and those they "preyed upon." In other words, rapists and those who were raped were held in the same cellblock, under the same conditions, both for being "homosexual." Martin, *Break Down the Walls*.
[72] Prisoner X, *Prison Confidential* (Los Angeles: Medco Books, 1969); Malcolm Braly, *False Starts: A Memoir of San Quentin and Other Prisons* (Boston: Little, Brown, and Company, 1976); "Proposed: California Medical Facility and Northern California Guidance Center, Vacaville, California," Corrections – Administration, Institutions – California Medical Facility, Vacaville-Proposal, F3717:314, Department of Corrections Records, California State Archives.
[73] Wilson, *Are Prisons Necessary?*, 219.
[74] Because a small but significant segment of gay activists on the outside in the 1970s focused attention on jails and prisons, currently and formerly incarcerated gay, gender nonconforming, and trans people were able to publish descriptions of their conditions and experiences to people on the outside for the first time. See for example, *Join Hands*, *No More Cages: A Women's Prison Newsletter*, *Through the Looking Glass*, *Gaycon Press Newsletter*, and *Inside Out: A Newsletter for Prisoners and their Gay Friends*. Many gay publications that were not specifically prisoner-focused also extensively covered prison issues, such as *Gay*

discriminatory and violent treatment by staff, including being housed with an "aggressive straight inmate," who might physically and sexually assault them.[75] Stories from the 1970s about the "Homosexual Unit" at California Medical Facility at Vacaville—where many gay, gender nonconforming, and transgender prisoners in the California system had been segregated since the facility opened in 1955—included medical neglect, cruelty, and even death.[76] Prisoners in this unit were placed in cells alone that were totally enclosed; they could not see out nor talk to anyone. There were reports of medical experiments, including drug and shock therapy, on gay prisoners by Vacaville doctors, supposedly to find cures for homosexuality.[77] While queer prisoners were confined to the unit, other prisoners were allowed to wander in for sex, which was not always consensual.[78] In Sybil Brand Institute's "Daddy Tank" in the 1970s, prisoners were subjected to isolation, restrictions, overcrowding, and harassment by guards. They were also given the filthiest

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Community News, *Lesbian Tide*, and *RDF*. See also, Regina Kunzel, "Lessons in Being Gay: Queer Encounters in Gay and Lesbian Prison Activism," *Radical History Review* 100 (Winter 2008).

[75] Jon Wildes, "To Be Young, Gay and Behind Bars," *Village VoiceI,* January 9, 1978.

[76] California prison officials had moved the primary homosexual segregation unit to Vacaville after it opened in large part because they wanted to treat these prisoners' homosexuality (and probably, by extension, their gender nonconformity). Understanding homosexuality as an illness or the result of "an arrest in an infantile state" that was frequently accompanied by "failure of development in the emotional and other fields," within four years, they determined that homosexuality was largely untreatable, not because officials no longer viewed it as a mental illness but because of homosexuals' supposed emotional maladjustment and because "they are rarely motivated for a change in their way of life." In their 1959 report on the "problem" of homosexuality, prison administrators explained that "rarely will anything less than long-term individual psychoanalysis produce satisfactory adjustment" and determined that this was a waste of resources. The report, instead, recommended that they begin to segregate prisoners in units in different facilities, in particularly at Soledad, while leaving a small group at Vacaville who were interested or amenable to psychotherapy. *Final Report of the Special Committee Regarding Homosexuality*, 1-2. See also, Special Committee Regarding Homosexuality, Minutes of Committee Meeting, April 10, 1959, California Medical Facility, Corrections Administration – Reports and Studies – Homosexuality, 1959, F3717: 1692, Department of Corrections Records, California State Archives.

[77] Don Jackson, "Gay Death at Vacaville," *Rough Times* 2, no. 7 (June 1972), LGBT Periodicals Collection, New York Public Library. Vacaville was not the only prison to do this during the 1970s. See also "Prison Life Behind the Lavender 'H,'" *Join Hands* 6, no. 4 (January/February 1977), LGBT Periodical Collection, New York Public Library; "Prolaxin Warning," *Join Hands* 2 (February-March 1976), Kinsey Institute Library and Special Collections, Indiana University.

[78] A00494 *Join Hands* – San Francisco, 6/18/74, International Gay Information Center Collection – (Audiovisual Materials), New York Public Library.

jobs, smaller commissary allowances, less correspondence privileges, and less access to books and magazines. Prisoners felt that "they were constantly being made examples of."[79] As Jon Wildes, a gay prisoner, wrote in the *Village Voice* in 1978, "The situation can become so bad that the gay inmate will usually choose to return to [general] population even through he may get killed by doing so." He explained that the violent, isolating, and restrictive conditions in protective custody "punished [prisoners] for seeking protection of [their] life."[80]

Despite rhetorical changes about the reasons for segregation in the 1970s, underlying heteronormative and racialized gender normative logics that authorized violent and punitive treatment of gender and sexual deviance and had been constructed in part through the work of segregation since the early twentieth century remained unchallenged. As prison officials shifted the official justifications for segregation from protection *from* to protection *for* gender nonconforming prisoners, constructions of queer dangerousness structured how their protection was practiced. Violence and punishment remained commonsensical, if not officially advocated for. Administrators often used

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[79] Kelly, "Cell Block 4200"; "No Touching, No Human Contact—In Cell Block 4200."

Gay, lesbian, and feminist activists on the outside protested the Daddy Tank in the early 1970s. In December of 1976, because of these protests, jail officials phased the maximum security "Daddy Tank" into the medium security "daddy dorm." While lesbians and gender nonconforming people were still segregated, they were allowed more privileges and access to classes and programs in this new dorm. Some reported that some of the most masculine prisoners were still segregated in maximum security. Furthermore, after the move to medium security, the jail began to segregate a larger number of feminine lesbians. Cordova, "Prison Reform."

[80] Wildes, "To Be Young, Gay and Behind Bars." While many queer prisoners were placed in segregation, not all were. And, despite the violent conditions of segregation, some who were in general population requested to be placed in segregation because of the violence they experienced in general population, yet were denied by prison officials. For example, one gay man, who served federal time at McNeil Island and other institutions, explains that he went to an officer, requesting protective custody because his life was in danger. This officer told him that "the only way I could leave the general population was on a stretcher. In other words, they make it extremely hard for a person to get on protective-custody status. They want blood first." Ibid.

other justifications to continue the same or similar punitive practices. For example, in a letter to *Join Hands* in 1976, a feminine gay prisoner described how California prison officials would use minor rules violations to justify the segregation of gender nonconforming gay prisoners in the Deuel Vocational Institution in Tracy, California. He argued that these minor infractions, for which heterosexual prisoners would not be segregated, were cover for their real motive: "We are supposed to be uncontrollable homosexuals and management problems." Once in segregation, they were repeatedly refused general population status "because of our homosexuality and our feminine traits." He also described how psychologically violent these restrictive and punitive conditions were, explaining that many "have to fight to keep our minds intact struggling with our sexual identity which can lead to attempted or successful suicide."[81] Thus, queer dangerousness remained an important structuring feature of penal logics, and gay, gender nonconforming, and trans prisoners continued to be viewed and treated as dangerous because of their queerness and punished for their gender and sexual deviance.

Punitive treatment of gender and sexual deviance remained folded into the prison system in other policies and practices in addition to the conditions of segregation. Prisons and jails still prohibited any sexual activity. Not only were gay and gender nonconforming prisoners punished for engaging in sexual activity, they were punished for being perceived as potentially doing so because of their sexual and gender identities. Many prisoners described receiving harsher punishments in general because they were

[81] Charles Ackert, letter to the editor, *Join Hands* 3 (April/May 1976), Kinsey Institute Library and Special Collections, Indiana University. Indeed, in the 1950s, California prison administrators began to segregate homosexuals incarcerated through the Youth Authority at the Deuel Vocational Institution. Inter-Departmental Communication, from Conrad to Burdman, "Report of Special Committee on Homosexuality."

gay or gender nonconforming. David A. Ward and Gene G. Kassebaum explain that this was the practice at the California Institute for Women at Frontera. In their 1965 study of the prison, they describe how many staff members were "offended by the sight of a person with outward homosexual appearances," which they often associated with masculinity.[82] By the 1950s, homosexual and gender nonconforming prisoners began to complain that their parole was being delayed or denied because of their homosexuality.[83] In a 1975 letter to *Join Hands*, a gay prisoner newspaper published in the 1970s, Edward Loftin, a gay prisoner in California, described being denied parole and sent to the California Medical Center at Vacaville to undergo testing: "They also said I *would* get a parole 'if' Vacaville sees that I could make it on the outside...I think you know why the parole board didn't give me parole, they *'do*' think that '*ALL*' gay people are sick and need to be in a Hospital…Everyone that I know, even the officers and councelor [*sic*] thought I would get parole. The true reason is I am '*Gay*' and *proud* of it."[84] The *Join Hands* editor describes being gay as "the *other* half of Eddie's 'crime.'"[85]

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[82] David A. Ward and Gene G. Kassebaum, *Women's Prison: Sex and Social Structure* (Chicago: Aldine Pub. Co., 1965), 202.

[83] Smith, "Some Problems in Dealing with Homosexuals"; "Prison Life Behind the Lavender 'H'"; Edward E. Loftin and *Join Hands*, "The Life and Death of a Gay Prisoner," in *After You're Out*, ed. Karla Jay and Allen Young (New York: Pyramid Books, 1975); "Behind Bars," *Through the Looking Glass* 10, no. 3 (September 1985); Jackie Hoffman, "Too Many Degenerates in Utah," *Join Hands* 7 (December 1976-January 1977), LGBT Periodicals Collection, New York Public Library.

According to a recent survey of transgender and gender nonconforming people in the Pennsylvania prison system from the Philadelphia-based Hearts on a Wire Collective, transgender and gender nonconforming prisoners tend to spend longer periods of time in prison and are more likely to be denied parole. This is not simply the product of overt anti-trans attitudes, but the ways that transphobia is structured into the entire prison industrial complex, including post-release resources. For example, trans people are often ineligible for housing hat satisfies requirements for parole; transitional housing is often segregated by birth sex and not equipped to deal with gender variance. Pascal Emmer, Adrian Lowe, and R. Barrett Marshall, *This is a Prison, Glitter is Not Allowed: Experiences of Trans and Gender Variant People in Pennsylvania's Prison System* (Philadelphia: Hearts on a Wire Collective, 2011).

[84] Loftin and *Join Hands*, "The Life and Death of a Gay Prisoner."

[85] Ibid., 138.

Prisoners also described a system whose idea of rehabilitation was overtly hetero- and gender normative and that actively viewed homosexuality and gender nonconformity as lack of rehabilitation. One queen confined in the segregated unit at Vacaville claimed that s/he was told that one of the conditions s/he had to meet in order to be released into general population was that s/he had to stop plucking hir eyebrows and let them grow back. A *Join Hands* reporter explains, "What rehabilitation means for a gay prisoners is that he becomes straight. As long as you persist in being gay, especially if you flaunt it, you'll just stay in prison. Because in California's indeterminate prison sentence system, you get a sentence of the minimum to life and the criterion for release is that you become rehabilitated."[86]

Join Hands and other prisoner newspapers that were inclusive of gay and trans prisoners in the 1970s were rife with similar complaints and analysis. These prisoners understood their segregation and the violence they experienced as deliberate, interconnected, and punishment for being gay and/or gender nonconforming. They did not describe their experiences as individual discrimination but as punishment for their gender and sexual deviance. In other words, these were not the actions of a few or even many biased individuals but the actions and logic of a hetero- and gender normative system that targeted queerness and gender and sexual deviance for elimination, punishment, and containment.

[86] *A00494* Join Hands.

Dehumanization as "Protection"

By the late 1970s and 1980s, many prison and jail officials began to recognize that their populations included transsexual prisoners. As they adopted policies and practices to manage this "new" type of prisoner, they utilized similar practices and rhetoric that treated gender nonconformity and transsexuality as a security threat. For example, in 1977, Diane Quirros, a Latina trans woman, entered the New York State prison system to serve a six- to twelve-year sentence, becoming, according to prison officials, New York State's first transsexual prisoner. While there certainly were trans women incarcerated in New York State before Quirros, she seems to have been the first acknowledged by the New York State prison officials. This new "recognition" probably reflected the increased media and legal attention on trans women.[87] Quirros, who had lived as female since she was a teenager and had taken hormones prior to her incarceration, described herself to a reporter as beautiful and feminine, with long hair that she loved. At the reception and classification center, prison staff shaved her head, strip searched her, and then sent her to segregation because, as a sergeant explained, she "was a threat to security."[88]

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[87] For example, Quirros entered New York state prison the same year that the New York Supreme Court ruled the United States Tennis Association had discriminated against Richards when they barred her from playing as a woman following her transition. Richards v. USTA, 400 NYS 2d 267 (Sup. Ct. 1977). Richards was perhaps the most widely known trans woman at the time and her case received quite a bit of media attention.

[88] Ralph Gardner Jr., "Prison of Gender," *The Soho News*, February 4, 1981, Folder: Transexualism, International Gay Information Center collection – (Ephemera—subjects), New York Public Library. Quirros' description of the intake process reveals that it was a traumatic experience for her, especially when they shaved her hair, during which she "cried and begged them to stop." After she was moved out of the reception center, she was allowed to regrow her hair. Like many of the gender nonconforming prisoners that I discussed in the previous chapter, Quirros made her own makeup, despite it being considered contraband. She also repeatedly requested to have sex reassignment treatment while incarcerated, but was refused by the department of corrections. Quirros came to the attention to reporters not when she first entered prison, but because David Berkowitz, known as the Son of Sam serial killer, reportedly fell in love

While Quirros was later allowed to grow her hair back out, throughout her incarceration, she was shuffled between maximum security prisons. Quirros was classified as maximum security not because she was violent but because she was seen as a problem for the internal security of the New York State prison system. Martin Horn, the assistant to the New York State Commissioner of Corrections at the time, described her as such: "[Quirros] is an exhibitionist and a flirt…He [*sic*] incited other inmates to come on to him." He explained that whenever officials moved Quirros, she "attracted trouble" and officials would "quickly pass her off to another prison." Quirros denied that she flirted and said that she did not engage in sex work. She explained that "the first thing I do when I get to a prison is to get myself a little boyfriend" in order to protect herself.[89] Despite this strategy, she was gang raped at least once and was subject to constant sexual pressure and harassment from other prisoners and staff.[90] Quirros described her experience in the maximum security prisons as "a living hell" and "a nightmare," but not necessarily because of the rape and sexual harassment. Instead, she points to the violence of the isolation of maximum security lock up as she told reporters that she would "rather deal with the rapes than be locked up into one of those bird cages 23 hours a day."[91]

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with her while they lived in the same cellblock. Once this came to the prison officials' attention, she was moved for her own safety. Paul Ellman, "Son of Sam's Heartthrob is Transsexual," *New York Post*, February 6, 1981, Folder: Transsexualism, International Gay Information Center collection – (Ephemera—subjects), New York Public Library.

The practice of shaving newly processed male-classified prisoners, including trans women, continues today in New York State. Williams interview.

[89] Gardner, "Prison of Gender."

[90] Quirros also reported that she had a sexual relationship with a guard, who also brought her hair dye and makeup from the outside. However, most guards verbally and physically harassed her: "They'd call me 'freak' and 'the thing.' They gave me the worst jobs. I was slapped and punished a few times in my face and in my breasts." A prison official explained, "Correctional officers have a macho thing. They don't know how to deal with Diane. It's a question of fear." Ibid.

[91] Ibid.

Horn's descriptions of Quirros echoed past descriptions of gender nonconforming prisoners in men's institutions as queer threats, sexually manipulative, and intentionally creating violence and chaos. As prison administrators did in the past, Horn showed little concern about the violence Quirros experienced and categorized her efforts to protect herself as pathological and deserving of punishment. He refused to recognize or respect Quirros' gender identity as he continued to refer to her as "he," reiterating New York State's refusal to recognize her womanhood by placing her in men's institutions. In doing so, Horn dehumanized Quirros, negating her right to safety, bodily integrity, and gender self-determination.

Over the past three and a half decades, prison officials began to favor justifying segregation as protecting trans and gender nonconforming prisoners from (prisoner-perpetrated) violence. Nevertheless, trans and gender nonconforming prisoners have been treated very similarly to Quirros, and prison officials continue to express concern about the threat of their prisoners' queer dangerousness. The continuation of portraying trans and gender nonconforming prisoners as a threat has been most clearly articulated in prison officials' responses to the lawsuits brought by trans prisoners challenging the conditions of their incarceration, as well as the courts' reasoning for finding not only segregation but also violent and isolating conditions constitutional and justified.

Approximately a decade after Quirros entered the New York State prison system, Lavarita Meriwether sued the Indiana Department of Corrections, challenging, in part, her indefinite confinement in administrative segregation. Within the Indiana prison system, Meriwether—who identified as a transsexual woman, had been taking hormones

for nearly a decade, and had undergone a number of gender-affirming surgeries prior to her incarceration—was confined in segregated "protective custody" units at two different men's institutions for months at a time. In her complaint, Meriwether told of constant harassment, violence, and sexual assault at the hand of prison officials and other prisoners both in the general population and in segregation. Within the segregated units, she was denied access to adequate recreation, living space, vocational and educational programs, and other resources.[92]

An Indiana district court dismissed her claim, arguing that her confinement in segregation was "a means of assuring the safe and efficient operation of a prison on a day-to-day basis."[93] While the Seventh Circuit Court of Appeals reversed the district court's dismissal, calling it "premature," the court largely affirmed the lower court's reasoning. The court expressed concern that Meriwether had thirty years more to serve, during which she could remain in segregation; nevertheless, they argued that determining whether prolonged segregation constitutes cruel and unusual punishment and was therefore unconstitutional is at least in part reliant on "the existence of feasible alternatives."[94] They stated:

> A prisoner such as [Meriwether] poses particularly serious management problems for prison officials. Given her transsexual identity and unique physical characteristics, her being housed among male inmates in a general population cell would undoubtedly create, in the words of the district court, "a volatile and explosive situation." Under such circumstances it is unlikely that prison officials would be able to protect her from the violence, sexual assault, and harassment about which she complains.[95]

[92] Meriwether v. Faulkner, 821 F.2d 408 (2d Cir. 1987).
[93] Quoted in *Meriwether* at 414.
[94] Ibid. at 416.
[95] Ibid. at 417.

Here we can see prison officials' shifting rhetoric. Meriwether was simultaneously a "serious management problem" (and therefore in need of punishment) and a vulnerable prisoner in need of protection. While this reasoning may seem contradictory, the court's logic ultimately made them compatible because the "protection" that the Indiana Department of Corrections provided was in the form of violent, isolating segregation, where the same victimization they claimed to be protecting her from continued. "Protection" of Meriwether in practice became protection of Indiana prison facilities from the disruption of her queer, feminine body and gender identity and punishment of Meriwether's queer dangerousness.

Since the early 1980s, security management has become an important tool used by prison officials to argue for the constitutionality of indefinite segregation. As Colin Dayan has shown, in the late 1970s and early 1980s, the Supreme Court began to "defined away the substance" of constitutional protections for prisoners, especially the Eighth Amendment's ban on cruel and unusual punishment.[96] A series of Supreme Court opinions created a distinction between "administrative segregation" (including "protective custody") and "disciplinary segregation" in prison administrators' constitutional obligation. The latter requires due process procedures, such as written notice of charges, a hearing, or an opportunity to defend oneself; the former does not. The Court has said that it must extend prison administrators a great deal of deference to their expertise, especially regarding security concerns.[97] Even if the conditions of confinement are the same—and they often are—this linguistic distinction makes these classifications

[96] Dayan, "Legal Slaves and Civil Bodies," 73.
[97] Joan Dayan, "Held in the Body of the State: Prisons and the Law," in *History, Memory, and the Law*, ed. Austin Sarat and Thomas R. Kearns (Ann Arbor, MI: University of Michigan Press, 1999).

legally distinct. Protection becomes security for the institution, which becomes punishment for the segregated prisoner. This legal reasoning legitimizes the violent and isolating conditions that Meriwether and other trans prisoners, such as Jackie Tates, live in as "protective" and necessary.

Indeed, the Seventh Circuit's *Meriwether* decision relies on these opinions to find that the use of administrative segregation was a legitimate security management tool and that prisoners, including Meriwether, do not have a liberty interest or due process rights to be held in general population rather than segregation.[98] Among the precedents that the Seventh Circuit relies on is their opinion in *Caldwell v. Miller*, decided the year before.[99] *Caldwell* addressed the conditions of confinement of the lockdown of the United States Penitentiary at Marion, Illinois, then the highest security federal prison in the US. In 1983, administrators put Marion on permanent lockdown, confining prisoners to their cells for twenty-four hours per day and effectively suspending all prisoner activities, following the murder of two guards and one prisoner. The court found that permanent lockdown did not constitute cruel and unusual punishment, arguing that the difference between conditions of lockdown and the "normal" conditions at Marion "is one of degree

[98] See Hewitt v. Helms, 459 U.S. 460 (1983). As the Seventh Circuit explained, "This result is necessitated by the fact that prison officials have broad administrative and discretionary authority over the institutions they manage and that prisoners retain only a narrow range of protected liberty interests. In *Hewitt v. Helms*, the Supreme Court expressly held that a prisoner has no protected liberty interest in being confined in the general prison population rather than in restrictive segregation…Given the broad uses of administrative segregation – 'to protect the prisoner's safety, to protect other inmates from a particular prisoner, to break up potentially disruptive groups of inmates, or simply to await later classification or transfer' – the Court ruled that inmates should reasonably anticipate being confined in administrative segregation at some point in their incarceration." *Meriwether*, 821 F.2d at 414.

[99] Caldwell v. Miller, 790 F2d 589 (7th Cir. 1986).

and not of kind" and therefore did not constitute "additional punishment."[100] In making this argument, the court explained that they "accord, as we must, prison officials wide-ranging deference in adopting policies that are needed to preserve internal order and security" and that permanent lockdown did not "intrude upon Caldwell's personal security in a way that would set them apart from normal confinement."[101]

This lockdown of Marion, which ultimately lasted twenty-three years, became the first of a "new generation" of segregation units—security housing units (SHU) and supermax prisons, which have introduced new technologies of extreme isolation and sensory deprivation into the experience of segregation.[102] Over the past few decades, departments of corrections around the US have relied on these new extreme segregation units to "manage" their most "problematic" prisoners. While these units are sometimes used for disciplinary placement, they are also often used for indefinite detention of certain groups and prisoners viewed as most dangerous and threatening to the security of the prison system. But as the history of Marion shows, these units do not just "bury" or warehouse individual prisoners in isolation but targeted problematic groups in order to modify behavior.

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[100] Ibid. at 604, 605. The following is a description of the conditions of confinement that they found constitutional: "Immediately following the October 23, 1983, lockdown, all indoor and outdoor recreation and exercise privileges were suspended, and Caldwell was confined to his cell twenty-four hours a day. Approximately one month later, Caldwell and the other inmates were permitted one hour of daily indoor exercise. By May of 1984, seven months after the lockdown, Caldwell was given an hour of weekly outdoor exercise in addition to that allowed indoors. In June of 1984, Caldwell's outdoor exercise privileges increased to two hours weekly, but for each hour spent outdoors he received an hour less indoors." Ibid. at 600.

[101] Ibid. at 596.

[102] In 1994, ADX Florence was opened to replace Marion as the highest security prison (a supermax) in the Federal Bureau of Prisons. The lockdown then ended, and Marion was reclassified as a medium security prison.

Built as a replacement for Alcatraz in 1963, Marion was intended to house "the worst of the worse." By the early 1970s, federal prison administrators began to use Marion to contain political prisoners and prison activists, particularly black nationalist and other politicized people of color, within the federal system. Historian Alan Eladio Gómez explains that administrators sought to contain "problem prisoners" in one institution and employed "a series of behavior-modification techniques, as well as physical and psychological torture" in order to control dissent.[103] Marion's behavior-modification programs were "designed to 'cure' deviants," to control and forcefully change prisoners' behavior, beliefs, and thoughts.[104] In other words, they not only attempted to contain and stop dissent but alter how these prisoners behaved, what they thought, and even what they believed, not for rehabilitative purposes but for control, to render them docile. The prisoners who underwent these programs would eventually be placed in segregation units as they continued to resist and dissent. These units became control units, which are the model for today's SHUs, supermax prisons, and other extreme security classifications, likely including Sacramento County Jail's T-Sep housing.

Gómez, Dayan, Dylan Rodríguez, and Lorna A. Rhodes have argued that these units constitute a new kind of prison technology, which is meant to strip a prisoner of their sense of self and bodily integrity.[105] This new technology relies on the

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[103] Alan Eladio Gómez, "Resisting Living Death at Marion Federal Pentientiary, 1972," *Radical History Review* 96 (Fall 2006): 59.
[104] Ibid., 59. See also, Stephen Dillon, "Fugitive Life: Race, Gender, and the Rise of the Neoliberal-Carceral State" (PhD diss., University of Minnesota, 2013).
[105] Gómez, "Resisting Living Death"; Dayan, "Legal Slaves and Civil Bodies"; Dayan, "Held in the Body of the State"; Dylan Rodríguez*, Forced Passages: Imprisoned Radical Intellectuals and the U.S. Prison Regime* (Minneapolis, University of Minnesota Press, 2006); Lorna A. Rhodes, *Total Confinement:*

dehumanization of prisoners to justify its violence as necessary and legitimate.[106] These units have been constructed and used to warehouse the most "threatening" and problematic prisoners, those deemed too dangerous for the prison yard and even for human interaction. According to prison administrators, these units do not "punish" but segregate prisoners in accordance with the needs of the internal security of the prison system. But, what counts as most threatening is usually determined by race and racialization. Indeed, in most systems, people of color are disproportionately housed in such units.[107] In particular, the most commonly identified group "threat" is the euphemistically termed "security threat groups," which officially stands in for "gang members," often a codeword for specific racially criminalized groups of black and brown men. These "security threat groups" are seen as (racially) dangerous and particularly violent and uncontrollable because of their racialized masculinity.[108] In practice, many black and brown men in prisons are profiled as "gang members" because of their blackness or brownness—often coupled with a certain tattoo, friend, or other "attribute"

Madness and Reason in the Maximum Security Prison (Berkeley, CA: University of California Press, 2004). See also Christian Parenti, *Lockdown America: Policing and Prisons in the Age of Crisis* (New York: Verso, 1999).

[106] Despite the often extreme conditions of these new units, they are not aberrant in the US prison system, which houses millions of people in cages for part or all of their lives. As Ruth Wilson Gilmore has argued, the conditions of the entire prison system relies on the dehumanization of those living in cages. Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (Berkeley, CA: University of California Press, 2007).

[107] See for example, Margo Schlanger, "Symposium Introduction and Preliminary Data on Racial Disparities," *Michigan Journal of Race and Law* 18 (2013).

[108] Of course, there is violence perpetrated by both men of color and white men in gangs. I do not mean to dismiss this violence, which can be a serious problem for many people inside and outside prisons, including trans and gender nonconforming people. However, prison administrators often blame violence in prisons entirely or almost entirely on racialized gangs, while also often, although not always, neglecting to mention how white supremacist gangs are also part of the "gang problem." Prison officials profile many men of color in prisons as actual or suspected gang members, a designation that can prolong their sentences, get them segregated, or make them vulnerable to staff violence. This focus on racialized gang violence occludes systemic violence within the prison system that is experienced by all prisoners but also in particular ways by those who are or are suspected to be involved in gangs.

in order to justify the presumptively "colorblind" designation—regardless of their behavior or actual affiliation. As Dayan, Rodríguez, and Rhodes argue, these new units have been created to contain a racialized threat, a threat that remains interconnected with the original targeted threat, politically radical prisoners, particularly politicized prisoners of color.

This racialized threat is key to courts finding administrative segregation in control units constitutional. For example, in *Caldwell*, the Seventh Circuit explained that their opinion was influenced by the type of prisoners housed in Marion, arguing that such prisoners "cannot be free of discomfort."[109] Dayan argues that the destruction of constitutional protections for prisoners has relied on "negating the humanity of the confined body," or the dehumanization of prisoners, as well as constructing violent prison conditions as ordinary and mundane.[110] This legal dehumanization—what Dayan calls "negative personhood"—couples with and legitimizes the material dehumanization of indefinite solitary confinement, which can strip a prisoner of their sense of self, their bodily integrity, and their sanity, arguably the aim, at least in part, of these units.[111] Similarly, Lisa Cacho argues that permanently (racially) criminalized groups, of which "gang members" are one of her primary examples, become "ineligible for personhood." These criminalized populations enter the criminal legal system as targets of containment, not as subjects or people in need of protection.[112]

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[109] *Caldwell*, 790 F2d at 601. Key to this finding was that the court found that the conditions of lockdown were no "more than incontinence and discomfort." Ibid, 601. See also *Meriwether*, 821 F.2d 408.
[110] Dayan, "Legal Slaves and Civil Bodies," 78.
[111] Colin Dayan, *The Law is a White Dog: How Legal Rituals Make and Unmake Persons* (Princeton, NJ: Princeton University Press, 2011), xii. Dayan argues that the prison and the law have become "collaborators in a new form of punishment that could evade constitutional claims." Ibid., xvi.
[112] Cacho, *Social Death*.

Dayan argues that these units are something new, that they have changed the use of isolation by making it a management tool rather than solely a disciplinary one. While these units are certainly something new in the extent of their capacity to isolate and sensorily deprive prisoners, the use of indefinite isolation for management is not new, as I have discussed. Isolation, segregation, and dehumanization have long been used to manage certain types of prisoners viewed as particularly threatening to the prison as an institution, including gender and sexually deviant prisoners as well as other types, such as mentally ill, developmentally disabled, and groups of color.[113]

Gender nonconforming and trans prisoners described this dehumanization and the use of segregation to manage their deviance and change their behavior and sense of self as they discuss the conditions of their segregation over the past few decades. For example, the feminine gay prisoner who was imprisoned in the Deuel Vocational Institution in Tracy, California, in the 1970s described the purpose of segregation as "brainwashing or pressuring" the segregated gender nonconforming and gay prisoners to become heterosexual and "to lose our total identity as a person." He explains that he and others had to "fight to keep our minds intact."[114] Similarly, Tates described one of the effects of T-Sep as causing her "to hate the fact that I was transgender."[115] More recently, Paula, a trans woman incarcerated in Texas, described her 2007 initiation into a new prison: "From the CO's to the Captain on shift, I was stripped of my identity, ridiculed,

[113] Racial segregation in prisons, while not isolating, was a management tool to keep different types or prisoners separate, especially to keep prisoners of color from corrupting white prisoners. For example, in his 1912 prison memoir, Donald Lowrie described the existence of "Kid Alley," "Crazy Alley," and "China Alley," indicating that San Quentin segregated at least young prisoners, mentally ill prisoners, and Chinese prisoners. Donald Lowrie, *My Life in Prison* (New York: Mitchell Kennerley, 1912).
[114] Ackert, letter to the editor.
[115] Garvin, "What's She Doing in the Men's Jail?"

called names, and told I must become a man now! My head was shaved, nails cut short, put on exhibition and for 3 days the ranking officers tried to find a way to get my finger and toe polish off."[116] The prisoner at Deuel, Tates, and Paula describe this stripping of their sexual and gender identities and subjectivities as intentional, a part of the dehumanizing intent of segregation and incarceration in general. Over the past few decades, the courts have officially legalized this dehumanization, constructing the prisoners who experience it as at fault and deserving.

While gender nonconforming and trans prisoners were not the primary targets for these new control units, as courts and prisons created the legal and material infrastructure of this new generation of indefinite segregation, the segregation of trans and gender nonconforming prisoners continued, informing and being informed by this (somewhat) new technology of racialized and sexed management, incapacitation, and dehumanization. In *Meriwether*, the Seventh Circuit secured trans and gender nonconforming prisoners' experiences of segregation to the work of these control units as they argued that Meriwether's claim was "indistinguishable from *Caldwell* and was therefore properly dismissed."[117] By the late 1980s, courts had designated the targeting of trans and gender nonconforming prisoners as "clearly a proper utilization of administrative segregation," enfolding these prisoners as a type of "security threat group," even if they are not officially labeled as such.[118]

While this current security threat classification system is designed to contain a racialized threat, it is also designed to contain gendered and sexual ones. Most scholars

[116] Paula W., "Paula W.'s Story," *Black &* Pink *Newsletter* (February 2010): 2.
[117] *Meriwether*, 821 F.2d at 414.
[118] Farmer v. Carlson, 685 F. Supp. 1335, 1344 (M.D. Penn. 1988).

who have written about this new generation of indefinite segregation have focused on its racialized logics and practices to the near total exclusion of gender and sex. Gang members, the official "security threat group," are viewed as especially threatening and violent because of their racialized masculinity. Gender nonconforming and trans prisoners are also viewed as a gendered and racialized threat—even if the racialization is often less overt. These prisoners embody a racialized (queer) feminine threat that is reliant on constructions of black femininity and femaleness—as well as other forms of racialized femininity—and also constructions of queer dangerousness that have utilized similar racialized language and logics as excessively sexual, sexually dominant and manipulative, and deviantly and dangerously feminine. It is also not a small point that incarcerated trans and gender nonconforming people are disproportionately black. Women's prisons and their administrators function under similar logics, although the use of security housing units or supermax facilities is less common and the concern about gangs much less present. Gender nonconforming and trans prisoners are viewed as threatening because of their often racialized (queer) masculinity and targeted for disciplinary segregation because administrators believe that they are more violent, more likely to flagrantly break rules and be disrespectful, and more likely to engage in sexual activity.[119]

One hundred years of designating queerness and gender nonconformity as dangerous and threatening, of dehumanizing gender nonconforming and trans prisoners and managing them through segregation, continues to structure the treatment of trans and

[119] Arkles, interview.

gender nonconforming prisoners today. This living history created the social and material conditions that allow trans and gender nonconforming prisoners around the US to be thrown in maximum security prisons, isolation units, and other types of administrative segregation and high security lockups, often indefinitely. Whether or not prison officials have explicitly articulated it as such, the totality of the conditions in which gender nonconforming and trans prisoners live remains punitive. Prisoners are punished for their sexual and gender deviancy, as the prison system constructs gender nonconformity as *dangerous*, as a threat to institutional security. Because security is the central concern and reason for the existence of prisons, queerness and gender nonconformity become dangerous and threats to the prison system itself.

This long and continuing history of systematic segregation of trans and gender nonconforming people within penal institutions reveals that racialized gender normativity is integral to understandings of security, practices of security maintenance, and the logics and practices of the US prison system as a whole. Safety, security, and order are hetero- and gender normative. They require homogeneity, whiteness, and normativity. Difference, nonnormativity, nonwhiteness, and queerness disrupt. They are contrary to institutional security and a threat to the normative functionings of the US prison system. Notions of security, which are at the heart of the organization and purpose of the prison system, are set up in opposition to racialized queerness. The rhetoric and practice of maintaining penal security relies on and reproduces constructions of racialized, gendered, and sexual threat that mark all prisoners as others, as outsiders, as threats, and as undeserving of life, safety, and humanity. This racialized queer threat bears out most

obviously in how prison administrators manage and discuss sexual violence within penal institutions.

Chapter Three

"Designed to Abuse": Queer Deviance and Carceral Sexual Violence

In 2008, Angela Brandywine Toth, a white trans woman who had been incarcerated in California since 1992, sued the California Department of Corrections and Rehabilitation (CDCR), challenging the conditions of her incarceration. In her lengthy complaint, Toth documented nearly constant harassment, discrimination, and physical and sexual violence, including gang rapes and forced prostitution, perpetrated by other prisoners and staff throughout her imprisonment. Staff routinely refused to protect her or process her grievances, often simply "losing them." They refused to believe that she was sexually assaulted, insinuating that because she was a "homosexual," she "must have asked for it."[1] They denied her medical attention after being raped and for other injuries and medical issues. When she reported sexual assaults, they laughed at her and made jokes about her body. She was placed with cellmates who were physically and sexually abusive, and she reported hearing from other prisoners that staff were intentionally placing her in cells with these men. She also reported other insidious and mundane forms of violence, including theft of property, public strip searches, abusive cell searches, and false disciplinary reports. Prison administrators, including medical staff and lawyers, refused to recognize her transsexuality and her identity as female. Most of the doctors

[1] First Amended Complaint at 7, Toth v. Yates, No. 08-01219 (E.D. Cal. Sept. 1, 2008). For example, during one instance, Toth describes being assaulted by a number of officers, who physically beat her as they called her a "piece of shit", "faggot", "cocksucker", "freak", and other names. During this encounter, they fractured her neck. Following the assault, she received inadequate medical attention and continued to experience assault from both staff and other prisoners, which caused her neck injury to never heal properly. Ibid. See also *Toth v. Schwartzenegger* (No. 11-00247, E.D. Cal.); Order Dismissing Plaintiff's Amended Complaint, *Toth* (No. 11-00247), Aug. 30, 2012.

and psychiatrists she encountered in California prisons also refused to diagnose her as a transsexual and refused to provide her with hormone treatment. One doctor told her that staff and prisoners would stop harassing and assaulting her if she chose to no longer be transgender. The violence and harassment she experienced was not confined to her time in general population but followed her into administrative segregation and protective custody, where she continued to be beaten, raped, and denied medical treatment.

Toth's horrifying experiences are, unfortunately, not isolated or rare. As she repeatedly asserts in her complaints, discrimination, harassment, and violence against LGBTQ prisoners is endemic in the US prison system, and trans and gender nonconforming prisoners, especially transfeminine people in men's prisons, experience some of the highest rates of sexual violence.[2] Throughout her complaints, Toth refuses to

[2] For example, a study of sexual assault in California men's prisons conducted in the mid-2000 found that 59% of transgender prisoners reported being sexually assaulted at some point in their incarceration, a rate that was thirteen times higher than the entire population. Transgender respondents also often reported multiple incidents. This study found that transgender, non-heterosexual, mentally ill, and black prisoners were considerably more vulnerable than other prisoners. The study also found that transgender prisoners were far less likely to report rapes or request medical attention. Valerie Jenness, Cheryl L. Maxson, Kristy N. Matsuda, and Jennifer Macy Sumner, "Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault," *UC Irvine Center for Evidence-Based Corrections Bulletin* 2, no. 2 (June 2007). See also, Alex Coolman, Lamar Glover, and Kara Gotsch, *Still in Danger: The Ongoing Threat of Sexual Violence Against Transgender Prisoners* (Los Angeles: Stop Prisoner Rape and the ACLU National Prison Project, 2005); D. Morgan Bassichis, *"It's War in Here": A Report on the Treatment of Transgender and Intersex People in New York State Men's Prisons* (New York: Sylvia Rivera Law Project, 2007); *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the US* (New York: Amnesty International USA, 2005); Pascal Emmer, Adrian Lowe, and R. Barrett Marshall, *This is a Prison, Glitter is Not Allowed: Experiences of Trans and Gender Variant People in Pennsylvania's Prison System* (Philadelphia: Hearts on a Wire Collective, 2011).

In addition, the pages of newsletters and journals for incarcerated LGBT people, such as *Black &* Pink *Newsletter*, *GCI TIP Journal*, feature many horrifying stories of sexual violence. See for example, William (Lilly) P., "Lilly's Story," *Black &* Pink *Newsletter* (March 2010); "A Letter from DONNA," *GIC TIP Journal* 1, no. 3 (Summer 2001); Paula W., "Paula W.'s Story," *Black &* Pink *Newsletter* (February 2010); PK Bunny, "Massachusetts Survivor," *GIC TIP Journal* 1, no. 3 (Summer 2001); Donna, "Gay, Lesbian Bi and Transgendered Prisoners: Their Silent Crisis," *GIC TIP Journal* 2, no. 1 (Winter 2001); Robert Linnet, "The Cruel & Unusual Punishment of She-Males Why Her Warden Calls Her Mister," *GIC TIP Journal* 2, no. 1 (Winter 2001); "Qualified Immunity Denied in Washington Guard's Rape of Transsexual Prisoner," *GIC TIP Journal* 2, no. 2 (Spring 2002); "Kerri," *GIC TIP Journal* 2, no. 3 (Summer 2002); "Eyeman Arizona Sister," *GIC TIP Journal* 3, no. 1 (Winter 2002); "Myqy," *GIC TIP Journal* 4, no. 1 (Winter

individualize or exceptionalize her experiences; instead, she argues that they are the product of the "heteroconforming" culture of the CDCR that "clearly is designed to aggravate and abuse her" and other gay, trans, and gender nonconforming prisoners.[3]

That gender nonconforming and trans prisoners are particularly vulnerable to sexual violence in men's prison would probably surprise few people. Current popular, social scientific, and other representations of men's prisons portray them as violent, especially sexually violent. Over the past few decades, the commonness of prison rape has become a frequently heard pop culture trope, the punch line of jokes and the threatening promise of TV cops. These representations portray prison sexual violence an inherent feature of (men's) prisons because of the supposedly inherently violent nature of prisoners. This supposedly inherently violent nature of prisons and prisoners is also often racialized as representations focus on racialized gang violence and black male rapists.[4] On the other hand, pop culture, as well as social scientific research and the law, tend to barely acknowledge the existence of sexual violence in women's prisons. In most dominant representations of prisons, rape is perpetrated only by excessively violent (often black) male prisoners, which works to obscure and justify the violence of incarceration and most staff-perpetrated violence. These representations have a long history grounded

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2003); "Vanity's Story," *GIC TIP Journal* 4, no. 4 (Fall 2004); Valjean Royal, Written testimony to the National Prison Rape Elimination Commission, *Black and Pink Newsletter* (June 2010).

[3] First Amended Complaint at 28, *Toth*, No. 08-01219. Toth further explains, "The system is not made for Transgender or Gay prison Queens, and is only meant for 'real' men [Heteronormativity]." Ibid., 7.

In her complaint in a different lawsuit, Toth makes the case that the totality of prison conditions are cruel and unusual, inhumane, and inadequate for LGBTQ prisoners. She therefore asks the district court for injunctive relief to force the CDCR to change its transphobic, homophobic culture. In order to do so, Toth provides a detailed list of 31 policies and practices that the CDCR should adopt. Ibid.; Order Denying Plaintiff's Motion for a T.R.O. and Prelim. Inj., *Toth* (No. 11-00247), Sept. 7, 2011.

[4] Kim Shayo Buchanan, "Our Prisons, Ourselves: Race, Gender and the Rule of Law," *Yale Law and Policy Review* 29, no 1 (2010).

in penological and social scientific constructions of sexual violence in prisons and the prisoner culture that supposedly creates that violence.

This chapter examines how prison administrators, social scientists, and the law have constructed and addressed sexual violence, particularly against trans and gender nonconforming prisoners, in penal institutions. Since the mid-twentieth century, prison administrators and social scientists have produced dominant narratives that construct prisons as sites of endemic, uncontrollable sexual violence and disorder, generally perpetrated by (racialized) hypermasculine male prisoners who are often incited to sexual violence by gender nonconforming prisoners. I argue that these narratives simultaneously (and contradictorily) constructed gender nonconforming and eventually trans prisoners as hypersexual and, therefore, unrapable and as inevitably subject to sexual violence. As such, sexual violence has long been a key aspect of the discursive and material penal management of gender nonconforming and trans prisoners. These dominant narratives work to obscure how sexual violence is institutionalized in penal management. Prison administrators have long used sexual violence as a tool of control, a tool that at once punishes racialized, sexual, and gender deviance and that produces understandings of queer dangerousness and security threat. By portraying prisoners as (queerly) dangerous and sexual security threats, prison administrators become protectors and quotidian, institutionalized forms of sexual violence—what I call carceral sexual violence—are normalized and produced as necessary in the name of security. In the last two sections of the chapter, I examine how this narrative of the impossibility and inevitability of sexual violence against gender nonconforming and trans prisoners was structured into legal

understandings of sexual violence as courts and eventually legislatures began to address sexual violence in penal institutions over the last few decades. By examining Eighth Amendment jurisprudence and the recent Prison Rape Elimination Act of 2003, I argue that these narratives often legitimize or obscure carceral sexual violence even as the law was purportedly eliminating it.

Drawing from feminist, particularly women of color feminist, activism and scholarship, this chapter approaches sexual violence as a tool of power and control, as a tool of systems of oppression—including heteropatriarchy, white supremacy, and colonialism—and as not only punitive and repressive but also productive.[5] As Andrea Smith argues in *Conquest: Sexual Violence and American Indian Genocide*, sexual violence is both a tool of direct sexual bodily violence and "a tool by which certain people become marked as inherently 'rapable.'"[6] This construction of rapability or violability relies on the production of racialized sexual nonnormativity and

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[5] See for example, Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide* (Cambridge, MA: South End Press, 2005); Andrea Smith, "Not an Indian Tradition: The Sexual Colonization of Native Peoples," *Hypatia* 18, no. 2 (Spring 2003); Incite! Women of Color Against Violence, *The Color of Violence: The INCITE! Anthology* (Cambridge: South End Press, 2006; Angela Y. Davis, *Women, Race, and Class* (New York: Vintage Books, 1981); Angela Y. Davis, "JoAnn Little: The Dialectics of Rape," in *The Angela Y. Davis Reader*, ed. Joy James (Malden, MA: Blackwell Publishing, 1998); Joy James, *Resisting State Violence: Radicalism, Gender, and Race in U.S. Culture* (Minneapolis, MN: University of Minnesota Press, 1996); Estelle B. Freedman, *Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation* (Cambridge, MA: Harvard University Press, 2013); Antonia I. Castañeda, "Sexual Violence in the Politics and Policies of Conquest: Amerindian Women and the Spanish Conquest of Alta California," in *Building with Our Hands: New Directions in Chicana Studies*, ed. Adela de la Torre and Beatríz M. Pesquera (Berkeley, CA: University of California Press, 1993); Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color," *Stanford Law Review* 43 (July 1991).

While Susan Brownmiller and Catherine MacKinnon often failed to understand how race and racialized systems of oppression were integral parts of constructions and experiences of sexual violence, they did important work theorizing rape as a tool of heteropatriarchy and an act of power and domination (although they differed in their theorizations about rape's relationship to sexuality and desire). Susan Brownmiller, *Against Our Will: Men, Women, and Rape* (New York: Fawcett Columbine, 1975); Catherine MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989). See also, Ann J. Cahill, *Rethinking Rape* (Ithaca, NY: Cornell University Press, 2001).

[6] Smith, *Conquest*, 3.

dangerousness. Long dominant constructions of black and brown sexual excess and danger produces people of color as inferior, primitive, deviant, and undeserving of citizenship and, in doing so, justifies violence against and state control over them.[7] Sexual violence has been used to destroy the perceived humanity and personhood of oppressed people, both on individual and community-wide levels. Put another way, the embodied experience of sexual violence is an outcome of and reproduces constructions of criminality, deviance, danger, and threat as embodied in nonwhiteness (particularly blackness) and sexual and gender nonnormativity.[8]

Smith advocates for a broad understanding of sexual violence that includes direct bodily assault by another person (or persons) but also violence perpetrated by the state. Drawing from Smith's definition of sexual violence, I understand sexual violence as encompassing a broad range of forms of violence that target the sexual (as in sexuality) or the sexed (as in gender or sex-classified) body. This definition includes violent sexual penetration and touching as well as sexual harassment, segregation based on sexuality or gender nonconformity, denial of gender-related medical treatment, sterilization or other disruptions of an imprisoned person's reproductive capacity, nonconsensual sex-classification, and other related violence.[9]

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[7] Joey L. Mogul, Andrea J. Ritchie, and Kay Whitlock, *Queer (In)Justice: The Criminalization of LGBT People in the United States* (Boston, MA: Beacon Press, 2010); Freedman, *Redefining Rape*; Davis, *Women, Race, and Class*; Davis, "JoAnn Little"; Smith, *Conquest*; Smith, "Not an Indian Tradition"; James, *Resisting State Violence*.

[8] James, *Resisting State Violence*. Here, I am also borrowing from and expanding on Ann J. Cahill's conceptualization of rape as an embodied experience. Cahill, *Rethinking Rape*.

[9] In using this definition of sexual violence, I do not mean to imply that all these forms of violence are equivalent. Instead, I use this broad definition in order to help us understand that these forms of violence are interrelated.

Incarceration itself is an intimate form of violence, a violence that targets the body and destroys bodily integrity. Penal staff and administrators have nearly complete control over prisoners' bodies and lives. In jail and prison, prisoners are denied the fundamental ability to protect, defend, and even take care of themselves as they are stripped of most forms of bodily autonomy. As Dylan Rodríguez has argued, through imprisonment, the state dehumanizes prisoners and renders incarcerated bodies as "infinitely fungible objects, available for whimsical and gratuitous productions of bodily and psychic violence, while presumed always already 'dangerous' and criminally disobedient."[10] Rodríguez argues that fungibility is produced from white supremacist, and particularly antiblack, carceral logics, but it is also—and interconnectedly—produced from carceral racialized gender normative logics, which produce all prisoners, but particularly gender nonconforming prisoners, as inherently (racially) gender and sexually nonnormative and dangerous. In practice, the fungibility of prisoners authorizes many forms of carceral violence, many of which are sexual. Put another way, sexual violence is woven into the fabric of incarceration and the logic and mechanisms of carceral violence.[11] The near total control of prisoners and their bodies produces a situation that not only facilitates rape and sexual assault perpetrated by staff with near legal immunity

[10] Dylan Rodríguez, *Forced Passages: Imprisoned Radical Intellectuals and the U.S. Prison Regime* (Minneapolis, University of Minnesota Press, 2006), 149.

[11] This understanding of prisons and incarceration also draws from a long history of trans, gender nonconforming, and gay prisoners and activists, like Toth, arguing that prisons are sexually violent and that sexual violence is used as a tool of control. See for example, Angela Y. Davis, *Are Prisons Obsolete?* (New York: Seven Stories Press, 2003); Assata Shakur, *Assata: An Autobiography* (Chicago: Lawrence Hill Books, 1987); "Dear Prisoners," *Join Hands* 1 (1976), Kinsey Institute Library and Special Collections, Indiana University; Don Cotton, Speech quoted in "Gays Support the SQ Six," *Join Hands* 1 (1976), Ibid.; "Prison Life Behind the Lavender 'H,'" *Lesbian Tide* 6, no. 4 (January/February 1977), LGBT Periodicals Collection, New York Public Library; Anthony Smith, Letter, n.d., Folder 42, Box 13, Broomfield Street Education Foundation Records (M64), Northeastern University Libraries; Donald G. Swaffer, Letter, October 9, 1986, Ibid.; Jason Lydon, interview by author, February 5, 2014, over phone, on file with author.

but also facilitates rape and sexual violence perpetrated by prisoners, often with full knowledge and even support by staff. This situation is worsened by the prison system's authority to classify and discipline prisoners' sex. As Toth's story exemplifies, sexual violence against trans and gender nonconforming people in prisons is multidimensional, pervasive, and institutionalized within the prison system.

Rape, sexual assault, sexual harassment, and coerced sex perpetrated by prisoners and staff is common throughout the US. In men's prisons, while prisoner-perpetrated violence is a pervasive, enormous problem, prisoners identify staff as perpetrators around half of the time and report that staff-perpetrated violence—both sexual assaults and the facilitation of sexual assault perpetrated by other prisoners—is a much larger concern than prisoner-perpetrated violence.[12] In women's prisons, the vast majority of sexual violence is perpetrated by staff.[13] Sexual violence is also integrated into imprisonment in many mundane, institutionalized ways, such as poor and sometimes violent medical treatment, sex classification that refuses to acknowledge a trans persons' gender identity,

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[12] Allen J. Beck, Ramona R. Rantala, and Jessica Rexroat, *Sexual Victimization Reported by Adult Correctional Authorities, 2009-11* (Washington, DC: Bureau of Justice Statistics, January 2014); *The Basics About Sexual Abuse in US Detention* (Just Detention International, August 2013).

The one-half statistic refers to sexual assaults that was officially reported to prison authorities and, therefore, only accounts for a small percentage of all sexual assaults in penal institutions. It also does not address staff involvement or facilitation of prisoner-perpetrated sexual violence. For example, like in Toth's case, staff place prisoners in potentially dangerous situations and refuse to help them. Some prisoners have reported that officers run prostitution rings where some or even all transgender or gender nonconforming prisoners are forced to participate. Dean Spade, Testimony at *Hearing: At Risk: The Gay, Lesbian, and Transgender Populations, Before the Prison Rape Elimination Commission*, San Francisco, California (August 19, 2005); Z Gabriel Arkles to the National Prison Rape Elimination Commission, August 15, 2005, http://archive.srlp.org/files/documents/NPREC_testimony_Arkles.pdf; Chase Strangio and Z Gabriel Arkles to Robert Hinchman, "Docket No. OAG-131; AG Order No. 3143-2010, National Standards to Prevent, Detect, and Respond to Prison Rape," May 10, 2010, http://srlp.org/files/SRLP%20PREA%20comment%20Docket%20no%20OAG-131.pdf; Just Detention International, "The Rape of LGBT Prisoners"; William (Lilly) P., "Lilly's Story"; "Eyeman Arizona Sister"; Buchanan, "Our Prisons, Ourselves."

[13] *"Not Part of My Sentence": Violations of Human Rights of Women in Custody* (Amnesty International, 1999); *All Too Familiar: Sexual Abuse of Women in US Sate Prisons* (Human Rights Watch, 1996).

forced conformity to gender norms, and abusive strip, body cavity, and pat-down searches.[14] Central to this carceral sexual violence, as Toth's experiences demonstrate, is the production of trans and gender nonconforming prisoners as hypersexual and therefore unrapable. Many staff view homosexuality, gender nonconformity, or trans status as a blanket consent to sex or as to blame for sexual violence. In practice, these attitudes lead staff to ignore reports of threats or violence against trans and gender nonconforming prisoners. Some laugh at reports of sexual violence, respond with harassment or threats of further violence, or punish prisoners for defending themselves.[15] In doing so, they

[14] Prisoners are often denied medical treatment, including following a sexual assault. Prisoners in women's facilities report feeling sexually assaulted during gynecological exams, which staff sometimes force them to submit to. In both men's and women's facilities, medical staff sometimes trade health care for sexual favors, or they harass or assault prisoners. Furthermore, medical staff have the authority to decide the gender identity and trans status of a prisoner, including in men's prisons frequently getting to decide if a trans woman has a "legitimate" need for a bra, and with this authority they routinely deny trans and gender nonconforming peoples' identities. Robin Levi, Testimony at *Hearing: At Risk: Sexual Abuse and Vulnerable Groups Behind Bars, Before the Prison Rape Elimination Commission*, San Francisco, California (August 19, 2005); Gabriel Arkles, interview by author, August 12, 2013, Boston, MA, on file with author; Alisha Williams, interview by author, August 19, 2013, New York, NY, on file with author.

The refusal to provide survivors with medical treatment after assaults can not only be physically and mentally disastrous for a survivor, but it also means that no medical record or other types of evidence exist of the assault. Furthermore, when prisoners try to keep and hide physical evidence of an assault, officers will sometimes find it, destroy it, and retaliate against them. Because of these actions, little to no evidence exists, which makes "proving" the assault difficult. Indeed, when prison administrators do investigate rape allegations, they rarely find them substantiated. According to Kim Shayo Buchanan, prison officials report that more than 80% of reports are found to be either "unsubstantiated" or "unfounded." Buchanan, "Our Prisons, Ourselves."

[15] For all of these reasons, prisoners frequently choose not to report rapes or file complaints against other prisoners or staff. If they do, they are potentially subject to violence and retaliation from both other prisoners and staff. Even when they are not intentionally punished for reporting abuse, their experiences of protection are often punitive and violent. For example, prisoners regularly report that they are raped while in administrative segregation, both by other prisoners and by staff. In fact, because segregation is so isolating and takes prisoners away from any kind of community with other prisoners, they are more at risk for sexual violence perpetrated by staff. Coolman, et al., *Still In Danger*; Just Detention International, "The Rape of LGBT Prisoners," in *Hate Violence against LGBT People in the US* (New York: National Coalition of Anti-Violence Programs, 2008); "A Letter from DONNA"; *In the Shadows: Sexual Violence in U.S. Detention Facilities* (Los Angeles: Stop Prisoner Rape, 2006); Masen Davis, et al., to Eric H. Holder, "Preventing the Sexual Abuse of Lesbian, Gay, Bisexual, Transgender, and Intersex People in Correctional Settings: Comments Submitted in Response to Docket No. OAG-131; AG Order No. 3143-2010, National Standards to Prevent, Detect, and Respond to Prison Rape," May 10, 2010; Arkles to the National Prison Rape Elimination Commission; Bassichis, *"It's War in Here"*; Emmer, et al., *This is a Prison, Glitter is Not Allowed*; Gabriel Arkles, "Safety and Solidarity across Gender Lines: Rethinking Segregation of

normalize sexual violence against trans and gender nonconforming prisoners, both invisibilizing prisoner- and staff-perpetrated sexual assault and rape and justifying other forms of sexual violence, such as abusive searches. As a trans woman incarcerated in Arizona explained in a 2002 letter to a prisoner newsletter, prison staff view gender nonconforming, trans, and gay prisoners as "sub-human."[16]

The Prison as a Space of Queer Dangerousness

Today's dominant construction of rape as an endemic—even natural—part of men's prison life dates back to the late 1960s and 1970s. Prior to the late 1960s, sexual violence in prisons was rarely explicitly marked as sexual assault or rape. Nevertheless, prison administrators and social scientists documented the existence of sexual violence in penal institutions since the nineteenth century as they discussed sex between prisoners. In *Criminal Intimacy: Prison and the Uneven History of Modern American Sexuality*, historian Regina Kunzel argues that prison administrators and social scientists were preoccupied with sex in prisons since the inception of the contemporary prison system. By the early twentieth century as homosexuality and heterosexuality were increasingly viewed as (supposedly) stable sexual identities, they began to view penal institutions as sites of sexual perversion and sex between prisoners as an integral (and perverse) aspect of prison culture, particularly in men's institutions.[17] Instead of thinking about "rape,"

Transgender People in Detention," *Temple Political and Civil Rights Law Review* 18, no. 2 (Spring 2009); Alexander L. Lee, "Gender*ed* Crime & Punishment: Strategies to Protect Transgender, Gender Variant & Intersex People in America's Prisons," *GIC TIP Journal* 4, no. 1 (Winter 2003); Jody Marksamer to the National Prison Rape Elimination Commission, August 15, 2005.

[16] "Eyeman Arizona Sister," 22.

[17] Regina Kunzel, *Criminal Intimacy: Prison and the Uneven History of Modern American Sexuality* (Chicago: University of Chicago Press, 2008). In *Criminal Intimacy*, Kunzel describes how constructions

they tended to conflate consensual, coercive, and forced sex. During this time, prison administrators and social scientists constructed narratives about men's prisons as sites of rampant perversion and violence perpetrated entirely by prisoners. Key to these narratives of prison perversion was an understanding of gender nonconforming prisoners as particularly (queerly) dangerous, as threats to institutional security and to other prisoners. Prison administrators viewed gender nonconforming prisoners as hypersexual, actively inciting the desire and sexual aggression of other (masculine) prisoners and therefore as unrapable (as always asking for it). In fact, prison officials and social scientists often described prison as "a rather happy place" or "a paradise" for homosexual and gender nonconforming people, a place where they were desirable and received constant sexual attention.[18] Yet, in their discussions of rampant sexual violence that surrounded them, prison officials and social scientists implied (although rarely, if every explicitly stated)

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of sex between prisoners shifted from "the abominable practice of a lustful individuals" with a sexual economy based on "the unnatural mixing of inmates of different types and status"—age in men's prisons and race in women's prisons—in the nineteenth century to "a culture unto itself" in the early and mid-twentieth century. Instead of age and/or race, this new sexual culture was primarily organized around differences of gender expression, especially in men's institutions. Ibid., 49, 29. Nearly all research and writings on prisons focused on men's institutions until the mid-twentieth century and the anxieties about sex were much more acute in the context of men's institutions.

[18] John Bartlow Martin, *Break Down the Walls: American Prisons: Present, Past, and Future* (New York: Ballantine Books, 1954), 178; Daniel Lee, "Seduction of the Guilty: Homosexuality in American Prisons," *Fact* 2 (December 1965), 58. Unlike most writers during this time, Martin also briefly mentions that homosexual and gender nonconforming prisoners were vulnerable to violence and sexual assault from both other prisoners and guards.

A few writers discussing women's prisons made similar claims. For example, Florence Monahan, who was the head of a number of women's institutions in the Midwest and California in the early twentieth century, claimed that many lesbians "deliberately put [themselves] in prison" because "a women's reformatory is a happy hunting ground. These women, failures in all they touch 'outside' and finding no point in existence in normal society, come to prison where they are housed, fed, and clothed at the State's expense and where, having no wage-earning duties to interfere, they can pursue their chief interest without distraction." Florence Monahan, *Women in Crime* (New York: Ives Washburn, Inc., 1941), 226.

I should note that there were certainly some homosexual and gender nonconforming people that did prefer prison for a variety of reasons, including regular access to food and a bed and easy access to sexual partners. My point is not that this construction of prison as a happy place for these people was not always accurate, but that this construction both produced prisons as perverse or queer spaces and normalized and elided sexual violence against homosexual and gender nonconforming prisoners.

that gender nonconforming prisoners were the victims of that violence. Moreover, this construction of the unrapability of gender nonconforming prisoners authorized and necessitated various forms of carceral violence, most notably their segregation, as they were viewed as inciting violence. Gender nonconforming prisoners were, therefore, constructed as simultaneously unrapable and constantly surrounded by (and potentially subject to) sexual violence.

In the late 1960s and early 1970s, the narrative about sexual violence in prison dramatically shifted as prison administrators and researchers began to explicitly discuss rape as a central problem in (usually men's) prisons. As Kunzel argues, this new construction of sexual violence focus on a narrative about men's prison sexual culture that emerged in the 1950s, which described a highly stratified gendered sexual culture of violence, coercion, hypermasculinity, and hypersexuality. Writers identified three main categories of prisoner who participated in this sexual culture: "wolves" or "jockers," who were (hyper)masculine, heterosexual (or "pseudo-homosexual") prisoners, who took the dominant or "male" role in sex; "punks," who were "weaker" heterosexual-identified prisoners, who were forced or coerced into sex by wolves; and "fags" or "queen," who were homosexuals outside prisons and who were generally marked by some kind of gender nonconformity. Kunzel argues that in the late 1960s and 1970s, this narrative was racialized, as administrators and researchers began to claim that rape in prison was primarily perpetrated by black men against white prisoners as a means of racial control and retribution.[19] While the language and other specifics of the new narrative were

[19] Kunzel, *Criminal Intimacy*. See for example, Leo Carroll, *Hacks, Blacks, and Cons: Race Relations in a Maximum Security Prison* (Lexington: D.C. Heath and Co., 1974); Arthur V. Huffman, "Sex Deviation in a

different from earlier discussions of sex and sexual violence in prisons, prisons continued to be constructed as spaces of sexual violence and disorder, perpetrated entirely by prisoners. Gender nonconforming prisoners—the "fags" and "queens"—also continued to be viewed as dangerously hypersexual and inciters of (sexual) violence and disorder and therefore unrapable; however, prison administrators and social scientists also began to describe them as constantly subject to sexual violence.

The shift in narrative about sexual violence and rape in prisons facilitated prison administrators' recognition that gender nonconforming prisoners were subject to sexual violence, as they focused more attention on the sexual violence perpetrated by (racialized) hypermasculine prisoners. By midcentury, prison administrators and social scientists had begun to argue that, as sociologist Gresham Sykes explained, the "pains of imprisonment" included the deprivation of heterosexual sex, leading to masculine, otherwise heterosexual male prisoners to participate in often violent homosexual sex.[20] As psychiatrist Benjamin Karpman explained, the deprivation of heterosexuality, coupled with "the sight and smell of naked bodies…parading [around which]…charges the atmosphere with excessive stimulation," led prisoners to lose "self-control" in violent

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Prison Community," *Journal of Social Therapy* 6 (1960); C. Scott Moss, Ray E. Hosford, and William R. Anderson, "Sexual Assault in a Prison," *Psychological Reports* 44 (1979); John Irwin, *The Felon* (Englewood Cliffs, NJ: Prentice-Hall, Inc., 1970); Anthony M. Scacco, *Rape in Prison* (Springfield, IL: Charles C. Thomas Publisher, 1975); John Haggarty, *Sex in Prison* (New York: Ace Books, 1975); Aryeh Neier, "Sex and Confinement," *The Civil Liberties Review* 5, no. 2 (July-Aug 1978).

This timing also coincides with the emergence of feminist anti-rape activism that shifted cultural and legal understandings of sexual violence and constructed a new vocabulary to talk about sexual violence. See for example, Brownmiller, *Against Our Will*.

[20] Gresham M. Sykes, *The Society of Captives: A Study of a Maximum Security Prison* (Princeton, NJ: Princeton University Press, 1958). See also, Robert M. Lindner, *Stone Walls and Men* (New York: Odyssey Press, 1946); Benjamin Karpman, "Sex Life in Prison," *Journal of Criminal Law, Criminology, and Police Science* 38 (February 1948). Kunzel argues that the participation of masculine, ostensibly heterosexual prisoners in homosexual activity caused prison administrators and social scientists great anxiety because of its implications for the nature of heterosexuality, as sex in prison potentially "reveal[ed] heterosexual identity as fragile, unstable, and, itself, situational." Kunzel, *Criminal Intimacy*, 8.

ways.[21] As Kunzel details, the narrative about (hyper)masculine prisoners committing sexual violence was explicitly racialized in the 1970s and secured to criminalized black masculinity. While earlier discussions of sex in prisons had focused on the unmet sexual needs of men, these new discussions focused on black masculinity and power, claiming that black rapists were driven to rape white prisoners out of racial rage and antiwhite hatred. Kunzel argues that this new narrative read prison rape through the shifts in the racial composition of prisons at the beginning of mass incarceration and the period's militant black activism, especially black nationalism, and was used to delegitimize black militancy by portraying it as irrationally and violently antiwhite as well as to confirm constructions and fears of black men's supposed dangerous and excessive masculinity.[22] This narrative constructed the prison as racially and sexually violent, often on the brink of chaos, and took some of the focus from the dangerousness of gender nonconforming prisoners. In this new context, some prison observers began to argue that gender nonconforming and homosexual prisoners were subject to sexual violence.[23]

Nevertheless, prison administrators and social scientists continued to argue explicitly that gender nonconforming prisoners were unrapable, even as they simultaneously admitted that they might be subject to sexual violence. For example, in

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[21] Karpman, "Sex Life in Prison," 479.

[22] These depictions of black sexual violence reinforced and reinterpreted black criminality, aggression, violence, and pathology. In other words, constructions of sexually dangerous and criminal black (hyper)masculinity, or the myth of the black rapist, that had been used to justify chattel slavery and then extra-legal lynching in previous eras was now being used to justify the mass incarceration of black men and the violence of imprisonment. As the now ubiquitous popular construction of prisons as sites of nearly constant and uncontrollable sexual violence was constructed during the 1970s and racialized as black, it worked with the rise of mass incarceration and constructions of black criminality that justified it to (re)racialize the space of the prison as black.

[23] For example, Sykes explained that "habitual homosexuals," the queens and fags, were likely to be victimized by aggressive masculine prisoners "who turn to homosexual as a temporary means of relief." Sykes, *The Society of Captives*, 71.

his study of homosexuality in prison published in 1971, sociologist George L. Kirkham claimed that most "queens" were "relatively immune" to institutional sexual coercion and violence because of their (desirable) femininity. Yet, Kirkham also acknowledged that if they were not attached to a stronger, heterosexual prisoner who protected them, they were constantly at risk of sexual assault and coercion. Nevertheless, he focused his concern on what he viewed as the sexual excessiveness of most queens, who "skip[] from marriage to marriage" and "leave in her wake a series of beatings and stabbings, spread veneral [*sic*] disease, and occasionally produce riots."[24] To Kirkham, queens were more dangerous than in danger. By focusing on their queer dangerousness, Kirkham, like other prison administrators and social scientists that I discussed in the last chapter, both erases and justifies gender nonconforming prisoners' experiences of insecurity and sexual violence.[25]

Similarly, in his 1975 book *Sex in Prison*, John Haggarty discusses a female-identified person named the Duchess who had a history of imprisonment in men's penal institutions. While Haggarty identifies her as a homosexual, the Duchess had been on hormones prior to incarceration, had breast implants, was planning on having sex

[24] George L. Kirkham, "Homosexuality in Prison," in *Studies in the Sociology of Sex*, ed. James M. Henslin. (New York: Meredith Corporation, 1971), 337. Kirkham explains that queens are "quickly identifiable" because of their "effeminancy, a bizarre caricature of real femininity." Ibid., 333. Kirkham also mentions that in some cases, "the more serious gender aberration of transsexualism is sometimes apparent." Ibid., 335.

[25] Moreover, some prison administrators and researchers argued that homosexual and gender nonconforming prisoners reveled in the violence. George Deveureux and Malcolm C. Moss explain that for gender nonconforming homosexual prisoners, who are fought over, the violence of the wolves "affords opportunities for masochistic satisfaction, for submission and plastic behavior, as well as satisfaction of the need for dependence, for unearned privileges, protection, etc." George Deveureux and Malcolm C. Moss, "The Social Structures of Prisons and the Organic Tensions," *Journal of Criminal Psychopathology* 4, no. 2 (October 1942), 317.

reassignment surgery, and explicitly identified as female.[26] Far from portraying her as at risk for sexual assault, Haggarty describes her as being "powerful and influential" in the prison because of her breasts and femininity. In prison, according to Haggarty, "the Duchess became the female sex symbol of her dreams." Even though, "she still had a male sex organ…she was finally being treated like the woman she always felt she was inside."[27] According to Haggarty, the only violence the Duchess experienced was perpetrated by other gender nonconforming prisoners because of their jealousy of her beauty, femininity, and the (sexual) attention she received. Throughout the study, Haggarty describes rampant sexual violence in prisons; the Duchess is the only prisoner that he discusses in detail who is neither the victim nor the perpetrator of sexual violence. Instead, Haggarty describes the Duchess as flirting and sexually performing for prisoners, inciting them to violence that disrupts the institution through her hypersexuality. This stark contrast between her story and the others in the book gives the impression that gender nonconforming prisoners were powerful and safe from sexual violence, obscuring not only the sexual violence that they experienced but also the racialized gender normative violence of the prison system more generally.

Throughout his discussion of the Duchess, Haggarty represents her as hypersexual and therefore (queerly) dangerous and unrapable. While Haggarty reduces her femininity and female-identity to aspects of her (male) homosexuality, his description of and

[26] Because Haggarty identifies her but does not let the Duchess identify herself, it is unclear exactly how she identified. In the 1970s, it was certainly possible that she identified as transsexual; however, Haggarty's description of her as a "homosexual" could have reflected her identity.

[27] Haggarty, *Sex in Prison*, 113. Although he does not recognize it as such, Haggarty also describes sexual violence perpetrated by staff against the Duchess. For example, he describes an incident in which she was caught by a guard stripping for other prisoners. He took her into the guard station and threatened her with assault and isolation if she did not tell him where she got the lingerie and who she had sex with. To avoid this, she gave him oral sex and claimed that she never had another problem.

response to her is simultaneously about her as a male homosexual and a woman.[28] Of particular importance to Haggarty is that the Duchess looks like a woman—both according to staff and other prisoners—and has breasts. Like some of the cross-gender identified people that I discussed in the first chapter, the Duchess was initially booked in the Women's House of Detention after her arrest. Haggarty explains that during booking staff strip searched her and "discovered" her penis, after which they transferred her to the Manhattan House of Detention, known as the Tombs. Like staff, prisoners at the Tombs also read the Duchess as female. Haggarty describes the Duchess's arrival there as causing (sexual) disorder:

> Inmates screamed and rattled their cups against the bars of their cells. Men ignored guards' orders to go back in line…"Hey, there's a real woman in here!" "Hey, hey man, we got some real pussy." "On the second cell block there's a real piece of ass!" "How did that cunt get in this place!" were some of the cries that echoed throughout the Tombs that afternoon. The "woman", the "real pussy" that set off this demonstration was the Duchess. She coyly took off her shirt, shook her shoulder-length hair and let it fall loose and free. The Duchess did have beautiful pert little breasts, but what those two or three hundred excited inmates didn't know as she rubbed her nipples with her forefinger,

[28] Scholars who have discussed gender nonconforming prisoners like the Duchess tend to engage with their gender nonconformity only as an outward sign of homosexuality. Indeed, prison administrators and social scientists, like Haggarty, generally explicitly viewed gender nonconformity as an outward sign of homosexuality and justified their treatment of these prisoners primarily through the need to manage or eliminate (homo)sexuality and related-violence and disorder. Nevertheless, the reduction of gender nonconformity to homosexuality obscures how the construction of trans women as queerly dangerous is usually simultaneously about constructions of the dangers of (male) homosexuality and of femininity and womanhood. While usually unintentional, this reduction can reinforce the belief that trans women are really men, thereby renaturalizing the sex binary and negating the identities of some prisoners who identified as female. Moreover, understanding gender nonconformity as only about homosexuality obscures how prisons regulate both nonnormative sexuality *and* gender. Sexuality, of course, tends to be hypervisible, while penal regulation of gender is deeply naturalized and therefore not nearly as visible. Nevertheless, it is important to mark how the regulation of these two categories is inextricably interconnected but not reducible to one another. Chauncey's somewhat brief discussion of gender nonconforming homosexual prisoners in Welfare Island is particularly illustrative of this reduction of gender nonconformity as a signpost of homosexuality. Chauncey, *Gay New York*. Of course, this argument that historians of sexuality, particularly of gay and lesbian history, tend to reduce gender nonconformity and cross-gender identity to homosexuality has been argued by trans studies scholars. See for example, Shannon Minter, "Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion in the Gay Rights Movement," *New York Law School Journal of Human Rights* 17 (2000-2001); Aaron H. Devor and Nicholas Matte, "ONE Inc. and Reed Erickson: The Uneasy Collaboration of Gay and Trans Activism," *GLQ* 10, no. 2 (2004).

> giggled seductively, and flirted with them from behind the locked door of the cell was that "this piece of ass" also had a penis.[29]

These prisoners were not responding to her as a male homosexual but as a woman. They were responding to her female body—which, Haggarty insistently reminds us, also has a (hidden) penis and is therefore "really" male—especially her breasts. Indeed, her breasts presented a particularly pernicious danger—Haggarty later states that they caused "pandemonium" in the jail—not only because they elicited (queer) desire but because they marked her as (deceptively) female.[30] Breasts as a particularly dangerous security threat—as a cause of sexual disorder and violence—would become a theme in prison administrators' concerns about trans women in men's prisons in the following decades. Drawing on dominant misogynist narratives of femininity and womanhood (particularly nonnormative femininity and womanhood) as dangerous and inciting sexual violence from men, Haggarty describes the Duchess as asking (and performing) for it, as desiring the attention, and he does not comment on how these catcalls and the (sexual) excitement exhibited by the other prisoners indicate that she might be subject to sexual violence (or, for that matter, that these responses to her by other prisoners were a form of sexual violence).

While Haggarty primarily discusses the Duchess's security threat as causing sexual disorder among prisoners, implicit in his discussion is that the Duchess is a threat to racialized gender normative carceral logics and its naturalized sex binary. The Duchess's mixed sex body—which has both breasts and a penis—produces administrative disorder and therefore requires normalization. Haggarty himself

[29] Haggarty, *Sex in Prison*, 105.
[30] Ibid., 107.

consistently reminds his reader that she is "really" male by marking her repeatedly as "deceptive" in her femaleness.[31]

In response to the Duchess's sexual and sexed security threat, jail administrators segregated her, cut her hair, and refused to provide her hormone therapy. Haggarty also implies that prison officials lamented that they could not remove her breast implants. Because of the loss of hormones, as Haggarty explained, "the deceptive womanly roundness of her hips fell away."[32] In other words, jail administrators did everything they could to strip her of her womanhood or visible femaleness, violent actions justified by her supposedly hypersexuality or queer dangerousness. Haggarty's description of the jail's management of the Duchess highlights some of the mundane regulatory carceral sexual violence that I argue is an important feature of the prison system's management of gender nonconforming prisoners. Jail administrators control the intimate contours of the Duchess's body, violently altering it to become more manageable (by making it more masculine) within the men's jail. This carceral sexual violence is legitimized and obscured by Haggarty's—and presumably jail administrator's—construction of the Duchess as an inciter of sexual violence and disorder, a source of administrative disorder, and, implicitly, a fraud.

This construction of gender nonconforming prisoners, like the Duchess, as inciting violence also relied on constructions of the (hyper)masculine (racialized) criminal perversion of prisoners who they incited to violence. Social scientists and prison

[31] As Talia Me Bettcher notes, this is a common narrative about trans women; a narrative that is often used to justify violence against them. Talia Mae Bettcher, "Evil Deceivers and Make-Believers: On Transphobic Violence and the Politics of Illusion," *Hypatia* 22, no. 3 (Summer 2007).
[32] Haggarty, *Sex in Prison*, 107.

administrators referenced these masculine prisoners to construct the prison as inevitably (sexually) violent; gender nonconforming prisoners were constructed as the volatile element that prevented prison administrators from controlling that violence. This confluence of criminalized, queer (hyper)masculinity and femininity helped justify and/or obscure carceral sexual violence against gender nonconforming prisoners.

These discourses also produce both feminine and (hyper)masculine categories of prisoners as dangerously queer, in mutually constitutive and intersecting ways. Masculine prisoners who are incited to violence are queered because of both their violent (criminal) desire for gender nonconforming prisoners like the Duchess and their hypermasculinity and racialized criminality, two traits that are produced as inherently interconnected. Queer studies scholars have used queer to describe non-normativity, especially but not limited to gender and sexual nonconformity. As queer of color scholars, such as Roderick Ferguson and Cathy Cohen, have shown, white supremacy often queers people of color by portraying them as sexually and gender nonnormative and often excessive, dangerous, and even monstrous.[33] Discourses of racialized nonheteronormativity have long been used to justify, organize, and normalize the marginalization, oppression, and criminalization of people and communities of color, and racialized criminality, especially black male and female criminality, has long been attached to sexual excess, danger, and (for black women) gender nonconformity. "Criminals" are constructed as nonnormative—and to a certain extent, queer—through their racialization and their

[33] Roderick Ferguson, *Aberrations in Black: Toward a Queer of Color Critique* (Minneapolis: University of Minnesota Press, 2004); Cathy J. Cohen, "Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?" *GLQ* 3 (1997). See also, Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham: Duke University Press, 2007).

depictions as unable to follow the rules of society. These not-explicitly gendered and sexualized nonnormative attributes easily lead to prisoners being seen as sexually and gender queer, as sexually excessive, uncontrollable, and violent, constructions reinforced by their location in sex-segregated spaces, which are considered inherently sexually and gender abnormal. In other words, all prisoners are constructed as dangerously nonnormative while certain prisoners are particularly dangerous in sexual and gendered queer ways. The prison itself, therefore, is produced as a queer space, a space of dangerous nonnormativity, a space frequently marked by (racialized) sexual violence, disorder, and danger.[34] Within the racialized and queer space of the prison system, sexual violence becomes not only unsurprising but expected. Sexual violence and state imprisonment are sutured together and naturalized, and prison administrators are vacated of responsibility for creating that violence.

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[34] Joey Mogul, Andrea Ritchie, and Kay Whitlock make a similar argument for understanding prisons as queer spaces in *Queer (In)Justice: The Criminalization of LGBT People in the United States*. See also, Kunzel, *Criminal Intimacy*.

As one researcher explained in 1942, staff saw these sexually and gender nonconforming prisoners as "natural products of a degraded group and ['proof'] that the convicts are depraved and animalistic, for they resort to practices abhorred by conventional persons." Prisoners were seen by staff as inherently different from "noncriminal persons" in their actions as well as their dress, speech, and walk: "They are enemies of and outcasts from society." S. Kirson Weinberg, "Aspects of the Prison's Social Structure," *American Journal of Sociology* 47 (1942): 721. Queens and wolves together queered the space of the prison in dangerous and threatening ways. Julius Leibert—who was a chaplain at San Quentin, Alcatrez, and Folsom in the 1950s—described the prison yard as dangerously (racialized) queer space: "Vast and forbidding when empty, [the yard] is a monster when packed. Five thousand heads, ten thousand eyes all blind, and a million pent-up hungers aching to burst forth—that's that yard. Perverts on the prowl—'jockers' ganging up on a fish, 'queens' reveling in fights between rivals for their favors, homos pairing off for an affair or quarreling like obscene lovers. Gambling rife and incessant—bets on anything and everything—who has more lice, the wop or the coon, for instance. The cigarette is king, buying anything from pilfered pies and stolen socks to any possible form of sexual depravity." Julius A. Leibert and Emily Kingsbery, *Behind Bars: What a Chaplain Saw in Alcatraz, Folsom and San Quentin* (Garden City, NY Doubleday and Company, Inc., 1965) 25. These writers not only marked all prisoners as sexually and gender queer but utilized racialized language—"depraved." "animalistic," and "monstrous"—to mark their difference from (white) sexually and gender normative society. This racial/sexual/gendered difference justified their imprisonment.

While social scientific and penological constructions of the prison as a space of endemic sexual violence was constructed through discussions of and research on men's prisons, key aspects of this dominant narrative appeared in research and writings on women's prisons. For most prison administrators and researcher, sexual violence was attached to masculinity and was only perpetrated by prisoners. This understanding of penal sexual violence led to prison writers generally describing sexual violence and coercion as rare in women's prisons, if they mentioned it at all, which functioned to occlude endemic staff-perpetrated sexual violence within most women's institutions.

Prior to the 1960s, very little research about women's prisons was published. This silence changed in the mid-1960s as a number of sociologists published studies of women's prisons.[35] These researchers found that lesbianism was central in women's prison culture. In contrast to the descriptions of a violent and coercive sexual culture in men's institutions, as Kunzel argues in her discussion of this literature, prison researchers wrote as if sex among women prisoners was "almost uniformly consensual."[36] Lesbian relationship were viewed as pathological but not violent. Often ignoring even their own evidence of sexual violence and coercion, writers generally described lesbian relationships in prisons as highly emotional, romantic, and domestic. The few writers

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[35] See for example, Sara Harris, *Hellhole: The Shocking Story of the Inmates and Life in the New York City House of Detention for Women* (New York: E.P. Dutton & Co., Inc., 1967; Russ Trainer, *Prison: School for Lesbians* (Van Nuys, CA: Triumph News Company, 1968); Rose Giallombardo, *Society of Women: A Study of a Women's Prison* (New York: John Wiley and Sons, Inc., 1966); Frederick S. Baldi, *My Unwelcome Guests* (Philadelphia: J. B. Lippincott Company, 1959); Haggarty, *Sex in Prison*.

[36] Kunzel, *Criminal Intimacy*, 137. Kunzel argues that depictions of lesbianism in prisons during this time was generally viewed as not violent in contrast to Estelle Freedman's discussion of the iconic violent prison lesbian. Freeman describes representation of lesbian prisoners as "menacing types" in post-World War II popular culture, arguing that the prison lesbian was constructed around the figure of the (sexually) aggressive black woman.
Estelle B. Freedman, "Prison Lesbian: Race, Class, and the Construction of the Aggressive Female Homosexual," *Feminist Studies* 22, 2 (Summer 1996).

who mentioned sexual violence usually blamed gender nonconforming lesbians, reconfirming the link between violence and masculinity, but unlike discussions of sexual violence and coercion in men's prisons, violence in women's prisons was described as isolated incidents and not part of prisoner culture. The naturalized sexual difference between men and women supposedly explained the striking difference between sexual cultures in men's and women's prisons, especially regarding physical and emotional needs; men were interested in sex and power, women in love and family. Prison administrators and social scientists generally concluded that sexual violence and coercion was against the nature of women.[37]

Because of the naturalization of sexual difference, writers generally even described masculine female-classified prisoners as desiring emotional connection and long-term relationships over sexual release. As David A. Ward and Gene G. Kassebaum explained in their 1965 study of the Frontera Correctional Institution in California, "The importance of the emotional component of homosexual relationships is a fundamental distinction between the self-image and role behavior of butches and wolves."[38] Lesbianism was produced as a discourse that denied the possibility of sexual violence in women's prisons both because of the naturalized gendered discourse of women's sexuality and because of the presumption that violence was only committed by prisoners. Nevertheless, women's prisons were still constructed as queer spaces that featured

[37] For example, Haggarty explained that "sex for a man is a much more immediate, direct, and quickly intense experience. A man will rape for sex, both in and out of prison…But such a concept is almost alien to a woman. It is hard to imagine a woman, even one in frenzies of sexual anticipation and hunger, capable of assaulting or raping a man or woman to satisfy that need for sex." Haggarty, *Sex in Prison*, 207.
[38] David A. Ward and Gene G. Kassebaum, *Women's Prison: Sex and Social Structure* (Chicago: Aldine Pub. Co., 1965), 193.

uncontainable queer relationships. Instead of sex being uncontrollably violent, relationships between prisoners in women's institutions—sometimes but not always sexual—were viewed as so common that they could not be stopped. In fact, the high percentage of prisoners participating in these relationships was a primary reason for the usual absence of segregation in women's institutions.

In relation to both men's and women's prisons, prison administrators and social scientists constructed sexual violence as inherently connected to different gendered formations of sexualized dangerous. This construction elided the sexual violence perpetrated by prison staff—violence that was quite common. In women's prisons, this dynamic almost entirely invisibilized sexual violence; while in men's prisons, it amplified the understanding of sexual dangerousness of prisoners and the prison space and legitimized institutional violence against them. Interestingly, femininity was the key to obscuring sexual violence in both men's and women's prisons: feminine prisoners in men's prisons were produced as hypersexual, queerly dangerous, and therefore unrapable; prisoners in women's prisons who were presumed to be women were considered incapable of sexual violence because of the naturalized non-violent nature of femininity. While different, in both cases, gendered queerness renders carceral sexual violence mundane and unremarkable (either because no one remarked upon it or because it was normalized).

Legalizing Carceral Sexual Violence

While Haggarty claimed that the Duchess was never sexually assaulted, the scene that he described, of male prisoners incited to disorderly, even violent, desire by her queerly feminine body and sexual performance alluded to the possibility—perhaps, inevitability—of her violation if there were no bars between her and those prisoners. The seemingly contradictory intersection of the discourses that I have discussed—the supposed impossibility of sexually violating gender nonconforming prisoners and the inevitability of sexual violence in prisons because of the sexually violent hypermasculine racialized nature of other prisoners—come together frequently to inform legal cases discussing sexual violence against trans women.

Trans women incarcerated in men's institutions began to file federal civil rights lawsuits challenging the conditions of their incarceration by the early 1980s, and their experiences of violence, especially sexual violence, were a frequent theme. By this time, prison administrators regularly acknowledged that trans women were at high risk for experiencing sexual violence—indeed, this had become their primary excuse for segregating trans women. Yet, prison administrator and the courts continued to portray gender nonconforming prisoners as queerly dangerous. Within legal documents and judicial opinions, these two narratives of impossibility and inevitability of sexual violence were often articulated simultaneously, which produced most sexual violence against trans and gender nonconforming prisoners as legally unrecognizable as cruel and unusual punishment. This process resulted in the naturalization and normalization—even the legalization—of most sexual violence within penal institutions.

These seemingly contradictory discourses structured the Indiana district court and the Seventh Circuit Court of Appeals opinions regarding Lavarita Meriwether's 1983 lawsuit, which I briefly discussed in the previous chapter. Meriwether, a trans woman who had been taking hormones for nearly a decade and had undergone a number of gender-affirming surgeries, filed a federal civil rights lawsuit challenging her indefinite segregation, conditions of confinement, and the denial of medical treatment related to her transsexuality in the Indiana prison system. She also alleged that she had survived frequent sexual assaults by staff and other prisoners, harassment by staff in both general population and segregation as well as repeated and unnecessary public strip searches, which staff used as a means to view her feminine body. In some of the first judicial opinions regarding an incarcerated trans woman published in the US, an Indiana district court and then the Seventh Circuit argued that Meriwether posed "particularly serious management problems for prison officials" because her body would create a "volatile and explosive situation" within the prison.[39] This inevitable "situation" justified her indefinite segregation. These decisions rested on the (largely unspoken) assumption that Meriwether's queer, feminine body would incite other prisoners to fight over her, not only violating her but, more importantly, disrupting the security of the institution. This

[39] Meriwether v. Faulkner, 821 F.2d 408, 417 (7th Cir. 1987). Notably, while the Seventh Circuit agreed with the district courts logic here, the court reversed and remanded the district court's dismissal of her challenge to her indefinite segregation, arguing that it might constitute cruel and unusual punishment (largely because she was a non-violent prisoner who had thirty more years to serve) and therefore violate the Eighth Amendment, which the district court had not considered.

I have found evidence of earlier federal civil rights lawsuits filed by incarcerated trans women that either did not result in a published opinion, either because the suit was settled or the court did not publish their opinion. See for example, Lynn Marie Scribner, Letter, May 24, 1985, Folder 42, Box 13, Broomfield Street Education Foundation Records (M64); Sharon Reynolds, "Wrong Body, Wrong Jail," n.d., Folder 53, Box 13, Broomfield Street Education Foundation Records (M64); Vanassa Meriwether, "The Dawn of a New Age," *Transsexuals in Prison* 1, no. 1 (March 22, 1986), Box 5, Bromfield Street Foundation (Collector) Prison Newsletters (M169), Northeastern University Libraries.

expected scenario both implicated Meriwether as dangerously queer but also all other prisoners in their expected excessive, violent, and uncontrollable sexual desire for her queer, feminine body.

While the courts' justification for her segregation relied on the assumption that Meriwether would inevitably be raped by other prisoners, the two courts differed somewhat in their treatment of her allegations of sexual violence. The district court dismissed Meriwether's entire complaint, arguing that she failed to state a claim upon which relief could be granted in relation to her challenge to her indefinite segregation and the denial of medical treatment. The court did not even address her allegations of sexual violence, harassment, and public strip searches. In doing so, the district court constructs her as unrapable (by not even bothering to address the allegations) and carceral sexual violence—both sexual assault and harassment perpetrated by staff and violent strip searches—as legally incomprehensible and unaddressable. The Seventh Circuit reversed and remanded the district courts' decision in part because the district court did not address these aspects of Meriwether's complaint. The court pointed to her transsexuality and imprisonment in a men's prison to demonstrate that her risk of assault was "sufficiently serious to require [prison administrators] to take some minimal measures to protect her from assault."[40] Yet, the court largely understood "protection" to be segregation, arguing that Meriwether's claims that prison administrators have deliberately failed to protect her from sexual violence "is somewhat in conflict with her desire not to remain in administrative segregation indefinitely."[41] Despite stating that Meriwether

[40] *Meriwether*, 821 F.2d at 417.
[41] Ibid. at 417-8.

should also be protected from assaults in administrative segregation, the court largely failed to recognize that the problem was not just that prison administrators failed to protect her from violence perpetrated by other prisoners but that staff perpetrated a substantial portion of the violence that she alleged. This absence of a substantial discussion of staff violence—including the strip searches—again rendered carceral sexual violence legally unremarkable and incomprehensible.

The *Meriwether* decisions demonstrate how juridical knowledge often mobilize the twin narratives of inevitability and impossibility constructed in the previous decades by penologists and social scientists to make sense of carceral sexual violence against trans and gender nonconforming prisoners. Within the decisions, we can also see how these contradictory discourses of inevitability and impossibility become compatible as they normalize carceral sexual violence and related management techniques. By understanding Meriwether's possible and inevitably violation as only perpetrated by prisoners and either ignoring staff-perpetrated violence or suggesting that segregation was a place of safety while simultaneously worrying about the security implications of Meriwether's queer dangerousness, Meriwether becomes inevitably subject to rape and, essentially, unrapable or unviolatable. Put another way, inevitability only describes prisoner-perpetrated sexual violence and impossibility primarily describes staff-perpetrated and (institutionalized) carceral sexual violence. Moreover, because that inevitability of prisoner-perpetrated sexual violence is intimately tied to her queer dangerousness, she becomes essentially unrapable, at fault, her queer femininity and feminized body are "asking for it." This queer dangerousness, tied to the inevitability of

sexual violence, then justifies certain forms of carceral violence, such as segregation. Inevitability and impossibility produce a cycle that normalizes carceral sexual violence.

Since *Meriwether*, courts have continued to mobilize these narratives in adjudicating complaints alleging sexual violence against trans women. Indeed, courts are primary producers of dominant discourses about sexual violence within prisons, determining what types of sexual violence and against which prisoners are legitimate or illegitimate—and therefore deserving of (state) intervention—and which are even recognizable as violence. As a system of norms and a primary arbiter (and perpetrators) of state violence, legal constructions of violence are deeply shaped by and help produce racialized, gender, and sexual normativity. Civil rights law, like the *Meriwether* decisions, both produces and is an archive of the boundaries of the state's legitimate violence generally and of carceral violence in particular.[42]

Seven years after the Seventh Circuit's *Meriwether* decision, these discourses would similarly structure another case, *Farmer v. Brennan*, the first and only case about an incarcerated trans woman (or any trans person) that the Supreme Court has heard. Taken up by the Court in order to help clarify Eighth Amendment jurisprudence, *Farmer* has helped shape the general contours of what the US state believes constitutes unconstitutional (and constitutional or legitimate) violence in prisons.

In March 1989, Dee Farmer—a young African American trans woman who had been incarcerated in the Federal Bureau of Prisons (BOP) since 1986—was transferred to USP-Terre Haute in Indiana, a federal maximum security men's penitentiary. After an

[42] Chandan Reddy, *Freedom With Violence: Race, Sexuality, and the US State* (Durham: Duke University Press, 2011); Michel Foucault, *Security, Territory, Population: Lectures at the Collége de France, 1977-1978* (New York: Picador, 2009).

initial stay in segregation while prison officials decided her placement, which was standard practice for all new prisoners, she was released into the general population. A week later, she was beaten and raped in her cell by another prisoner. Even though the perpetrator threatened to murder her if she reported the rape, she did so a week later. While prison officials moved her into segregation, it was reportedly because of her HIV-positive status—which was seen as a threat to security—not for her safety. A few months later, she filed a federal civil rights lawsuit claiming that prison officials were deliberately indifferent to her safety and therefore violated the Eighth Amendment's ban on cruel and unusual punishment. In her complaint, Farmer alleged that the BOP failed to establish and implement an effective policy for housing transsexuals. She claimed that prison officials knew that she had "a feminine appearance, ... [and] would be sexually assaulted at USP-Terre Haute."[43] Prison administrators denied any actual knowledge of Farmer's risk of sexual assault.

A Wisconsin district court dismissed Farmer's complaint, claiming that because prison officials did not have "actual knowledge of a threat to [Farmer's] safety" they were not liable for her rape.[44] The court claimed that they could find no evidence that administrators had any reason to believe that they could not keep her safe and emphasized that Farmer failed to inform officials of any danger. The Seventh Circuit affirmed the lower court's decision with no opinion. Farmer appealed, and the Supreme Court agreed to hear the case in 1993.

[43] Quoted in Brief of Petitioner at 9, Farmer v. Brennan, 511 U.S. 825 (No. 92-7247), Nov. 16, 1993.
[44] Quoted in Brief of Respondents at 10, *Farmer* (No. 92-7247), Dec. 14, 1993.

At stake in front of the Supreme Court was not whether Farmer had experienced sexual violence—that she had been raped was not in question—but whether prison officials should be held constitutionally liable for placing her in a dangerous situation that led to her rape. Specifically, the Court was asked to clarify their "deliberate indifference" standard. A key part of Eighth Amendment jurisprudence since the mid-1970s, deliberate indifference states that a prison administrator can only be found to violate the Eighth Amendment's prohibition on cruel and unusual punishment if he or she knowingly disregarded a substantial risk of harm.[45]

Farmer argued that the Court should adopt a more expansive definition of deliberate indifference that included "obvious risks," risks that were so obvious that prison officials *should have known* about them. In her own case, Farmer argued that whether or not Terre Haute administrators had actually known of a specific threat to her safety, the risk of sexual violence for a visibly feminine trans woman like Farmer in a maximum security men's prison was so obvious that they should have known. She argued that by placing her in general population at Terre Haute, a prison which was known to be particularly violent, prison officials "created an obvious, unreasonable risk of harm."[46] Moreover, she showed that BOP officials themselves had agreed with this determination on multiple occasions. At least one report from a BOP psychologist had noted that she would be "subject to a great deal of sexual pressure…because of [her] youth and

[45] Deliberate indifference is something more than mere negligence and something less than intent to cause harm. Stacy Lancaster Cozad, "Cruel But Not So Unusual: *Farmer v. Brennan* and the Devolving Standards of Decency," *Pepperdine Law Review* 23 (1995).
[46] She argued, "Indeed, it is hard to imagine a circumstance in which the risk of sexual assault would be more obvious." Reply Brief of Petitioner at 16, *Farmer* (No. 92-7247), Jan. 3, 1994; Brief of Petitioner at 65, *Farmer* (No. 92-7247).

feminine appearance."[47] She had also been placed in protective custody at other federal prisons because officials believed she was vulnerable to sexual violence. In fact, she had sued over this placement, and a district court had ruled against her, finding that placing her in general population was an obvious risk.[48]

BOP officials admitted that they knew Farmer was a transsexual, was visibly feminine, and had not committed violence. They had internal data showing that gay and gender nonconforming prisoners were disproportionately sexually assaulted; it was common practice within the BOP to segregate gender nonconforming and trans prisoners for their "protection"; and Farmer had been segregated for her protection in other BOP facilities. Nevertheless, Terre Haute officials argued that they knew of no *specific* threat to Farmer at the time and therefore were not liable. BOP officials petitioned the Supreme Court to adopt an "actual knowledge" standard for deliberate indifference, which was the standard the district court applied to dismiss the case. In this scenario, a prisoner would have to prove that prison officials actually knew of a substantial risk; showing that a risk was so obvious that they should have known would not be enough to satisfy the standard.

In order to justify such a high burden of proof, BOP officials and their supporters argued that anything less would make administrating prisons too difficult because prisons were inherently violent. In their brief to the Supreme Court, BOP officials argued that

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[47] Quoted in Brief of Petitioner at 12, *Farmer* (No. 92-7247).

[48] In a previous case, the warden of Terre Haute (who was the warden of USP-Lewisburg, where Farmer was then incarcerated, at the time, justified her placement in administrative segregation: "Where a threat to security exists, staff may take reasonable steps to alleviate a threat. In your case, institutional staff finds that a situation exists which may endanger your life in the general population. While steps are being taken to move you to a facility where extra security will not be necessary, it is appropriate to keep you separated from anyone who may harm you." Quoted in Farmer v. Carlson, 685 F. Supp. 1335, 1342 (M.D. Pa., 1988). In their decision, a Pennsylvania district court deferred to officials' decision, saying "clearly, placing plaintiff, a twenty-one year old transsexual, into the general population at Lewisburg, a Level Five security institution, could pose a significant threat to internal security and to plaintiff in particular." Ibid. at 1342.

because prisons are "volatile" and "inmate violence is often random and unpredictable," risk of assault is "inevitably present" for all prisoners; therefore, the meaning of "unreasonably high risk" is different than in the rest of society.[49] They claimed that sexual violence perpetrated by prisoners "can never be fully controlled, despite prison officials' best efforts."[50] The brief paints a picture of besieged prison administrators, doing all they can to keep institutional order and security and protect prisoners from violence perpetrated by other prisoners. In their *amicus curiae* brief supporting BOP officials, the attorneys general of thirty-four states also mobilized similar narratives, arguing that the "violent nature" of prisons required that courts provide prison officials with "substantial deference in matters of institutional security and safety."[51] In their arguments, BOP officials and the state attorneys general relied on and reproduced the decades old narratives of sexualized and racialized violently hypermasculine prisoners to construct the space of the prison as inherently and inevitably violent. In doing so, they naturalized violence in prisons, normalized violence as a feature of prisons that the law should expect and accept, and securely determined prisoners as the source of that violence. The BOP officials and state attorneys general constructed a particular definition of sexual violence: individualized sexual assault perpetrated by prisoners that threatens the security of the penal institution.

The state attorneys general further extended the BOP officials' argument by explaining that because non-trans prisoners are sexually assaulted in prisons, trans women like Farmer do not deserve "special" protection. Calling violence, sexual assault,

[49] Brief of Respondents at 15, *Farmer* (No. 92-7247).
[50] Ibid. at 14.
[51] Amicus Curiae of the States at 13, *Farmer* (No. 92-7247), Dec. 14, 1993.

and sexual pressure "undisputed facts of prison life," they argued, "Given that prisons by their very nature are dangerous and that many inmates live in fear of others, there is no principled basis for singling [Farmer] out for special protection solely because of his [*sic*] transsexual status."[52] By erasing distinctions between prisoners, including between different levels of risk and between prisoners who perpetrate rape and prisoners who are raped, they insinuated that because some prisoners are sexually violent, all prisoners deserve to be violated.

BOP officials used this construction of the inherent violence of prisoners and, therefore, prisons as justification for refusing to protect prisoners. Because of the supposed inevitability of sexual violence, they argued that any "risk" must be compared "to the level of risk ordinarily *acceptable*" in any given penal institution and that the risk must "rise significantly above the level that is ordinarily prevalent."[53] Sexual violence becomes a mundane and routine part of daily prison life for prisoners—and therefore something that is acceptable or legitimate—while also being a problem for institutional security and therefore requiring the management of all prisoners. This narrative also legitimizes a significant amount of violence used to stem this (inevitable) sexual violence, such as segregation. Within this framework, most sexual violence that trans and gender nonconforming prisoners experience could not be legally recognized as cruel and unusual punishment. In other words, the arguments from BOP officials and the state attorneys general obscured how sexual violence was and is structured into the prison system, vacating that system and its agents of the responsibility of creating and sustaining

[52] Ibid. at 38.
[53] Brief of Respondents at 22, 12, *Farmer* (No. 92-7247). My emphasis.

an "inherently violent" institution while also legitimizing the use of (sexual) violence as a tool of control within the violent queer space of the prison.

While BOP officials and the state attorneys general attempted to render Farmer indistinguishable from other prisoners in regards to risk of experiencing sexual violence, they also mobilized narratives about the queer dangerousness of gender nonconforming prisoners in order to justify her placement in a men's maximum security penitentiary. BOP officials claimed that the reason that Farmer was placed in Terre Haute was because she had committed numerous (non-violent) disciplinary infractions, including credit card fraud and "having sexual relations with another inmate while knowingly carrying the Human Immunodeficiency Virus (HIV)."[54] In both internal BOP records and communications with the court, officials conflated Farmer's record of disciplinary segregation and administrative segregation. For example, the progress report that accompanied and explained her transfer to Terre Haute noted repeated periods of segregation in other institutions but failed to distinguish between disciplinary and protective segregation. As Farmer explained in her brief to the court, "The progress report gives the erroneous impression that this confinement may have been to protect the safety of others, not to protect [Framer]."[55] Moreover, a week after her rape, prison officials placed Farmer in administrative segregation because "his [*sic*] status as a high-risk HIV-positive inmate posed a danger to others."[56] In their brief, the state attorneys general described her history of sexual assault in BOP facilities alongside her disciplinary

[54] Ibid. at 5.
[55] Reply Brief of Petitioner at 23, *Farmer* (No. 92-7247), Jan. 3, 1994.
[56] Brief of Respondents at 7-8, *Farmer* (No. 92-7247).

record, while also emphasizing her failure to report the violence.[57] They further pointed to at least one incident in which she was disciplined for having consensual sex with another prisoner, labeling her as a threat because she is HIV-positive.[58] The juxtaposition of her history of sexual violence and her disciplinary history portrayed her as dangerously hypersexual and as a sexual security threat, a threat tied to both her nonnormative sexuality and gender, and as at fault for that sexual violence and for her rape in Terre Haute.

As a young African American, HIV-positive trans woman, Farmer's record of infractions and discipline was most likely inflated by her race, sexuality, HIV status, and gender identity. Trans and gender nonconforming prisoners as well as black prisoners report being profiled as particularly troublesome.[59] As such, prisoners like Farmer are often targeted for punishment and disciplinary segregation in prisons. As I will discuss more below, the prohibition of consensual sex has also been an important method of criminalizing and constructing trans and gender nonconforming prisoners as sexually dangerous. In Farmer's case, BOP officials explicitly portrayed Farmer as a threat because of her HIV status and punished her for it. Black trans women, especially those who come in contact with the criminal legal system, were and are quite possibly the

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[57] Farmer had experienced pervasive sexual violence throughout the Federal Bureau of Prisons. She had been raped at least once in a previous institution and had experienced sexual pressure both in the general population as well as administrative segregation in most of the prisons in which she was incarcerated. Yet, Farmer often did not inform prison officials of this violence and harassment, something that is quite common among prisoners largely because of the inadequate and often violent responses by prison administrators to reports of sexual violence.

[58] At oral arguments, the BOP lawyer explained that the BOP has a policy of placing HIV-positive prisoners in administrative segregation "if they are either predators or if they are sexually promiscuous." Transcript of Oral Arguments at 9, *Farmer* (No. 92-7247), Jan. 12, 1994. This policy in effect conflates consensual sex and rape as equally "dangerous," when performed by an HIV-positive prisoner—and could perhaps mark HIV-positive rape *survivors* as threatening.

[59] Arkles, interview.

population hardest hit by HIV/AIDS. Farmer's HIV-positive status intersects with her trans status and her blackness to mark her as *especially* sexually threatening and dangerous to prison security. Prison officials cite this queer dangerousness to justify the violence she experienced—both from other prisoners and institutionally—and vacate themselves from responsibility.

Ultimately, the Supreme Court agreed with BOP officials that "deliberate indifference" required "actual knowledge" of an imminent threat of violence.[60] However, instead of using the "inherently violent" nature of prisons as its justification, the Court focused on the difference between "punishments" and prison "conditions." In his majority opinion, Justice David Souter argued that because the Eighth Amendment outlaws cruel and unusual "punishments" a prison official had to know of and disregard "an excessive risk to inmate health or safety" to have his/her actions legally determined to be cruel and unusual punishment.[61] Without this knowing disregard of a risk, carceral violence is a condition, not a punishment, and therefore not unconstitutional under the Eighth Amendment. In his discussion of the somewhat different legal context of anti-discrimination laws and litigation regarding race, legal scholar Alan David Freeman explains that racial discrimination can be approached from the perspective of its victim—who understands discrimination through the conditions that it produces—or its perpetrator—who understands discrimination as actions inflicted on a person by

[60] However, they remanded the case to the district court for further review because they said the district court may have placed too much weight on Farmer's failure to notify prison officials of her risk of harm. *Farmer*, 511 U.S. 825.
[61] *Farmer*, 511 U.S. at 837.

another.[62] However, the law historically and currently only conceptualizes discrimination through the "perpetrator perspective." In doing so, the law misconceives how discrimination and systems of oppression and inequality, such as racism, work, individualizing discrimination and negating the existence of structural discrimination (or the conditions of discrimination). Eighth Amendment jurisprudence similarly focuses on the "perpetrator perspective" as it constructs this distinction "punishment" and "conditions," individualizing and decontextualizing violence within prisons by focusing on the individualized motives of prison staff and ignoring institutionalized and structural carceral violence.

Souter's ability to disaggregate punishment from prison conditions was also based on nearly a decade and a half of rulings that continually weakened Eighth Amendment protections. As Colin Dayan has discussed in her analysis of Eighth Amendment jurisprudence, courts interpreted the Eighth Amendment most broadly between the mid-1960s and early 1980s, during the prisoners' rights movement.[63] In the early 1980s, courts, especially the Supreme Court, began to shift away from broad interpretation and weaken existing standards. Over the course of the 1980s and 1990s, the Supreme Court argued that there was no constitutional mandate for "comfortable prisons" and that "deprivations…simply are not punishments" unless prison administrators' knowingly and

[62] Alan David Freeman, "Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine" in *Critical Race Theory: The Key Writings that Formed the Movement*, ed. Kimberlé Crenshaw, et al. (New York: The New Press, 1995). See also, Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Brooklyn: South End Press, 2011).
[63] Colin Dayan, *The Story of Cruel and Unusual* (Cambridge: The MIT Press, 2007).

intentionally caused "unnecessary and wanton pain."[64] No matter how much suffering or violence a prisoner endured, if a "condition" was not a specific part of their sentence or knowingly and wantonly inflicted by prison administrators, the Court did not consider it "punishment," and therefore that condition did not violate the Eighth Amendment. The Court also gave prison officials' decisions an increasing amount of deference, citing their "special knowledge" of penal management and security, and ruled that violence or pain was sometimes *necessary* to maintain security and control prisoners. Moreover, the Court ruled that prison conditions could not cumulatively reach the level of cruel and unusual punishment, an important and effective strategy of prisoners' litigation in the 1960s and 1970s; prisoners had to show that they suffered a deprivation of a single identifiable "minimal civilized measure of life's necessities," such as food, warmth, clothing, or adequate medical care.[65]

These cases produced the conditions for the legal inability to recognize most carceral violence as cruel and unusual punishment, thereby normalizing and legitimizing it, by simultaneously arguing that conditions were no longer "punishments" and by focusing attention on the motivations of prison administrators while they also extended increasing amounts of deference to prison administrator's "special knowledge." As Dayan explains, "In this juridical calculation, what is harsh, brutal, or excessive turns into what is constitutional, customary, or just bearable."[66] The legal reasoning in this new

[64] Rhodes v. Chapman, 452 U.S. 337 (1981); Whitley v. Albers, 475 U.S. 312 (1986); Dayan, *The Story of Cruel and Unusual*.
[65] *Rhodes*, 452 U.S. at 347.
[66] Dayan, *The Story of Cruel and Unusual*, 25.

Eighth Amendment jurisprudence allowed violence in prison to "pass[] for necessary and commonplace."[67]

The *Farmer* decision continued the narrowing of legally recognizable cruel and unusual punishment and the expansion of legitimate carceral violence as it required a prison official to act (or fail to act) based on actual knowledge.[68] While Souter used different language to justify his actual knowledge definition of deliberate indifference, his reliance on deference to prison officials and his splitting of conditions and (legally recognizable) punishment overlaps in logic and effect with BOP official's portrayal of prisons as inherently violent and nearly uncontrollable.[69] The very basis of deference to prison officials relies on the construction of prisoners as inherently different from free, non-criminalized people. Prison administrators have special knowledge or expertise in controlling this (racially/sexually/gender deviant) population; therefore, their knowledge produces "conditions" aimed to (legally) control prisoners and maintain security. Under these circumstances, the inevitably or inherently dangerous prison, violent conditions are not punishment unless a prison administrator consciously and explicitly uses excessive

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[67] Ibid., 39.

[68] Indeed, the ACLU and Stop Prisoner Rape have argued that some courts have interpreted the Supreme Court's definition of deliberate indifference in *Farmer v. Brennan* as shielding officials from liability in all but the most extreme cases, which has disproportionately affected trans and gender nonconforming prisoners. Coolman, et al., *Still in Danger*.

[69] Justice Clarence Thomas made this connection more explicit in his concurring opinion. Like BOP officials, Thomas reasoned that prisons are "necessarily dangerous places" because prisoners are "society's most antisocial and violent people." Because of prisoners' "close proximity with one another" in prisons, "some level of brutality and sexual aggression among [prisoners] is inevitable no matter what the guards do…unless all prisoners are locked in their cells 24 hours a day and sedated." Thomas concurring decision, *Farmer*, 511 U.S. at 858-59. Thomas then argues that any condition of confinement, unless explicitly imposed as part of a sentence, cannot be considered "punishment" under the Eighth Amendment, explaining: "Because the unfortunate attack that befell [Farmer] was not part of his [*sic*] sentence, it did not constitute 'punishment' under the Eighth Amendment." Ibid. at 859.

violence to punish a prisoner. "Cruel and unusual punishment" becomes aberrant, the actions of bad administrators that exceed or betray their special expertise.

By simultaneously focusing on the intent and knowledge of prison officials and giving those officials extraordinary deference, the Court legalizes most forms of carceral sexual violence, especially those that are integrated into institutional security function. Yet, prisoners, especially trans and gender nonconforming prisoners, describe carceral sexual violence as an important part of carceral punishment, perpetrated by staff in many different forms. Eighth Amendment jurisprudence, including *Farmer*, produces prisoners as dangerous and fungible and strips them of the legal ability to name violence. As Dayan argues, "Legally the plaintiff has become a nonreactive body, a defenseless object. Subjectivity is the privilege of those in control."[70] This dehumanization is grounded in racialized, gendered, and sexualized constructions of prisoners as inherently dangerous and violent and trans and gender nonconforming prisoners as queerly dangerous and as security threats, which renders most forms of carceral sexual violence as unrecognizable as cruel and unusual punishment and therefore as legitimate violence. As Dayan asks, "What are legitimate correctional purposes when those incarcerated are arbitrarily assumed to be dangerous, unfit, and subhuman?"[71]

The Limits of Legal Reform: The Prison Rape Elimination Act of 2003

In 2003, the United States Congress unanimously passed the Prison Rape Elimination Act (PREA), which aimed to address and reduce rape in penal institutions.

[70] Joan Dayan, "Legal Slaves and Civil Bodies," in *Materializing Democracy*, ed. Russ Castronovo and Dana D. Nelson (Durham, NC: Duke University Press, 2002), 85.
[71] Dayan, *The Story of Cruel and Unusual,* 36.

PREA established a zero tolerance standard for prison rape and authorized the development and implementation of national standards to prevent, reduce, and punish prison rape.[72] In order to do this, PREA established the National Prison Rape Elimination Commission (NPREC), a bipartisan panel tasked with studying sexual assault in US prisons and jails. NPREC held public hearings from 2005 to 2007 and issued their report in June 2009. The Department of Justice edited NPREC's recommended standards and finalized the PREA standards in May 2012.[73] States are now required to be in compliance with these new standards in order to receive full federal funding—non-compliant states lose 5% of that funding. Compelled by PREA's passage, a number of state departments of corrections wrote their own policies to address sexual violence.

PREA is the first national legislation to substantively address sexual violence in prisons and work to eliminate that violence, and it, rightly, understands prison rape as a problem throughout the US prison system and a source of trauma for prisoners. It has incentivized departments of corrections around the US to take sexual violence seriously, at least in policy, and provides prisoners and their advocates with additional tools to address and challenge sexual violence in penal institutions. The standards also explicitly recognize that LGBTI and gender nonconforming people are at increased risk for sexual

[72] Prison Rape Elimination Act of 2003, S. 1435, 108th Cong. (2003). Robert Dumond argues that PREA was part of a wave of researchers and penologists addressing sexual violence in prisons in the late 1990s and early 2000s, including a flood of studies showing the prevalence of sexual violence, increased media attention, states adopting methods to document sexual violence, and states creating training and other methods of prevention. Robert W. Dumond, "The Impact of Prisoner Sexual Violence: Challenges of Implementing Public Law 108-79 The Prison Rape Elimination Act of 2003," *Journal of Legislation* 32, no. 2 (2006). This increased attention to sexual violence in prisons is probably the result of decades of activism by current and formerly incarcerated people and their advocates, such as Just Detention International.

[73] "National Standards to Prevent, Detect, and Respond to Prison Rape," *Federal Register* 77, no. 119 (June 20, 2012).

violence and offer some solutions. Nevertheless, PREA is extremely limited. Its enforcement mechanisms are relatively weak; the 5% federal funding penalty is low, and prisoners and their advocates cannot file lawsuits through PREA. Even more importantly, the law, the NPREC report, the adopted standards, and state PREA policies do not fundamentally change dominant narratives about sexual violence and queer dangerousness—in fact, they rely on and reproduce them in a number of ways—and include loopholes for security considerations. Prison rape is constructed as individualized actions that can be reduced or stopped through state intervention—although, importantly, the standards acknowledge and address staff perpetrated violence.

In her reading of PREA and the NPREC report, Jessi Lee Jackson argues that not only do PREA and NPREC misrecognize the prison system's relationship to sexual violence but they also "mobilized racialized fears of aggressive black male sexuality" to legitimize and popularize the law.[74] She explains that Congressional testimony supporting PREA frequently gave the impression that prison rape was overwhelmingly perpetrated by black men against white men. Indeed, the text of PREA describes prison sexual assaults as "frequently interracial" and explains that this dynamic "significantly exacerbates interracial tensions, both within prisons and…in the community at large," echoing social scientific research that blamed prison rape on black male prisoners (racially) targeting white prisoners.[75] Jackson argues that "racialized understandings of

[74] Jessi Lee Jackson, "Sexual Necropolitics and Prison Rape Elimination," *Signs* 39, no. 1 (Autumn 2013): 197.

[75] Prison Rape Elimination Act of 2003, S. 1435, 108th Cong. (2003): 973. Similarly, the Idaho Department of Correction's "Prison Rape Elimination" policy, which I will discuss in detail below, also names "exacerbate[d] interracial tensions because of interracial sexual assaults" as one of eight "consequences of prison rape and sexual activity." Idaho Department of Correction, "Prison Rape Elimination," 325.02.01.001, Version 3 (May 20, 2009).

sexual abuse in prison" framed how prison rape was defined and addressed in the law and the report. While interracial rape certainly happens in prisons and can lead to heightened racial tensions among prisoners, the focus on prison rape as racial because of the racial identities of the prisoners involved while the violent racialized structure of the prison system itself is simultaneously ignored or negated individualizes prison sexual violence and portrays the state and prison system as protectors, not perpetrators, and as able to solve the problem of prison rape. Jackson's excellent reading of the NPREC report shows how discourses of racialized sexual threat frame PREA, the NPREC report, and the adopted standards. These discourses were key to the passage of PREA and its construction of sexual violence in penal institutions, and they produced security exemptions, which has led to the adoption of standards that obscure and reauthorize many forms of carceral sexual violence, particularly those targeting trans and gender nonconforming prisoners.

In order to address trans prisoners' increased risk of sexual violence, the standards require prison administrators to determine housing placement and other concerns for trans and intersex prisoners on a case-by-case basis and prohibit blanket policies basing placement on genital status alone; nevertheless, they ultimately (re)produce trans and gender nonconforming prisoners as potential security threats that need to be addressed by prison administrators. The standards state that prison administrators should determine placement based on trans and intersex prisoners' "health and safety" and "whether the placement would present management or security problems," but also should give

"serious consideration to the inmate's own views regarding his or her own safety."[76] While it is important that the standards advocate for taking a prisoner's views into consideration, those views are framed as, at best, secondary to prison administrators' understandings of health, safety, and security. This language not only implies that trans and gender nonconforming prisoners might be threats to security but also mobilizes the extraordinary legal deference to prison administrators' special expertise to manage that queer threat, which has legalize and obscured most carceral sexual violence.

Similarly, the standards authorize pat-down, strip, and body cavity searches as commonsensical and necessary aspects of incarceration, renormalizing a practice that many trans and gender nonconforming prisoners identify as an important and pervasive form of carceral sexual violence. Invasive searches are common occurrences in penal institutions, justified as institutional policy because of the perception of prisoners as dangerous and untrustworthy. Described as necessary for institutional security, these searches are often violent and used to punish or humiliate prisoners, especially those whose bodies are seen as sexually ambiguous. Trans and gender nonconforming prisoners report being subject to repeated and unnecessary searches—sometimes every time they leave their cell—that can be intentionally painful and are sometimes performed in public.[77] Attorney, community organizer, and activist Andrea Richie describes strip searches as "a form of systematic, state-sanctioned sexual assault."[78] While the standards

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[76] "National Standards to Prevent, Detect, and Respond to Prison Rape," 37110.
[77] "No Where to Turn," *GIC TIP Journal* 1, no. 3 (Summer 2001); Paula W., "Paula W.'s Story"; Andrea Ritchie, Testimony at *Hearing: Lockups, Native American Detention Facilities, and Conditions in Texas Penal and Youth Institutions*, Austin, Texas (March 26-27, 2007), http://nprec.us/docs/lockupsintx_ritchie.pdf.
[78] Ritchie, Testimony, 133.

recognize that they can be a source of trauma for prisoners, they focus their interventions almost entirely on cross-gender searches. The standards prohibit cross-gender pat-down searches of female (but not male) prisoners in most adult facilities and cross-gender strip and body cavity searches for both male and female prisoners, "except in exigent circumstances or when performed by medical practitioners."[79] In their commentary on the standards, the Department of Justice (DOJ) explains that these "routine" searches involve "necessarily intimate touching" and explicitly exempts this touching from being considered sexual abuse, unless they are "performed in a manner that evidences an intent to abuse, arouse, or gratify sexual desire."[80]

Security fundamentally structures the standards' construction of searches in two primary ways. First, security produces the searches as commonsensically, "necessarily intimate" and therefore normative and largely unchallengeable. While the DOJ cites numerous statistics and commentary about sexual abuse, including during searches, and recognize that these searches—no matter the intent of the officer—can be experienced as traumatic, this trauma is quickly displaced by security concerns and, secondarily, by monetary costs. For example, while the DOJ acknowledged that male prisoners experience sexual abuse in cross-gender pat-down searches, they justify their exemption from this ban as a calculation of "benefits," arguing that male prisoners would "benefit…significantly less" than female prisoners while the costs would be significantly

[79] "National Standards to Prevent, Detect, and Respond to Prison Rape," 37201. They prohibit cross-gender pat-down searches for all prisoners in juvenile facilities and largely except lockups with less than fifty prisoners from these requirements. The standards also requires facilities to create policies and procedures to allow prisoners to shower, perform bodily functions, and change clothing "except in exigent circumstances or when such viewing is incidental to routine cell checks." Ibid., 37201.
[80] Ibid., 37132, 37116.

higher.[81] The security need and routinization of such searches also prohibits the DOJ from fully addressing the trauma that they cause, reducing their intervention to a manageable solution: prohibiting cross-gender searches in some contexts. Second, every "requirement" regarding searches includes the security-related exemption: "except in exigent circumstances." This loophole, again, provides deference to the security expertise of prison administrators, who decide what constitutes "exigent circumstances." These discourses of security—along with the focus on cross-gender searches—produce sexual abuse in searches as individualized, aberrant actions by guards who pervert a practice that ensures safety for all. This construction of searches and security also (re)produces prisoners' bodies as necessarily fungible and violatable in order to ensure that safety and security and obscures how these searches actually make many prisoners, especially gender nonconforming and trans prisoners, insecure by subjecting them to violent, traumatically invasive actions. The violatability of prisoners' bodies becomes even more stark as the DOJ recognizes the trauma of such searches.

The standards also say nothing about how the restrictions on "cross-gender" searches apply to trans and intersex prisoners. In their commentary about the standards, the DOJ explained that they did not include a provision requiring that prison administrators allow trans and intersex prisoners to choose the gender of the staff that searched them, for which LGBT advocates had argued, because "such requests have the potential to be arbitrary and disruptive to facility administration."[82] Instead, the DOJ stated that this problem "can be addressed by properly assigning (or re-assigning)

[81] Ibid., 37134.
[82] Ibid., 37135.

transgender and intersex inmates to facilities or housing units that correspond to their gender identity, and not making housing determinations based solely on genital status."[83] By stating that the gender of a prisoner for the purposes of determining which searches are "cross-gender" should be determined by that prisoner's official sex classification, the DOJ (re)authorizes prison administrators to determine a trans prisoner's sex and constructs that prisoner's gender identity as "arbitrary and disruptive to facility administration"—or, as queer dangerousness. Under these circumstances, the standards would require that trans women (and intersex and gender nonconforming people) in men's institutions be searched by male staff and prohibit searches by female staff and trans men (and gender nonconforming and intersex people) in women's institutions be searched by female staff.

The DOJ's suggested solution to this problem—"properly assigning" trans and intersex prisoners based on their gender identity—fundamentally disregards the reality of their own placement requirements. As discussed above, the standards locate the authority to determine "proper assignment" with prison administrators. Even as the standards prohibit automatic placement based on genital status, they seem to assume that placement will still largely be based on genitals or other physical attributes. While the standards prohibit searches or physical examinations of trans or intersex prisoners "for the sole purpose of determining the inmate's genital status," they still produce knowledge of genital status as a necessity for the management of these prisoners.[84] The standards state that if the genital status of a trans or intersex prisoner is unknown, staff should determine

[83] Ibid., 37135.
[84] Ibid., 37110.

that status through conversations with the prisoner, by reviewing their medical records, or, if necessary, through an examination conducted by a medical practitioner as part of a broader medical examination. The standards, therefore, reinforce the assumption that genitals provide information about the essential nature of a trans or intersex prisoner—and that non-trans-or-intersex prisoners' genital status can be "known" without investigation. In addition, when discussing the placement of trans and intersex prisoners in a sex-segregated facility, the DOJ explains that this placement may change over time, following hormone treatment or surgery. While a prisoners' gender identity has some impact on their "proper assignment," it is far from the determining factor, and in many cases matters very little. As civil rights attorney Chase Strangio explained to me, correctional agencies almost always reject suggestions for practices and policies that allow prisoners choice.[85] The DOJ's own dismissal of trans and intersex prisoners' preference for the gender of staff conducting searches is an example of the refusal to engage prisoners' choice and the disregard for their gender identity. The standards, therefore, do not fundamentally change the practice of classifying nearly all trans women as men and trans men as women, which is the source of a substantial amount of violence. Put another way, the assumption of the necessity of physical sex change renders trans men and women who do not or cannot physically transition and gender nonconforming prisoners as illegible to PREA.

The focus on cross-gender searches simultaneously overemphasizes gender in staff-perpetrated sexual abuse—suggesting that sexual abuse is primarily incited by sexual difference with little-to-no engagement with power—while negating how gender

[85] Chase Strangio, interview by author, August 20, 2013, New York, NY, on file with author.

deviance or nonconformity is also a basis for abuse that exceeds the terms of "cross-gender." Gender normative carceral logics produce this myopic focus on cross-gender searches and the need to create barriers to contact between (essentialized) males and females. In doing so, they render gender nonconforming, trans, and intersex prisoners as illegible and therefore largely ineligible for protection.

In addition to normalizing strip, body cavity, and pat-down searches—essentially constructing them as not violence, unless intended to be so—PREA also exempts medical examinations from being considered abuse (unless intended to be so). PREA states that examinations that gather physical evidence or are part of medical treatment in the course of investigating a rape as well as "the use of a health care provider's hands or fingers or the use of medical devices" during any "appropriate medical treatment" or while performing body cavity searches "in order to maintain security and safety within the prison or detention facility" are not sexual abuse.[86] While the standards prohibit searches or physical examinations of trans and intersex prisoners "for the sole purpose of determining the inmate's genital status," they authorize medical staff to conduct such an examination, "as part of a broader medical examination," "if necessary."[87] In other words, both medical and non-medical staff can still forcibly touch a prisoner's body and insert a variety of instruments into their body, including as a response to rape. Trans, gender nonconforming, and intersex prisoners report these actions as a frequent form of carceral sexual violence. Incarcerated women also report non-consensual gynecological

[86] Prison Rape Elimination Act of 2003, 988-89.
[87] "National Standards to Prevent, Detect, and Respond to Prison Rape," 37110.

exams as a form of carceral sexual violence.[88] Because these prisoners, especially those who are people of color, are often determined to be particularly dangerous and are also disproportionately survivors of prison rape, prison staff are able to justify invasive medical exams and searches as regular necessities of managing the order and security of a prison. PREA, in other words, produces a legally recognizable definition of sexual violence that excludes (and in some cases explicitly legalizes) many important forms of carceral sexual violence.

By mobilizing the rhetoric and practice of deference to prison administrators based on their expertise in security, PREA reproduces prisoners' bodies as fungible and violatable, particularly for security purposes. In effect, PREA (re)authorizes prison administrators to determine what protection is in practice while remobilizing narratives of queer security threat. Indeed, some state prison officials have interpreted PREA to legitimize their continued targeting of trans and gender nonconforming prisoners for discipline and punishment in the name of protection.

Idaho prison administrators explicitly do this in their "Prison Rape Elimination" policy, which includes a provision requiring "gender appropriate clothing and hygiene." The policy states:

> To foster an environment safe from sexual misconduct, offenders are prohibited from dressing or displaying the appearance of the opposite gender. Specifically, male offenders displaying feminine or effeminate appearance and female offenders displaying masculine appearance to include, but not limited to, the following: hairstyles, shaping eyebrows, face makeup, undergarments, jewelry, and gender opposite clothing.[89]

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[88] Arkles, interview; Levi, Testimony.

[89] Idaho Department of Correction, "Prison Rape Elimination." While this section notes that it must be implemented in accordance with their policy regarding prisoners with Gender Identity Disorder and any treatment plans for those prisoners, their GID policy says nothing about access to gendered clothing and grooming products. Notably, Idaho's GID policy is one of the more detailed policies and considered one of

While marking gender nonconformity as a cause of sexual violence—and by extension marking signs of gender nonconformity as hypersexuality—the policy does not name gender nonconforming, trans, or gay prisoners as at increased risk for sexual violence.[90] In doing so, it produces the criminalization (or disciplinization) of gender nonconformity as protection for gender nonconforming prisoners and their institutions. Trans and gender nonconforming prisoners are constructed as a source of sexual violence, not victims, and therefore to blame for their own victimization and related institutional disorder. Put another way, they are inevitably subject to sexual violence but unrapable (or at least unvictimizable). Moreover, Idaho's GID policy requires the placement of prisoners in a sexed facility based on their "primary physical sexual characteristics," defined as "genitalia and reproductive organs."[91] With such a policy—which effectively means that nearly all trans women (and gender nonconforming male-classified people) are in men's institutions and all trans men (and gender nonconforming female-classified people) are in women's institutions—Idaho's sexual violence elimination policy and GID policy work together to eliminate gender nonconformity in Idaho penal institutions.

While the prohibition on gender nonconformity explicitly targets gender nonconforming and trans prisoners, the policy also prohibits consensual sexual activity between prisoners, a prohibition that has long been a means to target trans and gender nonconforming prisoners for punishment throughout the US. The Idaho DOC's pamphlet

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the better ones. Idaho Department of Correction, "Gender Identity Disorder: Healthcare for Offenders with" 401.06.03.501 (adopted 10/31/2002).

[90] They explicitly name mentally ill prisoners, youth, and "those who appear to be potential targets for sexual predators." Idaho Department of Correction, "Prison Rape Elimination," 6.

[91] Idaho Department of Correction, "Gender Identity Disorder," 5, 2.

about the policy for prisoners, "Maintaining Dignity: Prison Rape and Sexual Activity Elimination," explains: "The Idaho Department of Correction has a zero-tolerance policy concerning rape and sexual activity in IDOC facilities. Prison rape and sexual activity seriously reduce the Department's ability to fulfill its mission to protect the public and successfully return offenders to communities."[92] Here and elsewhere in the pamphlet and policy, Idaho prison administrators conflate consensual sexual activity and sexual violence as equally dangerous. In their explanation for prohibiting sexual violence, they claim that sexual relationships in prison "foster violence," explaining that "eliminating sexual assault and sexual activity promotes a safer environment… [and] promotes an atmosphere where people can concentrate on making the changes in their lives that are necessary for success upon release."[93] Mobilizing narratives about the danger of (homo)sexual activity produced in the early and mid-twentieth century, they explain that the "consequences of prison rape and sexual activity" include increased risk that survivors of rape "will commit crimes when they are released," "worsen[ed] racial tensions because of interracial sexual assault," increased violence against prisoners and staff, negative psychological and physical effects for survivors, increased risk of "insurrection and riot," and reduced "ability to successfully transition to the community and a law-abiding life style when released."[94] This pamphlet and policy produce sex in prison as always violent and criminal, as perverting and morally deleterious, a production

[92] Idaho Department of Correction, *Maintaining Dignity: Prison Rape and Sexual Activity Elimination: Handbook for Offenders* (March 2004), 1. They also prohibit "inappropriate physical contact", such as "lingering touching, physical contact or inappropriate kissing."
[93] Ibid., 1.
[94] Ibid., 1. The policy also includes these "consequences."

reliant on long-held anxieties about (racialized) queer dangerousness and gender and sexual nonnormativity as threat.

These anxieties intersect with the continued construction of trans and gender nonconforming prisoners as (dangerously) hypersexual, inciters of sex, and unrapable to authorize prison administrators to target trans and gender nonconforming prisoners for discipline and punishment through this prohibition on sexual activity. Staff often assume that these prisoners are engaging in sex—whether they are or not—and believe that sexual assaults are consensual sex and that all sex is inevitably dangerous (at least to institutional order and security). Trans and gender nonconforming prisoners are, therefore, punished for their participation in sexual activity, perceived sexual activity, and sometimes for surviving sexual assault or rape. Neither the Idaho policy nor PREA and its standards challenge these controlling narratives. In fact, they often reproduce them.[95] Put another way, these policies actually make gender nonconforming and trans prisoners more vulnerable to sexual violence, not only perpetrated by staff but also by other prisoners, as they construct these prisoners as hypersexual and queerly dangerous and take away their ability to protect themselves.

[95] While PREA and its standards do not prohibit consensual sexual activity, they authorize its prohibition by state departments of corrections. During the NPREC commission, LGBT advocates recommended that the standards include a provision stating that consensual sexual activity should not be prohibited and that prisoners should not be disciplined for it. See for example, Strangio and Arkles to Hinchman. However, the standards did not include such a provision. Instead, they allowed for the prohibition and disciplining of consensual sexual activity but clarified that consensual sexual activity should not be automatically classified as sexual abuse. Nevertheless, legal scholar and former staff attorney at the Sylvia River Law Project Gabriel Arkles reported that PREA had been used to discipline rape survivors. Arkles described how when one of his trans client who had been repeatedly raped (which notably occurred after her repeated requests for protective custody were denied) finally reported the violence, she and her rapist were written up and disciplined for engaging in sexual conduct. At her hearing, the officer who ruled against her repeatedly brought up PREA "as if to shame her, to say that her points weren't valid." He questioned why she had not reported the rapes immediately, citing PREA as proof that she could and should have done so. While this trans woman appealed this decision and won, she still endured a traumatic official response—initially sanctioned in the name of PREA—to her sexual assault. Arkles, interview.

While the Idaho DOC makes some distinction between sexual assault and consensual sexual activity, the Massachusetts Department of Corrections (MDOC) almost entirely collapses consensual sex into sexual assault and rape in their "Sexually Abusive Behavior Prevention and Intervention Policy." The policy prohibits "all intentional acts of sexually abusive behavior or intimacy…regardless of consensual status" and defines "sexually abusive behavior" as including "acts of intimacy, sexual contact, sexual abuse and staff sexual misconduct."[96] Throughout the policy, no distinction is made between consensual sexual activity and sexual assault and rape. Prison administrators argue that no prisoner can consent to a sexual relationship, therefore all sex within prisons is at least "inherently coercive," if not violent.[97] While prisons are inherently violent and coercive institutions and consent can be very complicated within that environment, the construction of prisoners as unable to consent not only puts those perceived as hypersexual at increased risk of punishment but strips prisoners of a key part of life (for many): sexual intimacy and companionship. Sexual intimacy, love, and companionship

[96] Massachusetts Department of Correction, "Sexually Abusive Behavior Prevention and Intervention Policy," 103 DOC 519 (March 2013), 3, 5.

[97] For example, Paul DiPaolo, MDOC's PREA manager, explained in an affidavit to a Massachusetts district court: "Under PREA, no inmate can consent to a sexual relationship. Correctional officers can never know if sexual activity in prison is in consensual. There is something inherently coercive about any sexual relationship in prison." Affidavit of Paul DiPaolo at 2, Battista v. Spencer, No. 05-11456, 2011 U.S. Dist. LEXIS 92010 (D. Mass. 2011), Oct. 3, 2008, 2. DiPaolo further argued that PREA itself does not allow for consensual sexual activity among prisoners and that many states have the same policy as Massachusetts regarding the absence of consent. Brief of Defendants-Appellants, Battista v. Clarke, 645 F.3d 449 (1st Cir. 2011) (No. 10-1965), Oct. 25, 2010. See also, Dumond, "The Impact of Prisoner Sexual Violence."

In his discussion of PREA with me, Massachusetts antiprison activist Jason Lydon explained that prisoners were getting disciplinary tickets for sexual activity and even for talking about their genitals (for example, discussing their discomfort with or desire to alter them). In addition to targeting prisoners for discipline because of consensual sexual activity, he explained that the increased presence of cameras because of PREA also makes prisoners more vulnerable to punishment. Finally, he explained that in his experience, while MDOC told prisoners about PREA, staff, including the PREA manager who was in charge of addressing sexual violence, were largely unresponsive to or denied requests for assistance from prisoners and advocates. While he acknowledged that other advocates had reported that PREA had been useful, he found that it had only done harm. Lydon, interview.

are often constructed as a core part of what it means to be human. By prohibiting these human experiences and rendering them as coercion and violence, prisoners are dehumanized and produced as socially dead.

In addition to targeting trans and gender nonconforming prisoners for punishment, Massachusetts prison administrators have used this policy to justify their denial of gender-affirming medical treatment for at least a few trans women. For example, prison administrators repeatedly referenced this policy in their communications to a Massachusetts district court in order to justify their refusal to provide hormone therapy to Sandy Jo Battista, a white trans woman classified and housed as male. Officials argued that Battista's bodily feminization through hormone therapy would put her at increased risk for sexual violence and disrupt the space of the prison by inciting other prisoners to sexual desire and violence. They also argued that her involvement in a few sexual relationships with other prisoners, her past experience of sexual and other violence, and her history of non-compliance with prison rules (often directly related to her gender identity and expression) increased that risk.[98]

In keeping with their policy, prison administrators constantly collapsed consensual sex into sexual assault. They referred to both Battista's alleged consensual

[98] See for example, Defendants' Memorandum of Law, *Battista* (05-11456), Dec. 5, 2008; "Gender Identity Disorder Security Review" (Aug 8, 2008), Attachment to Defendants' Memorandum of Law, *Battista* (No. 05-11456), Dec. 5, 2008; Defendants' Sur-Reply to Plaintiff's Reply, *Battista* (No. 05-11456), Oct. 7, 2008; Defendant's Substitute Findings of Fact and Conclusions of Law, *Battista* (No. 05-11456), May 17, 2010; Affidavit of Robert Murphy, *Battista* (No. 05-11456), Sept. 4, 2008; Depositions of Robert F. Murphy, Jr., *Battista* (No. 05-11456), June 30, 2008; Katrin Rouse, Report of Qualified Examiner to the Court (April 1, 2002), Attached to Complaint, Battista v. Murphy, No. 03-12643 (D. Mass, Dec. 16, 2003). Massachusetts prison administrators made similar arguments in order to justify their denial of gender-affirming medical treatment for Teresa Brugliera (see *Brugliera v. Commissioner of Massachusetts Department of Correction*, No.07-40323, D. Mass.) and Michelle Kosilek (see *Kosilek v. Maloney*, No. 92-12820, D. Mass.; *Kosilek v. Spencer*, No. 00-12455, D. Mass.; *Kosilek v. Clarke*, No. 12-2194, D. Mass.).

sexual activity and experiences of sexual violence as a "PREA incidents."[99] Prison officials also referenced statistics gathered through PREA that included—but did not differentiate between—consensual sexual activity, sexual assault perpetrated by staff, and sexual assault perpetrated by prisoners to portray the Massachusetts Treatment Center, where Battista was incarcerated, as an exceptionally sexually dangerous place because of prisoner-perpetrated violence.[100]

Battista's consensual participation in sexual activity was constructed as the cause of the violence that she experienced—an assertion that they substantiated with PREA—and as a reason to not provide her with necessary medical treatment. In fact, MDOC's PREA manager explained that her "pattern of engaging in high-risk sexual activity" impacted "his opinion that providing Battista with female hormones would present a high risk of sexual assault."[101] Like the Idaho Department of Corrections, Massachusetts prison administrators use PREA's recognition that trans prisoners are at increased risk for sexual assault to prohibit certain kinds of gender nonconformity in their institutions. They constructed her feminization through hormone therapy, especially the development of breasts, as producing sexual violence and therefore as prohibited under PREA.[102] Using PREA to support their claims that hormone therapy would increase her risk of sexual violence and their policy regarding sexual violence to construct her as hypersexual and

[99] See, Defendant's Substitute Findings of Fact and Conclusions of Law, *Battista* (No. 05-11456); Executive Summary: The Alleged Sexual Misconduct by Residents (ND), Attached to Defendants' Sur-Reply to Plaintiff's Reply, *Battista* (No. 05-11456).
[100] See for example, Defendants' Sur-Reply to Plaintiff's Reply, *Battista* (No. 05-11456), Oct. 7, 2008; Defendant's Substitute Findings of Fact and Conclusions of Law, *Battista* (No. 05-11456).
[101] Defendants' Proposed Findings of Fact at 60, *Battista* (No. 05-11456), July 23, 2010.
[102] For example, they argued that their "concern that if Battista achieves a more feminine appearance, including the development of breasts, through hormones treatment [she will be at increased risk for sexual violence] is supported by PREA which specifically addresses the issues of transsexualism and the potential for victimization." Defendants' Proposed Findings of Fact at 54, *Battista* (No. 05-11456).

dangerous, Massachusetts prison administrators both vacated themselves of responsibility for her experiences of sexual violence and justified their denial of necessary medical treatment as protection and security (for Battista and the institution).

While one could argue that the Massachusetts and Idaho policies violate the PREA standards, I argue instead that they highlight PREA's limitations and failure to account for how sexual violence is structured into penal practices, especially those used to manage trans and gender nonconforming prisoners. As a liberal reform, PREA produces sexual violence as individual and aberrant and identifies state intervention, including increased surveillance, punishment, and other prison management tools, as the means to end prison rape.[103] As Jackson explains, PREA and NPREC "frame[] increased state control over incarcerated bodies as a way to solve the problem of prison rape."[104] In doing so, they sever "the structures of prison rape from the carceral system, presenting rape by either prisoners or staff as resulting from the absence of carceral power."[105] This account negates how carceral control and management strategies strip prisoners of agency, choice, and the ability to keep themselves safe, producing much of the violence in prisons, while also perpetrating violence against those prisoners through management

[103] Some feminists, particularly feminists of color, have recently similarly criticized the mainstream antiviolence movement's strategy of relying on the state and criminal legal system as the solution for sexual violence, which negates how the state is also a perpetrator of sexual violence and oppression. See Smith, *Conquest*; Beth E. Richie, *Arrested Justice: Black Women, Violence, and America's Prison Nation* (New York: New York University Press, 2012); Incite! Women of Color Against Violence, *The Color of Violence*; Julia Sudbury, "Rethinking Antiviolence Strategies; Lessons from the Black Women's Movement in Britain," in *Color of Violence*, ed. Incite! Women of Color Against Violence; Stormy Ogden, "Pomo Woman, Ex-Prisoner, Speaks Out," in *Color of Violence*, ed. Incite! Women of Color Against Violence; Kristin Bumiller, *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement Against Sexual Violence* (Durham, NC: Duke University Press, 2008); Kimberlé Crenshaw, "From Private Violence to Mass Incarceration: Thinking Intersectionality about Women, Race, and Social Control," *UCLA Law Review* 59 (2012); James, *Resisting State Violence.*

[104] Jackson, "Sexual Necropolitics," 197.

[105] Ibid., 208.

practices, often in the name of protection. As critical race, feminist, and queer studies scholars have argued, liberal reforms, including those that address violence and discrimination through state recognition and intervention, renormalize structural inequality and state violence by individualizing violence and discrimination and producing the state as a source of protection.[106]

While the PREA standards provide prisoners and their advocates with additional tools by recognizing that trans and gender nonconforming prisoners are disproportionately at risk for experiencing sexual violence—for example, by potentially helping prove the "actual knowledge" requirement that *Farmer* established—the standards simultaneously create additional opportunities and incentive for prison administrators to target trans and gender nonconforming prisoners for discipline and punishment because they do not—and cannot—address structural violence.[107] Ultimately, PREA falls in line with the racialized gender normative logics of the prison system that designate prisoner bodies as sites of insecurity that need containment and can rightfully be violated. PREA strengthens the prison system and produces certain forms of carceral sexual violence as protection and security.

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[106] See for example, Incite! Women of Color Against Violence, *The Color of Violence*; Spade, *Normal Life*; Freeman, "Legitimizing Racial Discrimination."

[107] All the advocates that I interviewed were highly critical of PREA but also argued that they would use it in their advocacy. In fact, Owen Daniel-McCarter, attorney and co-founder of the Transformative Justice Law Project, argued that because PREA acknowledges that prison rape exists and is a serious problem, it sets a new tone that might produce cultural change. Owen Daniel-McCarter, interview by author, September 5, 2013, Chicago, IL, on file with author; Strangio, interview; Williams, interview; Arkles, interview. My criticisms of PREA, its standards, and the related state department of corrections policies is not a criticism of prisoners and their advocates' participation in shaping those standards or in using them to address sexual violence.

While there have been major shifts in penological, social scientific, and legal discussions of sexual violence in prisons since the early twentieth century—from little acknowledgement of sexual assault and rape to Congress unanimously passing a national law that recognizes and aims to eliminate prison rape—sexual violence against all prisoners, but especially trans and gender nonconforming prisoners, remains a prominent feature of carceral power, and the narrative of the simultaneous inevitability and impossibility of sexual violence against trans and gender nonconforming people endures. Today, like in the past, discourses of inevitability authorize various forms of carceral violence—including segregation, invasive searches, and restrictions on gendered clothing, grooming products, and expressions—while impossibility relieves prison administrators from responsibility for sexual violence experienced by trans and gender nonconforming prisoners. In other words, this enduring narrative, along with the interconnected narrative of men's prisons as sites of uncontrollable sexual violence perpetrated by racially hypermasculine prisoners, continues to normalize and legitimize carceral power and carceral sexual violence, even obscuring some of it from being recognized as violence. These narratives are another product of the racialized gender normative logics of the US prison system, as carceral power targets and punishes racialized, gendered, and sexual nonnormativity and produces such nonnormativity as a (sexual) security threat. As such, gender nonconforming and trans prisoners play a key role in dominant narratives legitimizing incarceration and state violence, and they experience that carceral sexual violence particularly acutely, as carceral power produces them as inherently fungible.

Chapter Four

"A Serious Medical Need?": Carceral Necropower and Access to Gender-Affirming Medical Treatment

In 2009, Robert Murphy, the Superintendent of the Massachusetts Treatment Center, the Massachusetts Department of Correction's (MDOC) security hospital, concluded his "security review" of hormone treatment for Sandy Jo Battista, a white trans woman who was civilly committed to the Treatment Center, by stating, "The use of hormone therapy as well as other potential 'feminizing' physical changes are not supported due to the serious and potential security contraindications to his [sic] safety in this facility."[1] Throughout his security review, Murphy constructed Battista as queerly dangerous, as the source of (sexual) violence and institutional disorder. He argued that hormone therapy's feminizing effects—causing her "to have breasts and a feminine appearance"—would "create a significant risk" both to Battista's safety and the security and order of the Treatment Center. By concluding that MDOC should not provide Battista with hormone therapy because it posed a security threat, Murphy constructed institutional security as the determining factor in whether to provide penal medical treatment. According to this security review and the policy that mandated it as necessary to authorize the gender-affirming medical treatment within MDOC institutions, prisoners' health and mental and bodily needs are secondary to security concerns.

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[1] Robert Murphy, "GID Treatment Security Review – Sandy Jo Battista" (Sept. 1, 2009) at 5-6, Kosilek v. Spencer, 889 F.Supp.2d 190 (D. Mass. 2012), Sept. 16, 2011. See also Murphy's preliminary security review, in which he made similar determinations. Affidavit of Paul DiPaolo, Battista v. Dennehy, No. 05-11456, 2011 U.S. Dist. LEXIS 92010 (D. Mass. 2011), Oct. 3, 2008.

In 2003, Battista was adjudicated to be a "sexually dangerous person" and committed to the MTC for one day to life. She had originally been incarcerated in 1983 for a term of 12-20 years following her conviction for a sex offense. She was released from her criminal sentence in 2001 but was immediately civilly committed. Attached to Complaint, Battista v. Murphy, No. 03-12643 (D. Mass., Dec. 16, 2003).

In Murphy's six-page security review, we see a convergence of the discourses and practices that I have discussed over the past three chapters, justifying his effort to deny Battista access to gender-affirming medical treatment. Approximately half of the security review details Battista's commitment and disciplinary history—including allegations or charges that were never proven—and focuses on sexual incidents, both consensual and forced. Citing MDOC's PREA policy—which collapses consensual sexual activity and sexual assault as equivalently dangerous to prisoners' safety and institutional security—Murphy argued that her history of surviving sexual assaults and her participation in "improper sexual relationships" with a few other prisoners demonstrated her "lack of good judgment," portraying her as manipulative, deceptive, and dangerous.[2] By focusing on Battista's supposed disciplinary infractions and consensual sexual activity alongside her history of experiencing sexual violence and the supposed management problems of her (potentially) feminized body, Murphy portrays prison officials as protectors who are consistently thwarted by Battista's queerly dangerous actions and embodiment, thereby constructing the denial of hormone therapy as legitimate violence or as necessary to maintaining security.

Murphy wrote this security review in the context of a long legal battle over Battista's access to gender-affirming medical treatment, particularly hormone therapy.

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[2] Brief of Plaintiff-Appellee at 54, Battista v. Clarke, 645 F.3d 449 (1st Cir. 2011) (No. 10-1965), Dec. 7, 2010. For example, in his 2008 preliminary security review, Murphy argued that she was "not a reliable reporter" and that she "has a history of noncompliance with DOC rules." Affidavit of Robert Murphy at 3-5, *Battista* (No. 05-11456), Sept. 4, 2008. Battista's lawyers criticized Murphy's review as pretextual, as demonstrating that no matter what the results of therapy, Battista will never receive hormones due to security concerns. Moreover, they claim that the review was conducted in one hour and did not review the treatment plan or talk to her providers nor did they individually assess her housing situation nor did they take into account the harm that denying her hormones would do to her. Plaintiff's Reply to Defendant's Opposition to Plaintiff's Motion for Prelim. Inj., *Battista* (No. 05-11456), Sept. 19, 2008.

Battista, who was originally incarcerated for a criminal conviction in 1983, began to request gender-affirming medical treatment and access to women's clothing in 1995 as part of her effort to live as a woman in MCI-Norfolk, a medium security men's prison. Over the next sixteen years, MDOC officials consistently denied or delayed evaluations and gender-affirming treatment. During that time, Battista filed numerous federal civil rights lawsuits, struggled with depression, and attempted self-castration a few times while also living her life as a woman in men's prisons.[3] Her efforts, which I will detail in the second section, resulted in a Massachusetts district court ordering in 2010 (upheld by the First Circuit in 2011) that MDOC provide her with hormone therapy.[4]

Battista's victory is an exception rather than an example of the experiences of incarcerated people trying to access gender-affirming medical treatment in prisons and jails. Instead, her experiences prior to the 2010 ruling much more accurately exemplifies trans prisoners' access to such treatment. Departments of corrections around the US are at best reluctant to provide and frequently do all they can to obstruct access to gender-affirming medical treatment. While this reluctance or obstruction is in part the product of poor or inadequate health care in penal institutions around the US, gender-affirming medical treatment is also exceptionalized, explicitly marked as a (queer) security

[3] Affidavit of Direct Testimony of Sandy J. Battista, *Battista* (No. 05-11456), May 12, 2010; Affidavit of the Plaintiff, *Battista* (No. 05-11456), Oct. 17, 2005. See, *Battista v. Commonwealth of Massachusetts* (No. 97-3487A), *Battista v. Murphy* (No. 02-10137), *Battista v. Battista v. Murphy* (No. 03-12643), and *Battista v. Spencer* (No. 05-11456).

[4] Transcript of Hearing on Motion to Stay Execution of Modified Preliminary Injunction Order Pending Appeal, *Battista* (No. 05-11456), Aug. 23, 2010; Battista v. Clarke, 645 F.3d 449 (1st Cir. 2011). While this was an important victory, it cannot be separated from the great cost that precipitated it. It took sixteen years of advocacy, which put her in increased danger as she antagonized a system and administrators who had (almost) complete control over her body and life.

concern.[5] For example, MDOC administrators consistently argued that providing Battista with hormone therapy "would significantly hinder the Department in fulfilling its constitutionally-imposed duty to protect Battista and provide for the institutional security of the Treatment Center."[6] In other words, departments of corrections, including MDOC, usually erect additional barriers through policy and practice to gender-affirming treatment within the existing landscape of poor penal healthcare.

This chapter examines the carceral logics regarding the provision and denial of gender-affirming medical treatment by examining federal civil rights litigation, like Battista's, that addresses trans women's access to such treatment within men's penal institutions.[7] Most of the ways that prison administrators shape and restrict access to

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[5] For a discussion of inadequate penal healthcare, see Andrew P. Wilper, et al., "The Health and Health Care of US Prisoners: Results of a Nationwide Survey," *American Journal of Public Health* 99, no. 4 (2009); Sasha Abramsky and Jamie Fellner, *Ill-Equipped: US Prisons and Offenders with Mental Illness* (New York: Human Rights Watch, 2003); Joel H. Thompson, "Today's Deliberate Indifference: Providing Attention Without Providing Treatment to Prisoners with Serious Medical Needs," *Harvard Civil Rights-Civil Liberties Law Review* 45 (2010). For recent lawsuits about penal healthcare, see *Brown v. Plata*, 131 S.Ct. 1910 (2011); *Parsons v. Ryan*, No. 12-00601 (D. Ar.).

[6] Defendant's Substitute Findings of Fact and Conclusions of Law at 38, *Battista* (No. 05-11456), May 17, 2010.

[7] The chapter focuses on hormone therapy and to a lesser extent sex reassignment surgery. However, it is important to note that gender-affirming medical treatment is a much broader category that includes not only hormone therapy and sex reassignment surgery but other surgeries, electrolysis, preventative care such as mammograms, and other medical care. Gabriel Arkles notes that hormone therapy is not the only treatment that trans prisoners have difficulty accessing. For example, he explained that it is common for trans women who have complications with silicone injections to not get proper treatment and that mammograms are very difficult to get in men's prisons. In addition, trans prisoners often have difficulty accessing ostensibly non-transgender-related medical care, especially mental healthcare, because of transphobia among providers. Trans prisoners often experience verbal and even physical violence at the hands of medical staff. Many medical staff view them as manipulative and question their gender identity. Gabriel Arkles, interview by author, August 12, 2013, Boston, MA, on file with author; Alisha Williams, interview by author, August 19, 2013, New York, NY, on file with author; Owen Daniel-McCarter, interview by author, September 5, 2013, Chicago, IL, on file with author.

In addition, most prison systems categorize access to gendered clothing and grooming products associated with the sex that is not that of the facility as simultaneously a medical and security concern. Most departments of corrections, prisons, and jails have regulations governing gendered clothing and grooming products that restrict or deny access to products or clothing viewed as "cross-gender," such as makeup or dresses in men's institutions, which are justified as matters of security. Generally, the only exceptions officially make to these regulations are when access to these items and treatments are prescribed

gender-affirming medical treatment—such as the power to hire and fire providers—are invisible and borne out of the overwhelming power that prison staff have to control the minutia of prisoners' and institutional life. Federal civil rights lawsuits—especially those that are won by the incarcerated person, which are litigated for many years and even decades, producing hundreds of documents and requiring prison administrators to articulate their position multiple times—provide glimpses into the mechanisms and justifications for denying (or, less frequently, providing) access to such treatment.[8] I argue that within the penal space gender-affirming medical treatment is securitized, or produced as a security concern, and therefore restricted. This securitization is produced from the intersection of carceral necropolitics and racialized gender normative logics.

In his seminal essay "Necropolitics," postcolonial theorist Achille Mbembe argues that sovereign power defines "who matters and who does not, who is *disposable*

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by physicians as part of a treatment for GID. In addition, trans women report being targeted for disciplinary action and accumulating charges and punishments as both a direct and indirect result of their female identities and expressions. For example, many are charged with offenses, such as disobeying direct orders, defying institutional rules, or possessing contraband because they illicitly obtain or make gendered grooming products and clothing that are banned by institutional regulations. See for example, Cynthia Osborne, "Psychosexual Evaluation Report for Ophelia De'lonta" (March 31, 2004), Attached to Opposition to Plaintiff's Motion for Partial Summary Judgment, De'lonta v. Angelone, No. 99-00642 (W.D. Va. April 7, 2004); Community Access Board Annual Review (April, 21, 2004), Attached to Affidavit of Gregory J. Hughes, *Battista* (No. 05-11456), Oct. 7, 2002; Williams, interview.

Finally, the focus on trans women in men's prisons is the product of my archive. All the cases that I found involved trans women, nearly all of whom were in men's prisons. There is very little information about trans men in women's prisons. Even the activists and advocates that I talked to had very limited experience with transmasculine clients. However, anecdotal evidence suggests that incarcerated trans men face similar barriers to accessing gender-affirming medical treatment as incarcerated trans women. See, Jason Lydon, interview by author, February 5, 2014, over phone, on file with author; Gianna E. Israel, "Transsexual Inmate Treatment Issues," *GIC TIP Journal* 2, no. 4 (Fall 2002).

[8] Nevertheless, the use of these federal civil rights cases as an archive is also limiting. These cases, especially the successful ones like Battista's, represent a very small percentage of incarcerated trans and gender nonconforming people in men's prisons. Importantly, the only litigants whose complaints are taken seriously by courts—even if they ultimately do not rule in their favor—are trans women who can articulate their femaleness in binary, normative terms. They are also disproportionately white.

and who is not."[9] Focusing on colonialism, Mbembe argues that sovereign or state power subjugates certain forms of "life to the power of death."[10] Mbembe draws from and refines Foucault's theory of biopower, which argues that certain formations of power produce life through managing populations. Foucault argues that racism fractures populations, orienting certain populations towards life and letting others die.[11] Arguing that sovereign power does not just "let die," Mbembe theorizes necropower as actively producing "death-worlds," or "new and unique forms of social existence in which vast populations are subjected to conditions of life conferring upon them the status of *living dead*."[12]

While Mbembe focuses on the colony, prison is also site of necropower. The prison system, as it warehouses an increasing proportion of racialized and otherwise deviant populations, exposes those confined in them to violence and various forms of death. Prisoners are taken from their communities and generally denied the right to vote or participate in civic life. They are dehumanized and denied most rights, self-determination, the ability to keep themselves safe, and the ability make even the most basic choices. In other words, they are produced as civilly and socially dead, as "putative 'nonsubjects.'"[13] The death zone of the prison erases imprisoned people's individuality,

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[9] Achille Mbembe, "Necropolitics," *Public Culture* 15 (2003): 27. His emphasis.
[10] Ibid., 39.
[11] See Michel Foucault, *The History of Sexuality: An Introduction* (New York: Vintage Books, 1978); Michel Foucault, *"Society Must Be Defended": Lectures at the Collége de France, 1975-1976* (New York: Picador, 1997).
[12] Ibid., 40.
[13] Dylan Rodríguez*, Forced Passages: Imprisoned Radical Intellectuals and the U.S. Prison Regime* (Minneapolis, University of Minnesota Press, 2006), 37. See also, Dylan Rodríguez, "(Non)Scenes of Captivity: The Common Sense of Punishment and Death," *Radical History Review* 96 (2006); Ethan Blue and Patrick Timmons, "Editor's Introduction," *Radical History Review* 96 (2006); Alan Eladio Gómez, "Resisting Living Death at Marion Federal Penitentiary, 1972." *Radical History Review* 96 (Fall 2006).

humanity, and status as social and knowing subjects; to paraphrase Grace Kyungwon Hong, to be criminalized, especially racially criminalized, "is to not own oneself."[14] But, prisons also expose prisoners to premature (biological) death, as Ruth Wilson Gilmore has argued, through, for example, violence, poor medical care, and poor nutrition and sanitation.[15]

Thus, the prison is a "death-world," consigning prisoners to the status of "living dead." Critical prison studies scholars, like Gilmore, have argued that the necropolitical structure, logics, and practices of carceral spaces and administrations are produced through and organized by white supremacy and racialization. Carceral necropower is also organized by racialized gender normativity. As racialized gender normativity produces gender nonconformity as a threat to institutional security, as queer dangerousness, as something that needs to be contained, it exposes gender nonconforming people to social, civil, and premature (biological) death. Put another way, queer dangerousness necessitates necropower. As with all prisoners, medical treatment for trans prisoners is shaped by necropower. Racialized gender normativity constructs gender-affirming medical treatment as dangerous and threatening, justifying the (necropolitical) denial of treatment.

Health care is an important site of carceral necropower and a source of both social death and premature biological death. While gender-affirming medical treatment is not

[14] Grace Kyungwon Hong, *The Ruptures of American Capital: Women of Color Feminism and the Culture of Immigrant Labor* (Minneapolis, MN: University of Minnesota Press, 2006), 8.
[15] Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (Berkeley, CA: University of California Press, 2007).

usually life-or-death, for many trans people it is life-or-social death.[16] By denying trans prisoners access to gender-affirming medical treatment, prison administrators negate their identity, capacity to know themselves, and bodily integrity. This denial immobilizes them, fixes them in (gendered) time. It can also cause significant psychological and physical pain. The death space of the prison alters the very definition of "medical necessity," and, therefore, the norms of medicine and the provision of medical treatment.[17] It is a space where healing and wholeness cannot exist; where "do no harm" is replaced with do not inflict unnecessary pain. "Unnecessary" is, of course, defined by legal, prison, or medical actors, not prisoners or patients. In other words, there is a range of legitimate violence that can be (constitutionally) perpetrated against prisoners. As such, medical treatment gets legitimately folded into the security apparatus of the prison system, effectively securitizing medical authority and, in particular, gender-affirming medical treatment as it is identified as a particularly pernicious security threat. "Security" functions as the most explicit articulation of necropower in the provision and denial of gender-affirming medical treatment.

In part because the law, through the Eighth Amendment, guarantees the provision of "necessary" medical treatment, incarcerated trans people do sometimes gain access to

[16] However, it can be a source of premature death. As Owen Daniel-McCarter explains, one dangerous aspect of transgender-related medical treatment is that many penal medical providers have little to no knowledge of hormone treatment, including understanding its affects, its interactions with other medication (such as HIV medication or insulin), or the appropriate levels, and trans people who are provided with such treatment often do not have access to regular check ups. Daniel-McCarter, interview. Moreover, some incarcerated trans people commit or attempt to commit suicide or attempt self-castration, which can be life threatening.

[17] Prison administrators and a few courts explicitly argued this point. For example in *Battista*, the First Circuit explained that "medical 'need' in real life is an elastic term: security considerations also matter at prisons or civil counterparts, and administrators have to balance conflicting demands." *Battista*, 645 F.3d 454.See also, Kosilek v. Nelson, 221 F. Supp. 2d 156 (D. Mass. 2002); Deposition of Meredith R. Cary, De'lonta v. Johnson, 708 F. 3d 520 (4th Cir. 2013) (No. 11-00257), June 5, 2013.

gender-affirming medical treatment. While departments of corrections tend to restrict or block access to gender-affirming medical treatment, most allow their medical staff to provide such treatment, including hormone therapy but not sex reassignment surgery, at least in policy.[18] However, in practice, access to such treatment is inconsistent, complicated, and even arbitrary.[19] The process of evaluation, diagnosis, and treatment is usually long and convoluted and always requires trans prisoners to articulate their gender identity and medical "need" in ways that are recognizable to prison medical authorities.[20]

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[18] A growing number of departments of corrections have officially policies regarding access to gender-affirming medical treatment, but most still do not. However, all departments of corrections, in policy or practice, prohibit the provision of sex reassignment surgery, and, to my knowledge, no department of correction has ever done so.

[19] In discussing the provision of hormone treatment in the New York state system, Arkles explained that there "didn't seem like there was a lot of sense to" who received hormones and who was denied access. Arkles, interview.

Because all of the lawsuits that I examine in this chapter are initiated by a trans woman incarcerated in a men's institution, I will not examine gender-related medical treatment in women's prisons. From the little available information, access to gender-related medical treatment seems to be even more difficult and unlikely in women's prisons, but trans men probably also encounter similar obstacles and problems as trans women in men's prisons. Arkles explained that access to gender-related medical treatment is "pretty nonexistent" in New York state's women's prisons. In fact, he explained that New York State Department of Corrections and Community Supervision (DOCCS) administrators told him that there were no trans men in their facilities at all, even though advocates and prisoners told them otherwise. Arkles interview. Chase Strangio reported that the ACLU was assisting an incarcerated trans man in gaining access to testosterone therapy. This trans man was held in a women's prison where he initially received testosterone, but prison doctors later lowered then discontinued the treatment. Chase Strangio, interview by author, August 20, 2013, New York, NY, on file with author.

[20] For example, the New York State policy requires a process that is very long and complicated that generally takes a year and a half or longer. A prisoner must first request an evaluation through sick call. A New York Department of Corrections and Community Supervision (DOCCS) physician then determines if they should go to a specialist. If so, the prisoner is taken to a specialist for an evaluation. The only specialist that DOCCS uses resides in Buffalo and has a regular practice. He, therefore, can only do one or two evaluations per month, and it generally takes a few months to write the report. If this specialist recommends treatment, a DOCCS physician then determine which treatment to provide, and, if that treatment includes hormone therapy, the prisoner must see an endocrinologist, who determines if hormones are medically appropriate. Only after going through this entire process can a prisoner receive hormone therapy. Williams, interview.

Many departments of corrections in policy or practice require trans prisoners to have undergone prescribed hormone therapy prior to incarceration in order to continue hormone therapy while in prison. Because access to prescribed hormone therapy often requires resources—including money, medical insurance, access to gender-affirming doctors, educational privilege, whiteness, and/or the ability to articulate one's gender and sexual identity in recognizable, normative ways—incarcerated trans women, who are disproportionately low-income and nonwhite, have little-to-no access to affordable gender-

Because all prisoners are denied self-determination, prison administrators only recognize medical authority to determine "need" and access.[21] In this way, while the denial of (adequate) medicine in the prison system around the US is more obviously necropolitical, the *provision* of medicine is as well. Prison administrators and systems tend to provide only the most minimal medical treatment, treatment designed to primarily keep someone's body alive.[22] Medical providers also routinely participate in many different forms of carceral violence—from sanctioning the denial of medical treatment to participating in body cavity searches and other invasive exams. In this regard, medicine—which is generally biopolitical in perspective, or a technology to foster life—is almost entirely reoriented toward necropower.

"Evolving Standards of Decency"

Imprisoned trans women began to advocate for access to gender-affirming medical treatment by the 1970s, if not earlier, and at least some were provided hormone

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affirming medical treatment prior to their incarceration. Because of this, many who were taking hormones prior to their incarceration were only able to access them on the black market, which prison administrators do not recognize as legitimate treatment. Even when trans women are provided with hormone therapy, their treatment is often inconsistent, poorly managed, and/or they are provided with a low or even less than a therapeutic dose. Arkles, interview; Williams, interview.

[21] As Dean Spade has written about, the law generally relies on medical authority to determine rights and establish (legal) gender identity and sex classification for trans and gender nonconforming people. While it may seem less problematic for medical professionals to determine gender-affirming *medical treatment*, it is not their involvement that is at issue but how the law and prison system relies on medical authority to recognize "medical need" and to determine who should have access to and how they have access to such treatment, far beyond determining what treatments are safe. Dean Spade, "Resisting Medicine, Re/modeling Gender," *Berkeley Women's Law Journal* 18 (2003); Dean Spade, "Compliance Is Gendered: Struggling for Gender Self-Determination in a Hostile Economy," in *Transgender Rights*, ed. Paisley Currah, Richard M. Juang, and Shannon Minter Price (Minneapolis, MN: University of Minnesota Press, 2006).

[22] In practice, they often fail at even this minimal level of treatment. See, *Brown*, 131 S.Ct. 1910; *Parsons*, No. 12-00601 (D. Ar.). See also, Wilper, et al., "The Health and Health Care of US Prisoners"; Abramsky and Fellner, *Ill-Equipped*.

therapy in the 1970s and 1980s. For example, Diane Quirros, who New York Department of Corrections officials described to media as the first transsexual in the New York State prison system, was provided with hormone therapy during her incarceration in the late 1970s.[23] Some trans women were provided with hormone therapy by doctors associated with the California Medical Center at Vacaville in the 1980s.[24] Despite these examples, most were denied treatment, and by the early 1980s, a few incarcerated trans women began filing federal civil rights lawsuits in response to prison administrators denying them gender-affirming medical treatment.[25]

The relative newness of these requests for sex-reassignment treatments, despite the existence of cross-gender-identified people in penal institutions for many decades, reflects the larger history and context of transsexuality and medical treatment for transsexuality in the US. While medical sex reassignment began to be performed in Western Europe in the 1920s, before the 1960s, most US doctors and sexologists classified cross-gender-identified people as homosexuals and were either unaware of European sex reassignment operations or believed that cross-gender identity was a psychological problem appropriately treated with psychotherapy, not surgery. In the 1950s and perhaps earlier, a few US doctors supported medical sex reassignment, some of whom privately performed sex reassignment surgery for a small number of patients. No doctor was more vocal in his support or instrumental in legitimizing such treatment

[23] Quirros also attempted to get the New York Department of Corrections to provide sex reassignment surgery, but prison administrators refused. Ralph Gardner Jr., "Prison of Gender," *The Soho News*, February 4, 1981, Folder: Transexualism, International Gay Information Center collection – (Ephemera—subjects), New York Public Library.
[24] Jennifer Orthwein, email to author, March 8, 2014.
[25] For a discussion of the general denial of treatment in the 1980s, see Lynn Marie Scribner, "Lockdown: The Incarcerated Preoperative Transsexual," Folder 53, Box 13, Broomfield Street Education Foundation Records (M64), Northeastern University Libraries.

than Harry Benjamin, a German-born endocrinologist, who in the late 1940s and 1950s coined the term "transsexual," along with psychiatrist David O. Cauldwell, and advocated for medical sex reassignment treatment.[26] In the late 1960s, spurred by Benjamin's advocacy as well as individual and emergent collective advocacy by trans people themselves, a few university hospitals opened gender identity clinics, which openly performed sex reassignment surgery for a small number of patients, primarily trans women. These clinics were an important catalyst to the legitimization of such treatment in the US.[27] This legitimization, along with increased media attention and trans activism, led to an increasing number of people learning about the possibility of medicalized "sex change" and requesting hormonal and surgical sex-reassignment.

While most doctors still rejected sex reassignment surgery as proper treatment, those who performed it, especially those affiliated with university clinics established a standardized gatekeeping system to control access to treatment. While most university clinics closed in the early and mid-1970s, doctors in private practice began to take their place, which effectively expanded the availability of such medical treatment, but only for those who could afford it. By the end of the 1970s, hormone therapy and sex reassignment surgeries had become more accepted and established treatments for

[26] While Benjamin strongly supported medical sex reassignment, Cauldwell did not. Joanne Meyerowitz, *How Sex Changed: A History of Transsexuality in the United States* (Cambridge, MA: Harvard University Press, 2002). See also David O. Cauldwell, "Psychopathia Transexualis," *Sexology* 16 (1949); Harry Benjamin, *The Transsexual Phenomenon* (New York: The Julian Press, Inc., 1966).

[27] Johns Hopkins was the first to open such a clinic in 1966. Over the next two and a half years, they received almost 2000 requests for treatment but only performed sex reassignment surgery for twenty-four patients. The University of Minnesota, Northwestern University, Stanford University, University of Washington, University of California Los Angeles, and others soon after opened their own clinics. Meyerowitz, *How Sex Changed*. See also Susan Stryker, *Transgender History* (Berkeley, CA: Seal Press, 2008); Dallas Denny, "Transgender Communities of the United States in the Late Twentieth Century," in *Transgender Rights*.

transsexuality, and in 1979 the of the Harry Benjamin International Gender Dysphoria Association—now known as the World Professional Association for Transgender Health (WPATH)—was founded. At its founding meeting, the organization approved its first Standards of Care, which officially sanctioned hormonal and surgical treatment, but not on demand, further institutionalizing the medical gatekeeping system. The following year, "transsexualism"—which would later become Gender Identity Disorder and recently Gender Dysphoria—appeared in the American Psychiatric Association's revised *Diagnostic and Statistical Manual* (DSM).

In the 1960s and 1970s, as medical sex reassignment treatment became more established and institutionalized in the US, trans people also began to petition to change their legal sex classification with legal claims that were increasingly substantiated with medical consensus. They also soon legally challenged crossdressing laws, legal name changes, access to legal marriage, experiences of discrimination, and access to gender-affirming medical treatment via Medicaid.[28] These cases not only brought transsexuals to the attention of the law for the first time but also required courts to begin to develop precedents regarding legal interpretations of gender-affirming medical treatment.

[28] Meyerowitz, *How Sex Changed*; Andrew N. Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (New York: Routledge-Cavendish, 2006). Regarding crossdressing laws, see Columbus v. Zanders, No. 74AP-88, 1974 Ohio App. LEXIS 3187 (1974); City of Chicago v. Wilson, 75 Ill. 2d 525 (1978). Regarding name changes, see Mtr. Of Anonymous v. Weiner, 270 N.Y.S.2d 319 (1966); Matter of Anonymous, 314 N.Y.S.2d 668 (1970). Regarding marriage, see Anonymous v. Anonymous, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971); M.T. v. J.T., 355 A.2d204 (N.J. Sup. Ct. 1976). Regarding discrimination, Voyles v. Ralph K. Davies Medical Center, 403 F. Supp. 456 (N.D. Cal. 1975); Grossman v. Bernards Township Bd. Of Educ., No. 74-1904, 1975 U.S. Dist. LEXIS 16261 (D. N.J. 1975); Richards v. USTA, 400 NYS 2d 267 (Sup. Ct. 1977); Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984). Regarding Medicaid, *J.D. v. Lackner*, 80 Cal. App. 3d 90 (1978); *Minnesota Dept. of Public Welfare*, 257 N.W.2d 816, 819 (Minn. 1977).

Therefore, in the early 1980s, the first federal civil rights lawsuits regarding access to gender-affirming medical treatment in penal institutions were adjudicated during a time when professional standards for treatment and diagnostic criteria had been institutionalized and courts had been addressing transsexuals' legal concerns for nearly two decades.[29] Within this context, courts almost immediately recognized that transsexuality was a "serious medical need" that required some form of treatment in accordance with the Eighth Amendment's ban on cruel and unusual punishment.[30] Since its 1976 *Estelle v. Gamble* ruling, the Supreme Court has included medical care within the purview of the Eighth Amendment. *Estelle* held that prison officials and doctors violate the Eighth Amendment if they exhibit "deliberate indifference to serious medical needs."[31] In order to prove that medical care constitutes "cruel and unusual punishment" a prisoner must show that her medical treatment "shocks the conscience" or "offends evolving standards of decency" (which is referred to as the objective component) and must prove that prison officials were "deliberately indifferent" to her serious medical

[29] Because I primarily relied on legal databases to find relevant court cases, I only had access to published opinions and cases that were available in these databases. Not all lawsuits garner a published judicial opinion and not all published opinions are included in these databases (although most are). It is, therefore, possible that there were earlier lawsuits. I found evidence elsewhere, primarily in prisoner newsletters, of lawsuits from the early 1980s that I did not find in the legal databases. It is likely, however, that there were no earlier published opinions before *Supre v. Ricketts*, 596 F. Supp. 1532 (D. Colo. 1984), decided in a Colorado district court in 1984, because *Supre* nor later cases cited any earlier decisions.

It should also be noted that federal civil rights lawsuits had been a vital strategy of self-advocacy and activism by prisoners since the prisoners' rights movement in the 1970s. By filing lawsuits, incarcerated trans women utilized one important tactic of self-advocacy that many other prisoners have used to challenge their incarceration and the conditions of that incarceration over the past few decades, a tactic that can change those conditions and reduce violence in some instances.

[30] Nearly all lawsuits and their decisions primarily focused on a question of whether the medical treatment (or the lack of medical treatment) that these trans women received violated the Eighth Amendment's ban on cruel and unusual punishment. While litigants often utilized other constitutional standards, such as equal protection and due process, to make their arguments in their complaints, courts rarely, if ever, thought other constitutional standards were appropriate or useful.

[31] Estelle v. Gamble, 429 U.S. 97, 106 (1976).

need (which is referred to as the subjective component).[32] The Eighth Amendment requires that prison systems work within a basic standard of legitimate violence, with courts maintaining and sometimes redrawing those limits, based on dominant social norms. These limits help to maintain the legitimacy of the prison system and incarceration as the norm in US society. Yet, the Court acknowledges that the "standard of decency"—or what constitutes legitimate or constitutional violence and illegitimate or unconstitutional violence—changes or "evolves" over time. This "evolving standard of decency," therefore, allows the Court to recognize that changes in medical norms, like those regarding transsexuality, impact Eight Amendment jurisprudence's understanding of adequate medical care and "serious medical need."

While the Eighth Amendment standard requires prisons to provide adequate medical care, penal medical care is reduced to its barest "medical necessity," stripping medicine down to a physical or biological life-saving or sustaining technology, instead of something that improves or enhances life. Life in prison, therefore, becomes "bare life."[33] Put another way, the necropower of the prison space reduces medicine to its barest form. In practice, few prison systems even meet this bare requirement, as prison health care often produces premature death. It is at this point of the production of biological death that courts occasionally intervene.[34]

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[32] Ibid. at 106. See also, Wilson v. Seiter, 501 US 294 (1991); Farmer v. Brennan, 511 US 825 (1994). It is important to emphasize that proving the objective component, that medical treatment "shocks the conscience" or is otherwise inadequate or violent, is not enough to establish unconstitutional treatment, litigants must also prove the "subjective" component, that prison administrators were *knowingly* deliberate indifference. This is an extremely high bar, especially for incarcerated litigants, who are almost always acting as their own lawyers and have little-to-no access to resources.

[33] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford, CA: Stanford University Press, 1998).

[34] See for example, *Brown*, 131 S.Ct. 1910.

While courts put some limits on the inadequacy of prison health care, they have also constructed a constitutional framework through Eighth Amendment jurisprudence that renders constitutional a great deal of medical neglect and outright denial of treatment. Courts have consistently found that prisoners are not entitled to their choice of treatment and have constructed mechanisms for prison officials to shape what that care looks like. The Supreme Court has established that the standard specifically prohibits "unnecessary and wanton infliction of pain…totally without penological justification."[35] In determining what pain is "unnecessary and wanton," courts "must fairly weigh the practical constraints facing prison officials," particularly regarding maintaining order and security.[36] In developing this standard, courts simultaneously put limits on carceral power and carceral violence while (re)rendering constitutional the necropower of the prison system as it is manifested in security discourses. This constitutional necropower is apparent in Eighth Amendment jurisprudence as it codifies some pain and violence as necessary and legitimate and denies imprisoned people any authority over or legitimate knowledge about their medical needs, authorizing prison administrators to both determine appropriate medical treatment and legitimate violence (within certain limits). This standard is primarily concerned with the functioning, order, and security of the prison but must balance those "needs" with the general continuation of the bare life of prisoners.

[35] Gregg v. Georgia, 428 U.S. 153, 173 (1976). Conditions may be "restrictive and even harsh" without violating constitutional norms. Rhodes v. Chapman, 452 U.S. 337, 347 (1981). See also *Kosilek*, 221 F. Supp. 2d 156.

[36] *Gregg*, 428 U.S. at 173. See *Estelle*, 429 U.S. 97; *Wilson*, 501 U.S. 294; *Rhodes*, 452 U.S. 337. See also, Bell v. Wolfish, 441 U.S. 520 (1979), which states that "prison administrators...should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." Ibid., 547.

In 1987, the Seventh Circuit Court of Appeals became the first court to explicitly rule that transsexuality might constitute a serious medical need in the prison setting in *Meriwether v. Faulkner*, thereby pulling the question of access to gender-affirming medical treatment under the purview of Eighth Amendment jurisprudence. In 1983, Lavarita Meriwether, a trans woman incarcerated in Indiana, sued the Indiana Department of Corrections after prison administrators denied her access to gender-affirming medical treatment, which she argued violated her right under the Eighth Amendment to adequate medical care.[37] Prior to her incarceration in 1982, Meriwether had undergone hormone therapy for nine years under the supervision of a doctor. While medical staff at the Reception-Diagnostic Center confirmed her diagnosis of gender transsexualism, staff decided to "treat her as any other anatomical male," and she was assigned to the Indiana State Prison, a men's institution, without a prescription for hormones.[38] At the prison, she was denied all medical treatment for her transsexualism, including hormones and psychotherapy, and the Medical Director told her that he would make sure that she would not receive hormone therapy as long as she was incarcerated in the Indiana Department of Corrections.

Initially, an Indiana district court dismissed her claim, concluding that transsexualism was not a "serious medical need" and that hormone therapy was an "elective medication" that maintained "a physical appearance and life style in order to satisfy [her] psychological belief."[39] On appeal, the Seventh Circuit reversed the district

[37] These claims regarding transgender-related medical treatment were part of the same lawsuit that I discussed in Chapter Two.
[38] *Meriwether v. Faulkner*, 821 F.2d 408, 410 (7th Cir. 1987).
[39] Ibid., quoted at 411.

court's decision, finding that transsexualism was a "serious medical need" and that Meriwether, therefore, stated a legitimate claim.[40] While coming to nearly opposite conclusions, the district and Seventh Circuit courts relied on the same framework to make their rulings, recognizing only the knowledge and authority of medicine and prison administrators. The key element that led these two courts to different rulings was different interpretations of who or what constituted the primary parties of the disagreement. The district court framed the dispute as between Indiana prison and medical officials and Meriwether—who "elected" to undergo hormone therapy to "satisfy" her "belief," or put another way, she was attempting to exercise choice. The Seventh Circuit, on the other hand, framed the dispute as between Indiana prison administrators and medical authority—which categorized transsexualism "as a serious psychiatric disorder."[41] In the district court's framing, only one party (prison officials) had expertise or legitimate knowledge. However, for the Seventh Circuit, both parties had claim to legitimate knowledge.

As Michel Foucault has argued, within the law, medical opinion constitutes a "discourse of truth," legitimized by its scientific and institutional status.[42] As we have seen, carceral knowledge, too, is framed as a "discourse of truth" through prison administrators' expertise in security, punishment, and incarceration more generally. In his work tracing the emergence of medical (particularly psychiatric) authority and the prison

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[40] Ibid., quoted at 411.
[41] Ibid. at 411. The court also relies on legal precedent—gender dysphoria had been determined to be a serious medical need in cases that examines transsexuality outside of the prison context, cases that also relied on medical authority.
[42] Michel Foucault, *Abnormal: Lectures at the Collége de France, 1974-1975* (New York: Picador, 1999), 6. In *Abnormal*, Michel Foucault argues that medical/psychiatric testimony has "specific effects of truth and power" that have considerable juridical effects and even produce juridical truth. Ibid., 42.

in the West, Foucault shows that medical, carceral, and juridical knowledge-power are interrelated modern techniques of power and social control. He argues that each institution produced and were produced from the power of normalization and its imperative to identify, "know," and control "abnormal individuals."[43] Through the power of normalization, each of these formations of power-knowledge produces, legitimizes, naturalizes, and extends each other, especially their power to know and punish or manage the abnormal or the dangerous. That transsexuality had become a recognized medical or psychiatric condition by established medical authorities and that medical standards of treatment had been constructed were, therefore, key to the Seventh Circuit's ruling and ability to understand medical knowledge about transsexuality as "truth."

These medical standards of treatment, which began to be developed and institutionalized in the US in the late 1960s and 1970s with the emergence of gender identity clinics, were fundamentally structured by normalization. While the legitimization of sex reassignment treatment represented a major shift in thinking about sex and gender at the time, doctors remained deeply invested in White gender and hetero-norms, and these investments structured the gatekeeping system and medical model of transsexuality that they created.[44] The medical model of transsexuality, in part, was designed to

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[43] Foucault, *Abnormal*; Foucault, *Discipline and Punish*; Michel Foucault, *Security, Territory, Population: Lectures at the Collége de France, 1977-1978* (New York: Picador, 2009). While Foucault discusses a form of psychiatric expertise that is different from what I am discussing here (simply put, expertise on competence to stand trial, an explanation of the motive for the crime, or the insanity defense, my words, not his), the forging of the link between juridical power-knowledge and medical power-knowledge, and the core of the juridical recognition of medical power-knowledge that he describes is still applicable to this different setting.

[44] Trans studies scholars have long offered this critique of the medical model of transsexuality. See, for example, Meyerowitz, *How Sex Changed*; Denny, "Transgender Communities of the United States"; Spade, "Compliance is Gendered"; Spade, "Resisting Medicine, Re/modeling Gender"; Susan Stryker, "Transgender History, Homonormativity, and Disciplinarity," *Radical History Review* 100 (2008); Stryker,

restablilize a naturalized binary sex system that was inextricably attached to White gender norms—in other words, to racialized gender normativity. As Dan Irving has argued, doctors only opened the gates to treatment for the most "productive" transsexuals and extended and strengthened "hegemonic discourses of citizenship and productivity that buttressed the [white supremacist, heteronormative, capitalist] economy."[45] "Criminality," as a sign of (racialized) non-productivity, was a barrier to gaining access to treatment. Yet, much of the medical literature also attached criminality and "social parasitism" to transsexuality, constructing transsexuals as mentally ill, pathological, threatening, and dangerous. Even supportive doctors often viewed transsexuals, especially trans women, as manipulative, narcissistic, burdensome, and potentially dangerous, and in part (paternalistically) relied on these representations to justify the gatekeeping system.[46]

University clinics sought patients, as historian Joanne Meyerowitz explains, who would looked and acted "like conventional men and women" and "avoided 'exhibitionism' and promised to live 'quietly.'"[47] At least some, if not all, screened for criminal histories and excluded those with felony records.[48] In the late 1960s and early 1970s, these clinics received thousands of applications from transsexuals around the US and only accepted a few dozen. Under these circumstances, they wielded enormous

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Transgender History; Sandy Stone, "The *Empire* Strikes Back: A Posttranssexual Manifesto," in *The Transgender Studies Reader*, ed. Susan Stryker and Stephen Whittle (New York: Routledge, 2006); David Valentine and Riki Anne Wilchins, "One Percent on the Burn Chart: Gender, Genitals, and Hermaphrodites with Attitude," *Social Text* 52/53 (Autumn/Winter 1997); Dan Irving, "Normalized Transgressions: Legitimizing the Transsexual Body as Productive," *Radical History Review* 100 (Winter 2008).

[45] Irving, Normalized Transgressions."

[46] See for example, Benjamin, *The Transsexual Phenomenon*.

[47] Meyerowitz, *How Sex Changed*, 225.

[48] The University of Minnesota program did so. Thomas Kando. *Sex Change: The Achievement of Gender Identity Among Feminized Transsexuals* (Springfield, IL: Charles C Thomas Publisher, 1973).

power, offering new life through sex reassignment treatment for only the most normative transsexuals (or those who could perform normativity most effectively), shaping the ways that transsexuals would publicly articulate their identities.[49] They also resigned thousands of others who could not conform to these racialized, gendered, and sexual standards to various forms of death, sometimes literal physical death but more frequently the social death of living in a body that feels "wrong" and having one's identity constantly negated by society, medicine, and the state. Put another way, only a small class of transsexuals—those with monetary and educational resources and who could at least articulate a white gender and heteronormative (postsurgical) identity—could gain access to such treatment. The transsexuals who were most likely to be incarcerated—who were disproportionately low-income, non-white, and unemployed or underemployed—were unlikely to have successfully navigated such a normalizing system. While the standards were not as tightly controlled by the time the Seventh Circuit heard the *Meriwether* case, the standards of treatment continued to be defined by racialized gender normativity.

This medical investment in racialized gender normativity intersected with similar carceral and juridical investments. According to each site of knowledge-power, incarcerated trans women were a particular type of abnormal individual, in need of correction, normalization, and/or containment. As an abnormal individual who resided in the death space of the prison system, Meriwether could not be a source of legitimate

[49] As doctors during this time noted and trans historians have reflected upon, trans people would often read about and learn the language of the medical gatekeeping system, telling doctors what they wanted to hear in order to gain access to treatment. This tactic had the unfortunate side effects of reinforcing both the medical construction of transsexuality as invested in normative binary sex/gender—which would become an important source of tension between trans people and some feminists—as well as doctors' perception of trans people as manipulative. See, Stone, "The *Empire* Strikes Back."

knowledge. The district court, therefore, ruled against her. While the Seventh Circuit ostensibly ruled in her favor, the court never cites her as a source of knowledge, relying only on medical "truth" (about transsexuality and about her).[50] Meriwether was able to argue her claim only by demonstrating that her need was objective and substantiated by medical authority. Her previous diagnosis and treatment was, therefore, key to the Seventh Circuit's ruling. Her medical history not only functioned as medical testimony but her experience of "severe withdrawal symptoms" produced from prison administrators' denial of her (previously prescribed) hormone therapy allowed her to show physical, bodily suffering and need, which was visible and objective to the court and did not require them to rely on Meriwether's subjective articulation of her needs.[51] In contrast to Meriwether's (recognizable) physical suffering and her (legitimate) medical diagnostic and treatment history, the Medical Director's refusal to provide any treatment looked bigoted, arbitrary, and against medical norms and showed potential deliberate indifference.

While the Seventh Circuit ruled that transsexuality might constitute a serious medical need, it also classified it as controversial and complex, finding that *any*

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[50] In fact, the court argued that one of its criteria for determining that transsexuality could be categorized as a "serious medical need" was that it "is not voluntarily assumed and is not a matter of sexual preference." *Meriwether,* 821 F.2d at 412. While the court uses this language to distinguish transsexuals from homosexuals and transvestites, it also functions to negate Meriwether's self-determination. Importantly, very similar language would be used by a Massachusetts district court fifteen years later in its ruling that required the Massachusetts Department of Corrections to provide Michelle Kosilek with hormone therapy. In their description of GID, the court emphasizes that "the consensus of medical professionals is that transsexualism is biological and innate. It is not a freely chosen 'sexual preference' or produced by an individual's life experience." *Kosilek,* 221 F. Supp. 2d at 163.

Of course, this denial of self-determination is an extension, or a particularized version, of the denial of self-determination by the law, the prison system, and medicine for all prisoners as they are produced as socially dead.

[51] *Meriwether*, 821 F.2d at 410.

treatment, therefore, would satisfy the constitutional requirement.[52] Indiana prison administrators had potentially violated her constitutional rights because they provided no treatment at all, not because they refused to provide her with hormone therapy specifically (despite her previous prescription). The court explained that because of the "wide variety" of treatment options for transsexuality and "the highly controversial nature of some of those options" courts should "defer to the informed judgment of prison officials as to the appropriate form of medical treatment."[53] Here, we can see how carceral knowledge (or "prison official") and medical authority are often collapsed in the adjudication of access to gender-affirming medical treatment. The court's use of "prison officials," instead of specifically prison medical staff, allows prison administrators and security staff—along with medical staff—to legitimately determine medical treatment for (transsexual) prisoners. Medical treatment, therefore, becomes a security concern, suturing security and medical treatment in the (necropolitical) prison setting. Gender-affirming medical treatment is securitized.

The *Meriwether* decision helped establish a framework through which courts would interpret trans women's civil rights claims to gender-affirming medical treatment in penal institutions into the present. In the following decades, courts continued to function within this framework of carceral and medical authority, but they changed their understanding of what constituted adequate treatment, "evolving" their "standards of

[52] Indeed, the two previous opinions had similarly argued that transsexual prisoners were constitutionally entitled to some kind of treatment, but each of the plaintiffs had been offered psychotherapy and therefore lost their cases. *Supre*, 596 F. Supp. 1532; *Lamb v. Maschner*, 633 F. Supp. 351 (D. Kan. 1986).
[53] *Meriwether*, 821 F.2d at 414.

decency" as medical authority, both inside and outside the prison system, "evolved" its understandings of the norms for such treatment.

Through the 1980s and 1990s, courts continued to portray transsexuality as controversial and difficult to diagnose and treat, reflecting both the still relatively newly developed standards for providing gender-affirming medical treatment (which remained controversial) outside prisons and the rarity of requests for such treatment inside prisons. Conflict in these cases was either between incarcerated trans women's "self-diagnoses" (those who had not been diagnosed prior to their incarceration) and prison medical authority, who both refused to treat and to diagnose them with transsexualism or gender identity disorder, or between medical authority on the outside (in the form of prior diagnoses) and prison administrators and medical staff, who refused to continue treatment.[54] Trans women generally lost the former type of cases and had mixed results in the latter. In those cases in which trans women were denied all treatment, they often prevailed, like Meriwether. However, if prison medical staff and administrators provided psychotherapy—which was and probably remains the most common form of "treatment" offered to incarcerated trans people—courts generally ruled in prison administrators' favor, finding that psychotherapy satisfied their constitutional requirement.[55]

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[54] For the first type, see for example, *Farmer* 511 US 825. For the second type, see *Meriwether*, 821 F.2d 408; Phillips v. Michigan Department of Corrections, 731 F. Supp. 792 (W.D. Mich. 1990); South v. Gomez, No. 97-15191, 1997 U.S. App. LEXIS 30063 (9th Cir. 1997).

[55] The only exception to this general rule that I found prior to the 2000s was *Phillips*, in which a Michigan district court in 1990 ordered the Michigan Department of Corrections to provide hormone therapy to an Marty Phillips, a trans women incarcerated in the Michigan system. Phillips had had lived as a woman for most of her life and had been on hormones for many years prior to her incarceration; she had even been provided with hormone therapy while she was in jail. Nevertheless, when the physician at the prison "discovered" that she had testicles, he determined that there was no medical indication for estrogen. The court ruled in Phillips' favor by relying on expert medical testimony, all of whom diagnosed her with transsexualism. In ordering that the Michigan Department of Corrections provide hormone treatment, the

In nearly all cases, medical staff offering such psychotherapeutic treatment had little-to-no previous experience with transsexuality and some were openly hostile. Prisoners had to comply with these prison medical staff, under even the worst circumstances, because any refusal to participate would void their claims in courts because they "refused treatment" that departments of corrections provided.[56] For example, Dee Farmer's claims that the Federal Bureau of Prisons was deliberately indifferent to her medical needs were repeatedly dismissed by a number of courts throughout the late 1980s and 1990s, in part because she was offered psychotherapy. At the Federal Correctional Institution at Oxford, Wisconsin, the only psychologist that was made available to her diagnosed her as a transvestite and not a transsexual—despite her being previously diagnosed with transsexualism—and therefore determined that she was not entitled to treatment.[57] Farmer challenged his diagnosis and argued that this constituted a refusal to provide treatment. Despite prison administrators and the court categorizing the psychologist's diagnosis as "misinformed," a Wisconsin district court dismissed her case because, as prison officials argued, she had been offered

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court argued that prison administrators' conduct was "particularly egregious" because it "actually reversed the therapeutic effects of previous treatment." *Phillips*, 731 F. Supp. at 800.

[56] See for example, Long v. Nix, 86 F.3d 761 (8th Cir. 1996), in which the Eighth Circuit Court of Appeals described how Long "repeatedly refused to cooperate with prison psychologists and psychiatrists over the past twenty years" and recounted a series of hostile encounters between long and mental health staff. The court claimed that "In contrast to Long's behavior, the record shows that prison officials have been responsive to Long's requests for treatment when they were reasonable." Ibid. at 763. The court blamed Long for the failure of psychotherapy, stating, "We reject Long's contention that the Eighth Amendment requires the Iowa Department of Corrections to provide Long with a "sensitive" psychotherapist trained in gender-identity issues." Ibid. at 766.

[57] Farmer v. Haas, No. 90-1088, 1991 U.S. App. LEXIS 3549, (7th Cir. 1991).

psychological services but had not used those services, thereby refusing the "provided treatment."[58]

In the 2000s, these dynamics began to change as courts stopped regularly referring to transsexuality as "controversial," prison medical staff became more likely to diagnose GID and recommend hormone therapy, and some departments of corrections institutionalized written policies regarding gender-affirming medical treatment. These changes reflected changing US social and medical attitudes toward trans people and gender-affirming medical treatment. The 1990s saw the emergence of vibrant transgender activism around the US. One prominent focus of this activism was the medical establishment, and transgender activists helped expand access to gender-affirming medical treatment, loosen (although not eradicate) medical gatekeeping systems, and produce a new generation of affirming providers, especially in major cities.[59] While access to gender-affirming medical treatment was liberalized and become more accessible generally, access to affirming doctors and treatment became increasingly uneven across geography, class, race, and mental and physical ability. Some doctors

[58] Ibid. at *8. This case continued past this first district court decision and illustrates the difficulty of these cases and the vulnerability of incarcerated trans litigants, who are *pro se*—or acting as their own lawyers—the vast majority of the time. The Seventh Circuit reversed the district court's decision, arguing that Farmer had made many requests for treatment after her meeting with the psychologist and was "systematically denied…any treatment for her transsexualism," and remanded the case. Ibid. at *11-12. The remanded case eventually went to trial and the jury found in favor of the prison administrators. The trial hinged on the question of whether Farmer had or had not requested treatment. She largely relied on copies of requests for treatment that she sent prison administrators, and prison administrators claimed that these requests for treatment were forgeries. The trial essentially was about who the jury believed more. Farmer appealed the jury verdict, specifically regarding the judge's denial of appointing her a lawyer. The Seventh Circuit upheld the district court's judgment, justifying this decision not only by claiming that she had successfully litigated the case through a prior appeal and conducted herself well at trial but also noted that "No doubt a good lawyer would have done better than Farmer, and might have won; but if this were the test, district judges would be required to request counsel for every indigent litigant." Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993).

[59] Stryker, *Transgender History*; Meyerowitz, *How Sex Changed*.

continued to function under the original gatekeeping system, while others, especially those affiliated with LGBT communities and health care centers in major cities, began to offer treatment almost on demand, breaking down much but not all of the gatekeeping system. However, even in major cities, the populations of trans people who were most likely to end up imprisoned—low-income trans women of color—continued to have the least access to such treatment. This dynamic, therefore, continued to produce circumstances in which only a small percentage of the trans women requesting hormone therapy and sex reassignment treatment in prisons had pre-incarceration diagnoses and hormone prescriptions.[60] Nevertheless, the general shifts in increased access to gender-affirming medical treatment impacted prison health care.

While prison administrators continued to generally be averse to providing gender-affirming medical treatment, particularly hormone therapy and sex reassignment surgery, the doctors they employed seemed to be more likely—although not very likely—to diagnose trans women with GID and prescribe hormone therapy. Some trans women were therefore able to access hormone therapy, but prison administrators continued to block treatment for most prisoners. One important mechanisms that prison administrators developed to block such treatment in the late 1990s and 2000s were new official institutional policies, most of which stated that prison medical staff could only provide gender-affirming medical treatment at the same level (or less than) prisoners had been prescribed prior to their incarceration. While these policies allowed for the small number of incarcerated trans people who had been officially prescribed hormones prior to their

[60] Many incarcerated trans women were only able to access hormones prior to their incarceration—and sometimes while incarcerated—via the black market. These trans women entered prison on hormones but lacked a prescription.

incarceration to continue their prescriptions, they barred those who did not have prior prescriptions from ever gaining access to hormone treatment while incarcerated, and they barred all prisoners from accessing any surgical treatments.[61] These "freeze-frame" policies, which "froze" trans prisoners as the level of "change" that they entered prison with, were perhaps the most obvious and explicit example of the carceral necropolitical control over access to such treatment, as prison officials almost entirely usurped control of medical treatment. Trans prisoners were frozen in time, unable to grow or change. In effect, their gendered lives stopped. For those who had been on hormones prior to their incarceration but had been only able to access them via the black market, which prison officials did not recognize as legitimate treatment, they were not frozen in time, but lost time, forcefully reverted back to a prior bodily form. These "freeze-frame" policies, therefore, were and are a (necropolitical) technology of dehumanization and social death, as growing and changing are key aspects of life and being human.

By the late 1990s and early 2000s, courts began to consider civil rights lawsuits challenging the denial of hormone therapy following its recommendation by prison medical staff. These cases produced a somewhat new set of disputing parties: prison medical staff, who were barred from providing such treatment either in practice or by policy, and prison officials.[62] Courts in the 1980s and 1990s generally viewed any medical opinion, whether or not the medical professional had any experience with transsexuality or gender-affirming medical care, as authoritative and any type of

[61] In practice, even those prisoners who had prior prescriptions often had great difficulty getting prison officials and medical staff to continue their prescriptions at all or at appropriate levels.
[62] In some cases, prison medical staff did not even bother to evaluate, diagnose, and recommend treatment for trans prisoners because of department-wide freeze-frame policies.

treatment—which was usually psychotherapy—as satisfactorily fulfilling the constitutional requirement. However, in the 2000s, they began to distinguish between "prudent" and non-prudent medical opinions. In particular, courts looked to the Standards of Care (SOC) as the "prudent professional standards" or "accepted professional judgment," governing the norms of GID-related treatment protocols.[63] By this time, the SOC explicitly stated that psychotherapy was not intended to cure GID and that hormones were not only standard treatment but also "medically necessary" in many cases.[64] Because of these shifts in transgender-related medical norms inside and outside prisons, courts began to occasionally, if rarely, order departments of corrections to provide hormone therapy to some trans women, including those who had not been prescribed hormones prior to their incarceration. While courts did not always rule in trans prisoners' favor in cases that involved in practice (or individualized) denial of treatment, they almost uniformly struck down freeze-frame policies.[65] In doing so, these courts again clarified the limits of carceral (necro)power, ruling that departments of corrections

[63] Battista v. Dennehy, No. 05-11456, 2006 U.S. Dist. LEXIS 12484, at *24, 25; Konitzer v. Frank, 711 F. Supp. 2d 874, 906 (E.D. Wisc. 2010). For explicit citation of the SOC in order to determine that hormone therapy might be medically necessary, see *Kosilek*, 221 F. Supp. 2d 156; Gammett v. Idaho State Board of Corrections, No. 05-00257, 2007 U.S. Dist. LEXIS 55564 (D. Idaho 2007); Sundstrom v. Frank, 630 F. Supp. 2d 974 (E.D. Wisc. 2007); *Konitzer*, 711 F. Supp. 2d 874; Fields v. Smith, 712 F. Supp. 2d 830 (E.D. Wisc. 2010); De'lonta v. Johnson, No. 11-00257, 2011 U.S. Dist. LEXIS 124983 (W.D. Va. 2011); Soneeya v. Spencer, 851 F. Supp. 2d 228 (D. Mass. 2012); *Kosilek*, 889 F.Supp.2d 190; Kosilek v. Spencer, 740 F.3d 733 (1st Cir. 2014). Importantly, many decisions did not explicitly cite the SOC but still relied on its constructions of treatment norms and protocols.

[64] See, Harry Benjamin International Gender Dysphoria Association, *The Standards of Care for Gender Identity Disorders, Fifth Edition* (Düsseldorf: Symposion Publishing, 1998).

[65] See for example, Brooks v. Berg, 270 F. Supp. 2d 302 (N.D. N.Y. 2003); *Kosilek*, 221 F. Supp. 2d 156; Barrett v. Coplan, 292 F. Supp. 2d 281 (D. N.H. 2003); *Fields*, 712 F. Supp. 2d 830; *Soneeya*, 851 F. Supp. 2d 228; Adams v. Federal Bureau of Prisons, 716 F. Supp. 2d 107 (D. Mass. 2010); *Kosilek*, 889 F.Supp.2d 190. The exception was *Farmer v. Hawk-Sawyer*, in which a DC district court found that the BOP's freeze-frame policy was "rational," in part because they claimed that the policy did "not preclude putting an inmate on hormone therapy after admission." Farmer v. Hawk-Sawyer, 69 F. Supp. 2d 120, 127n8 (D. D.C. 1999). Eleven years later, the same policy was declared unconstitutional in *Adams*, 716 F. Supp. 2d 107.

could not institute blanket policies denying a specific type of treatment in all cases but could still deny treatment based on the individual circumstances of a prisoner and the individual needs of institutional security. Therefore, despite the changes in the legal determination of what constituted "adequate treatment," penal medical treatment remained sutured to security.

While in the 1980s and 1990s, prison officials could utilize (carceral) medical language and arguments to justify their denial of gender-affirming medical treatment because prison medical staff rarely diagnosed trans woman with GID and even more rarely recommended hormone therapy. In the changing context of the 2000s, the increased likelihood that prison medical staff might prescribe hormone therapy produced the imperative for prison administrators to shift their arguments, relying more centrally and explicitly on the argument that such treatment would create substantial institutional security problems.

Securitizing Gender-Affirming Medical Treatment

The construction of feminized or feminine (queer) bodies as dangerous security threats was not new, as I have argued throughout this dissertation, but the shift in transgender-related medical treatment norms inside and outside prisons in the 2000s necessitated prison administrators to more explicitly rely on security language to (constitutionally) deny treatment. Security discourses had been a part of legal struggles over such treatment since they began in the 1980s. Prison administrators argued or implied that providing such treatment would endanger institutional security, and courts

located prison administrators' specialized knowledge and their constitutional authority to shape medical treatment in their supposed security expertise. Underlying these constructions of security was the ever-present specter of queer dangerousness, prominently functioning to define insecurity and disorder and justifying different norms regarding the gender-affirming medical treatment within the penal space. Authorized by constitutional standards as well as the necropower of the prison as a supposedly total institution, prison administrators participated and continue to participate in medical decisions. This power alongside discourses of queer dangerousness effectively securitized gender-affirming medical treatment, authorizing security to function as a central feature of medical decisions regarding the provision of such treatment.

While the last section examined the relationship between law, carceral (necro)power, and medicine, this section examines more specifically how prison administrators articulated their refusal to provide gender-affirming medical treatment in the last two decades. To do so, I will consider Battista's case in greater detail as well as the Massachusetts Department of Corrections arguments against providing gender-affirming medical treatment to trans prisoners in general. Over the past two decades, MDOC's refusal to provide gender-affirming medical treatment has been the subject of numerous federal civil rights lawsuits, a number of which were ultimately decided in the incarcerated trans woman's favor.[66] These cases, particularly Battista's and Michelle

[66] Kosilek filed her original lawsuit in 1992, *Kosilek v. Maloney* (No. 92-12820, D. Mass.), but a Massachusetts district court did not rule on it until 2000 and 2002. See also, *Kosilek*, 221 F. Supp. 2d 156. See also, *Kosilek v. Spencer* (No. 00-12455, D. Mass); *Battista v. Commonwealth of Massachusetts* (No. 97-3487A); *Battista v. Murphy* (No. 02-10137, D. Mass.); *Battista v. Murphy* (03-12643, D. Mass.); *Battista v. Spencer* (No. 05-11456); *Soneeya v. Spencer* (No. 07-12325); *Brugliera v. Commissioner of Massachusetts Department of Correction* (No. 07-40323); *Alexander v. UMass Medical School* (No. 09-10776).

Kosilek's, both of which were drawn out for over a decade, provide a window through which to view not only the tactics used by MDOC administrators to deny incarcerated trans women gender-affirming medical treatment but also the reasoning and justifications for that denial. In response to these lawsuits, especially Kosilek's, MDOC adopted a series of official policies and unofficial practices in their efforts to shape medical treatment, arguing that at least some control over medical treatment was necessary because of security.

From at least the 1990s—when I first found evidence of trans women incarcerated in MDOC requesting treatment—to the present, MDOC administrators have staunchly opposed providing gender-affirming medical treatment. Prior to the mid-2000s, MDOC administrators primarily deployed two (interrelated) tactics to control and block such treatment within their institutions: hiring medical providers who would not diagnose GID or recommend hormone therapy or sex reassignment surgery and obstructing medical evaluations and treatment. These tactics successfully blocked Battista from receiving an evaluation from experts in transgender-related medical care for nearly ten years, from when she began to request an evaluation and treatment in 1995 to 2004. Without medical authority to substantiate her claims to treatment, a Massachusetts district court repeatedly found that MDOC's refusal to provide hormone therapy was constitutional.

MDOC first authorized an evaluation of Battista in 1997, after delaying or ignoring her requests for nearly two years. This evaluation was performed by a psychiatric consultant with no experience with GID and who never met with Battista. By conducting a "peer review" of her medical records, this consultant determined that

Battista did not have GID and recommended counseling and psychological testing.[67] Soon after, Battista filed a federal civil rights lawsuit, and, in 1998, a Massachusetts district court dismissed her complaint, arguing that because she was self-diagnosed, she "has failed to proffer reliable evidence, such as a medical diagnosis rendered by a physician, confirming her assertion."[68] Moreover, because Battista refused to participate in counseling with a provider who did not have expertise in GID, the only option given to her, the court determined that even if she could "prove" that she was a transsexual, MDOC administrators were not deliberately indifferent to her medical need because she was offered counseling and "refus[ed] to cooperate."[69] Battista filed another lawsuit in 2002, which was dismissed for similar reasons.[70]

Meanwhile, in 2000, in response primarily to Kosilek's lawsuit, MDOC adopted a freeze-frame policy, which stated, in part, that "security and operational concerns do not allow inmates to dress and function as members of the opposite sex."[71] This policy institutionalized and continued MDOC's general practice of obstructing and of folding security into considerations of such treatment. For example, before adopting this policy,

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[67] Victoria Russell, "Report re: Sandy Jo Battista" (March 17, 1997), Attached to Memorandum of Law in Support of the Opposition of Defendants to Plaintiff's Request for a Prelim. Inj., *Battista* (No. 05-11456), July 22, 2005.

[68] Memorandum and Order on Defendants' Motion to Dismiss or in the Alternative Motion for Summary Judgment at 12, *Battista* (No. 97-3487A), June 1, 1998.

[69] Ibid. at 13.

[70] The court again claimed that Battista was receiving some treatment because she was ostensibly undergoing therapy. Memorandum and Order, *Battista* (No. 02-10137), Nov. 4, 2002.

[71] Quoted in *Kosilek*, 221 F. Supp. 2d at 171. This policy, which was referred to as their "Guidelines for Mental Health Treatment of Inmates with Gender Identity Disorder," was drafted by a doctor who had no knowledge of GID or the Standards of Care. As a result of this policy, mental health staff created a treatment plan for Kosilek. This plan's primary goal was to help Kosilek develop "coping mechanisms to relieve [the] stress" related to her gender identity disorder. She was to be offered therapy sessions every two weeks to help her "to develop self-soothing strategies without violating DOC rules." The doctor who primarily authored the treatment plan told Kosilek that "self-soothing strategies" meant "to think pretty thoughts." Quoted in ibid. at 172. This doctor also stated that the treatment plan offered Kosilek nothing and that she did not feel that she was permitted to provide therapy to Kosilek.

then-Commissioner of Corrections Michael Maloney had made it clear to the University of Massachusetts Medical Correctional Health Services (UMMS)—who then provided medical and mental health services to MDOC prisoners as a private contractor—"that [he] did not want to provide Kosilek or any other inmate hormones or sex reassignment surgery."[72] As a result, UMMS looked for an expert who would support this viewpoint and found a Canadian doctor, Robert Dickey, who believed that sex reassignment surgery should never be considered for a prisoner and advocated for freeze-frame policies. Dickey's views and his status as a doctor and "expert" in transgender-related medical treatment helped legitimize MDOC's attempts to construct different norms for gender-affirming medical treatment outside and inside prisons, marking penal medicine as exceptional because of (necropolitical) security concerns.

By requesting a doctor with these views and adopting a freeze-frame policy, MDOC administrators attempted to keep control over the provision of gender-affirming medical treatment, even as they privatized and contracted out medical services for prisoners. Part of a larger neoliberalization of the US state, many states have privatized various aspects of their prison systems, from prisons themselves to food services to industry to health care.[73] While most states have not privatized their health care, a sizable number have done so, either in part or all, like Massachusetts. Prison administrators often argue that this allows them to reduce costs or that while providing health care is constitutionally required it is not a part of their core mission or specialization as prison

[72] *Kosilek*, 221 F. Supp. 2d at 169.
[73] For a discussion of privatization in the US prison system see, Angela Y. Davis, *Are Prisons Obsolete?* (New York: Seven Stories Press, 2003); Loïc Wacquant, *Prisons of Poverty* Minneapolis: University of Minnesota Press, 2009); Byron Eugene Price, *Merchandizing Prisoners: Who Really Pays for Prison Privatization* (Westport, CT: Praeger Publishers, 2006).

administrators and therefore should be outsourced. However, privatization also reduces their control over prisoners' lives.

The hiring of medical staff and experts is an important mechanism that departments of corrections utilize to shape medical treatment. Prison administrators tend to hire medical staff—as well as medical experts for litigation—who are unlikely to diagnose a prisoner with GID or recommend hormone therapy and sex reassignment surgery. Indeed, trans prisoners and their advocates report that penal medical staff usually either know nothing about transsexuality and gender-affirming medical treatment or hold discriminatory and pathologizing views of them.[74] For example, the psychiatric consultant who conducted Battista's first evaluation in 1997 called her name change and request for gender-affirming medical treatment "bizarre at best and psychotic at worst" and referred to sex reassignment surgery as "mutilating" and hormone therapy as "abnormal."[75] Another psychologist called her desire to transition an "obsession" and "distorted" thinking, explaining that her supposed belief that sex reassignment surgery

[74] A few advocates made anecdotal observations in this regard. Lydon, interview; Strangio, interview; Arkles, interview. See also, Israel, "Transsexual Inmate Treatment Issues"; "S. Raechel Leigh," *GIC TIP Journal* 4, no. 1 (Winter 2003); Janet Loftin, "A Transsexual's Experience in the California Department of Corrections (CDC)," *GIC TIP Journal* 4, no. 4 (Fall 2004); "Sarah J. Babcock," *GIC TIP* 2, no. 3 (Summer 2002). This tendency was also an important component in a number of legal cases.

Some medical staff are supportive. See, "Razjohn Monique Smyer," *GIC TIP Journal* 2, no. 4 (Fall 2002); "Deanna," *GIC TIP Journal* 1, no. 4 (Fall 2001). However, departments of corrections often fire medical staff who attempt to provide gender-affirming medical treatment. MDOC had a long-standing tactic of firing or attempting to fire consultants who diagnosed trans women with GID and recommended hormone treatments. For example, in 2000, MDOC terminated its relations with Marshall Forstein after he evaluated Kosilek and recommended that she be treated in accordance with the Standards of Care. After Kosilek won her first lawsuit, Dr. David Seil evaluated Kosilek, diagnosing GID and recommending hormones, electrolysis, and reevaluation after a year for sex reassignment surgery. Following this evaluation, MDOC also terminated its relationship with Seil. Memorandum and Order on Eighth Amendment Claim, Kosilek v. Spencer, No. 00-12455, 2012 U.S. Dist. LEXIS 124758, Sept. 4, 2012. In 2007, MDOC administrators also fired UMMS as their mental health provider at least in part because their consultants recommended sex reassignment surgery for Kosilek. *Soneeya*, 851 F. Supp. 2d 228.

[75] Victoria Russell, "Report re: Sandy Jo Battista."

was the solution to her problems "reflects unrealistic fantasy and magical thinking." He claimed that her "inability to reflect on alternative ways of understanding his [sic] condition and ways to deal with it…took on an irrational life of its own."[76] Unsurprisingly, neither provider diagnosed her with gender identity disorder nor recommended any treatments, other than psychotherapy. Yet, these were the only two medical experts that were made available to Battista until 2004, and it was partially on the basis of these evaluations that a district court dismissed two of her complaints.

As administrators of a supposedly total institution, prison officials are able to manipulate the minutia of prisoners' lives, including which medical providers they have access to. This authority to control every facet of institutional life renders invisible and normalizes a great deal of carceral violence, including poor health care. In other words, because of their power to control nearly every facet of carceral life, prison administrators are not only constitutionally sanctioned to choose medical providers, thereby shaping medical treatment, but hiring decisions and similar methods of shaping medical treatment are rarely scrutinized by courts. However, because MDOC privatized and contracted out their medical and mental health services, certain regularized strategies of obstructing and controlling gender-affirming medical treatment (and other health care)—most notably their ability to chose which doctors to hire and fire and to exert pressure on medical staff in unofficial ways—became visible to the district court and the object of judicial scrutiny when MDOC came into conflict with the contracted providers.

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[76] J. Tyler Carpenter, "Psychological Assessment Report" (Oct. 4, 1997) at 6, 5, Attached to Memorandum of Law in Support of the Opposition of Defendants to Plaintiff's Request for a Prelim. Inj., *Battista* (No. 05-11456). For other examples, see Ronald S. Ebert, "Psychological Evaluation re: Sandy Jo Batista" (Oct. 19, 2001), Attached to ibid.; David Campopiano and Robert Prentky, "I.D.P. Intake & Assessment Report" (Nov. 18, 1998), Attached to ibid.; Victoria Russell, "Report re: Sandy Jo Battista."

In the early 2000s, amid ongoing litigation, MDOC administrators attempted to mediate some of their loss of control produced from the privatization of prisoner health care. In addition to institutionalizing their freeze-frame policy, in 2002, MDOC amended its contract with UMMS to stipulate that MDOC would be responsible for the costs of GID-related hormone and surgical treatment and that any recommendation for a change in a prisoner's GID treatment required the approval of a number of high level MDOC administrators and a security review conducted by the Director of the Health Services Division and the Commissioner of Corrections. This new contract further exceptionalized and securitized GID-related treatment. Few, if any, other treatments were paid for by MDOC, instead of UMMS, and GID was the only medical or mental health "condition" for which UMMS was required to seek approval from MDOC administrators before providing treatment.[77] Nevertheless, UMMS still had control over the choice of providers.

In 2003, following a court decision that required MDOC to replace their freeze-frame policy with a more permissive policy, UMMS hired the Fenway Community Health Center, an LGBT community health care clinic in Boston, to conduct evaluations for GID and recommend treatment. As an LGBT-community-based clinic, Fenway's providers generally function under a model of transgender healthcare that centers self-determination, and they soon began to diagnose MDOC-incarcerated trans women with GID and recommend gender-affirming treatment. It is important to emphasize that if MDOC had not privatized their health care, thereby contracting out the authority to

[77] Defendant's Proposed Findings of Fact and Conclusions of Law, *Kosilek* (No. 00-12455), Aug. 21, 2006; Plaintiff's Opposition to Defendants' Motion for Summary Judgment, *Kosilek* (No. 00-12455), March 10, 2006; Deposition of Dr. Arthur Brewer, *Kosilek* (No. 00-12455), Jan. 27, 2006.

determine which experts to hire, Fenway would never have been selected as the outside expert for GID-related care. In fact, MDOC administrators attempted to dissuade UMMS from retaining Fenway. At a 2004 executive staff meeting between MDOC staff and UMMS staff, a MDOC staff member argued that Fenway might be too sympathetic to prisoners and too quick to recommend treatment. Instead, they recommended another provider, Cynthia Osborne, a social worker who had worked as an expert for a few other departments of corrections, arguing that she "may do more objective evaluations" and was "more sympathetic to DOC position."[78] UMMS, nevertheless, hired Fenway, and their providers' diagnoses and treatment recommendations changed the litigation situation, reducing (although not entirely eradicating) MDOC administrator's ability to speak through medical authority to justify blocking the provision of gender-affirming medical treatment. Instead, MDOC administrators began much more frequently to explicitly articulate security concerns in order to justify the continued denial of treatment.

In 2004, Fenway providers diagnosed Battista with GID and recommended hormone therapy, and in August 2005, an endocrinologist prescribed hormones.[79] MDOC blocked UMMS from administering this prescribed treatment, at first with no explanation, only later explaining, after numerous inquires by Battista, that they had put an administrative "hold" on her prescription, pending a "security review" to determine

[78] *Kosilek*, 740 F.3d at 742.
[79] This evaluation was, in part, an outcome of her second lawsuit, which, despite being dismissed by the court suit, led MDOC administrators to agree to provide Battista with "a comprehensive medical and psychological evaluation regarding his [sic] claimed gender disorder" and develop a new treatment plan. Quoted in Plaintiff's Proposed Findings of Fact and Conclusions of Law at 6, *Battista* (No. 05-11456), May 3, 2010. However, it took nearly two years for the evaluation to happen.

whether she could be housed safely while undergoing hormone therapy.[80] This security review was never conducted and, a few months later, Battista filed another federal civil rights lawsuit.[81] This new lawsuit set MDOC against their medical providers (both Fenway and UMMS, who supported Fenway's recommendations for treatment). In order to justify their continued denial of treatment, MDOC administrators increasingly and explicitly constructed Battista as a queer security threat both through their security expertise and by hiring medical experts to repackage their security arguments in medical expertise.

MDOC administrators relied on their established policy infrastructure, sanctioned by the constitutional standard of judicial deference to prison administrators because of their security expertise, to justify their requirement of a security review and the indefinite delay on Battista's hormone therapy. They offered the court little other explanation for years, nor did they conduct the security review, as they continued to delay Battista's medical treatment as long as possible. Following a rebuke by the district court judge in 2008, MDOC administrators began to explicitly argue that Battista as a (queer) sexual threat to security, a threat that would worsen, even become unmanageable, if she was provided with hormone therapy.

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[80] Quoted in Complaint at 9, *Battista* (No. 05-11456), July 5, 2005. After her diagnosis, the only treatment she received was counseling with a mental health administrator with no prior experience with GID. These sessions were not psychotherapy but brief "check-ins" once a month, often for less than five minutes. First Amended Complaint, *Battista* (No. 05-11456), Jan. 10, 2008. Because of the delay in hormone treatment, she had an emotional breakdown and was put on antidepressants. She requested that the "security review" be expedited do to the continual deterioration in her mental health. She relieved no response. In May 2005 she was removed from general population and placed in segregation on administrative watch because of "another emotional breakdown over the stress and anxiety she was experiencing." Complaint at 9, *Battista* (No. 05-11456).

[81] Complaint, *Battista* (No. 05-11456).

While there was no discussion of her sexual activity during the early years of litigation, in 2008, MDOC officials began to focus on her involvement in consensual sexual activity as a primary reason that she was a threat to her own safety and to institutional security and should, therefore, be denied access to hormone therapy.[82] Echoing long articulated constructions of queer dangerousness and security threat, MDOC administrators argued that this sexual activity would put her at greater risk for experiencing sexual violence, explaining that her sexual conduct (according to them) had caused her to experience sexual and physical violence in the past, and that this history "increases the risk that [Battista] will engage in similar prohibited sexual behaviors with other residents if feminized," which "could lead to jealousy and violence among other residents," causing disorder.[83] In addition, MDOC officials repeatedly argued that Battista's (potentially) feminized body would invite sexual violence and institutional disorder, especially in the context of a security hospital that housed "sex offenders."[84] For

[82] This sexual activity seemed to be in the context of a few long-term relationships with other prisoners over the course of a number of years. See for example, Defendant's Substitute Findings of Fact and Conclusions of Law, *Battista* (No. 05-11456).

[83] Defendants' Sur-Reply to Plaintiff's Reply to Defendants' Opposition to Plaintiff's Renewed Motion for a Prelim. Inj. At 8, *Battista* (No. 05-11456), Oct. 7, 2008.

[84] See for example, Joint Status Report, *Battista* (No. 05-11456), Aug. 5, 2008; Brief of Defendants-Appellants, *Battista* (No. 10-1965), Oct. 25, 2010; Proposed Findings of Fact and Conclusions of Law, *Battista* (No. 05-11456); Deposition of Robert F. Murphy, Jr., *Battista* (No. 05-11456), June 30, 2008. In response, Battista repeatedly emphasized that since 1995 she had lived openly as female—including changing her name, altering her clothing in a feminine style, wearing homemade makeup, and styling her hair—in the general populations of a number of men's prisons and that she had never experienced violence because of it. She argued that her female identity and expression had never caused "undue disruption, disorder, or distraction within the DOC" and had never presented any security problems, "other than a few derogatory comments by a few of your correctional officers." Complaint at 13, *Battista* (No. 05-11456); Battista to Robert Murphy at 2, *Battista* (No. 05-11456), April 27, 2005. See also, Affidavit of Direct Testimony of Sandy J. Battista, *Battista* (No. 05-11456).

Battista also argued that MDOC administrators claims that their actions were based on a concern for her safety as a prisoner who was vulnerable to violence were inconsistent with her experiences. For example, in a 2005 letter, she described how she had been double bunked with a prisoner who was twice her size and strength and was considered one of the MTC's most violent residents. While she never had a problem with him, she argued that "If concerns for residents safety and security were a legitimate concern

example, in his deposition, Murphy expressed concerns that her femininity could disrupt the space of the prison:

> I would anticipate that residents would begin to talk about [Battista's hormone treatment]. Because they're sex offenders, they would probably speak of it in referenced context of their own offending and attractiveness to victims and identifying victims. It would probably be discussed in the treatment groups, treatment staff would have to be familiar and prepared for it. The housing officers would have to be vigilant in monitoring it and there would be some serious safety concerns for both the residents as well as if it developed into dynamics where other residents became attracted to that resident and certain jealousies and collusions could develop. It could be very problematic to manage.[85]

In other words, Battista presented an institutional security threat both because of her sexualized behavior and because of her (sexualized) feminine embodiment. This threat would permeate the institution, requiring all staff to attend to the heightened danger. MDOC administrators portrayed hormone therapy as not only a threat that would extend and enhance Battista's queer dangerousness, but a technology that would "*render it impossible* for the DOC to fulfill its constitutionally-imposed duty to protect Battista and provide for institutional security."[86] Instead of being life sustaining or enhancing treatment, within the necropolitical space of the prison, gender-affirming medical treatment became a threat to institutional life and order, and the (violent) denial of medical treatment became "protection" for Battista.

MDOC administrators also continued to shape medical authority in order to deny Battista hormone therapy and to delegitimize the Fenway providers' recommendation of

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your subordinates would not be housing residents in double rooms with more aggressive inmates and clearly disregarding claims made by such residents of being harassed and intimidated while double-bunked…DOC chose to ignore any risk here in the name of overcrowding." Battista to Robert Murphy at 4, *Battista* (No. 05-11456). She consistently asserted that she had no concerns about her safety and emphasized that she worked to keep herself safe. In doing so, Battista asserted that she protected herself, with the help of other prisoners, and positioned MDOC as not a protector but as a source of violence.

[85] Deposition of Robert F. Murphy, Jr. at 75, *Battista* (No. 05-11456). While MDOC officials repeatedly referenced the Treatment Center's population of "sex offenders" as particularly problematic and sexually dangerous to Battista, in other cases, including *Kosilek* and *Soneeya*, they largely argued that same thing about other prison populations that were not composed entirely or primarily of "sex offenders."

[86] Brief of Defendants-Appellants at 28, *Battista* (No. 10-1965). My emphasis.

hormone therapy. In 2005, they hired Cynthia Osborne to act as their own expert to "peer review" the Fenway report. MDOC officials knew of Osborne because she had previously acted as an expert witness for the Virginia Department of Corrections and Wisconsin Department of Corrections regarding lawsuits similarly challenging the denial of hormone therapy to trans women prisoners.[87] Massachusetts prison officials were, therefore, aware that Osborne believed that criminality was a "contraindication" for hormone therapy and transgender-related surgery. Unsurprisingly, Osborne heavily criticized the Fenway report in her "peer review" and recommended that Battista not be provided with hormone therapy and that she undergo more thorough evaluations.[88]

Osborne's assessment was largely consistent with other assessments performed by MDOC-hired "experts," who advocated for very restricted access to gender-affirming medical treatments. These experts not only generally believed that medical sex reassignment was highly controversial and rarely, if ever, medically necessary, but also frequently shared MDOC officials' arguments that criminality—or the supposed

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[87] Osborne had also similarly "peer reviewed" Fenway providers' recommendation that Kosilek be provided with sex reassignment surgery a few months earlier.

MDOC administrators also used other tactics to delay and obstruct UMMS from providing gender-affirming medical treatment. For example, in a letter to MDOC administrators, UMMS doctors complained that they had been waiting "quite a while" for approval of treatment for a few patients following their GID diagnoses by Fenway doctors. They charged that MDOC officials seemed to be intentionally delaying treatment, noting that officials requested increasingly detailed information regarding treatment recommendations on multiple occasions, which "seem to ignore our many discussions regarding this topic." They also note that these requests "appear contrary to the procedure DOC has requested we follow for handling the treatment of these patients…Rather than providing us with a response approving or denying the treatment recommendations for these patients, you have sent us letters requesting further details, which we believe have already been explained to you, without approving or denying the specific treatment recommended." Kenneth L. Appelbaum and Arthur Brewer to Peter Heffernan at 2, *Battista* (No. 05-11456), Sept. 1, 2005, 2.

[88] Osborne was originally hired to "peer review" Fenway providers' recommendation for sex reassignment surgery. Addressing this action by MDOC, the Director of the UMMS Mental Health Program later testified that he could think of no other case in which they sought a second consultant to review their original consulting specialist's recommendation that seemed to be clinically appropriate. Plaintiff's Consolidated Requests for Findings of Fact and Conclusions of Law, *Kosilek* (No. 00-12455), Aug. 18, 2006.

dangerousness of prisoners—and security concerns within penal institutions changed the provision of medical treatment and the usefulness of guidelines like the Standards of Care.[89] These medical experts collapsed medical and security language, creating a penal medical language shaped by carceral necropower.

For instance, Osborne stated that Battista—as well as the other trans women that she evaluated—displayed high levels of "sociopathy and/or psychopathy," which she inextricably tied to criminality.[90] She argued that while "not every prisoner displays high levels of sociopathy or psychopathy, many do, and most have, by definition, engaged in antisocial behaviors."[91] Here, Osborne collapsed the legal and security status of prisoner or criminal and the medical status of sociopathy, or the official DSM diagnosis of Antisocial Personality Disorder, and marked them as "contraindications for hormones and surgery."[92] Residence in a prison became indicative of a medical pathology, a diagnostic criterion, and criminality was produced as medicalized dangerousness. In her

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[89] See for example, Cynthia Osborne, "Psychosexual Evaluation Report for Ophelia De'lonta"; Victoria Codispoti, "Psychiatric Transgender Evaluation of Ophelia De'lonta" (Jan. 15, 2007), Attached to Declaration of Don Bradford Hardin, Jr., *De'lonta* (No. 11-00257), July 12, 2013; Cynthia S. Osborne, "Peer report review for Sandy Jo Battista" (Oct. 10, 2005), Attached to Response of Defendants to Plaintiff's Oct. 17, 2005 Affidavit, *Battista* (No. 05-11456), Oct. 26, 2005; Chester W. Schmidt, Jr., "Psychological evaluation of Michele L. Kosilek" (Nov. 23, 2005), Attached to Defendant's Disclosure of Expert Testimony, *Kosilek* (No. 00-12455), Dec. 2, 2005; Cynthia S. Osborne, "Inmate evaluation of Michelle Kosilek" (Nov. 27, 2005), Attached to Ibid.; Cynthia S. Osborne, Evaluation of Scott Konitzer (a.k.a. Donna Dawn Konitzer) (Jan. 31, 2005), Attached to Brief in Support of Plaintiffs' Emergency Motion for a Prelim. Inj., Fields v. Smith, 712 F. Supp. 2d 830 (E.D. Wisc. 2010) (No. 06-00112), June 27, 2006. Dickey also diagnosed Kosilek with Antisocial Personality Disorder. George R. Brown, Evaluation re: Michelle Lynn Kosilek (Oct. 12, 2005), Attached to Plaintiff's Corrected Disclosure of Expert Testimony, *Kosilek* (No. 00-12455), Dec. 31, 2005. Brown, however, did not diagnose her as such.

[90] Osborne, "Peer report review for Sandy Jo Battista," 2.

[91] Ibid., 7.

[92] To emphasize her point she claimed that this was the case "without exception…in reputable gender clinics throughout the world." Osborne, "Peer report review for Sandy Jo Battista," 7. She made similar points in her evaluations of Kosilek and De'lonta. Cynthia S. Osborne, "Peer report review for Michelle Kosilek" (May 20, 2005), Attached to Plaintiff's Opposition to Defendants' Motion for Summary Judgment, *Kosilek* (No. 00-12455); Cynthia Osborne, "Psychosexual Evaluation Report for Ophelia De'lonta."

discussion of the ascription of sociopathy and Antisocial Personality Disorder to gang members, ethnic studies scholar Lisa Cacho draws on Foucault to argue that these diagnostic categories function as "conditions," permanently marking gang members as inherently abnormal and incorrigible. "Sociopathy" constructs certain forms of criminality—for Cacho, the racialized status criminality of "gang member"—as disease and disability, categories that have long been used to justify "state-sanctioned violence as necessary for national survival."[93] Cacho argues that these medical diagnoses and language help substantiate the construction of gang members as a permanently criminalized group, as "ineligible for personhood," or as socially dead. While "transgender" or gender nonconformity function quite differently than "gang member"—which functions as a racialized criminal status, a status that marks the bodies folded into it, generally young men of color, as already and inherently dangerous—the racialized death-world of the prison marks gender nonconformity as already and inherently dangerous, as a threat to the life or survival of the institution.

Experts also inextricably connected gender nonconformity and transsexuality with criminality and sociopathology, sometimes even viewing some trans women's gender identity as a product of their prison experiences. For example, one of Battista's evaluators discussed the "acceptance by other inmates" and the "sub cultural conditioning in the

[93] Lisa Cacho, *Social Death: Racialized Rightlessness and the Criminalization of the Unprotected* (New York: New York University Press, 2012), 70. See also Douglas C. Baynton, "Disability and the Justification of Inequality in American History," in *The New Disability History: American Perspectives*, ed. Paul K. Longmore and Lauri Umansky (New York: New York University Press, 2001); Lorna A. Rhodes, *Total Confinement: Madness and Reason in the Maximum Security Prison* (Berkeley, CA: University of California Press, 2004).

prison environment" as aspects that fed her gender identity.[94] In her evaluations of Battista and Kosilek, Osborne argued that "the isolation of prison life" may have "inflamed and rigidified the fixation and over valuing of a cross gender identity as the inmate's only possible solution for internal conflict."[95] In her evaluation of Kosilek, she pondered, "Is there a possibility that 'developing' GID satisfies the narcissistic need of some inmates (e.g. those high in psychopathy) to be different and to draw attention to themselves?"[96] She also claimed that there was an "apparent association between GID and criminality" because the prevalence of GID in incarcerated people seemed to be higher than in non-incarcerated populations.[97] By producing transsexuality or cross-gender identity as the product of the death space of the prison, these medical experts constructed incarcerated trans women's gender identities and requests for gender-affirming medical treatment as not only illegitimate but criminal, dangerous, and sociopathic.

Battista and other trans women, therefore, were marked as sociopathic both because of their confinement in penal institutions and because of their sexual and gender deviance and insistence on defining their own identities and medical needs. For example, Battista's participation in a few long-term sexual relationships over the course of a

[94] Quoted in Katrin Rouse, Report of Qualified Examiner to the Court (April 1, 2002) at 5, Attached to Complaint, *Battista* (No. 03-12643), Dec. 6, 2003.
[95] Osborne, "Peer report review for Michelle Kosilek," 11. She included the same phrase nearly word-for-word in her evaluation of De'lonta and the sentiment in her evaluation of Battista. See Osborne, "Psychosexual Evaluation Report for Ophelia De'lonta," 28; Osborne, "Peer report review for Sandy Jo Battista."
[96] Osborne, "Inmate evaluation of Michelle Kosilek," 13.
[97] Ibid., 13. In her evaluation of De'lonta, Osborne also interpreted De'onta's self-advocacy, assertion of her female-ness, survival strategies, and incidents of self-defense against sexual violence as indicative of criminality, psychopathy, impulsivity, and poor behavioral control. She viewed De'lonta's refusal to comply with institutional regulations restricting her femininity and female-identity as evidence that "criminality has continued to be a problem" for De'lonta. Osborne, "Psychosexual Evaluation Report for Ophelia De'lonta."

number of years as well as her advocacy for necessary medical treatment were categorized by MDOC officials and their medical experts, like Osborne, as examples of her deviance, manipulation, and dangerousness, as "a symptom of sociopathology" and criminality. This transformation of generally socially acceptable behavior into sociopathy and criminality, as Cacho argues, is the product of the construction of abnormality as "the sociopath's afflicted core."[98] All behavior, especially that which challenges institutional regulations and norms, is rendered suspect, dangerous. This triad of transsexuality, criminality, and sociopathology then allowed experts like Osborne to argue that "criminality and sociopathy" contraindicate gender-affirming medical treatment and that treatment standards, particularly the Standards of Care, were inappropriate for the prison setting because they did not address security. In her peer review of Battista, Osborne argued that providing hormone therapy might "cater to and fuel" her "personality instability," "worsening symptoms of entitlement and manipulativeness."[99] She, therefore, concluded that MDOC administrators' delay in providing such treatment was "responsible."[100] Moreover, Osborne asserted that prescribing hormones to incarcerated trans people "reflects, rather than compliance with the existing SOC, an explicit violation" because, she claimed, sociopathology and criminality reflected an inability to meet readiness criteria.[101]

Manipulativeness, both as a diagnostic criteria for sociopathology and related diagnoses as well as a criterion for queer dangerousness and security threat, was an

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[98] Cacho, *Social Death*, 71.
[99] Osborne, "Peer report review for Sandy Jo Battista," 3.
[100] Ibid., 13. In her report on Kosilek, she also warns that providing treatment could "cater to, and thereby deepen" Kosilek's "pathologies." Osborne, "Peer report review for Michelle Kosilek," 12.
[101] Osborne, "Peer report review for Sandy Jo Battista," 7-8.

important overlapping discourse in carceral security-speak and DOC-hired expert medical opinions, not only for Battista and MDOC but in similar cases around the US.[102] Prison administrators frequently framed trans women's self-advocacy for gender-affirming medical treatment as manipulative, deceitful, and examples of their "attitudes of entitlement," in other words as sociopathic. "Manipulation" functions as a particular gendered and sexualized symptom of sociopathology, often constructed as a danger or pathology of womanhood and femininity, and is inextricably connected to common constructions of trans people—especially trans women of color—as liars and deceivers, constructions that often legitimize violence against them.[103] In other words, "manipulative" functions for prison administrators and their medical experts as a specific, feminized formation of queer dangerousness or criminality. By constructing trans women as manipulative, sociopathic, and criminal, prison administrators and their experts could argue that denying access to gender-affirming medical treatment was a *necessary* infliction of pain. While courts did not always agree, they continued to legitimize the securitization of medical treatment—or, the inclusion of security considerations in determining medical treatment.

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[102] See for example, Affidavit by Luis Spencer, *Kosilek* (No. 00-12455), Feb. 16, 2006; Memorandum of Law in Support of the Opposition of Defendants to Plaintiff's Request for a Prelim. Inj., *Battista* (No. 05-11456); Osborne, "Psychosexual Evaluation Report for Ophelia De'lonta"; Osborne, "Peer report review for Sandy Jo Battista"; Osborne, "Peer report review for Michelle Kosilek"; Codispoti, "Psychiatric Transgender Evaluation of Ophelia De'lonta"; *Long*, 86 F.3d 761; *Supre v. Ricketts*, 792 F.2d 958 (10th Cir, 1986), dissenting opinion.

[103] Talia Mae Bettcher, "Evil Deceivers and Make-Believers: On Transphobic Violence and the Politics of Illusion" *Hypatia* 22, no. 3 (Summer 2007): 43-65.

In her discussion of mental illness and maximum security prisons in Washington state, Lorna A. Rhodes also has notes that prison staff often refer to prisoners as "manipulative." In fact, she argues that prison workers are "socializ[ed] to expect manipulation by inmates." Rhodes, *Total Confinement*, 165.

The Massachusetts district court's decision regarding Battista's case illustrates this dynamic. Following yet another round of evaluation by a new GID-specialist contractor, diagnosis of GID, further psychotherapy, and eventual recommendation and prescription for hormone therapy that was again delayed by MDOC administrators pending a security review, in late 2009, Murphy filed the security review of Battista's hormone therapy with which I began this chapter, which put an indefinite hold on Battista's hormone therapy. In 2010, the district court ruled in favor of Battista and ordered that MDOC administrators provide her with hormone therapy, finding that for over a decade MDOC officials had been "deliberately indifferent to the genuine medical need of [Battista] for hormone therapy to address…a substantial risk of serious harm if her Gender Identity Disorder is not treated in that fashion."[104]

Despite ruling in Battista's favor, which included finding that Murphy's security review did not legitimize MDOC's denial of hormone therapy, the district court essentially upheld the practice of reviewing the security implications of gender-affirming medical treatment and potentially denying such treatment based on security concerns. Calling Battista "a willful and manipulative figure who wants what she wants when she wants it," the district court argued that there was good "reason for the DOC to be concerned about her highly sexualized activity, which has an effect of roiling the environment at the Treatment Center through her development of various kinds of sexual relationships."[105] Nevertheless, as the First Circuit Court of Appeals explained in their 2011 decision upholding the district court decision, MDOC administrators "forfeited" the

[104] Transcript of Hearing on Motion to Stay Execution of Modified Preliminary Injunction Order Pending Appeal, *Battista* (No. 05-11456), 49.
[105] Ibid., 61, 65.

deference courts were required to show prison administrators by engaging in "a knowing and intentional strategy" of delays, pretextual security arguments, and obstruction tactics.[106]

While limiting MDOC administrators' power to determine (or deny) Battista access to gender-affirming medical treatments, the court sanctioned the securitization of gender-affirming medical treatment in prisons, citing Battista's queer dangerousness to justify this securitization. As a different Massachusetts district court explained in its 2002 opinion in Kosilek's first case, an opinion that ruled that MDOC officials had to provide Kosilek with hormone therapy:

> The duty of prison officials to protect the safety of inmates and prison personnel is a factor that may properly be considered in prescribing medical care for a serious medical need. It is conceivable that a prison official, acting reasonably and in good faith, might perceive an irreconcilable conflict between his duty to protect safety and his duty to provide an inmate adequate medical care. If so, his decision not to provide that care might not violate the Eighth Amendment because the resulting infliction of pain on the inmate would not be unnecessary or wanton. Rather, it might be reasonable and reasonable conduct does not violate the Eighth Amendment.[107]

In other words, "practical constraints imposed by the prison environment," or the securitization of medical care, potentially justifies the denial of gender-affirming medical

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[106] *Battista v. Clarke*, 645 F.3d 449, 455 (1st Cir. 2011); Transcript of Hearing on Motion to Stay Execution of Modified Preliminary Injunction Order Pending Appeal, *Battista* (No. 05-11456), 49. For example, Kathleen Dennehy, the Commissioner of Corrections from 2004 to 2007, had stated that she was determined not to be the first prison official to provide sex reassignment surgery to a prisoner, testifying that she would rather retire than obey an order from the Supreme Court to do so. The First Circuit found that "acting on this determination, Dennehy engaged in a pattern of pretense, pretext, and prevarication to deny Kosilek the sex reassignment surgery that the DOC doctors prescribed." Memorandum and Order on Eighth Amendment Claim at 12, *Kosilek* (No. 00-12455). When a specialist retained by DOC doctors recommended sex reassignment surgery while she was Deputy Commissioner, she participated in a decision to have him fired. When she became Commissioner, she stopped certain prescribed treatments for Kosilek and other trans prisoners, supposedly to review their cases, and long delayed decisions on whether such treatments would be allowed. She was also centrally involved in hiring Osborne. Ibid.

[107] *Kosilek*, 221 F. Supp. 2d at 161.

treatment.[108] Securitization renders constitutional the carceral violence of denying treatment in many, if not most, cases.

Sex Reassignment Surgery and Carceral Medical Treatment's Death Logic

In 2012, a Massachusetts district court ordered MDOC administrators to provide Kosilek with sex reassignment surgery in an opinion ruling that MDOC had been deliberately indifferent to Kosilek's serious medical need by denying her such treatment.[109] This ruling, which was upheld in 2014 by the First Circuit Court of Appeals, was the first time a US court ordered a department of corrections to provide sex reassignment surgery to a prisoner. While the case is ongoing because MDOC administrators appealed the First Circuit's opinion, Kosilek's case may indicate a change or "evolution" in the legal "standards of decency" related to the treatment of GID in penal institutions. Because all departments of corrections have official policies or unofficial practices of housing prisoners based on their genital status, the possibility of providing prisoners with sex reassignment surgery has somewhat different security implications, as MDOC argued to the courts.

Kosilek, who was incarcerated in 1992 to a life sentence with no possibility of parole, spent her first ten years in prison in litigation with MDOC in an effort to force prison administrators to provide her with gender-affirming medical treatment, which MDOC officials refused to provide her at least in part because they argued it was a threat to institutional security. In 2002, the district court ordered MDOC officials to allow

[108] Ibid. at 161.
[109] *Kosilek*, 889 F.Supp.2d 190.

"qualified medical professionals" to evaluate Kosilek and recommend treatment.[110] Following the ruling, MDOC administrators approved hormone therapy for Kosilek, after the then-Superintendent of MCI-Norfolk, where she was incarcerated, conducted a security review, finding no security concerns related to the treatment.[111] In 2003, she began hormone therapy, and a year later, she began to request an evaluation for sex reassignment surgery. After almost a year of repeated inquiries from Kosilek, UMMS authorized an evaluation by the Fenway Clinic, and in 2005, Fenway providers recommended sex reassignment surgery.[112] MDOC officials blocked this treatment, arguing that sex reassignment surgery would create major security problems. Kosilek, once again, filed a federal civil rights lawsuit.

As they had in other litigation, MDOC administrators offered both (and interrelated) medical and security justifications for their denial of treatment. First, MDOC administrators challenged Fenway's evaluation and recommendation as inappropriate. In particular, they argued, through their medical experts, that the Standards of Care's "real life experience" requirement, which requires trans people to live full-time as their preferred sex for a year prior to sex reassignment surgery, could not be fulfilled in a prison setting.[113] For example, Osborne argued that life in prison "presents an inherent

[110] *Kosilek*, 221 F. Supp. 2d at 162. The court, however, did not rule that MDOC officials had been deliberately indifferent and therefore did not find their actions to be unconstitutional. Instead, the court put the MDOC "on notice" that if they did not provide treatment, they would be violating Kosilek's rights.
[111] Plaintiff's Opposition to Defendants' Motion for Summary Judgment, *Kosilek* (No. 00-12455); Memorandum and Order on Eighth Amendment Claim, *Kosilek* (No. 00-12455).
[112] Amended Complaint, *Kosilek* (No. 00-12455), July 15, 2005; Kevin Kapila and Randi Kaufman, Evaluation re: Michelle Kosilek (Feb. 24, 2005), Attached to Memorandum of Law in Support of Defendant's Motion for Summary Judgment, *Kosilek* (No. 00-12455), Jan. 17, 2006.
[113] MDOC administrators manipulated medical authority in three important ways to substantiate this argument. First, they used policy. Their 2000 "Guidelines for Mental Health Treatment of Inmates with Gender Identity Disorder" explicitly explained that the "real life experience" "cannot be afforded inmates

and irresolvable contradiction to the standards regarding the real life experience."[114] The argument that a "real life experience" could not be achieved in prison was substantiated by arguing both that incarcerated people are, as Osborne explained, "usually individuals who are not and cannot make adequate psychosocial adjustment in the real world, and who would rarely if ever succeed in a real life experience in the real world" and because the prison puts limits on trans women's "feminization."[115]

In making this argument, MDOC administrators and their medical experts set up a trap that prisoners cannot get out of. Incarcerated trans women's confinement in prison produces them as criminal and sociopathic, which helps justify prison administrators' control over the minutia of their lives, including confining them in men's institutions and

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since security and operational concerns do not allow inmates to dress and function as members of the opposite sex." Quoted in *Kosilek*, 221 F. Supp. 2d at 171. However, the district court ultimately found this blanket ban on sex reassignment surgery, which was part of MDOC's freeze-frame policy, to be unconstitutional, as treatment decisions had to be based on individual assessment.

Second, they used their power to hire medical staff. In 2007, MDOC administrators terminated UMMS as their mental health provider at least in part because the Fenway providers recommended sex reassignment surgery for Kosilek. MDOC hired a new contractor, MHM Services, Inc., an out-of-state for-profit corporation, who then assumed responsibility for GID-related treatment and hired a new GID-specific subcontractor, Stephen Levine, a psychiatrist affiliated with Case Western University in Ohio. Levine had testified as an independent, court appointed expert earlier in Kosilek's legal proceedings, where he stated that the SOC were not applicable to incarcerated people, questioned the effectiveness of gender-affirming medical treatment, and argued the "real life experience" was not possible in the prison setting. *Soneeya*, 851 F. Supp. 2d 228; Defendant's Revised Proposed Findings of Fact and Conclusions of Law, *Kosilek* (No. 00-12455), May 15, 2007.

Third, they hired medical experts, like Osborne, who agreed with this position on the "real life experience." See for example, Schmidt, Jr., "Psychological evaluation of Michele L. Kosilek"; *Kosilek*, 221 F. Supp. 2d 156, recounting the opinion of another DOC consultant, Dr. Dickey; Victoria Russell to Kathleen Dennehy (n.d.), Attached to Memorandum in Support of Plaintiff's Renewed Motion for Prelim. Inj., *Battista* (No. 05-11456), Aug. 6, 2008; Transcript of Hearing on Motion Session with Closing Arguments, *Kosilek* (No. 00-12455), Dec. 21, 2009.

The aim of the "real life" experience is to allow trans people to demonstrate to their providers that that they can live as their preferred gender and also gives them a glimpse into what that life will be like. This requirement is controversial among trans people. The most recent version of the Standards of Care, published in 2011, relaxes this requirement.

[114] Osborne, "Psychosexual Evaluation Report for Ophelia De'lonta," 27; Osborne, "Peer report review for Michelle Kosilek," 5.

[115] Osborne, "Psychosexual Evaluation Report for Ophelia De'lonta," 27; Osborne, "Peer report review for Michelle Kosilek," 5; Codispoti, "Psychiatric Transgender Evaluation of Ophelia De'lonta," 17.

restricted their access to feminine clothing and grooming products. They are, therefore, unable to live as women and prove not only that they can "adjust" to life as a woman but also "adjust" to non-criminal life. They are then denied access to medicalized sex reassignment technologies that might allow them to be incarcerated in a women's prison, thereby "experiencing" what life is like as a woman.[116] This trap and the argument that incarcerated trans women cannot participate in the "real life" experience produces the space of the prison as a "death-world," a space outside of "real life." In particular, these death logics produce prisoners, like Kosilek, who will never be released from prison as the living-dead, as biologically living but unable to participate (ever again) in "real life."

Drawing on similar themes constructing Kosilek as the living-dead, MDOC administrators also argued that Kosilek's post-surgical placement would create unmanageable security problems. While MDOC's practice, like all departments of corrections around the US, is to place trans prisoners based on their genital status, MDOC administrators argued that they could place her neither back in Norfolk (which they implied was their default placement) nor in MCI-Framingham, MDOC's only women's prison. MDOC officials argued that her placement in either prison "would place substantial burdens on the DOC with regard to its ability to provide for internal order and security. The potential risk to the safety of [Kosilek], as well as to the safety of inmates, staff, and the public is significant should the surgery be approved."[117] In other words,

[116] In addition, many of these incarcerated trans women were incarcerated at least in part because they were trans or were connected to their experiences of marginalization because of being trans, including life-long experiences of violence, economic marginalization, familial or spousal abuse, and mental health problems. Their experiences of carceral and medical violence continued that cycle as well.

[117] Defendant's Proposed Findings of Fact and Conclusions of Law at 41, *Kosilek* (No. 00-12455). They also expressed concerns with the security problems of providing treatment, which might require her

MDOC administrators described Kosilek's potential post-surgical placement as an administrative disaster, which would threaten the security of any institution.

MDOC administrators argued that she would face violence in either institution because she is a trans woman and that her presence might disrupt the order of the institution. While the reasoning of these arguments was similar (she was a queer security threat), the specifics looked very different in a few key ways. In their discussions of placing her in Norfolk, officials almost entirely focused on her "substantial risk" of experiencing sexual violence and argued that this also "raise[d] climate issues at the prison."[118] In most cases, their emphasis was on the former (her risk for sexual violence) over the latter (her disruption of the space of the prison), although the two were inextricably linked, as they are in most carceral discourses about trans women as security threats. On the other hand, MDOC officials expressed numerous concerns about her placement in Framingham, primarily focusing on their strong belief that she "would have a significant adverse impact upon the climate of the prison."[119] While they also expressed concerns about her experiencing violence, this concern was framed as secondary to her disruption of the institution.

MDOC administrators were concerned that her crime—she was convicted of murdering her wife—would create a safety and security problem. They argued that because a high percentage of women in Framingham have histories of sexual and

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transportation out-of-state because there were no surgeons who performed sex reassignment surgery in Massachusetts.

[118] Memorandum of Law in Support of Defendant's Motion for Summary Judgment at 6, 16, *Kosilek* (No. 00-12455). See also Affidavit by Luis Spencer, *Kosilek* (No. 00-12455).

[119] Memorandum of Law in Support of Defendant's Motion for Summary Judgment at 6, *Kosilek* (No. 00-12455).

domestic violence and of mental illness, her presence would be troubling to many prisoners; could "cause a great deal of fear and anxiety" and anger; "would exacerbate the mental health problems experienced by the female inmates"; and could, therefore, "destabilize" the prison.[120] They also argued that these women would target her for violence. Interestingly, MDOC officials and at least one of their experts expressed a specific concern about "more aggressive, larger female[s] or females displaying more masculine characteristics" perpetrating violence against Kosilek.[121] Moreover, they expressed concern that Kosilek would perpetrate violence against the other women, despite having no history of violence since she was incarcerated. For example, in his assessment of Kosilek, after acknowledging that she had been "stable" and not involved in violence at Norfolk, the Director of MDOC's Research and Planning Division, who served as MDOC's expert witness on sexual violence in prisons, stated that that "if [Kosilek] were to be placed in a new environment, with more vulnerable females, and…where he [sic] might be under stress, with a different social dynamic, it is not implausible that he [sic] could manifest a more aggressive posture."[122] MDOC officials also claimed that she would be stronger than many of the women in Framingham and

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[120] Quoted in Defendant's Revised Proposed Findings of Fact and Conclusions of Law at 56, *Kosilek* (No. 00-12455); Memorandum of Law in Support of Defendant's Motion for Summary Judgment at 17, *Kosilek* (No. 00-12455). See also, A. F. Beeler to Richard McFarland, "Security Aspects of Inmate's Kosilek's Request" (Dec. 2, 2005), Defendant's Disclosure of Expert Testimony, *Kosilek* (No. 00-12455), Dec. 2, 2005; Robert W. Dumond, "Outline of Key Issues to be Discussed by Robert W. Dumond, Relative to Risks of Victimization for Individuals who are Transgendered in Incarcerated Settings" (Dec. 2, 2005), Attached to ibid.

[121] Dumond, "Outline of Key Issues to be Discussed," 5. He expressed similar concern in his testimony, claiming that "in the last 15 years, there's a growing network of female offenders who … are committing more violent crimes and they've adopted more traditional masculine types of attitudes and attributes and they've imported them into the prison culture even in female settings. So there's a cadre of women in prison who have adopted the same type of violent, aggressive approaches, which had not been manifested in female settings." Quoted in Defendant's Revised Proposed Findings of Fact and Conclusions of Law at 57, *Kosilek* (No. 00-12455).

[122] Dumond, "Outline of Key Issues to be Discussed," 5.

therefore more of a threat and that she would be an escape risk, at least in part because of her supposed greater strength.[123]

While prison administrators expressed serious concerns about security whether she was placed in a men's or women's facility, the specifics of those concerns were altered by the differently gendered spaces of those institutions and the supposed sexed natures of those confined within them. In reference to housing in both Norfolk and Framingham, Kosilek was portrayed as the likely victim of violence and as a source of disorder because of the queer dangerousness of her feminized body, which they often explicitly linked to the queer threat of other prisoners, either of sexual violence perpetrated by male prisoners in Norfolk or queer gender-based violence perpetrated by gender nonconforming prisoners in Framingham. However, prison administrators were clearly much more troubled by her potential placement in Framingham and, unlike in their discussions of Norfolk, repeatedly emphasized that Kosilek would likely perpetrate violence. In their discussions of Framingham, prison administrators treated Kosilek as a predatory male, who would be lured into committing violence by the presence of women, and as inherently stronger and more difficult to contain than the (non-trans) female prisoners. This assumption, too, was rooted in her embodied queer dangerousness. While her body would be feminized, prison administrators still viewed it as inherently a male body, which would abnormally inhabit a supposedly female space. To MDOC administrators, male and female bodies were inherently and naturally different, with male

[123] MDOC administrators argued that "the perimeter security of the area where the general population is housed is not sufficient to house a medium security male inmate with a security risk 'B' rating…there are legitimate concerns that plaintiff's physical strength would be sufficient to overcome the prison's current perimeter security for the general population areas." Memorandum of Law in Support of Defendant's Motion for Summary Judgment at 18, *Kosilek* (No. 00-12455).

bodies being stronger and more physically dangerous and violent. Indeed, their claims that Kosilek possessed greater strength seemed to be entirely based on the fact that she was classified as male. Kosilek was described as being approximately five feet and seven inches tall and 137 pounds, not much bigger than the average woman, nor does MDOC have a policy of segregating or placing very strong or large female-classified prisoners in men's prisons. Like in Battista's case, MDOC administrators' construction of Kosilek as a threat to security hinged largely on sex(uality). They explicitly argued that she would be subjected to sexual violence in Norfolk, and, while they never explicitly said so, their discussions of the assumed violence she would commit in Framingham implied that some might be sexual, that her sexual difference along with her criminality would naturally produce sexual violence.[124]

In MDOC's arguments about Kosilek's post-surgical placement, Kosilek becomes administratively unclassifiable, the detritus of the prison system's racialized gender normative sex-segregation, which produces sexual difference as inherent, unalterable, and mutually exclusive as well as gender nonconformity as dangerous. In *Psychiatric Power*, Foucault argues that disciplinary systems, including the prison, produce "something like

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[124] According to both Kosilek and MDOC officials, she had never been sexually assaulted nor did she participate in consensual sexual activity. In fact, in her first fifteen years of incarceration, she only received one disciplinary ticket, and it was for using homemade makeup. Brown, Evaluation re: Michelle Lynn Kosilek.

Unsurprisingly, all discussions or concerns about violence exclusively focused on prisoners, either Kosilek committing violence or other prisoners committing violence against her. MDOC administrators framed themselves as protectors, even arguing that the fact that Kosilek had not committed violence while in prison was not her doing but was the prison's, explaining that she had "done well" in Norfolk because of its "unique setting" and "good staff." Transcript of Hearing on Motion Session with Closing Arguments, *Kosilek* (No. 00-12455). Yet, like other prisoners, Kosilek reported that the only threats to her safety had come from staff. For example, she reported experiencing verbal abuse from some correctional officers; she was "routinely subjected to humiliating pat searches in which [male] corrections officers put their hands on her chest where she has noticeable breasts"; and she was required for many years to shower in view of other prisoners and staff.[124] That violence disappears—or is legitimized—as prison administrators frame Kosilek as dangerous and their actions as protective.

a residue…something like 'the unclassifiable."[125] Foucault identifies "delinquents"—or those deemed inherently dangerous and incorrigible, uncorrectable by a disciplinary system—and the mentally ill—who he calls "the residue of all residues" as they cannot be assimilated to any of society's disciplines—as examples of such "residue" or "the unclassifiable."[126] As "the stumbling block in the physics of disciplinary power," the unclassifiable, therefore, threaten disciplinary and classificatory systems and are in need of containment.

While all incarcerated trans women to a certain extent exceed the prison system's racialized gender normative classification system—hence their production as security threats and as queerly dangerous—prison-provided sex reassignment surgery marks Kosilek as wholly unclassifiable. As MDOC administrators argued that she would be unclassifiable post-surgery, they also explained that if Kosilek had undergone sex reassignment surgery prior to her incarceration she would have been placed in Framingham and may have been able to be safe there. While MDOC officials explained the difference between these two scenarios as about her "notoriety" (notoriety, it should be emphasized, that was produced from her need to sue MDOC in order to receive medical treatment), carceral necropower, in fact, marks prison-provided sex reassignment surgery and the surgically altered body that it constructs as dangerous and different from sex reassignment surgery outside prison.

Kosilek's dangerous and unclassifiable post-surgical body, therefore, would need to be contained, and MDOC administrators argued that she would have to be placed in

[125] Michel Foucault, *Psychiatric Power: Lectures at the Collége de France, 1973-74* (New York: Picador, 2003), 53.
[126] Ibid., 53, 54.

maximum security segregation in either Norfolk or Framingham for her "own protection, the protection of others and to maintain the safe and orderly operation of" either institution.[127] MDOC administrators argued that this scenario was untenable both because it would be administratively and financially burdensome for MDOC and because it would significantly worsen her situation—especially as it might have to be for the rest of her life. In contrast, MDOC administrators argued that trans people are "able to live with that pain, that anxiety, that uncomfortableness [of not having sex reassignment surgery] for 10, 20 or 30 years… That's very different than an appendix, a person with an appendix that bursts, who will have to get treatment."[128] They repeatedly argued that they could manage Kosilek and her "pain" through antidepressants and suicide prevention strategies. Outlining their suicide prevention programs for prisoners in their briefs to the court, MDOC administrators explained that upon winning the case, they would immediately place Kosilek "in a secure area pending [her] assessment by mental health staff."[129]

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[127] Dumond, "Outline of Key Issues to be Discussed," 5. See also, A. F. Beeler to Richard McFarland, "Security Aspects of Inmate's Kosilek's Request"; Affidavit by Luis Spencer, *Kosilek* (No. 00-12455); Kathleen Dennehy, "Defendant Department of Correction's Report on Anticipated Safety and Security Concerns Arising from the Allowance of Inmate Michelle Kosilek's Request for Sex Reassignment Surgery" (n.d.), Attached to Memorandum of Law in Support of Defendant's Motion for Summary Judgment, *Kosilek* (No. 00-12455); Affidavit of Lynn Bissonnette, *Kosilek* (No. 00-12455), Feb. 17, 2006.

Many of the legal documents submitted by the MDOC that asserted that she would have to be placed in segregation also emphasized the unpleasantness of the segregation units in both Norfolk and Framingham, which were highly restrictive and isolating. They argued that both units would be a dramatic change from her conditions in Norfolk, would be required for the remainder of her life, and would not only adversely affect her mental health but also potentially negatively impact the climate of either institution. See also, Memorandum of Law in Support of Defendant's Motion for Summary Judgment, *Kosilek* (No. 00-12455); Affidavit by Luis Spencer, *Kosilek* (No. 00-12455).

[128] Transcript of Hearing on Motion Session with Closing Arguments at 43-44, *Kosilek* (No. 00-12455), Dec.

[129] Defendant's Revised Proposed Findings of Fact and Conclusions of Law at 42, *Kosilek* (No. 00-12455). The question of Kosilek committing suicide was an important feature of the case, as Kosilek had repeatedly stated that if she did not receive necessary treatment, she would probably kill herself. MDOC administrators and their medical experts called her discussions of suicide "manipulative" and contraindications for sex reassignment surgery. Yet, they also argued that her lack of suicide attempts or self-injury since starting hormone therapy was evidence that she was receiving adequate treatment.

Presumably, this "secure area" would be suicide watch, which often entails isolation in a strip cell, where a prisoner is confined with nothing, not even their clothing, for hours to days. For prison administrators, adequate treatment is keeping Kosilek physically alive. Kosilek, therefore, becomes the living-dead.

Carceral necropower, coupled with racialized gender normative constructions of queer dangerousness, securitizes gender-affirming medical treatment, transforming transgender-related health care into an exceptional, dangerous type of medical treatment and necessitating the denial of medical treatment for incarcerated trans women. While courts have constructed boundaries around the legitimate denial of treatment, they have simultaneously sanctioned this securitization of gender-affirming medical treatment and the continued construction of gender nonconformity, particularly when embodied by the queer transfeminine body, as dangerous, as a threat to institutional security. Carceral violence, therefore, continues to function largely unabated, as medical and carceral institutions are empowered to control and define trans prisoners' medical needs and treatment.

While trans studies scholars and activists have long argued that the medical establishment has set up a medical gatekeeping system, designed to control access to treatment as well as discipline trans people into conforming to normative models of transsexuality and racialized hetero- and gender norms, within penal institutions, prison administrators act as another layer of gatekeeper, establishing policies defining access to treatment. Prison administrators and security staff are usually intimately involved with

the provision of gender-affirming medical treatment, defining that treatment as a problem of security as well as medicine and shaping treatment into something somewhat different than on the outside. In doing so, the experience and definition of such treatment is transformed. For trans people who utilize gender-affirming medical treatments outside of prison, that treatment is life-affirming and enhancing. For those who are imprisoned, even when they are able to access such treatment, carceral, medical, and legal logics produce it as a technology to ensure the continuation of bare (biological) life; medical care becomes an extension of the death logics of the prison, producing the living-dead.

Marked by the racialized, nonnormative, necropolitical space of the prison, both incarcerated trans women who seek to access gender-affirming medical treatment and that treatment itself are transformed into queer dangerousness. In so doing, carceral necropower fractures trans experience, especially regarding health care. In conceptualizing "queer necropolitics," Jasbir Puar argues that racialized sexual pathology and deviance—what she calls "queerness as population"—are targeted for death as a key part of the mechanism that enables normative "queer liberal subjects" to be folded into life.[130] Criminalization and imprisonment are a key part of queer necropolitics. Those trans people—like myself—who are not targets for criminalization and imprisonment can be folded back into life and access gender-affirming medical treatments with relative ease. Those who are targets—not only those currently incarcerated but those formerly

[130] Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham: Duke University Press, 2007), 24. See also, Jin Haritaworn, Adi Kuntsman, and Silvia Posocco, "Introduction," in *Queer Necropolitics*, ed. Jin Haritaworn, Adi Kuntsman, and Silvia Posocco (New York: Routledge, 2014); C. Riley Snorton and Jin Haritaworn, "Trans Necropolitics: A Transnational Reflection on Violence, Death, and the Trans of Color Afterlife," in *the Transgender Studies Reader 2*, ed. Susan Stryker and Aren Z. Aizura (New York: Routledge, 2013).

incarcerated or from segments of trans communities that are the prime targets of criminalization, especially low-income trans women of color—are subject to state violence, denial of medical treatment, and the living death of incarceration.

Conclusion

Life and Resistance in a Space of Death: A "Queer Antiprison Politic"

In 1999, Ophelia De'lonta, an African American trans woman incarcerated in Virginia, filed a federal civil rights lawsuit against the Virginia Department of Corrections (VDOC), claiming that they were deliberately indifferent to her serious medical need and requesting a court order for hormone therapy. Incarcerated since 1983, De'lonta began to request treatment in 1987. Four years later, in 1993, a VDOC physician prescribed hormone therapy, which was abruptly terminated in 1995 when she was transferred to a different prison.[1] In 2003, the Fourth Circuit Court of Appeals, ruled that VDOC may have been deliberately indifferent to De'lonta's serious medical need by, in part, arguing that: "The most harmful effect of the cessation of the hormone treatment, however, was that De'lonta developed an uncontrollable urge to mutilate her genitals…De'lonta's need for protection against continued self-mutilation constitutes a serious medical need to which prison officials may not be deliberately indifferent."[2] While the Fourth Circuit discussed De'lonta's self-injury and self-castration attempts as

[1] While the court records are unclear about the circumstances around this prescription, it does not seem to have been part of a specific effort to evaluate her for GID, and the record indicates that the prescription was inconsistently filled. This prescription may be an example of a sympathetic doctor providing treatment to De'lonta. Despite this, the other circumstances of the VDOC's denial of gender-affirming medical treatment for De'lonta are similar to those I outlined in the previous chapter.

[2] De'lonta v. Angelone, 330 F.3d 630, 632, 634 (4th Cir. 2003). This decision reversed and remanded 2001 Virginia district court opinion, which dismissed her case for failure to state a claim. The court found that the VDOC had provided her with "some sort of treatment"—primarily Prozac—and was therefore not deliberately indifferent to her medical need. Quoted in Brief of Appellant at 11, De'lonta v. Angelone, 330 F.3d 630 (No. 01-8020), May 20, 2002. In 2004, De'lonta and the VDOC settled the case, which eventually led to her again receiving hormone therapy and being allowed to dress and live as a woman "to a limited extent." The settlement also led to VDOC adopting a new policy regarding access to gender-affirming medical treatment. First Amended Complaint at 7, De'lonta v. Johnson, No. 11-00257, 2011 U.S. Dist. LEXIS 124983 (W.D. Va. 2011), May 3, 2013.

evidence of harm and inadequate treatment by VDOC administrators, their framing constructs her racialized, gender nonconforming body as out of control and in need of containment and protection by those same prison administrators. In doing so, the court constructs De'lonta as agency-less in her own self-injury and self-castration attempts (they are out of her control), as a "depersonalized person," as the living-dead.[3]

Yet, De'lonta's communications with the district and Fourth Circuit courts and her testimony reveal a more complex story. Initially acting as her own lawyer, De'lonta consistently framed her self-injury and self-castration attempts as "uncontrollable" and "compulsive." For example, in her appeal brief to the Fourth Circuit, she explained that since she was taken off hormones in 1995, she "felt compelled to mutilate her genitals and remove her testicles," arguing that VDOC must provide her with "treatment that will not cause her compulsively to continue to castrate herself, thereby inflicting grievous physical and additional mental injury upon herself."[4] In an earlier memorandum to a Virginia district court, she describes herself as "the *victim* of this violence," requesting to be "protected from it, not treated (as she has been) as a malicious perpetrator of said violence." She further explained,

> This is the law. "Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'" Had another inmate inflicted upon Ms. De'lonta the grievous harms here at issue over a period of years, we would not be debating whether the Eighth Amendment requires [prison administrators] to act in her defense. The Eighth Amendment's proscriptions do not change because (having been denied conventional treatment for her condition and being treated with derision instead) Ms. De'lonta is unable to stop harming herself.[5]

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[3] Colin Dayan, *The Law is a White Dog: How Legal Rituals Make and Unmake Persons* (Princeton, NJ: Princeton University Press, 2011), 32.
[4] Brief of Appellant at 7, 25, *De'lonta* (No. 01-8020). At this point in her litigation, lawyers from the American Civil Liberties Union were representing her. However, the strategy and language I am discussing was well established by this time.
[5] Memorandum in Opposition to Motion for Summary Judgment of Defendants Angelone and Johnson at 9, De'lonta v. Angelone, No. 99-00642 (W.D. Va. Feb. 11, 2004).

Here, De'lonta strategically uses a disempowering narrative of lack of control in order to wield legal arguments "proving" that VDOC administrators were liable and deliberately indifferent to her medical need. Since the law does not recognize prisoners as sources of legitimate knowledge, De'lonta preempts the law's desubjugation and, in doing so, provides language and framing that was taken up nearly word-for-word by the Fourth Circuit in its favorable ruling. In other words, while the courts' framing of her self-castration reads as if De'lonta has no control or agency, that the self-injury is a pathology to be controlled by prison medical and security staff, this framing is derived from how De'lonta *chose* to frame her self-injury and self-castration attempts.

Elsewhere, De'lonta provides a different explanation of her self-castration attempts. During one of the evaluations with a VDOC medical expert, she described how she hoped to do enough damage or cause an infection in order to get a doctor to complete her castration, explaining, "I don't consider it's hurting myself…I have no other way to resolve the problem…It relieves the pressure for awhile…it's like having a migraine 24-7."[6] In her discussion of her self-injury and self-castration attempts in the documentary *Cruel and Unusual*, she explained, "I felt that maybe if I could start it that they would have to finish it. I wanted to get rid of my testicles to stop the hormone testosterone…I feel that they are not supposed to be there anyway. So that just led me to, at every opportunity I could get, to cut."[7] In these non-legal venues, De'lonta does not frame her

[6] Quoted in Cynthia Osborne, "Psychosexual Evaluation Report for Ophelia De'lonta" (March 31, 2004) at 17, Attached to Opposition to Plaintiff's Motion for Partial Summary Judgment, *De'lonta* (No. 99-00642), April 7, 2004.
[7] *Cruel and Unusual*, directed by Janet Baus, Dan Hunt, and Reid Williams (Alluvial Filmworks, 2006) DVD.

self-castration attempts as lack of control or as violence done to her. Instead, she explains that she is performing self-surgery, providing herself with necessary treatment that is denied to her by VDOC administrators. Thus, De'lonta does not claim that there is no violence being done in this situation but, instead, locates the source of violence in her inability to access gender-affirming medical treatment, in the prison system's necropolitical control of her body and access to medical treatment.

De'lonta is not unique in her attempts to self-castrate. Self-castration—both attempts that resulted in complete castration and, much more often, that did not—were frequent themes in trans women's lawsuits.[8] These actions of bodily self-injury or self-

[8] While I have no way of determining how common attempts at self-castration are, it is not uncommon. See for example, Supre v. Ricketts, 596 F. Supp. 1532 (C. Colo. 1984); Supre v. Ricketts, 792 F.2d 958 (10th Cir. 1986); Farmer v. Hawk, 991 F. Supp. 19 (D. D.C. 1998); Farmer v. Moritsugu, 163 F.3d 610 (D. D.C. 1998); Farmer v. Hawk-Sawyer, 69 F. Supp. 2d 120 (D. D.C. 1999); White v. Farrier, 849 F.2d 322 (8th Cir. 1988); Kosilek v. Maloney, 221 F. Supp. 2d 156 (D. Mass. 2002); Barrett v. Coplan, 292 F. Supp. 2d 281 (D. N.H. 2003); Stevens v. Williams, No. 05-1790, 2006 U.S. Dist. LEXIS 44544 (D. Or. 2006);Gammett v. Idaho State Board of Corrections, No. 05-00257, 2007 U.S. Dist. LEXIS 55564 (D. Idaho 2007); Gammett v. Idaho State Board of Corrections, No. 05-00257, 2007 U.S. Dist. LEXIS 66456 (D. Idaho 2007); Sundstrom v. Frank, No. 06-00112, 2007 U.S. Dist. LEXIS 76597 (E.D. Wis. 2007); Konitzer v. Alba, No. 07-00527, 2007 U.S. Dist. LEXIS 86741 (E.D. Wis. 2007); Battista v. Dennehy, No. 05-11456, 2006 U.S. Dist. LEXIS 12484 (D. Mass. 2006); Konitzer v. Frank, 711 F. Supp. 2d 874 (E.D. Wis. 2010); Isaak v. Idaho Department of Correction, No. 06-00033, 2007 U.S. Dist. LEXIS 70298 (D. Idaho 2007); Adams v. Federal Bureau of Prisons, 716 F. Supp. 2d 107 (D. Mass. 2010); Battista v. Clarke, 645 F.3d 449 (1st Cir. 2011); Soneeya v. Spencer, 851 F. Supp. 2d 228 (D. Mass. 2012); Kosilek v. Spencer, No. 00-12455, 2012 U.S. Dist. LEXIS 124758 (D. Mass. 2012). See also, "Kitty," *GIC TIP Journal* 2, no. 4 (Fall 2002); Breänna, "Mrs. Breänna Lynn Destiny's Story," *Black &* Pink *Newsletter* (November 2010); "'Was' Pre-Op," *GIC TIP Journal* 1, no. 4 (Fall 2001); Rebecca Boone, "Idaho Settles Lawsuits from Transgender Inmates," *GIC TIP Journal* 10, no. 3 (Fall 2009). See also, *Cruel and Unusual*; George R. Brown, "Autocastration and Autopenectomy as Surgical Self-Treatment in Incarcerated Persons with Gender Identity Disorder," *International Journal of Transgenderism* 12, no. 1 (2010).

Interestingly, one of the earliest federal civil rights lawsuits brought by an incarcerated trans women—in fact, it seems to be the first with a published opinion—centers on the aftermath of a self-castration attempt. In 1981, Shauna Supre, a trans woman incarcerated in Colorado, attempted to castrate herself. When prison officials took her to the hospital, she refused any treatment that did not involve removing her testicles. Following numerous consultations—with psychiatrists to determine whether she was insane or incompetent (they determined that she was not), with Supre's lawyer and the Attorney General's office—her doctors completed the surgery that she began. Supre's case is the only one that I have found in which doctors completed a prisoner's self-castration attempt. Following the surgery, while her doctors recommended that she begin estrogen treatment, the Colorado Department of Corrections refused to provide them. In response, Supre filed a federal civil rights lawsuit challenging their denial of hormone therapy as cruel and unusual punishment. The district court judge pushed hard for a settlement and

surgery lead to an important question that I will (far too briefly) consider in this conclusion: What do agency, resistance, and life look like in a space of death?

This dissertation has focused on penal policies and practices, carceral power and violence, and the power of the prison system, law, medicine, and social science in constructing sex, queer dangerousness, and security. While carceral power produces prisoners as "depersonalized persons," as the living-dead, stripping them of self-determination and bodily autonomy, prisoners are not agency-less. They are not actually dead.[9] They continue to live and, in doing so, exert power on the prison system and prison administrators. As Michel Foucault argues, power flows in all directions. Incarcerated trans and gender nonconforming people—like all prisoners—constantly challenge and alter the workings and space of the prison system, an important factor leading to their construction as dangerous and as security risks. Resistance and life in a carceral space of death cannot be disentangled from the prison system's (failed) aim to exert totalizing control over prisoners' minds, bodies, and ability to communicate. Because their lives and bodies are so constrained and controlled and because they are subject to constant state violence, actions, choices, or mundane ways of living that are taken for granted outside of prisons can be great acts of resistance within the death space of the prison, and prisoners take enormous bodily and mental health risk when they resist and make life choices outside those sanctioned by prison administrations. Self-castration attempts (both failed and successful) are illustrative of this entanglement.

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eventually allowed an indefinite continuance on the condition that the DOC provide "treatment with low level doses of female hormones." *Supre*, 596 F. Supp. at 1534.

[9] Unless, of course, they are. Imprisonment does lead to premature death, and, of course, the US state does kill prisoners.

Attempts at self-castration and other forms of self-injury are simultaneously products of carceral violence—of the denial of medical treatment, the inability for prisoners to chose their own medical providers or seek second opinions, the extreme bodily restrictions that prisoners live under, and carceral necropower. They are resistance strategies for some trans women.[10] Like De'lonta, other incarcerated trans women who attempted self-castration described their motivations as self-treatment to address extreme psychological pain that prison administrators not only disregarded but worsened. For example, in a note to Idaho prison administrators written before she successfully self-castrated, Jenniffer Ann Spencer explained that she self-castrated because "I am a transgenderd [sic] individual and I could stand the sight of them no more. This is not a suicide attempt. This is simply a way for me to remmady [sic] my problem."[11] When prison staff asked her why she "had gone through something so painful," she responded that "it was much more painful to live as a transgender."[12] Similarly, in a 2001 request to prison administrators for surgical castration, Sandy Jo Battista explained that she lived daily with "mental torment…over my identity issues" and that being "forced to live with a growth on my bodies that does not belong there is unbearable at times."[13] She explained that this "torment" might lead her to castrate herself. Nine years later, following multiple

[10] In marking self-castration as "resistance," I do not mean to romanticize it or deny its very harmful and potentially life-threatening consequences. Indeed, De'lonta's self-castration attempts resulted in numerous emergency hospital visits and even surgical interventions (although, notably, doctors never completed her desired castration). Trans women risk their lives every time they attempt to self-castrate, primarily because of loss of blood or infection.

[11] Quoted in *Gammett*, 2007 U.S. Dist. LEXIS 55564, at *23. See also, Rebecca Boone, "Idaho Settles Lawsuits from Transgender Inmates," *GIC TIP Journal* 10, no. 3 (Fall 2009).

[12] Quoted in *Gammett*, 2007 U.S. Dist. LEXIS 55564, at *23.

[13] Sandy Jo Battista to Robert Murphy, "Request to Purchase Female Clothing and Elect Non-Medically Necessary Treatment ('Surgical Castration') at my Own Expense" (Sept. 10, 2001) at 2, Attached to Complaint, Battista v. Murphy, No. 03-12643 (D. Mass., Dec. 16, 2003).

self-castration attempts, she explained that she attempted to castrate herself because "I simply wanted to be normal and, in my mind, being normal does not include having testicles."[14] For these trans women the pain of imprisonment in both prison and their un-surgically-altered bodies—two forms of imprisonment that are deeply interconnected for many similarly situated trans women—was unbearable. While prison administrators stripped them of choice about legitimate medical treatment and medical providers, they chose instead to treat themselves, thereby exerting agency over their own bodies.

While these trans women describe their self-castration attempts as a means of healing, of moving forward with their lives, of *living*, prison administrators viewed them as a manifestation of queer dangerousness, as a threat to institutional security, and treated them as such. To courts, prison administrators described self-castration attempts and other self-injury as "manipulative" and products of trans prisoners' supposed personality disorders, or sociopathology, and within their institutions, they generally responded to these actions with punishment, violence, and various forms of segregation. For example, following a self-castration attempt in 2010, VDOC administrators charged De'lonta with "self-mutilation or other intentionally inflicted self injury," an official disciplinary offense, and sentenced her to twenty days in isolation.[15] Even when she was not officially

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[14] Affidavit of Direct Testimony of Sandy J. Battista at 11, *Battista* (No. 05-11456), May 12, 2010

[15] Many prison systems, including VDOC, prohibit self-injury and categorize it, either officially or unofficially as a disciplinary offense. Prisoners are, therefore, often punished for engaging in various forms of self-injury, including suicide attempts. Terry Kupers, *Prison Madness: The Mental Health Crisis Behind Bars and What We Must Do About It* (San Francisco: Jossey-Bass, 1999); Human Rights Watch, Sasha Abramsky and Jamie Fellner, *Ill-Equipped: US Prisons and Offenders with Mental Illness* (New York: Human Rights Watch, 2003). See for example, Virginia Department of Corrections, "Offender Discipline, Institutions," 861.1 (Sept. 1, 2011).

In their communications with the courts, VDOC administrators repeatedly referred to her self-castration attempts as manipulative and products of her supposed personality disorders. For example, her therapist and the Chief Psychiatrist determined that her self-castration attempts "were not directly related to

charged with and punished for "self-mutilation" or a related disciplinary offense, VDOC administrators frequently placed her in solitary confinement, or in strip cells, following a self-castration attempt, where she would have been not only confined alone under constant supervision but she is stripped of all clothing and property.[16] De'lonta explained that for years she "underwent a cycle of repeated self-mutilation followed by confinement in five-point restraints."[17] Similarly, in response to a self-castration attempt in 2005, MDOC administrators placed Battista in segregation on a mental health watch, "clothed in nothing but a security wrap."[18] Prison administrators also issued an Observation Behavior Report, the civil commitment version of a disciplinary report.[19] By placing trans women like De'lonta and Battista in segregation—whether it is disciplinary segregation, mental health watch, or a strip cell—prison administrators attempt to (re)assert total control over trans women's bodies, holding them in a state of extreme psychological pain and resecuring them to a space of gendered death.

By categorizing self-castration attempts as manipulation, disassociating them from Gender Identity Disorder, and attaching them to sociopathology, prison administrators attempted to use acts of self-castration as evidence justifying their denial

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her gender identity disorder," instead they attributed them to her borderline personality disorder. Quoted in Memorandum in Support of Plaintiff's Motion for a Prelim. Inj. and to Compel Access to Plaintiff at 26, *De'lonta* (No. 11-00257), July 12, 2013.

[16] In one case, she was placed in a strip cell and told that she would not be allowed out unless she signed a treatment plan devised by the mental health staff, which she "reluctantly" signed. Quoted in Brief of Appellant at 11, *De'lonta* (No. 01-8020).

[17] Ibid. at 7.

[18] Affidavit of the Plaintiff, Sandy J. Battista at 2, Battista v. Dennehy, No. 05-11456, 2011 U.S. Dist. LEXIS 92010 (D. Mass. 2011), Oct. 17, 2005; Second Affidavit of Lawrence M. Weiner, *Battista* (No. 05-11456), Oct. 26, 2005. She was taken off mental health watch after a day and released back into general population within three days after she told staff that she would not self-injure again.

[19] Plaintiff's Proposed Findings of Fact and Conclusions of Law, *Battista* (No. 05-11456), May 3, 2010. Like VDOC administrators, MDOC administrators referred to Battista's self-castration attempts as an example of her "acts of manipulation." Defendant's Substitute Findings of Fact and Conclusions of Law at 33, *Battista* (No. 05-11456), May 17, 2010.

of hormone therapy or sex reassignment surgery.[20] In doing so, they constructed self-castration attempts as dangerous to penal institutions and security. In fact, MDOC administrators argued that providing sex reassignment surgery to Michelle Kosilek after she stated that she would attempt to self-castrate or kill herself if she was denied treatment "would undermine [their] ability to effectively manage the Massachusetts prison system." MDOC administrators explained that by "acced[ing] to manipulative threats of self-harm by inmates seeking to force prison administrators to meet their demands for special treatment would be "a significant security concern" and would "reward the manipulative behaviors and encourage[] other inmates to engage in similar behaviors."[21] Explaining that these "threats," therefore, justified their denial of treatment, they stated, "if [Kosilek] is successful in obtaining SRS, the message sent to inmates in the Massachusetts DOC is that threats of self-injurious behavior can be used to obtain the desired benefits previously denied. To provide plaintiff with SRS in response to such threats will only encourage other inmates to engage in similar manipulative behaviors which will adversely impact the Commissioner's ability to preserve internal order and discipline within the prison system."[22] Threat of self-castration in response to the denial of necessary treatment as well as a history of such attempts made Kosilek ineligible, according to MDOC administrators, for the very treatment that would eliminate her need

[20] See for example, Chester W. Schmidt, Jr., "Psychological evaluation of Michele L. Kosilek" (Nov. 23, 2005), Attached to Defendant's Disclosure of Expert Testimony, Kosilek v. Spencer, No. 00-12455, 2012 U.S. Dist. LEXIS 124758, Dec. 2, 2005; Cynthia S. Osborne, "Inmate evaluation of Michelle Kosilek" (Nov. 27, 2005), Attached to Defendant's Disclosure of Expert Testimony, *Kosilek* (No. 00-12455), Dec. 2, 2005; Memorandum of Law in Support of Defendant's Motion for Summary Judgment, *Kosilek* (No. 00-12455), Jan. 17, 2006; Defendant's Proposed Findings of Fact and Conclusions of Law, *Kosilek* (No. 00-12455), Aug. 21, 2006; Affidavit by Luis Spencer, *Kosilek* (No. 00-12455), Feb. 16, 2006.
[21] Memorandum of Law in Support of Defendant's Motion for Summary Judgment at 7, 19, *Kosilek* (No. 00-12455).
[22] Ibid. at 19-20.

to self-castrate. Kosilek's assertion of control over her own body and medical treatment in opposition to the control of prison administrators is framed as a threat to MDOC administrators' ability to keep control of all prisoners. Kosilek, her "threats" of self-castration, as well as her potential (prison-provided) sex reassignment surgery become a form of queer dangerousness, and, therefore, the proper objects of carceral control.

MDOC administrators further argue that there is legal precedent allowing prison administrators to take steps to thwart similar "manipulative" uses of a prisoner's body and health "to obtain specific privileges … or specific medical treatment" and offer the example of MDOC obtaining court authorization to force feed prisoner who "have undertaken life-threatening hunger strikes in order to force the DOC to meet their demands for transfers or other benefits."[23] The analogy between hunger strikes and self-castration attempts here is apt. While hunger strikes are more readily associated with resistance or protest, both hunger strikes and self-castration attempts are methods of resisting the conditions of carceral necropower by strategically using one of the few resources that imprisoned people have at their disposal: their bodies. By exposing themselves to harm and premature death, prisoners challenge the (not quite) total control of carceral necropower—both over their bodies and over their deaths. But, importantly, this exposure to harm and premature death is in the service of life, as prisoners attempt to change individual or collective conditions within prisons.[24] This analogy also helps us

[23] Ibid. at 20. See also, Defendant's Proposed Findings of Fact and Conclusions of Law, *Kosilek* (No. 00-12455); Defendant's Revised Proposed Findings of Fact and Conclusions of Law, *Kosilek* (No. 00-12455), May 15, 2007; Transcript of Hearing on Motion Session with Closing Arguments, *Kosilek* (No. 00-12455), Dec. 21, 2009.

[24] For brief discussion of hunger strikes and necropower, see Sarah Lamble, "Queer Necropolitics and the Expanding Carceral State: Interrogating Sexual Investments in Punishment," *Law and Critique* 24, no. 3 (November 2013).

better understand self-castration attempts as a potential form of resistance to the racialized gender normative carceral death logics.

A Queer Antiprison Politics

[Trans girls] already, from the moment we decide to be a transgendered person, are living outside the law. The moment this dick-swinging motherfucker wants to put a dress on and head on down the street to go to the store or something like that, they have broke the law…We can be beaten, attacked, and killed, and it's OK… You are already a convict for just how you express yourself and you might start to live a lifestyle of a person that is living outside the law. Because you can't get a legitimate job, you can't get a chance in school, you can't get a chance to function and survive as a part of mainstream society. So, immediately, once you've done this, you're part of the [prison industrial complex]. Whether you get there right away or you slowly build toward it, but every step that you take, takes you another step closer to it. – Miss Major[25]

In the passage above, Miss Major—a formerly incarcerated African American trans woman, a long-time trans and prison activist, and current Executive Director of the TGI Justice Project—reminds us that many trans people, especially trans women of color, become involved in the prison system by simply living their lives.[26] But, even more profoundly, she marks gender nonconformity or trans-status as "living outside the law," as already "part of the [prison industrial complex]." This formulation helps us understand how the carceral production of gender nonconformity as queer dangerousness is a specific manifestation of a larger pattern of criminalization of gender nonconformity and

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Trans prisoners have also engaged in hunger strikes, joining in with larger organized hunger strikes that have occurred in numerous states, including California and Illinois, in the past few years, or engaging in individual hunger strikes in order to gain access to gender affirming medical treatment. For example, De'lonta did so on at least two occasions, and VDOC administrators seemed to categorize these hunger strikes as another example of her "self-injurious behaviors." Osborne, "Psychosexual Evaluation Report for Ophelia De'lonta," quoted on 10. See also, Long v. Nix, 86 F.3d 761 (8th Cir. 1996); Gender Anarky, "Select Writings," http://www.warren-wilson.edu/~empower/Gender_Anarky_Read.pdf. See also, Lydon, interview; Brown, "Autocastration and Autopenectomy."

[25] Jayden Donahue, "Making It Happen, Mama: A Conversation with Miss Major," in *Captive Genders*, ed. Eric A Stanley and Nat Smith (Oakland, CA: AK Press, 2011), quoted on 277.

[26] The TGI Justice Project is an organization that works on issues faced by trans people in the criminal legal system while centering the work and experiences of low-income trans women of color who are or have been incarcerated. See their website at www.tgijp.org.

trans status—both within the criminal legal system and US society broadly speaking—which exposes all trans people, but especially trans people of color who are marked as dangerous and criminal by race as well, to state violence and state-imposed death.

Yet, as the mainstream LGBT movement gains more influence, it becomes increasingly invested in the criminal legal system. Calling this investment "queer penality," Sarah Lamble argues that these politics literally channel social, epistemological, political, and economic resources towards the prison system and state practices of punishment and violence, state practices that, notably, target queer and trans people.[27] Lamble and other scholars have argued that this queer penality is a symptom of "queer necropolitics" and represents an investment in state racism and violence.[28] In *Terrorist Assemblages: Homonationalism in Queer Times*, Jasbir Puar theorizes "queer necropolitics" as constructing conditions for "the differences between queer subjects who are being folded (back) into life and the racialized queernesses that emerge through the naming of populations," consigning them to death.[29] For Puar and others, race—and particularly racialized gender and sexual nonnormativity or "racialized queerness"—fundamentally fractures queerness, as those who can conform to and embody (White) homonormativity are (re)included under the umbrella of state protection and citizenship-

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[27] Sarah Lamble, "Queer Investments in Punitiveness: Sexual Citizenship, Social Movements and the Expanding Carceral State," in *Queer Necropolitics*, ed. Jin Haritaworn, Adi Kuntsman, and Silvia Posocco (New York: Routledge, 2014); Lamble, "Queer Necropolitics and the Expanding Carceral State."
[28] See also, Jin Haritaworn, Adi Kuntsman, and Silvia Posocco, "Introduction," in *Queer Necropolitics*; Morgan Bassichis and Dean Spade, "Queer Politics and Anti-Blackness," in *Queer Necropolitics*; Che Gossett, "We Will Not Rest in Peace: AIDS Activism, Black Radicalism, Queer and/or Trans Resistance," in *Queer Necropolitics*; Elijah Adiv Edelman, "'Walking While Transgender': Necropolitical Regulations of Trans Feminine Bodies of Colour in the Nation's Capital." in *Queer Necropolitics*; Anna M. Agathangelou, M. Daniel Bassichis, and Tamara L. Spira. "Intimate Investments: Homonormativity, Global Lockdown, and the Seductions of Empire," *Radical History Review* 100 (Winter 2008).
[29] Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham: Duke University Press, 2007), 35.

life while those who embody racialized gender and sexual nonnormativity are exposed to state violence, containment, and death. Importantly, both sides of this binary are inextricably intertwined. LGBT people have been able to lay recognizable claims to citizenship and state protection through appealing to (homo)normativity, state racism, and state violence and helping produce conditions of death for the racially queer. By centering legal recognition and formal inclusion through in hate crimes legislation, "marriage equality," open inclusion in the US military, and the eradication of formal barriers to "equal citizenship," as well as full participation in the neoliberal, capitalist economy, LGBT rights politics often, as Morgan Bassichis and Dean Spade argue, also "unwittingly reproduce and are productive of the fundamental structures of anti-blackness, settler colonialism, and permanent war undergirding the United States."[30] In other words, queer necropolitics and queer penality are a constitutive aspect of homonormative—and even emergent transnormative—politics and embodiments, which invests LGBT rights in white life and normative citizenship.

Produced from (carceral) racialized gender normative logics, queer dangerousness should be understood as interconnected with (or one type of) racialized queerness. Carceral constructions of queer dangerousness not only expose trans and gender nonconforming prisoners to targeted carceral violence and various forms of death but also sever incarcerated trans and gender nonconforming people from the imagined (by LGBT rights politics) LGBT community. Thus, incarceration and racialized criminalization are central technologies in the production of racialized queerness and the bio- and necropolitical fracturing of LGBTQ populations. As Jin Haritaworn, Adi Kuntsman, and

[30] Bassichis and Spade, "Queer Politics and Anti-Blackness," 194.

Silvia Posocco argue in their introduction to the recent anthology, *Queer Necropolitics*, incarceration and queer penality have become "a method for the production of respectable and innocent genders and sexualities that are worthy of visibility, recognition and protection."[31]

Central to these arguments against queer penality and homonormative politics is an understanding of the criminal legal system as inherently (racially, gender, and sexually) violent, as producing violence not only for those in prison but for those who are connected to criminalized communities outside prisons, including marginalized trans and queer communities. Put another way, as racialized gender normativity both functions as a constitutive logic of the US prison system and produces (incarcerated) gender nonconformity as queer dangerousness, the prison system is fundamentally designed to target trans and gender nonconforming people for violence and containment. Thus, prisons and the broader criminal legal system do not and cannot make queer and trans people safe—in fact, queer and trans people cannot be safe as long as prisons exist. Justice cannot exist in a space of death nor can an institution of death—an institution designed to oppress and do violence to marginalized populations—end oppression, do justice, or heal individuals, communities, and society. Critics of queer penality and homonormative politics, therefore, call for prison abolition or, to use Beth Richie's term, a "queer antiprison politic" that addresses the criminal legal system as inherently a white-supremacist-hetero-gender-normative institution.[32]

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[31] Haritaworn, Kuntsman, and Posocco, "Introduction," 16.

[32] Beth Richie, "Queering Antiprison Work: African American Lesbians in the Juvenile Justice System," in *Global Lockdown: Race, Gender, and the Prison-Industrial Complex*, ed. Julia Sudbury (New York: Routledge, 2005), 83. See also, Morgan Bassichis, Alexander Lee, and Dean Spade, "Building an

While the prison system has been a primary site of contemporary struggles for racial and economic justice since at least the 1970s, it is increasingly also (and interconnectedly) a site of the struggle for gender and sexual justice.[33] Often in opposition to this mainstream LGBT rights politics, there is vibrant and growing radical queer/trans activism that centrally engages with the prison system, much of which is prison abolitionist, and queer antiprison politics have been imagined and enacted by incarcerated and formerly incarcerated trans, queer, and gender nonconforming people, like Miss Major, for decades. While this work includes the construction of and participation in queer and trans political organizations and movement building inside and outside prisons, we should also include within this formulation of queer antiprison politics both self-castration attempts and the quotidian, often mundane tactics of living gendered lives within the (gender) death space of the prison. For as long as prison administrators have identified gender nonconformity as a problem, gender nonconforming prisoners in both men's and women's penal institutions have resisted gendered restrictions and death, altering prison-issued clothing to make it more feminine or masculine, making their own makeup, making jewelry, binding their chests to make them look more masculine, dying their hair with ink and growing it out, changing their

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Abolitionist Trans and Queer Movement with Everything We've Got," in *Captive Genders*; S. Lamble, "Transforming Carceral Logics: 10 Reasons to Dismantle the Prison Industrial Complex through Queer/Trans Analysis and Action" in *Captive Genders*.

[33] Black nationalists and other radical activists and scholars articulated the prison system as a white supremacist institution, arguing that its abolition was key to abolishing white supremacy. See George L. Jackson, *Blood in My Eye* (New York: Random House, 1972); Assata Shakur, *Assata: An Autobiography* (Chicago: Lawrence Hill Books, 1987); Angela Y. Davis, ed., *If They Come in the Morning: Voices of Resistance* (New York: Third Press, 1971). See also, Angela Y. Davis, *Are Prisons Obsolete?* (New York: Seven Stories Press, 2003); Julia Sudbury, "Celling Black Bodies: Black Women in the Global Prison Industrial Complex" *Feminist Review* 80 (2005); Dylan Rodríguez*, Forced Passages: Imprisoned Radical Intellectuals and the U.S. Prison Regime* (Minneapolis, University of Minnesota Press, 2006); Michael Hames-García, *Fugitive Thought: Prison Movements, Race, and the Meaning of Justice* (Minneapolis: University of Minnesota Press, 2004).

names and pronouns, having sex, building communities, and loving one another.[34] In doing so, we can identify a queer antiprison political tradition that stretches back over one hundred years.

[34] For a discussion of these strategies in men's prisons, see Joseph Fulling Fishman, *Sex in Prison: Revealing Sex Conditions in American Prisons* (National Library Press, 1934); Frank Samuel Caprio, *Female Homosexuality: A Psychodynamic Study of Lesbianism* (New York: The Citadel Press, 1954); Paul Warren, *Next Time Is for Life* (New York: Dell Publishing Company, Inc., 1953); George Sylvester Viereck, *Men into Beasts* (New York: Fawcett Publications, Inc., 1952); Samuel Kahn, *Mentality and Homosexuality* (Boston: Meador Publishing Company, 1937); John Irwin and Donald Cressey, "Thieves, Convicts, and the Inmate Culture," *Social Problems* 10, no. 2 (Autumn 1962); Prisoner X, *Prison Confidential* (Los Angeles: Medco Books, 1969). For women's prisons, see Rose Giallombardo, *Society of Women: A Study of a Women's Prison* (New York: John Wiley and Sons, Inc., 1966); Sara Harris, *Hellhole: The Shocking Story of the Inmates and Life in the New York City House of Detention for Women* (New York: E.P. Dutton & Co., Inc., 1967); Russ Trainer, *Prison: School for Lesbians* (Van Nuys, CA: Triumph News Company, 1968); Elizabeth Gurley Flynn, *The Alderson Story: My Life as a Political Prisoner* (New York: International Publishers, 1963); David A. Ward and Gene G. Kassebaum, *Women's Prison: Sex and Social Structure* (Chicago: Aldine Publishing Co., 1965); Prison Materials Collection, Kinsey Institute Library and Special Collections, Indiana University. See also, Regina Kunzel, *Criminal Intimacy: Prison and the Uneven History of Modern American Sexuality* (Chicago: University of Chicago Press, 2008).

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