8

PRISONS

Written with Grace (Yongxi) Pan

The historical legacy of sex segregation in prisons⁵ is unlike the contexts examined thus far in this book. The establishment of prisons for women separate from men was not the sort of feminist achievement that women's colleges were, nor was it an effort to correct centuries of discrimination, as was the case in U.S. athletic competitions. Nonetheless, how sex segregation developed in U.S. prisons was and remains a function of beliefs about gender and about the role of incarceration (Owen, Wells, & Pollock 2017).

According to Nicole Hahn Rafter's influential account, *Partial Justice: Women in State Prisons, 1800–1935*, sex segregation of U.S. prisons in the 19th century was carried out in three stages. First, women were confined in separate rooms or individual cells, but remained part of the general prison population; second, women were put in separate spaces in or near the men's section, such as an attic or annex; and finally, women were relocated to a separate building altogether (1985). Prison facilities for women were typically inferior to those of male prisoners, with less access to fresh air and exercise yards. A chronic lack of supervision in female prisons led, in some states, to exploitation, rape, and forced prostitution. Rafter attributes these differences and exploitations to

Gender-based perceptions—that female prisoners were the source of sexual mischief; that they could not earn as much as men [through forced prison labor]; that they had gone beyond the pale redemption—combined with the problem of smaller numbers to create a situation in which women's needs were slighted.
(1985, 13)

For nearly the first century of U.S. history, prisoners in general were seen as irredeemable; women in particular were described as “fallen,” marked by “a stigma that once attached could never be removed” (Banks 2003 2).

Because women were viewed as being more pure and moral by nature than men, the woman who dared to stray or fell from her elevated pedestal was

regarded as having fallen a greater distance than a male, and hence as being beyond any possibility of reformation.

(Dodge 1999, 908)

Not surprisingly, one stated reason for sex segregation in prisons was that such fallen women exerted a “pernicious” influence on the “good order and discipline” of male inmates. In the mid-19th century, a consistent theme within non-segregated prisons was that “female convicts were more trouble than male” (Dodge 1999, 912). This is a manifestation, albeit an unusual one, of androcentrism:

[M]asculine criminality has always been deemed more ‘normal’ than feminine criminality. There has always been a tendency to regard those women who have been publicly punished by the state for their misbehaviors as significantly more aberrant and far more threatening to society than their numerous male counterparts.

(Davis 2003, 66)

Beginning in the mid-19th century, prison reform began to shift its focus from punishment to differing forms of rehabilitation. In women’s prisons, architectural changes included the creation of the “cottage plan” with “homes,” serving to promote a more domestic setting. In some prisons, women were allowed to keep their babies with them to encourage the motherly and nurturing instincts. Domestic training was seen as “the key to women’s salvation” (Banks 2003, 7). Not all prisons were so idealistic, of course, and in some states the situation for prisoners, women included, was abysmal. The aftermath of the Civil War, for example, saw the emergence of southern prison farms for men and women that “adopted techniques of slavery such as the overseer with his lash and the practice of working bands of subjects on farms” (Rafter 1985, 88). Even into the Progressive Era of the early 20th century, practices that can be described only as torture were used to discipline inmates (Rothman 2017).

The history of the U.S. penal system is complex and riddled with systemic failures that extend far beyond the scope of this book.⁶ Understanding that beliefs about sex and gender have always informed prison design and practices is, however, essential to our understanding of more recent developments, with a direct relevance to the Transgender Exigency.

The United States is the largest incarcerator in the world. Despite having its lowest incarceration rate in 20 years, the United States accounts for about 25% of the world’s prison population, with over 2.1 million people in U.S. prisons as of 2018 (ICPR 2021). The prison population in 1972 was under 200,000, almost 2 million less than it is today (Langan et al. 1988). The United States incarcerates 629 people per 100,000, the highest rate in the world (ICPR 2021). According to research done by Peter Wagner and Wendy Sawyer at the Prison Policy Initiative,

The American criminal justice system holds almost 2.3 million people in 1,833 state prisons, 110 federal prisons, 1,772 juvenile correctional facilities,

3,134 local jails, 218 immigration detention facilities, and 80 Indian Country jails as well as in military prisons, civil commitment centers, state psychiatric hospitals, and prisons in the U.S. territories.

(2020)

According to the U.S. Department of Justice, during the Reagan administration the number of state and federal prisoners increased by over 90% between 1980 and 1988 (Besette 1989). In Texas, for example, the state incarcerated 182 people for every 100,000 residents in 1978; by 2003, that figure increased to 710 (Cullen 2018).

Historically, far fewer women have been incarcerated than men. In 2015, men made up 92.8% of state prison populations, down from 96.3% in 1978 (Sawyer 2018). In federal prisons, as of July 25, 2020, 93.2% of inmates are identified as male with the remaining 6.8% being female (Federal Bureau of Prisons 2020). While the rate of incarceration in the U.S. began to climb dramatically in the 1980s with the War on Drugs, the increased rate for women significantly outpaced those for men: “Nationwide, women’s state prison populations grew 834% over nearly 40 years—more than double the pace of the growth among men” (Sawyer 2018).

The status of incarcerated women is especially relevant here, as will be discussed in the following sections. Fearing assault in men’s prisons, transgender men rarely request to be housed with male prisoners and typically prefer to be housed with women (Sosin 2020).

Historically, conditions for women inmates have been far worse than for men. In *In Search of Safety*, criminologist Barbara Owen and her colleagues describe “features of the physical plant and the prison environment that threaten women’s safety, among them crowding, unsanitary conditions, and unconstitutional health care” (Owen, Wells, & Pollock 2107, 43). Most jurisdictions have fewer facilities for women than for men; this restricts women’s “ability to be placed in community programs or other programs requiring a low-custody designation” (Owen, Wells, & Pollock 2017, 52). Because there are fewer facilities for women, they are often isolated and a significant distance not only from the families of women inmates, but also from legal and community resources. Women tend to be housed all in one facility, regardless of the severity of their crimes.

Men, in contrast, generally are assigned to prisons based on a variety of factors, including their criminal offense, prior criminal history, and psychological profile. Also, because of the greater number of male institutions, men stand a much better chance of being housed near their place of residence, thus making it easier for family, friends, and attorneys to visit.

(HRW 1996)

As physician/anthropologist Carolyn Sufrin’s important work documents, the U.S. prison system treats males as the “default” prisoners, and institutions of incarceration “are designed with men in mind” (2017, 10). One especially problematic

effect of such androcentrism is that women's reproductive health is routinely neglected:

Research and public narratives document a systematic lack of reproductive health care for incarcerated women on a national scale, from absent or substandard prenatal care, to forced withdrawal from opiates in pregnancy (despite the known pregnancy risks), to lack of access to abortion and contraception.

(Sufrin 2017, 10)

Women's institutions often have more rules about conduct, and they are sometimes described as "pettier": "even when the rules in both prisons are broadly identical, women seem to be subject to stricter supervision than men and are often punished for behavior that would not be sanctioned in men's prisons, such as cursing, failing to eat all the food on one's plate, and sharing shampoo" (Banks 2003, 67).

A two-and-a-half-year study by Human Rights Watch found widespread sexual assault against women prisoners by male guards (HRW 1996). Though the report found that all groups suffer sexual misconduct, it also reported that lesbian and transgender prisoners are sometimes singled out for misconduct by officers. While assault between inmates occurs, a significant amount of assault is perpetrated by male prison staff (Davis 2003, 60–83). The U.S. Commission on Civil Rights noted that while

men and women in prison report similar rates of staff-on-inmate misconduct (2.4 percent vs 2.3 percent), nearly 82 percent of the female victims in prison said they were pressured by staff to engage in sexual activity, compared to 55 percent of male victims in prison. For both male and female inmates, the perpetrator of staff sexual misconduct was most often of the opposite sex.

(2020, 109)

According to Brenda V. Smith, Professor of the American University Washington College of Law and Former Commissioner of the National Prison Rape Commission, despite the passage of the Prison Rape Elimination Act in 2003 (discussed later), "It is evident that sexual abuse is still a serious contemporary issue facing women in custody. Sexual victimization of women in custody is an enduring theme in the history of women in custody" (U.S. Commission on Civil Rights 2020, 111). For example, in a survey of 18,000 former state prisoners by the Bureau of Justice Statistics, 9.6% reported one or more incidents of sexual victimization during their most recent period of incarceration. The rate of inmate-on-inmate sexual victimization for women reported was 13.7%—three times higher than for men at 4.2% (Beck & Johnson 2012, 5).

In recent years, while progress has been made to reduce the national rate of incarceration, progress has been slower for women. According to Wendy Sawyer of

the Prison Policy Initiative, this slower progress is due to three reasons: Incarcerated women are more likely to receive disciplinary action and more severe sanctions for similar behavior compared to men; Women have less access to alternative programs for first-time offenders than men; and states continue to “widen the net” through various efforts to criminalize women’s behavior, including (for example) school-aged girls’ misbehavior (2018).

As we turn to the implications of the Transgender Exigency, it is worth noting that while incarceration is no doubt an awful experience for men and women, in certain respects women have the worst of it and have been subjected to a disproportionate share of abuse and sexual assault.

The Transgender Exigency

The proportion of transgender people who are incarcerated is estimated to be larger than the proportion of transgender people in the general U.S. population. Contrary to the impression we may have from high profile transgender celebrities such as Caitlyn Jenner, many transgender people struggle financially: “Discrimination by potential employers and landlords and rejection by family force many transgender people into the underground economy” (Schwartzapfel 2020). According to the U.S. Transgender Survey of 2015, one in five transgender people have participated in the underground economy for income at some point in their lives, including 12% who have been involved in sex work (James et al. 2016, 12). Moreover, the survey suggests that transgender people were more than twice as likely to live in poverty than the general population, and are more likely to face prison time (James et al. 2016). In some cases, transgender women are arrested for prostitution just walking down the street, a crime that activists describe as “walking while trans.” Two percent of transgender people interviewed said they had been arrested in the previous year; 58% of transgender respondents reported experiencing mistreatments from the police or law enforcement officers in the past year. Such mistreatments involved verbal harassment, references to a wrong gender, and physical or sexual assault; 57% claimed that “they would feel uncomfortable asking the police for help if they needed it” (James et al. 2016, 12).

Transgender people who are incarcerated do not fare any better. In the same survey, 23% of transgender inmates reported experiencing physical assault from prison staff or other prisoners in the previous year, and one in five (20%) were sexually assaulted. Compared with the general U.S. prison population, transgender prisoners are five times more likely to be sexually abused by prison staff and nine times more likely to be sexually assaulted by other inmates (James et al. 2016, 211–212). Accordingly, the segregation of prisoners by sex has put transgender prisoners, a group expanding in number and estimated as at least 4,890 individuals today—1,097 people self-reported as transgender among 141,500 prisoners (0.7%) in Texas alone—in an awkward and often unsafe situation (Sosin 2020).

The fact that transgender prisoners fall prey to sexual violence behind bars has been documented for decades. In 1989, Dee Farmer, a Black trans woman housed

in a maximum-security male prison in Indiana, was raped by another male inmate. She then sued prison officials who had transferred her from her previous cell in Wisconsin to the cell in Indiana. She demanded compensation for her “mental anguish, psychological damage, humiliation, swollen face, cuts and bruises to her mouth and lips and a cut on her back, as well as some bleeding” resulting from the rape (Strangio 2014; Flowers 2014). The case made it to the Supreme Court after five years. On June 6, 1994, the Court unanimously ruled in *Farmer v. Brennan* that the prison officials’ “deliberate indifference” to inmate health and safety violated Farmer’s Eighth Amendment protection against cruel and unusual punishments, and thus the officials should be held liable for damages (Strangio 2014).

Farmer v. Brennan marks an early effort by the Supreme Court to address the issue of prison rape (Flowers 2014). It was followed by the passage of the Prison Rape Elimination Act (PREA) by Congress in 2003 (Stahl 2018). Though the act did not explicitly refer to transgender prisoners, it referred to *Farmer v. Brennan* when stating that “the high incidence of sexual assault within prisons involves actual and potential violations of the United States Constitution.” Setting a zero-tolerance goal for prison rape, the PREA established a “National Prison Rape Elimination Commission” (NPREC), mandated the Department of Justice to “make the prevention of prison rape a top priority in each prison system,” and instructed national standards to be developed and instituted through research and data collection to “prevent, detect, and reduce sexual violence in prisons” (National Institute of Justice Staff 2006; Kaufman 2008).

As required by the PREA, the Department of Justice’s Bureau of Justice Statistics and the National Institute of Justice (NIJ) collected data and conducted research on prison rape. A survey conducted by the Bureau of Justice Statistics found that in 2006, 1.3 million prisoners reported 60,500 cases of sexual violence ranging from unwanted touching to rape, a rate of 4.6% (Kaufman 2008). In 2007, a study of California prisons conducted by the University of California, Irvine’s Center for Evidence-Based Corrections found that transgender women housed in male prisons were 13 times (59%) more likely to experience sexual offenses than cisgender inmates (4.4%) (Jenness et al. 2007). Data from multiple years by the Bureau of Justice Statistics found that nearly 40% of transgender prisoners experienced sexual abuse in federal and state prisons, as opposed to 4% of the general incarcerated population (Beck 2014).

In 2012, after a decade of research and review, the guidelines and standards for eliminating prison rape drafted by NPREC, commonly referred to as the PREA Standards, were finalized and implemented. In the standards, whether a prisoner is transgender, gender nonconforming, or DSD is officially listed as a required factor for screening for risk of victimization and abuse. The information gathered concerning gender identity, along with other factors such as prior acts of sexual abuse, body shape, age, and criminal history, are to be used to inform “housing, bed, work, education, and program assignments with the goal of keeping separate those inmates at high risks of being sexually victimized from those at high risk of being sexually abusive” (PREA Standards 2012, 20).

The standards require a case-by-case evaluation for housing and programming assignments. They also state that assignments for “each transgender or intersex inmate shall be reassessed at least twice each year to review any threats to safety experienced by the inmate” (115.42[d]) and that transgender and DSD inmates’ “own views with respect to his or her own safety shall be given serious consideration” (115.42[e]). By making it clear that a person’s gender as assigned at birth no longer stands as the sole factor for housing assignments, the new set of standards brought an end to strict sex segregation in prisons based purely on a biological definition of sex. The standards applied to all federal prisons starting in 2012 and required state compliance beginning in 2013.

Implementation of the new transgender policies has been slow. It was reported that even under the Obama administration, “a high level of prison facilities were ignoring PREA standards” (Moreau 2018a). The very first transfer of a transgender female prisoner from a male prison to a female prison took place in September 2018, six years after the PREA standards were in place (Levenson 2019).

The PREA standards formulated in 2012 did not incorporate details on the *criteria* and *procedures* for the decision-making. In 2016, the Bureau of Justice Assistance published a more specific interpretation of the PREA standards through the National PREA Resource Center website. It notes that “Any written policy or actual practice that assigns transgender or intersex inmates to gender-specific facilities, housing units, or programs based solely on their external genital anatomy violates the standard. A PREA-compliant policy must require an individualized assessment. A policy must give ‘serious consideration’ to transgender or intersex inmates’ own views with respect to safety.” In terms of the criteria to include in the “serious consideration,” the notice states that the “assessment, therefore, must consider the transgender or intersex inmate’s gender identity.” A policy

may also consider an inmate’s security threat level, criminal and disciplinary history, current gender expression, medical and mental health information, vulnerability to sexual victimization, and likelihood of perpetrating abuse. The policy will likely consider facility-specific factors as well, including inmate populations, staffing patterns, and physical layouts.

(National PREA Resource Center 2016)

Prison policy was complicated by the case of *Rhames v. United States* in 2017. Female inmates Brenda Rhames, Rhonda Fleming, Charlsa Little, and Jeanette Driever were housed in the Federal Medical Center, Carswell, a federal women’s prison. They sued the federal government in Texas District Court, arguing that their rights to personal privacy and dignity had been violated by being housed with men who claim to be transgender women in the prison. The amended complaint filed in May 2017 stated:

Housing male inmates in facilities otherwise housing only female inmates creates a situation that incessantly violates the privacy of female inmates;

endangers the physical and mental health of the female Plaintiffs and others, including prison staff; increases the potential for rape; increases the potential for consensual sex which is nonetheless prohibited by prison regulations; increases the risk for other forms of physical assault, violates the Plaintiffs' right to freely exercise their religion; and causes mental and emotional distress that must be promptly mitigated by preliminary and permanent injunctive relief.

(Fleming, Little, Driever, & Rhames v. U.S. 2017)

The case was dismissed in 2019, in part because the plaintiffs lost standing (Rhames left prison, for example), and in part because of changes in policy made by the Bureau of Prisons (BOP). The Trump administration—in part because of this case—revised the language of the BOP's *Transgender Offender Manual* one year after its initial publication in 2017. Before the revision, the manual recommended the housing of transgender inmates to be consistent with their “gender identity”; the modified version in 2018 strikes through the original recommendation and requires officials to “use biological sex as the initial determination” for designation and placement. The revised manual makes clear that the placement decision shall not only consider the health and safety of the transgender inmate, but also “the management and security of the institution” and “risk to other inmates in the institution.” In light of these criteria, the manual stipulates that “the designation to a facility of the inmate’s identified gender would be appropriate only in rare cases” (Inch 2018). The revision restores “biological sex” as the presumptive criterion for housing inmates, which creates a very unfavorable situation in light of the increasing prominence of self-identification among the transgender community. In fact, research suggests that more than 80% of transwomen in the United States retain their male genitalia (James et al. 2016, 102). The regulatory definition at work introduced by the Trump administration’s revision assumes the following form: A prisoner whose biological sex is male/female (X) counts as a man/woman (Y) in the context of U.S. prisons (C).

The policy shift was met with considerable disapproval from transgender advocacy groups. Mara Keisling, the executive director of the National Center for Transgender Equality, called the revision an “inhumane agenda,” saying that “the extreme rates of physical and sexual violence faced by transgender people in our nation’s prisons is a stain on the entire criminal justice system”; Aryah Lester, the founder of Trans Miami, remarked that the new policy will “lead to increased violence against transgender individuals” and that the policy proves that to Trump, “trans people’s lives don’t matter” (Moreau 2018a).

A specific criticism made of the revised policy is that “biological sex” is not defined by the BOP and, according to the ALCU’s Staff Attorney Chase Strangio, until recently “the term appeared nowhere in federal or state law” (2018). Strangio calls “biological sex” a dog whistle for “trans exclusion.” Furthermore, the new rule violates the PREA, which requires federal and state prisons to give inmates’ own sense of safety and identity serious and careful considerations before making

the final placement decision (Strangio & Fetting 2018). Nancy Ayers, a spokesperson for the Bureau of Prisons, said that she believes the revised policy does consider individual needs in accordance with the PREA: “The manual now addresses and articulates the balance of safety needs of transgender inmates as well as other inmates, including those with histories of trauma, privacy concerns, etc., on a case-by-case basis” (Gathright 2018).

Despite the Trump administration’s rollback of transgender protections, some state and local jurisdictions have implemented policies similar to those advanced in PREA.

In 2014, a specialized Transgender Housing Unit for transgender women was opened in Rikers Island in New York City. Correction Commissioner Joseph Ponte stated, “Providing [transgender women] with specialized housing and services is good policy and meaningful reform and is expected to reduce incidents involving these individuals while also leading to better long-term outcomes, including possible reductions in recidivism” (Mathias 2014).

In May, 2018, Connecticut was the first state to enact a policy requiring the state Department of Correction to house prisoners according to their gender identity. The law only applies to those who are “diagnosed with gender dysphoria or had their gender marker legally changed” (Riley 2018).⁷ The key definitive attribute informing Connecticut’s regulation of housing transgender prisoners is documentation: A prisoner who is legally or diagnostically documented gender as male/female (X) counts presumptively as a man/woman (Y) in the context of Connecticut prisons (C).

Massachusetts General Laws c.127 § 32A amended by the Criminal Justice Reform Act of 2018 stipulates that transgender inmates “with or without a diagnosis of gender dysphoria or any other physical or mental health diagnosis” shall be addressed and if requested, housed in a manner consistent with their gender identity, unless the commissioner certifies that such placement would not ensure prisoners’ safety or would present management or security concerns (MassGov 2018). Such an approach empowers inmates’ own sense of identity as the presumptive criterion for inmate placement decisions. Only when inmates’ own preferences pose security risks would the default decision based on identity be challenged. Similarly, California passed legislation, signed into law in September 2020, requiring that transgender inmates “Be housed at a correctional facility designated for men or women based on the individual’s preference” in all situations unless there are “management or security concerns” (SB-132 2020, sec. 4).⁸

In July 2021, the New Jersey Department of Corrections adopted a new policy to make it customary for prisoners who identify as transgender to be assigned a prison stay in line with their gender identity (Diaz 2021). The policy was an outcome of a settlement in a case brought by a transgender woman after she spent 18 months in four different men’s prisons, during which she “faced humiliating strip searches in front of male guards. Male prisoners exposed themselves to her. She faced sexual harassment, discrimination and physical threats from corrections officers and inmates alike” (Diaz 2021).

In any case, the regulatory definition reflected by such policies therefore would be: A prisoner whose self-identified gender identity is male/female (X) counts presumptively as a man/woman (Y) in the context of the relevant jail or prison (C).

Other states have moved in the more conservative direction. State prisons in Texas house transgender inmates based on their “sex at birth” (McGaughy 2018). Thus: A prisoner whose assigned birth is male/female (X) counts as a man/woman (Y) in the context of the state prison (C).

Justice Louis Brandeis famously said that states may “serve as a laboratory” to “try novel social and economic experiments” (1932, 311). As states experiment with different definitional policies with regard to transgender inmates, undoubtedly data will emerge to show the relative strengths and weaknesses of different definitional approaches. For example, there have been allegations that a policy of placement based on self-identification is being abused in one county facility in the state of Washington, and that at least one inmate incarcerated for a sex offense arrived “from a male facility” and raped a female in the women’s prison soon after (Monson 2021). The *Los Angeles Times* reports that “A transgender woman at a men’s prison, who asked not to be identified for fear of retaliation, said that she knows at least five inmates who have applied to transfer under false pretenses and that staffers have asked her to help identify such inmates” (Miller 2021). True or not, such allegations raise fears of cisgender male inmates trying to game the system to get placed in women’s facilities (see, for example, Shrier 2021).

Overall, prisons have been slow to house transgender inmates based on their gender identity, even after new laws such as California’s is enacted (Ferrannini 2021). The ACLU’s Chase Strangio claims that “Placement of transgender women in women’s facilities is exceedingly rare and where it does happen, it is often the result of years of advocacy by the individual prisoners and detainees” (in Stahl 2018). Data collected by NBC News showed that out of 4,890 transgender inmates in U.S. state prisons, only 15 cases of prisoners housed according to their lived gender could be confirmed, or 0.3% (Sosin 2020). Among the 15 cases, 13 were transgender women housed in women’s facilities, and two were transgender men housed in men’s facilities. In Texas, none of the 980 transgender prisoners (891 transgender women and 89 transgender men) lived in gender-consistent housing. The consequences can be significant. PREA Data Collection Activities in 2015 reported that in the previous year, “An estimated 35% of transgender inmates held in prisons and 34% held in local jails reported experiencing one or more incidents of sexual victimization by another inmate or facility staff in the past 12 months” (U.S. Justice Department 2015).

Opposition to policies designed to assist transgender inmates, particularly transgender women, has brought together unlikely allies. When New York City announced efforts to respect transgender women’s gender identity, the decision was denounced on the conservative website *Breitbart.com*. The news story began, “The mayor of New York is offering male criminals the chance to move into women’s jails, providing the men say they have a ‘female gender identity’” (Munro 2018). The Christian legal advocacy group Alliance Defending Freedom (who

also advanced the “bathroom bills” agenda elsewhere) intervened in the *Rhames v. United States* lawsuit in support of the cisgender female plaintiffs, claiming that American prisons’ actions to alleviate the risks for incarcerated transgender people are a response to crisis “contrived” by transgender people and the prisons that adapt to their gender identity. According to the Alliance, cisgender women in prison are harmed by prisons accepting what the ADF calls “gender identity ideology” (Stahl 2018).

From a very different political starting point, a group opposing California’s SB-132 identifies itself as “unapologetically radical feminists,” and describes SB-132 as “a stunning act of female erasure and elevation of men’s feelings over women’s physical and psychological safety” (WoLF 2019). As a result, the bill would

harm one of the most vulnerable groups in society: incarcerated women. It would allow any male at any time to self-declare that he has a woman “gender identity,” and on that basis allow him to demand to be housed in a women’s correctional facility.

(WoLF 2019)⁹

In sum, the transgender situation in U.S. prisons is ill-defined, no pun intended. Both extremes of presumptive self-identification and biological essentialism can be found at work, as well as efforts to find a middle ground. The differences among states’ requirements illustrate a definitional rupture in the context of the U.S. prison system—a transgender inmate can count as male in one state and as female in another. The values that the competing definitions represent are nominally the same; that is, the desire to protect vulnerable groups of inmates.

Regarding future directions, a brief account of the experience with transgender inmates in the United Kingdom provides worthwhile insights. UK law dealing with gender identity in general and regulations concerning transgender prisoners in particular are significantly more developed than in the United States.

The UK experience

The roots of transgender legal rights in the UK can be traced back to a resolution by the European Parliament in 1989 to protect the rights of “transsexuals” known as Recommendation 1117 (Parliamentary Assembly 1989). The Recommendation included a call for legal protections in cases of “irreversible transsexualism,” including changing birth certificates, identity papers, and in general prohibiting “all discrimination in the enjoyment of fundamental rights and freedoms” (Parliamentary Assembly 1989).

In 2002, the European Court of Human Rights ruled in *Goodwin & I v. United Kingdom* that the English law that denied the plaintiff Christine Goodwin, a 65-year-old transgender woman, from changing her gender marker on her birth certificate breached respect for privacy and right to marry under the European Convention on Human Rights (BBC News 2002b). Around the same time, a

different transgender woman lost a bid to change her birth certificate; the judge ruling that “The register of births is a historical register of fact” (BBC News 2002a). Resolution to these conflicting rulings came in the form of a new law, the Gender Recognition Act of 2004. At the heart of the Act was the creation of a Gender Recognition Certificate (GRC) that would function as legal affirmation of what was called an acquired gender.

To receive a GRC, an applicant must be 18 years old or more, and under standard circumstances must meet three criteria:

- They have, or have had, gender dysphoria
- They have lived fully for the last two years in their acquired gender and continue to do so
- They intend to live permanently in their acquired gender until death

(Government Equalities Office 2018)

The United States lacks a comparable process, with each state having different rules and processes for changing names and legal documents of transgender people, and yet another set of procedures for changing one’s sex on a U.S. passport or in Social Security’s records. The UK also has, by law, added gender reassignment as a “protected characteristic” protected against discrimination in the 2010 Equality Act. Thus, the legislative status of transgender protection at a national level is quite different in the UK than in the U.S., and this national approach is reflected in national prison policies.

The Ministry of Justice issued *The Care and Management of Transsexual Prisoners* as the first policy directive to address procedures for transgender prisoners (2011). The directive, referred to as PSI 07/2011, defined “transsexual” as

someone who lives or proposes to live in the gender opposite to the one assigned at birth. The gender in which the transsexual person lives or proposes to live is known as that person’s acquired gender. A transsexual person *may or may not* have been diagnosed with gender dysphoria.

(2011, 2)

Despite the statement that a diagnosis of gender dysphoria is not required, it should be noted that to receive a GRC, such a diagnosis *is* required, and having a GRC certainly made it much simpler to request and receive a prison housing assignment consistent with one’s gender identity. Otherwise, decisions are made on a case-by-case basis.¹⁰ With a GRC in hand, the policy states that “A male to female transsexual person with a gender recognition certificate may be refused location in the female estate only on security grounds” (2011, 5). Even if the inmate is guilty of violent crimes against other women, including attempted rape, the presumption is that the inmate would be housed in the female “estate” (facility). Transgender men with GRCs “may not be refused” location in the male estate. The policy can be summarized as advancing a regulatory definition that only legally documentable

(GRC or GRC-in-progress) or biologically males/females (X) count as a man/woman (Y) in the context of UK prisons (C).

An example of a relocation of a trans inmate under the 2011 policy was Tara Hudson. Hudson was a transgender woman who had gone through reconstructive surgery but had not yet obtained a GRC by the time she was sentenced to a 12-week jail term for headbutting a barman. Lacking a GRC, she was placed in a male prison but appealed to transfer to a female prison. The news of her appeal then became viral on the internet and led 140,000 people to sign a petition rooting for her transfer. She was successfully transferred to a female jail in 2015, despite her “worrying criminal record” of eight previous convictions, including battery. The prison officer explained their decision by saying although the longstanding policy is to place offenders according to their legally recognized gender (as per PSI 07/2011),

our guidelines allow room for discretion and in such cases, medical experts will review the circumstances in order to protect the emotional wellbeing of the person concerned. Our top priority is the safety and welfare of those in our custody and decisions relating to the location of transgender prisoners are taken by a range of people including psychologists, healthcare professionals and prison staff.

(BBC News 2015b)

Nonetheless, two high profile deaths in 2015 of transgender women placed in men’s prisons, Vikki Thompson and Joanne Latham—both of whom also lacked GRCs—raised questions about the adequacy of PSI 07/2011 procedures (Alison & Pidd 2015; Pidd 2017). In 2016, the Ministry of Justice issued a new version of *The Care and Management of Transgender Offenders* (PSI 17/2016) to replace the former PSI 07/2011. Not only did the title change from “transsexual” to the more inclusive “transgender,” the policy document loosened the requirement for a GRC to qualify for gender identity-consistent housing. The policy is described at some length here for reasons that will be explained later on.

The new policy requires transgender offenders to be asked their view of “the part of the prison estate (i.e. male or female) that reflects the gender with which they identify” (Ministry of Justice 2016, 9). If they do not have a GRC, then the request must be made by a Transgender Case Board. The offender is then asked to provide “evidence of living in the gender with which they identify.” The policy continues,

The strength of this evidence must be considered within the context of a Transgender Case Board together with all known risk factors before a decision is made. Each offender must be assessed on a case by case basis and discretion may be applied following a Transgender Case Board. Transgender offenders must be allowed to live in the gender they identify with during this process.

(2016, 10)

Figure 8.1 describes the types of evidence that can be provided and ranks their relative strength (Ministry of Justice 2016, 28). In the evidence description, documented evidence such as the GRC and birth certificates still counts as the strongest evidence (“full confirmation”), second to which are “strong confirmation” including health care information and “actual life” traces of living consistently in one’s acquired gender. The absence of actual lifestyle evidence, along with covert attempts to use gender role to sway judicial decisions function as counterevidence. All of these made it more likely in theory for transgender inmates without GRCs

FIGURE 8.1 UK Evidence of Living in the Gender with which the Offender Identifies

to be housed based on their gender identity if they can provide “strong confirmation” evidence.

The new policy reduces the dependence on documentation or surgical requirements and instead commits to a “durational” attribute, seeking to testify from one’s everyday lifestyle that the inmate has been living consistently in their “acquired” gender. Thus, the regulatory definition can be written as: Transgender prisoners who can provide adequate evidence of living consistently and permanently in a specific gender category (X) count as women/men (Y) in the context of UK prisons (C).

Just as the new policy took effect, a notorious incident took place that further complicated the policy situation in the UK. Karen White, a transgender woman, was incarcerated on remand for “for grievous bodily harm, burglary, multiple rapes and other sexual offences against women” in 2017, just as PSI 17/2016 took effect (Parveen 2018a). Although she neither had a GRC nor had gone through reconstructive surgery, White was placed in a female prison under the new policy. In the female facility, she sexually assaulted two female inmates within her first three months of imprisonment. The incident caused a media storm across the nation as an illustration of the potential danger associated with placing transgender women in women’s prisons. White was sentenced to life in prison in October, 2018, for two counts of rape, two sexual assaults and one count of “wounding.” She had previous convictions for indecent assault, indecent exposure and gross indecency involving children, animal cruelty and dishonesty (Parveen 2018b). The Ministry of Justice apologized for placing her into a women’s prison, noting that her previous criminal history had not been taken into account when the housing assignment was made by the “Local Transgender Case Board” and that the case was not reviewed by a second board (a “Complex Transgender Case Board”) that should have assessed the particulars (Parveen 2018a, 2018b). As noted by reporter Nazia Parveen, “both sides of the transgender rights debate are united in the belief mistakes were made” in the case (2018a).

The Ministry of Justice’s count of transgender prisoners between March and April 2017 gave an estimate of 125 transgender inmates in England and Wales.¹¹ This number grew to 139 in 2018 and 163 in 2019. Among these 163 individuals, 129 reported their legal gender as male, 32 as female and two did not state their legal gender. When asked about the gender with which the prisoner identified, 130 identified as female, 20 as male and 13 did not provide a response (Ministry of Justice 2019b, 14–15). The number of trans inmates identifying as female is further complicated by allegations of a high percentage of sexual offenders among the trans prison population. The controversial advocacy group Fair Play for Women examined individual prison inspection reports in 2017 and concluded that at least 41% of transgender women (whom they refer to as “transgender-identifying males”) in prisons in England and Wales were convicted sex offenders (2017). This figure is twice as high as the 19% of all prison populations convicted of sexual offenses calculated by the Ministry of Justice in 2018, and becomes even more salient when compared to 3.2%, the estimated percentage of sexual offenders

among the entire female-estate population (The Ministry of Justice 2018; Fair Play For Women 2017). Fair Play's numbers were criticized in a fact check article by the BBC, which suggested the percentages were skewed because many transgender inmates were not included in the count (Reality Check Team 2018). Nonetheless, adding to concerns about proper placement of transgender inmates is the fact that the number of inmates claiming to be transgender rose dramatically, with one watchdog survey suggesting "there are up to 1,500 transgender inmates among the 90,000 prisoners in England and Wales, more than ten times previous estimates, and at least four times the number in the general population" (Hymas 2019). Officials representing the Prison Officers Association and the Victim Rights Campaign expressed the concern that the inmates were merely trying to obtain "prison perks" such as separate showers, separate cells, and access to women's housing facilities (Hymas 2019). Consequently, the challenge confronting the UK government after the Karen White incident was to improve their ability to assess and control the potential risks of abuse associated with transgender prisoners and at the same time to hold the ground for transgender prisoners' basic rights.

In 2019, another revision of *The Care and Management of Individuals who are Transgender* was introduced to replace PSI 17/2016. The new policy categorizes its primarily concerned subjects into the following two groups: (1) individuals who express a consistent desire to live permanently in the gender with which they identify, and which is opposite to the biological sex assigned to them at birth, regardless of the intent to pursue a new legal gender recognition; (2) individuals who identify as transgender but do not seek to acquire a new gender, including Intersex, nonbinary, gender fluid, and transvestite individuals.

Substituting for PSI 17/2016, the new policy builds on the previous version in ways that include requiring the initial location of all prisoners to match their legal gender until the CCB (Complex Case Board) has approved a transfer, and changing the convening time of Initial Local Transgender Case Board to "within 14 days," not three days as per PSI 17/2016, to allow for a suitable amount of time for disclosure and informed risk assessments. The key addition is in the area of "risk assessment." While the policy retains the "evidence list" from PSI 17/2016, it stipulates that "a balanced approach must be adopted where the safety and well-being of the individual who is transgender is balanced by an informed assessment of any risks that the individual presents to other people" (Ministry of Justice 2019a, 11). The risk assessment procedure considers two kinds of risk: (1) potential risk to the transgender individual from others, and (2) potential risk to others from the transgender individual.

The examination of the first type of risk, risk of abuse committed by cisgender inmates upon a transgender inmate, considers the following factors (* indicates critical factors):

*Mental health and personality disorder; *History of self-harm; *Anatomy, including risk of sexual or violent assault; *Testimony from the individual about a sense of vulnerability, e.g. in a male environment, in a particular

prison, or from a particular prisoner or group of other prisoners; *Risk of suicide; *Medication including the absence of medication and the impact of known side effects; *History of being attacked, bullied or victimised; *Intelligence including evidence of coercion, manipulation, or threats towards the individual; Family circumstances/relationship; Age; Physical health; Learning disabilities or difficulties.

(Ministry of Justice 2019a, 12)

The assessment of the second type of risk, risk of harm committed by transgender inmates, considers the following factors (* indicates critical factors):

*Offending history, including index offence, past convictions and intelligence of potential criminal activity- e.g. credible accusations; *Anatomy, including considerations of physical strength and genitalia; *Sexual behaviours and relationships within custodial/residential settings; *Use of medication relating to gender reassignment; and use of medication generally; *Past behavior in custody, the community, in the care of the police, or in the care of prisoner escort services; *Intelligence reports; *Evidence of threats towards others; *Mental health and personality disorder; Learning disabilities or difficulties; Substance misuse.

(Ministry of Justice 2019a, 12–13)

The regulatory definition of gender in the UK prison context has evolved to assume the following form: Only prisoners who can provide sufficient evidence of living consistently and permanently in a gender identity *and* whose associated risks posed by and to other inmates are not particularly high (X) are eligible to count as women/men (Y) in the context of UK prisons (C). Under very specific circumstances, inmates can be placed in a manner consistent with their gender identity or housed separately in facilities limited to transgender inmates. The UK opened the first transgender cell at HMP Downview in Sutton, Surrey in 2019. The cell unit now houses three transgender women inmates, all of whom have attained GRCs (Anonymous [*The Economist*] 2019; Hymas 2019).

What might the U.S. learn from the UK experience?

The procedures put into place by UK in 2019 may seem complicated, but they appear to be a sincere effort to balance competing values involving the rights of transgender inmates and the safety of cisgender women inmates. As noted in the 2019 UK policy, the management of individuals who are transgender “must seek to protect both the welfare and rights of the individual, and the welfare and rights of others in custody around them” (Ministry of Justice 2019a, 5). A recent legal challenge to the 2019 policy was refused, while the court noted that the government has to “consider competing interests and to balance competing rights,” and acknowledged that “this is a sensitive area, in which it is unlikely that any policy

could be devised which would be to the satisfaction of all persons affected by it” (*Regina [FDJ] v Secretary of State for Justice* 2021). The extreme approaches found in the United States, ranging from presumptive self-identification to a strict biological definition that effectively defines transgender women out of existence, privilege one set of values and, arguably, neglect the other.

The UK experience also suggests that policies may be drafted with the best of intentions, but implementation is another matter. The expression “culture eats policy for breakfast” suggests that no matter how well designed an institution’s new policies are, if they run counter to the habitual practices and values of that institution, they are likely to fail. Thus, accusations remain that the vast majority of transgender inmates are in the “wrong” prison facility (R. Smith 2019; Ministry of Justice 2019b). And despite the creation of separate facilities for trans inmates at institutions like Riker’s Island in the U.S., trans women continue to die unnecessarily, as in the tragic case of Layleen Polanco.¹²

Valerie Jenness, Distinguished Professor of Criminology, Law, and Society at the University of California, Irvine, has observed state officials charged with the placement of transgender inmates. She notes that a “case-by-case” approach to placement is shrouded in layers of ambiguity about how best to apply abstract criteria. This, in turn, creates a situation in which the same set of “facts” about the person and the context in which they are incarcerated can create a double-bind. For example, if a trans person who is incarcerated in a facility for men makes a request to move to a facility consistent with their gender identify, their disciplinary record is likely to be discussed by the team in charge of responding to the request. If the person has a disciplinary record the request might be denied in order to avoid “rewarding” negative behavior and out of concern for the women with whom the person would be housed if the request were approved. On the other hand, if the person does not have a disciplinary record, then their case file can be read as evidence that they have acclimated successfully into their current facility and thus should remain in it (Jenness 2020; see also Sumner & Jenness 2014).

Of course, institutional inertia is no reason not to improve policies, and as all parts of the criminal justice system gain more experience with transgender populations, one can hope that implementation practices will improve on both sides of the Atlantic. In any case, compared to the rampant inconsistency of U.S. federal and state policies, the UK approach should be considered a model worthy of careful study and consideration.

Notes

- 1 Quoted in Hughto et al. (2018, 75).
- 2 Quoted in Kilty (2020, 11).
- 3 Quoted in Hughto et al. (2018, 76).
- 4 Quoted in Kilty (2020, 18).
- 5 Unless otherwise noted, the word “prison” in this chapter refers to federal and state prisons and penitentiaries. Other places of incarceration will be identified specifically where relevant.

- 6 Hinton (2016) traces the politics and policy decisions since the War on Poverty that have led to the reliance on mass incarceration in the U.S. See also Davis (2003), Gottschalk (2006).
- 7 It should be noted that it is challenging to change one's legal ID to reflect a gender change. According to the 2015 U.S. Transgender Survey, only 11% of respondents reported that all of their IDs had the name and gender they preferred, while more than two-thirds (68%) reported that none of their IDs had the name and gender they preferred (James et al. 2016).
- 8 Transgender women inmates have different individual preferences for housing placement. In a study of 315 transgender women incarcerated in 27 California men's prisons, 64.9% preferred to be housed in a men's prison, while the rest (35.1%) preferred to be housed in a women's prison. One prisoner explained her preference to stay in a men's prison by saying, "Women are more vicious. They scare me. Around men, I have my fan base. I'm more pretty than most of the girls here. Plus, I have my boyfriend—my husband—and he will take care of things" (Jenness, Sexton, & Sumner 2019, 622).
- 9 Proving that politics makes strange bedfellows, WoLF sometimes partners with conservative groups and think tanks such as the Family Policy Alliance and the Heritage Foundation (Ring 2019).
- 10 PSI 7/2011 states: "Some transsexual people will be sufficiently advanced in the gender reassignment process that it may be appropriate to place them in the estate of their acquired gender, even if the law does not yet recognise they are of their acquired gender" (Ministry of Justice 2011, 16).
- 11 The Ministry of Justice's counts of transgender prisoners excluded those who have GRCs and the figures are likely to underestimate the true transgender population in prisons because some of the transgender inmates may not declare their gender identity or have a local case board conference (Ministry of Justice 2019b, p. 14).
- 12 Because Polanco could not afford \$500 bail for a misdemeanor charge, she was jailed in Riker's Island. After an altercation, she was put in solitary confinement and died of an epileptic seizure after guards failed to follow correct observation and intervention procedures. Had she been housed with cisgender women inmates, or had the facility followed correct procedure, it is unlikely she would have died in custody. Her family was awarded a \$5.9 million settlement (Simko-Bednarski 2020). Trans activists point to her case as symptomatic of mistreatment of transgender inmates (Burns 2020; Gajanan 2020; Gold & Piccoli 2019).