ABOLITION AS LODESTAR: RETHINKING PRISON REFORM FROM A TRANS PERSPECTIVE

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Given the disproportionate violence trans people in prison experience, flooding the legal system with litigation to create change for individual plaintiffs is only a stopgap measure. A better remedy to uproot the harm is to keep trans people out of prison entirely. The first claim of this Note is that prisons are inherently more violent for trans people than for the general prison population. The second claim is a remedy to the first: alternatives to incarceration should be offered to trans people who are convicted. Such alternatives should be considered for all people in U.S. prisons because the conditions are so unsustainable and damaging. This Note focuses on trans people as a case study for the types of gendered harm prisons create.

Viewing the disproportionate violence trans people experience in prison within the broader legal context of trans rights, this Note argues that the criminal legal system is systemically transphobic to an irreparable extent, which should compel policymakers, legal scholars, and litigators to explore and seriously consider alternatives to carceral punishment.

This Note proceeds in four parts. First, it summarizes recent litigation efforts to protect LGBTQ people broadly and trans people in prison specifically. Second, the Note makes an empirical claim that prison is particularly violent for trans people, relying on Supreme Court and congressional findings as well as scholarly analysis. Third, using the retributive theory of punishment, the Note makes the normative claim that the subjective experience of trans people in prison is so egregiously violent that it deserves a special remedy. Finally, applying prison abolition as a lodestar, the Note catego-

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rizes some potential interventions as carceral, non-carceral, de-carceral, and transformative.

Introduction

"Without community there is no liberation, only the most vulnerable and temporary armistice between an individual and her oppression. But community must not mean a shedding of our differences, nor the pathetic pretense that these differences do not exist. Those of us who stand outside the circle of this society's definition of acceptable women . . . know that survival is not an academic skill. It is learning how to stand alone, unpopular and sometimes reviled, and how to make common cause with those others identified as outside the structures in order to define and

> *seek a world in which we can all flourish. It is learning how to take our differences and make them strengths. For the master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change. And this fact is only threatening to those women who still define the master's house as their only source of support."*[1]

In October Term 2019, the Supreme Court finally[2] granted certiorari on two same-sex cases[3] and one trans[4] case[5] of employment discrimination. The Court answered the narrow statutory interpretation question whether discriminating "on the basis of sex" in Title VII of the Civil Rights Act of 1964[6] includes firing employees based on their sexual orientation or gender identity. In a 6-3 decision authored by Justice Gorsuch, the Court found that it does.[7] These cases took center stage after the LGBT rights movement successfully won same-sex marriage as a right in 2015[8] and after the Court punted the resolution of the clash between free exercise rights and a local

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[1] AUDRE LORDE, *The Master's Tools Will Never Dismantle the Master's House*, *in* SISTER OUTSIDER: ESSAYS AND SPEECHES 110, 112 (1984).

[2] Mark Sherman, *Supreme Court to Take Up LGBT Job Discrimination Cases*, AP NEWS (Apr. 22, 2019), https://apnews.com/be82bc96f46e4eb7a6d5de807210b30f [https://perma.cc/5YD5-TAY4] ("The Justices had been weighing whether to take on the cases since December, an unusually long time, before deciding to hear them. It's unclear what caused the delay.").

[3] Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019); Bostock v. Clayton Cty. Bd. of Comm'rs, 723 Fed. App'x 964 (11th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019).

[4] This Note uses the term "trans" in an effort to "be inclusive of a wide variety of identities under the transgender umbrella." GLAAD MEDIA REFERENCE GUIDE (10th ed. 2016) 10, https://www.glaad.org/sites/default/files/GLAAD-Media-Reference-Guide-Tenth-Edition.pdf [https://perma.cc/3FLC-SXK2]. For the purposes of this Note, it is not analytically useful to differentiate between "transgender," "[a]n umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth," and "transsexual," "[a]n older term that originated in the medical and psychological communities . . . [that is] preferred by some people who . . . [change] their bodies through medical interventions . . . ." *Id.* As this Note will discuss, the way trans people are policed in prison is similar regardless of the medical interventions they may have had or the terms they use to express their gender.

[5] Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019).

[6] 42 U.S.C. § 2000e-2 (2012) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."). The statute was amended in 1991 to provide for employer liability if the plaintiff could show that sex was a "motivating factor for any employment practice, even though other factors also motivate the practice," *id.* § 2000e-2(m), but a plaintiff's remedies under this amendment are limited if the defendant can show that sex was not a determinative or "but for" cause, *id.* § 2000e-5(g)(2)(B).

[7] Bostock v. Clayton Cty., No. 17-1618, slip op. at 2 (U.S. June 15, 2020), https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci [https://perma.cc/9KGR-T5T2].

[8] *See* Obergefell v. Hodges, 576 U.S. 644, 644 (2015).

anti-LGBT discrimination ordinance in 2018.[9] The ACLU, counsel, or amicus on all of the aforementioned cases, called *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*[10] the "first-ever decision on trans civil rights."[11] This framing is nothing short of erasure. The Supreme Court first heard a civil rights case involving a trans plaintiff in 1994: *Farmer v. Brennan*.[12] The case allowed a Black trans woman in prison to win a groundswell of change for people in prison across the entire country through the creation of a new standard for prison condition cases. Her case was nothing short of transformative and should be mainstreamed in the discourse of trans rights.

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[9] *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723–24 (2018) ("The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment . . . . Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality. . . . [T]he delicate question of when the free exercise of [one's] religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach. That requirement, however, was not met here. Given all these considerations, it is proper to hold that whatever the outcome of some future controversy involving facts similar to these, the Commission's actions here violated the Free Exercise Clause; and its order must be set aside."); *see also* Leslie Kendrick & Micah Schwartzman, *The Supreme Court 2017 Term—Comment*: *The Etiquette of Animus*, 132 HARV. L. REV. 133, 135 (2018) ("In our view, the court erred by elevating matters of etiquette—the importance of appearing respectful and considerate—over giving a reasoned justification for resolving conflicts between religious liberty and antidiscrimination law." (citations omitted)).

[10] 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019).

[11] *Trans Rights Under Attack in 2020*, ACLU (last visited May 9, 2020), https://www.aclu.org/issues/lgbt-rights/transgender-rights/trans-rights-under-attack-2020 [https://perma.cc/8KSA-NAH2]; *Fired for Being Trans: Celebs Read from Letter that Led to SCOTUS Case*, ACLU (last visited May 9, 2020), https://www.aclu.org/video/fired-being-trans-celebs-read-letter-led-scotus-case [https://perma.cc/E6DT-SKAN] ("This will be the first SCOTUS case involving the civil rights of trans people."); *Media Advisory, ACLU and Aimee Stephens Hold Monday Press Conference on First Transgender Rights Case to be Heard by U.S. Supreme Court*, ACLU MICHIGAN (Sept. 27, 2019), https://www.aclumich.org/en/press-releases/aclu-and-aimee-stephens-hold-monday-press-conference-first-transgender-rights-case-be [https://perma.cc/5MN7-8VGL]. This framing has reached other forms of media outside of ACLU communications. *See* Katelyn Burns, *Aimee Stephens Brought the First Major Trans Rights Case to the Supreme Court. She May Not Live to See the Decision.*, VOX (May 8, 2020, 12:00 PM), https://www.vox.com/identities/2020/5/8/21251746/aimee-stephens-trans-supreme-court-health?fbclid=IWAR11htKC4ica0YC36Sos-u170ra7ESCfkQKHBUZ8u8l3aPZGi5lHHPbGw5U [https://perma.cc/Q98D-2SVN].

[12] Farmer v. Brennan, 511 U.S. 825, 825 (1994). While the case pertained to constitutional rights, not rights granted by the Civil Rights Act, the "civil rights" language used popularly with LGBTQ rights often elides the distinction. *See, e.g.*, *The Rights of Lesbian, Gay, Bisexual, and Transgender People*, ACLU, https://www.aclu.org/other/rights-lesbian-gay-bisexual-and-transgender-people (last visited June 18, 2020) [https://perma.cc/4QS7-YR4N].

Prison abolition has rapidly entered popular consciousness as a lodestar for transforming the criminal legal system as we know it.[13] Professor Dorothy Roberts recently used abolition as a framework for interpreting the U.S. Constitution,[14] and this Note applies it to tools in the criminal justice, civil rights, and movement toolkits. This Note views prison abolition as a pragmatic organizing principle that seeks to end "all systems of domination, exploitation, and oppression."[15] It is rooted in the history of Black people in the United States and originated in efforts to end slavery and the Jim Crow laws that followed the abolition of slavery.[16] It has been used in recent discussions to curb mass incarceration in the United States through calls to end the use of prisons, jails, policing,[17] immigration detention centers,[18] the foster system,[19] and the death penalty.[20] A broader concept of abolition can also be extended to calls to end patriarchy, cisnormativity, heteronormativity, animal and earth exploitation, ableism, colonialism, imperialism, and militarism, as these oppressive systems are all connected.[21]

The COVID-19 pandemic has accelerated the social acceptance for turning these abolitionist dream goals into reality. The spread of COVID-19 brought calls for compassionate release for people in prison, some of which were successful.[22] Notably, a few of the ACLU's national projects—the

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[13] *See, e.g.*, Dan Berger et al., *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration [https://perma.cc/QNK9-V57U]; Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES MAG. (Apr. 17, 2019), https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html [https://perma.cc/44P7-MG9T]; Mariame Kaba, *Yes, We Literally Mean Abolish the Police*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html [https://perma.cc/T7FP-4ZEE].

[14] *See generally* Dorothy Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 19–20 (2019) (terming her framework "new abolition constitutionalism," *id.* at 110). Roberts pointed to the Reconstruction Amendments as a sign of an unfinished revolution that allows engaging with the state to be part of abolitionism and urged activists to not let the U.S. Constitution compromise their abolitionist principles. *Id.* at 105, 108.

[15] *Id.* at 5 n.17 (quoting ABOLISHING CARCERAL SOCIETY 4 (Abolition Collective ed., 2018)).

[16] *See id.* at 8–9 & n.41.

[17] See sources cited *supra* note 13.

[18] *See* César Cuauhtémoc García Hernández, *Abolish Immigration Prisons*, N.Y. TIMES (Dec. 2, 2019), https://www.nytimes.com/2019/12/02/opinion/immigration-detention-prison.html [https://perma.cc/5TRB-FMPR].

[19] *See* Erin Miles Cloud, *Toward the Abolition of the Foster System*, 15.3 SCHOLAR & FEMINIST ONLINE (2019), http://sfonline.barnard.edu/unraveling-criminalizing-webs-building-police-free-futures/toward-the-abolition-of-the-foster-system/ [https://perma.cc/K7VC-9M2R].

[20] *See, e.g.*, Jeremy Engle, *Should We Abolish the Death Penalty?*, N.Y. TIMES (Mar. 20, 2019), https://www.nytimes.com/2019/03/20/learning/should-we-abolish-the-death-penalty.html [https://perma.cc/YA9T-KWEK].

[21] *See* Roberts, *supra* note 14, at 120.

[22] *See* Joseph Neff & Keri Blakinger, *Few Federal Prisoners Released Under COVID-19 Emergency Policies*, MARSHALL PROJECT (Apr. 25, 2020, 6:00 AM), https://www.themarshallproject.org/2020/04/25/few-federal-prisoners-released-under-covid-19-emergency-policies [https://perma.cc/U354-5U27].

LGBT & HIV Project, the Criminal Law Reform Project, and the Racial Justice Project—collaborated in a class action to ensure people in federal custody in Arizona are protected from the threat of COVID-19 to an extent that meets national standards.[23] The brief does not mention trans people, but it includes HIV as an example of compromised immune systems that are elevated by COVID-19.[24] The ACLU filed similar suits in California, Louisiana, Massachusetts, Texas, and Washington, D.C.[25]

Even before the pandemic, mass incarceration in the United States should have been understood as a crisis. For trans people in prison, fatalities may not usually happen as rapidly as during this horrible pandemic, but the assuredness of harm, sometimes to the extremes of homicide[26] or suicide,[27] can rightly be seen as an epidemic.[28] Trans people need to be centered in efforts to transform the criminal legal system to reflect our "evolving standards of decency"[29] for how we treat the people we seek to hold accountable for causing harm.

Prison abolitionist legal efforts sit at the nexus of criminal law and civil rights law. Progressive criminal justice reformists would be familiar with some of the pathways for obtaining justice for people in the criminal legal system, including, but not limited to, holistic criminal defense,[30] post-conviction counsel,[31] parole representation,[32] advocacy in disciplinary hearings,[33]

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[23] *Lawsuit Seeks Class Action Relief for People Detained in Federal Custody in Arizona*, ACLU (May 8, 2020), https://www.aclu.org/press-releases/aclu-sues-protect-people-incarcerated-private-prison-covid-19?fbclid=IWAR0hey550c6Kve07SpYb0u7iJ-oGRGsILW4bEDsKkjNgAwnWBbc7boetOHA [https://perma.cc/83BV-QV23].

[24] Class-Action Complaint for Declaratory and Injunctive Relief and Petition for Writs of Habeas Corpus, Lucero-Gonzalez et al. v. Kline (D. Ariz. May 8, 2020), at 8 ¶ 31, https://www.aclu.org/legal-document/class-action-complaint-declarative-and-injunctive-relief-during-covid-19 [https://perma.cc/Q26V-NRAF].

[25] *Id.*

[26] *See, e.g.*, Tim Fitzsimons, *Man Sentenced to Death for Killing Transgender Cellmate*, NBC News (Dec. 6, 2019, 3:54 PM), https://www.nbcnews.com/feature/nbc-out/man-sentenced-death-killing-transgender-cellmate-n1097161 [https://perma.cc/LVE5-SZY3].

[27] *See, e.g.*, Leah Drakeford, *Correctional Policy and Attempted Suicide Among Transgender Individuals*, 24 J. Correctional Health Care 171, 177–79 (2018). Homosexuals may face similar risk here. *See* Kitty Calavita & Valerie Jenness, Appealing to Justice: Prisoner Grievances, Rights, and Carceral Logic 121 (2015) (discussing a suicide that took place shortly after a homosexual man in prison requested a single cell).

[28] *See infra* Part II.

[29] Rhodes v. Chapman, 462 U.S. 337, 346 (1981) (internal citation omitted).

[30] *See, e.g.*, James M. Anderson et al., *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 Harv. L. Rev. 819, 862–79 (2019) (showing the various ways in which "holistic defense," *see id.* at 825–26, improves client outcomes during and after trial).

[31] *See generally* Ken Strutin, *Litigating from the Prison of the Mind: A Cognitive Right to Post-Conviction Counsel*, 14 Cardozo Pub. L. Pol'y & Ethics J. 343 (2016) (making the case for the necessity of post-conviction counsel given the strain on people in prison).

[32] *See* E. Lea Johnston, *Modifying Unjust Sentences*, 49 Ga. L. Rev. 433, 452–53 (2015) (discussing parole and its shortcomings).

and either statutory or constitutional claims for misconduct that happens within the prison either at the hand of correction officers or others serving sentences.[34] Though not coterminous with the civil rights statutes, legal advocates have raised Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment claims to the Court and have combined them with civil rights claims variably.[35] Prison abolition pushes legal advocates and thinkers to break from their siloes and apply an assortment of doctrines. It demands nuance.

Roberts articulated an intention to use her scholarship to engage with activists.[36] She framed her positionality for the reader, flagging that her "realization that white supremacy is deeply woven into the fabric of every legal institution in the United States and upheld by U.S. constitutional law" led her to identify as an abolitionist.[37] This self-reflexivity is informed by social sciences and critical race theory and works as an important launching pad for the rest of the article. I must make a similar admission to ground my approach.

Centering trans people can present new insights for scholars interested in constitutional and criminal law. Focusing on this oppressed minority within the prison system as applying prison abolition as a framework is an ontological move informed by critical social theory.[38] I take up this approach of Black feminist thought as a Black, Filipino, trans femme legal scholar. While I understand that my lived experiences give me some insight relevant to my analysis, I also acknowledge that, due to my education in elite institutions and the fact that I have never been incarcerated, I do not speak from the voice of the parties impacted by prisons discussed in this Note.[39] Even so, my Black trans lens can "best be viewed as subjugated knowledge."[40] I

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[33] Harvard Prison Legal Assistance Project (2020), https://clinics.law.harvard.edu/plap/ [https://perma.cc/55MP-B23D] (offering such services).

[34] Roger A. Hanson & Henry W.K. Daley, Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation 1 (1994), https://static.prisonpolicy.org/scans/bjs/ccopaj.pdf [https://perma.cc/9U8E-BY3W] (summarizing efforts to bring such claims).

[35] *See* Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747, 763–64, 771–73, 781–82 (2011).

[36] Roberts, *supra* note 14, at 10 n.42.

[37] *Id.* at 10.

[38] *See generally* Patricia Hill Collins, Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment 11 (2009) ("Social theories emerging from and/or on behalf of . . . historically oppressed groups aim to find ways to escape from, survive in, and/or oppose prevailing social and economic injustice.").

[39] *See id.* at 37 ("The existence of a Black women's standpoint does not mean that African-American women, academic or otherwise, appreciate its content, see its significance, or recognize its potential as a catalyst for social change. One key task for Black women intellectuals of diverse ages, social classes, educational backgrounds, and occupations consists of asking the right questions and investigating all dimensions of a Black women's standpoint with and for African-American women. Historically, Black women intellectuals stood in a special relationship to the larger community of African-American women, a relationship that framed Black feminist thought's contours as critical social theory. Whether this relationship will persist depends, ironically, on Black women intellectuals' abilities to analyze their own social location.").

[40] *Id.* at 269.

have learned from trans people who have spent time in prison through being in movement with them. I have read their first-hand experiences in letters and case files and have had phone calls with a small number of them. I am also informed by the research done by the Sylvia Rivera Law Project to bring together the voices and experiences of trans people in prison in a qualitative report.[41] Though I am not speaking from personal experience, as others have,[42] I aim to use my social location in order to bring the lived experiences of other trans people into the pages of legal scholarship. This approach may unearth some realities of the carceral state that go beyond this specific demographic, pointing to systemic flaws that necessitate sweeping change for all, not only for the trans people who motivated this Note. This does not water down the importance of centering trans people in my analysis, but rather highlights the gains that come from articulating an abolitionist vision from their lens.[43]

There have been some positive legislative efforts recently.[44] Beginning in 2019, Massachusetts began to allow incarcerated trans people, "with or without a diagnosis of gender dysphoria or any other physical or mental health diagnosis," to be "housed in a correctional facility with [people][45] with the same gender identity."[46] Further, "[t]he fact that a [person] is les-

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[41] Sylvia Rivera Law Project, "It's War In Here": A Report on the Treatment of Transgender and Intersex People in New York State Men's Prisons (2007), https://srlp.org/files/warinhere.pdf [https://perma.cc/CB7T-CKE5].

[42] *See, e.g.*, Angel E. Sanchez, *In Spite of Prison, in Developments in the Law—Prison Abolition*, 132 Harv. L. Rev. 1650, 1650–51 (2019).

[43] I here extend to trans people a perspective Black feminists have held for over a century. *See* Robin D. G. Kelley, Freedom Dreams: The Black Radical Imagination 139 (2002) (describing the work of Anna Julia Cooper, a Black woman who wrote in the late 1800s, as making "the case that the condition of black women could be a barometer for the condition of all women as well as for that of the black community."); Combahee River Collective, *The Combahee River Collective Statement*, *in* How We Get Free: Black Feminism and the Combahee River Collective 15, 22–23 (Keeanga-Yamahtta Taylor ed. 2017) ("We might use our position at the bottom, however, to make a clear leap into revolutionary action. If Black women were free, it would mean that everyone else would have to be free since our freedom would necessitate the destruction of all the systems of oppression.").

[44] While this discussion is included to offer bright spots—and to show their shortcomings—such reforms are still rare. Most states have not enacted statutory protections beyond the federal requirements discussed below. *See infra* notes 120–141, 230–238, and accompanying text. This landscape means that transgender people in prison in most parts of the United States lack state-specific protections.

[45] Here and throughout, I have modified the use of the word "inmate" or "prisoner" from quotations in the text because I believe that the terms dehumanize the people housed in jails and prisons. It remains in some quotations in footnotes in which alterations would hinder readability.

[46] Mass. Gen. Laws ch. 127 § 32A (2018) (amended in 2018 M.G.L.A. 69 § 91, effective Dec. 31, 2018) ("A prisoner of a correctional institution, jail or house of correction that has a gender identity, as defined in section 7 of chapter 4, that differs from the prisoner's sex assigned at birth, with or without a diagnosis of gender dysphoria or any other physical or mental health diagnosis, shall be: (i) addressed in a manner consistent with the prisoner's gender identity; (ii) provided with access to commissary items, clothing, programming, educational materials and personal property that is consistent with the prisoner's gender identity; (iii) searched by an officer of the same gender identity if the

bian, gay, bisexual, trans, queer, or intersex or has a gender identity or expression or sexual orientation uncommon in general population shall not be grounds for placement in restrictive housing."[47] Pre-existing Massachusetts law allows trans people in prison to be assessed through a medical evaluation and, if found to have gender dysphoria, to receive medical treatment including hormone therapy.[48] While these statutes and regulations are positive, they do not eradicate the harms trans people experience in men's and women's prisons alike. For example, in California, even after federal policies were put in place, trans people remained at risk due to the pervasive apathy of the officials.[49] As long as they are housed within a system that surveils them constantly, this risk is foreseeable. This is partially due to the lack of enforcement within prisons, holding the state back from change and prompting trans people to bring lawsuits. As this Note argues, it may also be a sign of a larger issue: the misalignment of right and remedy.

In response to the structural barriers to medical access trans people face in prison,[50] impact litigators have brought cases to gain rights for trans people seeking gender affirmative care during incarceration.[51] No matter the efforts to improve the treatment of trans people in prison, gender will always be a part of the structure of the prison system.[52] The gender norms in prison are rigid and laden with societal expectations of proper presentation that perpetuate racialized hierarchies.[53] The Supreme Court has held that prisons that do not place trans women and other trans people housed in men's pris-

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search requires an inmate to remove all clothing or includes a visual inspection of the anal cavity or genitals; provided, however, that the officer's gender identity shall be consistent with the prisoner's request; and provided further, that such search shall not be conducted for the sole purpose of determining genital status; and (iv) housed in a correctional facility with inmates with the same gender identity; provided further, that the placement shall be consistent with the prisoner's request, unless the commissioner, the sheriff or a designee of the commissioner or sheriff certifies in writing that the particular placement would not ensure the prisoner's health or safety or that the placement would present management or security problems.").

[47] MASS. GEN. LAWS ch. 127 § 39A(c).

[48] *See* MASS. DEP'T OF CORR., *Identification, Treatment and Correctional Management of Inmates Diagnosed with Gender Dysphoria*, 103 DOC 652 (effective May 19, 2016).

[49] *See* Miranda Leitsinger, *Transgender Prisoners Say They "Never Feel Safe." Could a Proposed Law Help?*, KQED (Jan. 8, 2020), https://www.kqed.org/news/11794221/could-changing-how-transgender-inmates-are-housed-make-prison-safer-for-them [https://perma.cc/X5GM-9YBG].

[50] *See* Douglas Routh et al., *Transgender Inmates in Prisons: A Review of Applicable Statutes and Policies*, INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 1, 13–17 (2015).

[51] *See* Christopher Zoukis, *More Legal Cases Involving Transgender Prisoners in Multiple States*, PRISON LEGAL NEWS (Nov. 6, 2018), https://www.prisonlegalnews.org/news/2018/nov/6/more-legal-cases-involving-transgender-prisoners-multiple-states/ [https://perma.cc/6XYW-PDN7].

[52] ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 60–83 (2003).

[53] *See* Gabriel Arkles, *Correcting Race and Gender: Prison Regulation of Social Hierarchy Through Dress*, 87 N.Y.U. L. REV. 859, 871–86 (2012) (discussing the imposition of disciplinary sanctions like solitary confinement on people who deviate from social norms through dress in prison).

ons[54] separately from violent offenders are deliberately indifferent to the heightened risk of assault that trans people are likely to experience.[55] Scholars have continued to find that gay men and trans people experience high rates of sexual assault in prison—and the L.A. County Jail created an entirely separate unit for those populations in an attempt to remedy the problem.[56] Yet, this effort fails the abolitionist goal of not expanding the carceral state.[57] In order to protect trans people from harm based on their gender identity, a structural shift in our conception of prison reform is necessary.

This shift can be informed by other discussions in criminal law, two of which this Note builds on directly. First, moral philosophers have debated whether individual experiences of punishment should be taken into consideration when sentencing those who are found guilty of a criminal offense.[58] Proponents of subjective punishment argue that juveniles and people with mental impairments have unique experiences of punishment because they have diminished moral culpability and increased susceptibility to violence.[59] This Note does not take up the moral culpability strand of this argument, but

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[54] A note here on language. There are many trans people—including nonbinary people—housed in men's prisons who do not identify as trans women and who are just as susceptible to disproportionate violence. As I describe below, over the twentieth century, social scientists collected data on these groups inconsistently. *See infra* section II.b. History therefore holds an incomplete record of the violence trans people of various understandings have experienced throughout time. The fluid terminology should not hold us back from analyzing what we can and trying to be more respectful in our modern thrust. In that vein, I include a space between "trans" and "women" and I have made alterations to the use of "transwomen" when I directly quote a source. This reflects a trend in usage today, which may very well change further over time.

[55] *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 847 (1994) (holding that a prison official was "deliberately indifferent" to a trans plaintiff and was thus "held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.").

[56] *See* Sharon Dolovich, *Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail*, 102 J. Crim. L. & Criminology 965, 978–88 (2012).

[57] *See* Fay Honey Knopp et al., Instead of Prisons: A Handbook for Abolitionists (Mark Morris ed., 1976), https://www.prisonpolicy.org/scans/instead_of_prisons/chapter4.shtml [https://perma.cc/KBN7-LAT5]; *see also* Berger et al., *supra* note 13 ("Rather than juxtapose the fight for better conditions against the demand for eradicating institutions of state violence, abolitionists navigate this divide. For the better part of fifty years, abolitionists have led and participated in campaigns that have fought to reduce state violence and maximize people's collective wellbeing. Abolitionists have worked to end solitary confinement and the death penalty, stop the construction of new prisons, eradicate cash bail, organized to free people from prison, opposed the expansion of punishment through hate crime laws and surveillance, pushed for universal health care, and developed alternative modes of conflict resolution that do not rely on the criminal punishment system.").

[58] *See, e.g.*, Miriam H. Baer, *Evaluating the Consequences of Calibrated Sentencing: A Response to Professor Kolber*, 109 Colum. L. Rev. Sidebar 11, 19–20 (2009), http://www.columbialawreview.org/Sidebar/volume/109/11_Baer.pdf [https://perma.cc/J5GF-KPVV] (responding to the retributive focus of the debate with a deterrence-based argument).

[59] *See infra* notes 248–257.

it adopts the logic that the disproportionate violence these groups experience when they are in prison necessitates a structural response.[60] This Note focuses on the heightened vulnerability to violence that trans people experience in prison to extend a subjective view of punishment to this group and possibly others, such as effeminate men and queer men.

I'd like to emphasize here that adding trans people to this list leaves open the possibility that other groups or individuals may be able to bring similar arguments in the future. Indeed, this should be expected. Whenever the prison population changes, the hierarchies within it will shift and cause others to experience disproportionate violence due to relative youth, size, race, class, education level, or disability. If this happens, these groups should have a claim to the same arguments made here for trans people.

Second, and relatedly, this Note aims to be part of a larger discourse on alternatives to incarceration for all people in prison. To be clear, even an able-bodied, masculine man could experience undue violence while incarcerated; the act of incarceration itself can be viewed as unduly violent. It is vitally important to curb this country's singularly outstanding growth of the carceral state. This is not a radical leftist statement, but simply a fact.[61] Even the most cynical reader should consider the alternatives recommended by this Note because the status quo is an economic, social, and humanitarian crisis. We can chip away at the number of people incarcerated in the United States by remedying the unique experiences of harm faced by people inside—whether trans people, mothers separated from their children in immigration detention centers, young people, or people with disabilities. Slowly but surely, politicians and officials should realize that alternative methods could work better for everyone who is currently incarcerated. Our situation is dire; lawmakers and activists in the United States should view restorative justice, clemency, shorter sentences, counseling and drug treatment diversion programs, and more as potential alternatives to incarceration for everyone.

This Note makes four moves to center trans people as striving toward that abolitionist goal. Part I critiques recent litigation efforts to protect LGBTQ people broadly and trans people in prison specifically. Part II makes the empirical claim that prison is particularly violent for trans people, based on Supreme Court and congressional findings and scholarly analysis.[62] Part III uses the retributive theory of punishment to make the normative claim that trans people in prison should not receive incarceration as punishment,

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[60] *See infra* notes 251, 261–262, and accompanying text.

[61] *See, e.g.*, Michelle Ye Hee Lee, *Yes, U.S. Locks People Up at a Higher Rate Than Any Other Country*, WASH. POST (July 7, 2015, 3:00 A.M.), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/ [https://perma.cc/E68Z-8LF4] (quoting Democratic and Republican politicians making the point).

[62] This Part acknowledges the formative abolitionist thinkers who would query the use of time behind bars as a sentence for punishment altogether.

invoking the debate over the subjective experience of incarceration for juveniles and people with mental illness. Alternatives to incarceration should therefore be offered to all trans people who are convicted, and to those who realize their trans gender identity while in prison. Part IV applies prison abolition as a pragmatic framework to evaluate various legal, legislative, and grassroots interventions and classify them as carceral—either upholding or expanding the prison industrial complex—non-carceral, de-carceral, or transformative.[63] By plotting some points along this abolitionist spectrum, this Note aims to foster dialogue among various movement actors.

I. Insights on LGBTQ Impact Litigation

For better or for worse,[64] impact litigation has been a prominent tool for achieving the mainstream LGBTQ rights agenda. The "have-nots" have become the "haves" through repeated claims, "community organizing, class action and test-case strategies, along with [an] increase in legal services."[65] Social movements have responded to the litigation in various ways; though some feared "complacency" as a response to the flashpoint win of marriage,[66] *Masterpiece Cakeshop*[67] showed the work continued—if only because of the religious backlash. As Professor Michael Klarman wrote, every step toward "gay rights progress also fomented backlash,"[68] ever since the homophile movement in the late 1950s through the 1960s stoked "the mobilization of the religious right in the late 1970s."[69] As long as that is the case, there is a need for legal defenders.

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[63] This Note differentiates carceral, non-carceral, de-carceral, and transformative interventions akin to the way abolitionists delineate "reformist reforms" from "non-reformist reforms." *See* Roberts, *supra* note 14, at 114.

[64] *Compare* Douglas NeJaime, *Winning Through Losing*, 96 Iowa L. Rev. 941, 945 (2011) (arguing that litigation is always good for social movements, even when activist plaintiffs lose), *with* Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 Iowa L. Rev. Bull. 61, 62 (2010–2011) (responding to NeJaime by offering a more cautionary approach to the use of litigation, which may "deradicalize and subtly reshape social movements in undesirable ways, all while supporting the status quo").

[65] Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc'y Rev. 95, 144 (1974). Galanter notes that there "may be tensions among these commitments," particularly between organizing and class action cases. *Id.* at 144 n.123.

[66] Pierre-Antoine Louis, *Readers on Pride Month and L.G.B.T. Rights: 'An Ongoing Battle'.*, N.Y. Times (June 20, 2018), https://www.nytimes.com/2018/06/20/us/pride-month-gay-pride-lgbt-trans.html [https://perma.cc/62WF-DDQP].

[67] Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

[68] Michael J. Klarman, From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage 26 (2013).

[69] *Id.*; *see also id.* at 9–20, 26–29 (detailing the history of the rise of the gay and lesbian rights movement through Stonewall and the response of repeals and referenda of gay rights ordinances by the right).

The LGBTQ movement coalesced to achieve formal legal equality in a cross-sectional meeting popularly known as the "roundtable,"[70] a collaboration of funders, activists, and lawyers.[71] The roundtable pursued same-sex marriage not because it was politically popular,[72] but because it was the issue that most directly affected all of the people seated at that table—conservative and progressive alike, and all rich or connected to power in some capacity.[73] This decision to center those with money set up the LGBTQ movement to focus on the most privileged among us instead of those most oppressed.

Those players with the most power in the LGBTQ rights movement of the past sixty years made strides in same-sex equality and only recently turned to attaining trans rights.[74] Leading up to the Court's decision in *Bostock v. Clayton County*,[75] the results in lower courts had been fairly positive for trans people.[76] After applying intermediate scrutiny to trans discrimination, the Eleventh Circuit held that "a person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."[77] Trans people who were discriminated against because they did not act like a "man" or "woman" ought to act have received protections under sex discrimination across the circuits.[78] Two district court judges have

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[70] *See* Gabriel Arkles et al., *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. SOC. JUST. 579, 586–89 (2010) (describing the history of the LGBT Litigators' Roundtable that began in the early 1980s).

[71] *See* Molly Ball, *How Gay Marriage Became a Constitutional Right*, THE ATLANTIC (July 1, 2015), https://www.theatlantic.com/politics/archive/2015/07/gay-marriage-supreme-court-politics-activism/397052/ [https://perma.cc/6DW2-LENQ]; *see also* DAVID LEWIS, HEARTS AND MINDS: THE UNTOLD STORY OF HOW PHILANTHROPY AND THE CIVIL MARRIAGE COLLABORATIVE HELPED AMERICA EMBRACE MARRIAGE EQUALITY 4 (2015).

[72] *See* Michael J. Klarman, *How Same-Sex Marriage Came to Be*, HARV. MAG. (March-April 2013), https://www.harvardmagazine.com/2013/03/how-same-sex-marriage-came-to-be [https://perma.cc/UEZ4-LMXX] (describing the referenda used by Republicans to make same-sex rights salient in voters' minds in election years and the other signs of political backlash against gay rights that occurred in the early 2000s).

[73] *See* LEWIS, *supra* note 71, at 3 ("[The Civil Marriage Collaborative] and its funders would play a critical role in helping the LGBT movement develop, coalesce around and pursue a shared strategy to secure the freedom to marry state-by-state and then nationwide."); *cf.* DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 29–31 (2015) (excoriating the decision of the institutionalized LGBTQ movement to make marriage the central reform for a decade).

[74] Even with this new focus on trans rights, the most privileged parts of the movement are still slow to face the issues of trans people who face higher amounts of risk, such as trans people in prison and trans homeless people.

[75] No. 17-1618, slip op. at 2 (U.S. June 15, 2020) (holding that "on the basis of sex" as written in the Civil Rights Act includes gender identity and sexual orientation).

[76] This positive framing of the trans rights cases comes with the important caveat that the construction of sex and gender in these cases have often relied on the gender binary in conservative ways, due to the utilitarian goals of litigators. *See* Jules Welsh, Note, *Assimilation, Expansion, and Ambivalence: Strategic Fault Lines in the Pro-Trans Legal Movement*, 56 HARV. C.R.-C.L. L. REV. (forthcoming 2021) (on file with author).

[77] Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011).

[78] *See id.* at 1317–18 (collecting cases); Kastl v. Maricopa Cty. Comm. College Dist., No. 02–1531PHX–SRB, 2004 WL 2008954, at *2–3 (D. Ariz. June 3, 2004), *aff'd* 325

used an entirely new quasi-suspect class in order to protect trans people from discrimination.[79] Finally, a school defendant in a trans discrimination case argued that it "treat[ed] all boys and girls the same."[80] However, the plaintiff, a trans boy, was not treated the same.[81] Heightened scrutiny applied because the school's actions fell into a subgroup of sex discrimination in the form of sex stereotyping.[82]

These cases show that state actors have been discriminating against trans people as trans people have become more visible. The bathroom bill referenda further show the present state of distress over trans identities.[83] However, activists should not allow history to repeat itself; the same-sex marriage movement put trans people second, and the current trans rights movement should be careful to not put trans people who exist at intersections of oppression—trans poor people, trans people of color, trans indigenous people, trans people in prison, and trans people with disabilities—in last place.[84] Trans activists should center the most oppressed among the trans community in all efforts to bring about change for trans people.

A. Challenging the Mainstream LGBTQ Agenda

Ensuring that the most vulnerable among the LGBTQ community are served does not necessarily require impact litigation battles. Though there are definitions to be interpreted in various statutes, there are also lives to be cared for on the ground, right now. The members of the LGBTQ community being policed today in the highest numbers do not look like most of the recent flashpoint litigation plaintiffs.[85] Like the AIDS era necessitated a rise in legal services organizations,[86] trans people, including trans sex workers,

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Fed. App'x. 492 (9th Cir. 2009) ("[N]either a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that nonconforming trait.").

[79] Adkins v. City of New York, 143 F. Supp. 3d 134, 139–40 (S.D.N.Y. 2015); *accord* Bd. of Educ. v. U.S. Dep't of Educ., 208 F. Supp. 3d 850, 871–74 (S.D. Ohio 2016).

[80] Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017).

[81] *Id.* at 1045, 1052.

[82] *Id.* at 1051.

[83] *See* Scott L. Cummings, *Law and Social Movements: Reimagining the Progressive Canon*, 2018 Wis. L. Rev. 441, 499 (2018) ("[C]onservative resistance to LGBT rights persists and is currently reformulating around religious opt outs, bans on transgender bathrooms and military service, and ongoing efforts to limit the ability of same-sex parents to foster or adopt children.").

[84] *Cf.* Spade, *supra* note 73, at 31 ("Since the availability of marriage does not protect straight people of color, poor people, indigenous people, prisoners, or people with disabilities from having their families torn apart by child welfare systems, it is unlikely to do so for queer poor people, queer people of color, queer indigenous people, queer prisoners, and queer people with disabilities.").

[85] This critique is not a new one. *See generally* Cathy J. Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?*, 3 GLQ: J. Lesbian & Gay Stud. 437 (1997) (arguing that legal efforts have not led to transformative politics).

[86] *See* Gwendolyn M. Leachman, *From Protest to* Perry*: How Litigation Shaped the LGBT Movement's Agenda*, 47 U.C.D. L. Rev. 1667, 1716–17, 1722 (2014).

are some of today's most "vulnerable LGBTQ subpopulations."[87] Is the LGBTQ movement—with all of its various players—prioritizing its most precarious members?

In general, the answer is no. Two collections of essays[88] were published after *Obergefell* that situate the LGBTQ movement in queer theory in order to push thinkers, activists, and litigators toward these vulnerable parts of the community that have been waiting their turn. Surprisingly, the writers do not overlap in their suggestions besides a call for a more racially aware lens of persisting homophobia.[89] Other topics that they note should be included on the post-marriage agenda include sex workers' rights,[90] trans immigration,[91] trans medical needs,[92] LGBTQ youth navigating schools[93] and homelessness,[94] elders,[95] nonbinary people,[96] and polyamory.[97]

Most of these issues will not be easily accomplished through impact litigation, which is one possible, albeit generous, reason why the LGBTQ roundtable decided to forego them and pursue same-sex equality first.[98] The strengths of movement lawyering need to be teased out and applied to these issues if they are to come to fruition. Movement lawyering, like any client services, requires constant self-awareness of positionality and personal ethics.[99] It can be defined as "the use of integrated advocacy strategies, inside

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[87] Douglas NeJaime, *A New Vision for LGBT Rights Critique and Reform*, 2019 JOTWELL 1, 2 (2019).

[88] AFTER MARRIAGE EQUALITY: THE FUTURE OF LGBT RIGHTS (Carlos A. Ball ed. 2016) (hereinafter Ball); THE UNFINISHED QUEER AGENDA AFTER MARRIAGE EQUALITY (Angela Jones et al. eds. 2018) (hereinafter Jones).

[89] *See* Russell K. Robinson, *Diverging Identities*, *in* Ball, *supra* note 88, at 212, 225; Katherine Franke, *What Marriage Equality Teaches Us*, *in* Ball, 238, 247–50; Hari Ziyad, *Anti-Blackness and 'the Queer Agenda': Post-Conference Reflections with Hair Ziyad*, *in* Jones, *supra* note 88, at 16, 16–19; Jennicet Gutiérrez et al., *Systemic Violence: Reflections on the Pulse Nightclub Massacre*, *in* Jones, at 20, 26–28, 33.

[90] Kate D'Adamo, *Queering the Trade*, *in* Jones, *supra* note 88, at 35.

[91] Pooja Gehi & Gabriel Arkles, *The Tacit Targeting of Trans Immigrants as 'Criminal Aliens': Old Tactics and New*, *in* Jones, *supra* note 88, at 53.

[92] stef shuster, *Passing as Experts in Transgender Medicine*, *in* Jones, *supra* note 88, at 74.

[93] Ryan Thoreson, *LGBTQ Youth and Education: Rethinking Children's Rights in Schools*, in Jones, *supra* note 88, at 102.

[94] Brandon Andrew Robinson, *"I Want to be Happy in Life": Success, Failure, and Addressing LGBTQ Youth Homelessness*, *in* Jones, *supra* note 88, at 117.

[95] Nancy J. Knauer, *LGBT Elders: Making the Case for Equity in Aging*, *in* Ball, *supra* note 88, at 105, 114 (noting the re-closeting of LGBT elders is a public health concern and a civil rights issue).

[96] Carlos A. Ball, *A New Stage for the LGBT Movement: Protecting Gender and Sexual Multiplicities*, *in* Ball, *supra* note 88, at 157, 162–63.

[97] Joseph J. Fischel, *A More Promiscuous Politics: LGBT Rights Without the LGBT Rights*, *in* Ball, *supra* note 88, at 181.

[98] *Cf.* AMY L. BRANDZEL, AGAINST CITIZENSHIP: THE VIOLENCE OF THE NORMATIVE 86–93 (2016) (arguing instead that same-sex marriage sought to "incorporate and assimilate gays and lesbians into the norms of the national polity," *id.* at 87, which reproduces hierarchy and puts intersectional issues of mass incarceration and class struggle second).

[99] *See generally* Susan D. Carle & Scott L. Cummings, *A Reflection on the Ethics of Movement Lawyering*, 31 GEO. J. LEGAL ETHICS 447 (2018) (historicizing movement lawyering and exploring its legal ethics implications).

and outside of formal lawmaking spaces, by lawyers who are accountable to mobilized social movement groups to build the power of those groups to produce or oppose social change goals that they define."[100] In a critique of NAACP Legal Defense Fund's *Brown v. Board* litigation, Professor Derrick Bell cautioned that public interest lawyers have an "asymmetrical power" relationship with their client that "enables lawyers to pursue their own political vision over client interests, undermining the core professional tenet of client accountability."[101] After Bell, some thought public interest lawyering overall was "insufficiently self-reflective" and "untethered from the interests of the vulnerable communities they claimed to represent."[102] Such critics pushed the field toward a "client-centered approach, in which lawyers deferred to their clients' stated aims, articulated after active dialogue and counseling."[103] Movement lawyers are accountable "to mobilized social movement organizations that have the resources and political power to advance campaigns . . . [, assuaging the] concern about lawyers dominating vulnerable clients because [such] groups are organized and sophisticated—able to assert power in collaborations with lawyers."[104]

Theorists have analyzed movement lawyering's strengths and found some best practices: allowing movement stakeholders to "identify targets, tactics, and goals;"[105] "achieving discrete policy wins[;] building public support[;] strengthening grassroots participation[;] reinforcing the organizational capacity of the movement itself[;]"[106] integrating lawsuits with "policy, organizing, and media initiatives"[107] in order to maximize the nonlegal advocacy; using legislative reforms to restore the funding for legal services in order to assist them in pursuing "large-scale resource-intensive lawsuits;"[108] being wary of the overuse of pro bono lawyering;[109] using private public interest firms for all they're worth while understanding they, too, have limits and "are unlikely to be tightly integrated with, and accountable to, social movements;"[110] and exploring law school clinics further.[111]

Interestingly, some theorists point to the same-sex marriage movement as an example of movement lawyering done right.[112] This reveals the crux of

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[100] Carle & Cummings, *supra* note 99, at 452.

[101] *Id.* at 454 (characterizing Bell's work, Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976)).

[102] *Id.* at 455.

[103] *Id.*

[104] *Id.* at 457.

[105] *Id.*

[106] *Id.*

[107] Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603, 615 (2009).

[108] *Id.* at 621.

[109] *Id.* at 622–23.

[110] *Id.* at 625.

[111] *Id.* at 625–28.

[112] *See* Carle & Cummings, *supra* note 99, at 458; Cummings & Rhode, *supra* note 107, at 616.

the issue: Who belongs to the LGBTQ movement? Who sets the agenda? Who leads? If those who already hold privilege are allowed to set the terms, fund non-profit organizations, work with lawyers to bring cases forward, fund mass-media campaigns, and bring other organizations into the same room, power does not get redistributed. Instead, affluent (likely white, likely male), professional, healthy, and otherwise privileged parts of the LGBTQ community have their needs met, while others are sidelined. The formal legal LGBTQ equality movement can be held up as a model even though many on the inside continue to offer critiques of how it has let down its own community—often its trans subcommunity.[113] Professor Marie-Amélie George warns us not to fixate on the exceptional plaintiffs: "[T]here is a significant difference between arguing on behalf of a single plaintiff, or before an administrative agency, and the large-scale, media-intensive work of the anti-sodomy or marriage equality movement."[114] That precise media work led "heterosexuals who accept gays[’] and lesbians[’] rights [to] 'draw the line' at transgender rights, in part because transgender individuals seem to violate fundamental social norms in a way gays and lesbians do not."[115]

Further, cis[116] lesbian, gay, and bisexual activists also drew that line. Infamously, the Human Rights Campaign, which Professor Dean Spade called a "conservative national gay and lesbian organization,"[117] excluded trans people from the pursuit of the Employment Non-Discrimination Act, chasing the desire to achieve same-sex rights at any cost, including the formal legal equality of transgender people.[118] In this instance, assimilationist social movement lawyering for gay rights delayed equality for trans people. Movement lawyers must always center the most marginalized within the movement lest this occur again.[119]

As the next section shows, trans people in prison face legal challenges that were not resolved by *Bostock*'s Title VII holding. The Supreme Court has not taken a case on trans people in prison and the violence they face in over twenty-five years. Now that litigants have created a circuit split on the question whether trans people have a right to gender-affirming medical care while in prison, there is a chance that the Court would grant certiorari, and, given the make-up of the current Justices, the outcome may not be favorable.

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[113] *See, e.g.*, Marie-Amélie George, *The LGBT Disconnect: Politics and Perils of Legal Movement Formation*, 2018 Wis. L. Rev. 503 (2018).

[114] *Id.* at 567.

[115] *Id.* at 570–71.

[116] An abbreviation of "cisgender." *Cis*, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/cis (last visited Nov. 1, 2020); *see* GLAAD, *supra* note 4, at 11 ("A term used . . . to describe people who are not transgender.").

[117] Spade, *supra* note 73, at 39.

[118] *Id.* at 38–39.

[119] *See* Arkles et al., *supra* note 70, at 619–624 (describing examples that valued the importance of allowing formerly incarcerated trans people of color lead in conference and convenings that set movement agendas).

B. Prison Reforms Sought by Trans Litigants

In 2003, Congress recognized the additional harm facing trans people in prison by passing the Prison Rape Elimination Act[120] (PREA). In doing so, Congress cited[121] *Farmer v. Brennan*,[122] a case brought by a Black trans woman plaintiff that deals directly with safety in prison. Dee Farmer, an "overtly feminine" trans woman, had been segregated "at a different federal prison because of safety concerns."[123] Nevertheless, she was housed in the general population of her new maximum-security prison and was "brutally beaten and raped by" the person who shared her cell "less than two weeks later."[124] The Court held that there was a genuine dispute over whether Farmer's corrections officers knew about and must have taken into consideration the risk that she faced as a trans person in prison such that her motion should have survived summary judgment.[125] The Court promulgated a new rule that a prison official may be held liable for "deliberate indifference" to a plaintiff's Eighth Amendment right to protection against violence while in custody if the official "knows that [the plaintiff] . . . face[s] a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."[126] The Court's new standard meant that, beyond the case at hand, prison officials "should be aware of the heightened risk for [trans people] and protect them."[127] If a trans person notifies prison officials of their gender, the officials should take steps to protect that person.[128] Deliberate indifference, then, seemed to be established by the assertion of a trans gender identity alone.[129]

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[120] Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (2003).
[121] 42 U.S.C. § 15601 (2012).
[122] 511 U.S. 825 (1994).
[123] *Id.* at 852 (Blackmun, J., concurring).
[124] *Id.*
[125] *See id.* at 848–49 (majority) (remanding the grant of summary judgment because there was evidence on the record showing the prison officials were aware of the risk Farmer faced, such as the government's "admission that petitioner is a 'non-violent' transsexual who, because of petitioner's 'youth and feminine appearance' is 'likely to experience a great deal of sexual pressure' in prison," *id.* at 848).
[126] *Id.* at 847.
[127] American Civil Liberties Union and National Center for Lesbian Rights, Know Your Rights: Laws, Court Decisions, and Advocacy Tips to Protect Transgender Prisoners 4 (2014), http://www.nclrights.org/wp-content/uploads/2014/12/KnowYourRights_GuidetoProtectTransgenderPrisoners.pdf (quoting Lojan v. Crumbsie, No. 12 CV.0320 LAP, 2013 WL 411356, at *4 (S.D.N.Y. Feb. 1, 2013) (finding mere knowledge that plaintiff was trans was sufficient to put prison officials on notice that she was susceptible to physical attack)).
[128] *See id.* (quoting Green v. Brown, 361 F.3d 290, 293–95 (6th Cir. 2004) (holding defendant's knowledge of trans people's vulnerability raised issue of fact as to deliberate indifference in failing to take protective measures); Green v. Hooks, No. 6:13-cv-17, 2013 WL 4647493, at *3 (S.D. Ga. Aug 29, 2013) (concluding allegations that defendants were aware that trans plaintiff feared for her life and that "prison is dangerous for transgender [people]" stated plausible case of deliberate indifference)).
[129] This expanded the deliberate indifference standard previously set forth in *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (finding "deliberate indifference to serious medical

Trans plaintiffs like Farmer are the miner's canary for sexual violence occurring in prison. Farmer's case pointed out her particular vulnerability as a trans woman, but the Court's ruling is more expansive. This was explored during oral argument when Farmer's counsel posed:

> Suppose we were making a list of people who would be at obvious risk of sexual assault if placed in a high security male prison. Women would be at the top of the list, surely, and the risk is so obvious that we cannot imagine a prison deciding to confine women in general population at a male high security facility. But also, near the top of the list would be someone who had the appearance and demeanor of a woman, a transsexual like petitioner.[130]

Justice Ginsburg responded: "How about a young man with a slight build, youthful 18, 19-year-old, slender male[?]"[131] Counsel replied: "[O]ne could easily imagine a number of facilities in which a person as described by Your Honor would be at obvious and unreasonable risk in general population."[132] This flags the broader reach of *Farmer*, PREA, and this Note beyond the realm of trans people in prison.[133] Young men, particularly first-time offenders, are known to be at increased risk of sexual victimization; as included in PREA, Congress found that juveniles in adult prison are often sexually assaulted within the first 48 hours of their incarceration.[134] Justice Ginsburg's question was prescient. Accordingly, *Farmer*'s deliberate indifference standard for the sexual violence that people in prison could face has been used for Eighth Amendment claims for cis[135] and trans plaintiffs alike.

PREA was passed by Congress in 2003 and the U.S. Department of Justice (DOJ) promulgated the Final Rule in 2012.[136] The Final Rule created some specific protections for trans people. It banned physical exams of trans and intersex people for the sole purpose of determining their genital status.[137] It further prohibited agencies from assigning trans and intersex people to housing or programming assignments based on genital status; rather, the agency must consider on a case-by-case basis whether a placement would

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needs of [people in prison]" violative of the Eighth Amendment), and applied it to the new area of sexual violence.

[130] Transcript of Oral Argument, Farmer v. Brennan, 511 U.S. 825, 1994 WL 662567, at 9 (1994) (No. 92-7247).

[131] *Id.*

[132] *Id.* at 10.

[133] *See, e.g.*, Carl Weiss & David James Friar, Terror in the Prisons: Homosexual Rape and Why Society Condones It 138–40 (1974) ("Prison rapists consider themselves masculine conquerors of effeminate punks. According to prison rapists, the aggressor is not a homosexual." *Id.* at 138.).

[134] Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601 (2012).

[135] *See, e.g.*, Michelle Ortiz v. Paula Jordan, 562 U.S. 180, 182–83, 190 (2011) (endorsing the application of *Farmer* to a cis woman plaintiff); Spruce v. Sargent, 149 F.3d 783, 785–86 (8th Cir. 1998) (applying *Farmer* to a cis man plaintiff and remanding grant of summary judgment).

[136] 28 C.F.R. § 115 (2014).

[137] 28 C.F.R. § 115.15 (e).

ensure health and safety, and whether the placement would present management or security problems, giving serious consideration to the person's own views regarding their safety.[138] Finally, it gave trans and intersex people "the opportunity to shower separately from other" people.[139] Congress found that states that do not comply with PREA demonstrate deliberate indifference.[140] As a consequence, the federal funding provided to a state for prison purposes is reduced by 5% unless the state adopts the national PREA standards or assures that no less than 5% of their federally received funds would be applied to adopting and complying with those standards on the state level.[141]

PREA's promulgation notwithstanding, trans people in prison have had to rely on litigation to enforce their rights. In recent years, impact litigators have focused on trans people's needs for hormone therapy,[142] women's cosmetic and commissary items,[143] transfer to women's prisons,[144] and access to gender-affirming surgeries.[145] This type of representation improves the lives of trans people in prison through gender-affirming dress[146] and medical care, both of which can benefit their mental health. Indeed, the importance of this debate cannot be understated; a groundbreaking study showed a correlation between the amount of gender-affirming care trans people in prison receive and their likelihood of attempting suicide.[147] Federal law offers four potential lines of argument for trans plaintiffs in prison: Eighth Amendment, disability law, equal protection, and due process. With some exceptions, these cases have had limited reach, either to one plaintiff, one prison, or one federal district.

1. *Eighth Amendment*

The Eighth Amendment has been the primary vehicle for trans people seeking gender-affirming care in prison. Six federal circuit courts have engaged with the question whether denying some form of gender-affirming expression or medical access is an act of deliberate indifference to gender

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[138] 28 C.F.R. § 115.42 (c).
[139] 28 C.F.R. § 115.42 (f).
[140] 42 U.S.C. § 15601.
[141] 42 U.S.C. § 15607.
[142] *See* Keohane v. Jones, 328 F. Supp. 3d. 1288, 1293 (N.D. Fla. 2018) (granting access to hormone therapy, female clothing, and female grooming standards).
[143] *See* Quine v. Beard, No. 14-cv-02726-JST, 2017 WL 4551480, at *1 (N.D. Ca. Oct. 12, 2017) (denying defendant's motion to stay court order granting enforcement of a settlement granting women's property to trans plaintiff).
[144] *See* Doe v. Mass. Dep't of Corr., Civil Action No. 17-12255-RGS (June 14, 2018) (denying defendant's motion to dismiss and granting preliminary injunction to transfer a trans woman to women's prison).
[145] *See* Kosilek v. Spencer, 774 F.3d 63 (1st Cir. 2014) (en banc) (denying deliberate indifference claim for gender-affirming surgery); Gibson v. Collier, 920 F.3d 212 (5th Cir. 2019) (same). *But see* Norsworthy v. Beard, 87 F. Supp. 3d. 1164, 1195 (N.D. Ca. 2015) (granting preliminary injunction for surgery).
[146] *See* Arkles, *supra* note 53, at 871–86.
[147] *See* Drakeford, *supra* note 27, at 177–79.

dysphoria.[148] Three circuits reaching the merits made rulings that were negative for trans rights,[149] and only one circuit reaching the merits was positive.[150] The Ninth Circuit created a circuit split on this issue in August 2019.[151]

The circuits that found no deliberate indifference for withholding gender-affirming medical care built on one another over the span of six years. The first was *Kosilek v. Spencer*,[152] a 2014 decision from the First Circuit sitting en banc. The First Circuit did not mandate a single approach to treating the gender dysphoria of a trans patient in prison when given two medically "adequate options," one of which did not include gender-affirming surgery.[153] The First Circuit warned that it did not "create a de facto ban against [gender-affirming surgeries] as a medical treatment for any incarcerated individual," which "would conflict with the requirement that medical care be individualized based on a particular [person's] serious medical needs."[154]

The Fifth Circuit's decision in *Gibson v. Collier*[155] showed how *Kosilek* may have negative implications for trans rights in the future. *Gibson* held that a state policy that does not permit gender-affirming surgeries for trans people in prison—a de facto ban—does not violate the Eighth Amendment.[156] Here, Texas's policies did not designate surgery as part of the treatment protocol for gender dysphoria.[157] The plaintiff, Vanessa Lynn Gibson,[158] argued that this prevented the prison officials from considering the medical

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[148] *See, e.g.*, Campbell v. Kallas, 936 F.3d 536, 538 (7th Cir. 2019); Kosilek v. Spencer, 774 F.3d 63, 90 (1st Cir. 2014) (en banc); Gibson v. Collier, 920 F.3d 212 (5th Cir. 2019); De'Lonta v. Johnson, 708 F.3d 520, 522–23 (4th Cir. 2013); Edmo v. Corizon, Inc., 935 F.3d 757, 785–97 (9th Cir. 2019); Keohane v. Fla. Dep't of Corr. Sec'y, 952 F.3d 1257, 1262 (11th Cir. 2020).

[149] *Gibson*, 920 F.3d at 216 (upholding ban on gender affirmation surgery); *Keohane*, 952 F.3d at 1272–78 (rejecting gender dysphoria as a basis for medically necessary accommodations); *Campbell*, 936 F.3d at 549 (rejecting medical care besides hormone therapy).

[150] *Edmo*, 935 F.3d at 785–97 (9th Cir. 2019).

[151] *See id.*

[152] 774 F.3d 63 (1st Cir. 2014) (en banc).

[153] *See id.* at 90.

[154] *See id.* at 91.

[155] 920 F.3d 212 (5th Cir. 2019).

[156] *See id.* at 216.

[157] *Id.* at 218.

[158] The Fifth Circuit went so far as to include the plaintiff's legal name and "he" pronouns in the opinion, *see id.* at 216, a rude and transphobic act. In *Bostock*, none of the opinions go to such lengths for Aimee Stephens, *see* Bostock v. Clayton Cty., No. 17-1618, passim (U.S. June 15, 2020), which one legal scholar found notable, *see* Alexander Chen, *Gay Rights and Trans Rights Are Indivisible. SCOTUS Just Showed Why.*, SLATE (June 18, 2020, 10:31 A.M.), https://slate.com/news-and-politics/2020/06/gay-transgender-rights-indivisible-supreme-court.html [https://perma.cc/4RJW-6WG3] ("The court also reinforced the implicit validation of Aimee Stephens' female gender identity by using female pronouns to refer to her throughout the opinion. These analytical and linguistic moves allowed the court to legitimate Stephens' gender identity as a woman, even as the court declined to formally define sex in the opinion.").

necessity of her surgery under the World Professional Association for Transgender Health Standards of Care[159] (WPATH). Her claim was dismissed at summary judgment,[160] and Judge Ho affirmed.[161] Texas did not dispute that Gibson has a serious medical need,[162] so the opinion turned on deliberate indifference. The Fifth Circuit cited *Kosilek* to show an ongoing controversy around the medical necessity of gender-affirming surgery, framing WPATH's guidance as "merely one side in a sharply contested medical debate" and holding that Texas rightfully chose one of two alternatives.[163] The Fifth Circuit ignored the fact that the Fourth and Seventh circuits had already acknowledged WPATH as the generally accepted protocol for treating trans patients.[164] The *Gibson* dissent cites two district court opinions granting gender-affirming surgeries that both critiqued the state's expert witness in *Kosilek*, Dr. Stephen Levine, as misrepresenting WPATH[165] and as an outlier in the field who was not credible.[166]

Before *Kosilek*, the Seventh Circuit upheld the invalidation of the Wisconsin Department of Corrections policy that prohibited medically necessary treatment for gender identity under an Eighth Amendment challenge.[167] However, this opinion did not create a positive obligation on the state. Later, the Seventh Circuit found that there was no clearly established state requirement to provide trans people in prison with any gender-affirming care besides hormone replacement therapy.[168]

The Fourth Circuit reversed and remanded the dismissal of an Eighth Amendment claim for gender-affirming surgeries, stating there was a plausible claim.[169] This was a step forward from the Seventh Circuit, but given the case was remanded, the Fourth Circuit did not reach the merits.

For the first time in the federal circuit courts, the Ninth Circuit upheld the district court's finding that a gender-affirming surgery was medically necessary and that the prison medical official was deliberately indifferent to serious medical needs when he denied the surgery.[170] The Ninth Circuit emphasized that the First Circuit did not create a de facto ban against gender-

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[159] WPATH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 54 (7th ed. 2011).

[160] *Gibson*, 920 F.3d at 218.

[161] *Id.* at 228.

[162] *Id.* at 219.

[163] *Id.* at 221.

[164] *See* De'Lonta v. Johnson, 708 F.3d 520, 522–23 (4th Cir. 2013) ("The Standards of Care, published by the World Professional Association for Transgender Health, are the generally accepted protocols for the treatment of GID.") (citation omitted); Campbell v. Kallas, 936 F.3d 536, 538 (7th Cir. 2019).

[165] *See* Edmo v. Idaho Dep't of Corr., 358 F. Supp. 3d 1103, 1125 (D. Idaho 2018); Norsworthy v. Beard, 87 F. Supp. 3d 1164, 1183, 1188 (N.D. Cal. 2015).

[166] *Edmo*, 358 F. Supp. 3d at 1125.

[167] *See* Fields v. Smith, 653 F.3d 550, 559 (7th Cir. 2011).

[168] *See Campbell*, 936 F.3d at 549.

[169] *De'Lonta*, 708 F.3d at 522.

[170] *See* Edmo v. Corizon, Inc., 935 F.3d 757, 785–97 (9th Cir. 2019).

affirming surgeries.[171] The opinion carefully critiqued the Fifth Circuit's interpretation of *Kosilek*. The Ninth Circuit said *Gibson* "contradicts and misconstrues the precedent it purports to follow,"[172] and said the opinion suffered from relying "on an incorrect, or at best outdated, premise that '[t]here is no medical consensus that [gender-affirming surgery] is a necessary or even effective treatment for gender dysphoria.'"[173]

In 2020, the Eleventh Circuit reached the issue. In *Keohane v. Jones*,[174] brought by the ACLU, a federal district court granted the plaintiff hormone therapy and female clothing and grooming standards, allowing her to grow out her hair, and found the defendants' rationale for "denial of care based on 'security concerns' constitute[d] deliberate indifference to her gender dysphoria."[175] The Eleventh Circuit reversed.[176] The Eleventh Circuit dismissed the medical necessity argument for hormone therapy because it was moot[177] and rejected the argument that gender dysphoria would necessitate any kind of social transitioning under the Eighth Amendment.[178] Both the vigorous dissent and the majority opinion notably omitted *Gibson* from their analyses; the majority placed the discussion squarely in *Kosilek*, while the dissent discussed *Kosilek* and *Edmo*.

If the Court takes up the question raised by the circuits, it is likely to avoid the question of deliberate indifference and instead focus on *Kosilek*'s battle of the experts and narrow medical necessity determination. The circuit opinions are firmly rooted in the pathologization of gender identity as a condition for medical necessity claims. Spade has made a crisp critique of this requirement in medical procedures and in other avenues that provide legal recognition of a trans identity.[179] Under the deliberate indifference standard, trans people must exhibit "serious medical need"[180] in order to receive care while incarcerated. Battles have been waged in court over who gets to define that need, risking cultural backslide instead of striving toward progress.[181]

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[171] *Id.* at 797.

[172] *Id.*

[173] *Id.* at 795 (citing Gibson v. Collier, 920 F.3d 212, 223 (5th Cir. 2019)); *cf.* Linda D. Chin, Note, *A Prisoner's Right to Transsexual Therapies: A Look at* Brooks v. Berg, 11 CARDOZO WOMEN'S L.J. 151, 175–76, 264 (2004) (arguing that gender-affirming surgeries are not life-saving or necessary, and therefore should not be covered by the government for trans people in prison).

[174] 328 F. Supp. 3d. 1288 (N.D. Fla. 2018).

[175] *Id.* at 1306.

[176] Keohane v. Fla. Dep't of Corr. Sec'y, 952 F.3d 1257, 1262 (11th Cir. 2020).

[177] *Id.* at 1272.

[178] *See id.* at 1272–78.

[179] *See* Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 16–18, 24–26 (2003). Spade notes that this requirement entrenches binary gender normativity and ties a trans person's identity to a dysphoria diagnosis in order to receive care. *Id.*

[180] Estelle v. Gamble, 429 U.S. 97, 104 (1976); *accord* Kosilek v. Spencer, 774 F.3d 63, 91 (1st Cir. 2014) (en banc); Gibson v. Collier, 920 F.3d 212, 219 (5th Cir. 2019); Edmo v. Corizon, Inc., 935 F.3d 757, 767 (9th Cir. 2019).

[181] By this I mean that the hyper-fixation with which courts have focused on medical diagnoses of trans people seeking care has implied that trans people in prison are not

Once they pass the threshold issue whether a plaintiff is "trans enough" to receive care, courts have shifted the battle to whether the treatments for gender dysphoria, as set forth in the WPATH Standards of Care, are legitimate or necessary.[182] Given these terms of debate, the courts have fallen behind. Trans advocates have helped some medical providers in society move on from requiring the medical necessity of gender-affirming care to be proven based on the rigid guidelines of medical gatekeepers,[183] and the Eighth Amendment demands that courts must follow suit.

2. *ADA, Equal Protection, and Due Process Claims*

Federal disability law, promulgated by the Americans with Disabilities Act (ADA)[184] and the Rehabilitation Act of 1973,[185] has recently been applied to gender dysphoria cases.[186] Even though gender identity was excluded from the ADA,[187] gender dysphoria was not. In *Doe v. Massachusetts*

"trans enough" for the daily violence they experience in a gendered prison to be remedied if they do not experience the "serious medical need" to receive particular types of gender-affirming medical interventions. This Note offers an alternative path: focusing on the harm that trans people experience rather than obsessing over criteria to qualify for protection only after a medical practitioner deems the person "trans enough." Trans people may experience gender-based violence regardless of whether their particular experience of gender dysphoria would be diagnosed as a serious medical need. Further, the focus on harm instead of the particularities of dysphoria keeps this path open to other prison populations.

[182] *See Gibson*, 920 F.3d at 223; *Keohane*, 952 F.3d at 1272–78.

[183] *See* Evan Urquhart, *Gatekeepers vs. Informed Consent: Who Decides When a Trans Person Can Medically Transition?*, SLATE (Mar. 11, 2016, 4:18 PM), https://slate.com/human-interest/2016/03/transgender-patients-and-informed-consent-who-decides-when-transition-treatment-is-appropriate.html [https://perma.cc/DS6J-GVS4]; Harron Walker, *How Medical Institutions Drive Trans Women Underground*, OUT MAG. (Mar. 14, 2019, 8:00 AM), https://www.out.com/health/2019/3/14/how-medical-institutions-drive-trans-women-underground [https://perma.cc/3HRN-RCL5]; *cf.* Carey Callahan, *Gender Identity Is Hard but Jumping to Medical Solutions Is Worse*, ECONOMIST (Dec. 3, 2019), https://www.economist.com/open-future/2019/12/03/gender-identity-is-hard-but-jumping-to-medical-solutions-is-worse [https://perma.cc/9MTK-K4XH] (acknowledging that gatekeeping through "a series of requirements and assessments . . . restricted access in the past" and that "informed-consent protocols have become the norm rather than the exception," specifically at "American colleges, LGBT health centres and recently many Planned Parenthoods," though ultimately arguing for a middle ground that requires more than informed consent).

[184] 42 U.S.C. § 12101.

[185] 29 U.S.C. § 701.

[186] *See, e.g.,* Blatt v. Cabela's Retail Inc., No. 5:14-CV-04822, 2017 WL 2178123, at *16 (E.D. Pa. May 18, 2017) (holding plaintiff's gender dysphoria was disabling and granting reasonable accommodations); *cf.* Ali Szemanski, Note, *When Trans Rights Are Disability Rights: The Promises and Perils of Seeking Gender Dysphoria Coverage Under the Americans with Disabilities Act*, 43 HARV. J.L. & GENDER 137, 159–65 (2020) (describing both the utility and the caveats of pursuing this line of litigation).

[187] *See generally* Taylor Payne, Note, *A Narrow Escape: Transcending the GID Exclusion Act in the Americans with Disabilities Act*, 83 MO. L. REV. 799 (2018) (explaining that Congress excluded transvestitism, transsexualism, pedophilia, gender identity disorders not resulting from physical impairments, or other sexual behaviors from ADA protection).

Department of Correction,[188] for example, Angelina Resto—who was represented by the LGBTQ impact litigation firm, GLAD[189]—brought multiple legal claims to federal court seeking an injunction to make the Massachusetts Department of Correction (MDOC) transfer her from a men's correctional facility to a women's correctional facility.[190] In a decision denying MDOC's motion to dismiss, Judge Stearns found that Resto would likely prevail on both the ADA and equal protection claims.[191] However, the court based its findings on the ADA accommodations granted to her gender dysphoria diagnosis, not on her trans status as a whole, to explicitly rule in a way that adhered to constitutional avoidance.[192] Mining the statutory interpretation power within the ADA would be a possible avenue for medical claims, but it is also likely to get caught in the medical necessity debate in the Eighth Amendment jurisprudence.

The Fourteenth Amendment's protection against discrimination on the basis of sex has created an equal protection argument for trans status.[193] Any classification of trans people is reviewed under intermediate scrutiny, by which "gender must serve important governmental objectives and must be substantially related to achievement of those objectives" to be upheld.[194] The "burden of justification" for the classification "is demanding and it rests entirely on the State," which must prove to a court that the justification is "exceedingly persuasive."[195] In the First Circuit, for example, a trans person in prison must be treated the same as another person in prison whom any "prudent person, looking objectively at the incidents, would think [is] roughly equivalent and . . . similarly situated" to the trans person.[196]

The very first successful case for trans people in prison seeking medical care came in the form of a statutory claim, not a constitutional one. In *Cruz v. Zucker*,[197] Judge Rakoff held gender-affirming surgeries for a trans person in prison were covered by the Medicaid Act.[198] In 2019, a district court in

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[188] Doe v. Mass. Dep't of Corr., No. 17-12255, 2018 WL 2994403, at *1 (D. Mass. June 14, 2018).

[189] Doe v. Mass. Dep't of Corr., GLBTQ Legal Advocates & Defenders (2020), https://www.glad.org/cases/doe-v-massachusetts-department-correction/ [https://perma.cc/434S-Q85Z].

[190] *See* Complaint at 2, Doe, 2018 WL 2994403 (No. 17-12255) (listing claims under the ADA, the Rehabilitation Act, section 1983 of the Civil Rights Act, equal protection and due process under the Fourteenth Amendment, and equal protection and due process under the Massachusetts Constitution).

[191] *Doe*, 2018 WL 2994403, at *12.

[192] *See id.* at *7–8.

[193] *See* Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 571 (6th Cir. 2018).

[194] Craig v. Boren, 429 U.S. 190, 197 (1976).

[195] United States v. Virginia, 518 U.S. 515, 533 (1996).

[196] Davis v. Coakely, 802 F.3d 128, 133 (1st Cir. 2015) (quoting Barrington Cove Ltd. P'ship v. Rhode Island Hous. & Mortg. Fin. Corp., 246 F.3d 1, 8 (1st Cir. 2001)).

[197] 116 F. Supp. 3d 334 (S.D.N.Y. 2015) (granting the right to gender-affirming surgeries for Medicaid recipients).

[198] *See id.* at 336.

Wisconsin built upon *Cruz* and found a successful equal protection claim for gender-affirming surgeries under Medicaid, on top of the statutory claims raised by the plaintiff.[199] Though this claim has not reached the circuit courts, future equal protection claims might be able to skirt the medical necessity debate under the deliberate indifference standard.

Finally, the Supreme Court held that "[p]rison housing classifications give rise to a protected liberty interest only if the classification creates an 'atypical and significant hardship on the [person] in relation to the normal incidents of prison life.'"[200] This due process right could apply to arguments for privacy and bodily integrity. In the Massachusetts case, for example, the district court held that some examples that met the atypical and significant hardship standard included "fears for her physical safety, the potential for sexual violence and assault, the trauma and stigmatization instilled by undergoing regular strip-searches by male guards and, on occasion, being forced to shower in the presence of [men]."[201]

These claims coexist with Eighth Amendment arguments as viable paths forward for litigants, but they face a significant hurdle: discretion granted to corrections officials.

3. *Safety and Security Exigency Exception*

Prisons have a fairly sweeping defense to the civil claims brought under any of the legal theories discussed in this Part. There is an exigency exception in most prison regulations regarding gender-affirming care.[202] For trans people in prison, "exigent circumstances" is a catch-all term that provides discretion to corrections officials to determine when they are able to supersede any given PREA protection because of the safety and security considerations involved with managing a prison.[203] This follows a theme of "[j]udicial deference to prison officials . . . in the federal courts."[204] This broad exception to civil rights protections could be the death knell for trans prison litigation. An exigency exception was considered in the Massachusetts case. There, Judge Stearns pointed out that Resto had no disciplinary problems and did not present a security risk because she was serving a sen-

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[199] *See* Flack v. Wis. Dep't of Health Servs., 395 F. Supp. 3d 1001, 1022 (W.D. Wis. 2019).

[200] Sandin v. Conner, 515 U.S. 472, 484 (1995).

[201] Doe v. Mass. Dep't of Corr., No. 17-12255, 2018 WL 2994403, at *11 (D. Mass. June 14, 2018).

[202] *See, e.g.*, MASS. GEN. LAWS ch. 127 § 32A (2018) (amended in 2018 M.G.L.A. 69 § 91, effective Dec. 31, 2018) ("[U]nless the commissioner, the sheriff or a designee of the commissioner or sheriff certifies in writing that the particular placement would not ensure the prisoner's health or safety or that the placement would present management or security problems.").

[203] *See, e.g.*, 28 C.F.R. 115.15 (prohibiting cross-sex searches and physical searches to determine the status of a person's genitalia unless "exigent" circumstances require).

[204] Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 961 & n.306 (2009).

tence for a nonviolent drug offense.[205] This improved her case for transfer, in the eyes of the court—or at least should have weighed in her favor as Massachusetts calculated the risk of her transfer. The court stated that "generalized concerns for prison security are insufficient to meet the 'demanding' burden placed on the State to justify sex-based classifications."[206] Offering a hypothetical, Judge Stearns considered that a trans person "might pose a safety risk to other [people in prison] . . . where the [trans person] has a past history of crimes involving violence or sexual assault," citing the security exigency in the statute.[207]

This dicta risks creating yet another charmed circle. Trans people's susceptibility to violence in prison does not change based on the nature of their offenses. Judge Stearns's hypothetical comparator was later actualized in his own district. Katheena Soneeya had been serving a life sentence without the possibility of parole for the murder of two women[208] when she brought a civil suit to transfer to a women's prison.[209] Judge Woodlock offered commentary that intimated that it may be possible for her and potentially future trans plaintiffs to overcome the safety and security exigency. The transcript of the bench trial shows Judge Woodlock's discussion of the exigency exception.[210]

The Assistant Attorney General representing the MDOC was cross-examining the plaintiff's expert witness, Dr. Randi Ettner—a physician who works with WPATH and who had diagnosed Soneeya with gender dysphoria and had recommended her transfer to a women's prison.[211] MDOC asked Dr. Ettner if she had considered Soneeya's crimes when Dr. Ettner made her recommendation.[212] Judge Woodlock cut off the line of questioning regarding a security exigency with a set of questions directed at MDOC that noted that Dr. Ettner should not be responsible for considering past crimes when making her diagnosis[213] and pointed out that Dr. Ettner was "not simply a backboard against which to throw arguments"[214] about "safety and security problems."[215] Further, Judge Woodlock rhetorically asked whether there were other women in the same women's prison who were "murderers of

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[205] *Doe*, 2018 WL 2994403, at *10–11.
[206] *Id.* at *10 (quoting United States v. Virginia, 518 U.S. 515, 531 (1996)).
[207] *Id.*
[208] Soneeya v. Spencer, 851 F. Supp. 2d 228, 230 (D. Mass. 2012).
[209] Soneeya (fka Hunt) v. Mici, No. 1:07-cv-1232 (D. Mass.) (pending), https://www.courtlistener.com/docket/4925577/soneeya-fka-hunt-v-mici/?page=2 [https://perma.cc/GCJ9-EXMQ].
[210] Transcript of Bench Trial Day 1 at 1-64 to 1-70, Soneeya v. Turco, (D. Mass. Apr. 8, 2019) (No. 07-12325-DPW).
[211] *Id.* at 1-64 to 1-66.
[212] *Id.* at 1-67.
[213] *See id.* at 1-69 to 1-70.
[214] *Id.* at 1-70.
[215] *Id.* at 1-69.

women" and who "have abused other women," such that treating them as "undifferentiated" was not helpful.[216]

This line of questioning could bode well for the decision still to come on Soneeya's transfer. One could even argue that there is sex discrimination at play when the government raises an exigency requirement against a trans woman seeking transfer to a women's prison—such as emphasizing the violent crimes that Soneeya committed for which she was serving time in prison—when there are other women who pose similar risks there who did not receive similar hesitation regarding their placement. Soneeya did not raise a sex discrimination argument in response to the exigency, but Judge Woodlock's inquiry makes it seem as if he is poised to consider it.

This intra-district conflict shows that the courts have not reached consensus on the exigency issue. There is ample judicial discretion over the extent to which the exigency will hold significance in the adjudication, just as corrections officers have plenty of discretion regarding how they will enforce PREA's requirements. The matter is ripe for litigation, but it is also a constant hindrance for trans people in prison, particularly those who hope to transfer to women's prisons in order to reduce the amount of harm they are experiencing on a regular basis.[217]

Trans people who discover their identity while within prison and who are able to convince the medical review board of their symptoms must go through grievances and likely litigation in order to access gender-affirming care. Though President Obama ended the practice of "freeze frame" policies in federal prisons,[218] litigants have still had to bring claims against state Departments of Corrections practices of limiting gender-affirming care to whatever treatment trans people in prison had when they first entered

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[216] *Id.* at 1-68; *see also* Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & C.R.L. REV. 515, 519–27 (2009) (discussing the systemic violence of prisons as arguing that people in prison are not any more prone to violence than people not in prison and noting that trans people are disproportionately targeted in prison).

[217] This group may be broader than trans women because it may include nonbinary people housed in men's prisons. *See supra* note 54.

[218] *See* Matt Apuzzo, *Transgender Inmate's Hormone Treatment Lawsuit Gets Justice Dept. Backing*, N.Y. TIMES (Apr. 3, 2015), https://www.nytimes.com/2015/04/04/us/ashley-diamond-transgender-hormone-lawsuit.html [https://perma.cc/9BEE-5GYP]. Under "freeze frame" policies, once trans people entered prison or jail, they were only allowed to access the gender-related medical care they were already formally diagnosed by a medical professional and prescribed with hormone replacement therapy (HRT) before incarceration. *Id.* They were prohibited from "expanding or starting new treatments." *Id.* This barred access to those trans people who the prison may not have noted as trans during the intake process, *id.*, or who may have found alternate ways of accessing HRT through their community networks, *see, e.g.*, Kirsty Clark et al., *Structural Inequities and Social Networks Impact Hormone Use and Misuse Among Transgender Women in Los Angeles County*, 47 ARCHIVES SEXUAL BEHAV. 953, 960 (2018) ("[T]rans women who are surrounded by trans women in their social networks who use hormones to enhance their gender presentation may be more likely to access hormones by any means necessary, including without a medical prescription, in order to fit in with network alters.").

prison.[219] The First Step Act,[220] signed by President Trump, did not improve prison policy regarding trans people.

Abolitionist efforts would seek to upend the criminal legal system as it applies to trans people. This entails looking for a more promising path than the Eighth Amendment offers. The rest of this Note takes up that challenge. To begin, the next Part makes the empirical claim for the disproportionate violence trans people experience in prison.

II. Disproportionate Violence

Regardless of PREA's passage, and perhaps precisely because of the way it has been wielded,[221] trans people in prison continue to experience disproportionate amounts of sexual violence in prison. Before PREA, rape in men's prisons was quite prevalent and generally seen as part of the punishment.[222] PREA may have intended to change that, but the status quo has persisted.

A. PREA's Findings and Aftermath

When the DOJ promulgated its Final Rule in 2012, the Bureau of Justice Statistics (BJS) released its findings of prison violence. By a nationwide estimate, there were 3,209 trans people in U.S. prisons in 2011 and 2012.[223] BJS found that between 2011 and 2012, 33.2% of trans people who were incarcerated in federal and state prisons had been sexually assaulted by another detainee or prison staff member, as opposed to 4% for the overall prison population—in other words, trans people were victimized at over eight times the rate of the general prison population.[224] Trans women are by far the biggest target for rape in men's prisons.[225] One study found that 59% of trans women housed in men's prisons in California reported experiencing

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[219] *See, e.g.*, Hicklin v. Precynthe, No. 4:16-cv-01357-NCC, 2018 WL 806764 (E.D. Mo. Feb. 9, 2018).

[220] First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

[221] *See generally* Gabriel Arkles, *Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm*, 17 N.Y.U. J. Legis. & Pub. Pol'y 801, 811–20 (2014) (discussing how PREA has actually harmed people in prison because of the way courts have used it); *see also* Alice Ristroph, *Sexual Punishments*, 15 Colum. J. Gender & L. 139, 176, 181–83 (2006) (critiquing PREA on its terms for perpetuating the sexual violence in prison by punishing offenders with more prison time and surveillance).

[222] *See* Ristroph, *supra* note 221, at 140.

[223] Allen J. Beck, U.S. Dep't of Justice, Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12: Supplemental Tables: Prevalence of Sexual Victimization Among Transgender Adult Inmates 2 (2014).

[224] *See id.*

[225] Hallie Maryniuk, Pennsylvania Coalition Against Rape, National Criminal Justice Reference Service, Understanding Rape in Prison (2014), https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=269634 [https://perma.cc/VB2M-V2WY].

sexual assault, over thirteen times more than the overall rate of 4.4%.[226] Another study documenting the experiences of California's trans population in prison showed both the high prevalence of trans people in prison and the higher precarity of this population while incarcerated.[227] The number of PREA reports have increased over time; in the most recent PREA-mandated data collection report by the DOJ, the number of allegations of sexual victimization nearly tripled from 2011 to 2015, with a 63% rise in substantial allegations.[228] Unfortunately, BJS did not disaggregate data by gender identity when releasing updated annual reports, so a further comparison of the experience of trans people in prison compared to the 2012 data is not possible.[229]

Though PREA was a legislative landslide, it has not had teeth in most states.[230] The public does not seem to care about the sexual abuse happening behind bars, the resulting PTSD that compromises rehabilitation, or the resulting spread of HIV.[231] As one author put it, "prison rape nonchalance in popular culture . . . promotes [a] rape-as-punishment framework and normalizes rape itself."[232] Researchers may not know the full extent of the problem because, according to the authors of one study, "[t]he raped [men] (the 'punks') won't voluntarily discuss it" with them.[233] To date, only New York City and San Francisco jails have announced a commitment to housing trans people based on their gender identity.[234] The 5% reduction in federal prison funding made it relatively harmless for five states to opt out of PREA: Arizona, Arkansas, and Idaho explicitly opted out and Alaska and Utah did not

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[226] VALERIE JENNESS ET AL., VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT 54 (2007), https://ucicorrections.seweb.uci.edu/files/2013/06/Jenness-et-al._PREA-Report.pdf [https://perma.cc/5EEC-AMTP].

[227] Lori Sexton et al., *Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men's Prisons*, 27 JUSTICE Q. 835 (2010).

[228] U.S. DEP'T OF JUSTICE, PREA DATA COLLECTION ACTIVITIES, 2018, at 1 (2018), https://www.bjs.gov/content/pub/pdf/pdca18.pdf [https://perma.cc/8MFZ-97KE].

[229] *Compare id. with* BECK, *supra* note 223, at 2.

[230] *See generally* Ash Olli Kulak, Note, *Locked Away in SEG "For Their Own Protection": How Congress Gave Federal Corrections the Discretion to House Transgender (Trans) Inmates in Gender-Inappropriate Facilities and Solitary Confinement*, 6 IND. J.L. & SOC. EQUALITY 301 (2018) (discussing how PREA gives trans people scant protections).

[231] Elizabeth Stoker Bruenig, *Why Americans Don't Care About Prison Rape*, NATION (Mar. 2, 2015), https://www.thenation.com/article/archive/why-americans-dont-care-about-prison-rape/ [https://perma.cc/V5NZ-ATXY]; *see also* REGINA KUNZEL, CRIMINAL INTIMACY: PRISON AND THE UNEVEN HISTORY OF MODERN AMERICAN SEXUALITY 226–35 (2008) (discussing the poor and slow public health response to HIV/AIDS spreading behind bars).

[232] Bruenig, *supra* note 231.

[233] WEISS & FRIAR, *supra* note 133, at x.

[234] Karen Matthews, *New York City Jails to Accommodate Transgender Inmates*, AP NEWS (Apr. 16, 2018), https://apnews.com/68fb5c7f8a8c469ab3fdaf79d6927574 [https://perma.cc/KS4Y-9VJM].

submit assurances (thus implicitly opting out).[235] Florida and Indiana opted out at first, then submitted assurances.[236] PREA needs to be implemented effectively in all forty-five states that have agreed to follow its standards. Until that happens, and probably even afterwards, trans people will continue to be at heightened risk of sexual violence in men's prisons.[237]

As a final note, the racial element to these findings is worrisome. In 2011, the National Transgender Discrimination Survey found that Black trans women were sexually assaulted in jail at a rate of 38%, compared to 12% of White trans women in jail.[238] This shows the importance of an intersectional lens in efforts to track and remedy the full, nuanced extent of the problems created by mass incarceration.

B. Academic Findings

The government findings alone show the disparate prevalence of assault against trans people in prison. A deeper dive into extra-governmental sociological research highlights further considerations.

First, it is difficult to trace how long this violence has been occurring because of the shifting terminology for trans people as they have been understood over time. In early studies of prison culture, the term "homosexuals" tends to include more "effeminate homosexuals" who could possibly be seen as trans in modern conceptions.[239] Researchers in the 1970s differentiated between "'innocent victims' of prison rape"—those victims of sexual assault who were seen as heterosexual—from "homosexuals, known as 'sissys [sic],' 'freaks,' or 'girls.'"[240] Even though some reports noted that "gay men were very often the victims and rarely if ever the perpetrators of sexual assaults in prison, many accounts . . . granted considerably greater sympathy to the victim status of presumptively heterosexual [people] who were subjected to sexual coercion and sometimes assault."[241] Researchers met people "who identified as queens, ladies, and girls" as early as the 1960s, describing their femininity as "carefully cultivated" in a context "where normative

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[235] Jesse Lerner-Kinglake, *Most States Report Significant Efforts to Stop Prisoner Rape*, JUST DETENTION INTERNATIONAL (June 29, 2015), https://justdetention.org/most-states-report-significant-efforts-to-stop-prisoner-rape/ [https://perma.cc/2UD3-G5JG].

[236] *Id.*

[237] Strutin, *supra* note 31, at 360–61 nn.73–74 (discussing LGBT discrimination, rape, and sexual assault occurring in prison).

[238] JAIME M. GRANT ET AL., NATIONAL CENTER FOR TRANSGENDER EQUALITY AND NATIONAL GAY AND LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 168 (2011), https://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf [https://perma.cc/YJ66-S4TJ].

[239] *See, e.g.*, WAYNE S. WOODEN & JAY PARKER, MEN BEHIND BARS: SEXUAL EXPLOITATION IN PRISON 3 (1983).

[240] KUNZEL, *supra* note 231, at 156.

[241] *Id.* at 196–97.

gender was policed."[242] Such "queens" were distinguished from those heterosexuals who were presumed to have "unwilling, coerced participation in prison sex," whereas these queens and gay men, "it was sometimes implied, invited the attention, had it coming, or even enjoyed it."[243] Those with "gender inversion [were] assumed to be constitutively linked to sexual deviance."[244]

These studies show the early tendency to blame gender-nonconforming, effeminate people in prison for the violence they faced—an act of deliberate indifference, if not worse. Lest the reader believe this is a relic of the past, even more modern research, which strives to use correct terminology, risks falling into similar victim-blaming tropes. One study stated that trans women are "more likely to be sexually abused and assaulted once incarcerated . . . due to their physical appearance and demeanor at the time they enter prison," where their femininity "may draw unwanted attention" and would make them "vulnerable to unwanted sex in a population of [men] looking for what they perceive to be a heterosexual-like encounter."[245]

In part because of the mélange of terms to categorize them, history may not have a good record of the disparate impact of violence on members of this group. Trans people have thus been shunned and abused by prison officials, researchers, and fellow incarcerated people alike. Granting the terminology has been fluid, the studies nevertheless reveal that deliberately indifferent and sometimes outwardly abrasive responses from prison guards to the violence facing trans (and broadly effeminate) people in prison is a phenomenon that has existed for decades. Two studies from California that took place over three decades apart are illustrative.

First, a pair of researchers studying a California prison in 1979 and 1980 learned that the prison classified "transsexuals" along with "effeminate homosexuals," and housed them together.[246] Even so, effeminate men would be housed in prisons where the guards knew they would be susceptible to sexual violence in order to racially balance out the housing to prevent gangs from developing. This happened even in prisons that were more "violence-prone" and "even when they voice[d] their concern about such potential placement."[247] When prison rape took place, there was "no counseling or support services provided to the victims," and "prison officials tended to 'blame the victim.'"[248] The researchers found that "close to half of the homosexuals in [their] sample had been under some form of sexual pres-

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[242] *Id.* at 185.
[243] *Id.* at 197.
[244] *Id.* at 59.
[245] Ashley G. Blackburn et al., *Gay, Lesbian, Bisexual, and Transgender Inmates*, *in* SEX IN PRISON: MYTHS AND REALITIES 87, 105 (Catherine D. Marcum & Tammy L. Castle eds., 2014).
[246] WOODEN & PARKER, *supra* note 239, at 208.
[247] *Id.* at 210.
[248] *Id.* at 140–41; *see also id.* at 118.

sure."[249] In comparison, a 2007 study of a California prison found that in the general sample, officers were aware of the sexual assault in 60.6% of incidents, and that those victims received medical attention 70% of the time when it was needed, while trans people in the same institution "indicated that officers were *unaware* of the sexual assault/misconduct in the majority (70.7%) of incidents[ ] and that they did *not* receive medical attention 64.3% of the time when it was needed."[250] Though there is not much research covering the years between, it seems evident that the deliberate indifference of prison guards toward trans people's experiences has not been bent by time.

These empirical findings, both qualitative and quantitative, show the scope of the problem. The facts are clear: trans people experience more sexual assault in prison than the general population.[251] Perhaps this has always been the case, but we know it with certainty now from the BJS study of 2011–2012. The heightened vulnerability to assault is exacerbated through apathy, blame, or facilitation by corrections officials.[252] To make matters worse, solitary confinement is the most frequent remedy the prisons resort to in order to purportedly protect trans people from this violence.[253] Trans people in protective segregation prison live in isolation for up to twenty-three hours per day, making the punishment that is most dreaded by the general population the norm for far too many trans people.[254] The normalization of this additional punishment as a condition of a trans person's incarceration necessitates the normative claim that follows.

III. Unequal Subjective Experience of Prison

The issues presented in the recent cases discussed in Part I and the empirical findings in Part II reveal a harrowing reality: the experience of prison for trans people is defined by unsparing violence. As described in the BJS findings and stated in PREA, young, newly incarcerated, gay, and trans people are all particularly vulnerable in men's prisons.[255] There is a moral injustice to the harm they experience. There are no just deserts;[256] the actual sentence is far more severe than what judges and juries found the defendants

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[249] *Id.* at 134.

[250] Jenness et al., *supra* note 226, at 37.

[251] Wooden & Parker, *supra* note 239, at 134.

[252] *See* Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 J.L. & Pol'y 13, 31–32 (2011).

[253] *See* Blackburn et al., *supra* note 245, at 108–09.

[254] *Id.*

[255] *See* Prison Rape Elimination Act of 2003, 42 U.S.C. § 15603 (2012) (describing the risk to young, newly incarcerated people); Beck, *supra* note 223, at 2 (describing the heightened risks for gay and trans people). As discussed below, women's prisons are safer than men's prisons for trans people, but still not completely safe because of surveillance by prison guards. *See infra* notes 305–312, and accompanying text.

[256] Mary Sigler, *Just Deserts, Prison Rape, and the Pleasing Fiction of Guideline Sentencing*, 38 Ariz. St. L.J. 561, 576–77 (2006).

should serve. Retributivists should consider the unintentional burdens of punishment on certain groups of people in prison.[257] Individual experiences of punishment should be taken into account in sentencing, as the deliberate indifference standard requires.

A. Analogous Groups with Heightened Vulnerability

Why should we single out trans people—or any demographic—for special protections based on the violence they experience in prison? The idea might be more palatable if we start by examining two other groups that already receive special protections to some extent. As a society, we punish juveniles less than we punish adults because of their immaturity; we think they are less morally responsible and less receptive to rehabilitative efforts.[258] Prison is a poor deterrent for those with less developed decision-making processes.[259] Further, when youth are punished with solitary confinement, the consequences are even more dire than for adults.[260] Finally, teenagers are singled out as victims of sexual assault early on in their time in prison.[261]

Those who think juveniles should not be punished differently point to the crimes they have committed and the experiences the victims endured; the age of the defendant is irrelevant to the harm they caused others, or so the argument goes.[262] This version of retributivism is closest to *lex talionis*,

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[257] *See* Adam J. Kolber, *Unintentional Punishment*, 18 LEGAL THEORY 1, 2, 14, 26–29 (2012).

[258] *See, e.g.*, Laurence Steinberg, *Sentences Should Acknowledge Juveniles' Maturity, and Immaturity*, N.Y. TIMES (Feb. 6, 2015, 3:24 PM), https://www.nytimes.com/roomfordebate/2012/06/05/when-to-punish-a-young-offender-and-when-to-rehabilitate/sentences-should-acknowledge-juveniles-maturity-and-immaturity [https://perma.cc/KA3Q-PP7G].

[259] R. Daniel Okonkwo, *Prison Is a Poor Deterrent, and a Dangerous Punishment*, N.Y. TIMES (Sept. 18, 2013, 3:10 PM), https://www.nytimes.com/roomfordebate/2012/06/05/when-to-punish-a-young-offender-and-when-to-rehabilitate/prison-is-a-poor-deterrent-and-a-dangerous-punishment [https://perma.cc/85PW-XHK8].

[260] Amy Fettig, *The Dangers of Juveniles in Solitary Confinement*, N.Y. TIMES (June 5, 2012), https://www.nytimes.com/roomfordebate/2012/06/05/when-to-punish-a-young-offender-and-when-to-rehabilitate/the-dangers-of-juveniles-in-solitary-confinement [https://perma.cc/A2V2-BMMH].

[261] T.J. Parsell, *In Prison, Teenagers Become Prey*, N.Y. TIMES (June 5, 2012), https://www.nytimes.com/roomfordebate/2012/06/05/when-to-punish-a-young-offender-and-when-to-rehabilitate/in-prison-teenagers-become-prey [https://perma.cc/LU83-GVHJ].

[262] *See, e.g.*, CHARLES D. STIMSON & ANDREW M. GROSSMAN, ADULT TIME FOR ADULT CRIMES, LIFE WITHOUT PAROLE FOR JUVENILE KILLERS AND VIOLENT TEENS 30 (2009), http://s3.amazonaws.com/thf_media/2009/pdf/sr0065.pdf [https://perma.cc/L7BH-PSB7] (arguing the proportionality principle in non-capital cases, which "focuse[s] on the harm caused or threatened to the victim or society[,] . . . allows no room for consideration of mitigating factors, such as age, except as may be inherent in assessing the offender's *mens rea*") (internal quotation omitted); Jennifer Bishop-Jenkins, *Remember the Victims of Juvenile Offenders*, N.Y. TIMES (June 5, 2012), https://www.nytimes.com/roomfordebate/2012/06/05/when-to-punish-a-young-offender-and-when-to-rehabilitate/remember-the-victims-of-juvenile-offenders [https://perma.cc/Y4HC-EK7D]; Charles D. Stimson, *Adult Punishments for Juveniles*, N.Y. TIMES (Dec.

which seeks to make the victim right again by evening the odds.[263] It is often critiqued for lacking a consideration of the victim's desires, desert, or proportionality, all of which retributivism aims to take into account.[264]

Retributivism is also the operating principle that allows mental status to "serve as a defense to crime" and to "mitigate or eliminate punishment."[265] Mental health conditions and the lack of support for those experiencing mental illness in prison were important considerations in Justice Kennedy's majority opinion in *Brown v. Plata*,[266] which included photos of the cells that would house those experiencing mental illness.[267]

It is important to distinguish the insanity defense, which shows a defendant should be found not guilty, from the experience of punishment for those who have mental disorders. For this latter group, perhaps imprisonment should not be imposed in the first place, either.[268] The disproportionate harm of the sentence they would serve led Professor Mirko Bagaric to recommend a sentence discount of 10%, minimum, and 50%, maximum, for those with mental illness.[269] Such a blunt suggestion is equivalent to the argument to simply not incarcerate juveniles. These remedies are not as outlandish as they may seem at first; given the plight of people with mental disorders when incarcerated,[270] shortening time behind bars is pragmatic and quite sensible. Research has shown that people with serious mental illnesses are at a much higher vulnerability of sexual victimization in prison,[271] which alters their just deserts by subjecting them to inhumane treatment.[272]

B. The Trans Experience of Incarceration

Trans adults are not immature or less culpable for their crimes, so the reasoning used for juveniles and people with mental illness do not map onto

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9, 2015, 7:57 PM), https://www.nytimes.com/roomfordebate/2012/06/05/when-to-punish-a-young-offender-and-when-to-rehabilitate/adult-punishments-for-juveniles [https://perma.cc/R98T-589W].

[263] *See, e.g.*, William Ian Miller, Eye for an Eye 4, 20 (2006).

[264] *See* Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 Harv. C.R.-C.L. L. Rev. 407, 412–13, 475–76 (2005).

[265] Ken Strutin, *The Realignment of Incarcerative Punishment: Sentencing Reform and the Conditions of Confinement*, 38 Wm. Mitchell L. Rev. 1313, 1345 (2012).

[266] Brown v. Plata, 131 S. Ct. 1910 (2011).

[267] Strutin, *supra* note 265, at 1371.

[268] *See* Mirko Bagaric, *A Rational (Unapologetically Pragmatic) Approach to Dealing with the Irrational—The Sentencing of Offenders with Mental Disorders*, 29 Harv. Human Rts. J. 1, 50 (2016).

[269] *Id.* at 5–6.

[270] *See* E. Lea Johnston, *Conditions of Confinement at Sentencing: The Case of Seriously Disordered Offenders*, 63 Cath. U. L. Rev. 625, 626–30, 639–41 (2014) (describing the various vulnerabilities of people in prison with major mental disorders, including being "more prone to physical and sexual victimization.").

[271] E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. Crim. L. & Criminology 147, 165–69 (2013).

[272] *Id.* at 207–16.

them directly. However, Professor Adam Kolber's work suggests there is another argument to be made regarding the "subjective experience of punishment"[273] of trans people in prison. Kolber has argued that subjective experience should be taken "into account when sentencing."[274] He used the example of claustrophobes to show a "compelling real-life case for taking account of punishment experience."[275] Kolber's research found only a single case in which claustrophobia was a sole determining factor for a mitigated sentence; judges mostly denied special treatment for the disorder.[276] Kolber critiqued the fact that the U.S. Sentencing Guidelines Manual explicitly "advises judges not to depart downward from the guidelines based on a number of factors that likely correlate with offenders' experiences in prison," listing mental and emotional conditions, physique, and age as factors that should not play a part in sentencing.[277] Kolber's normative argument is put forth in the face of these realities; he offered a detailed look at three "flavors" of retributivism—experiential suffering, loss of liberty, and expressive—and argued that subjective experience would alter the assessment of each.[278] Kolber listed sensitivities that may be part of the calculus, as well as potential objections to a mitigated sentence based on sensitivity.[279]

Trans people are well positioned to expand Kolber's thesis. First, they are sensitive to the condition of prison when they are assigned to prisons based on their sex parts. Kolber pointed out that prison bureaucrats have a significant role in accommodating different health needs,[280] including conditions and placement.[281] The courts would thus have limited control over the conditions of trans people without the tools the Eighth Amendment litigation has provided. Though trans women and other trans people in men's prisons[282] have gained certain accommodations, as long as they are housed with men as a default placement, they are not being fully accommodated. Even when they are housed with women, trans people still face potential sexual violence from prison guards,[283] who may in fact surveil them more closely because of their known trans status.[284] Trans men and nonbinary people currently housed in women's prisons would probably face heightened risk in a men's

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[273] Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009).
[274] *Id.* at 185.
[275] *Id.* at 190.
[276] *Id.* at 192 (collecting cases).
[277] *Id.* at 193–94.
[278] *Id.* at 200–10.
[279] *See id.* at 233–36.
[280] *Id.* at 192.
[281] *Id.* at 195.
[282] *See supra* note 54.
[283] *See* Teresa A. Miller, *Keeping the Government's Hands Off Our Bodies: Mapping a Feminist Legal Theory Approach to Privacy in Cross-Gender Prison Searches*, 4 BUFF. CRIM. L. REV. 861, 868 n.29 (2001).
[284] *See* Kulak, *supra* note 230, at 320 (discussing rape as creating disparate sentencing for trans people, *id.* at 318–20, punishments disproportionate to the original sentence, *id.* at 302, and the "forbidden" factors on rates of incarceration that need to be consid-

prison, but they also experience biological essentialism when instantly housed in a women's prison. The gender binary is an unavoidable issue as long as only two gendered categories of prisons exist.[285] When the violence trans people experience at disproportionate rates (detailed in Part II) is considered on top of this reductive reality, the problem becomes intractable.

Retributivism should allow an alternate punishment for these vulnerable groups. As Professor Ken Strutin wrote, "[t]he risk of harm and sexual assault; the deleterious impact on the elderly, infirm, and mentally challenged; and a host of other factors already discussed have justified in individual cases amelioration of the immutable prison option."[286] Juveniles, people with mental illness, and trans people are all at higher susceptibility of physical and sexual assault while in prison. Retributivism would instruct the sentencing judge to consider this vulnerability in order "to avoid imposing an inhumane punishment."[287] It would also instruct that such a heightened experience of punishment via incarceration necessitates an adjusted sanction to have punishment of "equal impact" that "equaliz[es] the severity of penalties imposed on equally blameworthy offenders."[288] Put another way, shifting realities asks the criminal legal system to consider how "adaptation affects the experience of punishment that the typical person is expected to have."[289]

C. Critics

Many are not on board with the subjectivity principle.[290] One sound counterargument is that subjectivity may not only cloud victims' sense of justice, but could be unfair to all others who receive normal-length sentences. Professors Dan Markel and Chad Flanders argue that subjectivity "does matter to some extent to retributivism," but is "either true but of minor significance . . . , or else nontrivial but unsound."[291] They go on to state that proportionality need not be more than a "guidepost" for retributive

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ered at the sentencing phase, *id.* at 302, 305); *see also* Ristroph, *supra* note 221, at 160 (describing the visibility of people's bodies to corrections officers).

[285] *See* Lihi Yona, *Keepin' It Real: Israel's Segregation of Transgender Prisoners and the Transgender/Cisgender Binary*, 24 BUFF. J. GENDER, L. & SOC. POL'Y 43, 58–64 (2015–16) (arguing that the binaries of trans/cis and man/woman are the root of the problem that leads to violence in men's prisons).

[286] Strutin, *supra* note 265, at 1372.

[287] Johnston, *supra* note 270, at 643.

[288] *Id.* at 646.

[289] John Bronsteen et al., *Retribution and the Experience of Punishment*, 98 CALIF. L. REV. 1463, 1464 (2010).

[290] *See, e.g.*, David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619 (2010) (arguing retributive punishment should not differ based on traits of the defendant under a utilitarian theory); Kenneth W. Simons, *Retributivists Need Not and Should Not Endorse the Subjectivist Account of Punishment*, 109 COLUM. L. REV. SIDEBAR 1 (2009) (responding to Professor Kolber's argument and defending an objective approach).

[291] Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907, 909 (2010).

punishment,[292] for "retributivism is a theory primarily about the justification of punishment."[293] They also argue that individualizing punishment downplays the offender's status as an "autonomous agent[ ]" who should experience punishment with "equality" given the "equality in the free choice made" when they "commit[ted] the same crimes."[294]

To Professor David Gray, "pain and suffering under [theories of crime, criminal agency, and justice] may be incidental effects of punishment, but punishment is neither justified nor measured by its capacity to produce pain and suffering."[295] Raising the deontological threshold moral theory, Gray argues that suffering is a "normally neutral experiential phenomena" whereas "just punishment for retributivists" is imposed "only if, and only to the extent, it is deserved."[296] Under a pure Kantian point of view, he argues, suffering is not, need not be, and should not be part of the equation when meting out punishment.[297] This is why "punishment remains 'punishment' even if the wrongdoer 'desire[s] punishment.'"[298] As respecting the "moral freedom of offenders,"[299] clearly communicated retributivist punishment is much better for the public than the "private language" that comes from subjective punishments.[300]

This strong response to subjectivists disregards a simple truth: prisons are not the only possible place for punishment. If there were other, more creative ways to hold people accountable and make the victim feel justice that did not also create the additional suffering, would it not be better aligned with even the objective retributivist goals? This would require getting out of the mindset that prisons are a necessary component to criminal justice—a central goal of prison abolition.

D. Cis Discrimination?

A corollary critique could be framed as a sex discrimination claim from cis plaintiffs. If we carve out protections for individuals based solely—indeed, logically and presumptively—on their gender identity or gender expression, the argument goes, cis people would be discriminated against by not being considered for shortened sentences or access to alternatives to prison at the outset. This foreseeable "reverse gender discrimination" claim resonates with the victim-centered retributive theory from those who do not

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[292] *Id.* at 912.
[293] *Id.* at 913 (emphasis omitted).
[294] *Id.* at 915.
[295] Gray, *supra* note 290, at 1657.
[296] *Id.* at 1657–58.
[297] *See id.* at 1664.
[298] *Id.* at 1665 (alteration in original) (citation omitted).
[299] *Id.* at 1668.
[300] *Id.* at 1667 (citation omitted).

want a sentencing discount for juvenile offenders. Why should the Eighth Amendment trump the Fourteenth Amendment?

Sentencing trans people with their subjective experience of punishment in mind should not implicate a sex discrimination claim from cis people because this theory of mitigation should be an option for everyone. If a cis plaintiff brought a sex discrimination claim, it should only force courts to expand the use of alternatives to incarceration. The reverse-discrimination viewpoint stems from a fear that gaining reforms for some of the most oppressed in prison will leave those at the top of the prison hierarchy without recourse. In fact, the opposite may be true. Focusing on the violence experienced by trans people housed in men's prisons would necessitate a critique of the system as a whole. If, once trans people are removed from prison, the remaining people inside—either corrections officers or those serving time—turn to enacting disproportionate violence on whichever class is the new bottom of the totem pole, that class would be able to bring the same claim that trans people did. Amiri Baraka's words resonate here: "We are the vanguard because we are at the bottom, and when we raise to stand up straight everything stacked upon us topples."[301]

IV. Prison Abolition as Lodestar

To frame my proposed remedies, I return to my discussion of Roberts's abolition constitutionalism theory. Through an "instrumental use"[302] of the U.S. Constitution, Roberts argues that the goal of equal citizenship could be attained through "non-reformist reforms."[303] Roberts describes courts as agents with discretion to mete out justice, and accepts their role in controlling whose citizenship can be deemed equal.[304]

The U.S. Constitution should not be the only site of radical contestation, but it is one possible site of abolition, and it offers some important avenues for incremental steps that can be made through reform.[305] This Part attempts to differentiate abolitionist interventions from reforms that concede either the ongoing existence of the prison system or governmental authority over trans people's bodies—which, as the previous parts have shown, perpetuate harm.

A. Questioning "Non-Reformist Reforms"

One tension in Roberts's Foreword lies in who wields creative decision-making power over non-reformist reforms. Enacting abolitionist reforms

[301] Kelley, *supra* note 43, at 107.
[302] Roberts, *supra* note 14, at 109.
[303] *Id.* at 114, 118.
[304] *See id.* at 41–43; *see also id.* at 53 (framing the Court as at fault in *Dred Scott*, not the U.S. Constitution).
[305] *Id.* at 108.

under the Thirteenth Amendment seems to benefit people in prison,[306] but litigation puts power directly into the hands of the courts, which have historically expanded the carceral state further to resolve concerns regarding prison conditions such as overcrowding.[307] This is in tension with other "non-reformist reforms" that were conceived by activists and enacted democratically, such as local reparations ordinances that arose outside of formal legal institutions in Chicago.[308] There is a slightly unclear dividing principle between reformist reforms and non-reformist reforms when viewing the examples in totality.

In my opinion, true non-reformist reforms should be understood as getting society closer to prison abolition. Sometimes, after freedom dreaming amongst abolitionists (who may not want to rely on the state, but may do so selectively), non-reformist reformers turn to the state for assistance with bringing their dreams to life. Because these reforms are in direct response to their organizing, they are properly categorized as non-reformist.

However, there is always a risk when working within the state that organizers will lose steam. If the government can throw money at the problem or take an episodic response, it might quell activist energy that could have led to a broader, more structural transformation—say firing an individual officer, rather than exposing an entire police force as condoning or creating discriminatory and violent practices. By reducing systemic and structural problems into individual issues, the state—or the activists calling for reforms, even if they purport to be advocating for "non-reformist" reforms—may miss an opportunity for transformative justice.[309]

The line between non-reformist reforms and transformative justice is thin, but tangible. In response to the "Chicago Police Department's systematic infliction of torture and other forms of violence against African American suspects," for instance, the reparatory measures—"including monetary compensation for the living survivors, tuition-free education at the City Colleges for survivors and their families, and a public memorial"—were an amazing success for activists.[310] But a systemic transformation would entail free higher education for all and the end of the Chicago Police Department altogether. Monetary reparations are an important shift of power away from the government—or any party that has caused harm—and toward those who are being repaired or restored. On paper, that seems non-carceral, perhaps even de-carceral. Unless the reparations are continuous payments instead of

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[306] *See id.* at 119.
[307] *See id.* at 43, 112.
[308] *See id.* at 117.
[309] *See* Mariame Kaba & John Duda, *Towards the Horizon of Abolition: A Conversation with Mariame Kaba*, The Next System Project (Nov. 9, 2017), https://thenextsystem.org/learn/stories/towards-horizon-abolition-conversation-mariame-kaba?fbclid=IWAR3eLT7ax43VfOKZPyuGlTHFr4r8CdkyI4tIjZtrTNSFFSaConDM8nGbZcE [https://perma.cc/4K9B-PU49] (discussing the need to focus on transformational objectives rather than fixating on problematic individuals).
[310] *See* Roberts, *supra* note 14, at 117.

one-time *and* accompanied by other shifts of power, however, they cannot fundamentally shift the systemic oppression that created the opportunity for the harm to happen in the first place.[311]

I am not arguing that abolitionists should refrain from using reform, by which I mean interventions that uphold the systems we seek to dismantle in the future. This is the challenge for the "ambivalent utilitarians" who believe in abolition, and who also want to make people's lives better today.[312] But we should never mistake a reform for a transformation, lest we water down the capacity for abolition as the racial capitalist state, with all its slippery creativity that critical race theory has taught us it knows how to employ, tries to appease our demands.

The rest of this section categorizes some of the interventions made by trans prison litigators, policy advocates, and grassroots organizers into "carceral interventions," "non-carceral interventions," "de-carceral interventions," and transformative justice alternatives. I acknowledge that I am comparing tools and strategies that usually do not go together. Part of my normative thrust is that the various parts of the LGBTQ movement need to see these options in one big toolkit and discuss the optimal ones together, especially as trans prison issues enter the mainstream LGBTQ agenda. I invite disagreement with my categorizations because the dialogue of setting such labels is part of movement building. I ask that those who may not be regularly invited to the agenda-setting roundtable be part of conversations like this one. My goal is to lay out the potential options and prioritize based on what will actually get people free of the shackles of the oppressive state while simultaneously finding ways to get the state to be benevolent to all.

B. Carceral Interventions

One could simply call this category "prison reform" or "criminal justice reform." As a helpful example, on the policing front, one could view this category as the #8cantwait campaign that emerged in response to the killing of George Floyd.[313] This campaign advocated for policies that would restrict the use of force, put more funding into training police officers, and create more legitimacy for policing as an institution. Regarding prisons, these interventions would build more prisons, put more funding into public prisons, or otherwise legitimize the carceral state. With that said, sometimes people may feel an urgent need to help people inside instead of working to

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[311] This is a lesson learned from a study of the Western Shoshone Tribe, which did not accept monetary reparations and thus unknowingly allowed two of its members to have preserved a land rights claim under international law, which I have written about elsewhere. *See Developments in the Law—Unjust Enrichment*, 133 HARV. L. REV. 2148, 2150, 2161–62 (2020).

[312] *See* Welsh, *supra* note 76.

[313] Campaign Zero, "#8cantwait" (last visited Sept. 10, 2020), https://8cantwait.org/ [https://perma.cc/TNV9-96JF].

shut the system down altogether. Even carceral interventions may seem justifiable in the right circumstances.

1. *Gender-Affirming Prison Placements*

Gender-affirming prison placements—either within a standalone unit for LGBTQ people within a prison of the incorrect gender, or in a women's prison (which I assume to be safer for all trans people[314])—are perfect examples of reformist reforms. Many of the issues facing trans people in prison would be mitigated if all trans people were placed in women's facilities if they preferred.[315] But the potential sexual assaults from guards would not be resolved by this remedy.[316] In fact, trans people are disproportionately targeted for sexual assault in women's detention facilities.[317]

"Gender-affirming prison placement" is an inherent contradiction when gender is constantly policed in all prisons.[318] This doesn't meet the non-reformist definition; this reform "make[s] it harder for us to dismantle the systems we are trying to abolish."[319] We actually lose ground at getting trans people out of prison if they are housed somewhere the concerned public, already a subset of the general public, would believe they fit into more comfortably. This critique is in tension with the reality that this is something

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[314] Yona, *supra* note 285, at 46 (discussing how people who "adapt masculine dress code and behavior are usually less 'noticeable' as transgender in comparison to [those who adapt feminine dress codes]" (citation omitted)); *cf.* B Camminga, *"Gender Refugees" in South Africa: The "Common-Sense" Paradox*, 53 AFR. SPECTRUM 89, 105 n.16 (2018) ("It should be noted here that it is generally agreed that trans women and transgender people who are non-binary face greater struggles globally [compared to trans men]. It is often harder for them to pass, to find access to gainful employment, and to be treated with respect. As Julia Serrano notes, this can be attributed to the fact that 'women's appearances get more attention, women's actions are more commented on and critiqued more than men['s], so in that world it just makes sense that people will focus more on trans woman than trans men.'" (citation omitted)).

[315] *See* Sydney Scott, *"One Is Not Born, But Becomes a Woman": A Fourteenth Amendment Argument in Support of Housing Male-to-Female Transgender Inmates in Female Facilities*, 15 U. PA. J. CONST. L. 1259, 1294–96 (2013); *see also supra* note 54.

[316] *See id.* at 1273, 1278; *see also* SYLVIA RIVERA LAW PROJECT, *supra* note 41, at 32–33.

[317] Sydney Tarzell, Note, *The Gender Lines Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 178 (2006).

[318] *See* SPADE, *supra* note 73, at 73–74 ("Control that operates through population-level interventions is particularly significant to trans politics because of the way trans people struggle with gender categorization in the purportedly banal and innocuous daily administration of programs, policies, and institutions (e.g., homeless shelters, prisons, jails, foster care, juvenile punishment, public benefits, immigration documentation, health insurance, Social Security, driver licensing, and public bathrooms)."); *see also* SYLVIA RIVERA LAW PROJECT, *supra* note 41, at 19 ("Our interviewees' experiences reveal that as long as placement in prisons is sex-segregated and based on genitalia and birth-assigned sex . . . , any placement for transgender, gender non-conforming, and intersex people in correctional facilities is dangerous and detrimental.").

[319] Kaba & Duda, *supra* note 309.

many trans people in prison want.[320] So, of course, legal advocates should support trans people in their efforts, but the advocates should also explain the risks. We already know that once transferred, they will be policed and surveilled with even more intense scrutiny.[321] The time and effort of the transfer process will also likely make the petitioner highly scrutinized by the prison staff. Yet, placement in a women's prison is undoubtedly harm reduction; it probably lessens the deleterious impacts of a men's prison on a trans person's welfare, either from feelings of dysphoria or from the violence from other people inside. This reform is therefore an important baseline step as abolitionists strive for more. If a trans person is not placed into a women's prison in the first instance, and if they want to be moved into one, even an abolitionist litigator should assist with the transfer while remembering that it is not the end of the work by any stretch of the imagination.

2. *LGBTQ-Only Facilities*

In the same vein, the creation of trans prisons or trans-segregated units is at best a reformist reform. At worst, this would risk putting the trans people in further danger. The gender placement happens during intake,[322] and administrators have not been good at discerning proper placement—and don't always listen to the safety needs of the person they're screening.[323] Some researchers found that prison and jail administrators were making placements into the gay, bisexual, and trans housing unit based on self-identification, not based on vulnerability factors as PREA dictates.[324] This allowed sexual "predators . . . to lie in order to access the unit where they could exploit weak" people in the unit for protection."[325] As a result, Rikers Island "decided to close the unit and instead house vulnerable [people] who ask for protective custody in a similar fashion to solitary confinement for which gay and transgender [people] would be locked down for twenty-three

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[320] *See, e.g.*, Doe v. Mass, Dep't of Corr., Civil Action No. 17-12255-RGS, 9–10 (June 14, 2018); *cf.* SYLVIA RIVERA LAW PROJECT, *supra* note 41, at 35 (including placement in a women's prison if the trans person determines it is the "most appropriate placement based on their safety concerns and gender identity" as a policy recommendation).

[321] *See, e.g.*, Matthew Clarke, *Two Transgender Prisoners Transferred to Women's Prison*, PRISON LEGAL NEWS (Mar. 5, 2019), https://www.prisonlegalnews.org/news/2019/mar/5/two-transgender-prisoners-transferred-womens-prison/ [https://perma.cc/HD3Z-FDYQ] (explaining prisoners' sex assigned at birth in the article). I assume that surveillance of their gender will make it nearly impossible for these women to pass within the prison, particularly because of the heightened fears after one-off incidents of sexual violence occur that get international attention. *See, e.g.*, Nazia Parveen, *Transgender Prisoner Who Sexually Assaulted Inmates Jailed for Life*, GUARDIAN (Oct. 11, 2018, 9:58 EDT), https://www.theguardian.com/uk-news/2018/oct/11/transgender-prisoner-who-sexually-assaulted-inmates-jailed-for-life [https://perma.cc/E2ME-45EL].

[322] *See* Blackburn et al., *supra* note 245, at 108.

[323] *See* SYLVIA RIVERA LAW PROJECT, *supra* note 41, at 17–18.

[324] Blackburn et al., *supra* note 245, at 108–09.

[325] *Id.* at 109.

hours a day."[326] Further, when empowered to screen into LGBTQ units or facilities, prison officials may become hypervigilant of the trans or queer people and could more readily abuse them precisely because of their identities, as they have already been documented to when trans people are segregated into ostensibly protective custody.[327]

C. Non-Carceral Interventions

I have broken up the "non-reformist reform" category from abolitionist theory into two: non-carceral and de-carceral interventions. Non-carceral interventions would not give more funding to prisons or justify their existence while helping the people inside of their walls. These interventions are abolitionist in that they refuse to let prisons create a secondary citizen status. However, they stop short of trying to deconstruct the prison altogether. Non-carceral interventions take aim at improving the living conditions of people who are caught up in the violence of the carceral state with minimal interaction with the system—or perhaps a lot of interaction with it—either through litigation, as described in Part I, or through advocacy on the inside. The difference is that a non-carceral intervention does not attempt to dismantle the system head-on, while a de-carceral intervention does.

1. *Name-Change Petitions*

Name-change petitions are an example of non-carceral interventions. They are gender affirming and they do not make it any harder to combat the criminal legal system. They provide the trans people who undergo them a ray of hope by giving them a legal document that affirms that they deserve to be called the name they choose—though their name could and should be respected even without a legal name change.[328] By unifying multiple forms of identification before leaving prison, name-change support can also expedite the process of registering for benefits, attending school, seeking employment, or finding safe housing upon reentry.[329] For the most part, identification cards still rely on the gender binary, which not all trans people may identify with.[330] Name changes are not beholden to the same type of medicalized scrutiny that many states require for changing one's gender on

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[326] *Id.*

[327] *See* Arkles, *supra* note 216, at 540–41.

[328] *See* SYLVIA RIVERA LAW PROJECT, *supra* note 41, at 36, 39.

[329] *See* Flow Chart: Disproportionate Poverty, SYLVIA RIVERA LAW PROJECT (2020), https://srlp.org/resources/flow-chart-disproportionate-poverty/ [https://perma.cc/CB7T-CKE5].

[330] *See* Jessica A. Clarke, *They, Them and Theirs*, 132 HARV. L. REV. 894, 947–51 (2019) (exploring the needs for nonbinary legal identification documents).

identification cards.[331] However, focusing too much on name-change petitions for people inside takes time away from efforts to get people out of prison entirely. Further, name-change petitions are not transformative; they rely on the state, and there is often a lot of work necessary in order to get the name change approved if the person is serving time, which can create stress on the person's life on the inside.

2. *Gender-Affirming Medical Care in Prison*

Medical care access while incarcerated, the lion's share of the efforts happening through the impact litigation cases discussed in Part I, toe the line between carceral and non-carceral interventions. These cases are challenging to categorize because the various considerations do not align. First, successes might make it harder to abolish the carceral system; if trans people can get the medical services they need while in custody, it could be more challenging to mobilize around ending their incarceration altogether. On the other hand, robust healthcare access provided by the government is something worth fighting for, even from an abolitionist perspective.[332]

Accessing gender-affirming care while in prison, under our current system, does not enter the de-carceral realm because navigating the process requires significan concessions. Doctors—often prison staff medical officials—determine who can access various medical necessities. The prison is in control of their gender dysphoria policy, as Part I explored. Medical gatekeeping is already bad enough in the world outside of prisons;[333] most readers could not imagine the invasiveness of the questions asked of trans people, even with the supposedly new and improved DSM-V.[334] Trans people know they must conform to a particular, binaristic script to get what they need, even if it does not match their authentic lived experience.[335] The LGBTQ movement celebrates that homosexuality was removed from the

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[331] *See* Issues: Identity Documents & Privacy, Nat'l Ctr. for Transgender Equality (2020), https://transequality.org/issues/identity-documents-privacy [https://perma.cc/9E5U-SSL3].

[332] *See, e.g.*, 8. Invest in Care, Not Cops, 8toAbolition (2020), https://www.8toabolition.com/invest-in-care-not-cops [https://perma.cc/QTU2-G7WP].

[333] *See* Spade, *supra* note 179, at 16–19.

[334] *See* Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 451 (5th ed. 2013) ("The gender conflict affects people in different ways. It can change the way a person wants to express their gender and can influence behavior, dress, and self-image. Some people may cross-dress. . . . Gender dysphoria is not the same as gender nonconformity, which refers to behaviors not matching the gender norms or stereotypes of the gender assigned at birth. Examples of gender nonconformity (also referred to as gender expansiveness or gender creativity) include girls behaving and dressing in ways more socially expected of boys or occasional cross-dressing in adult men. Gender nonconformity is not a mental disorder. Gender dysphoria is also not the same as being gay/lesbian.").

[335] *See generally* Clarke, *supra* note 330, at 986–90 (exploring how the assumed legal interest in binary sex or gender in health care settings can be challenged to include nonbinary-inclusive elements with a mix of alternative methods).

DSM in 1973.[336] Why must gender dysphoria remain pathologized? Why must the diagnosis be a requirement before hormone replacement therapy? Trans people should be able to demand access to hormones and surgeries without a medical gatekeeper.[337] Finally, trans medical care should include access to holistic therapy, not just therapy to screen for gender dysphoria and offer diagnoses.

D. De-carceral Interventions

De-carceral interventions form the other half of my dissection of non-reformist reforms. De-carceral interventions would bring society closer to abolitionist goals such as making a police force irrelevant and defunct[338] or shutting down a prison. Such goals often exist as potentialities, and either civic or state action in direct response to citizen organizing can accomplish them. De-carceral interventions strive to enact the prison abolitionist lodestar at every step. De-carceral interventions are unlikely to occur through impact litigation, because, by their nature, they do not rely on the rule of law in order to be effectuated.

De-carceral interventions would take as an opening premise that trans people are disproportionately incarcerated.[339] Lihi Yona framed two explanations why. First, many trans people are poor and live on the streets "after being pushed out by their communities and families," exacerbating the discrimination in employment, housing, and health insurance that the population already faces.[340] This creates a "virtual pipeline to prison" as trans people "resort to illegal means to live," such as sex work and drug trade.[341] In addition, because adults who identify as trans are more racially diverse than the non-trans population,[342] they are likely to be more heavily policed.[343]

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[336] *See, e.g.*, Elliott Kozuch, *#FlashbackFriday—Today in 1973, the APA Removed Homosexuality from List of Mental Illnesses*, HUMAN RTS. CAMPAIGN (Dec. 15, 2017), https://www.hrc.org/blog/flashbackfriday-today-in-1973-the-apa-removed-homosexuality-from-list-of-me [https://perma.cc/5RRM-BEFB].

[337] *See* Spade, *supra* note 179, at 28.

[338] *See, e.g.*, Reformist Reforms vs. Abolitionist Steps in Policing, CRITICAL RESISTANCE (last visited June 25, 2020), https://static1.squarespace.com/static/59ead8f9692ebee25b72f17f/t/5b65cd58758d46d34254f22c/1533398363539/CR_NoCops_reform_vs_abolition_CRside.pdf [https://perma.cc/WK7A-SCUN].

[339] *See* Yona, *supra* note 285, at 46–47 (quoting Pooja Gebi, *Gendered (In)security: Migration and Criminalization in the Security State*, 35 HARV. J.L. & GENDER 357, 364–74 (2012)).

[340] *Id.* at 47.

[341] *Id.* (quoting Angela Okamura, *Equality Behind Bars: Improving the Legal Protections of Transgender Inmates in the California Prison System*, 8 HASTINGS RACE & POVERTY L.J. 109, 110 (2011)).

[342] ANDREW R. FLORES ET AL., THE WILLIAMS INSTITUTE, RACE AND ETHNICITY OF ADULTS WHO IDENTIFY AS TRANSGENDER IN THE UNITED STATES 2 (2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Race-and-Ethnicity-of-Transgender-Identified-Adults-in-the-US.pdf [https://perma.cc/W6ZN-SVB4].

[343] *See* Andrea J. Ritchie, *Crimes Against Nature: Challenging Criminalization of Queerness and Black Women's Sexuality*, 14 LOY. J. PUB. INT. L. 355, 366 (2013).

Second, trans people of all economic classes are criminalized because of stigma, whether that is being policed for using the wrong restroom[344] or being harassed by police officers because they are, or are wrongly assumed to be, sex workers.[345] They also may be convicted for fighting back against transphobic hate crimes, even when in self-defense.[346]

1. *Discretionary Diversions*

The trans prison pipeline needs to be diverted at every opportunity. Arguing for decreased sentences and diversion programs, especially for violent offenders who were left out of the First Step Act, would be a valuable role for litigators to play. To alleviate Yona's first explanation for trans criminal rates, prosecutors can take these social conditions into account when exercising their discretion to not bring charges or to seek low sentences, as Larry Krasner has done for low-level, non-violent drug offenses.[347] By exercising prosecutorial discretion until legislative reform has taken place, prosecutors can allow trans people to continue to resort to the different economies of homelessness in order to sustain themselves.[348] Sex work should be seen as work.[349] More broadly, the criminalization of race and poverty should be taken into account for all people who are arrested, not just trans people. This is a clear instance in which the broader criminal legal system would benefit from the systemic reforms that a trans-centered approach would produce.

Prosecutors can also decide to offer restorative justice diversion programs at the sentencing phase. This would be particularly helpful for addressing Yona's second reason for trans incarceration rates. Restorative justice often brings the victim and the offender into a mediated dialogue.[350]

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[344] *See* Yona, *supra* note 285, at 47 (quoting Arkles, *supra* note 216, at 525–26).

[345] *Id.* (quoting THE URBAN JUSTICE CTR., REVOLVING DOOR: AN ANALYSIS OF STREET-BASED PROSTITUTION IN NEW YORK CITY (2003), http://sexworkersproject.org/downloads/RevolvingDoor.pdf; AMNESTY INT'L, UNITED STATES OF AMERICA STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE IN THE U.S. (2005), https://www.amnesty.org/download/Documents/84000/amr511222005en.pdf.).

[346] *Id.* at 48 (quoting Russell Goldman, *Transgender Activist Cece McDonald Released from Prison*, ABC NEWS (Jan. 13, 2014), http://abcnews.go.com/blogs/headlines/2014/01/transgender-activist-cece-mcdonald-released-early-from-prison [https://perma.cc/246B-JLZ3]).

[347] Maura Ewing, *America's Leading Reform-Minded District Attorney Has Taken His Most Radical Step Yet*, SLATE (Dec. 4, 2018, 3:40 PM), https://slate.com/news-and-politics/2018/12/philadelphia-district-attorney-larry-krasner-criminal-justice-reform.html [https://perma.cc/5892-F4D3].

[348] *See, e.g.*, Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1659 (2010) (including prostitution as one of the "petty crimes that typically lack concrete victims" that prosecutors should simply not charge people for).

[349] *See* GLOBAL NETWORK OF SEX WORK PROJECTS, SEX WORK AS WORK (2017), https://www.nswp.org/sites/nswp.org/files/policy_brief_sex_work_as_work_nswp_-_2017.pdf [https://perma.cc/BAC5-3SVC].

[350] HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 36–37 (2002).

This allows education and healing by the aggrieved parties, their communities, and the person who caused harm. If trans people are wrongfully convicted, restorative justice offers an opportunity to educate the police officer or transphobic attacker who proximately triggered their arrest. If trans people committed violence, this allows them an option to avoid the extra vulnerability they face in prison through an alternative means of rehabilitation.

Restorative justice would ideally become a common practice for all. Those who have theorized it have shown the questionable bases of retributive justice.[351] I do not suggest that trans people are exceptional compared to all criminal defendants. The data available suggest that trans people would benefit from restorative justice greatly, but that should not preclude its efficacy for other populations. Rather, the widely applicable benefits of restorative justice suit this case well given the violence trans people face in prison. Other alternatives to incarceration could be explored for trans people, and all defendants, such as shortened sentences at the outset[352] or clemency.[353]

2. *Post-Conviction Counsel, Parole and Compassionate Release*

De-carceral interventions might also include individualized, short-term efforts to get people out of prison one by one. Post-conviction counsel is an undervalued and essential part of getting people out of prison. Representation is generally not granted as a right, with the exception of death penalty cases, so post-conviction hearings are not always seen as part of the due process for a criminal case. But obtaining adequate post-conviction counsel can be a decisive factor in a person's freedom.[354]

Post-conviction counsel is critical because even if there are no other legal claims to be raised, counsel can help to argue for parole and compassionate release. The compassionate release bills described in the introduction[355] are the most recent form of de-carceral legal services that swept the country.

There is also the potential for a policy enactment that would make structural de-carceral reform. For instance, the District of Columbia's COVID-19 Response Supplemental Emergency Amendment Act[356] could be described as a de-carceral piece of legislation.[357] The Act welcomed motions for compassionate release for individuals convicted of felony offenses, granting courts the ability to modify terms of imprisonment if the petitioner met eligibility factors and could show they were not a danger to the commu-

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[351] *See* John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 53, 60 (1999).

[352] *See* Bagaric, *supra* note 268, at 50.

[353] *See* Gray, *supra* note 290, at 1692.

[354] *See* Strutin, *supra* note 31.

[355] *See supra,* notes 22–25 and accompanying text.

[356] COVID-19 Response Supplemental Emergency Amendment Act of 2020 (Act 23-286; 67 DCR 3093) (April 7, 2020) § 3d.

[357] I thank Jules Welsh for this point.

nity.[358] The Act is properly seen as de-carceral even though it was passed by a municipality and does not instantly declare all D.C. jails and prisons abolished. The abolitionist lodestar offers a useful microscope for scrutinizing the Act.

COVID-19 could be replaced with any sort of hardship an individual or an entire population might face. If people in prison can show that they are rehabilitated and are no longer a danger to the community, if they can express a compelling hardship, and they have served time, they should be eligible for parole or compassionate release. Parole is the mechanism for getting people out of prison earlier than their sentence would dictate.[359] Even though the attorneys must work within the system directly to file their motions, they are taking people out of prison and working towards emptying prison cells, which would get closer to making them defunct. This can meet the definition for de-carceral interventions, but it toes the line between non-carceral and de-carceral—as does the discussion of lowered sentences in Part III.[360] This

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[358] The full language of the requirements for eligibility reads:

Sec. 3d. Motions for compassionate release for individuals convicted of felony offenses.

(a) Notwithstanding any other provision of law, the court may modify a term of imprisonment imposed upon a defendant if it determines the defendant is not a danger to the safety of any other person or the community, pursuant to the factors to be considered in 18 U.S.C. §§ 3142(g) and 3553(a) and evidence of the defendant's rehabilitation while incarcerated, and:
  (1) The defendant has a terminal illness, which means a disease or condition with an end-of-life trajectory;
  (2) The defendant is 60 years of age or older and has served at least 25 years in prison; or
  (3) Other extraordinary and compelling reasons warrant such a modification, including:
    (A) A debilitating medical condition involving an incurable, progressive illness, or a debilitating injury from which the defendant will not recover;
    (B) Elderly age, defined as a defendant who is:
      (i) 60 years of age or older;
      (ii) Has served at least 20 years in prison or has served the greater of 10 years or 75% of their sentence; and
      (iii) Suffers from a chronic or serious medical condition related to the aging process or that causes an acute vulnerability to severe medical complications or death as a result of COVID-19;
    (C) Death or incapacitation of the family member caregiver of the defendant's children; or
    (D) Incapacitation of a spouse or a domestic partner when the defendant would be the only available caregiver for the spouse or domestic partner."

67 DCR 3093 § 3d(a).

[359] The importance of parole is precisely why life without parole (LWOP) sentences are not sufficient as a harm-reductionist alternative to death penalty cases. Though arguing for LWOP as policy reform in states that still uphold the death penalty seems like a useful step, it would fall into the carceral intervention category.

[360] Sentence reductions as described in Part III are most likely non-carceral. Sentencing is a poor intervention point because litigants must ask the judge to predict the future.

shows that the intervention itself cannot define the category alone; actors must look to larger goals and outcomes of their actions to see where their interventions truly fall.

3. *Broadening Housing Options*

Residential reentry programs, also known as halfway houses, are often presented as an opportunity after prison for people to receive counseling, job training, and other support as reintegrating into society after spending time behind bars.[361] It can be difficult to find housing and employment after incarceration, particularly for trans people,[362] so halfway houses are an important step towards rehabilitation. One alternative to incarceration would be placing trans people into such settings directly, skipping the harm of incarceration. This may allow more freedom of gender expression than the stringent conditions of prison, while still providing supervision during the sentence.

The struggle for gender affirmation continues even in such programs. One study found that trans people in residential reentry programs have reported that they experienced "violence and harassment by fellow residents and by staff," that they have been placed in programs that "do not match their gender identity," and that they "have had their clothing taken away for violating house policies."[363] Trans people report similar discrimination in homeless shelters. In one study, 29% of trans people who had been homeless had been turned away by a shelter for their trans identity, and 55% had been harassed by staff or residents.[364] The staff in shelters and residential programs need to be trained to be LGBTQ-inclusive. This need is particularly crucial due to the challenge of ensuring adequate cultural competence in settings in which people enter and leave quickly and the staff must handle many competing considerations at once. Coming out of a COVID-19 relief effort, a group of trans activists in New Orleans made plans to build the country's first living spaces "for homeless transgender and gender non-conforming people,"[365] which would help to lower the violence trans people experience in shelters.

The amount of subjectivity in calculating perceived future harm plays to the sympathy of the court in a way that could lead to unjust and inequitable results. While analogizing to the proposed remedies for juveniles and people with mental illnesses was useful to my normative claim, these other remedies are my preferred alternative interventions.

[361] *See generally* S. David Mitchell, *Impeding Reentry: Agency and Judicial Obstacles to Longer Halfway House Placements*, 16 MICH. J. RACE & L. 235 (2011) (discussing doctrinal challenges to access to halfway houses).

[362] *See* SYLVIA RIVERA LAW PROJECT, *supra* note 329.

[363] CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, UNJUST: HOW THE BROKEN CRIMINAL JUSTICE SYSTEM FAILS TRANSGENDER PEOPLE 30 (2016), http://www.lgbtmap.org/file/lgbt-criminal-justice-trans.pdf [https://perma.cc/3S8A-UMTN].

[364] *Id.* at 6.

[365] Doug MacCash, *Planned Refuge for New Orleans' Homeless Transgender People Would Be First of its Kind in U.S.*, NEW ORLEANS ADVOCATE (July 17, 2020, 6:00 AM), https://www.nola.com/news/article_708d7fb4-c797-11ea-8aa0-f742a2e5908d.html [https://perma.cc/L86F-BFUR].

Black and Pink's Executive Director, Dominique Morgan, recently opened Lydon House, the country's first housing for LGBTQ+ people who were formerly incarcerated, which will serve as a safe space, a school, and a home.[366] Lydon House is precisely the type of de-carceral intervention the LGBTQ movement needs to fund and mobilize around. Creating more supportive living environments for trans people is necessary to alleviate the violence they experience. Programs led by and catered to LGBTQ people would optimize the support for this community, decrease the violence they experience, and decrease the risk of recidivism.

Surveillance is a major concern with halfway houses and other forms of parole.[367] Supervised living circumstances are far from ideal, and techniques such as electronic monitoring are rightly seen as forms of punishment in themselves.[368] With that said, time served, shortened sentences, and release are excellent mitigatory options.[369] After conviction, if there are any ways to get people out of prison faster, they should be pursued through post-conviction counsel. Before conviction, the arguments of subjective experience of punishment explored in Part III should be raised in plea negotiations and at trial. Abolitionist litigators can show the court system that they will no longer tolerate incarceration as an acceptable status quo, which will chip away at the system, ever so steadily.

E. The Transformative Justice Path Ahead

Prison abolition is generative, not limiting. Abolitionists shouldn't withhold arguments on behalf of those who can benefit from them immensely—in this instance, trans people—because of the potential cis people who would want to raise the same claims in the future. That would reveal a "fear of too much justice."[370] The United States should take this small step along the path of justice and see where it leads us. It isn't as if the path leads us into the unknown; many other countries have criminal legal systems that resemble something closer to the visions U.S. abolitionist espouse, and those countries are beginning to find that prisons are not a requirement for keeping their societies safe.[371] The discrimination at play worth fighting is happening

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[366] *See* Courtney M. McSwain, *YJLI Fellow Dominique Morgan Seeks Healing for System-Impacted Youth and Families*, Nat'l Juv. Just. Network (Oct. 31, 2019), https://www.njjn.org/article/yjli-fellow-dominique-morgan-seeks-healing-for-system-impacted-youth-and-families [https://perma.cc/NJ6N-CGTM].

[367] *See* Richard P. Seiter & Karen R. Kadela, *Prisoner Reentry: What Works, What Does Not, and What Is Promising*, 49 Crime & Delinq. 360, 363, 380 (2003) (noting the shift of parole supervision toward surveillance).

[368] *See* Aylana K. Eisenberg, *Mass Monitoring*, 90 S. Cal. L. Rev. 123, 128–29 (2017).

[369] *See, e.g.*, Alexander A. Reinert, *Release as Remedy for Excessive Punishment*, 53 Wm. & Mary L. Rev. 1575, 1602–1608, 1637–1638 (2012).

[370] McCleskey v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

[371] *See, e.g.*, Danielle Batist, *How the Dutch Are Closing Their Prisons*, U.S. News (May 13, 2019, 12:57 PM), https://www.usnews.com/news/best-countries/articles/2019-

at the hands of the state when policing people of color and sending them to prison disproportionately, not the compassionate release of trans people on the basis of the violence they experience because of their gender. Abolitionists need to contend with people's fears about how they would hold others accountable for the harm they cause if we lived in a society without prisons. Enter transformative justice.

Transformative justice[372] has untapped potential in the LGBTQ rights movement. Compared to traditional reforms, transformative justice "do[es] not rely on the state . . . ; do[es] not reinforce or perpetuate violence such as oppressive norms or vigilantism; and most importantly, . . . actively cultivate[s] the things we know prevent violence[,] such as healing, accountability, resilience, and safety for all involved."[373] The only intervention in my aforementioned list that may count as transformative is the Lydon House.[374]

Sylvia Rivera Law Project[375] and Black and Pink[376] have engaged in another major form of transformative justice: pen pal and newsletter services that connect people on the outside of prisons and jails with people on the inside.[377] Ignoring the existence of the prison walls and building community despite those walls is an instantiation of transformative justice. The abolitionist world we want to live in can start to take shape in small ways like this, today. Mail can make a person's day and "signals to guards and other [people serving sentences] that there are people paying attention to [the pen pal's] welfare."[378] This is simultaneously harm reduction and transformative justice in that it does not rely on the state; it does not perpetuate oppressive norms such as that people living in prisons being unworthy of our friendship; and it cultivates healing, community building, and safety.

Transformative justice has been described as an effective tool for navigating interpersonal violence.[379] Instead of perpetuating harm upon learning

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05-13/the-netherlands-is-closing-its-prisons [https://perma.cc/D38Q-65DC] (noting that financial penalties and community service are granted as punishment by judges more regularly than prison sentences because they "yield better results").

[372] Transformative justice is here defined as "a political framework and approach for responding to violence, harm and abuse." Mia Mingus, *Transformative Justice: A Brief Description*, TRANSFORMHARM.ORG (last visited May 9, 2020), https://transformharm.org/transformative-justice-a-brief-description/ [https://perma.cc/F285-FGW7]. This term has been used in various contexts, but it is popularly used by abolitionist thinkers who strive to create alternatives to incarceration. *See* Kaba & Duda, *supra* note 309 (discussing abolitionism using the framework of transformative justice).

[373] Mingus, *supra* note 372.

[374] *See supra* note 366 and accompanying text.

[375] *SRLP's Prison Organizing and Advocacy*, SYLVIA RIVERA LAW PROJECT (2020), https://srlp.org/about/prisoner-advisory-committee/ [https://perma.cc/TD2M-5P2R].

[376] *See* Nico Lang, *How to Find an Incarcerated LGBTQ Pen Pal—and Why You Should*, VICE (June 17, 2020, 11:02 AM), https://www.vice.com/en_us/article/n7wzxq/how-to-find-an-incarcerated-lgbtq-pen-pal-black-and-pink [https://perma.cc/NGS3-966F].

[377] I thank David Booth of Black and Pink for raising this point in our dialogue.

[378] Lang, *supra* note 376.

[379] *See generally* Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, *in Developments in the Law—Prison*

that a teacher in the community enacted sexual violence on his student, Patrisse Cullors "reached out to [her] community and facilitated healing circles with the student," during which they "held space for collective reflection and breathing . . . [and] reminded [them]selves of everyone's humanity."[380] These healing practices are also part of prison abolition; Cullors wrote that "[a]bolition seeks out restorative practices for all, even when that implies working with the perpetrator of said violence. Abolition finds new ways to operate within a society that considers its members disposable."[381]

Could we one day extend this healing to all people who perpetrate harm to our loved ones? It is possible, even if it seems hard to envision from our current place within a "draconian and antiquated system."[382] But especially given the realities of sex and sexual violence in prisons, we need to seek out these alternatives immediately. For instance, Jason Lydon, the founder of Black and Pink,[383] pointed out that PREA led to mandatory discipline against LGBTQ people in prison "for consensual affectionate and/or sexual contact, from holding hands to sexual intercourse."[384] Lydon argued that PREA's mandates for strip searches "perpetuate an overwhelming bioessentialist notion of sex and gender," forcing trans women "to remove their shirt and bra for a female guard to examine them and then their pants and underwear for a male guard to examine them."[385] Lydon invoked José Esteban Muñoz's disidentification theory to analyze how black trans people in prison "resist"[386] and "create opportunities to live into senses of self, many of which are forbidden by the prison administration" through cutting up oversized t-shirts into well-fitting dresses.[387] Lydon provided examples of "[c]oncrete utopias"[388]—efforts to organize free world allies to support movements organized on the inside; free and unrecorded counseling for people on the inside offered by counselors trained "with tools to meet the needs of incarcerated survivors with attention to the complex realities of incarceration";[389] and "recogniz[ing] that prisons cannot function without sexual violence."[390]

Other transformative justice practices are much more quotidian than the systemic efforts Lydon raised and show the daily work that transformative justice might entail, in the long run. How you deal with conflict at work. The

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Abolition, 132 HARV. L. REV. 1684 (Apr. 10, 2019) (offering personal anecdotes of transformative justice interventions in various contexts).

[380] *Id.* at 1688.

[381] *Id.*

[382] *Id.* at 1694.

[383] Jason M. Lydon, *Once There Was No Prison Rape: Ending Sexual Violence as Strategy for Prison Abolition*, 6 PHILOSOPHIA 61, 62 (2016).

[384] *Id.* at 64.

[385] *Id.* at 65.

[386] *Id.*

[387] *Id.* at 66.

[388] *Id.* at 68.

[389] *Id.* at 69.

[390] *Id.* at 70.

amount of generosity you give to people who do something wrong. Educating people about the roots of the hurt when they misgender someone else. Participating in mutual aid. Serving as a legal observer in protests or courtrooms. Making project decisions by consensus instead of through hierarchical orders. Finding alternatives to calling the police and sticking to them. Intervening compassionately when someone on the sidewalk is in crisis. These are not reforms, nor are they necessarily interventions. Transformative justice calls for a mindset shift and a steadfast commitment to combating the internalized oppression we all hold from being raised in a patriarchal and capitalistic society.[391]

As Muñoz wrote: "The here and now is a prison house. We must strive . . . to think and feel a *then and there*."[392] We cannot be cowed by not having a complete blueprint for the alternatives to incarceration right now.[393] If we conjure up transformative justice alternatives whenever we strategize litigation or legislative efforts, some of the ones that seem impossible might actually gain in popularity. If we can dream them up, we can try to bring them to life. Working in movements to make our goals happen is critical.[394] Lawyers cannot allow our profession to take control of the movement, as is our instinct, as well as that of elite funders.[395] The healthiest transformative justice practice is stepping back, listening, being in circle dialogues, and collaborating with people who are most affected by the oppressive policies of the state. By centering trans people who are policed on a regular basis and who exist in and out of the prison system,[396] and by letting them set the agenda, the LGBTQ rights movement will be able to shift toward a transformative justice model over time. Focusing on the sexual violence that trans people inside experience will get the movement on the right path.

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[391] *Cf.* Berger et al., *supra* note 13. I am indebted to Gabriel Arkles for providing feedback that improved this section.

[392] JOSÉ ESTEBAN MUÑOZ, CRUISING UTOPIA: THE THEN AND THERE OF QUEER FUTURITY 1 (2009).

[393] *See* Allegra M. McLeod, *Confronting Criminal Law's Violence: The Possibilities of Unfinished Alternatives*, 8 HARV. UNBOUND 109, 113 (2013) ("[T]his unfinished quality ought not to be denied as an embarrassment or flaw, but instead should be embraced as a source of critical strength and possibility. In this dimension, this essay is . . . a call to attend further to as yet incomplete reformist alternatives that may portend less violent and more self-determined ways of achieving some measure of social order and collective peace.").

[394] *See* SPADE, *supra* note 73, at 97–100.

[395] *See id.* at 100.

[396] *See, e.g.*, Mike Ludwig, *Sex Workers Have Never Counted on Cops. Let's Learn from Their Safety Tactics.*, TRUTHOUT (June 19, 2020), https://truthout.org/articles/sex-workers-have-never-counted-on-cops-lets-learn-from-their-safety-tactics/?fbclid=IWAR2p6RhbXlnZdTAnRCJHSg2EUv-jrcVHzfXTO4IETggqwcdAqajxszGm5AI [https://perma.cc/RF8B-XSAD] (detailing how police and prison abolition movements can learn from "Black trans sex working women and femmes").

Conclusion

The disproportionate harm trans people experience deserves our immediate attention. Trans people have waited decades for their plight to be fully remedied. Retributive theorists have opened the door for determinations that take the subjective experience of punishment into account. Impact litigation and legislative reform have provided paths to reform the system, but they have not ended the violence trans people in prison endure. Because litigation has fallen short of ending the perpetuation of injustice, alternative remedies might light the path out of this dark cave we find ourselves in.

Given the extremity of mass incarceration in the United States, restorative justice and other alternatives to punishment should be on the table for all people in prison regardless of their offenses or their heightened vulnerability. Trans people experience multiple layers of oppression in prison; for that reason, they are the miner's canary, not the special exception. As Spade wrote, "social justice trickles up, not down."[397] The end goal, following the abolitionist lodestar, is a world without prisons. By prioritizing interventions that get us closer to abolition, we can achieve positive change for not only trans people, but for all. By centering the most vulnerable among us—poor trans people of color in prison—we will ensure they "will not be compromised for promises of legal and media recognition,"[398] as they were by the LGBTQ rights movement in the past. Further, we will knock down structural barriers in ways that will benefit all people in prison—and in doing so, improve the safety of the communities most heavily policed. Prison abolition is an effort of solidarity across identities; an intersectional approach allows a nuanced understanding of how the violence of prison works. This Note's analytical method can peel back the curtain on harm faced by other groups—or by a single client seeking post-conviction relief.

This Note has probed some of the potential methods for making this case. Future work can explore any of the Parts in greater detail. By centering trans people, prison abolition theory is pushed to be even more critical of efforts that maintain the stability of the prison industrial complex. Should litigants revisit the *Farmer* standard?[399] Further study of the cases since PREA's passage, especially in the years since *Cruz v. Zucker*,[400] is also a ripe area for analysis. What is the reasoning of district judges who have not fol-

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[397] Spade, *supra* note 73, at 137.

[398] *Id.* at 138.

[399] *See generally* Dolovich, *supra* note 204, at 943–72 (exploring the possibility of "doctrinal reform" while acknowledging that "[n]ot only is there no sign that the Supreme Court is inclined to revisit *Farmer*, but were it to do so, it is not clear that it would be to expand, rather than to further limit, the possible scope of government liability," *id.* at 971).

[400] Cruz v. Zucker, 116 F. Supp. 3d 334 (S.D.N.Y. 2015) (granting the right to gender-affirming surgeries for Medicaid recipients); *see also* Flack v. Wis. Dep't of Health Servs., 395 F. Supp. 3d 1001, 1022 (W.D. Wis. 2019) (same).

lowed the SDNY? How has that reasoning been mirrored in other cases?[401] Is there any correlation between the outcome of the civil actions and whether the cases and case records reveal trans discrimination in the courtroom on behalf of judges who choose to misgender the trans plaintiffs from the bench or in their opinions?[402] Does a judge voicing her misunderstanding of the experience of trans people—either not fully understanding their risks in prison or not accepting their lived experience of their gender identity as valid—correlate with substantive legal dispositions? Has litigation in this area set the movement down a path that will make it harder to build solidarity with other people in prison?

Trans people are the tip of the iceberg. Making carceral institutions irrelevant is the abolitionist lodestar. As a first step, reformist reforms are good, and they have helped people who are suffering. Non-reformist reforms are even better and may include Eighth Amendment and novel Fourteenth Amendment strategies to get people access to medical necessities while inside. The largest transformations, however, will not come from the courts. Prison abolition informs us to keep thinking beyond what we already know, and to dream of a better world yet to come. The LGBTQ movement can get there if we hold on to each other and remain in solidarity, always centering in our efforts the people who are suffering most in the systems we are all coping with and struggling to dismantle.

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[401] *See, e.g.*, Complaint, *Lange v. Houston Cty.*, No. 5:19-CV-00392, 2019 WL 4879411 at 6–7, 12–14, 23–24 (M.D. Ga. Oct. 2, 2019) (raising the equal protection claim used in *Cruz* for medically necessary gender-affirming care in an employment context instead of a prison context).

[402] *See, e.g.,* Diana Flynn, *FILED: Fifth Circuit Must Reconsider Opinion that Misgenders Trans Litigant*, LAMBDA LEGAL (Mar. 23, 2020), https://www.lambdalegal.org/blog/20200323_kyle-duncan-fifth-circuit-misgender-trans-litigant [https://perma.cc/PYU5-QZ36] (discussing the recent opinion from the Fifth Circuit, *United States v. Varner*, 948 F.3d 250 (5th Cir. 2020), which misgendered the trans woman plaintiff throughout and which denied the use of gender-affirming pronouns for the duration of her appeal).