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PRISON HOUSING POLICIES FOR TRANSGENDER,
NON-BINARY, GENDER-NON-CONFORMING, AND
INTERSEX PEOPLE: RESTORATIVE WAYS TO
ADDRESS THE GENDER BINARY IN THE UNITED
STATES PRISON SYSTEM

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*“[I]t was the end of the last quarter of 2019 where I was able to drop the lawsuit against the correctional officer who had sexually harmed me when I knew . . . that the carceral state is not the way for me to find healing I was not going to seek my transformation and restoration through this system.”*¹

INTRODUCTION

Each year, rhetoric and legislation attacking transgender, non-binary, gender non-conforming and intersex individuals seemingly grows louder.² Many political institutions in the United States perpetuate and enable the oppression of these individuals, one of which is the United States prison system.³ In the quotation above, Dominique Morgan, the Executive Director of Black and Pink, a prison abolitionist organization, describes her process of coming to terms with the harms she experienced in prison as a transgender woman. Morgan, originally charged with murder, lived eighteen months in solitary confinement, six of those on death row.⁴

This quotation from Morgan not only illustrates how the prison system failed to ensure her safety (as a person convicted of a crime), but it also expresses her reckoning with the failure of the justice system to provide her with a process through which she could heal (as someone who survived a crime). Morgan’s story represents just one of the dangers people face in prisons, especially the vulnerability often heightened for people historically marginalized by society.

Transgender, non-binary, gender-non-conforming, and intersex (“TNGI”)⁵ individuals experience violence, sexual assault, social

1. Interview by Myrl Beam with Dominique Morgan, Exec. Dir., Black & Pink Nat’l (Jan. 29, 2021), https://umedia.lib.umn.edu/item/p16022coll97:237?q=%22Tretter+Transgender+Oral+History+Project+Phase+2%22&sort=date_created_sort+desc%2C+title_sort+asc.

2. See *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures*, ACLU (Mar. 10, 2023), <https://www.aclu.org/legislative-attacks-on-lgbtq-rights> [<https://perma.cc/MFX9-KT7X>].

3. See *infra* Section I.B.

4. In the interview, Morgan describes the charges that the state brought against her, but she never spoke about the outcome of her case. Interview by Myrl Beam, *supra* note 1.

5. “Trans” and “transgender” are typically considered umbrella terms for people who have gender identities or expressions that do not align with their sex at birth. Jessica Szuminski, Note, *Behind the Binary Bars: A Critique of Prison Placement Policies for Transgender, Non-Binary, and Gender Non-Conforming Prisoners*, MINN. L. REV. 477, 483–84 (2020). I avoid the use of this umbrella language and instead use the acronym TNGI because, while many identities fall under the transgender/trans umbrella, people experience

stigmatization, and discrimination from society and, in particular, the United States prison system.⁶ Despite some efforts to make housing in prisons safer for TNGI people, the system still fails to protect them.⁷

TNGI people face harms in prison that cisgender people do not because of the “hyper-gendered”⁸ structure of the prison system. For example, prison staff often misgender TNGI people, and prison housing policies regularly result in placing TNGI people in prisons according to their sex at birth instead of their gender identity.⁹ In addition, TNGI people are ten times more likely to be sexually assaulted in prison than the general prison population.¹⁰

This Comment seeks to center the experiences of TNGI people living in prisons to shed light on the harms they incur from the United States prison system. Because of the gendered structure of the prison system, TNGI people face additional harms that cisgender prisoners do not experience, and the reforms to prison housing policies have failed to fully address the root of the problem. Restorative justice, through mechanisms used in place of prisons as well as through values-based policymaking, can better account for TNGI people’s well-being by breaking away from the gender binary

a variety of relationships with gender that do not always fit within that umbrella terminology. *Id.* In other words, some people fall in line with the male-female binary, and some people do not. *Id.* Moreover, intersex people have differences in reproductive anatomy, such as variations in chromosomes, sex organs, and internal organs. *Id.* at 484. Intersex people may fall within the trans/transgender umbrella, and some do not since their genders do not always align with their intersex variations. *Id.* Nonetheless, intersex people are often subjected to unfair treatment by the United States justice system and should likewise be centered in this conversation. *See e.g., id.* at 488 & n.63; *Zzym v. Pompeo*, 958 F.3d 1014, 1020, 1022 (10th Cir. 2020) (holding that the State Department acted within its authority by enforcing its binary sex policy on a United States passport applicant, who was intersex and did not identify as male or female).

6. Caroline Medina, Lindsay Mahowald, Thee Santos & Sharita Gruberg, *Protecting and Advancing Health Care for Transgender Adult Communities*, CTR. FOR AM. PROGRESS (Aug. 18, 2021), <https://www.americanprogress.org/article/protecting-advancing-health-care-transgender-adult-communities/> [perma.cc/5N62-ULWQ].

7. *See, e.g.,* Kate Sosin, *Trans, Imprisoned – and Trapped*, NBC NEWS (Feb. 26, 2020), <https://www.nbcnews.com/feature/nbc-out/transgender-women-are-nearly-always-incarcerated-men-s-putting-many-n1142436> (discussing how no state has ever failed a Prison Rape Elimination Act audit due to its placement of transferred prisoners) [<https://perma.cc/2LFH-JB36>].

8. Rose Gilroy, et al., *Transgender Rights and Issues*, 22 GEO. J. GENDER & L. 417, 459 (2021) (quoting Sydney Tarzwell, 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, 176–77 (2006)).

9. *Id.* at 459.

10. *Id.* at 458.

in prisons and focusing on the diversity of human experiences and methods of relationship-building.

Part I seeks to illuminate the experiences of TNGI people in the United States and, more specifically, in prison. I also introduce the current prison housing policies and practices in the United States. In Part II, I provide a preview of restorative justice, which will be combined with the theories in Part III to form the rest of the argument.

The first section of Part III introduces theories concerning the gendered structure of prisons and how this perpetuates the gender binary. I then expand upon these theories and apply them to the experiences of TNGI people in prison. Next, I explain how the theory of relational restorative justice can help move past the gender binary in prisons and create a more equitable response to wrongdoings. Last, I discuss the current movements concerning prison housing reform and explain why these are lacking.

I. BACKGROUND

This Part begins with an introduction to Janetta Johnson, a transgender woman who experienced life in a male prison in California. Her story is threaded throughout this Comment to center the voices of TNGI people in this conversation. Then, this Part discusses the structural and social struggles TNGI people face throughout the United States to illustrate the compounding structures that subject TNGI individuals to discrimination and subjugation in the United States. Next, I focus specifically on the major concerns for TNGI people in prisons, including statistics about housing policies and violence directed toward them while in prison. Last, this Part introduces the current federal prison housing guidelines and how those impact TNGI people in prisons.

A. *Prison, from the Perspective of a Trans Woman*

The voices of TNGI people must be centered in conversations concerning prisons and the criminal justice system in general. Society has used these systems to wield social power over marginalized people in the United States.¹¹ In this Comment, I set out to

11. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 9 (10th Anniversary ed. 2020) (“The stark and sobering reality is

center TNGI voices because, without their first-hand experiences, my arguments would remain merely theoretical, and my goal is to offer proposals that are relevant and responsive to these experiences. To this day, the harms perpetuated by the system against TNGI people remain unaccounted for by the United States justice system.¹²

1. Janetta Johnson Introduction

Janetta Johnson is the executive director of the Transgender, Gender-Variant, and Intersex Justice Project (“TGIJP”) based in San Francisco, California.¹³ TGIJP seeks to provide legal services for transgender, gender-variant, and gender-non-conforming people in prisons, jails, and detention centers.¹⁴ In addition to providing services to people inside the system, TGIJP hires people released from prison, provides them with temporary housing, facilitates access to medical and mental health professionals, and teaches them professional skills to help them reintegrate into society.¹⁵

2. Johnson, Herself, Faced Imprisonment as a Transgender Woman¹⁶

In an interview now published on the TGIJP website, Johnson describes what it was like living in a male prison despite being a

that, for reasons largely unrelated to actual crime trends, the American penal system has emerged as a system of social control unparalleled in world history. And while the size of the system alone might suggest that it would touch the lives of most Americans, the primary targets of its control can be defined largely by race. This is an astonishing development, especially given that as recently as the mid-1970s, the most well-respected criminologists were predicting that the prison system would soon fade away.”).

12. See *infra* notes 125–31 and accompanying text.

13. *Perspectives in Belonging: Janetta Johnson*, OTHERING & BELONGING INST., <https://belonging.berkeley.edu/perspectives-belonging-janetta-johnson> [<https://perma.cc/TUB4-A46K>].

14. *About Us*, TGI JUST., <http://www.tgijp.org/about-us.html> [<https://perma.cc/7JGX-5QKU>].

15. Mia McKenzie, *Bustin’ Out: From Solitary to Re-Entry by Janetta Johnson*, YOUTUBE, at 06:14–08:29 (Dec. 17, 2014), <https://www.youtube.com/watch?v=T9Qo6koD5dw> [<https://perma.cc/L95X-YADH>].

16. Vera Institute of Justice, *Janetta Johnson: Advocate and Formerly Incarcerated Person*, YOUTUBE (June 28, 2018), https://www.youtube.com/watch?v=_R4KQwmmPjI [<http://perma.cc/VA98-MQEX>].

woman. She states, “[i]t’s hard being a woman inside the criminal justice system period, and then being trans.”¹⁷

In another interview, Johnson describes being locked in the “SHU”¹⁸ for possessing contraband while in prison.¹⁹ The “contraband” in question was, in actuality, a collection of hair rollers she kept in her locker, gifted to her by another transgender person in prison.²⁰ For Johnson, the hair rollers were the only means by which she could “feminize” herself while living in prison.²¹

In reflecting on her experience in prison, she says, “it seems to me that transgender people have been so traumatized in custody that they’ve lost a complete sense of how we’re supposed to be treated as human beings . . . nobody should be violated sexually, nobody should be violated physically, nobody should be afraid to walk to the store and have fear of somebody just attacking you solely based on the fact that you’re transgender.”²²

B. TNGI People Are More Likely to Face Prison Time Than the General Population, and While in Prison, They Face Violence and Discrimination

To better understand the weight of Johnson’s experience, it is important to establish what life is like in the United States for TNGI people. Additionally, I refer to statistics and the major concerns for TNGI people, more specifically, in prisons across the United States.

17. *Id.* at 00:11–00:15.

18. SHU stands for Special Housing Units and is pronounced: “shoe.” Christopher Zoukis, *Prison Life in America: Special Housing Units (SHUs)*, ZOUKIS CONSULTING GRP., <https://prisonerresource.com/prison-life/special-housing-units-shus/> [https://perma.cc/Y9Y2-TQAA] (Jan. 25, 2022, 6:20 PM); Jordan Gaines Lewis, *Orange is the New Bleak: What the SHU Can Do to Your Brain*, PSYCH. TODAY (July 3, 2015), <https://psychologytoday.com/ca/blog/brain-babble/201507/orange-is-the-new-bleak-what-the-shu-can-do-your-brain> [https://perma.cc/EH79-DASP].

19. McKenzie, *supra* note 15, at 00:13–00:42.

20. *Id.* at 00:20–00:34.

21. *Id.* at 00:20–00:42.

22. *Id.* at 04:31–05:09.

1. Statistics Concerning TNGI People in the United States Provide a Bigger Picture of the Societal Harms They Face Outside of Prisons

Based on a survey²³ examining the experiences of just under 30,000 TNGI people in the United States and its territories, researchers discovered extensive mistreatment and violence directed toward the respondents.²⁴ Among the data collected, the report explains that over 50% of respondents who were out as TNGI between kindergarten and twelfth grade had experienced some form of mistreatment.²⁵ To break that down, because they were TNGI, 54% of those respondents had been verbally harassed, 24% had been physically attacked, and 13% had been sexually assaulted.²⁶

TNGI people face not only mistreatment and violence but also systemic hardships, such as economic instability and mental and physical effects stemming from discrimination and stigmatization.²⁷ The report states that “[a]mong the starkest findings is that 40% of respondents have attempted suicide in their lifetime—nearly nine times the attempted suicide rate in the U.S. population (4.6%).”²⁸ It is also important to note that because of discrimination and the stigma experienced by TNGI people, some turn to theft and

23. This survey utilizes the transgender umbrella terminology rather than the inclusive grouping of individuals I attempt to center in this Comment. SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET, & MA'AYAN ANAFI, *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 23* (2016). However, the surveyed population included “individuals who identified as transgender, trans, genderqueer, non-binary, and other identities on the transgender identity spectrum.” *Id.* The survey materials “specified that the survey was for adults at any stage of their lives, journey, or transition to encourage participation among individuals with diverse experiences regarding their transgender identity.” *Id.* It is unclear from the survey whether an intersex individual might have viewed the material and submitted responses, and as stated above, many intersex people do not even fall under the transgender umbrella. *See id.* For that reason, it is possible that this survey is underinclusive for the purposes of my research, but despite using the transgender umbrella terminology in the survey, I will continue to refer to the survey respondents as TNGI individuals because the population surveyed closely matches the individuals I seek to center in this Comment. *See id.*

24. *Id.* at 4.

25. *Id.*

26. *Id.*

27. *Id.* at 5 (noting that 29% of TNGI respondents were living in poverty compared with the 12% of the general United States population and that 39% of respondents experienced psychological distress).

28. *Id.*

the “underground economy,” including sex work, both of which are criminalized in the United States.²⁹

2. Interactions Between TNGI People and Law Enforcement

Because TNGI individuals may turn to the “underground economy” due to numerous structures designed to discriminate and ostracize them from society, many come into contact with law enforcement during their lifetimes.³⁰ For example, 40% of respondents in the report by the National Center for Transgender Equality had some interaction with law enforcement in the past year.³¹ Of the respondents who indicated that they had been arrested in the past year, 22% believed that they were arrested because they were transgender, non-binary, gender non-conforming, or intersex.³² Additionally, 57% of TNGI people reported being uncomfortable asking the police for help when needed.³³

Moreover, among the respondents who had interacted with law enforcement officers within a year of the survey, 11% said that an officer assumed they were a sex worker.³⁴ This percentage dramatically increases when race and gender are considered; 33% of Black, 30% of multiracial, 25% of Latina, 23% of Native American, and 20% of Asian transgender women reported that officers assumed they were sex workers.³⁵

These strained interactions with the police lead to a higher incarceration rate for TNGI individuals than for the United States

29. *Id.* at 14 (“One in five (20%) have participated in the underground economy for income at some point in their lives—including 12% who have done sex work in exchange for income”); Sosin, *supra* note 7 (describing the experience of a transgender person in prison who stole women’s purses because she didn’t have enough money and was uncomfortable purchasing them for herself).

30. *See* JAMES ET AL., *supra* note 23, at 158, 185.

31. *Id.* at 185.

32. *Id.* at 189.

33. *Id.* at 188–89.

34. *Id.* at 187.

35. *Id.* It is vital to continue to take compounding factors such as race, ethnicity, gender presentation, and economic class into account when discussing anything about TNGI people, especially their interactions with law enforcement and the United States prison system. These factors not only impact who the police have historically targeted but also how prison staff have treated them once inside system. Medina et al., *supra* note 6. (“Black and Latina transgender women are consistently and drastically overrepresented among victims. Awareness and fear of potential victimization contribute to many stresses that transgender people already face. This fear is justified by not only the possibility of lethal violence but also the ubiquity of nonlethal violence.”).

general population.³⁶ Despite possibly being underestimated due to the difficulty of aggregating data requiring respondents to self-report as TNGI, roughly 16% of TNGI people living in the United States have been placed in prison or jail during their lifetime.³⁷ In comparison, approximately 3–5% of the United States population has been in prison or jail during their lifetime.³⁸

3. Gender-Based Versus Sex-at-Birth-Based Housing in Prisons

Once inside the criminal justice system, statistics taken from surveys of TNGI individuals indicate that prisons mostly do not house TNGI people according to their genders or preferences. In an investigation by NBC News conducted in 2020, investigators found that, based on data from forty-five states and Washington, D.C., there were 4,890 TNGI people in state prisons.³⁹ Among those TNGI individuals, the investigators only confirmed fifteen cases where the prisons housed them according to their gender rather than their sex at birth.⁴⁰ Using Texas as an example, the investigators discovered that none of the 980 TNGI people in Texas state prisons were housed according to their gender.⁴¹

4. Violence and Sexual Assault of TNGI People Inside Prisons

For many people, prison housing based on gender is not always the greatest concern; rather, it is the violence and sexual assault

36. See Alex Jones, *Visualizing the Unequal Treatment of LGBTQ People in the Criminal Justice System*, PRISON POLY INITIATIVE (Mar. 2, 2021), <https://www.prisonpolicy.org/blog/2021/03/02/lgbtq/> [https://perma.cc/MTS7-36LF].

37. HARPER JEAN TOBIN, RAFFI FREEDMAN-GURSPAN & LISA MOTTET, *A BLUEPRINT FOR EQUALITY: A FEDERAL AGENDA FOR TRANSGENDER PEOPLE* 42 (2015).

38. Despite no reliable or up-to-date statistics, I estimate that 3-5% of all Americans have been placed in prisons or jails during their lifetime based on two sources, for comparison purposes. See *How Many Americans Have Been Incarcerated?*, EHRlich L. OFFIS., <http://www.notguiltynj.com/how-many-americans-have-been-incarcerated/> [https://perma.cc/W5WK-2Z66]; THOMAS P. BONCZAR & ALLEN J. BECK, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., NCJ 160092, LIFETIME LIKELIHOOD OF GOING TO STATE OR FEDERAL PRISON 1 (1997). Additionally, 45% of Americans have had an immediate family member incarcerated for at least one night. Susan Kelley, *Study: Nearly Half of Americans Have Had a Family Member Jailed, Imprisoned*, CORNELL CHRON. (Mar. 4, 2019), <https://news.cornell.edu/stories/2019/03/study-nearly-half-americans-have-had-family-member-jailed-imprisoned> [https://perma.cc/ED5C-9E6N]. For Black Americans, this statistic is even higher, with sixty percent having an immediate family member incarcerated. *Id.*

39. Sosin, *supra* note 7.

40. *Id.*

41. *Id.* (noting that Texas has one of the largest incarcerated populations in the country).

experienced behind prison walls. Sexual assault is a pervasive issue in all prisons.⁴² For example, in a report by the Department of Justice (“DOJ”), there were 1,465,200 prisoners in the United States in 2018.⁴³ In another report by the DOJ concerning sexual assault in adult prisons between 2012 and 2018, prison administrators reported 18,884 allegations of sexual victimization in 2018, but only 6% of the allegations were substantiated.⁴⁴ Therefore, 1.3% of all people in prisons in 2018 reported experiencing sexual assault in prison, and of the 18,884 reported allegations of sexual assault, only 1,133 of those reported were found to be substantiated.

In comparison, a report published by the DOJ in 2015 examined surveys from 2007 to 2012 and found that 35% of TNGI individuals who had spent twelve months or less in prison had experienced sexual assault by prison staff or another person in prison.⁴⁵ Using these numbers, TNGI people in prison were nearly twenty-seven times more likely to report experiencing sexual assault than their cisgender counterparts.⁴⁶ Lastly, in terms of substantiated reports of sexual assault by prison investigations, TNGI people were ten times more likely to be sexually assaulted in prison than cisgender people.⁴⁷

5. Other Concerns for TNGI People in Prison

In addition to the housing practices that fail to consider TNGI people’s housing preferences in prisons and the increased violence and sexual assault TNGI individuals face in prisons, TNGI people also experience what some might consider micro-aggressions,⁴⁸ for

42. See generally LAURA M. MARUSCHAK & EMILY D. BUEHLER, BUREAU OF JUST. STATS., U.S. DEP’T OF JUST., NCJ 252836, SURVEY OF SEXUAL VICTIMIZATION IN ADULT CORRECTIONAL FACILITIES, 2012-2018 – STATISTICAL TABLES (2021).

43. E. ANNE CARSON, BUREAU OF JUST. STATS., U.S. DEP’T OF JUST., NCJ 253516, PRISONERS IN 2018, at 1 (2020), <https://bjs.ojp.gov/content/pub/pdf/p18.pdf> [<https://perma.cc/B2MW-6SGP>].

44. *Id.* at 1.

45. BUREAU OF JUST. STATS., U.S. DEP’T OF JUST., NCJ 248824, PREA DATA COLLECTION ACTIVITIES, 2015, at 2 (2015), <https://bjs.ojp.gov/content/pub/pdf/pdca15.pdf> [<https://perma.cc/ZJ3P-T3QF>].

46. Compare CARSON, *supra* note 43, at 1, with BUREAU OF JUST. STATS., *supra* note 45, at 2.

47. Gilroy et al., *supra* note 8, at 458.

48. See generally Kevin L. Nadal, *Measuring LGBTQ Microaggressions: The Sexual Orientation Microaggressions Scale (SOMS) and the Gender Identity Microaggressions Scale (GIMS)*, 66 J. HOMOSEXUALITY 1404, 1404 (2019) (defining microaggressions as “brief and

which statistics do not exist. For example, TNGI people housed according to their sex at birth might feel that they are unable to express their genders in fundamental ways.⁴⁹ One of these ways is being referred to using a name or pronoun that reflects who they are.⁵⁰

Moreover, many TNGI people in prison, especially transgender individuals, express frustration toward prison medical staff who refuse to diagnose them with gender dysphoria, which is often needed so that they can receive prescriptions for hormone therapy and gender-confirmation surgery.⁵¹ Similarly, some transgender people in prison report that their prisons refuse to approve their transfer to the facility that reflects their gender unless they undergo gender-affirmation surgery, despite only one in four transgender Americans choosing to have gender-affirming surgery.⁵² This is part of a larger ongoing discussion about TNGI people's Eighth Amendment right to ensure their access to trans or gender-affirming healthcare, which is not the main concern of this Comment but is nonetheless contextually important.⁵³

C. *Current Prison Housing Practices in the United States*

The law that comes closest to protecting TNGI people in prisons is the Prison Rape Elimination Act ("PREA"). Despite its drafters' intentions, PREA remains toothless with regard to fixing state and

commonplace daily verbal, behavioral, or environmental indignities, intentional or unintentional, that demonstrate bias toward members of historically marginalized groups").

49. See, e.g., Sosin, *supra* note 7.

50. *Id.* This refers to practices like deadnaming and misgendering. Thomas Nash Taylor, *Deadnamed and Misgendered: How Specific Microaggressions Influence Perceptions of Therapists*, at 5–6 (2022) (M.A., dissertation, Southern Illinois University Edwardsville). Deadnaming refers to the use of a TNGI persons' "name assigned to them at birth in cases where those names have been rejected." *Id.* at 6. Misgendering "is the act of incorrectly using pronouns or language that does not affirm or match gender identity." *Id.* at 5.

51. Gary Cornelius, *Managing Liability Associated with Transgender Inmates*, LEXIPOL (June 5, 2020), <https://www.lexipol.com/resources/blog/managing-liability-associated-with-transgender-inmates/> [<https://perma.cc/ZEH8-6HHB>].

52. Sosin, *supra* note 7.

53. See Szuminski, *supra* note 5, at 505 ("Despite the difficult standard that TNGI individuals must overcome thanks to [Farmer v. Brennan, 511 U.S. 825 (1994)], TNGI inmates have sometimes been successful in pursuing Eighth Amendment claims to ensure their access to trans healthcare, and TNGI prisoners could use this standard to argue that denying them access to safe housing is also in violation of the Eighth Amendment.").

local prison housing policies for TNGI individuals due to empty incentives and indirect enforcement.⁵⁴

1. PREA

Congress passed PREA unanimously in 2003, aiming to stop sexual assaults behind bars.⁵⁵ PREA sets out to provide policies, procedures, and standards to respond to sexual misconduct and violence in prisons.⁵⁶ Part of these standards includes establishing definitions for various terms such as “sexual abuse (§ 115.6), prevention planning (§ 115.11-18), responsive planning (§ 115.11-22), training and education of staff and inmates (§ 115.31-35), reporting allegations (§ 115.51-54,) investigation of allegations (§ 115.71-73), data collection via the Survey of Sexual Violence (SSV, § 115.87), and audits (§ 115.93 and § 115.401-405).”⁵⁷

Though the main purpose of PREA is to address sexual misconduct and violence in prisons, it serves a dual purpose in creating additional protections for LGBTQ+ people in prisons.⁵⁸ Guidelines added in 2012 require prisons to interview people during the intake process and then continuously every six months, inquiring into that person’s safety concerns, which might include concerns about being housed in a facility that does not match their gender identity.⁵⁹ The prison must then take that person’s concerns—mostly involving violence or threats of violence they have faced—into account when deciding on housing them in either a male or female facility.⁶⁰ Some people involved in the prison industry regard these PREA regulations as a “federal reformist effort” to influence changes in state and local prisons.⁶¹

54. Giovanna Shay, *PREA's Peril*, 7 NE. U. L.J. 21, 21–22 (2015).

55. Prison Rape Elimination Act of 2003, 42 U.S.C. ch. 147 § 15601 et seq; Sosin, *supra* note 7.

56. RAMONA R. RANTALA, BUREAU JUST. STAT., U.S. DEP'T. JUST., NCJ251146, SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2012–15, at 3 (2018).

57. *Id.*

58. Shay, *supra* note 54, at 21.

59. Sosin, *supra* note 7.

60. *Id.*

61. Shay, *supra* note 54, at 21.

2. The Enforcement Powers of PREA

Under PREA, the Bureau of Prisons (“BOP”) became subject to the standards established by the Act, but state and local prison systems remain subjected only to indirect enforcement by the Act.⁶² The principal mechanism for enforcing PREA on state prisons is a threatened loss of up to 5% of the federal funding provided for state prisons if they fail to comply with the standards established in the Act.⁶³ Beginning in 2013, governors of each state have been required to certify audits of their state’s compliance with PREA standards,⁶⁴ but as of 2020, no state had ever failed a PREA audit based on its housing practices for transgender prisoners.⁶⁵

Furthermore, PREA did not establish a separate office within the DOJ to ensure enforcement of the standards and has no formal mechanism used to investigate complaints concerning PREA violations.⁶⁶ PREA charges DOJ with the collection of information concerning reported instances of sexual violence in prisons but has no provision for individual rights of action by people in prison.⁶⁷

As many were quick to point out, when Congress passed PREA and when the new guidelines were introduced in 2013, state prisons and local jails receive such minimal federal funding that this primary enforcement mechanism of PREA remains “simply too weak . . . to create much incentive for some governors to implement the regulations.”⁶⁸ Lastly, some people warn that PREA, due to its broad rules and standards, can be used by prisons to target and harass people in prison based on actual or perceived LGBTQ+ identities.⁶⁹

62. *Id.* at 22.

63. *Id.*

64. *Id.*

65. Sosin, *supra* note 7.

66. Shay, *supra* note 54, at 22; *see also* Derek Gilna, *Five Years After Implementation, PREA Standards Remain Inadequate*, PRISON LEGAL NEWS (Nov. 8, 2017), <https://www.prisonlegalnews.org/news/2017/nov/8/five-years-after-implementation-prea-standards-remain-inadequate/> [<https://perma.cc/84HW-GMFC>].

67. 34 U.S.C. § 30303.

68. Shay, *supra* note 54, at 23.

69. *Id.* at 32.

3. Prison Policies Shift with White House Administrations

Alongside the weak enforcement of PREA, prison housing policies have shifted along with the changes in the United States presidential administrations. During the Obama administration, the BOP, operating under the DOJ, utilized a policy manual called the Transgender Offender Manual, which recommended housing people in prison according to their gender identity.⁷⁰

However, the Trump administration changed this policy to require biological sex to be the primary consideration for deciding which facility to place someone in.⁷¹ The Trump policy added that only in rare cases should gender identity factor into the housing determination for people in prison.⁷²

Most recently, in January 2022, the Biden administration restored the Obama-era policies and took them one step further.⁷³ The current policies require federal prisons to use peoples' lived names and pronouns.⁷⁴ The Biden administration hopes that these policies, like PREA, will help "set a precedent and a tone for state prison systems."⁷⁵

Though the Biden administration has reintroduced TNGI-friendly policies for prison housing, the flipping of policies between administrations, in addition to the weak enforcement powers of PREA, has left prisons insufficiently prepared to ensure the safety of TNGI individuals.⁷⁶

70. The Associated Press, *Justice Department Reviewing Policies on Transgender Inmates*, NBC NEWS, <https://www.nbcnews.com/nbc-out/out-news/justice-department-reviewing-policies-transgender-inmates-rcna2067> [<https://perma.cc/X5X3-4ZBH>] (Sept. 17, 2021, 11:01 AM).

71. *Id.*

72. *Id.*

73. Kate Sosin, *Biden Administration Releases New Transgender Federal Prison Policy*, THE 19TH (Jan. 26, 2022, 4:52 PM), <https://19thnews.org/2022/01/biden-administration-releases-new-transgender-federal-prison-policy/> [<https://perma.cc/SC8Q-DLCD>]. The new manual seeks to "ensure the Bureau of Prisons [] properly identifies, tracks, and provides services to the transgender population." FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., 5200.08, TRANSGENDER OFFENDER MANUAL 1–2 (Jan. 13, 2022), <https://www.bop.gov/policy/progstat/5200-08-cn-1.pdf> [<https://perma.cc/ZZV8-XJSX>].

74. The Associated Press, *supra* note 70. Again, this is a reference to deadnaming and misgendering. See *supra* note 60 and accompanying text.

75. Sosin, *supra* note 73.

76. Alex Redcay, Wade Luquet, Lorraine Phillips & McKenzie Huggin, *Legal Battles: Transgender Inmates' Rights*, 100 PRISON J. 662, 665 (2020).

II. BRIEF INTRODUCTION TO RESTORATIVE JUSTICE

The United States prison system remains largely incapable of ensuring the safety of TNGI individuals.⁷⁷ I propose that restorative justice, when used in place of the retributive practice of prisons, can better ensure the safety of TNGI individuals as well as many other marginalized individuals currently harmed by the prison system. Before beginning my argument, though, I set this Part aside to provide a brief and conceptual introduction to restorative justice and some of the methods practitioners of this theory of justice utilize.

Restorative justice practitioners strive to repair the harm caused by harmful conduct rather than punish someone for their actions.⁷⁸ This contrasts with the current, predominant theory of justice,⁷⁹ retributive justice,⁸⁰ which “define[s] justice as the establishment of blame and the imposition of pain under the guidance of right rules.”⁸¹ In place of a retributive system of justice, restorative justice offers a mode of justice defined and applied according to the individuals involved so as to address the wrongdoings rather than punish them.⁸² Restorative justice shifts the paradigm toward mending human relationships rather than placing people in prison for wrongful acts and is, therefore, a more values-based theory of justice.⁸³ However, restorative justice is not mutually exclusive with the criminal justice system;⁸⁴ it might be helpful to think of it as parallel with retribution rather than an abolition of criminal justice and the prison system.

77. See *supra* notes 38–52 and accompanying text.

78. Ross London, *A New Paradigm Arises*, in *A RESTORATIVE JUSTICE READER* 5, 6 (Gerry Johnstone ed., 2013).

79. Doron Samuel-Siegel, Kenneth S. Anderson & Emily Lopynski, *Reckoning with Structural Racism: A Restorative Jurisprudence of Equal Protection*, 23 *RICH. PUB. INT. L. REV.*, 137, 192 (2020).

80. Donald H.J. Herman, *Restorative Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflict in the Search for Justice*, *SEATTLE J. FOR SOC. JUST.* 71, 72 (2017). Retributive justice, a name for the contemporary practice of criminal punishment, is often linked to the imposing of a sanction or punishment on a person deemed to have violated the law through the prosecution and establishment of guilt. *Id.*

81. Howard Zehr, *Retributive Justice*, in *A RESTORATIVE JUSTICE READER* 23, 26 (Gerry Johnstone ed., 2013).

82. Kathleen Daly, *What is Restorative Justice? Fresh Answers to a Vexed Question*, 11 *VICTIMS & OFFENDERS* 9, 21 (2016).

83. Samuel-Siegel et al., *supra* note 79, at 192.

84. *Id.* at 193–93.

It is important to note, though, that restorative justice need not be limited in scope to formal mechanisms for administering justice, such as mediations, conferences, circles, and impact panels discussed below.⁸⁵ The values-driven focus of restorative justice can be implemented, for example, through legislative policies for prisons and as a replacement for prisons.⁸⁶ With that said, there are several practices and mechanisms utilized to achieve these restorative justice goals. I outline just a few of them to offer examples of restorative practices that have been used in place of retributive practices like prisons.

One such restorative practice is mediation, often referred to as victim-offender mediation (“VOM”) programs.⁸⁷ VOMs allow offenders and victims to meet with a trained mediator with the goal of (1) identifying the injustice, (2) agreeing on how to resolve the harm, and (3) planning for the future.⁸⁸

Another practice is called conferencing, where, like VOMs, the victim and offender meet, but conferences also invite the parties’ families, members of the community, and sometimes law enforcement officials.⁸⁹ Conferences conclude once the parties have agreed on how to repair the wrongdoing and reduce a plan to writing.⁹⁰

A third common restorative practice is a circle, which focuses on community-based decision-making.⁹¹ Circles are facilitated community meetings where the facilitator ensures an orderly process whereby each person is allowed to speak, and circles are focused on constructive outcomes for the victim, the offender, and the community at large.⁹²

85. Jennifer J. Llewellyn, Bruce P. Archibald, Donald Clairmont & Diane Crocker, *Imagining Success for a Restorative Approach to Justice: Implications for Measurement and Evaluation*, 36 DALHOUSIE L.J. 281, 296 (2013).

86. *See id.* at 296–97 (“[T]he promise restorative justice offers for other social and political institutions, systems, and work, lies with its relational approach and the understanding it offers about the needs and capacities of human beings and the institutions, systems, practices, processes, and policies in and through which we can flourish. One of the implications, then, when we start from an understanding of restorative justice as a relational theory of justice, is that a restorative approach is not limited to a theory or idea of justice—but could be applied to other ideas or areas.”).

87. Daniel W. Van Ness & Karen Heetderks Strong, *Encounter*, in A RESTORATIVE JUSTICE READER 82, 83 (Gerry Johnstone ed., 2d ed. 2013).

88. *Id.* at 84.

89. *Id.* at 84–85.

90. *Id.* at 85.

91. *Id.*

92. *Id.*

The last major restorative practice is known as an impact panel.⁹³ Impact panels are comprised of a group of victims and a group of offenders linked only by the commonality of the offense committed or experienced.⁹⁴ This practice is typically utilized when either the victim or the offender is unknown or deceased and is used to help victims find closure and to inspire change in the offender's future actions.⁹⁵

III. ARGUMENT

In this Part, I demonstrate that by looking at the prison system through a gendered lens, provided by Angela Davis, it becomes apparent that the system was only constructed for and by white, cis-gender men. I expand on Davis's theory, arguing that because the system furthers discrimination against TNGI people and maintains the white patriarchal social order in much the same way as she claims it has for women, the understanding of prisons as gendered institutions can—and should—be expanded to include TNGI people.

After expanding Davis's argument to include TNGI people, I explain the ways that restorative justice can help break down the reliance on the gender binary as a way for society to respond to wrongful acts and thereby alleviate the unaccounted-for harms TNGI people experience in prisons.

A. At Its Foundation, the United States Prison System Is Based on and Perpetuates the Gender Binary

In her book, *Are Prisons Obsolete?*, Angela Davis devotes a chapter to discussing the gendered structure of the prison system.⁹⁶ For this Comment, I focus on three main points that Davis makes, which illustrate not only how women have suffered in prisons but also how TNGI people, alongside women, have experienced harm under this system. These three points include the gendered nature of criminality, punishment as a means of reformation, and bodily discipline as an unaccounted-for method of punishment.

93. *Id.* at 86.

94. *Id.*

95. *Id.*

96. ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 60 (Greg Ruggiero ed., 2003).

1. Criminality is Gendered

First, Davis explains that the concept of criminality is itself shrouded in gendered connotations.⁹⁷ She begins by tracing the gender binary in prisons back to the tendency for society to view male deviance as more “normal” than female deviance.⁹⁸ For example, the dominant institution to control men has always been jail or prison, whereas women have been more likely to end up in mental or psychiatric facilities.⁹⁹ Because of this, Davis concludes that “deviant men have been constructed as criminal, while deviant women have been constructed as insane.”¹⁰⁰

Moreover, Davis notes that criminality intersects with class and race.¹⁰¹ To illustrate, for White and upper-class women, moral deviance was historically considered an emotional and mental disorder, but for women of color and lower-class women, it was treated as criminal.¹⁰²

2. Punishment as a Means of Reformation

Second, Davis traces prisons back to their purpose in society¹⁰³ to show why women were excluded from traditional male forms of punishment, like prison. Davis explains that the foundational principles of male imprisonment were ideologically connected to “penitence and reform.”¹⁰⁴

Men could achieve penitence and reform, she writes, through the giving up of rights and liberties in return for greater “self-reflection, religious study, and work.”¹⁰⁵ They could then regain some of

97. *Id.* at 65.

98. *Id.* at 66.

99. *Id.*

100. *Id.*

101. *Id.* at 67.

102. *Id.*

103. Here, Davis focuses on just one of the five common objectives of punishment to note that women were unable to partake in this system due to their lacking the necessary rights. *Id.* at 64–73. To be clear, the five primary objectives of the criminal justice system are commonly listed as retribution, deterrence, rehabilitation, incapacitation, and restoration. David McKenzie, *5 Primary Objectives of the Criminal Justice System*, MCKENZIE LAW FIRM, P.C. (Feb. 18, 2016), <https://www.davidmckenzielawfirm.com/blog/5-primary-objectives-of-the-criminal-justice-system/> [<https://perma.cc/M96C-XNE2>]. While Davis does not specifically mention these objectives, her discussion spans retribution, rehabilitation, and restoration. DAVIS, *supra* note 96, at 61–73.

104. DAVIS, *supra* note 96, at 69.

105. *Id.* at 69–70.

the rights and liberties that they conceded once they were reformed by the system.¹⁰⁶ This is significant because whereas male convicts could relinquish their rights while in prison, women historically were not guaranteed these rights or liberties; therefore, women could not participate in the act of punishment to achieve reformation.¹⁰⁷

3. Unaccounted-For Methods of Punishment—Bodily Discipline

Because of the different treatments of criminality and purposes of punishment, which both revolve around the gender binary, Davis describes the punishments to which women are subjected and men are not.¹⁰⁸ Davis terms these additional harms “bodily discipline” and defines them as “the connection between state-inflicted corporal punishment and the physical assaults on women in domestic spaces.”¹⁰⁹

Because of the separation between male and female social deviance, the distinction became highly sexualized, and women have been routinely subjected to bodily discipline.¹¹⁰ For example, prison guards treat women as “hypersexual” to justify the sexual abuse of women in prison, thereby transferring the deviance of the prison guards committing these wrongs onto the women who experience the assault.¹¹¹ Davis mentions this malleability of deviance and criminality, in part, to note that these forms of “bodily discipline” have rarely related to state punishment and exist solely to create and perpetuate social power.¹¹²

106. *Id.*

107. *Id.*

108. *Id.* at 66–69.

109. *Id.* at 68. Davis states that this form of punishment is also often experienced by women in “the context of intimate relationships, but it is rarely understood to be related to state punishment.” *Id.*

110. *Id.* at 66–68.

111. *Id.* at 67–68.

112. *Id.* at 68.

B. Prisons, as Gendered Institutions, Impact TNGI Individuals

1. Biological Criminality

In the 1970s and 1980s, the United States experienced a period of “resurrected biological theories of criminality.”¹¹³ During this time of increased “punitivity,” many politicians adopted tough-on-crime platforms.¹¹⁴ In place of rehabilitative programs, they enacted harsher sentencing laws, lengthened jail terms, added mandatory sentences, got rid of parole, and introduced life sentences for repeat offenders¹¹⁵ Critics viewed these reforms as “a means of social control exercised by a repressive state.”¹¹⁶

However, Davis argues that the United States prison system has always maintained a biological theory of criminality; deviant men were criminals, but deviant women were insane.¹¹⁷ I challenge Davis’s assertion to consider a less binary-focused approach. Rather, male deviance was criminal and accordingly capable of rehabilitation. Non-cisgender male—including female—deviance was then characterized as insanity and not capable of reform.

To illustrate how society has punished people differently based on the body or person acting, the perceived deviance from societal norms by TNGI individuals has historically been treated as a mental disorder—something beyond criminal.¹¹⁸ For example, “transsexualism” first became a diagnosis in the International Classification of Diseases and Related Health Problems in 1978 and was included among paraphilias and sexual deviations.¹¹⁹ This diagnosis was then modified in 1992 to include “transsexualism” among

113. London, *supra* note 78, at 5.

114. *Id.*

115. *Id.*

116. *Id.* at 6.

117. DAVIS, *supra* note 96, at 66.

118. See Shayla Love, *The WHO Says Being Transgender Is a Mental Illness. But That’s About to Change*, WASH. POST (July 28, 2016, 4:20 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2016/07/28/the-w-h-o-says-being-transgender-is-a-mental-illness-but-thats-about-to-change/> [<https://perma.cc/3N9Q-GNPE>].

119. M. Fernández Rodríguez, M. Menéndez Granda & Villaverde González, *Gender Incongruence is No Longer a Mental Disorder*, 2 J. MENTAL HEALTH & CLINICAL PSYCH., no. 5, 2018, at 6, 6; George R. Brown, *Overview of Paraphilias and Paraphilic Disorders*, MERCK MANUAL, <https://www.merckmanuals.com/home/mental-health-disorders/paraphilias-and-paraphilic-disorders/overview-of-paraphilias-and-paraphilic-disorders> [<https://perma.cc/6RBC-K8WS>] (Sept. 2022) (“Paraphilias are frequent, intense, sexual arousing fantasies or behaviors that involve inanimate objects, children or nonconsenting adults, or suffering or humiliation of oneself or the partner.”).

personality and behavior disorders.¹²⁰ It was not until 2018 that the World Health Organization (“WHO”) pioneered the process to eliminate “transsexuality” and “gender identity disorder” from manuals of mental disorders internationally.¹²¹ This shift away from treating TNGI gender expression as a mental disorder in favor of greater acceptance of gender expressions illustrates the fact that TNGI individuals have historically lacked bodily autonomy. Because of this lack of respect, societal responses to perceived gender deviance in terms of structures like prisons, now lag behind this movement toward respecting gender expressions.

In conclusion, like women, TNGI people have often been relegated to diagnoses of mental disorders as a means of social control upheld by biological theories of criminality.¹²² Considering this tendency to view TNGI people as psychologically deviant, one is left to conclude that policymakers have used this as a basis on which to fail to safely house or rehabilitate TNGI individuals who engage in wrongful conduct.

2. Available Means for Reform

Similar to the experience of having one’s identity tied to psychological disorders, TNGI people, like women, were also historically not afforded the appropriate rights that could be conceded in return for rehabilitation. To this day, the United States legal system guarantees few protections for TNGI individuals and “invalidate[s] . . . almost every trans person who has sought restitution for discrimination.”¹²³

It was not until 2020, in *Bostock v. Clayton County*, that the Supreme Court of the United States ruled that Title VII of the Civil Rights Act of 1964 extended employment protections for TNGI people.¹²⁴ Despite this case, there is no federal anti-discrimination law providing protections for gender identity outside of the employment sphere, so TNGI people face discrimination with no legal protection or remedy when seeking housing, when requiring medical

120. *Id.*

121. *Id.*

122. *See supra* notes 117–21 and accompanying text.

123. *A Brief History of Civil Rights in the United States: Transgender Rights in the United States*, HOW. U. SCH. OF L.: VERNON E. JORDAN L. LIBR., <https://library.law.howard.edu/civilrightshistory/transgender> [<https://perma.cc/3PDF-5C6A>] (Jan. 6, 2023, 12:25 PM).

124. 140 S. Ct. 1731, 1737 (2020).

attention, or even while at social events like restaurants.¹²⁵ Furthermore, many states have ongoing debates about passing legislation that includes a prohibition of TNGI people from public restrooms and the creation of exemptions based on religious beliefs.¹²⁶ Lastly, a general lack of accurate identification documents exists for TNGI people, especially for those who have undergone gender transition and no longer maintain the appearance of their identification photos.¹²⁷

In conclusion, the United States federal government has historically guaranteed fewer rights for TNGI people, like women, than men. Thus, according to Davis, the current system of relinquishing rights in return for reform and rehabilitation is impossible.

3. Bodily Discipline and Unaccounted-For Harms

To help explain the forms of bodily discipline and unaccounted-for harms that TNGI people experience in prisons, I return to the first-hand experiences of Johnson.

a. Harms against TNGI bodies

Johnson, the transgender woman introduced in Section I.A., describes the sub-human treatment and bodily punishment she experienced from prison guards. She states, “[i]t was a complete shock to me, being back in prison and being called sir, mister, he It feels like they’re just out to make an attack on your whole transgender body.”¹²⁸ Johnson continues, “there’s only two things gonna happen, either you’re gonna get your ass whooped [or] you gonna be asked to have sex or forced to have sex.”¹²⁹

This experience is not an isolated one. One respondent to the 2015 U.S. Transgender Survey describes his experience, stating, “[w]hen I was booked, the officers asked very intrusive questions about my genitalia in a very nonprofessional manner and laughed about it.”¹³⁰ Another respondent explains:

125. *Understanding the Transgender Community*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/understanding-the-transgender-community> [<https://perma.cc/S2LM-E372>].

126. *Id.*

127. *Id.*

128. Vera Institute of Justice, *supra* note 16, at 00:29–00:40.

129. McKenzie, *supra* note 15, at 00:56–01:04.

130. JAMES ET AL., *supra* note 23, at 188.

I was in [jail] for 12 days housed with male detainees. Upon being booked, I was escorted to the shower area where I was forced to strip down and shower with male inmates who made sexual advances towards me while mocking me for being different. I feared for my life and the guards were of no help because they mocked me for being transgender.¹³¹

Lastly, some TNGI people in prison feel forced to engage in sexual relations with other prisoners in return for protection from violence and sexual assault.¹³²

b. Unaccounted-for Harms Perpetuated by the Structures

Despite federal prison guidelines defining gender as “a construct used to classify a person as male, female, both, or neither,” the system places all people either in an all-male or an all-female facility.¹³³ One respondent to the 2015 U.S. Transgender Survey describes how prison staff placed him in the wrong facility despite his gender identity. He states, “[t]hey ended up booking me into an all-female solitary confinement cell, kept calling me ‘miss,’ and gave me female colors even though I pass full time as male.”¹³⁴

Johnson explains why so much violence targeted at transgender people in prison goes unreported or unnoticed. While in prison, one of her goals was to get into an early release program.¹³⁵ But, when she went to report an instance of sexual assault to a prison officer, the officer stopped her mid-sentence, stating, “before you tell me what I think you’re gonna tell me, the only place that can house you is in the SHU. And it’s the same SHU that you would be placed in if you stabbed somebody on the compound.”¹³⁶

Johnson clarifies that being placed in the SHU makes that person ineligible for early release programs or the opportunity to serve time only on the weekends.¹³⁷ Therefore when prison staff house a TNGI person in the SHU due to “sensitive needs,” this, in reality, strips them of opportunities in exchange for increased safety.¹³⁸

131. *Id.*

132. Sosin, *supra* note 7.

133. FED. BUREAU OF PRISONS, *supra* note 73, at 2.

134. JAMES ET AL., *supra* note 23, at 188.

135. McKenzie, *supra* note 15, at 01:30–01:39.

136. *Id.* at 02:58–03:14.

137. *Id.* at 02:02–02:17.

138. *Id.* at 01:50–02:09.

She states, “it’s not okay to hold us back as a community or prevent us from accessing a resource that everybody else accesses.”¹³⁹

She concludes, stating, “[t]here were times that I would just cry and cry and cry because I felt so much sadness and hurt and pain and disappointment about the poor treatment that I was experiencing, and not just myself, I mean, the transgender community as a whole.”¹⁴⁰ Based on these numerous statements from TNGI people who experienced prison, the failure of prisons to move past the gender binary leaves TNGI individuals placed in the wrong facilities, unable to report abuses, and subjected to isolation.

In the end, TNGI people, like women, experience harms such as sexual violence by prison guards and other prisoners, sub-human treatment, and structures that purposely make life in prison more difficult and longer, to which cisgender male prisoners are not subjected. Prisons are not designed for women or TNGI people; they are constructed for male criminality and male retribution. When women and TNGI people are placed in prisons, they subject women and TNGI people to bodily discipline as a way of perpetuating the male social hierarchy. Therefore, Davis’s gendered conception of the United States prison system is easily expandable to include TNGI people, which only further highlights the harms created and perpetuated by the gender binary.

C. *Restorative Justice Alleviates Harms*

1. Restorative Justice as a Solution

Where the United States prison system is incapable of adequately ensuring the safety of TNGI individuals and creating space through which they can atone for the crimes they have committed, I posit that theories of restorative justice can do just that. While a great deal of scholarship discussing the definition of restorative justice, how to measure restorative justice practices, and what restorative justice offers victims and the community exists,¹⁴¹ this Comment focuses on the ability of restorative justice to better the

139. *Id.* at 02:19–02:26.

140. *Id.* at 04:13–04:27.

141. *See generally* Daly, *supra* note 82, at 11 (explaining the problems of defining restorative justice).

wrongdoers, specifically TNGI individuals who commit wrongful acts.

For an offender, justice in the restorative model is “about taking responsibility for the wrong that was done.”¹⁴² TNGI people in prison face increased instances of harm and sexual abuse than cis-gender people.¹⁴³ Additionally, as I have described above, the system is incapable of removing the gender binary, which ostracizes TNGI people in prison and makes them more vulnerable to abuse from other people in prison and prison staff.¹⁴⁴ Therefore, it is important to emphasize the restoration of human relationships rather than punishment.¹⁴⁵ Here, I adopt the relational theory of restorative justice proposed by Jennifer J. Llewellyn.¹⁴⁶

2. Relational Restorative Justice: Connections, Equality in Terms, Attention to What Is Required

In Llewellyn’s relational theory of restorative justice, I focus on two main points that apply to prison housing policies for TNGI people: the connection-based nature of humans and the securing of relationships.

First, the relational theory of restorative justice focuses on the connection-based nature of humans.¹⁴⁷ Llewellyn challenges the individualist nature of retributive, corrective, restitutive, and distributive justice.¹⁴⁸ She writes, “[a]ttention to the multiple and intersecting relationships in which we live makes clear the ways in which wrongdoing causes harm not only to the individuals involved but also to the connections and relationships in and through which individuals live.”¹⁴⁹ These connections and relationships include those that exist between the victims, the wrongdoers, their immediate communities, and ultimately their greater community and society.¹⁵⁰

142. Katherine van Wormer, *Restorative Justice as Social Justice for Victims of Gendered Violence: A Standpoint Feminist Perspective*, 54 SOC. WORK 107, 109 (2009).

143. Gilroy et al., *supra* note 8, at 458.

144. *See supra* Section III.B.

145. van Wormer, *supra* note 142, at 109.

146. Llewellyn et al., *supra* note 85, at 296–97.

147. *Id.* at 297.

148. *Id.*

149. *Id.*

150. *Id.*

Second, when a societal wrong occurs, the relational theory of restorative justice “seeks to secure relationships in which all parties involved enjoy equality in the character and terms of relationship with one another.”¹⁵¹ To realize this equality, attention “to the particular contexts, the parties involved, and to what will be required to ensure respect, concern, and dignity in the relations between and among parties” is required.¹⁵²

Within this relational theory of restorative justice, therefore, Llewellyn describes a fundamental focus on equal concern and respect for human diversity.¹⁵³ Because these two main points focus on the connection-based nature of humans as well as equality in the terms of relationships, they are the most antithetical to how the United States prison system functions.

For example, prisons, by their nature, do not focus on human connections since prisons place inmates in prison cells and separate them by gender.¹⁵⁴ And, specifically for TNGI people in prison, when they fear they are in danger, prison staff often place them in solitary confinement as a protective measure, leading to psychological damage and sometimes lengthened prison time.¹⁵⁵

Moreover, current prison housing policies fail to ensure equal respect, concern, and dignity for TNGI people because prisons rarely house TNGI people according to their lived gender.¹⁵⁶ Additionally, some TNGI individuals express fear that they will be unsafe regardless of whether they are placed in a male or female facility.¹⁵⁷ Prisons cannot ensure equal respect, concern, and dignity for TNGI people because the gender binary—the option of either male or female facilities—inherently places TNGI individuals at a disadvantage.

3. How Relational Restorative Justice Alleviates Harms

To illustrate how a relational theory of restorative justice can alleviate the harms experienced by TNGI people in the United

151. *Id.* at 298.

152. *Id.* at 299.

153. *Id.* at 299–300.

154. See FED. BUREAU OF PRISONS, *supra* note 73, at 6–7.

155. Szuminski, *supra* note 5, at 497–98.

156. See *supra* notes 38–40 and accompanying text.

157. Sosin, *supra* note 7.

States prison system, I must first return to the manners in which Davis argues that prisons perpetuate the gender binary.

First, prisons perpetuate the gender binary by relying on biological criminality.¹⁵⁸ As described above, this can be expanded to include TNGI people because, like women, their deviance from societal norms has often been classified as insanity rather than criminality.¹⁵⁹ Second, Davis describes the process through which women were unable to experience personal reform through prisons because they historically lacked the necessary rights and liberties needed to cede in exchange for rehabilitation.¹⁶⁰ TNGI people also experience this inability to achieve reform because of the historical lack of rights and liberties afforded to them.¹⁶¹ Last, prisons preserves the gender binary by relying on the bodily discipline of women and TNGI people alike, which leads to unaccounted-for harms directed toward them that cisgender men do not experience.¹⁶²

In this Section, I break down each category that perpetuates the gender binary in prisons and describe how a relational theory of restorative justice not only deconstructs the gender binary but also alleviates the additional harms incurred by women and TNGI people in prisons.

a. Biological Criminality: Relational Restorative Justice

As described above, the prison system in the United States relies on biological theories of criminality.¹⁶³ Because of this, society has historically labeled women and TNGI individuals as insane and cast them aside from traditional means of rehabilitation.¹⁶⁴

Instead of individualist conceptions of justice, relational restorative justice requires considering the connectedness of humans.¹⁶⁵ This necessitates us to extend the scope of the harms resulting from a wrongful action beyond those of the victims and wrongdoers to involve “those connected with them, including their immediate

158. See *supra* Section III.A.

159. See *supra* notes 113–22 and accompanying text.

160. See *supra* notes 103–10 and accompanying text.

161. See *supra* notes 123–27 and accompanying text.

162. See *supra* notes 109–12, 129–40 and accompanying text.

163. See *supra* notes 95–100 and accompanying text.

164. See *supra* notes 99–100 and accompanying text.

165. Llewellyn et al., *supra* note 85, at 297.

communities of care and support, broader communities to which they belong, and ultimately the social fabric of their society.”¹⁶⁶

Moreover, by focusing on the harm done to these relationships, this theory of justice dissolves the separation of public and private wrongs by always “extend[ing] beyond private relationships between two parties and involv[ing] a wider set of relationships.”¹⁶⁷ Under relational restorative justice, societal wrongs are always public and distinguishable only by the responses required within the scope of their effects.¹⁶⁸

For TNGI people and women alike, this focus on connections extends the restoration of the harm beyond the victim(s) and wrongdoer(s) into society at large. Rather than focusing on conceptions of criminality constructed only for cisgender men, relational restorative justice dissolves the reliance on the private and public dichotomy of wrongs and relies on the required response for each wrong committed. The scope of the responses to a wrongful act, then, does not rely on any sense of “criminality” that might be gendered; instead, it relies on the relationships, described above, including the victim, wrongdoer, their communities, and society to decide what response is necessary. Especially for individuals like TNGI people who face discrimination and social ostracization, relying on a variety of sources, such as the community and society, can act as a further check on the harshness of a response to a wrongdoing.

Note, however, that TNGI individuals might be more vulnerable to harsh responses to wrongful actions depending on the context of their communities and society and depending on where they live or how open they are to information about their identity being known by the community. Therefore, this requires that close attention be paid to their needs and offering a variety of approaches to potential solutions.

b. Available Means for Retribution: Relational Restorative Justice

Second, because women and TNGI people both could not historically realize the purpose of prisons—the achieving of reform and rehabilitation—relational restorative justice must also be able to account for this. The purpose of the relational theory of restorative

166. *Id.*

167. *Id.* at 298.

168. *Id.*

justice, however, is not retribution; rather, it is the inquiry into how the parties contributed to the harm, how the harm affected the parties involved, and how the parties can restore the impacted relationships.¹⁶⁹ To accomplish this, restorative practices need not be reinvented, “but [they] would have to be utilized on a much larger and consistent basis.”¹⁷⁰

“[A]ttention to dimensions of relationship [would have] to be advanced along lines fundamental to relational theory, dimensions such as the scope of the relationship across social subsystems, degree of commitment, and obligation presumed in the relationship.”¹⁷¹ There must be a connection between the procedures or mechanisms of justice used with these principles of relational restorative justice. However, there are already creative restorative mechanisms in practice.¹⁷² Such mechanisms include VOMs, conferences, circles, and impact panels.¹⁷³

For TNGI people, these mechanisms—used more widely and with relational principles at their core—remove the historical barriers to accessing the purpose of justice. By replacing the retributive purpose of justice with the focus on restoring the relationship between the victim, wrongdoer, and society, TNGI people can begin to benefit from interacting with systems of justice. By using creative justice mechanisms like VOMs, TNGI individuals will be able to rely on the justice system to achieve restorative goals, but only once relational restorative principles replace retribution.

c. Bodily Discipline: Relational Restorative Justice

Third, where “[a]n ‘eye for an eye’ was intended as a limit, not a command,”¹⁷⁴ transgender people in prison are subjected to treatment denying their existence and violating their bodies,¹⁷⁵ which far exceeds any conceivable limit for punishment. This is an expansion of the unaccounted-for punishments Davis explains when discussing bodily discipline.¹⁷⁶

169. *Id.* at 302.

170. *Id.* at 314.

171. *Id.*

172. *See supra* notes 87–95 and accompanying text.

173. *See supra* notes 87–95 and accompanying text.

174. Zehr, *supra* note 81, at 30.

175. *See supra* notes 42–53 and accompanying text.

176. *See supra* Section III.A.3.

Instead of relying on bodily discipline, relational restorative justice secures equality in the character and terms of the relationship between the parties.¹⁷⁷ To achieve this form of equality among the parties, justice requires “ongoing dialogue among different points of view.”¹⁷⁸ From there, this form of justice must treat people with equal concern and respect, specifically respect for human diversity.¹⁷⁹

This requires attention to the contexts and experiences of the individual parties involved in the wrongdoing.¹⁸⁰ The retributive use of prisons automatically does not guarantee TNGI individuals, who are monolithically subjected to sexual abuse and psychological damage while in prisons, equal attention to their contexts and experiences.¹⁸¹ What is necessary here is attention be paid to the needs of TNGI people, which may stray from the typical needs of cisgender people, and specifically cisgender men, for whom the prison system was constructed.

Relational restorative justice promotes equality in the terms of the parties and guarantees that the responses to the commission of a societal wrong remain focused on the contexts of the people involved and the relationships among them. Part of this process, especially for TNGI individuals, is addressing the unaccounted-for harms, particularly those that take the form of bodily discipline, naming them as such, and ensuring that a response to a wrongdoing removes or accounts for these potential harms.

D. *Alternative Approaches Concerning Prison Housing Policies for TNGI Individuals*

In this final Section, I wrap up my argument by describing alternative approaches to housing TNGI people in prisons. Here, I wish to emphasize that restorative justice need not always take the form of mechanisms like VOMs, conferences, circles, or impact panels in place of prisons—though it can and should utilize these when appropriate. Rather, I hope that a values-based approach to

177. Llewellyn et al., *supra* note 85, at 297.

178. *Id.* at 298 (quoting Christine M. Koggel in *Perspectives on Equality: Constructing a Relational Theory* 5 (Rowman & Littlefield 1998)).

179. *Id.*

180. *Id.* at 299.

181. *See supra* notes 128–139 and accompanying text.

justice, like relational restorative justice, will inform all policy-making and begin to validate TNGI individuals rather than ostracize them.

Before individuals are incarcerated, restorative justice principles should be utilized to keep TNGI individuals out of prisons; mechanisms such as VOMs, circles, impact panels, and the like should be used instead of defaulting to prisons. When these restorative justice mechanisms cannot be implemented, then restorative justice principles and values, like the focus on connection-building and the securing of relationships, should inform prison housing policies concerning TNGI individuals. If restorative justice mechanisms and policies fail to ensure the safety of TNGI people in the United States criminal justice system, then the only solution left is for prisons to be abolished altogether.

Next, I describe some of the current modes and proposals for ensuring the safety of TNGI individuals in prisons and describe their shortcomings. I return to some of the current policies relating to housing TNGI individuals according to their gender identity. Then, I analyze proposals to create separate housing units in prisons dedicated to TNGI individuals. Last, I end with a discussion concerning prison abolition.

1. Housing Based on Gender Identity

Prison housing policies that place individuals according to their gender rather than sex at birth nevertheless place TNGI individuals in situations of extreme discomfort, ostracization by cisgender prisoners, and violence.¹⁸² Currently, most policies proposed or enacted to more safely house TNGI people, like PREA, focus only on housing TNGI individuals according to their gender identity.¹⁸³ For example, New York prisons have a policy to house people according to their gender, and California prisons allow people to choose whether to be housed in a male or female prison.¹⁸⁴

182. Sosin, *supra* note 7.

183. See Gary Cornelius, *Transgender Inmates: Treating Them Fairly, Keeping Them Safe*, LEXIPOL, <https://www.lexipol.com/resources/blog/addressing-housing-and-safety-for-transgender-inmates/> [https://perma.cc/Z594-UQ4C] (July 29, 2022).

184. See *id.*; Leila Miller, *California Prisons Grapple with Hundreds of Transgender Inmates Requesting New Housing*, L.A. TIMES (Apr. 5, 2021, 6:00 AM), <https://www.latimes.com/california/story/2021-04-05/california-prisons-consider-gender-identity-housing-requests> [https://perma.cc/MP4K-M3GP].

While policies centered around the ability to choose the facility one prefers to be housed in are best-case scenarios under the United States prison system, I still caution that prison housing reform should not stop there. These choice-focused policies force TNGI individuals to choose from the lesser of two evils, where “[n]ot all transgender prisoners want to be moved. Many transgender men prefer to be housed with women, because they fear sexual assault in men’s prisons . . . [a]nd some transgender women are concerned about facing a lack of acceptance, or even violence, in women’s prisons.”¹⁸⁵ And, while these policies rightfully focus on the needs of TNGI people in prison, they fail to ensure the safety of non-binary or gender non-conforming individuals and people who wish to have their gender identity unknown by prison staff, for whom prisons do not provide any equitable housing options.¹⁸⁶ Restorative justice, however, creates space for creative and non-binary approaches to dealing with societal wrongs that are still incapable of being imagined in the current prison system.

Lastly, I leave with a question of whether PREA is the wrong approach after all. Working within the retributive system, PREA takes a case-by-case approach to housing in prisons, asking questions about where people would feel safest and what threats of violence people face or have faced.¹⁸⁷ However, as noted, PREA lacks enforcement capabilities, leaving it with an unrealized potential.¹⁸⁸ I end on this because it is important to recognize the intention behind this legislation and ask where these intentions could potentially be better placed to realize greater changes to the criminal justice system.

2. Separate Housing for TNGI Individuals

Second, some scholars have called for the development of separate prison housing options for TNGI individuals.¹⁸⁹ This concept should not be confused with the use of solitary confinement as a protective measure for TNGI people in prison.¹⁹⁰ Instead, the

185. Sosin, *supra* note 7.

186. Szuminski, *supra* note 5, at 508.

187. Sosin, *supra* note 7.

188. *See supra* Section I.C.2.

189. Szuminski, *supra* note 5, at 516–17.

190. While some may consider the use of solitary confinement a housing policy for TNGI people, I don’t categorize it as such because it does not require much more discussion beyond the quantifiable harms it causes. *See id.* at 497–98, 510–11 (stating “[y]et another

development of separate prison housing would look more like multiple housing wings designated only for TNGI individuals, though subject to identical conditions as the rest of the prison.¹⁹¹

I challenge this idea because it fails to address the root of the problem: the ways prisons perpetuate the gender binary. The creation of a third wing does not break down the gender binary, it isolates, from the cisgender prison population, a collection of people who do not fall or do not wish to live within the binary.

Moreover, the creation of a third wing might promote the differences between cisgender people and TNGI individuals rather than focus on the connections that are shared among all humans. Relational restorative justice pushes the United State justice system away from the gender binary and toward a focus on the connections between humans and the restoration of harmed relationships, two fundamental issues third wings fail to accomplish.

3. Prison Abolition

Last, no current solution for prison housing can ensure the safety of TNGI individuals because the prison system lacks the ability to ensure the safety, justness, and fairness of any individuals in prison.¹⁹² Therefore, prison abolition, the overhaul of the entire United States prison system, remains the most ideal solution.¹⁹³

I end with this argument to also note that the theories I adopted from Davis are primarily rooted in her explanation of prison abolition as a necessity. Prison abolition would allow the United States to “focus on rehabilitative and preventative efforts rather than purely punitive and carceral ones.”¹⁹⁴ While I believe prison

imprisonment concern that disproportionately affects TNGI prisoners is the use of ‘administrative segregation,’ or solitary confinement, both as a ‘protective’ measure, and as a disciplinary measure. Trans prisoners are more likely to end up in solitary confinement than the general population. The devastating psychological damage that solitary confinement inflicts upon a person is severe, and its regular use has been compared to torture When TNGI individuals are forcefully segregated from the general population, even if the correctional officers are claiming to do so for the inmate’s safety, their agency is stripped from them and they lose the protection of any community they have formed in the general population”).

191. *Id.* at 517.

192. *See id.* at 514.

193. *Id.*

194. *Id.* at 514–15.

abolition to be an inevitable necessity, the reality of abolishing prisons is likely unattainable under the current political regimes.¹⁹⁵

Instead, relational restorative justice, while not overhauling the current United States system of justice, can provide a parallel means to achieving justice. It can serve as a replacement for punitive forms of justice while not requiring the upheaval of the justice system. It can inform policymaking so that future mechanisms of administering justice build relationships rather than tear them apart. Relational restorative justice can serve those individuals, like TNGI people, people of color, and women, who are historically harmed by the justice system while continuing to work within the current political regimes.

CONCLUSION

Multiple forces of inequality and unjust treatment bedevil the current United States prison system, only one of which concerns the additional and unaccounted-for harms directed toward TNGI individuals in prisons.¹⁹⁶ The United States prison system relies upon and perpetuates the gender binary, and efforts to make prisons more inclusive remain futile without a full deconstruction of the binary. Prisons have never treated male deviance and female deviance equally and therefore cannot expand to accommodate other genders that do not fall under this binary approach.

The relational theory of restorative justice can deconstruct the gender binary and treat individuals according to their differences by restoring the connections between the victim(s), wrongdoer(s), their communities, and society. Until prison abolition becomes a realistic option, restorative justice operates as a parallel to the prison system and informs policymaking that effectively provides for the safety and well-being of TNGI individuals in the United States justice system.

*John G. Sims **

195. *Id.* at 515.

196. *See, e.g., id.* at 525; JAMES ET AL., *supra* note 23, at 187; Gilroy et al., *supra* note 8, at 459.

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