

**Gender Not Fit for Prisons:
On The Incompatibility of Gender
as a Means to Segregate Prisoners**
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ABSTRACT

Prisons worldwide, including in Australia, are segregated based on biological sex. On the other hand, feminist scholarship challenges gender within the binary of man and woman, arguing instead that individuals undergo the process of “becoming” and are not merely born. In this space, tensions exist for transgender individuals interacting with prisons. Although many policy initiatives are being established by correctional authorities world-wide, these innovations are often criticized for failing to translate into reality. It is argued here that prisons must reimagine the way they categorize individuals based on binary conceptions of gender. Instead, they must view gender through the optics of transgenderism, where it is conceived as something fluid, changing, and mutable.

INTRODUCTION

Prisons worldwide, including in Australia, are segregated based on biological sex (Rodgers et al., 2017). On the other hand, feminist scholarship challenges gender within the binary of man and woman, arguing instead that individuals undergo the process of becoming and are not merely born (de Beauvoir, 1949). In this space, serious tensions exist for transgender individuals interacting with social institutions (including prisons), rendering transgenderism incoherent with social gender constructions. For transgender individuals, this tension is lived and contributes to their overall experience of structural sex and gender discrimination. It is argued here that prisons and other social institutions must implement policies geared towards bettering the conditions and interactions of transgender individuals with prisons by admitting transgender prisoners based on gender and not biological sex.

Further, traditional constructions of gender that fit within the dualism of man or woman are incoherent with gender constructions under the optics of transgenderism. Therefore, policy initiatives and innovations must have regard for the fluidity of sex and gender, and be careful not to perpetuate structural discrimination through traditionalist perspectives.

Moreover, this paper centralizes the work of Singer (2013) in interrogating the incongruity of transgenderism within binary schemas, particularly within broader social institutions.

INCONGRUITY OF TRANSGENDERISM

“Classificatory schemas that ascribed gender attribution, enforce gender socialization, and assign sex at birth is usually dimorphic: male/female” (Singer, 2013, p. 2). As a result, these schemas make bodies socially useful, culturally legible, and productive under different regimes of power (Singer, 2013). The inability for transgenderism to be articulated within these understandings, and the incongruity between bodies, identities, assigned gender, and gender expression (Singer, 2013), explicates the institutional betrayal of social life, government, and its processes in actively marginalizing transgender people through discriminative, exclusive, and phobic social structures. Of these, prison is a salient example, causing deleterious effects for transgender people (Maycock, 2020). Incorporating academic understandings gained through transgender studies into interrogative discussions of structural transphobia, including the experiences of transgender people as violators of sex and gender norms (Singer, 2013), is key to enriching public policy initiatives geared towards mitigating the effects of how gender is socially constructed. Moreover, it can inform policy initiatives to see transgenderism as a progressive and enriching tool forwarding the feminist project.

SEX, GENDER AND TRANSGENDERISM

Sex and gender theorists explain the attainment of gender through processes that include socialisation (Hoominfar, 2021) and performativity (Butler, 2006). An example is the gendering of colour (Wikberg, 2013), articulated thorough social constructs which assign colour to gender. For example, blue is often associated with the male gender, whereas pink is associated with the female gender (socialisation). As these gendered associations of colour are embedded into the child’s psyche, it is performed and expressed socially (performativity) as an endeavour to conform to specific and prescribed gender dispositions, including personality traits and behaviours indicative of the broader social belief that masculinity is prescribed for

men and femininity for women (Richardson, 2015). Furthermore, during the nineteenth century and early in the twentieth century, scientific theories dominated discourses of gender (Richardson, 2015). These theories reflected “biological” and “natural” explanations of human behavior, positing that these “sex differences” produced discernible psychological and behavioural dispositions in both males and females (Richardson, 2015).

From the outset, biological and naturalist explanations, and the gendering of particular objects, simplified social perceptions of man and woman into dichotomous and inflexible categories, in which transgenderism is incongruent. For example, clothing products for male customers are marketed using cisgender male models. Likewise, products for female consumers are marketed utilizing cisgender female models, inferring cisgenderism as being desired and socially prescribed, similar to Martino’s (1999) notion of “desirable masculinities” (p. 243). In this realm, sex is inextricably intertwined with gender and is not perceived as being two separate social constructions that do not collude. These cumulative societal explanations and perceptions of sex and gender account for transgenderism, contributing to the construction of transphobia. That is, “the fear, intolerance, or hatred of people who are, or who perceive to be transgender” (Gainsburg, 2020). However, as Spade (2011, as cited in Singer, 2013) argues, transphobia does not sufficiently describe the state administrative practices that oppress transgender people, but rather an “intersectional analysis of the classed and racialized criminalization of gender nonconforming lives” (p. 3) is better equipped to understanding the structural harms faced by transgender people. In other words, examining transphobia within a specific institutional context should not be discussed in isolation, but rather factors contributing to the social structures that perpetuate transphobia must be interrogated through an intersectional lens.

STRUCTURAL TRANSPHOBIA IN PRISONS

Governmental institutions do not openly and overtly commit transphobia within prisons, but rather it is employed through structural policies, reflecting, reinforcing, and reinscribing the conceptual understanding of sex and gender within broader society. Feinberg (1992, as cited in Singer, 2013) infers the cause of transphobia to be an effect of the “[violations of] socially, culturally, and state-enforced boundaries of sex and gender” (p. 1). Further,

these boundaries could be explained as a residue of Christian values, indoctrinated into laws and institutions due to colonization. For example, Hall and colleagues (2010) found in a study of harassment that religious beliefs moderated the effects of harassment. The penal estate in Australia is dichotomized based on biological sex assigned at birth – men and women are not intermingled with each other (Rodgers et al., 2017). The problem that transgenderism poses to the penal estate is that it does not fit into the categorical mechanisms employed to achieve social order and cohesion – transgenderism violates these gender norms (Singer, 2013). Transgender individuals identify their gender as being different to that of their sex (ibid). The policy guiding the segregation of prisons (within the Victorian [Australia] context) dictates that a person’s initial custody placement, so as to coincide with prescribed gender norms, must be based on sex and not gender (e.g., Corrections Act 1986 [Vic]; Corrections Victoria, Department of Justice and Community Safety, 2021).

There are, of course, practical explanations that substantiate these practices. For example, the Corrections Regulation 2019 (Victoria) stipulates the procedure of “strip searches” (cl. 86) as a combatant against the trafficking of illegal substances to prisons from the general community. This is, of course, important as research infers that a significant number of prisoners held in custody are charged or have been found guilty of a drug-related crime (Duke, 2003). It is common practice for strip searches to be facilitated by a custodial officer of the same biological sex (Corrections Regulations 2019, cl. 82(2G)). As the transgender community is not a homogenous group (Harris, 2017), not all of its members have undergone medical intervention. Therefore, there may be differences between sex and gender. For example, some transgender women may still have or consciously choose to have their natural/biological defining features intact. However, they may have undergone breast augmentation. In this instance, how would the prison facilitate strip searches consistent with the laws of the State? Perhaps, a female officer could inspect the top half of the person’s body, for they resemble a female’s biological anatomy. Therefore, perhaps a male officer inspects the bottom half under the same rationale. Suppose prisons adopt this practice of officers inspecting part of a transgender person’s body in isolation, indicative of their biological sexual features. Are prisons not merely perpetuating, condoning, and exacerbating transphobia for these practices signify social rejection and ignorance against transgenderism? If a

person identifies as a woman, then that person should be stripped-searched based on how they identify, irrespective of their biological sex.

Moreover, these practices have individual psychological harms on transgender individuals. A helpful framework to understand these various harms is Meyer's (2003) Minority Stress Theory (MST). According to Meyer (2003), minority stress is the "excess stress to which individuals from stigmatized social categories are exposed to as a result of their social, often minority, position" (p. 675). Meyer (2003) originally developed MST as a way to account for the effects of minority stress on the mental health of specific sexual minority groups, typically, lesbian, gay, and bisexual (LGB) individuals. Since then, tokenistic incorporation of transgender individuals has been included in the conceptual framework of MST. Interestingly, Clarke and colleagues (2010) found that the stressors experienced by transgender individuals do not necessarily align with those experienced by their LGB counterparts. Consequently, Testa and colleagues (2015) developed an extension of MST referred to as Gender Minority Stress Theory (GMST), which considers the specific stressors transgender individuals experience. GMST asserts that minority stress experienced by transgender individuals are not only different but often more deleterious. A prevalent cause of this is cisnormativity. That is, the assumption that it is "normal" for an individual's gender identity to align with its biological or physical features assigned at birth. Correctional policy, such as the process of strip-searching of transgender individuals exemplified above, indicate the prevalence of cisnormativity within the corrections space. GMST forwards the idea that cisnormativity elevates the likelihood of mental health problems experienced by transgender individuals by exposing them to trauma and spaces which reflect their secondary and subordinated social position. Therefore, not only does the strip search process exemplified above perpetuate structural transphobia, but it potentially adds more harm by way of trauma, anxiety, and distress to transgender individuals. Research shows that trauma, anxiety, and distress all elevate an individual's propensity to re-offend (Smith and Trimboli, 2010), further exacerbating the position of transgender and gender diverse cohorts within the criminal justice space.

So far, this essay has interrogated the work of sex and gender as a cultural artefact that inadvertently subordinates transgender people through norming social structures due to their deviance from expected gender norms. The work of Maycock (2020) highlights the pains of imprisonment (as adapted from

Sykes, 1958) transgender people undergo individually whilst in custody. That is, the deprivations or frustrations of prison life experienced by transgender people resultant of these social structures (Maycock, 2020). Some of the difficulties faced by transgender people in prisons include “issues relating to transitioning within custody, being housed in prison wings of gender assigned at birth, and not lived gender, misgendering, misnaming, and experiences of transphobia and stigma perpetrated by other people in custody and by prison staff” (ibid, p. 2). Maycock argues that these “pains not only illuminate aspects of life in custody... but more widely illuminate the challenges associated with the growing diversity of gender performance being made to fit within largely binary prison systems” (ibid, p. 8). Maycock’s (2020) research involved 13 transgender participants incarcerated in the Scottish correctional space, 11 of whom are transgender women and the remainder transgender men. The plight of transgender people in the context of prisons is harmful to those undergoing the incarceration experience and to the community in which the prison serves as a deterrent mechanism, desisting crime. During their time in prison, transgender people are significantly more likely to experience problems than other prison populations, including placement within the prison establishment based on anatomy and not gender performance, victimization, treatment, and healthcare provisions (Gorden et al., 2017). Most of the pains recounted by research participants resonate with those experienced by cisgender prisoners. However, several particular transgender-specific pains, which can be posited as residual outcomes of structural gender norms, emerged within the research findings. These included: the pains of being in the hall and in the wrong clothes, the pains of transitioning in custody, and the pains of isolation.

However, an important point of consideration is that despite potential developments in transgender policy, the plight of transgender people in prison will always be of concern. Prisons and the mechanisms that support the commission of prisons are itself producers of transgender inequalities, best captured by Stanley and colleagues (2012) who note: “the only prison that would be responsive to gender is one that ceases to exist” (p. 122). Stanley and colleagues argue that all innovations that aim to better the experiences of gay and transgender people are centered around the notion that we need a system of incarceration in the first place. That intervention can be put into place to minimize the gendered harms experienced by gay and transgender communities. However, artefacts of the prison industry will always reproduce these harms. These can be manifestly observed

through regulations and rules, which include gendered dress codes, gendered behavioural codes, and hierarchical systems. For example, even if transgender and gender diverse individuals were to be housed in a location reflective of their lived gender, they must still adhere to the gendered norms within that institution. As argued above, transgenderism is fluid and cannot sufficiently captured through binary conceptions. However, whilst abolitionist perspectives concerning transgender experience bring to light important considerations, it is beyond the scope of this article to fully explore the plethora of insights researched within abolitionist scholarship.

DEVELOPMENTS IN PRISON POLICY

It is notable to mention that some advancements to the plight of transgender people are occurring, allowing for transgender incarcerated people to be held in custodial settings commensurate to their gender and not their biological sex assigned at birth (see Lamble, 2012). In the United Kingdom, transgender individuals who have attained a Gender Recognition Certificate (GRC) under the *Gender Recognition Act* (2004) can be detained at an institution that reflects their gender. Although the transgender community welcomes this initiative, Lamble (2012) elucidates critical practical implications that the GRC does not sufficiently mitigate in addressing the experiences of transgender people in prison. Despite transgender prisoners obtaining a GRC, prisons in the United Kingdom are still reluctant to classify them according to the gender indicated on the GRC citing that holding a transgender person in custody indicative of their identified gender poses a “security risk” (Lamble, 2012, p. 8) to the prison. Within this context, public policy has kept abreast with the scholarship of transgender studies. However, this policy initiative remains obsolete to its purported intention. A possible explanation of this practice is through an interrogation of reductionist and essentialist perceptions geared towards describing transgender people into one monolithic community. That is all transgender people, despite a proportion seeking medical intervention in an attempt to conform to prescribed gender norms, present in such a way that is still obfuscating and discombobulating for societal acceptance. As a residue of this rejection, it is assumed that all transgender people manifest their identities in a way that is discordant with the perceptions of the prison population, causing hostility. And yet, while there is cognizance

of this, initiatives, intervention, and other transgender-specific projects are not undertaken by the penal estate – projects that could perhaps have the potential to quash assumptions associated with transgenderism that lead to their inability to participate in gender spaces reflective of theirs. In some ways, these experiences of structural transphobia documented by Lamble (2012) echoes Foucauldian perspectives on how prison is inherently oppressive, regardless of benevolent ideals (Jouet, 2021).

Within the Victorian (Australia) context, the 2.4.1 Commissioner’s Requirement (CV, DJCS, 2021) published in March 2021 echoed the objectives of the GRC in the United Kingdom. However, like its predecessor, transgender prisoners’ placement in prison is contingent on security and safety protocols. Clause 6.1 informs, “as a guiding principle, a person should be imprisoned in the prison of their gender rather than their sex assigned or assumed at birth” (ibid, p. 5). However, clause 6.5.1 of the same document states, “these decisions will be made with a view to ensuring the safety and welfare of the prisoner and other prisoners, as well as the security and good order of the prison” (ibid, p. 7). Currently, no study has evaluated the policies and procedures concerning this newly established strategy. However, if Corrections Victoria (CV) and the Department of Justice and Community Safety (DJCS) follows the steps of the GRC in the United Kingdom, it would undoubtedly be a worrying trajectory for transgender individuals. It would be helpful to analyze this policy in the future after it has been in place for some time to evaluate its efficacy and fidelity to guiding principles.

Another important note to consider in interrogating transgenderism in prisons is that “transgender does not only denote a specific type of identity and political collective; it also emphasizes transversal movement across boundaries of sex and gender relative to specific social structures and cultures” (Singer, 2013, pp. 1-2). Meaning that for transgender people, gender is not a dualism of male and female, but rather is a fluid notion that cannot be categorized. Therefore, structural policies aimed at alleviating transphobia through policy initiatives such as the implementation of the GRC and CR 2.4.1 must have regard to the fluidity of transgenderism (Singer, 2013). Cultural and social schemas of the dualism of male and female do not fit into the transgender lens of what gender is and the way it manifests. Ultimately, for policy initiatives such as the GRC and CR 2.4.1 to reach their potential utilitarian effect, it must encapsulate gender through

the optics of transgenderism. Current structures of gender are limiting and have been shown to perpetuate imbalanced power relations that hinder the objectives of the feminist project (Ortner, 1974, as cited in Brown, 1981). The transgender optic of gender may be the missing ingredient of the feminist project towards equality.

LACK OF TRANSGENDER SPECIFIC INTERVENTIONS

It has been established that the role of prisons within the context of social life is to act as a deterrent from antisocial behaviours and attitudes which risk the order and cohesion of society (Apel and Nagin, 2015) through its various rehabilitative functions. As criminological research expanded and the academic scholarship realized the inefficiency of prisons, rehabilitation was soon introduced as one of the primary functions of the penal estate (Apel and Nagin, 2015). Thus, intervention and treatment were incorporated into the fabric of prison culture. Further, research elaborated the need for prisons to resemble therapeutic spaces (e.g. Bennet and Shuker, 2018; Williams and Winship, 2018) that encourage active participation in rehabilitation projects and reintegration initiatives, reducing the anxieties and difficulties inherent with leaving the prison experience. These projects were all established as a response, upholding and protecting the pillar of community safety as the ultimate objective of criminal justice, recognizing the difficulties prisoners face during and after prison.

Studies have illustrated the difficulties and challenges associated with being a transgender person in the community (e.g. Dernberger, 2017), suggesting the elevated problems transgender people experience after the prison spell compared to their cisgender counterparts. Intervention-specific projects geared towards rehabilitating transgender individuals, considering inimitable rehabilitation goals, including reducing the difficulties faced by transgender people in the community (Melendez and Pinto, 2007), are few and far between. The failure of prisons in establishing these initiatives reduces its efficacy within its purported community safety objective. The dearth of practical policy and attention reflects society's appetite, or lack thereof, in not accepting transgenderism as part of the gender norm, but also a reflection of its inability to see transgenderism as an enriching component of the feminist project.

RECOMMENDATIONS

Some practical and essential steps need to be enacted to reduce the experiences of discrimination and transphobia among transgender individuals. Firstly, due to the fluidity of gender within the transgender optics, it must be a long-term goal to segregate prisoners based on socialised gender. In the interim, transgender prisoners must be given a choice, at the first possible opportunity, on the location of their accommodation – whether in a male or female prison. For first time prisoners, their location may seem trivial as they will not know the difference in facilities between institutions for men and women. However, to reduce the elevated stress and anxiety experienced by transgender individuals, they should have the choice to decide. Additionally, the penal estate must not assess their suitability on whether or not they are “masculine enough” or “feminine enough” to fit in with the cohort of prisoners within that prison. Corrections must house transgender prisoners in establishments in which they are comfortable to foster a therapeutic and rehabilitative experience – one where transgender individuals willingly engage in clinical and non-clinical rehabilitation programs.

Secondly, alleviating the experiences of transphobia within the prison cannot be remedied in isolation. Projects that simultaneously address individuals’ perceptions about sex and gender norms, transgender and gender diverse myths, and prisoner and prison staff culture, to name a few, are also significant in quashing cisnormative views and structures. For example, educational forums and programs may be organized by correctional institutions as a way to facilitate organic conversations about transgenderism, encouraging curiosity among members of staff and prisoners, and paving the way for social change. It would also be essential to amplify the voices of transgender and gender diverse prisoners to shed light on their experiences to enrich the corrections space in creating policy and protocols. Transgender individuals should have input in any policy initiative that directly relates to their carceral experience.

Thirdly, as with the social change project above, university curriculums need to be amended to include transgender-specific training. Higher education institutions produce future criminal justice practitioners, and yet anecdotal accounts indicate that most universities do not equip professionals with the skills to handle inimitable issues faced by transgender and gender diverse populations in the criminal justice arena. Early research points to the often

complex and interrelated factors that lead transgender and gender diverse cohorts to take on criminally deviant behaviours, consequently leading to criminal justice interactions (e.g. Jumper, 2021). Providing useful training to criminal justice practitioners will enable them to more efficiently and adequately assist transgender individuals during and after their time in prison. The three recommendations explicated above are not exhaustive measures. Instead, they are first-step initiatives that require immediate implementation and attention by correctional and governmental institutions.

CONCLUSION

This paper has demonstrated the need to reorganize the segregation of prisons away from dichotomized, essentialist, and biological basis. Biology is not destiny. A woman's ability to reproduce does not in itself constitute her gender. The fluidity and mutability of sex and gender through the optics of transgenderism as a means to segregate social institutions, like prisons, provides a more holistic and complete template, which accounts for the miscellany of identities associated with the term transgender. Heteronormative constructions and assumptions on how bodies are defined and engaged with have clear implications for transgender individuals. Although recent developments in governmental and institutional policies have been enacted to ameliorate the experiences of transgender individuals, more work still needs to be done to synthesize policy with actual experienced outcomes. To this end, studies are needed, particularly evaluating current practices and policies such as CV, DJCS, 2021. It is then crucial for governmental bodies to utilize these studies to better equip the penal estate in dealing with transgender prisoners, ensuring that academic epistemologies are at the forefront of governmental policy.

Moreover, it is vital to establish transgender-specific innovations, recognizing the interrelated and complex problems transgender people face during and after the prison experience. By extension, it is insufficient for prisons to essentialize all prisoners, especially transgender and other gender diverse individuals, into one monolithic community. This has significant implications for its rehabilitative and deterrent utility within the broader criminal justice system. Allowing transgender individuals to be placed contingent on their lived gender would be an essential first step towards ameliorating structural transphobia.

Finally, the recommendations above need to have immediate effect. The harms faced by the transgender community in prison are pervasive and continued. However, these experiences of distress, invisibility, and transphobia lived by transgender people in prison can be alleviated, which requires society to look profoundly into how it functions, categorizes, discerns, and distinguishes people based on differences. It must reimagine the utility of sex and gender as a tool to categorize and sort in order for the potential of transgenderism to be realized, supporting the alleviation of transphobia not only in prisons but in the broader community.

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