**Mapping the Manifestations of Exclusion: Challenging the Incarceration of Queer People**

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## 

### **Introduction**

Prisons are sites of coercion, harm, pain, and violence.[[1]](#footnote-0) They function to sustain and strengthen the capitalist system through their failure to rehabilitate and reintegrate prisoners into society.[[2]](#footnote-1) Prisons are central to promoting neoliberal rationalities that exclude those who are deemed unempowerable and unenterprising; such as people of colour, the working class, and other vulnerable groups. In effect the prison functions to safeguard those who profit from the neoliberal order, from the Other(s) who are perceived to endanger the continuation of these capitalist systems.[[3]](#footnote-2)

Prisons are deeply gendered institutions that enforce a gender binary and perpetuate heteronormative gender performativity.[[4]](#footnote-3) Queer people challenge gender-normative and heteronormative power relations that the prison’s binary structure produces. They experience magnified forms of violence within the prison including physical and sexual violence, verbal abuse, isolation and the denial of healthcare.[[5]](#footnote-4) There have been attempts at providing tailored, inclusive responses to imprisonment. These efforts are various; ranging from policies aimed at “managing” the specific needs of transgender prisoners within existing prison sites to expanding the prison system through the creation of prisons for non-binary people.[[6]](#footnote-5) This is intended as part of a broader initiative to best accommodate Queer prisoners within the prison environment and on the outside following the completion of their sentence.[[7]](#footnote-6)

While many commend the various attempts to assuage the exclusion of Queer prisoners, these reformist approaches fail to address the structural violence generated by the coercive and binary nature of the prison system. As Dean Spade reinforces, they merely “reify the racialized-gendered control of prisons”.[[8]](#footnote-7) This is because they overlook the prison as a site that forces Queer prisoners to “inhabit identities that [they] had rejected as part of their sense of selfhood.”[[9]](#footnote-8) Simultaneously, they neglect that homophobia and transphobia are intrinsic to the existence and functioning of the criminal justice system.[[10]](#footnote-9)

We argue that these confinement spaces produce varieties of exclusion for queer people in prison who challenge the gendered binaries inherent in the material construction of imprisonment. They are deemed both vulnerable and threatening.[[11]](#footnote-10) In short, they are considered difficult prisoners.[[12]](#footnote-11) As a consequence they face multiple manifestations of exclusion.

The purpose of this chapter is to explore how the law on prisoners’ rights legitimizes and reinforces these normative relations of power with a focus on three areas: (a) gender recognition: the systemic exclusions of transgender identities; (b) isolation of visible and vulnerable queer prisoners; and (c) the heightened surveillance of long term relationships. Before we move on to the analysis of multiple exclusion of queer prisoners that is reproduced in particular prisoners’ rights cases, the subsequent section sets out the theoretical framework. This is centred on heteronormative and gender-normative power relations in prison that produce queer prisoners in an irreconcilable paradox as both vulnerable and threatening.

### **I. Queer prisoners: vulnerable and threatening**

We take a Foucauldian perspective of power. Michel Foucault, in his seminal work “Discipline and Punish”, questioned the centrality of the prison in contemporary punitive regimes, as well as the broader question how power functions.[[13]](#footnote-12) For Foucault, the prison functions in many ways similar to other institutions in industrialized societies, such as the factory and the school, to produce docile bodies through disciplinary power.[[14]](#footnote-13) In his later work, on governmentality and biopower, he found that liberalism/neoliberalism produced a particular form of power, power as government.[[15]](#footnote-14) Liberalism/neoliberalism as rationalities of power in combination with technologies of power aims at creatively and reflexively shaping people’s conduct to enhance the wellbeing of the population as a whole (biopower).[[16]](#footnote-15) Through governance and self-governance, the aim is to secure the wellbeing of the population – through e.g. sanitation, health and safety regulations, public health insurance – to support the capitalist economy through enterprising labour.[[17]](#footnote-16) Crucially, Foucault argued that governmentality reconfigured and co-opted other forms of power, such as disciplinary power and sovereignty.[[18]](#footnote-17) Under liberalism/neoliberalism sovereignty is democratized and is, therefore, understood through a human rights discourse; the utility produced through disciplinary power shifts towards a general utility through regulation; and power as government becomes processes directed at the well-being and labour of the population in which “the subject is revealed in its social, biological and economic form.”[[19]](#footnote-18) For Foucault then, power is relational; it requires a subject who can resist;[[20]](#footnote-19) and power is productive or persuasive as well as coercive.[[21]](#footnote-20)

Applying this approach to incarceration, gendered power relations produce homogenized conceptions of men and women prisoners and reinforce hierarchical gender relations.Both the works of Kelly Hannah-Moffat and Eamonn Carrabine separately have shown that power in prison is diffused through mundane practices, routines, and local decision-making.[[22]](#footnote-21) Power in prison functions in a way to creatively and reflexively shape prisoners’ conduct through productive and repressive forms of power. The neoliberal strategies, empowerment and responsibilization, to shape prisoners’ conduct so that they can be integrated into society, are aimed at governance at a distance through self-regulation and self-monitoring. They nevertheless depend on coercive, disciplinary governing strategies directed at those who are perceived as resistant or are deemed unempowerable, namely those who are not capable nor willing to self-govern pursuant to neoliberal strategies.[[23]](#footnote-22) These governing strategies can be understood as producing prisoners as governable subjects.[[24]](#footnote-23)

Prisons, then, are deeply gendered institutions that enforce a gender binary and perpetuate heteronormative gender performativity.[[25]](#footnote-24) Judith Butler highlights that gender is a performative rather than an expressive act.[[26]](#footnote-25) It is continuously produced through repetition/variation of the gendered self within the constraints of discursive practices that produce binary dominant gender ideals and, at the same time, obscure their derivative origin.[[27]](#footnote-26) Prisons reflect “a hyper expression of traditional gender roles.”[[28]](#footnote-27) Men’s prisons are characterized by a hypermasculine environment in which a degree of violence and aggression is deemed acceptable or an unavoidable part of prison culture for men.[[29]](#footnote-28) This in turn facilitates violence against prisoners by officers – and also violence between prisoners for transgressions from the hypermasculine performance.[[30]](#footnote-29) Gender normative masculinity in prison perpetuates a heterosexist environment in which homophobia, transphobia and misogyny are amplified.

Women's imprisonment, in contrast, is characterised by numerous contradictory discourses that require women to be both “in control” (e.g. coping and caring) and “out of control” (e.g. in need of protection).[[31]](#footnote-30) Women’s prisons are constructed as spaces of “feminine” passivity, dependence and emotion, with gender-nonconformity amongst women seen as evidence of their delinquency.[[32]](#footnote-31) Consequently, women and /or gender non-conforming prisoners are considered to violate normative femininity and, therefore, prisons function to “Discipline, Infantalize, Feminize, Medicalize and Domesticize.”[[33]](#footnote-32) Whereas governance strategies – namely control, rehabilitation or normalisation - for men who conform to the dominant ideals of masculinity are centred on their offending behaviour, the risk that they pose to society and the institution. These gendered governing strategies produce binary prisoner identities: the normal man versus the dangerous, disruptive, violent and foreign man.[[34]](#footnote-33) These are still within the scope of possible identities within the hypermasculine imaginary of gender performance. More significantly for our analysis is the binary normal man versus the “difficult” Other, who is considered dangerous/risky as well as vulnerable.[[35]](#footnote-34)

LGBTIQ+ people in prison are othered to a degree through homogenization in two groups, sexual orientation and gender identity.[[36]](#footnote-35) Moreover the process involves the stripping away of intersected identities, such as race, class, age, ability.[[37]](#footnote-36) Trans women/men who present in their chosen gender and genderfluid/non-binary people are extremely visible and subject to transphobia as well as enhanced governing strategies,[[38]](#footnote-37) whereas queer people may feel unsafe to be open about their sexuality. In all cases, the prison’s protective regimes operate on a spectrum of isolation from solitary confinement to Vulnerable Prisoner Units.[[39]](#footnote-38) All of these involve restrictions of access to exercise, association, work and education. Julia Oparah in her analysis that disrupts the fixed category of woman through an “anti-racist” gender queer framework, writes that the prison’s rigid gender binary forces trans/gender non-conforming people to “inhabit a gender identity that [they] had rejected as a fundamental part of their sense of selfhood.”[[40]](#footnote-39) Through her nuanced framework she draws out the intersectional experiences of race, class and gender non-conformity of incarceration in a rigid binary system.[[41]](#footnote-40)

The prison represents a site of coercion in particular for people with fluid gender identities and sexualities, who experience violent and coercive hostility. Gail Mason, in her study on homophobic violence writes that homophobic-related violence is distinct from gendered violence.[[42]](#footnote-41) It can be understood as violence that not only affects queer people’s everyday practices for avoiding harm, but also “knowledge systems through which we construct and recognise sexual identities.”[[43]](#footnote-42)  In her analysis of the interrelationship of power and violence, she finds that power relations that produce exclusionary regimes centred on gender, sexuality, race (and gender identity) are constitutive of violence.[[44]](#footnote-43) Queer and gender fluid people challenge these binary gendered governing strategies and the biological determinism implicit in the structure of imprisonment.

It is important to note that prisoners’ subjectivity is contested in prison. People in prison negotiate power relations within the institution through a sense of self that is formed outside and reflects wider social constructions of gender, race, class, sexuality, gender identity, ability and age.[[45]](#footnote-44) Exposed to asymmetric power relations, they nevertheless engage in everyday struggles with other prisoners and staff over food, exercise, visits, and association to retain a degree of choice and autonomy.[[46]](#footnote-45) Queer prisoners engage in hidden resistance practices that challenge the heteronormative subject prisoner to create better alternative subject positions.[[47]](#footnote-46) Within the context of penal governing strategies, this resistant subjectivity is conceived as a paradox, both vulnerable and threatening. This paradox in turn produces varieties of exclusion for queer prisoners that will be explored in the following section.

### **II. Varieties of exclusion**

Queer prisoners are doubly excluded in prison. Due to the forced gender binary together with high prevalence of homophobia and transphobia predominantly in men’s prisons but not exclusively, many queer prisoners are faced with either keeping their identities hidden or being exposed to ridicule, bullying and harassment.[[48]](#footnote-47) This has been highlighted as a “cycle of invisibility” that exposes them to further risks and harms.[[49]](#footnote-48)

In this part of the chapter we explore how the law on prisoners’ rights reinforces gender-normative and heteronormative conceptions through the multiple manifestations of exclusion of queer prisoners: gender recognition - the systemic exclusions of transgender identities; isolation of visible and vulnerable queer prisoners; heightened surveillance of long term relationships.

## A. Gender recognition: the systemic exclusions of transgender identities

Concerted efforts have been made to advance the inclusion of transgender and more fluid identities within society. However, existing legal approaches continue to ostracize these identities in various ways. For example, transgender and gender non-conforming identities are consistently excluded from entering freely into some conventional societal practices that are pursued nonchalantly by their cis counterparts, such as sexual based intimacy and family life.[[50]](#footnote-49) This is driven by the common law’s appropriation of biology and anatomy as the standard by which to privilege those identities it deems worthy of inclusion. Simultaneously, the common law eschews those identities deemed less worthy of inclusion to the periphery of the legal conscience.[[51]](#footnote-50)

The law’s failure to accommodate the needs of transgender people within wider society is amplified in the context of the prison, due to the hypervisibility of transgender prisoners and, consequently, their heightened vulnerability within the prison environment.[[52]](#footnote-51) Transgender prisoners are exposed to heightened levels of vulnerability within the prison because their gender expression digresses from the heteronormative prison environment.[[53]](#footnote-52) As a site, the prison has legitimized the exposure of transgender prisoners to an increased hybrid visibility-vulnerability, because it places restrictions upon such items supporting inmates’ gender expression.[[54]](#footnote-53) Although prison guidelines state that “[a]ll individuals in our care must be supported to express the gender with which they identify”, Emerton identifies the significant barriers hindering access to specific healthcare for transgender prisoners.[[55]](#footnote-54) Thus, in providing only formal access to these essential services, prisons can be said to increase the visibility of transgender prisoners and, thus, exacerbate their pre-existing vulnerabilities, because “they do not conform to the dictates of an extremely heteronormative and masculinist environment.”[[56]](#footnote-55)

The exclusionary jurisprudential approach towards criminalised transgender people and those with more fluid gender identities can be traced back to the common law prior to the enforcement of the Human Rights Act 1998.[[57]](#footnote-56) The Court of Appeal decision in *Regina v Frederick William Harris* illustrates the judiciary’s historically cisnormative and exclusionary approach towards LGBTQI+ people and imprisonment.[[58]](#footnote-57) Harris concerned a transgender appellant who appealed their sentence for various fraudulent related offences.[[59]](#footnote-58) Initially, Justice Goddard accorded weight to the appellant’s distress and fear of potential violence should their gender history become common knowledge amongst their peers within the prison.[[60]](#footnote-59) In considering this, Justice Goddard allowed the defendant’s appeal and proposed that all prison sentences should run concurrently.[[61]](#footnote-60)

While the judgment in *Harris* may appear to reflect an enlightened and progressive perspective, in merely providing a concurrent sentence, Justice Goddard failed to give full consideration to the prison as enforcing the “hyper expression of traditional gender roles.”[[62]](#footnote-61) As such, the judge can be sai failed to reflect properly on the well-documented nature of the prison as a site endorsing violence and exclusion specd to havifically for transgender people. In failing to critically reflect upon the suitability of the prison for the appellant in terms of their gender identity, the judgment simply privileged the “niceties of [law’s] internal structure and the beauty of its logical processes.”[[63]](#footnote-62)Thus, the judicial approach adopted in *Harris* suggests that the law prioritises the prison system’s regulation of gender in the binary sense above supporting the autonomy and welfare of transgender prisoners.[[64]](#footnote-63) In short, the judge gives precedence to the legal status quo above ensuring that the prison system can suitably accommodate the appellant.

Further, the court diminishes the autonomy and welfare of transgender prisoners by emphasising the appellant’s gender identity as hindering the decision-making process.[[65]](#footnote-64) The judge problematized the gender identity of the appellant above troubling the innate transphobia and homophobia of the prison environment.[[66]](#footnote-65) In preserving the use of imprisonment in this instance, the judge consciously exposed the appellant to multiple forms of exclusion and oppression within the prison, such as; prejudice, discrimination, and violence.[[67]](#footnote-66)

Although the judge was informed about the defendant’s legitimate fears of a possible attack within the prison in light of transphobic attitudes, she refrained from imposing a suspended prison sentence. The reluctance to provide the defendant with a suspended sentence arose despite the judge’s ability to access the doctrine of judicial notice.[[68]](#footnote-67) Although the ambit of judicial notice is unclear, Alex Sharpe suggests that this rule would allow for judges to refer to the “well-documented pattern of discrimination and violence experienced by transgender and other gender non-conforming people” within judgments.[[69]](#footnote-68) Thus, in theory such an approach could ensure that the law protects people with more fluid gender identities from the well-evidenced violence of imprisonment by addressing their transgression of the law from within society rather than from within the confines of the prison.

Instead, the judge in *Harris* reified existing cisnormative approaches towards criminal justice. This is because the judge “bar[red] open inquiry [to] the normative desirability of alternative judicial decisions, and thus naturaliz[ed] contingent doctrinal choices.”[[70]](#footnote-69) Therefore, the failure to challenge the use of custodial sentences for queer prisoners resulted in the double-exclusion of the appellant from mainstream society and within the prison. Fundamentally, the decision in *Harris* represents a missed opportunity to contest gender-normative approaches to incarceration and criminal justice.[[71]](#footnote-70)

#### (i) Permitting Prison Transfer: Lighting the Touch Paper for Inclusive Reform?

More recent jurisprudence indicates the desire to better accommodate transgender people within the prison estate. In R (on the application of B) v Secretary of State for Justice (AB), the High Court heard an application to challenge the decision denying the transfer of a transgender woman to the women’s prison estate.[[72]](#footnote-71) The applicant was a pre-operative transgender woman who was granted a Gender Recognition Certificate (GRC) in 2006 in line with the Gender Recognition Act (GRA) 2004.[[73]](#footnote-72) Despite legal recognition of her gender status, her requests to be placed within a prison correlating with her gender status were denied.The applicant’s transfer to the women’s prison estate was crucial in accessing a physical gender reassignment to support her gender transition. The Gender Identity Clinic would not approve gender reassignment surgery until the claimant could demonstrate that she had lived as a woman in a woman’s prison for 2 years.[[74]](#footnote-73) However, the prison authorities deemed it inappropriate to transfer the claimant to a women's prison and they continued to hold her within the Vulnerable Prisoners Unit.[[75]](#footnote-74) As part of the judgment, the court recognised that this denied the claimant even the prospect of physical gender reassignment surgery.[[76]](#footnote-75)

Encouragingly, the judge held that the refusal to transfer the claimant was unjustified and, in doing so, the prison service had disproportionately interfered with the claimant’s personal autonomy in violation of art. 8 of the European Convention on Human Rights (ECHR).[[77]](#footnote-76) Although the judge recognised imprisonment as involving the restriction of personal autonomy to some extent, he characterised the failure to transfer the claimant to the women’s prison estate as “going beyond that which imprisonment is intended to do.”[[78]](#footnote-77) In summary, the judge declared:

“When issues so close to the identity of a prisoner as here, so intimately concerned with her personal autonomy, the deployment of resources as a justification for the infringement of rights must be clear and weighty in order to be proportionate. Here they are neither.”[[79]](#footnote-78)

In outlining the high standard required to justify an infringement on individuals’ personal autonomy and identity, the judgment underlines the law’s commitment to safeguarding the fundamental needs of those with more fluid gender identities. In doing so, the passage also highlights the tension between the legal recognition of transgender prisoners’ gender identity and the punitive institutional norms that seek to deny this recognition. Ultimately, in safeguarding the claimant’s right to autonomy and privacy, the law indicates its increased commitment to including transgender prisoners more effectively into the prison estate. Again, however, this judgment does little to challenge the culture of transphobia at the very root of the prison.

#### (ii) Prison Service Policies: A Transformative Approach towards Transgender Prisoners?

In the past, official guidelines have legitimized the partial inclusion of transgender prisoners and the absolute exclusion of prisoners with more fluid gender identities.[[80]](#footnote-79) The National Offenders Management Service (NOMS) Instructions on managing transgender prisoners (PSI-07/2011) was enacted in response to the shortcomings identified in the *AB* case. The purpose of PSI-07/2011 was to outline the duties of prison service professionals in managing the rights and specific needs of incarcerated transgender people.[[81]](#footnote-80) These duties included ensuring the fair treatment of transgender people, providing an equivalent quality of care to transgender prisoners who have been diagnosed with gender dysphoria as they would expect to receive from the NHS, and allowing them to wear clothes that support their gender identity.[[82]](#footnote-81)

Outwardly, the PSI 07/2011 appears to have provided incarcerated transgender people with a plethora of assurances that their gender identity would be effectively supported and safeguarded. However, the wording of the policy was inclusive only of those who proposed to live “permanently [in] the gender opposite to the one assigned at birth.”[[83]](#footnote-82) As a result, the policy excluded a multiplicity of individuals whose gender expressions deviate from the gender in the heteronormative sense. Thus, the policy compelled individuals to either convey their gender in a rigid manner reflecting the policy in order to have their needs met, or to risk having their needs overlooked by authentically portraying their gender identity.

The policy also extended a high degree of discretion to prison professionals to make important decisions about the lives of transgender people. Prison officers who possess limited knowledge and training opportunities to address sensitive matters like gender identity were given considerable discretion in implementing this policy.[[84]](#footnote-83) Similarly, they were extended considerable discretion in crucial decisions including in the placement of transgender inmates within the prison most suitably aligning with the prisoner’s gender identity.[[85]](#footnote-84) Given the combined lack of expertise and considerable scope in which to implement the policy, S Lamble highlights that the policy provided a platform to foster archaic attitudes towards gender identity. Similarly, Mia Harris and Robyn Emerton argue that the policy limited and denied transgender prisoners of their basic needs to express and have their gender identity recognised.[[86]](#footnote-85) In sum, although the PSI 07/2011 appears progressive in recognizing the specific needs and rights of some transgender prisoners, the policy also limited its protection to those performing gender in the binary sense.

The alienation of individuals who are perceived as falling outside the remit of the policy is evident in *R (on the application of Green) v Secretary of State for Justice*.[[87]](#footnote-86) The case challenged the decision made by the prison governor to prohibit supportive gender items on security grounds, including a wig and tights to an incarcerated transgender person.[[88]](#footnote-87) *Green* argued that the decision contravened PSI 07/2011, as well as violating her rights enshrined under the Equality Act 2010.[[89]](#footnote-88)

Initially, the judge acknowledged the complexity of the prison environment for transgender people and for those with more fluid gender identities. [[90]](#footnote-89) Similarly, he recognized that the hostility and ignorance towards transgender people within the prison environment increased the exposure of transgender prisoners to potential instances of sexual and physical violence.[[91]](#footnote-90) Encouragingly, he accorded weight to the “profound” importance of recognising an individual’s gender identity and gender transition.[[92]](#footnote-91) However, the judge ruled that the prohibition of the items represented a legitimate and necessary security and discipline measure.[[93]](#footnote-92) Rather than addressing the culture of transphobia within the prison environment, the judge problematized *Green’s* gender identity as an issue that is “likely to materially affect the good order of the other wings.”[[94]](#footnote-93) This mirrors more historic jurisprudence established by *Harris*, as once again the judge missed the opportunity to address the foundation of transphobia within the prison. In failing to trouble these embedded attitudes within the prison estate, the court perpetuates the very discrimination that the law purports to protect society against.[[95]](#footnote-94)

Perhaps, more concerning is the judge’s refusal to recognize and accommodate the identity of the transgender claimant properly within the judgment. Towards the end of the judgment, he makes inferences to the claimant’s biological and anatomical makeup and physical appearance in a manner which casts doubt on the authenticity of her gender status.[[96]](#footnote-95) The judge states:

“The claimant is a man seeking to become a woman – but he is still of the male gender and a male prisoner. He is in a male prison and until there is a Gender Recognition Certificate, he remains male. A woman prisoner cannot conceivably be the comparator as the woman prisoner has (either by birth or election) achieved what the claimant wishes. Male to female transsexuals are not automatically entitled to the same treatment as women – until they become women.”[[97]](#footnote-96)

In narrowly conceptualising the claimant’s gender identity in essentialist terms, the judge merely reifies archaic jurisprudence.[[98]](#footnote-97) Further, the judge perpetuates the false premise that transgender people must undergo a physical gender reassignment in order to be perceived as living authentically in their true gender. Thus, he can also be said to contravene the Equality Act 2010, as he fails to accord the same respect to transgender prisoners like *Green* who are “proposing to undergo” or who are “undergoing” a process of gender reassignment.[[99]](#footnote-98) Ultimately, it is clear that the essentialist legacy of *Corbett v Corbett (Otherwise Ashley) (No 1)* remains despite the enactment of the Equality Act 2010, which was heralded as a “new beginning” in terms of equality for some of the most vulnerable members of our society.[[100]](#footnote-99)

Following the self-inflicted deaths of transgender women prisoners – Vikki Thompson, Joanne Latham and Jenny Swift – after they were incorrectly placed in the men’s prison estate, the Government was compelled to revise the former rigid and essentialist PSI-2011.[[101]](#footnote-100) The new policy PSI-17/2016 came into effect in January 2017 with the promise of extending a “more flexible approach to location” and protection of those transgender prisoners who express their gender in binary terms, but also to those with more fluid gender identities and non-binary prisoners.[[102]](#footnote-101) Harris and Emerton commend the largely progressive stance provided by the revised PSI embracing the swifter and more transparent process of location supported by the convening of “Transgender Case Boards”.[[103]](#footnote-102) Despite the more progressive stance of PSI-17/2016, Robyn Emerton highlights that media outlets consistently problematize the inclusion of transgender people within the prison environment.[[104]](#footnote-103) This concern has since been amplified more recently by gender critical feminists following the transfer of Karen White to the women’s prison estate.[[105]](#footnote-104)

While PSI-17/2016 extends protection to a diverse range of genders, the policy reinforces the need to demonstrate “consistent evidence” of living in an authentic gender.[[106]](#footnote-105) Thus, while the policy takes steps to include a range of transgender prisoners who experience their gender in binary terms, Harris and Emerton highlight that non-binary prisoners will continue to be placed within either the men’s or women’s prison estate depending on their legal gender.[[107]](#footnote-106) Thus, arguably, PSI-17/2016 decreases the vulnerability of some transgender prisoners by offering limited opportunities to lessen their visibility within the prison. This is the reverse for non-binary prisoners, who are left increasingly vulnerable within the prison because they are rendered invisible by inadequate institutional policies. Therefore, while some gender identities are granted more substantive, but nonetheless limited inclusion, others receive only formal protection and thereby remain on the periphery of the legal conscience.

At the time of writing, the Government has once again sought to implement a new policy, the Transgender Policy Framework (2020) for the care and management of individuals who are transgender.[[108]](#footnote-107) The new framework “The Care and Management of Individuals who are Transgender” is a detailed risk management strategy that is designed to strike a “balance” between maintaining the wellbeing and safety of “transgender” people and others occupying the prison estate. It makes several key amendments to the former PSI-17/2016 including, an extension to the period in which to convene the Initial Local Transgender Case Board and the mandatory completion of an “Advance Disclosure” form prior to each Local and Complex Transgender Case Board.[[109]](#footnote-108) Unlike the previous PSI-17/2016, the new framework explicitly centres the “balance[ing] of risks and the promot[ion] of the safety of all”; suggesting that the policy was heavily influenced by the case concerning Karen White and subsequent pressure groups.[[110]](#footnote-109) Further in-depth research must be undertaken to explore the specific impacts of this recent policy change on transgender people and intersex, non-binary, gender fluid people and cross-dressers who are also encompassed under this policy.

## B. Isolation of visible and vulnerable queer prisoners

Queer prisoners who become visible or trans prisoners who are hypervisible and who raise incidents of bullying, harassment or abuse and ask for protection are often isolated and placed in conditions amounting to (or near to) solitary confinement.[[111]](#footnote-110) In 2013, two judgments were delivered on the issue of gay men placed in solitary confinement after they asked for protection: in the first case, *X v Turkey*, the European Court of Human Rights (ECtHR) questioned the protective nature of solitary confinement to protect prisoners from a homophobic environment and raised particular concerns about the conditions and the duration of the isolation.[[112]](#footnote-111) Similar questions were also raised in an Irish case, *Connolly v Governor of Wheatfield Prison*.[[113]](#footnote-112)

In *X v Turkey,* the European Court of Human Rights found both a violation of art. 3 ECHR, relating to inhuman and degrading treatment, along with a violation of art. 14, which related to discrimination on grounds of sexual orientation. The claimant, a gay man was kept in solitary confinement for eight months and 18 days with no contact to other prisoners and no exercise. In effect, he could only leave his cell when he received visits. In addition, his cell was badly lit, dirty and rat-infested. The authorities justified this form of isolation as protective custody.

In European human rights jurisprudence, solitary confinement itself does not violate art. 3 ECHR. Over time the courts have maintained that complete sensory and social isolation would invariably meet that threshold.[[114]](#footnote-113) Since then the test has been revised to include an assessment of:

“the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned (see *Rohde v. Denmark*, no. 69332/01, § 93, 21 July 2005).”[[115]](#footnote-114)

The success in X's case is partly due to the extreme conditions to which he was subject. The European Court of Human Rights noted that the claimant’s conditions were worse than those of prisoners on whole-life sentences or those who posed a specific security risk, even though he was in protective custody.[[116]](#footnote-115) The complete social isolation, as well as the unsanitary conditions, combined with the supposedly protective purpose met the extremely high threshold under art. 3 ECHR. They found that “the conditions of detention in solitary confinement were capable of causing him both mental and physical suffering and a feeling of profound violation of his human dignity.”[[117]](#footnote-116) Crucially, it seems that the judges clearly questioned the extent to which solitary confinement can have a protective function.

Significantly, the ECtHR maintained that the isolation of queer prisoners on protective grounds needed to be justified with a clear, legitimate aim as well as a proportionate response. In this case, they found that the isolation was solely discriminatory, namely based on his sexual orientation and this amounted to a violation of art. 14 ECHR. It is important to note that X’s case was exceptional in terms of the deprivation he suffered and the overt discrimination. Although the ruling challenges arbitrary decision-making, it fails to challenge the use of so-called protective isolation for vulnerable, in this case queer, prisoners. This is a theme that runs through the limited jurisprudence on the issue.

The Irish High Court, in *Connolly v Governor of Wheatfield Prison*, seems to have picked up the point that the isolation of queer prisoners for their protection needed to be based on a legitimate aim and needed to be a proportionate response in the circumstances.[[118]](#footnote-117) Here, the Court’s focus was on the legality of the solitary confinement, in particular the review process, the duration and any enhancements of the regime.

Mr Connolly requested protection from the mainstream regime for fear of further violent, homophobic attacks.[[119]](#footnote-118) Following a transfer to Wheatfield Prison in 2013, it was assessed that he was safe to be in the main regime. He objected and was then transferred to a segregation unit (“restricted regime”), where he was subject to 23-hour lock-up with one hour of exercise in the yard with other prisoners. He had access to items such as a television, books and magazines. However, he was excluded from education and other social activities. This decision was reviewed on a monthly basis.

The central question before the High Court was whether the solitary confinement of Connelly under the circumstances violated a provision in the Irish Constitution – to protect individuals from “unjust attack” – and whether this would justify his release. Mr Justice Hogan found that Mr Connolly's three months in solitary confinement for his protection was lawful. He maintained that solitary confinement is to be understood as an exceptional measure. Although he acknowledged the severely restrictive regime, he emphasized that the “voluntary” nature of the detention against the prison authorities’ assessment, together with access to a television and reading material, as well as the medical support, went some way to mitigating the harm of solitary confinement. Moreover, the periodic review of the detention provided a mechanism to monitor Mr Connolly’s welfare. However, he added that the prison authorities were under a duty to monitor for signs of psychological distress. If the detention should be extended “indefinitely or for an extended period of months with no sign of variation” it may be considered unlawful.[[120]](#footnote-119) He distinguished Mr Connolly’s case from an earlier judgment where the applicant had been subjected to complete sensory deprivation.[[121]](#footnote-120)

Although Mr Justice Hogan stressed the importance of duration, his ruling is clearly deferential. He maintained that the supervisory function of the court does not extend to setting prescriptive standards in relation to solitary confinement.[[122]](#footnote-121) In this particular case, he repeatedly emphasized that Connolly was not being punished and that his conditions were ameliorated by some access to the social world. His refusal to leave segregation for fear of homophobic attacks seemed to have added legitimacy to the situation.

Judges are deferential in the prison context, in particular where there are security considerations. This also accounts for the high threshold under art. 3 ECHR, where segregation of prisoners needs to come close to complete sensory and social isolation.[[123]](#footnote-122) The underlying assumption is that prisoners’ rights are limited by the purposes of imprisonment. This was emphasized in the United Kingdom Supreme Court decision in *Bourgass*.[[124]](#footnote-123) Lord Reed, in an unanimous judgment, maintained that prisoners had a right to “some degree of association”; however, the prison authorities have a wide discretion due to the complexities of managing that particular environment.[[125]](#footnote-124) Prisoners had no “precisely defined entitlement to association as a matter of public law. The amount of time, which he is permitted to spend outside his cell, and the degree of association which he is in consequence permitted to have with other prisoners …” was dependent on a number of factors.[[126]](#footnote-125) This particular case concerned prisoners detained for violent and terrorist offences who were segregated for good order and discipline following various allegations of assault. Here, Lord Reed did not consider the implication for prisoners who are segregated for their own protection.

In the first instance, these spaces are designed and organised with security and surveillance in mind. Yet, segregation also doubles as a framework for protecting prisoners who are at risk in the main prison.[[127]](#footnote-126) This means that prisoners are physically removed from the mainstream regime to either dedicated high security units designed to detain prisoners in solitary confinement or dedicated prison wings for vulnerable prisoners. As a consequence, they are not able to participate in the general activities (such as gym, library, education, work) at all (in the case of solitary confinement) or they may have reduced access (vulnerable prisoners). In England and Wales, there are different ways that prisoners can be segregated for protection: moved to designated segregation units, segregation in own cell or moved to a designated wing, so-called Vulnerable Prisoner Unit (VPUs). Prisoners who request protection may be moved to the prison’s segregation unit, now Care and Separation Unit (CSU), temporarily until a space in a VPU becomes available.

In a comprehensive review of segregation units in England and Wales in 2015, “Deep Custody”, Shalev and Kimmet found that six per cent of prisoners were segregated for their own protection.[[128]](#footnote-127) This can include those who are at risk of self-harm, as well as prisoners who are at risk of harm from other prisoners.

This “catch all” function is captured by a prison officer interviewed for the “Deep Custody” study. Segregation “can be for prisoners where basically there’s nowhere else to place them. It’s a case of needs must- there’s nowhere else. It’s protection for them and us (Officer).”[[129]](#footnote-128)

For prisoners who are segregated this means solitary confinement with little time spent outside their cell, mainly to have a shower or exercise in the yard. They are unlikely to have their personal belongings with them nor are they likely to have access to a television.[[130]](#footnote-129) In “Deep Custody”, they found that the conditions of confinement in segregation units or CSUs were not only restrictive but extremely deprived.

“Regimes … were impoverished, comprising little more than a short period of exercise, a shower, a phone call, and meals. In some units prisoners had to choose between having a shower and taking exercise or making a phone call in any one day. Most of the prisons we visited did not meet international standards in the provision of exercise.”[[131]](#footnote-130)

The severely harmful effects of solitary confinement to prisoners’ mental and physical health are well-established.[[132]](#footnote-131) They have been raised by international human rights bodies.[[133]](#footnote-132) In the *Bourgass* case, the Minister and the prison authorities accepted that solitary confinement posed risks to prisoners’ health and wellbeing. They emphasized that its use was restricted to a measure of “last resort where other means of addressing risk are considered insufficient.”[[134]](#footnote-133) Yet, there is still a significant lack of recognition from the prison authorities that solitary confinement or isolation are an inappropriate way to detain vulnerable prisoners.[[135]](#footnote-134)

Vulnerable prisoner units (VPUs) are dedicated spaces for prisoners in need of protection. While they resemble an ordinary wing, prisoners still face considerable restrictions. For instance, in a letter to “Inside Times” in 2012, a gay man wrote how following abuse from other prisoners he was classified as a vulnerable prisoner and moved to the vulnerable prisoner unit.[[136]](#footnote-135) His conditions of confinement changed considerably. He was mainly confined to his cell apart from one early session of basic education. In addition to this, he lost his job in the prison education block. He felt that this was unjustified and that he was treated unfairly as a gay man. Prisoners in varying degrees of social isolation are denied access to prison resources including education, recreation and work. Due to the homophobic and transphobic environment in the main prison regime, they may feel that it is risky for them to return.

Solitary confinement and other forms of segregation represent the essence of the prison’s punitive capacity when all normalization and rehabilitation measures are stripped away. It is widely recognised that prolonged social isolation is harmful. These isolation measures seem wholly unsuited as a means of protecting prisoners from systemic homophobia and transphobia. Not only are these spaces ill-suited for a protective function, the prison environment itself is incompatible for such a task. The “unempowerable” prisoners, which includes those who are deemed in need of protection from the main regime, are essentially treated in the same way as the dangerous, risky and violent.

## C. Separation and Relationship recognition

In this final section, we critically engage with some more recent judgments on the way formalized relationships in prison challenge the heteronormative assumptions on prisoners’ right to family life under art. 8 ECHR.[[137]](#footnote-136) These are premised on the assumption that incarceration entails the separation of people in spousal relationships. Consequently, there is a recognition of the importance of relationships based on kinship to prisoners and, ultimately, their reintegration to society. The support of prisoners’ family relationships is framed through the spatial and temporal separation with an emphasis on the facilitation of visits, correspondence and communication via technology. In this section, we explore how the courts have engaged with queer relationships in prison. The first issue has been the extension of inter-prison visits to queer couples. The second has been the separation of prisoners once relationships have been formalized.

#### (i) Inter-prison visits and the quality of family life

In two consecutive applications, Charles O’Neill and William Lauchlan (O’Neill and Lauchlan), both serving life sentences with long tariffs, challenged the Scottish Prison Service’s (SPS) decision to refuse inter-prison visits.[[138]](#footnote-137) They claimed that, as a gay couple, the refusal amounted to a breach of their right to family life, art. 8 ECHR, and discrimination in breach of art. 14 ECHR.[[139]](#footnote-138) In its second ruling, the Scottish Court considered two issues, first the legal validity of the Scottish inter-prison visit scheme and, secondly, whether the inter-prison visits extended to civil partnerships more broadly and to O'Neill and Lauchlan more specifically. The focus here will be on the latter.

In relation to the general question, the Court held that gay and lesbian couples were entitled to inter-prison visits.[[140]](#footnote-139) In the particular circumstance of the case, Lord Stewart assessed the nature of the claimants' relationship. He held that the SPS did not fail to respect their right to family life nor did they discriminate against them. The question was whether the particular relationship amounted to “family life”. According to Lord Stewart, family life:

“can refer to two different but overlapping things: it can refer to the type of relationship and it can refer to the quality of the relations between or among those concerned. There is no exhaustive definition of the relationships which attract the protection and support of Article 8 ECHR: … Article 8 ECHR does not, for example, oblige the state to respect abusive, coercive and exploitative relationships …”.[[141]](#footnote-140)

The time and purpose of their togetherness was deemed central to establishing the quality of their relationship. In this case, the comparatively short periods together outside prison were dominated by their joint sexual violence towards young boys.[[142]](#footnote-141) Therefore, the judge found that the nature of their relationship did not come within the remit of art. 8 ECHR.

While the test of family life was applied restrictively in this case, there may be scope within this definition to broaden family life beyond heteronormative conceptions. Feminist critique centres on the privileging of heterosexual spousal relationships and correspondingly the “under-valuing of relationships of care, love and support.”[[143]](#footnote-142) Lord Stewart placed emphasis on “affection, confidence and dependence, that is financial, social and emotional dependence.”[[144]](#footnote-143) This could be interpreted as the extension of family life beyond the conjugal to other dependency models. Sue Westwood in her detailed analysis of the role of friendship relations to older, especially lesbian and gay, people and the ways in which law and social policy is adapting to the changing nature of relationships, summarizes different models.[[145]](#footnote-144) These include a reorientation away from spousal relationships to the centring of carer-dependent dyad;[[146]](#footnote-145) an openness to valuing non-typical family configurations;[[147]](#footnote-146) broadening next of kin and financial rights to alternative relationships;[[148]](#footnote-147) application of contracts to formalize varied relationships;[[149]](#footnote-148) as well as different registration schemes that could be opened up to non-spousal relationships.[[150]](#footnote-149)In the conclusion, Westwood questions to what extent such alternative care and dependency relationships, including friendship, need to be or indeed should be formalized in law.

The formalization of conjugal relationships in prison through civil partnerships or marriage challenges the heteronormative focus of the right to family life. Partners who live in the same space, be it the same prison wing or sharing a cell, openly subvert the forced separation of spouses inherent in incarceration. Arguably, they openly challenge the prison to its core. This is explored in the following section, which unpacks two recent judgments on whether the separation of prisoners from their partners should be considered a violation of the right to family life.

#### (ii) Separating prisoners from their partners

Two judgments have explored the legality of separating prisoners from their partners: *Bright* *and Keeley* and *Hopkins*.[[151]](#footnote-150) *Bright and Keeley* [2014] involved combined applications: David Bright challenged the refusal to transfer his partner Beau Beale back onto the wing following allegations he had made against another prisoner, and to restrict further contact. Bright and Beale were planning to enter into a civil partnership. Andrew Keeley challenged the transfer of his partner John Doughty to another wing after the prison authorities had noticed them having sex. After the transfer, they entered into a civil partnership. Following further allegations of misconduct, they were also separated at work. Both Bright and Keeley argued that the decisions to separate them from their partners violated art. 8 of the ECHR.

The Court of Appeal granted permission to proceed and heard the case. Its decision was centred on three points: first, whether, under art. 8(2) ECHR, “in accordance with the law” requires a dedicated policy providing guidance for prisoners in long term relationships to avoid separation; second whether the separation is proportionate; and third, whether prisoners are entitled to make representations before the decision is made.[[152]](#footnote-151)

Lord Dyson agreed with the Secretary of State that it would be impracticable to devise a specific policy on allocation and separation of prisoners, due to the complex considerations beyond their sexuality and, in particular, security considerations. More specifically, he agreed that it would be unworkable to devise a policy on managing long-term relationships in prison. He maintained that, due to these complexities, art. 8(2) ECHR did allow for discretion. To avoid arbitrary decision-making, the discretion needed to be exercised for a proper purpose. The decision-maker should not discriminate against prisoners and was governed by the duty to act reasonably.[[153]](#footnote-152) He summed up that the absence of such a policy did not fall foul of the art. 8(2) ECHR requirement that a restriction needed to be “in accordance with the law.”[[154]](#footnote-153) He also found that, in both cases, the decisions to separate the prisoners had been proportionate and that the prisoners had been able to participate in the decision making process, if the complaint and appeal procedures are also taken into account. He did not agree that the procedural requirements under art. 8 ECHR placed a duty on the prison authorities to hear representations prior to separation.

The central problem with this judgment is the acceptance that a policy providing guidance on long term relationships is unworkable. The applicants made a strong argument that there was a lack of certainty due to a failure to provide consistent guidance on whether long term relationships should be supported, and whether public expressions of affection, tenderness as well as intimacy were deemed unacceptable in prison.[[155]](#footnote-154) In fact, the decisions to separate were framed in internal policies that centred on the ban on sexual relations, indecency and insulting behaviour coupled with the “behavioural expectations” under the Incentives and Earned Privileges Scheme (IEP).[[156]](#footnote-155) In evidence, a member of the National Offender Management Service (NOMS) explained that prisoners, who were found to have engaged in sexual relations, would no longer be able to share a cell. Whereas sexual behaviour in semi-public spaces would be considered indecent and insulting.

In a study on “Sex in Prison”, published in the year after the judgment, the Howard League found that there seemed to be a lack of consistency of approach towards sex in prison, insufficient promotion of sexual health through access to condoms, and that staff were unsure how to react.[[157]](#footnote-156) In general, consensual, hidden sex in prison was tolerated, as it is understood as a way to assert a sense of self. There seemed to be an assumption that prisoners showing signs of affection and tenderness were engaged in intimate relations. This could result in separation.[[158]](#footnote-157) By accepting this framing, Lord Dyson reduced the issue of long-term relationships to sexual relationships. Moreover, he affirmed the prison authorities’ views that questioned prisoners’ capacity to enter into consensual sexual relationships, as well as the resource implications for establishing “true” consensual relationships.[[159]](#footnote-158) Unsurprisingly, this is reflective of how queer sex/intimacy beyond the prison exists in the shadow of law and regulation.[[160]](#footnote-159)

In turn, it is the mere possibility of sexual relations that are implicit in long term relationships together with their visibility or formalization that seem to be the deciding factors. Formally, pre-established long-term relationships give queer prisoners equal access to visits, as well as inter-prison visits. This is because these relationships seem to conform or are made to conform to gender normative conceptions that enforce the separation of spousal relationships in prison. Their hypervisibility leads to a presumption towards separation.

This was the case in the second judgment, *Hopkins*, in which Michelle Hopkins challenged the decision to move her civil partner out of their shared cell into an adjacent cell after an initial three months in prison.[[161]](#footnote-160) The decision was based on the “intimate relationship restriction”, which banned women who were in a relationship from sharing a cell.

Among other issues, Justice Silber ruled on whether the separation violated arts. 3 and 8 ECHR. The applicant argued in both instances that, due to her ability, she needed the care and support of her civil partner. First, the separation from her civil partner had resulted in degrading treatment in accordance with art. 3 ECHR. Second, distinguishing her case from *Bright and Keeley*, she was entitled to receive the care and support that she needed from her civil partner. Justice Silber found that she had not suffered degradation to meet the threshold of art. 3 ECHR. And significantly, he concluded that both women were first and foremost prisoners and, therefore, that they had lost the right to choose “in whose company they can sleep because any custodial order inevitably curtails the right to enjoy many features of life outside prison.”[[162]](#footnote-161)

This starting point also influenced Justice Silber’s approach to art. 8 ECHR. He held that art. 8 ECHR was not engaged, for their pre-existing relationship and rights to family life were framed by their incarceration like any other prisoner. The separation from your partner did not automatically engage art. 8 ECHR because this was a central aspect of imprisonment.[[163]](#footnote-162) He added that, in case it was engaged, art. 8(2) ECHR would justify the authority’s decision to prevent the women from sharing a cell, because the policy with its “intimate relationship restriction” was in accordance with the law and it promoted good order and discipline. Moreover, the decision was deemed proportionate because the women could apply to be located in the same wing.[[164]](#footnote-163)

Justice Silber reproduces the key heteronormative assumptions that came out of the *Bright and Keeley* judgment: first, that the prison involves separation from your family. This draws on the prisoners’ rights jurisprudence around art. 8 ECHR that is deeply heteronormative and gender normative. At the centre is the assumption that prisoners, mostly men, are separated from their close family members – spouses, children, parents and siblings – by the prison walls. Prisons, then, have a positive duty to ensure prisoners maintain “effective contact” with family members, that is to facilitate visits, correspondence and communication.[[165]](#footnote-164) For spouses or other family members who are both in prison, “maintaining effective contact” means that inter-prison visits can be facilitated on a three-monthly basis in addition to communication and correspondence.[[166]](#footnote-165)

The second assumption is that queer relationships are deemed to threaten the fabric of the prison. The biggest threat to the prison’s punitive capacity seems to be the perception that prison authorities were condoning sex in prison, which would invoke an exception to the blanket ban on sex in prison for long term relationships.[[167]](#footnote-166) Moreover, the ability to live in loving and caring relationships in prison is perceived as a threat to the fragile heteronormative institutional “equilibrium”. For the supposedly more favourable treatment of queer couples would lead to “the likely unfavourable reaction of other prisoners who are not able to maintain their sexual relations.”[[168]](#footnote-167) This seems to be an inversion of formal equality where a supposed situational advantage for queer prisoners produced through the prison’s gender binary needs to be rectified through the increased governance and closer surveillance of queer prisoners in open relationships. It is important to note how queer care emerges in response to a system that seeks to deny and punish (queer) intimacy. This moves the ‘queer outside’ into the space of law (or prisons) and disrupts the (hetero)normativity it attempts to sustain.[[169]](#footnote-168)

## Conclusion and Outlook

While there are increasing efforts to make prisons more hospitable and responsive to the unique experiences of queer prisoners, we argue that the inability to secure the universal and authentic inclusion of all sexualities and gender identities renders these attempts insufficient “reformist reforms”.[[170]](#footnote-169) Ultimately, many of these legal decisions and reforms are pursued with the intention of continuing the undisturbed production of capital by the prison under the pretence of instilling progressive and enlightened approaches towards criminal justice.

Our analysis of the jurisprudence reinforces the historical exposure of many queer prisoners to increased levels of violence and vulnerability through the reliance on the prison as a method of punishment. Some reconfigurations have been made recently to include some marginalised groups to an extent (e.g. non-binary people). However, these reforms overlook the reality that these marginalised groups are eternally excluded by the prison regardless of reform because they are in conflict with the underlying structure of the prison. Current protective regimes for queer prisoners that centre on isolation and exclusion seem wholly unsuited to challenging the systemic homophobia and transphobia within the prison system.[[171]](#footnote-170) Within this environment, queer caring relationships are seen as a threat to the heteronormative order. The separation of queer couples in prison paradoxically is perceived as a way to achieve equality for the supposedly disadvantaged majority. However, the heightened surveillance that queer prisoners face, is neglected.

Following our examination of the jurisprudence, we refer back to Dean Spade’s suggestion that the innate anti-queer, homophobic, and transphobic nature of prisons means that the exclusion of queer prisoners will always remain an irreconcilable issue. Thus, rather than our collective efforts in the superficial “reformist reforms”, which work within the confines of the existing exclusionary system, we align ourselves with fellow queer abolitionist efforts to advocate for the abolition of the Prison Industrial Complex.[[172]](#footnote-171) In this context, abolition of the prison system requires a commitment to “addressing homophobia and transphobia in criminal punishment systems [and] rejects the quest for inclusion and recognition in violent legal and administrative apparatuses…and instead seeks the abolition of criminal punishment... It properly identifies the fruitlessness of seeking safety at the hands of the most significant perpetrators of racialized gendered violence.”[[173]](#footnote-172)

While it is important to engage in efforts to mitigate harm for queer prisoners who are already trapped in the PIC, fundamentally Stanley, Spade and Queer (In) Justice reinforce:

“We can’t stop there – queer liberation and sexual and gender self-determination require that we reach toward abolition, not just of prisons, and for some of us, police, but of the systems that produce them, and which replicate systems of policing and punishment beyond prison walls”.[[174]](#footnote-173)

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29. Joe Sim, “Tougher than the rest? Men in prison”, in *Just Boys Doing Business? Men, Masculinities and Crime*, ed. Tim Newburn and Elizabeth A. Stanko (London: Routledge, 1994) 100-17. [↑](#footnote-ref-28)
30. Lori Girshick, “Out of Compliance”, 217. [↑](#footnote-ref-29)
31. P. Carlen, *Sledgehammer: Women's Imprisonment at the* Millennium (London: Macmillan Press, 1998) 67-8. [↑](#footnote-ref-30)
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34. This reflects the racialized dimension at the core of incarceration that has already been highlighted. [↑](#footnote-ref-33)
35. Corcoran, *Out of Order*. [↑](#footnote-ref-34)
36. This is evidenced in ways in which official statistics are collected, namely the percentage of LGB or other prisoners and the number of trans prisoners in a year. For 2017/18, 2.7% of prisoners who declared were LGB or other and 139 trans prisoners out of 83,263 incarcerated people. A breakdown to age, gender and ethnicity is only produced for trans prisoners, e.g. 9% BAME (27% BAME in overall prison population). Ministry of Justice, NOMS Annual Offender Equalities Report 2016/17, Ministry of Justice Statistics Bulletin, November 30, 2017 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/760093/hmpps-offender-equalities-2017-18.pdf>. NOMS only really started collecting some data on LGB and trans people in prison from 2015/16 Offender Equalities Report. The first report was published in 2013. [↑](#footnote-ref-35)
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38. See subsection Gender Recognition. [↑](#footnote-ref-37)
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40. Julia C Oparah, “Feminism and the (Trans)gender Entrapment of Gender Nonconforming Prisoners”, *UCLA Women’s L.J.* 18, (2012): 239-271, 241. [↑](#footnote-ref-39)
41. Oparah, “(Trans)gender Entrapment”, 270. [↑](#footnote-ref-40)
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56. Jenness and Fernstermaker “Gender Authenticity”, 10 [↑](#footnote-ref-55)
57. The Human Rights Act 1998 came into force in 2000. [↑](#footnote-ref-56)
58. *R v Frederick William Harris [2000]* WL 1027092.

    The term ‘cisnormative’ describes the approach that “assum[es] people experience harmony between their gender identity and their anatomy, and privileges those who do:; Alex Sharpe. *Sexual Intimacy and Gender Identity ‘Fraud’: Reframing the Legal and Ethical Debate* (Abingdon: Routledge, 2018). [↑](#footnote-ref-57)
59. *Harris* [2000], [2]. [↑](#footnote-ref-58)
60. *Harris* [2000] [9]-[10]. [↑](#footnote-ref-59)
61. *Harris* [2000] [11]. [↑](#footnote-ref-60)
62. Stanley and Smith, *Captive Genders,* 217. [↑](#footnote-ref-61)
63. Roscoe Pound, “Mechanical Jurisprudence”, *Columbia Law Review* (1908). [↑](#footnote-ref-62)
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65. *Harris* [2000] [9]. [↑](#footnote-ref-64)
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    *Harris* [2000] [9]. [↑](#footnote-ref-65)
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71. See: Sharpe, “Queering Judgment” for an alternative approach to judgment writing as a means of reconfiguring historic juristic constructions of gender; whilst also remaining faithful to the constraints and conventions imposed by traditional judicial method. Exploring the potential of establishing gender-fluid approaches to judicial decision-making within a criminal law context would be a valuable avenue of further research. [↑](#footnote-ref-70)
72. *R (on the application of B) v Secretary of State for Justice* [2009] EWHC 2220. [↑](#footnote-ref-71)
73. *AB* [2009]. Under Section 9(1) of the GRA 2004, the individual in receipt of the certificate must be recognised within their acquired gender and sex upon its issue. [↑](#footnote-ref-72)
74. *AB* [2009] [7]. [↑](#footnote-ref-73)
75. *AB* [2009] [4]. [↑](#footnote-ref-74)
76. *AB* [2009] [7] and [49]. [↑](#footnote-ref-75)
77. *AB* [2009] [49]. [↑](#footnote-ref-76)
78. *AB* [2009] [49]. [↑](#footnote-ref-77)
79. *AB* [2009] [77]. [↑](#footnote-ref-78)
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81. *AB* [2009] [18]. [↑](#footnote-ref-80)
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87. *Green* [2013] [↑](#footnote-ref-86)
88. A detailed list of the items requested can be found at paragraph 35 of the judgment. [↑](#footnote-ref-87)
89. Section 13 (1) *Equality Act 2010*; *Green* [2013] [31]-[32], [34], and [65]. [↑](#footnote-ref-88)
90. *Green* [2013] [2], [28], and [46]. [↑](#footnote-ref-89)
91. *Green* [2013] [2], [28], and [46]. [↑](#footnote-ref-90)
92. *Green* [2013] 3491 [2]. [↑](#footnote-ref-91)
93. *Green* [2013] [37] and [71]. [↑](#footnote-ref-92)
94. *Green* [2013] EWHC [46]. [↑](#footnote-ref-93)
95. Dunn, ‘Slipping Off’, l4. [↑](#footnote-ref-94)
96. *Green* [2013] [10]-[11]. [↑](#footnote-ref-95)
97. *Green* [2013] [68]. [↑](#footnote-ref-96)
98. *Corbett* [[1970]](http://www.pfc.org.uk/node/319) represented the authority on determining sex and gender until the enactment of the Gender Recognition Act 2004. The case concerned the applicant, Arthur Corbett, who issued legal proceedings to annul the marriage with his spouse, April Ashley on the grounds that she was male. Upon the construction of invasive and chromosomal, gonadal and genital tests to determine the sex of Ashley, Lord Justice Ormerod ruled that sex was fixed at birth and unalterable, meaning that Ashley would only be recognised as male for the purposes of marriage law in England and Wales. In permitting the annulment of the marriage between the couple on the basis of rigid and biological conceptions of sex, Omerod J refused to recognise Ashley’s gender identity as a woman. [↑](#footnote-ref-97)
99. Section 7 (1) *Equality Act 2010*. [↑](#footnote-ref-98)
100. Bob Hepple, ‘The New Single Equality Act in Britain’, *The Equality Rights Review* (2010): 11-24, 22. [↑](#footnote-ref-99)
101. Anon, “Transgender prison deaths: Watchdog calls for action” *BBC News*, January 10, 2017, accessed March 27, 2020, <https://www.bbc.co.uk/news/uk-38562714>. [↑](#footnote-ref-100)
102. PSI 07/2016, Transgender Prisoners 1.3, 2.3,2.4, 2.5. [↑](#footnote-ref-101)
103. Mia Harris and Robyn Emerton, “New Policy on Transgender Prisoners: Progressive but can Prisons Keep Pace?” *Inherently Human*, 21st Nov. 2016, https://inherentlyhuman.wordpress.com/2016/11/21/new-policy-on-transgender-prisoners-progressive-but-can-prisons-keep-pace/ [↑](#footnote-ref-102)
104. Emerton, Robyn, “Transgender prisoners” 4 [↑](#footnote-ref-103)
105. For a nuanced analysis of the Karen White case see: Sharpe, “Foxes in the Henhouse”. [↑](#footnote-ref-104)
106. PSI 17/2016, Transgender Prisoners. 2.4 [↑](#footnote-ref-105)
107. Harris and Emerton, “New Policy”. [↑](#footnote-ref-106)
108. “The Care and Management of Individuals who are Transgender”, HM Prisons and Probation Service, 31 October 2019. [↑](#footnote-ref-107)
109. The Care and Management of Individuals who are Transgender, 2019. [↑](#footnote-ref-108)
110. The Care and Management of Individuals who are Transgender, 2019, 1.6

     For a nuanced analysis of the Karen White case see: Sharpe, “Foxes in the Henhouse”. [↑](#footnote-ref-109)
111. Interim report of the Special Rapporteur on Torture to the UN General Assembly, 5 August 2011, A/66/268, p.19 cit. in Penal Reform International and APT, LGBTI persons deprived of their liberty: framework for preventive monitoring, 2nd ed. 2015, url: https://cdn.penalreform.org/wp-content/uploads/2016/01/lgbti-framework-2nd-ed-v7-web.pdf, p. 11. [↑](#footnote-ref-110)
112. *X v Turkey*, App. No. 24626/09 (ECtHR, 27 May 2013). [↑](#footnote-ref-111)
113. *Connolly v Governor of Wheatfield* Prison [2013] IEHC 334. [↑](#footnote-ref-112)
114. *Kröcher and Möller v Switzerland,* App. No. 8463/78 (ECmHR, 1978). [↑](#footnote-ref-113)
115. *X v Turkey* [2003] [40]. [↑](#footnote-ref-114)
116. To put it in context, European human rights precedents that set out the test for the use of solitary confinement were cases in which prisoners were either in pre-trial detention for or convicted of very serious offences, such as drug trafficking/organized crime (*Rohde v Denmark* (69332/01) July 21, 2005), and terrorism (*Ramirez Sanchez* (59450/00) July 7, 2006). [↑](#footnote-ref-115)
117. *X v Turkey* [2003] [45]. [↑](#footnote-ref-116)
118. *Connolly* [2013]. [↑](#footnote-ref-117)
119. Mainstream regime refers to prison wings that are not segregated spaces either for protection, punishment or containment. [↑](#footnote-ref-118)
120. *Connolly* [2013] [27]. [↑](#footnote-ref-119)
121. See *Kinsella* [2012] 1 I.R. 467. This mirrors the threshold set by the European Court of Human Rights mentioned above. [↑](#footnote-ref-120)
122. This seems to be a broader problem in administrative rulings on prison standards, also in England and Wales. This is particularly the case relating to issues of security and order. [↑](#footnote-ref-121)
123. See *Kröcher and Möller* (1978). [↑](#footnote-ref-122)
124. *R (on the application of Bourgass and another)* SC [2015] UKSC 54. [↑](#footnote-ref-123)
125. *R v Deputy Governor of Parkhurst Prison, Ex p Hague* [1992] 1 AC 58 cit. in *Bourgass* [2015] [122]. [↑](#footnote-ref-124)
126. *Ex p Hague* [1992] cit. in *Bourgass* [2015] [122].  [↑](#footnote-ref-125)
127. Segregation of such prisoners is governed by Rule 45(1) of the Prison Rules 1999. Prisoners can be removed for the preservation of “good order or discipline” as well as “in his own interests”. [↑](#footnote-ref-126)
128. Sharon Shalev and Edgar Kimmet, *Deep Custody: Segregation Units and Close Supervision Centres in England and Wales*, Prison Reform Trust, 2015. [↑](#footnote-ref-127)
129. Shalev and Kimmet, *Deep Custody*, 5. [↑](#footnote-ref-128)
130. Prisons and Probation Ombudsman for England and Wales, *Learning Lessons Bulletin: Fatal Incident Investigations: Segregation,* (June 2015) url: http://www.ppo.gov.uk/app/uploads/2015/06/Learning-Lessons-Bulletin-Segregation-final.pdf. [↑](#footnote-ref-129)
131. Shalev and Kimmet, *Deep Custody*, 132. [↑](#footnote-ref-130)
132. For a comprehensive review, see Peter Scharff Smith, “The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature”, *Crime and Justice* 34, no 1 (2006): 441-528. [↑](#footnote-ref-131)
133. See the UN Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 2008 Istanbul Statement on the Use and Effects of Solitary Confinement cited *Bourgass* [2015] [38]. [↑](#footnote-ref-132)
134. *Bourgass* [2015] [40]. [↑](#footnote-ref-133)
135. Ariana Silvestri, “Prison Conditions in the United Kingdom”, European Prison Observatory, 2013, https://www.crimeandjustice.org.uk/sites/crimeandjustice.org.uk/files/Prison%20conditions%20in%20the%20UK.pdf, p.22. It is difficult to identify how this disproportionately affects LGBTIQ+ people as NOMS data on segregation does not include sexual orientation and gender identity. The most recent demographic data of numbers of prisoners segregated is listed in “Deep Custody”, 148-149. They are split by ethnicity, age and gender. In the 2017/2018 Offender Equalities Annual Report, it is stated that number of segregation days among other data have been excluded due to poor quality of the data (see Ministry of Justice 2017/2018 Offender Equalities, 3). [↑](#footnote-ref-134)
136. Erwin James, “Homophobia is still rife in UK prisons”, *The Guardian*, September 25, 2012, accessed March 27, 2020, <https://www.theguardian.com/society/2012/sep/25/homophobia-rife-uk-prisons>. [↑](#footnote-ref-135)
137. For a comprehensive overview of prisoners’ rights under art. 8 ECHR, see Dirk Van Zyl Smit and Sonja Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights* (Oxford: Oxford University Press, 2009). [↑](#footnote-ref-136)
138. *Charles O’Neill and William Lauchlan*, [2015] CSOH 93; [2015] CSOH 144 (*O’Neill and Lauchlan* (2015a) (2015b)) The Scottish Prison Service as well as its legal system are independent. [↑](#footnote-ref-137)
139. The factual context of the decision is a bit strange in the sense that it changed in between the dates for the first (20-21 November 2014) and second hearing (12 May 2015). Following the first hearing, the Scottish Prison Service (SPS) changed its assessment of O’Neill and Lauchlan’s relationship; it acknowledged that they had been in a same sex relationship since before their detention in 2008. Furthermore, the SPS approved one inter-prison visit in that same period. [↑](#footnote-ref-138)
140. *O’Neill and Lauchlan* (2015a) [10]. This is also the case in England and Wales, where inter-prison visits are governed by PSI 16/2011, Providing Visits and Services to Visitors, [5.15]. See also *R (on the application of Bright) v Secretary of State for Justice, Bright v Governor of Whitemoor Prison CA (Civil Division) [2014] EWCA Civ 1628; [2015] 1 W.L.R. 723; [2014] 12 WLUK 564* para 14. [↑](#footnote-ref-139)
141. *O’Neill and Lauchlan* (2015a) [15]. [↑](#footnote-ref-140)
142. This raises the question whether this family life test is equally applied to heterosexual couples in prison. [↑](#footnote-ref-141)
143. Lynch cit. in Sue Westwood, “‘My Friends are my Family’: an argument about the limitations of contemporary law’s recognition of relationships in later life”, *Journal of Social Welfare and Family Law*, 35, no 3 (2013): 347-363, 349. [↑](#footnote-ref-142)
144. *O’Neill and Lauchlan* (2015a) [15]. [↑](#footnote-ref-143)
145. Westwood, “My Friends”, 349. [↑](#footnote-ref-144)
146. Fineman cited in Westwood, “My Friends”, 349. [↑](#footnote-ref-145)
147. Polikoff cited in Westwood, “My Friends”, 349. [↑](#footnote-ref-146)
148. Roseneil cited in Westwood, “My Friends”, 349. [↑](#footnote-ref-147)
149. Stychin cited in Westwood, “My Friends”, 349. [↑](#footnote-ref-148)
150. Barker cited in Westwood, “My Friends”, 349. [↑](#footnote-ref-149)
151. *R (on the application of Bright) v Secretary of State for Justice, Bright v Governor of Whitemoor Prison* CA (Civil Division) [2014] EWCA Civ 1628; [2015] 1 W.L.R. 723; [2014] 12 WLUK 564. *R (on the application of Hopkins) v Sodexo / HMP Bronzefield QB (Administrative Court)* [2016] EWHC 606 (Admin), 2016 A.C.D. 61. [↑](#footnote-ref-150)
152. The applicants had been refused permission to apply for judicial review in the Administrative Court. On appeal, they received permission and the proceedings were retained in the Court of Appeal. [↑](#footnote-ref-151)
153. *Bright and Keeley* [2014] para 33. Lord Dyson is referring to Wednesbury reasonableness: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. [↑](#footnote-ref-152)
154. *Bright and Keeley* [2014] [35]. [↑](#footnote-ref-153)
155. *Bright and Keeley* [2014] [23]. [↑](#footnote-ref-154)
156. The IEP is a mechanism to promote compliance in prisoners through incentives and to punish prisoners with loss of “privileges” if they do not comply. For more information, see House of Commons Library, Research Briefings July 31, 2014, accessed May 20, 2019, <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06942>. [↑](#footnote-ref-155)
157. Alisa Stevens, *Sex in prison: Experiences of former prisoners. A Report for the Howard League’s Commission on Sex in Prison*, The Howard League for Penal Reform, 2015, accessed May 25, 2019, <https://howardleague.org/publications/sex-in-prison-experiences-of-former-prisoners/>. [↑](#footnote-ref-156)
158. Stevens, Sex in prison. [↑](#footnote-ref-157)
159. *Bright and Keeley* [2014] [27]. [↑](#footnote-ref-158)
160. See Leslie J. Moran, *The Homosexual(ity) of Law* (London and New York: Routledge, 1996). [↑](#footnote-ref-159)
161. *Hopkins* [2016]. [↑](#footnote-ref-160)
162. *Hopkins* [2016] [59]-[60]. [↑](#footnote-ref-161)
163. *Hopkins* [2016] [70]. [↑](#footnote-ref-162)
164. *Hopkins* [2016] [77]. [↑](#footnote-ref-163)
165. *X v United Kingdom* (EComHR, 8 October 1982); *Messina v Italy (no 2)*, App. No. 25498/94 (ECtHR, 28 September 2000) [61]; *McCotter v UK*, App. No. 20479/92 (EComHR, 1992). And, correspondingly, family members of prisoners have a right to maintain relationships with their close relations in prison. For a comprehensive study: see Helen Codd, *In the Shadow of Prison: Families, Imprisonment and Criminal Justice* (Routledge 2008). [↑](#footnote-ref-164)
166. Inter-prison visits are governed by PSI 16/2011, Providing Visits and Services to Visitors, HM Prison and Probation Service, https://www.justice.gov.uk/offenders/psis/prison-service-instructions-2011, [5.15]. [↑](#footnote-ref-165)
167. *Hopkins* [2016] para 46. [↑](#footnote-ref-166)
168. Lord Dyson in *Bright and Keeley* [27]. For the UK has a blanket ban on conjugal visits which has been upheld by the European Commission under the ECHR’s margin of appreciation, see *ELH and PBH v UK* [1998] EHLR 231. Moreover, in an earlier judgment, the European Commission upheld a blanket ban on sex between married couples in prison, see *X and Y v Switzerland* (1978) 13 DR 241. In contrast, in 2011, the Supreme Court of Costa Rica ruled that conjugal visits needed to be extended to prisoners in same-sex relationships; see Acción de inconstitucionalidad contra el artículo 66 del Reglamento Técnico Penitenciario, Decreto Ejecutivo Número 33876-J, Exp: 08-002849- 0007-CO, Res. No. 2011013800. cited in IPR and APR 2015. [↑](#footnote-ref-167)
169. Thank you to Peter Dunne and Sen Raj for pointing this out. [↑](#footnote-ref-168)
170. André Gorz, “Strategy for Labou”, in *Theories of Labour Movement*, ed. Jon Dunlop (Detroit: Wayne State University Press, 1987) 100-117; Girshick, “Out of Compliance” 191. [↑](#footnote-ref-169)
171. See Diane Taylor, “Officials altered records in bisexual prison officer case, judge says” *The Guardian*, May 28, 2019, accessed January 20, 2020, url: <https://www.theguardian.com/world/2019/may/28/officials-altered-records-in-bisexual-prison-officer-case-judge-says>. [↑](#footnote-ref-170)
172. This is in no way intended to negate or to detract from the positive efforts many people make within the prison system and from the outside to challenge systemic harm and violence that differentiates on grounds of race, gender, sexuality and sexual identity. [↑](#footnote-ref-171)
173. Spade, “Racialized Gender Violence”, 195. [↑](#footnote-ref-172)
174. Stanley, Spade, and Queer (In) Justice “Queering Prison Abolition”, 122. [↑](#footnote-ref-173)