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**Transgender prisoners: law, prison administration,
and the emerging tension between human rights and risk**

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Abstract

Through the figure of the transgender prisoner, this thesis examines both the transformative potential, and the limits, of law and human rights, in redrawing the lines of sex/gender and expanding the possibilities and liveability of transgender lives. The prison, with its sex-segregated estate and binary gender society/regime, is a particularly useful site to examine how transgender people and their bodies are problematised in broader society. It magnifies the challenges faced by law and human rights in attempting to alter certain historically entrenched “truths” about sex/gender and transgender people. Drawing on post-Foucauldian legal scholarship, queer, feminist and transgender literature, and risk theory, the thesis examines the impact of recent human rights-based legal developments on English and Welsh prison policy, and considers the potential of human rights discourse to alter the prison administration’s governance of sex/gender, as it relates to transgender prisoners. It focuses on three areas: prison allocation and segregation, gender presentation and access to medical treatment. The thesis identifies an emerging tension between human rights and risk in the prison’s construction and governance of transgender prisoners. It reflects on a particularly deeply-entrenched anxiety about the gender authenticity and bodies of transgender women prisoners, especially those who transition whilst in prison and wish to transfer to the female estate. It concludes by arguing that there are certain inescapable “truths” that society cannot seem to get beyond, and that, whatever law and policy say, both bodies and normative gender performance still matter in cultural and institutional constructions of “authentic” gender and risk.

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¹ Name changed.

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- AC v Berkshire West Primary Care Trust*** [2010] EWHC 1162 (Admin).
- A.P., Garçon, Nicot v France*** ECtHR, App nos. 79885/12, 52471/13 and 52596/13.
Judgment of 6 April 2017.
- A v Chief Constable of West Yorkshire Police*** [2004] UKHL 21.
- CF v Alberta (Vital Statistics)*** 2014 ABQB 237.
- Arbon v Anderson*** [1943] KB 252.
- Associated Provincial Picture Houses Ltd v Wednesbury Corporation*** [1948] 1 KB 223
 (“***Wednesbury***”).
- Becker v Home Office*** [1972] 2 ALL ER 676.
- Bellinger v Bellinger*** [2003] UKHL 21.
- Bellinger v Bellinger*** [2001] EWCA Civ 1140.
- Bogdanova v. Russia*** ECtHR, App no. 63378/13.
- Brown v Board of Education*** 347 US 483 (1954).
- Carpenter v Secretary of State for Justice*** [2015] EWHC 464 (Admin).
- Chessington World of Adventures v Reed*** [1997] IRLR 556.
- Corbett v Corbett*** [1970] 2 All ER 33 (“***Corbett***”).
- Cossey v UK*** (1991) ECtHR, judgment of 27 Sept 1990, Series A, no 184 .
- Croft v Royal Mail Group PLC*** [2003] IRLR 592.
- Joanne Dennehey v Secretary of State for Justice and Sodexo Ltd*** [2016] EWHC 1219
(Admin).
- Estate of DiMarco v Wyoming Department of Corrections*** 300 F.Supp 2d 1183 (2004).
- Ex parte Anderson*** [1984] QB 778.
- Ex parte St Germain*** [1979] 1 All ER 701.
- Farmer v Brennan*** (1994) 511 US.
- Golder v UK*** [1975] 1 EHRR 524.
- Goodwin v UK*** and ***I v UK*** [2002] ECtHR App Nos. 28957/95 and 25680/94 . Judgment of 11
July 2002 (“***Goodwin***”).

Grant v South West Trains Ltd ECJ, Case C-249/96; [1998] ECR I-621.

H v Secretary of State for Justice [2015] EWHC 1550 (Admin).

Hirst v UK (No. 2) [2005] ECHR 681.

Holt v Hobbs (2015) 135.S.Ct 835.

Horton v Mead [1913] 1 KB 154.

Howard League for Penal Reform & The Prisoners' Advice Service, R (on the application of) v The Lord Chancellor [2017] EWCA Civ 244.

Hutchinson v UK [2017] ECtHR. Application no. 57592/08. Grand Chamber judgment of 17 Jan 2017.

Identoba v Georgia ECtHR. Application no. 73235/12. Judgment of 12 May 2015.

James, Wells and Lee v UK ECtHR. Application nos. 25119/09 57715/09 57877/09; [2012] ECHR 1706.

Judgment of the Supreme Court of Israel (in Hebrew), Criminal Appeals Nos. 5833/12; 6207/12; 6227/12.

Kara v UK (1998) 27 EHRR CD 272.

Kavanagh and Canadian Human Rights Commission v Attorney General of Canada 2001 CanLII 8496 (CHRT) ("**Kavanagh**").

Lawrence v Texas 539 US 558 (2003).

P v S and Cornwall County Council [1996] IRLR 347.

NW Lancashire Health Authority v A, D & G [1999] EWCA Civ 2022 ("**NW Lancashire**").

R (on the application of AB) v Secretary of State for Justice and Another [2009] EWHC 2220 (Admin) ("**AB**").

R (on the application of AB a child, by his litigation friend) v Secretary of State for Justice and Youth Justice Board [2017] EWHC 1694 (Admin).

R (on the application of AC) v Berkshire West Primary Care Trust [2011] EWCA Civ 247.

R (on the application of Bourgass and another) v Secretary of State for Justice [2015] UKSC 54 ("**Bourgass**").

R (on the application of DB) v Secretary of State for the Home Department and Ashworth Hospital Authority [2006] EWHC 659 ("**DB**").

R (on the application of Joanne Dennehey) v Secretary of State for Justice and Sodexo Ltd [2016] EWHC 1219 ("**Dennehey**").

R (on the application of E) v Ashworth Hospital Authority [2001] EWHC Admin 1089.

R (on the application of Green) v Secretary of State for Justice [2013] EWHC 3491 (“*Green*”).

R (on the application of H) v Secretary of State for Justice [2015] EWHC 1550 (Admin).

R (on the application of Hunnisett) v the Governor of HMP Frankland [2017] EWHC 742 (Admin) (“*Hunnisett*”).

R (on the application of Wood) v Commissioner of Police of the Metropolis [2009] EWCA Civ 414.

Raymond v Honey [1983] AC 1.

R v Tan and Others [1983] 2 All ER 12.

Rees v UK (1986) 9 EHRR 56.

Shahid v Scottish Ministers [2016] AC 429.

Sheffield and Horsham v UK (1998) 27 EHRR 163, ECtHR.

Toonen v Australia (1994) UN Human Rights Committee, UN Doc CCPR/C/50/D/488/1992.

Vinter and Others v UK (2013) ECtHR 645.

Wagner v Maricopa County (2013). No. 10-15501 D.C. No. 2:07-cv-00819- EHC.

White v British Sugar Corporation [1977] IRLR 121.

X, Y and Z v UK (1997) 24 EHRR 143, ECtHR.

X v Turkey (2012) ECtHR. App No. 24626/09. Judgment of 9 Oct 2012.

List of Abbreviations

ACCT	Assessment, Care in Custody, Teamwork
APA	American Psychiatric Association
CSC	Correctional Services Canada
DSM	Diagnostic and Statistical Manual of Mental Disorders
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
GIRES	Gender Identity Research and Education Society
GRA	Gender Recognition Act
GRC	Gender Recognition Certificate
HMP	Her Majesty's Prison
IEP	Incentives and Earned Privileges Scheme
IPP	Imprisonment for Public Protection
IWG	Interdepartmental Working Group on Transsexual People
NCCL	National Council for Civil Liberties
NHS	National Health Service
NOMS	National Offender Management Services. Renamed Her Majesty's Prison and Probation Service in February 2017.
NRC	NOMS National Research Committee
ONS	Office for National Statistics
PAS	Prisoners' Advice Service
PFC	Press for Change
PMS	Prison Medical Service
PRT	Prison Reform Trust

PSI	Prison Service Instruction
PSI 2011	PSI 07/2011 on the <i>Care and Management of Transsexual Prisoners</i>
PSI 2016	PSI 17/2016 on the <i>Care and Management of Transgender Offenders</i>
PPO	Prisons and Probation Ombudsman
PSO	Prison Service Order
UN	United Nations
VPU	Vulnerable Prisoners' Unit
WESC	House of Commons Women and Equalities Select Committee
WPATH	World Professional Association for Transgender Health

Introduction: Setting the Scene

Through the figure of the transgender prisoner, this thesis examines both the transformative potential, and the limits, of law and human rights in redrawing the lines of sex/gender and expanding the possibilities and liveability of trans/gendered lives. It focuses on the situation in England and Wales.² In particular, the thesis highlights an emerging tension between human rights and risk in the construction of the transgender prisoner, and in the governance of transgender prisoners' daily lives. This introduction sets the scene for the thesis. After discussing the origins of the research, the introduction is divided into five parts: first, it describes the contemporary socio-political landscape in which the thesis is situated; second, it outlines the core aims of the thesis; in the third part, it explains the contribution the thesis will make to the literature; the fourth part concerns the methodology and research sources; and the fifth and final part concludes with the overall structure of the thesis and chapter outlines.

Two recent cases provide a snapshot of some of the struggles faced by transgender people who are sent to prison, and some of the issues explored by this thesis:

² The thesis focuses on the English and Welsh prison system, managed by the National Offender Management Service ("**NOMS**"), and since February 2017, by Her Majesty's Prison and Probation Service ("**HMPPS**"). The Scottish and Northern Ireland prison systems are managed separately, under devolved powers, by the Scottish Prison Service and Northern Ireland Prison Service, respectively. On 12 March 2014, the Scottish Prison Service, in conjunction with the Scottish Transgender Alliance, introduced a *Gender Identity and Gender Reassignment Policy* for people in custody, based on a self-determination model (Scottish Prison Service 2014). The Northern Ireland Prison Service interestingly reported to the House of Commons in 2016 that it had no recent record of any prisoners who have self-identified as transgender, but that their needs would be considered on a case by case basis, to include arrangements for where they would be accommodated and how they would engage in the prison regime (Strickland 2016: 13). On the situation in the Republic of Ireland, see Irish Penal Reform Trust 2016.

On 5 January 2017, the press reported the third apparent suicide by a transgender prisoner in just over a year. Jenny Swift was found dead in her cell on 30 December 2016, whilst on remand³ in a male prison. According to various reports (e.g. Fenton 2017; Fae 2017a; Halliday 2017a), her requests to be assigned to a female prison had been rejected on the basis that she did not have a Gender Recognition Certificate (“**GRC**”) and was therefore legally male. Refusing to wear the male prison uniform, she allegedly entered prison naked. She was referred to as “Mr” by some prison staff and taunted by other prisoners. Although she had been living as a woman and taking oestrogen for three years, she was denied hormones when she arrived in prison, on the basis that they had been purchased via the internet, rather than obtained by prescription.⁴ She was experiencing withdrawal symptoms and, according to a friend, was feeling “miserable, sad and ill” (Halliday 2017a).⁵

On 21 March 2017, it was widely reported in the media that Jessica Winfield, a transgender woman who was sentenced to life imprisonment in 1995 for the rapes of two girls, had been transferred from the male to the female prison estate (e.g. Doran and Diaz 2017; Fox 2017; Shaw 2017). Winfield had reassigned her gender, obtained a GRC, which legally recognised her as a woman, and had undergone gender reassignment surgery⁶ whilst in the male estate. News of her transfer to a women’s prison and her National Health Service (“**NHS**”)-

³ She was not granted bail and was therefore sent, or “remanded”, to prison until her trial date.

⁴ Due, in particular, to long waiting times for appointments at NHS Gender Identity Clinics, some transgender people resort to purchasing hormones on the internet (Newman and Jeory 2016). The inquest heard that Swift had subsequently been prescribed HRT medication, and was due to start taking it on 3 January 2017, a few days after her death (Halliday 2017b).

⁵ The Prisons and Probation Ombudsman (“**PPO**”) report and inquest into Swift’s death were pending at the time of submitting the thesis. The inquest subsequently took place at Doncaster Coroner’s Court from 18 to 21 December 2017. The jury’s verdict, reported in the press on 22 December 2017, was “death by misadventure” (Tamplin 2017).

⁶ Later reports suggest this was partial genital surgery and did not involve a penectomy (Joseph 2017). On the significance of this fact, see Chapter 6.

funded surgery generated disquiet, alarm even. BBC Radio 4's *PM* programme commented that Winfield "is being placed in a prison for women, which has obviously provoked some alarm and distress among prisoners who are going to be sharing that prison with him [*sic*]" (Shaw 2017), whilst the *Sun's* headline announced "Victims' fury as double rapist who attacked two young girls is moved to a women-only jail after £10k NHS sex-change op" (Doran and Diaz 2017).

The issues reflected in these two cases are not new. Transgender prisoners and their bodies have long been problematised by prison administration, and have given rise to practical questions about whose gender is authentic and should be accepted as legitimate for prison allocation purposes, access to gender-affirming clothing, and access to medical treatment. Prison administration has also been concerned about how best to manage transgender prisoners as both an "at risk" and "risky" prison population. At a more fundamental level, transgender prisoners' lives and bodies have long been culturally and institutionally unintelligible, and have been regarded as a risk to the binary sex/gender order of the prison. What is relatively new, however, is the reconfiguration of the transgender prisoner as a human-rights bearer,⁷ and official recognition of the human rights – albeit couched in the language of "care" and "needs" – of transgender prisoners in prison policy. It was only in

⁷ Concern about the situation of transgender prisoners is also increasingly being expressed in international human rights fora. Within the United Nations human rights bodies and mechanisms, for example, the Special Rapporteur on Torture has been at the forefront of drawing attention to this issue, e.g. UN Doc. A/56/156 of 3 July 2001. Other recent examples include the report of Office of High Commissioner for Human Rights (*Discrimination and Violence against Individuals based on their Sexual Orientation and Gender Identity*) of 4 May 2015, UN Doc. A/HRC/29/23, paras 34 -36; the report of the Special Rapporteur on Torture (*Applicability of the Prohibition of Torture in International Law to the Unique Experiences of Women, Girls, and Lesbian, Gay, Bisexual, Transgender and Intersex Persons*) of 5 January 2016, UN Doc. A/HRC/31/57, paras 34-35; and the report of the Special Rapporteur on Violence against Women (*Pathways to, Conditions and Consequences of Incarceration for Women*), UN Doc. A/68/340 of 21 August 2013, paras 60 and 63. Unfortunately, the scope of this thesis does not permit a fuller analysis of developments in the international human rights arena.

2011, after an extraordinary fifteen years in the pipeline (Whittle *et al* 2007),⁸ that the UK's first ever official prison policy on transgender prisoners was introduced.

Driven by, and reflecting, human rights-based legislative developments in the Gender Recognition Act 2004 and Equality Act 2010, as well as the landmark ruling in *R (on the application of AB) v Secretary of State for Justice and Another* [2009] EWHC 2220 (Admin) ("**AB**"), the new prison policy not only officially recognised the existence of the transgender prison population for the first time, but also set out a comprehensive regime for their governance. Prison Service Instruction 07/2011 on the *Care and Management of Transsexual Prisoners* ("**PSI 2011**") requires prison administrators to allocate "transsexual prisoners" to a prison corresponding to their legal gender, and provides discretion in allocation decisions where a person does not have a GRC legally certifying their gender. PSI 2011 also makes it mandatory for prison administrators to permit prisoners "who consider themselves transsexual" to live and dress in accordance with their gender, whichever part of the prison estate they are allocated to, and to provide them with NHS-equivalent medical treatment. It was this potentially significant "reform" moment that was originally intended to form the centrepiece of this thesis. However, such is the rapid speed of developments in the field, that the thesis can now take the story even further.

After a series of events in 2015 shone a spotlight on the situation of transgender prisoners housed in prisons inappropriate for their gender, PSI 2011 was reviewed and fundamentally

⁸In 1996, Press for Change and the (since disbanded) Sexuality and Gender Alliance were commissioned to present a report to the Home Office, which detailed issues experienced by transgender prisoners, and tabled a draft policy (Whittle *et al* 2007). This policy went through numerous drafts, which the Home Office circulated to various voluntary sector organisations for comments, but its finalisation was repeatedly stalled (*ibid*). The author's attempts to locate the 1996 initial report have proved unsuccessful, despite the valuable assistance of Stephen Whittle (Press for Change), Richard Elkins (re Transgender Archives at University of Ulster), and Aaron Devor (re Transgender Archives at University of Victoria, Canada).

revised. Prison Service Instruction 17/2016 on the *Care and Management of Transgender Offenders* (“**PSI 2016**”) came into full effect on 1 January 2017, promising, amongst other things, a “more flexible approach” to prison allocation – only days after Jenny Swift’s death in the male estate. In an internationally ground-breaking move, it also extended PSI 2011’s provision that transgender prisoners must be permitted to live and dress in their gender, to prisoners with non-binary and fluid genders.

The thesis examines the actual and potential effects of human-rights based legal developments on prison policy, and on the prison administration’s construction and governance of transgender prisoners as a risky and at risk prison population. It takes a two-pronged approach to law. It not only considers law’s direct effects on the governance of transgender prisoners’ lives, but also explores, at a deeper, discursive level, the way in which the “new” human rights discourse has started to unfold in the prison, and has altered, or has the potential to alter, culturally and institutionally entrenched understandings of transgender people/prisoners as Other, inauthentic and, above all, risky. Combining these two different approaches to law – namely, fusing a more traditional legal analysis with a Foucauldian analysis of law as a productive power with normative effects – is, at times, conceptually and structurally tricky. Whilst the resulting product is perhaps not as academically “neat” as it would otherwise be, it will hopefully result in a more comprehensive and richer analysis of law’s power effects in this field, than if one approach or the other was adopted exclusively.

The Contemporary Socio-Political Landscape

In order to examine the effects of law and human rights on the prison administration's construction and governance of transgender prisoners, it is imperative to situate the thesis in its broader socio-political context. The following section discusses the catalyst for the most recent prison policy reform, only five years after the introduction of PSI 2011, and presents an overview of the contemporary landscape in which this thesis is situated. This landscape is characterised by political hostility towards prisoners' rights, a deepening prison crisis, a culture of fear and anxiety around trans/gender authenticity and transgender bodies, and public concern about possible further liberalisation of the regulation of gender.

The catalyst for further policy reform: PSI 2016

As noted, in 2015, a series of events triggered unprecedented public and political concern about the situation of transgender prisoners housed in prisons inappropriate to their gender, because they did not have a GRC legally certifying their gender. It started when Tara Hudson, who had lived as a woman for many years but did not have a GRC, was sentenced in October 2015 to 12 weeks' imprisonment, and placed in a male prison, on a small unit reserved for prisoners with complex mental and physical needs (of which she had neither). Within a week, widespread social media and press coverage of her plight, and an on-line petition signed by around 160,000 people, helped secure her transfer to a female prison, where she served the remainder of her sentence. After her release, Hudson spoke about her distressing experience in the male prison, including the humiliation she had felt at her "half-and-half" strip-search (i.e. her top half was searched by a woman prison officer and bottom

half by a male prison officer),⁹ the sexual harassment she had suffered from other prisoners, her fears for her own safety, and the isolation and despair she had felt spending 23 hours a day alone in a cell. Even after being transferred to the female estate, she was housed on a special wing, and was not allowed into other prisoners' cells (see e.g. Gayle 2015; Curtis 2015; Duffy 2015; Sanghani 2016).¹⁰

Weeks later, in November 2015, the press widely reported the death of Vikki Thompson, who had been housed in a men's prison for the previous six weeks, awaiting sentencing (Quinn 2015; Clarke-Billings 2015; Slawson 2015). Like Tara Hudson, she had lived for many years as a woman, but did not have a GRC. Both at court, and on reception to prison, she said that she did not want to be in a male prison (PPO 2017: para 108), but the Prisons and Probation Ombudsman ("**PPO**") later found "no evidence that anyone advised her that she could ask to move to a woman's prison, or that anyone considered her location, without an application" (*ibid*). After complaining of harassment from other prisoners on the wing, she was moved, at her request, from the main estate to the vulnerable prisoners' wing. Although identified as at risk of suicide and self-harm and placed on an ACCT,¹¹ she hanged herself between hourly cell checks. At the coroner's inquest into her death, in May 2017,

⁹ In June 2017, Avon and Somerset Constabulary formally admitted liability for discrimination on the basis of gender reassignment under the Equality Act 2010, after three male officers were present at a strip-search of a transgender woman at a police station. They also admitted assault (Bhatt Murphy 2017a; Fae 2017b). This case may have implications for the practice of "half-and half" strip searches of transgender prisoners who do not have a GRC, and whose bodies/ genitalia are not congruent with their gender, see PSI 67/2011 on *Strip Searching*.

¹⁰ In January 2018, Tara Hudson commenced legal action against the Ministry of Justice for sexual assault and discrimination. The Ministry of Justice and Government lawyers' response was, reportedly, that they did not consider her to be a woman, and that she "is as a matter of biological fact a man" (Townsend 2018). Although initially scheduled for April 2018, the case has yet to be heard by the courts.

¹¹ Broadly, the Prison Service uses a system called ACCT (Assessment, Care in Custody, Teamwork) to identify prisoners at particular risk of self-harm or suicide, to monitor the prisoner closely, and to engage and support them in prison.

the jury acknowledged “the day-to-day pressures” on all services involved, which were “under immense pressure, understaffed and working in extremely difficult ... situations” (West Yorkshire (Eastern) Coroner’s Court 2017), but concluded that the management of ACCT procedures were inadequate, and that some of the mandatory requirements of PSI 2011 had not been complied with (*ibid*). Ten days later, Joanne Latham, who was serving a life sentence in a Close Supervision Centre in the male estate¹², and had started to live as a woman four months’ earlier, also took her own life (PPO 2017).

These three events, in such close proximity, and the publicity surrounding them, led Parliament to hold an emergency debate on the situation of transgender prisoners (Hansard, HC Debates, 15 December 2015, vol 603, col 1524-1532). The House of Commons’ Women and Equalities Select Committee’s (“**WESC**”) report on *Transgender Equality*, published on 8 December 2015, also expressed concern, and drew attention to apparent misunderstandings and inconsistencies in the implementation of PSI 2011 (2015: paras 300-321). Indeed, to WESC, it appeared that “all too often the Instruction was simply being ignored” (*ibid*: para 309). The very same day, the Ministry of Justice announced that it would undertake a “fundamental review” of the situation of transgender offenders and prisoners (2015b), rather than the more limited revision of PSI 2011, which was already underway internally.¹³ Two external reviewers were appointed, who interviewed prison

¹² There are three Close Supervision Centres in the male estate, and none in the female estate. They hold around 60 of the “most dangerous, challenging and disruptive prisoners” in the prison system (HMI Prisons: 2015). It is an extreme form of custody, sometimes called “deep custody”, with highly restrictive conditions, limited stimuli and human contact (*ibid*). There are units at HMP Woodhill, Wakefield and Whitemoor. A prisoner would not be placed in a CSC solely because they are transgender. For an in-depth review, see Edgar and Shalev 2015.

¹³ Unlike Prison Service Orders (“**PSOs**”), Prison Service Instructions (“**PSIs**”) have a fixed expiry date. PSI 2011 had officially expired on 14 March 2015, and was already being reviewed internally. According to the Minister for Justice and PPO, PSI 2011 continued to be valid until the revised policy was issued (WESC 2015, para 315).

staff and transgender prisoners, amongst others, and sought submissions from a wide-range of stakeholders.¹⁴ The mandate of the review was to ensure that the care and management of transgender offenders and prisoners is “fit for purpose and provides an appropriate balance between the needs of the individual and the responsibility to manage risk and safeguard the well-being of all prisoners” (Ministry of Justice 2015). Thus, the terms of the review render explicit the need to balance transgender prisoners’ “needs” (notably, still not expressed in terms of “rights”) with the prison’s risk management and safeguarding duties. The report of the review and the “refreshed” policy (which now covers not only transgender prisoners but transgender offenders more broadly) were published on 8 November 2016 (Ministry of Justice 2016a). The first official, *ad hoc*, statistics on the number of transgender prisoners were also released. These identified 70 transgender prisoners in 33 different prisons (of a total public and private prison estate of 123) between March 2016 and April 2016 (Ministry of Justice 2016b). The statistics do not include prisoners who have already transitioned and hold a GRC, or transgender prisoners who are not known to prison staff, however, so are not definitive. The Ministry of Justice recognised there “may be some under-counting” (*ibid*: 2).¹⁵ No other demographic data is available on the transgender prisoner population in England and Wales.

However, some prisoners were told by prison management that since PSI 2011 had expired, it no longer applied (Interview with Press for Change, 26 Oct 2015).

¹⁴ The author contributed to a joint-submission with Sharpe and Emmerich (2016).

¹⁵ Indeed, the next set of official statistics, published 20 November 2017, identified 125 prisoners living in, or presenting in, a gender different to their sex assigned at birth and who had had a local transgender case board in the period between 31 March 2017 and 28 April 2017. 47 of the 124 public and private prisons (38%) in England and Wales said that they had one or more transgender prisoners in the same period (Ministry of Justice: 2017).

PSI 2016 became fully effective on 1 January 2017. The revised policy emphasises the need for prison administration to consider a person's gender as a whole, rather than focusing on their "sex", "anatomy" or "sexual functioning", and promises that the National Offender Management Service ("**NOMS**", now Her Majesty's Prison and Probation Service, "**HMPPS**") will adopt "a more flexible approach" in prison allocation decisions, which will take into account not only legally-certified gender, but also "consistent evidence" of living in one's gender. In an internationally ground-breaking move, PSI 2016 also extends PSI 2011's provisions on access to gender-affirming items to non-binary and gender-fluid prisoners, going beyond law's binary construction of gender. PSI 2016's "soft" launch on the day the US presidential election results were announced meant the launch of the revised policy passed almost unnoticed (Emerton and Harris 2016). Arguably, this timing was not coincidental, but indicative of ministerial anxiety about introducing such a progressive policy in a political climate which is hostile to any further expansion of prisoners' rights.

Harsh political climate

The current political environment is not receptive to human rights developments, generally, and is particularly critical of the part played by the Human Rights Act 1998 and the European Court of Human Rights in upholding human rights for "undesirables" such as terrorists, prisoners and criminals (Robinson 2015). The Coalition Government vehemently objected to the European Court's ruling in 2005 that prisoners were entitled to the right to vote (*Hirst v UK (No. 2)* [2005] ECHR 681), for example, and the Government has steadfastly refused to

implement the court's decision.¹⁶ In 2013, the Conservative Government also “profoundly disagreed” with the European Court's judgment in *Vinter and Others v UK* [2013] ECHR 645, that whole life tariffs without the possibility of parole are inhumane and therefore breach prisoners' human rights (Casciani 2013). This issue was finally resolved in 2017.¹⁷ The finalisation of Brexit has put on hold the long-standing Conservative agenda to scrap the Human Rights Act 1998 and replace it with a Bill of Rights (Watt 2015; Stone 2016; Bowcott 2016), and withdrawal from the jurisdiction of the European Court of Human Rights has been deferred until at least 2022 (Hope 2017). However, together with Brexit (and withdrawal from the European Union's judicial body, the European Court of Justice), these plans remain central to the Government's agenda to reassert national sovereignty over human rights issues.

In addition to criticising the European Court's “meddling” in the prisoners' rights field, the Government has reinforced the message that prisoners are less deserving, or “less eligible”, than other citizens in terms of human rights, by introducing (in 2013) sweeping legal aid cuts, which severely curtail prisoners' access to legal advice, and to legal representation in parole hearings and court (Renaud-Komiya 2013). Prisoners who wish to challenge their conditions or treatment in prison are now only funded on an “exceptional case basis”.¹⁸

¹⁶ On 2 November 2017, the Justice Minister announced the Government's proposal to give the right to vote to “around 100 prisoners”, who are on licence for short-term sentences, in the hope of drawing a line under the 12 year dispute with the European Court (Travis 2017b).

¹⁷ There are around 60 prisoners currently serving whole-life tariffs. In January 2017, the European Court of Human Rights' Grand Chamber held that whole-life sentences are compatible with article 3 of the European Convention on Human Rights, after legal clarification by the English courts that such sentences are open to review in exceptional circumstances, and therefore do not completely extinguish prisoners' “right to hope”, see *Hutchinson v UK* [2017] ECHR (App no. 57592/08).

¹⁸ In April 2017, the Court of Appeal held that the removal of legal aid in three categories – pre-tariff reviews by the Parole Board, category A reviews, and decisions on placing prisoners in Close Supervision Centres – was unlawful (*Howard League for Penal Reform & The Prisoners' Advice Service, R (On the Application of) v The*

Even then, use of public funds for prisoner litigation is unpopular under the UK's rising tide of penal populism (Jennings *et al* 2015), as evidenced in the critical media coverage of the handful of cases in which transgender prisoners have exceptionally been granted legal aid to bring cases to court (Allen 2009; Doughty 2013).

Prison crisis

Meanwhile, at the time this thesis is written, the situation in the English and Welsh prison estate is becoming increasingly unstable. Overcrowding, understaffing and underfunding have led to impoverished regimes and to prisoners in some prisons regularly spending 23 hours a day in their cells. Together with the widespread availability of the synthetic drug “spice”, violence against staff and other prisoners has surged, and has rendered many prisons unsafe, both for prisoners and prison staff. Unprecedented levels of self-harm and suicide are reported amongst prisoners (Travis 2017b; Watt 2017). Her Majesty's Chief Prison Inspector himself has described many prisons as “violent and dangerous” places (2015-16: 8). In November 2016, some 10,000 prison officers went on a 24 hour-strike in protest at “the volatile and dangerous state of prisons” (Prison Officers' Association 2016), after riots occurred at HMP Lewes and HMP Bedford prisons. Further riots broke out at HMP Birmingham at the end of 2016. Phil Wheatley, former Chief Executive of NOMS and Director General of the Prison Service, has described the custodial system as having been brought to the “brink of collapse” by the “deep budget cuts” and “wild swings in government policy” under three successive Conservative justice secretaries, Ken Clarke, Chris Grayling and Michael Gove (Travis 2016).

Lord Chancellor [2017] EWCA Civ 244). The lack of legal aid for prisoners to challenge their treatment in prison, other than in exceptionally funded cases, remains.

Although the current Conservative prime minister, Theresa May, promised a £1.3 billion injection of funding into new prisons in the next five years, and an extra 250,000 front-line staff, the prison crisis is expected to get worse before it gets better (Wright and Palumbo 2016). The *Prisons and Court Bill*, which prioritised prison safety and reform over the warehousing of prisoners (and passed its second reading in the House of Commons in March 2017), was put on hold when the snap General Election was called in April 2017 and fell with the dissolution of parliament in May 2017. The new Justice Secretary, David Lidington,¹⁹ has promised to build on previous reforms (Lidington 2017), but there appear to be no plans to resurrect the Bill (Bulman 2017). Meanwhile, the prison crisis shows no signs of abating; in August 2017, riots broke out at HMP The Mount, in September 2017, at HMP Birmingham, and in October, at HMP Long Lartin. Whilst prison administrators are coming under increasing pressure to absorb human and equality rights in their governance of prisoners, maintaining security and good order, and safeguarding prisoners, are of heightened concern at a time when many prisons are under considerable strain.

Fear around trans/gender authenticity and transgender bodies

Finally, it is important to situate the thesis in the context of current cultural fears and anxieties around trans/gender authenticity and transgender bodies. Transgender women's access to "women-only spaces", including public toilets, prisons and centres for women who have experienced rape and domestic violence from men, remains a particularly highly charged topic. This is exemplified by the deep-seated, emotional response to Jessica Winfield's transfer from the male to the women's prison estate in March 2017 (referred to above). Despite the fact that she had obtained legal recognition of her gender, through a

¹⁹ Subsequently replaced, in January 2018, by David Gauke.

GRC, the media coverage of her transfer is indicative of a widespread public view that she is not a “real” woman, but a man, and, moreover, that she represents both a psychological and physical threat to (cis)women prisoners in the female estate.²⁰ Whilst this fear was heightened by the fact that Jessica Winfield was in prison for raping two girls, a similar anxiety is evident in relation to the (trans)gender authenticity and bodies of transgender women in general. In January 2017, for example, the Girl Guides’ new guidelines, which welcome transgender girls and women into the association, produced the following media headlines: “now BOYS can be Girl Guides if they think they’re the wrong gender, and anyone who says they’re a woman can be at girls’ sleepovers without telling parents” (Manning 2017). Not only do such headlines question transgender women’s authenticity, they also imply that they are a threat to children, that they are paedophiles. Similar anxieties followed Top Shop’s announcement that its changing rooms would now be gender-neutral (e.g. Petter 2017; Brennan 2017; Jones 2017).

Although the state has not endorsed the view that transgender people are risky to children,²¹ it has legitimised cultural anxieties around trans/gender authenticity and bodies, by permitting the exclusion of transgender people from single-sex spaces and from employment which involves close, personal contact with others in its equality legislation.²² The recent spate of criminal prosecutions for “gender identity fraud” has further contributed to this “politics of fear” (Sharpe 2016). Since 2012, six people assigned female

²⁰ Similar concerns were expressed about trans/gender authenticity and transgender women’s access to “women-only spaces”, including prisons, in various submissions to the WESC *Transgender Equality Inquiry* in 2015, e.g. submissions by Jeffreys (2015), Campaign to End Rape (2015), Radical Feminist Legal Support Network (2015), Women Analysing Policy on Women (2015), and Women and Girls Equality Network (2015).

²¹ Such discourse is reminiscent of the mid-twentieth century conflation between “homosexuality” and paedophilia, addressed in the Wolfenden Committee’s report (Home Office: 1957).

²² See Chapter 3 for further discussion.

at birth (two of whom specifically identified as transgender men)²³ have been successfully prosecuted for “duping” (cisgender) women into sexual relations with them, by fraudulently representing themselves as male²⁴ (see, e.g. Sharpe 2014, 2015, 2016, 2017).

At the same time, the Government’s proposals to further liberalise the legal governance of gender (whilst they have cross-party support²⁵ and have been welcomed in some quarters) appear to be generating widespread concern. In July 2017, it was announced that a public consultation on the Gender Recognition Act will take place in Autumn 2017 (Government Equalities Office 2017), although this consultation is still pending as at 20 December 2017.²⁶ The proposed consultation is in response to a recommendation in WESC’s report on *Transgender Equality* that the Gender Recognition Act should be updated “in line with the principles of gender self-declaration” (2015, para 45). Proposals will include dispensing with the requirement for a medical diagnosis of gender dysphoria, and, among other options, “reducing the length and intrusiveness of the gender recognition system” (*ibid*). In October 2017, meanwhile, the press reported that the Office for National Statistics (“ONS”) was considering whether to make it optional to indicate one’s “sex” in the next 2021 census, on the basis that the “question is considered to be irrelevant, unacceptable and intrusive, particularly to trans participants, due to asking about sex rather than gender” (Telegraph

²³ Kyran Lee had identified as a man for a decade before the alleged offence, but did not have a GRC. He has since been accepted into a Gender Clinic treatment programme (Sharpe 2015). As Lee decided to plead guilty, the question whether he was in fact guilty of gender fraud was not legally argued or judicially examined. Chris Wilson also identified as a man (*ibid*).

²⁴ This “false representation” was found to vitiate consent, leading to charges of sexual assault and assault by penetration.

²⁵ Jeremy Corbyn, Leader of the Opposition, has announced that Labour would support “self-determination” of gender (Mason 2017).

²⁶ As of 20 June 2018, the consultation has still not been announced. In the meantime, the Scottish parliament has conducted its own separate public consultation on reform of the GRA 2004. See: <https://consult.gov.scot/family-law/review-of-the-gender-recognition-act-2004/>. (20 June 2018). The results of the Scottish consultation, which closed on 1 March 2018, have not been reported as of 20 June 2018.

Reporters 2017c). The ONS report cited by the press was actually directed at generating more information about gender identity, and canvassed various options to capture this information in the next census. This type of selective media reporting seems intent on fuelling anxiety, and generating backlash, among the general public. It is difficult to assess to what extent press coverage reflects the current mood, although it is generally accepted in the literature that the media tends to both reflect and shape dominant norms among the public (e.g. Gamson *et al* 1992).

Strong criticisms also come from feminists who wish to insist on an understanding of sex/gender that excludes transgender women from “women-only” spaces, and regard the state’s endorsement of psychological “gender identity” through the Gender Recognition Act, and its proposed protection in equality law,²⁷ as eroding (cisgender) women’s rights. As prominent radical feminist Germaine Greer has remarked: “we keep arguing that women have won everything they need to win. They haven’t even won the right to exist” (Roberts 2017). Others have expressed incredulity at the extent of recent developments. In response to the ONS report, Philip Davies, MP (interestingly a member of the WESC), said “the world is going mad – political correctness is taking over the country” (Hughes 2017). Allison Pearson’s opinion piece for the *Telegraph* decried the Government for being at the “forefront of the lunacy”, when “its instinct should be to resist change for change’s sake” (2017). Under the headline, “When will the madness end in this brave new transgender world?”, she argues that a “tiny minority” is being allowed “to dictate to the majority” and

²⁷ WESC proposed that the current protected characteristic of “gender reassignment” in the Equality Act 2010 should be amended to “gender identity” (2015: para 108). This proposal has not been taken forward by the Government.

“what’s at stake here is nothing less than our millennia-old understanding of human beings”
(*ibid*).

Core Aims of the Thesis

The overarching purpose of the thesis is to show how the historical consolidation of legal, medical and penal power in the construction and governance of transgender prisoners has had harmful, often violent, effects on their bodies and lives, and to consider the extent to which human rights-based legal developments, and human rights and equality discourse, have the potential to improve the liveability of their lives. This central objective can be subdivided into three more specific aims.

The first aim of the thesis is to shed light on law’s direct, “sovereign” or instrumental effects on the lives of transgender prisoners; to answer, for example, the more straight-forward questions such as how law (i.e. legislation and court judgments) has historically affected which prison a transgender prisoner is allocated to, what they may wear, and whether they are provided access to medical treatment, such as hormones and gender reassignment surgery (if so desired). The thesis will examine how recent human rights-based legal developments, including the Human Rights Act 1998, Gender Recognition Act 2004 and Equality Act 2010, have impacted on formal prison policy in relation to transgender prisoners. It will chart the prison authorities’ response to human rights-based shifts in the legal boundaries of sex/gender,²⁸ the broadening of equality protection to transgender

²⁸ As discussed further in Chapter 2, any neat division between sex and gender is conceptually problematic, and presenting “sex” as a biological “fact” of the body is misleading, since “biological sex” is a legal and cultural construct (*Corbett v Corbett* [1970] 2 ALL ER 33) and medical developments suggest that there may be a biological basis for gender identity (e.g. Zhou *et al* 1995 and Rosenthal 2014). As discussed in Chapter 3, the Gender Recognition Act now collapses the two terms – hence the reference here to “sex/gender”. For two recent accounts of the relationship between sex and gender, see e.g. Conaghan 2013: 17-23 and Cowan 2005.

prisoners, and the replacement of the principle of “less eligibility”²⁹ with “NHS-equivalence” in prisoner healthcare. The thesis seeks to identify the emerging fault-lines on the ground, to trace specific problems as they migrate from the prison to the courts, and to analyse the specific conflicts and their judicial resolution.

The second, and perhaps more important, aim of the thesis is to go beyond the confines of traditional legal analysis to explore the deeper, normative effects of law on the prison’s conceptual understanding of sex/gender and on its production of the transgender prisoner. This is where a Foucauldian approach to law enriches the analysis. As detailed in Chapter 2, this aspect of the thesis will consider the way in which law acts as a norm-producing power, and will examine its power/knowledge effects on the previous discursive terrain. The thesis will argue that, historically, the criminal justice system has been one of many regulatory mechanisms that have collectively worked to steer bodies into pre-determined binary sex/gender categories as part of the governmentality of sex and gender (Foucault 1978). Consequently, transgender prisoners and their bodies have been produced not only as culturally and institutionally unintelligible (Butler 1990), but also as risky, as they depart from the norm. They have also been medicalised and pathologised. The thesis seeks to examine the effects of recent human rights and equality discourse on this prior discursive terrain. It considers whether this “new” discourse has the potential to alter the way prison administration understands sex/ gender and constructs transgender prisoners, and *thus* the way it governs them. It asks, for example, whether human rights-based developments have

²⁹ The principle of less eligibility is understood to come from English poor law, which was regulated by the principle that “the condition of the pauper supported from public funds must always be inferior to that which could be obtained by working at the lowest-paid job available... lest men prefer idleness to labour” (MacKenzie and MacKenzie 1977: 318, cited in Sieh 1980: 160). In its application to imprisonment, the principle of less eligibility stipulates that, to act as a deterrent, prisoners should not receive better treatment than “the lowest classes of the free population” (*ibid*).

led the prison administration to redraw its gendered lines conceptually, as well as instrumentally, and whether they have had a deeper impact on the prison administration's internal logic, i.e. the way it makes internal sense, against the backdrop of the "new penology" (Feeley and Simon 1992) and its "inexorable logic of risk" (Ericson and Haggerty 1997). It reflects on whether human rights and equality discourse has the potential to recalibrate the transgender prisoner as a human rights-bearer, rather than as a supplicant; to alter the deeply entrenched cultural and institutional construction of transgender prisoners' gender as inauthentic, and their bodies as risky; and to stem the resurgence of the political and populist view that prisoners are less deserving of rights, and public resources to meet those rights, than "law-abiding citizens".

The third aim of the thesis is to reflect on the transformative potential of law and human rights, as well as the limits and risks of turning to law and human rights, as a solution to the problems presented/ experienced by transgender prisoners whilst they are in prison. This probably begs the question: is the everyday improvement of transgender prisoners' lives all there is to the author's concept of transformation? There will undoubtedly be some who would argue that this conceptualisation of transformation is impoverished, that simply aiming for everyday improvements in transgender prisoners' lives, without challenging the broader normative structures at play which increase transgender people's pathways to imprisonment,³⁰ and without interrogating the social normalisation of the prison as an

³⁰Earlier research suggests that transgender prisoners may be overrepresented in the UK prison system (Whittle and Stephens 2001), although up-to-date research is urgently needed in this regard. The harm caused to transgender people by the binary gendered norms which structure society at large is reflected in many transgender people's experiences of shame and stigma, exclusion, isolation, discrimination, harassment and violence. These experiences are increasingly well-documented, as are the harmful effects on transgender people's mental health and socio-economic status, in terms of accessing education, employment, housing etc. On the UK situation, see, for example, *Engendered Penalties: Transgender People's Experiences of Inequality and Discrimination* (Whittle et al 2007), the *Trans Mental Health Survey 2012* (McNeil et al 2012) and

institution (both as a highly gendered institution, and as an institution *per se*), is not a transformative vision at all. Indeed, some might argue that legal and policy reform in this field not only serves to shore-up the status quo, but also actively *prevents* more radical transformation – a process Reva Siegal has aptly called “preservation through transformation” (1977, as cited in Harris 2006: 1540).

The author would not disagree that seeking improvements in the everyday lives of transgender prisoners is a narrow (albeit pragmatic/realistic) conceptualisation of transformation, and that broader visions of transformation must be pursued alongside. She also recognises the “paradox” of human rights (Brown 2000), whereby engagement with human rights is unpredictable and short-term gains may sometimes come at the expense of long-term objectives.³¹ The author would respond, however, there is an urgency to the situation of transgender prisoners, as clearly attested by the cases of suicide, self-harm and suffering referred to in this thesis, which justifies recourse to human rights, notwithstanding its unpredictability, limits and risks. It is not a matter of pursuing a human rights “luxury”,

Stonewalls’ recent *Trans Report* (2018). The government’s LGBT consultation and survey, the report of which is due to be published in summer 2018, also promises to be highly informative of the experiences of LGBT (including non-binary) people living in the UK today. See <https://www.gov.uk/government/consultations/national-lgbt-survey>. (20 June 2018).

³¹ In an excellent article entitled “From Stonewall to the Suburbs? Towards a Political Economy of Sexuality”, Angela Harris explores this paradox through an analysis of the long-term political implications for the queer movement of the landmark US Supreme Court gay rights decision in *Lawrence v Texas* 539 US 558 (2003). Citing Siegal, Harris expresses concern that the fight for same-sex marriage in the US risks becoming yet another example of “preservation through transformation”, as the absorption of queering the family into same-sex marriage threatens to silence the deeper gay and feminist critique of marriage *per se*. Adding a note of caution to other scholars’ optimism surrounding *Lawrence v Texas* (which declared sodomy laws unconstitutional) and its potential for long-term transformation, notwithstanding the short-term, vicious backlash against same-sex marriage laws that followed, Harris argues that, fifty years after the US Supreme Court decision in *Brown v Board of Education* 347 US 483 (1954) (which struck down state laws establishing separate schools for black and white students), many regard the decision in *Brown* as “a story of winning the battle but losing the war” as “despite the contemporary judicial embrace of the benefits of ‘diversity’” the more transformative vision of “integration as a social ideal, not to mention a material reality, seems to have been lost” (2006: 1545). *Brown*, Harris argues, is in fact “a story about *the taming of a radical vision through law*” (1546, emphasis added).

as some might regard the right of same-sex couples to marry, for example, the stakes are far higher, they literally concern the liveability of transgender people's lives. As many commentators have remarked, it is easy to critique from the shadows, and to keep one's hands clean,³² but Foucault himself urged us to get our hands dirty, to make decisions and act, even if we make the wrong decisions, tie ourselves in knots and no longer know what to do. In the transgender law field, scholars and activists such as Paisley Currah (e.g. 2003) and Dean Spade (e.g. 2009, 2012) have written compellingly on the importance of remaining grounded in the urgent needs of transgender people in the here and now, whilst working towards a broader set of demands, and a larger political imaginary. Spade argues that, in order to confront this challenge in law reform and policy work, we must centre the experiences of those most vulnerable in our communities, such as prisoners (2009:312) and measure the quality of law reform work in terms of "meaningful changes to trans lives" (311). He includes prison health care, prison placement and gender change on identification documents as examples of "urgent areas affecting the survival of vulnerable trans people today" (312).

Having briefly addressed this issue, it is time to return to the current (third) aim of the thesis, namely to assess the transformative potential of law and human rights to improve the everyday lives of transgender prisoners. In the same way that Foucault critiqued the grand narrative of rational scientific discovery and progress in the Enlightenment period, Smart has argued that law is often presented as "a force of linear progress, a beacon to lead us out of darkness" (1989:12) and warned that we should not be "seduced" by law as a

³² In the educational field, Allen Luke similarly responds to those who would argue that anything done to improve the educational system simply services the existing project, by urging us to "draw the line about our intervention somewhere", or we and our work "may be destined to critique", preventing us from "getting our hands dirty". As he astutely observes, "there is a haven in critique" (1995: 75).

solution to social problems or assume that “rights” will correct “wrongs”. The thesis seeks to demonstrate how human rights-based legal developments have a tendency to re-entrench hegemonic norms in the very moment of reform and to exclude as they include. It aims to show through a critical discourse analysis³³ of the first judgments to emanate from the UK transgender prisoner rights’ field, that prisoners’ recourse to, and resistance through, human rights is unpredictable, both in terms of its immediate outcome and its potentially negative discursive effects; that it often comes at a price. The prison, with its literal division of prisoners into the male and female estate, offers a particularly useful case study for how transgender people and their bodies are problematised in broader society. The prison acts not simply as a mirror, but as a magnifying glass on society, and on the challenges faced by law, and its human rights and equality discourse, in changing historically entrenched cultural “truths” about sex/gender, and in adapting to the rapidly changing gender landscape.

In the final analysis, after analysing recent developments in law, policy and case-law in relation to transgender prisoners, the thesis will argue that there is a certain inescapable “truth” that contemporary society cannot (yet) seem to get beyond, namely that gender is about anatomical bodies and a certain biological “truth”, and that transgender people are fundamentally inauthentic and inherently risky, both to cisgender people and to the established gender order. This particular truth returns like a Foucauldian wheel of power; it is not only that prison administration tends to revert to the way things were always done (Pat Carlen has referred to this propensity as “carceral clawback” (2002)), but that it tends

³³ The thesis uses critical discourse analysis to examine the various legal, policy and other texts relied upon in this thesis, as informed by post-structuralism and the work of Foucault. This approach is well-known and does not need to be expounded upon here (see e.g. Hall 2001 and Graham 2011 for good overviews).

to revert to the way it has always thought about transgender people and always understood them, and made internal sense through its binary categorisation and division of sexed bodies and its gendered disciplinary regimes.

The thesis proposes that the way that gender and bodies have always been interpreted is so historically and culturally entrenched that law, prison administration, and society as a whole, are struggling to adjust. Whilst human rights and equality discourse has led to an apparently liberalising moment in the re-conceptualisation of gender, the situation of transgender prisoners highlights the fact that law and policy doesn't yet fully translate, culturally or institutionally. It demonstrates that the tensions are too great at this point, and that recourse to human rights always meets its limits on the ground, in flesh and blood. The optimistic discourse of human rights meets with, competes with, and is often trumped by the unshakeable, inexorable, discourse of risk. Yet, this thesis will argue that human rights is not an empty discourse, and that human rights are not illusory, but that changing the gender order is a slow legal, political and cultural struggle, in which law and its powerful human rights discourse can play a valuable part.

Contribution to the Literature

This thesis will make an original and timely contribution to the literature. It will be the first in-depth piece of research into the historical and contemporary situation of transgender prisoners in England and Wales - not only in law, but across the disciplines. By collating materials and information from a wide range of sources (see Methodology and Research Sources below) and mapping the field, it will be of value to many scholars and activists, especially given the recent, burgeoning interest in this topic. It will also contribute to wider

academic scholarship on trans/gender, prisons, law and human rights. The following review will show how the thesis will fill a gap in the current, limited literature in the field.

There is surprisingly little UK scholarly literature on the situation of transgender prisoners, and hardly any which directly informs either a traditional legal analysis, or a Foucauldian analysis of the effects of law and human rights on the governance, and liveability, of transgender prisoners' lives. Traditional legal scholarship on prisoners' human rights in the UK (e.g. Livingstone *et al* 2008) and in the European context (e.g. Livingstone 2000; Van Zyl Smit and Snacken 2009) has yet to engage with the situation of transgender prisoners. UK criminological literature, whilst alive to the effects of penal power on gendered bodies, especially women's bodies (e.g. Carlen 1983; Dobash, Dobash and Gutteridge 1986; Zedner 1991a, 1991b; Bosworth 2000; Sim 1990; Carlen and Worrell 2004; Corcoran 2006) and to the effects of the prison's institutionally entrenched, exaggerated gender norms on prison masculinities (e.g. Sim 1994; Newburn and Stanko (eds) 1994; Jewkes 2005; Philipps 2014) has tended to take the subjects of "women in prison" and "men in prison" as fixed, rather than fluid and contested sites, although the new field of queer criminology is starting to address this shortcoming, as discussed below.

In the last few years, new strands of literature have started to emerge which specifically focus on the transgender prisoner population in the English and Welsh prison system, but to date, none offers an in-depth, theoretically-based analysis of the transgender prisoner as a subject of law, human rights and/or risk discourse. In sum, academic literature on UK legal and policy developments relating to the governance of transgender prisoners is sparse. The following outlines three areas in which a literature is developing: the first relates to law and

prison policy, the second to professional practice of working with transgender prisoners, and the third to transgender prisoners' experiences.

First, there is a small body of literature on law and prison policy relating to transgender prisoners in the UK, mainly in the form of short overviews and commentaries. Commentary on PSI 2011 and PSI 2016 comprises several brief summaries in the prisoner newsletter *Inside Time* (Cooney 2009; Harman 2016), Sarah Lamble's concise, perceptive critique of PSI 2011 in *the Howard League for Penal Reform ECAN Bulletin* (2012), and Robyn Emerton and Mia Harris's comment on PSI 2016 in *Inherently Human* (2016). Jane Ryan, a solicitor who has advised a number of transgender prisoners in actions against the state, provides an excellent synopsis of recent developments in policy and case-law in *Legal Action* (2016b), and has offered an insightful critique of prison policy and practice at various conferences (e.g. 2016a). Some other literature informs the field, but does not comprehensively deal with the Gender Recognition Act 2004, the Equality Act 2010, PSI 2011 or PSI 2016. Set against the backdrop of the Equality Act 2010 and prison policy on *Ensuring Equality* (PSI 32/2011), for example, Peter Dunn (2013) examines the quality of engagement with sexual orientation and transgender issues in the English and Welsh prison system, through an analysis of HM Inspectorate of Prisons' findings, but does not relate this to PSI 2011. Sarah Pemberton's comparative analysis of US and UK's prison placement and healthcare policies for transgender prisoners acts as a forerunner for this thesis in its Foucauldian and Butlerian approach to the material (2013), but unfortunately the policy discussion is (by the author's own admission) very broad brush, and neglects recent developments in the UK field, including PSI 2011.

The only other example in the legal and policy field is Petra Boldt's and Chris Philipps' article for the *Scottish Law Journal* (2011). This article is highly revealing of the negative stereotyping which can occur in this field and is useful to the thesis's analysis of the seemingly widespread, enduring view that transgender prisoners' gender is inauthentic, and that transgender women prisoners are especially risky. Without citing any evidence, the authors uncritically portray transgender women – especially those who they characterise as being “obviously of the opposite sex” (*ibid*:3) – as representing a threat to cisgender women prisoners in women's prisons, causing the latter emotional distress and even insomnia (*ibid*). They further mention the problems which can occur where “a transgender male is dressed as a woman” in a male prison (*ibid*). The authors do not situate their analysis in the feminist literature, nor do they demonstrate any awareness that these statements are anything other than taken-for-granted “truths” about transgender prisoners, which disavow their gender authenticity. Yet, their comments are suggestive of the trans-exclusionary radical feminist position adopted, for example, by Jeffreys in *Gender Hurts: A Feminist Analysis of the Politics of Transgenderism* (2014). Referring to a smattering of transgender prisoners imprisoned for violence against women in the US, Canada and the UK, Jeffreys critiques the progressive realisation of transgender prisoners' rights, whereby “a man's right to wear make-up and be housed with vulnerable women who are incarcerated trumps the right of those women to be protected from violent men” (*ibid*, 161). Whilst not reflective of the trans-inclusive feminist position the author adopts in this thesis, such discourse seems to have considerable traction with the general public. It must therefore be taken into account in the thesis, as a competing discourse to transgender prisoners' rights (see Chapter 3).

Outside the legal and policy field, the second area of burgeoning UK-based research relates to professionals working with transgender prisoners. This literature offers useful background for this thesis, but is more practically- rather than theoretically-driven. This is true, for example, of Stephen Whittle and Lindsey Poole's early pilot study into the provision for transgender offenders in the criminal justice system and the information needs of probation officers working with transgender offenders (2001; Poole, Whittle and Stephens 2002) which was, for a long time, the only research in the field, and regularly cited in transgender equality reports (e.g. Whittle *et al* 2007; Mitchell and Howarth 2009). After a gap of more than a decade, new research has started to emerge, largely in the forensic psychiatry and psychology field: a literature review seeking insights into the question of how to coordinate prisoners' gender reassignment with offender behaviour therapy in prison therapeutic communities (Jones and Brookes 2013),³⁴ and a paper examining one transgender woman's experience thereof (Disspain *et al* 2015). Another paper examines prison staff's experiences of working with transgender women who are sex offenders in a male prison (Marlow, Winder and Elliot 2017).

Transgender prisoners' experiences have also started to be documented, contributing to a nascent knowledge about them as a prison population in England and Wales. This third area of literature includes Phil Forder's *Released Inside: Conversations with Transgender Prisoners and the Staff that Care for them* (2017), which relays the experiences of 13 transgender prisoners, and several staff, in HMP Albany, HMP Parkhurst, HMP Rye Hill, HMP Parc and HMP Stafford. In compiling these accounts, the author (a community inclusion manager from HMP Parc in South Wales) seeks to give some "practical insights to assist

³⁴ On HMP Grendon's therapeutic prison community, see Genders and Player (2010). See also Shefer (2012).

prison staff working on a daily basis with transgender prisoners” (*ibid*: 6). Sarah Jane Baker’s *Transgender behind Prison Walls* (2017) gives a first-hand account of her experience of transitioning in prison, reviews prison policy, and offers practical guidance and information directed at “all transgender prisoners, their families and prison staff” (*ibid*: 17). Both works provide valuable insights into experiences of transgender prisoners, and give a personal dimension to some of the issues identified by this thesis. For example, Baker observes that transgender prisoners face “cultural resistance and marginalisation behind bars”, and “what rights we do have are seen as privileges, rather than a humane and civilised way of treating some of the most vulnerable inmates without our penal system” (*ibid*: 19).

This newly emerging body of literature is a sign of increasing interest in the transgender prison population in England and Wales, a population which has, for many years, been largely invisible (Gordon *et al* 2017). It makes an important contribution to knowledge about the experiences of transgender prisoners – which, Gordon *et al* conclude, is “an under-researched area generally, but particularly in the UK” (*ibid*: 11) – and of the experiences of those working with them. However, the academic literature does not yet examine law and policy in this field, nor has it engaged with the effects of recent human-rights based developments and discourse on the governance of transgender prisoners’ daily lives.

By stark contrast to the limited academic scholarship in the UK, a substantial body of academic literature (and jurisprudence) on transgender prisoners exists in the US, including detailed legal and human rights analyses. Particularly valuable examples include: Rosenblum 1999; Tarzwell 2006; Lee 2008; Arkles 2009; Okamura 2011; Arkles 2012 and Harvard Law Review 2013-14. The US literature also benefits from the rich research output

of a large-scale empirical research project into the views of transgender women housed in men's prisons regarding their preferred prison allocation (Sexton, Jenness and Sumner 2010; Jenness 2010; Jenness 2014), their sense of community (Sexton and Jenness 2016) and the "dilemma of difference" (Sumner and Sexton 2016). This project also generated an insightful gender analysis of the women's desire to be recognised as authentic women, or what they call the "real deal" (Jenness and Fenstermaker 2014). US trans/queer scholarship has also started to engage with the prison system from a prison abolitionist stance (e.g. Spade 2011 and 2015; Stanley and Smith (eds) 2011; Vitulli 2013). Further, Regina Kunzel's history of sexuality in the American prison (2008) provides a rich source of material relating to the historical governance of sexually and gender "deviant" prisoners, which is absent in the UK literature.

Beyond the US, scholars have analysed the legal situation of transgender prisoners in Australia (e.g. Edney 2004), Canada (e.g. Mann 2006, Smith 2014), Hong Kong (Erni 2013) and Israel (Yona 2016). Whilst the author has studied this comparative literature in depth, it is referred to in this thesis only where it particularly enriches the analysis and/or UK-specific literature is lacking. Aside from the fact that the prison systems and prison policies are very different, the US literature in particular is so well-established that she was concerned that over-reliance on it would run the risk of eclipsing the UK analysis. By focusing on transgender prisoners in the English and Welsh prison system, this thesis will make an original contribution to the literature and will map the field for future research.

The fact that the thesis concentrates on transgender prisoners, and not gender non-conforming people more broadly, may lead to criticisms that the research upholds, rather

than challenges, existing identity-based categories.³⁵ That is not its intention. As queer criminology is emerging, there are inevitably different views on the direction it should take, and it is recognised that this thesis is relatively moderate in its “queer ambitions”. Matthew Ball (2014) persuasively calls for “queer/ed criminology” to take “queer” as denoting a mode of doing something, and a position from which something can be done, rather than as an identity (2014: 23) and draws on Foucault’s understanding of critique as “the art of not being governed” (1978:44) to chart a possible path for critical queer/ed criminology. Whilst Ball recognises the value of representing LGBTQ people in criminological research, and producing knowledge about their experiences, he expresses concern that such “inclusion projects” (*ibid*: 24) may potentially lead to the use of essentialised understandings of identity.³⁶ Ball continues that “even works that do engage with queer theoretical insights regarding sexuality and gender diversity, that unpack the homo/hetero binary and are attuned to matters of essentialism ... can often limit the boundaries of the critique that they offer” (*ibid*: 22), in that “they use queer concepts to more effectively understand and represent the subjects of the research, and not in the other ways they could be used, such as to think differently about the broader criminological enterprise itself” (*ibid*: 23). This critique is partially true of this thesis; its aim is indeed to engage with queer (and other) theoretical insights to better understand the regulation of transgender prisoners as a defined subject of law and prison policy. It is not concerned with deconstructing the criminological enterprise. It leaves that more radical work to other scholars, such as those

³⁵ Further, although an intersectional approach is preferable when researching and writing about marginalised groups (see e.g. Arkles’ pioneering study of the enforcement of racialised gender norms through prison dress in US prisons, 2012), such an analysis is beyond the scope of this thesis.

³⁶ Indeed, this was the experience of feminism in its early efforts to define the “woman” of its representational politics, which led *inter alia* to the exclusion of transgender women and other women who did not conform to the heteronormative matrix, as discussed in Chapter 2.

who argue that trans/queer liberation and prison abolition must be grown together (e.g. Stanley and Smith (*eds*) 2011, Spade 2011 and 2015, Lamble 2013). In criminological terms, its more moderate aims are aligned with “queer realism” (Woods 2014). This approach treads a path between identity-based perspectives, which assume that existing categories of sexual orientation and gender identity (e.g. gay, lesbian, bisexual, transgender) correspond to collective identities, and deconstructive approaches, that seek to disrupt fixed or stabilised notions of sexual orientation and gender identity (Ball *et al* 2014:6).

Borrowing from Adrian Howe’s reflections on the disjunction between postmodern critique and feminist practice in the context of research on women prisoners, the author is mindful that we must be careful not to risk losing sight of transgender prisoners, just as they are beginning to become visible (1994: 164). It is important not to become paralysed by the rigorous demands of postmodernism and poststructuralism to question and deconstruct everything – despite Foucault’s poststructuralist desire to disrupt equilibrium and certainty so that “all those who speak for others or to others” no longer know what to do (*ibid*: 288) – for otherwise there would be no progress in the field, even if law’s solutions are not perfect. Similarly, as Laureen Snider has remarked in relation to reforms in relation to women’s imprisonment, it is important not to arrive at an “ironic impasse”, where one group fervently works towards legal and policy advances for transgender prisoners on the basis of existing knowledge of their needs, whilst another group works just as fast to deconstruct that knowledge and to critique legal and policy reform as not radical enough (2003). There is also a sentiment here, that it is important to attend to the needs of those here and now, rather than sacrifice them and their hard-won identities to some notional better future.

Beyond the UK literature on transgender prisoners, the thesis draws on, and, in turn hopes to contribute to, a broad base of literature in the legal, gender and criminological field. Rather than review this wide range of literature here, it will be integrated, as relevant, into subsequent chapters. The purpose of the above, brief review is simply to show how this thesis fits into the existing small body of literature on transgender prisoners in the UK, and to demonstrate how it will contribute to it.

Methodology and Research Sources

Before turning to the historical background to the thesis, an explanation of its methodology and research sources is apposite, particularly given that some might regard its mixed-methods as somewhat unorthodox, and, as with many research projects, the final thesis does not directly reflect the much broader research base it started out from.

The author is mindful of Vivien Namaste's critique that transgender people have not been served by the queer academic project (2000 and 2009), and that a "truly transformative intellectual practice would collaborate" with the transgender people under investigation, to ensure that it is useful to them, and "to ensure that their political and intellectual priorities are addressed" (2009:27). That more ambitious, collaborative task lies ahead. The first task, and the one that most suits the author's legal skill-set, is to map the field. This essential, preliminary work has not yet been done. It is important to note, however, that in the early phases of research, the author spent considerable time and energy exploring the viability of conducting a more traditional criminological or socio-legal piece of research into the way in which recent human rights law and policy developments are playing out on the ground,

which would be examined through interviews with prison governors, prison staff and transgender prisoners.

In addition to reviewing the literature on conducting research inside English and Welsh prisons (e.g. Liebling 1999; Bosworth *et al* 2005; Crewe 2009; Phillips and Earle 2010; Rowe 2011 and Phillips 2012: Chapter 3), this exploratory phase included meeting with Jamie Bennett (governor, HMP Grendon) and Sarah Disspain (forensic psychologist, then at HMP Grendon) about research possibilities at HMP Grendon, which has housed several transgender prisoners over the years and was interested in supporting further research in this field (see Disspain *et al* 2015). It also included very helpful conversations with staff at the Howard League for Penal Reform and with Alisa Stevens, University of Southampton, regarding the methodology used to research prisoners' experiences for the *Sex in Prison* project (Howard League for Penal Reform 2014 and 2015).

In order to obtain a sufficiently robust sample of what the author, from her preliminary research,³⁷ understood to be a small and highly dispersed transgender prisoner population, and their management, interviews for this project would need to be carried out in numerous prisons across the country. It became clear that the need to obtain approval from NOMS National Research Committee (“NRC”) to such a research project, in addition to University ethics approval, would present a major challenge in the context of a three-year funded doctoral research project. Indeed, Michelle Jaffe, a previous doctoral candidate at Keele University, spent two years negotiating with the NRC to obtain approval for a research

³⁷ This preliminary research involved mapping details of known transgender prisoners in the English and Welsh prison system from press reports, HM Prison Inspectorate reports, IMB reports, case law and other public sources. It will be recalled that, at this time, there was no official data on the numbers or locations of transgender prisoners. The first official statistics, released in November 2016, identified 70 transgender prisoners across 33 prisons, in a one month window (Ministry of Justice 2016b).

project on the Samaritans' Listening Project, which involved a survey and interviews with prisoners, staff and "listeners" in four prisons. Her doctoral thesis (Jaffe 2015) was accompanied by a volume of correspondence with the NRC which was as thick as the thesis itself, and made for sobering reading; this was clearly a political minefield (see *ibid*: 118-125 in particular).

Even if NRC approval were ultimately obtained, the author and her supervisors concluded that the logistics of such an ambitious project were simply not viable in the context and time-frame of a PhD, and that the time and costs involved would outweigh the benefits. Moreover, there was a very real risk that the research would not yield the amount, quality and depth of data needed to test the author's primary research questions relating to the impact of law and policy in this field and its interrelationship with the governance of risk. In addition, the data would be unlikely to be representative of the transgender prisoner population.³⁸ Instead, by mapping the field, from a wide and creative range of research sources, it is hoped that this thesis will act as a spring-board for further research, including, as a priority, prison-based research of the nature described above (see Conclusion).

The thesis therefore seeks to at least *indirectly* account for the experiences and concerns of some transgender prisoners, and to assess the potential and limits of legal and policy developments to improve transgender prisoners' lives, not through on-the-ground research into transgender prisoners' and prison management's day-to-day experiences, but through an analysis of the types of issues which have reached the courts, voluntary sector

³⁸ Aside from the issue of obtaining NRC (and relevant prisons') consent, interviews would be much more likely to be of long-term prisoners. The problems of identifying and capturing (in time) the experiences of short-term transgender prisoners and their management, via all the necessary approvals and security clearances, might well be insurmountable.

organisations and the Prisons and Probation Ombudsman, all of which are researchable from the “outside”.

Complaints which have reached the courts provided the richest textual material for the analysis in this thesis; the judgments in *AB* (2009) and *Green* (2013) offer an invaluable window on the prison’s construction of the transgender prisoner and important insights into the emerging fault-lines between the “new” human rights discourse and established risk-based governance of transgender prisoners, the official rationale behind prison decisions, and the courts’ resolution of the issues. Press announcements on recent cases settled out of court (e.g. *XT*, Bhatt Murphy Solicitors 2017b), and the judgment in the preliminary hearing for *Hunnisett* (2017) have since added to these important research sources (see Chapter 4). In order to supplement these core materials, the author conducted four semi-structured, qualitative interviews with voluntary sector organisations who have engaged in providing support, advice and advocacy for transgender prisoners. These comprised: the Gender Identity Research and Education Society (“**GIRES**”) (13 Oct 2015), Press for Change (“**PFC**”) (26 Oct 2015), the Prison Reform Trust (“**PRT**”) (17 Nov 2015) and the Prisoners’ Advice Service (“**PAS**”) (13 April 2016). The author also interviewed a solicitor who has represented several transgender prisoners pursuing legal cases against the Ministry of Justice (Jane Ryan, Bhatt Murphy Solicitors) (18 May 2016).

These interviews sought to enhance the desk-based research by tapping into the accounts, experiences and insights of voluntary sector organisations and solicitors regarding their work on behalf of transgender prisoners, and to seek their views on the extent to which (if any) recent human rights developments, and particularly the PSI 2011, have helped them to advocate on behalf of transgender prisoners, whether through policy reform efforts and/or

in individual cases. Appendix 1 contains Keele Research Ethics Committee approval, granted in July 2015, and Appendix 2 contains the schedule of questions used to guide the interviews.

The main contribution these interviews made to the research data was the information they provided about a number of cases settled outside the court process (albeit details were necessarily limited, due to client confidentiality), and the fact that the author was kept aware of subsequent developments in the field by Press for Change and Jane Ryan. Whilst the interviews provided extremely helpful background for the project, and in particular, gave the author a sense of the important work that voluntary sector organisations do “behind the scenes”, the data gathered was not sufficiently robust to advance the central analysis around the power of human rights to improve the situation of transgender prisoners, so no further interviews were pursued. The author recognises that solicitors working in this very small legal field have to be particularly careful to retain client confidentiality, and that voluntary sector organisations have to tread a cautious, non-political path, in order to retain their reputations and to support their clients and meet their needs. Thus the content of the interviews was probably not only limited by client confidentiality, but also by “realpolitik”. For example, one voluntary sector organisation approached by the author did not wish to be interviewed, or for advertisements to be placed in their magazine, on the basis that it was extremely important for them to remain independent from academic research projects. Another example of caution on the part of solicitors and voluntary sector organisations, is that most of the interviews were not recorded, at the request of the interviewees. This brief account is given to help explain the sparse use made of the interviews in the thesis. Although they were a very valuable source

of information (and in particular helped to fill in some gaps regarding transgender men's experiences, which are entirely absent from existing case law and literature), they are not presented in the thesis as a source of qualitative research data which is subjected to systematic analysis within its overall aims and objectives.

During the course of the research, the author had around 50 more informal conversations, in person or on the telephone, and ranging from 5 minutes to 45 minutes, with a wide range of people including voluntary sector workers, prison governors, prison wing staff, prison equality officers, prison mental healthcare staff, prison GPs, prison-based forensic psychologists, members of the Independent Monitoring Board and HM Prison Inspectorate, coroners, solicitors and barristers, and others working in the field. These opportunities mainly arose out of various conferences, seminars and inquests. In particular Joanne Roberts,³⁹ who was working as a volunteer at Only Connect, spent an hour talking to the author about her experiences of the issues facing transgender prisoners (both transgender men and women) she had lived alongside in various women's prisons, which provided invaluable insights from the "inside" (7 July 2014). James Barrett, lead consultant at the Charing Cross Gender Identity Clinic, and president of the British Association of Gender Identity Specialists, shared his views on PSI 2011, his clinical experience of dealing with transgender prisoners, and his thoughts on the need for comprehensive research in this field (including an urgent need to explore the views of prison governors and prison psychiatrists on the subject), in a long telephone conversation (13 Oct 2015). Louise Finer, Senior Policy Officer and National Preventive Mechanism Coordinator at HM Inspectorate of Prisons, met to discuss the author's research and HM Inspectorate of Prison's work on the

³⁹ Name changed.

issue (24 June 2016). Since these conversations were not conducted as formal interviews, they cannot be directly cited, but they greatly enriched the author's overall understanding of the subject, from many different perspectives. They are mentioned here not as formal research methodology, but to show the extent of the author's deeper and broader engagement with the research, beyond that which is more clearly evident from the text of the thesis. They also demonstrate the need for future qualitative research, to capture these different experiences and insights in a very fast-moving field.

Similarly, as well as examining PPO reports on investigations into the deaths of transgender prisoners in custody, the author attended part of the coroners' inquests relating to the deaths in custody of Senthoram Kanagasingham (2015) and Vikki Thompson (2017) (two and four days, respectively), to gain a deeper insight into these cases.

Finally, turning back to research sources, given the lack of previous research in the field, the thesis draws on wide range of sources outside the traditional literature, including parliamentary debates and "grey" materials such as voluntary sector reports and government reports. It has also had to rely fairly heavily on press reports for information about transgender prisoners. Apart from various on-line data bases, the Lesbian and Gay Newspaper Archives ("**LAGNA**") has been an invaluable source for otherwise hard-to-find historical press cuttings. The Prison Service College Library kindly provided the author with access to the complete collection of the *Prison Service Medical Journal* and other historical, in-house publications. Staff at the Hull History Centre, Hull University (Liberty Archives), and at the Transgender Archives at University of Victoria, Canada assisted the author in trying to track down historical materials. Drawing on such a wide range of sources has produced a much broader picture of the contemporary situation than available in the current literature,

and has helped piece together what the author believes to be the first, albeit preliminary, history of the treatment of transgender prisoners in England and Wales.

Structure of the Thesis and Chapter Outlines

The thesis begins by laying the broad historical, theoretical and legal ground, in Chapters 1 through to 3. It then analyses the effects of law and human rights on the prison administration's construction of transgender prisoners, and its governance of their lives in three specific areas, namely prison allocation and segregation (Chapter 4), gender presentation (Chapter 5) and access to medical gender reassignment treatment (Chapter 6). The following provides a synopsis of each chapter and simultaneously highlights some of the core themes that will run through the thesis.

Chapter 1 sets the historical scene for the thesis. Whilst the "transsexual" was named in British medicine in 1949 (Caldwell 1949), it is important to have a sense of the longer history of the gender non-conforming figure, not only in order to contextualise later legal, medical and penal developments, but also for understanding the deeply-entrenched historical roots of much contemporary discourse around transgender prisoners, and especially transgender women prisoners. The chapter highlights the criminalisation of men for "personating women for immoral purposes" in the Victorian era, which has had enduring discursive power in the construction of transgender women's gender performance as inauthentic, artificial and imitative, and their bodies as potentially risky to cisgender women in close, confined sex-segregated spaces, such as prisons. The chapter then traces the historical pathologisation of transgender people, and the medicalisation of "transsexuality" through the curative model of hormone treatment and gender reassignment surgery. The

chapter shows how these two historical discourses converged in law's first medico-legal construction of the "transsexual". As the thesis will demonstrate, the first legal definition of sex, laid down in *Corbett v Corbett* [1970] 2 All ER 33 ("*Corbett*"), was based on certain biological factors (especially genitalia) at birth, and refused to recognise transgender people's gender. This case governed the legal regulation of sex/gender for the next 30 years.

Chapter 2 sets out the three theoretical "pillars" which structure the thesis in its analysis of law and human rights, gender and risk. It shows how a Foucauldian-based approach links the three fields together. Although Foucault is widely understood to have narrated the demise of law in modern power relations, and to have rejected human rights as an illusory form of resistance to state power, this chapter draws on post-Foucauldian legal scholarship to argue that law is a powerful force in contemporary society, and that human rights discourse has considerable political purchase, even though recourse to rights carries risk. It argues that is important to examine law as a productive power, which not only represents but also *constitutes* its subjects, and has powerful norm-producing effects on the way that society thinks, speaks and acts about sex/gender and transgender people. The second theoretical pillar comprises feminist, queer and transgender theory on the constitution, performativity and embodiment of gender. Following Butler (1990), the chapter argues that dominant scripts of sex/gender have restricted the possibilities of gendered lives, and rendered certain trans/gender lives and bodies "culturally unintelligible". It addresses the powerful, trans-exclusionary radical feminist discourse that transgender women's bodies present a physical and psychological risk to cisgender women in "women-only" spaces. This construction of transgender people and their bodies as risky intersects with the third

theoretical pillar of the thesis. This third part draws on risk literature, to argue that, in contemporary “risk society” (Beck 1992), and under the continuing conditions of the “new penology” (Feeley and Simon 1992), risk has become a key driving force in prison management and pervades prison thinking at every level. Approaching risk through a governmentality approach, the chapter argues that transgender prisoners are primarily constructed and governed as a fundamental risk to the prison’s established binary sex/gender order. It argues that transgender prisoners present a myriad of new and uncertain challenges for prison governance, which are constructed primarily as risks, and approached through a precautionary logic.

Chapter 3 returns to the story of law. It charts the emergence of the transgender prisoner as a human rights-bearer, through cumulative developments in transgender rights and prisoner rights. Drawing on the theoretical insights of Chapter 2, this chapter explores both the transformative potential, and the potentially negative discursive effects, of human-rights based law reform. In particular, it examines law’s re-conceptualisation of sex/gender in the Gender Recognition Act 2004, which finally made legal space for certain transgender people, but, in the very moment of reform, entrenched the gender binary, and perpetuated the historically pathologising, medicalised model of transgender people. Following Sharpe (2007), the chapter shows that, whilst the Gender Recognition Act ostensibly delinks gender from sexed bodies, anatomical bodies and “biological sex” as determined at birth still matter in law. The chapter then traces the broadening of transgender people’s legal protection against discrimination, culminating in the Equality Act 2010. It draws attention to law’s continuing production of transgender people’s gender performance as inauthentic, artificial and imitative, in order to bolster cisgender identity as natural, real and original. In the

prisoners' rights field, the chapter highlights the significance of developments in prisoners' right to access the courts, and the introduction, in 1994, of NHS-equivalence in prisoner healthcare, which paved the way for transgender prisoners to access medical gender reassignment treatment, including surgery, on the same basis as those in the outside community. The chapter concludes with an analysis of law's first construction of the transgender prisoner as a human rights-bearer, in **AB** (2009), and with an overview of the subsequent, first construction of the transgender prisoner in official prison policy, in PSI 2011.

Chapter 4 examines the prison authorities' power to determine a transgender prisoner's sex/gender in prison allocation decisions. Against the historical backdrop of the sex-segregated prison estate in England and Wales, it shows how the prison's regulation of trans/gender developed separately from law, and was based on transgender prisoners' genitalia upon entry to prison, rather than their genitalia at birth (**Corbett** (1970)). It examines the first official statements on transgender prisoners' allocation within the prison estate, and the perceived need for their protective segregation. The chapter highlights the emergence of a specific risk discourse around transgender women prisoners' bodies and "biology", which casts them as potentially psychologically and sexually harmful to cisgender women prisoners. Through an in-depth analysis of the High Court judgment in **AB** (2009), the chapter examines judicial resolution of the tensions between human rights and risk discourse. It then addresses the routine practice of separating transgender prisoners from the main prison population, ostensibly to protect them from harm. It considers the equality and health implications of placement in segregation, vulnerable prisoners' units ("**VPU**s") and healthcare on transgender prisoners' lives, as well as the symbolic effects, in terms of

othering them, and perpetuating the notion that they are risky, rather than addressing transphobia in the main estate. Finally, through various recent court cases and press reports, the chapter questions the ability of the potentially transformative policy developments in PSI 2011 and PSI 2016 to achieve fundamental change in the way that sex/gender is perceived, and the way in which transgender women prisoners are constructed as especially risky.

Chapter 5 examines transgender prisoners' struggles to express their gender through hair, clothing, and other gender-affirming items, when they are placed in prisons which do not reflect their gender. It shows how, historically, prison uniform and hair-cutting was used as a technique of power to discipline and normalise prisoners into dominant gender and class-based norms, and how prisoners' dress is now disciplined and controlled in much more subtle and pervasive ways. Against this broader backdrop, the chapter examines prison management responses to transgender prisoners' desire to express their gender, and reflects on the transformative potential of PSI 2011, which provides that transgender prisoners must be permitted to live and dress in their self-identified gender, whichever prison they are allocated to. Through an in-depth analysis of *R (on the application of Green) v Secretary of State for Justice* [2013] EWHC 3491 (Admin) ("**Green**"), the chapter explores the tension between PSI 2011's human rights and equality discourse, and the prison's precautionary approach to security- and risk- management, in relation to transgender prisoners' right to access gender-affirming items. **Green** also provides an opportunity to critically examine the "hierarchy of authenticity" (Serano 2007) which law perpetuates between transgender and cisgender people's gender performance, and judicial

endorsement of the seemingly widespread view that permitting and enabling transgender prisoners to live and dress in their gender is a “privilege”, rather than a right.

Chapter 6 examines penal power over prisoners’ access to specialist medical gender reassignment treatment, in light of the powerful legacy of the medico-legal model of transgender. It charts how, historically, far from being benevolent, prison medicine was part of the wider discipline and control of prisoners, and was embedded in the broader doctrine of “less eligibility” (Sim 1990). The chapter shows how prison medical power was used to violently enforce normative sexuality and gender on prisoners considered “deviant”, including the first “transsexual” prisoners. The chapter charts developments in transgender prisoners’ right to access medical gender reassignment treatment, through the significant introduction, in 1994, of a policy of “NHS-equivalent” prisoner healthcare, and the Court of Appeal’s ruling in *NW Lancashire Health Authority v A, D & G* [1999] EWCA Civ 2022 (“*NW Lancashire*”) that treatment for “gender dysphoria” falls within the remit of the NHS. The chapter reflects on PSI 2011 and PSI 2016’s contribution to the field, and the enduring expectation that transgender prisoners submit to a medical model of gender reassignment, if they wish to obtain legal recognition, and be allocated to a gender-appropriate prison. The chapter considers the remaining structural and conceptual barriers to the full realisation of transgender prisoners’ right to NHS-equivalent medical treatment. It explores the paradox whereby transgender prisoners are not considered deserving of gender reassignment surgery on the NHS, but unless and until they have full genital surgery, they are viewed as suspicious and risky – particularly transgender women prisoners. The chapter concludes with some reflections on the more subtle gatekeeping powers now at play, including gender

clinicians' authority over whether prison is a sufficiently "real life experience" to qualify for gender reassignment surgery.

Chapter 1: A Brief History of the Legal and Medical Regulation of Gender Non-Conforming People

This chapter provides important historical background for this thesis. It traces legal and medical developments in relation to gender non-conforming people from the Victorian era, through to the medical naming of the “transsexual” in England, in 1949 (Cauldwell 1949), and the establishment of the first medico-legal model of “transsexuality” in **Corbett** (1970). Whilst the main jumping-off point for the thesis is the medical naming of the “transsexual”, gender non-conforming people have a much longer history. It is important to have a sense of this history both to contextualise the significance of later legal, medical and penal developments, and to be alive to the deeply-entrenched, historical roots of much contemporary discourse around transgender people, including as prisoners. In this sense, this chapter is intended as a brief Foucauldian “history of the present”,⁴⁰ connecting the past to the present. Unfortunately, space prohibits a more detailed review.

Although the criminal justice system has long problematised gender non-conforming people, this particular history appears to be untold. Notably, whilst Foucault traced both the history of the prison (1977) and the history of sexuality (1979), he did not consider these subjects in conjunction with each other, nor did he explore the concept of gender separately from sex. Also absent from the literature is the closely interrelated history of sexuality in the English prison (*cf.* Regina Kunzel’s excellent history of sexuality in the American prison (2008)).

⁴⁰ For an excellent account of Foucault’s method of writing a “history of the present”, compared to conventional histories, see Garland 2014.

This chapter is divided into four parts. The first part examines law's regulation of "gender deviance" in Victorian times, and in particular its criminalisation of men for "personating a woman for immoral purposes", which has had enduring normative power in relation to transgender women and their access to "women-only" spaces.⁴¹ It also shows how the later offence of "importuning for immoral purposes" was disproportionately used to police and punish men who cross-dressed or were simply perceived to be "effeminate", culminating in the 1940s and 50s. Part two discusses the science of sexology in England at the turn of the twentieth century, which, like in Germany, was initially developed to challenge law's criminalisation of sexual relations between men, on the basis that the "sexual invert" was simply a variation of nature. It shows how the separate, gender non-normative figure of the "sexual invert" was soon pathologised and collapsed into the narrower figure of the "homosexual" under the psychoanalytical school. It specifically considers the effects of these different medical models on the prison's construction and governance of the "constitutional homosexual" or "invert". Part three turns to the 1949 naming of the "transsexual" in British medical science, and subsequent developments in the medicalisation and treatment of "true transsexuals", through to Fisk's broader conceptualisation of "gender dysphoria" in 1973. The fourth part examines the first "transsexual of law" and the first medico-legal model of "transsexuality", established in *Corbett* (1970). It explains *Corbett's* narrow conceptualisation of "legal sex", which placed transgender people outside the law for the next 30 years.

Before turning to the analysis, it must be noted that before the popularisation of the term "transsexual" and its medical conceptualisation in the late 1960s, it is difficult to prize apart

⁴¹ See Chapter 3 for a discussion of the trans-exclusionary radical feminist construction of transgender women.

historical material on gender non-conforming people from historical material on the “homosexual”. This historical conflation between gender and sexuality persists today, in popular (mis)understandings of transgender. This chapter adopts the relevant terminology of the day,⁴² and for the sake of clarity, refers to “men” and “women” as those assigned male and female at birth. This may not sit comfortably with the modern scholar of (trans)gender. However, there is a concern that applying today’s interpretative framework to the past would erase the discursive power of specific terminology, and blur the shifts in discourse which are central to the historical analysis in this chapter.

Law’s Regulation of Sexual and Gender “Deviance”

A rich literature now exists on the history of sexual and gender “deviance” and its regulation in England, and particularly London (e.g. Weeks 1981/2012; Cohen 1993; Trumbach 1998; Kaplan 2005; Moran 1996; Cocks and Houlbrook 2006; Cocks 2010; Upchurch 2009). This part focuses on those aspects which relate to law’s direct or indirect regulation of cross-dressing and/or non-normative gender, and surrounding discourse. This is not always easy, as historically, cross-dressing, non-normative gender expression and homosexuality were conflated. It starts with the trial of Ernest Boulton and Frederick Park in 1870/1, which sets up several recurring themes in this thesis. Although there had previously been prosecutions and convictions of men for “impersonating women for immoral purposes” in the mid-nineteenth century, Boulton and Park’s case was the first to receive widespread press

⁴² It has, however, relied on English translations of German and Italian language texts. It is not possible to ascertain the closeness to the original text of the particular terminology adopted by the translator, but different translations vary considerably. The hidden power of the translator is particularly apparent in Lombroso’s *The Female Offender* (1895), which, it has since been revealed, was “sanitised” in the original 1909 English translation, to avoid offending Victorian sensibilities, see Lombroso and Ferrero (2004).

coverage and national notoriety: *The Times* referred to it as “the most extraordinary case we can remember to have occurred in our time” (1870:9).

Impersonating a woman for immoral purposes

Boulton and Park were arrested whilst attending a West End theatre, dressed as women. The police had been called many times before by the manager of the particular theatre about their exhibitionist and rowdy behaviour, but only agreed to attend this time as Park had entered the ladies’ restroom, where he asked a female attendant to help pin his dress. It was this intrusion into a designated women’s space by a man “masquerading” as a woman, and the need to protect “vulnerable” women from such “abhorrent imposters” that became a central element of the prosecution’s case.

Much to the public gallery’s delight, the defendants were made to appear in court in the clothes and wigs in which they had been arrested (Upchurch 2000:137). This was clearly meant to discipline the defendants and to act as a deterrent to others. The *Times* reported that “Boulton wore a cherry-coloured evening silk dress trimmed with white lace; his arms were bare, and he had on bracelets. He wore a wig and a plaited chignon” and “Park’s costume consisted of a dark green satin dress, low necked, trimmed with black lace, of which material he also had a shawl round his shoulders. His hair was flaxen and in curls.” (1870: 9). Whilst there was initially considerable public sympathy for the young defendants, the mood turned when it emerged during the committal proceedings that Boulton had been in a long-term, live-in relationship with Lord Clinton, and described himself in private correspondence as Clinton’s “wife”. As this relationship was assumed to involve sex, much more serious sodomy-related charges were laid and tried instead, one year later. The

“Penny Press” revelled in the scandal of the “he-she ladies”. Upchurch maintains that, for the general newspaper-reading public, “the link between cross-dressing and sodomy had been neither absolute, nor even assumed”, but now “it was difficult to ignore”. Thus, he argues, the categories of cross-dresser and sodomite collapsed into each other, and became conflated in the public and legal imaginary (2000). (Although note that Trumbach (1998) dates this collapse much earlier, to the so-called “gender revolution” of the eighteenth century).

During the proceedings, it became clear that Boulton and Park were part of a well-developed community of upper- and middle-class men who enjoyed cross-dressing and/or sexual relations with men. Public knowledge of this fact threatened to cast a shadow on the Victorian middle-class masculine ideal and to bring the nation’s honour into disrepute (Upchurch 2000:130). Such was the concern, that the Attorney General took the unusual step of presenting the case for the Crown himself. Upchurch argues that the Attorney General deliberately sought to portray the defendants as isolated deviant individuals, reminding the jury in his closing speech that “no stain is inflicted upon the honour of this country by such offences being committed by comparatively few” (*ibid*). He also celebrated the lack of “learning or knowledge” about sodomy among the English medical profession, contrasting it with the “learned treatises” written on the subject elsewhere (*ibid*). As Crozier has remarked, the medical profession’s ignorance was seen to act as a “vindication of the morality of the English nation” (Crozier 2001:72, see also Edmond 2004). After being acquitted of the more serious sodomy-related charges, Boulton and Park were found guilty of impersonating a woman for immoral purposes. They received a fine and two years’

probation, which prohibited them from wearing women's clothes for any reason (*The Times*, 7 June 1871: 10).

No prohibition on impersonating a man

There are historical accounts – including in the criminal justice system – of women who cross-dressed and lived permanently as men, but there appear to be no recorded prosecutions against women for “impersonating a man for immoral purposes”. It seems that women's cross-dressing was generally less visible than men's and was rarely perceived as “immoral”; their motives were largely assumed to be economic, such as gaining employment in traditionally male occupations. Even where they had intimate relationships with women, such relationships were assumed to be of a non-sexual nature, and therefore not of moral or legal concern. Occasionally courts did express disapproval, but they had no legal powers at their disposal to discipline and punish those concerned. For example, when Bill (Mary) Chapman – who was variously described by the press as a “man-woman”, a “thing”, a “creature” and “it” (Jackson 2015:68) – came before the courts with her partner Isabella Watson in 1835 for creating a public disturbance, dressed in conventional male attire and presenting as a man (as the police officer attested she had done for at least ten years as a ballad-singer and speech-crier “known all over England”), the magistrate lamented his lack of legal powers to deal with her. He declared that “she may be a disorderly and disreputable character, which in fact her dressing as a man clearly shows, but I know of no law to punish her for wearing male attire” (*ibid*). Noting that “she may have more than one reason for dressing in that manner, and passing as the husband of the woman Watson”, he added, “I wish it was in my power to imprison her” (*ibid*).

Tightening the screw on sexual and gender deviance

The period following Boulton and Park witnessed a tightening of laws on sexual deviance, as the Victorian concern with morality and sexual health led to greater regulation of prostitution and sexual relations between men. In 1885, the offence of “gross indecency” was added to the statute books through “Labouchère’s Amendment”. This new offence criminalised sexual relations between men, including in private.⁴³ Foucault referred to Labouchère’s Amendment as the moment when the law turned its gaze on homosexuality as an identity rather than a sexual act (1979). In 1898, the new offence of importuning made it illegal for a “male persistently to solicit or importune in a public place for immoral purposes”.

Originally intended to criminalise “bullies” or “pimps” who lived off the earnings of female prostitution (Wolfenden Committee 1957:42), the offence of importuning “for immoral purposes” was soon exclusively deployed by the police to target men perceived to be importuning other men for private sexual relations (itself regarded as a form of prostitution) (*ibid*). The policing of this offence disproportionately affected men who cross-dressed and/or whose appearance and mannerisms were perceived to be effeminate, whom the police assumed to be seeking out homosexual relations, even if they were simply standing somewhere or walking down the street (Schofield 1965). In 1912, Parliament specifically confirmed that the law applied to this scenario, notwithstanding its original legislative intent and, in *Horton v Mead* [1913] KB 154, the courts held that a man could be charged with importuning even if he had not spoken to or touched anybody, or attempted to do so, and

⁴³ Criminal Law Amendment Act 1885, s.11.

even if no-one had complained. Effectively, the judiciary endorsed the construction and policing of homosexual identity as identifiable by effeminate appearance or cross-dressing.

Notably, the criminal offences of gross indecency and importuning applied solely to men. This explains the lack of historical discourse around “lesbian offenders” compared to “homosexual offenders” as a specific legal⁴⁴ or penal category. In 1921, the House of Commons’ attempt to amend the offence of “gross indecency” to include women stalled, when the House of Lords feared that increasing women’s knowledge of lesbianism might further encourage it (HL Deb 15 August 1921, vol 43, cc567-77; see further e.g. Weeks 1985/2012: 105-106). The obscenity trial and banning of Radclyffe Halls’ lesbian (or, as Prosser 1998 has argued, transgender) novel *The Well of Loneliness* (1928), sparked further debate (see e.g. Souhami 1998/2013; Doan and Prosser (eds) 1991). Publication of the novel was not only considered scandalous, but also liable to encourage women into lesbianism, given the shortage of men after the First World War. Sir William Henry Willcox, medical adviser to the Home Office, advised the Director of Prosecutions that lesbianism leads to “gross mental illness” and “nervous instability ... it is a vice which, if widespread, becomes a danger to the well-being of a nation” (cited in Arnold 2011: 295-296).

The same concerns emerged after the morally and sexually liberating years of the Second World War, when there was a marked cultural shift, and traditional values of marriage, family and heterosexuality were reasserted, including through the criminal justice system. A significant increase – some called it a witch hunt – in the policing and prosecution of “homosexual offences”, and in the number of men being imprisoned for such offences

⁴⁴ Whilst certain offences criminalised same-sex relations between men, there was no defined “homosexual of the law” until the Wolfenden Committee was mandated, in 1957, to review the laws on prostitution and “homosexual offences”, which it then had to define (Moran 2002).

followed in the post-war years, as the police developed new tactics of small-scale entrapment on the streets and parks, acted as agent provocateurs in public toilets, and launched raids on drag balls and public houses. Effeminate and/or cross-dressing men were particularly targeted, as they were assumed to be homosexual. Schofield's 1965 study on homosexuality for the Home Office found that men with feminine appearance and mannerisms were greatly over-represented among prisoners serving sentences for importuning. This policing led to a climate of fear among homosexual and/or gender non-conforming men in the 1950s and 60s, as recounted in the autobiographies of Peter Wildeblood (1955), Edward Montagu (2000) and Quentin Crisp (1977).

Decriminalisation

Public concern around the high-profile prosecutions, convictions and imprisonment of Montagu, Wildeblood and others for private, consensual adult sex led to the setting up of the Wolfenden Committee, which was mandated in 1957 to review the laws on prostitution and "homosexual offences". Such was the enduring power of the link between prostitution and homosexuality, that it was not considered at all problematic for the Wolfenden Committee's mandate to comprise these two fields of law (see Moran 1996). In 1967, the Wolfenden Committee's recommendations were finally followed, and the Sexual Offences Act 1967 decriminalised private consensual sex between men over the age of 21. Whilst the Act retained the offence of importuning for immoral purposes, it stipulated that prosecutions should not be brought where the impugned "immoral purpose" was engaging in private, homosexual relations. This finally drew to a close years of misuse of the offence of importuning to police gender-non conforming men, who were perceived to be homosexuals purely on the basis of their cross-dressing and/or effeminate appearance and

mannerisms. However, the Act still criminalised certain specific “homosexual offences” (*ibid*), including sexual relations with a man under the age of 21, and sexual relations other than in private.

The Science of Sexology, the “Sexual Invert”, the “Homosexual”, and the Prison

As well as law’s regulation of sexual and gender non-normativity, it important to have some background on the medical profession’s interpretation of transgender narratives which preceded the medical naming of the “transsexual”, as these understandings fed into prison responses to gender non-conforming prisoners.

The “sexual invert” of the science of sexology

As the law tightened its grip around sexual and gender non-conformity, the late nineteenth century also witnessed a burgeoning production of scientific knowledge in the fields of criminality and sexology. As Kunzel has remarked, “criminality and sexual perversion had long been understood to be in a tautological relationship with one another, such that attention to one naturally and inevitably invited attention to the other” (2008: 7). On the Continent, knowledge-production in the field of sexology was profiting from the captive subjects offered by the asylum and the prison,⁴⁵ but England’s first sexologists eschewed this approach, as they were keen to avoid making any link between same-sex sexual acts and criminality. Their political impetus was to call for the decriminalisation of same-sex relations, on the basis that same-sex desire was a simple variation of nature, a congenital abnormality, rather than a chosen sexual perversion. Thus, in the first English-authored

⁴⁵ There was considerable professional “cross-fertilisation” between these sites, since members of the medical profession commonly worked at both the prison and the asylum in the course of their careers.

book on sexology, *Sexual Inversion*, Havelock Ellis and John Addington Symonds informed readers that “we are not dealing with subjects belonging to the lunatic asylum or the prison. We are concerned with people who live in freedom, sometimes suffering intensely from their abnormal organisation, but otherwise ordinary members of society” (1897:94).⁴⁶

The ideas developed by Ellis, Symonds and others within the conceptual framework of “sexual inversion” are important to the historical analysis as they started to map identities that today would be considered transgender (Prosser 2008:143),⁴⁷ many years before the “transsexual” was named in medical science. Whilst Ellis and Symonds were the first to coin the term “sexual inversion”, the concept of inversion is generally credited to German lawyer Karl Heinrich Ulrichs, who advanced a theory of natural “Uranian” love between people of the same sex, and introduced the transgender figure of the “Urning”, in advocating for law reform. Ulrichs’ theory was that, through a migration of the soul during foetal development, the male “Urning” possessed a female soul enclosed within a male body,⁴⁸ and the female “Urningin” possessed a male soul within a female body. Indeed, although Ulrichs is unproblematically described by his main biographer, Hubert Kennedy, as “the first self-proclaimed homosexual to speak out publicly for the rights of homosexuals” (1988: 9), his self-description clearly presents a transgender, rather than a homosexual narrative: “have I

⁴⁶ Although *Sexual Inversion* received mixed reviews from the British medical profession (Crozier 2008:60-65), and was even banned as an obscene publication (see Craig 1937), it was gradually established as the most authoritative work in the field, and was still published well into the 1960s.

⁴⁷ In the first edition of *Sexual Inversion*, most of the case studies read primarily as homosexual and bisexual narratives, apart from case 19, a short description of a man “who thinks he ought to have been a woman” (Ellis and Symonds 1897/2008: 147). In Appendix F, however, the authors also re-tell in considerable detail the infamous case of Count/ess Sarolta V: how “this man-woman” (*ibid*, 317) had been assigned female at birth, had been brought up as a boy until the age of 13 and had lived as a man for over 10 years before marrying a woman in 1888. In later, solo-authored editions of *Sexual Inversion*, Ellis included several new case studies which present a distinctly transgender narrative (1901).

⁴⁸ On female inversion, and the historical construction of female sexuality, see further Chauncey (1982) and Bauer (2009).

a masculine beard and manly limbs and body;/ Yes, confined by these: but I am and remain a woman” (cited in Prosser 1998: 56). As Prosser has noted, Ulrich’s “wrong body” formula recurred as a popular trope for transsexuality over a century later (*ibid*: 143), and, despite today’s broader understanding of transgenderism, still has considerable discursive power in the medical and public arena. Ulrich’s theory also connects uncannily with contemporary developments in endocrinology, which have established that there are “sexually-dimorphic” brain structures that have different morphological characteristics in males and females (see e.g. Zhou *et al* 1995 and Rosenthal 2014).

According to Ellis and Symonds, Ulrich’s work (probably because he was a lawyer, not a medic) had limited influence. Rather, it was Carl Westphal who first put the study of sexual inversion on an “assured scientific basis” (1897/2008:115). Indeed, Foucault credits Westphal’s influential paper on “contrary sexual feeling” as the birth of the science of sexology (1990:43). Westphal (an eminent professor of psychiatry in Austria) presented case studies of two patients – one assigned male, and one assigned female at birth – who had approached him for clinical help (1869). In today’s terms, both case studies would undoubtedly be read as transgender narratives. Like Ulrichs, Westphal believed that sexual inversion was congenital. However, he proposed that it was a symptom of a neuropathic or psychopathic condition. His work therefore sowed the seed that sexual inversion was a pathological condition, a theory which was further developed in the work of Richard von Krafft-Ebing.

In 1886, Krafft-Ebing published a highly influential, detailed medical encyclopaedia of sexual “perversions” entitled *Psychopathia Sexualis*. In its 1893 edition, it contained over 200 case histories, some of which would now be regarded as transgender histories. Under the

heading of “antipathetic sexual instinct”, Krafft-Ebing described a whole range of “perversions”, from pure sexual-desire, to “fully developed cases in which males are females in feeling; and *vice versa*” (1893: 253). He used Ulrich’s term “Urnings” to describe these cases, and thought that they evidenced a type of hereditary “disease-process” (*ibid*: 216), or “pathological sexuality” (*ibid*: 332). Whilst the hereditary theory soon lost favour, Krafft-Ebing’s pathologising discourse took firm root and displaced the “natural variation” theory posited by Ulrichs, Ellis, Symonds and others to advocate for law reform. Krafft-Ebing’s conceptualisation of transgender as a mental disorder dominated the medical and legal response to transgender people for the entire twentieth century, and has only recently started to be challenged.

Sexology and the conundrum of the prison

In documenting and theorising sexual inversion, sexologists were faced with the conundrum presented by the seemingly widely-acknowledged proliferation of homosexual activity in prisons, ships, boarding schools and other same-sex environments. Ellis and Symonds observed that “homosexual practices everywhere flourish and abound among prisoners” and noted that “the initiated are familiar with the fact in English prisons” (2008: 105, note 22). This fact did not align neatly with their theory of the congenital nature of sexual inversion. Both Ellis and Symonds (*ibid*: 105) and Krafft-Ebing (1965: 188) advanced the proposition that some people might have a “latent predisposition” to “homosexuality”, which is “excited” from its dormant state by a “powerful external cause”, such as the same-sex environment of the prison. These “acquired” or “situational” homosexuals returned to “normal sexual intercourse” as soon as the “obstacles to it were removed” (Krafft-Ebing: 188).

Significantly, the authors distinguished congenital “inverts” or “constitutional homosexuals” from “acquired homosexuals” by their perceived effeminate gender presentation. Thus, Ellis and Symonds uncritically cite a US prison physician, who had written to them that “there are many men with features suggestive of femininity that attract others to them in a way that reminds me of a bitch in heat followed by a pack of dogs” (2008: 105), whilst Krafft-Ebing thought it “highly probable” that, in environments “where abstinence from normal sexual indulgence is enforced”, such as prisons, there are “single individuals of low morals and great sensuality, or *actual homosexuals*, who seduce the others. Lust, imitation and desire further their purpose” (1965: 391, emphasis added). This early view that an “actual homosexual” may act as a potential seducer in prison, and may use “imitation” to “further his purpose” – whether in narrow terms of taking the passive “female” role in sexual acts and/or more broadly “imitating” a woman in appearance, behaviour etc. – continued to find expression in penal, political and public discourse around the “problem” of homosexuality in prison for many years to come. Indeed, whilst the advent of psychoanalysis led to the “massive discursive loss” of sexology’s broader gender non-normative figure of the “invert” (Prosser 1998: 151), the conceptual framework developed by sexologists to account for the proliferation of same-sex sexual relations in the prison had enduring explanatory power. Well into the 1960s and 1970s, prison observers, prison medical officers and prisoners alike in English prisons distinguished between the prison’s “genuine inverts” or “constitutional homosexuals” (or “bitches” in prison vernacular) (e.g. Morris and Morris 1963:187), whom they identified by their perceived effeminate gender expression and assumed “passive” sexual role, and the prison’s “acquired homosexuals”,

who only engaged in (“active”) “homosexual intercourse for want of something better” (Krafft-Ebing 1965: 188).

The “repressed homosexual” of the psychoanalytical school

In 1905, Freud’s seminal *Three Essays on the Theory of Sexuality* were published in German, and soon made their mark in medical circles,⁴⁹ but it was not until his work was translated into English in the mid-1920s that the psychoanalytical school of thought began to exert an influence on popular understandings of “homosexuality” in England (Dickinson 2014: 36, note 131). Freud argued that all homosexuality was an acquired phenomenon, and specifically referred to the increased prevalence of homosexual activity in same-sex environments such as prisons to back up his theory that *all* homosexuality was acquired (Freud 1920/1949:18). His well-known thesis was that homosexuality in adults was the result of an “arrested state” of “normal” sexual development, which was treatable by psychoanalysis.⁵⁰ The “invert” was dismissed as “sexology’s false construction of homosexuality” (Prosser 1998:150). Thus, in what Prosser describes as “his most overtly transgender case”, Freud read at the root of his (female assigned, male identifying) subject’s narrative of imagined sex change “not transgender but a repressed *homosexuality*” (150-151, referencing Freud 1911).

⁴⁹ In the meantime, Ellis engaged in a lively correspondence with Freud, helped disseminate his work and ideas among the English medical profession, and completely revised *Sexual Inversion* (1915) to address and critique psychoanalysis. Ellis also incorporated into this edition the ideas of Magnus Hirshfeld and Iwan Bloch, both of whom had been influenced by his work (2008: 67-72).

⁵⁰ Psychotherapy worked on the principle that the therapist would bring repressed emotions and unresolved traumas in a person’s sexual development from their subconscious to their conscious mind, including through hypnosis, where these new “insights” could then be treated.

The criminal justice response to the medical treatment of “homosexual offenders”

The theory that homosexuality was an acquired phenomenon which could be cured by psychiatric treatment, had a profound impact on the criminal justice response to “homosexual offenders” in the 1940s, 50s and 60s, until homosexuality was partially decriminalised in 1967. The courts started to order some homosexual offenders to undergo hormone therapy in the community as a term of their probation, and on sentencing others to prison, promised that they would receive psychiatric treatment. People who would probably identify as transgender today would have been caught up in the courts’ drive to “cure” or temper the sex-drive of homosexuals.⁵¹ The egregious history of the court’s involvement in ordering the “treatment” of homosexual offenders in the community and the prison, and the deployment of prison medical power to discipline and control non-normative sexuality and gender generally in this period is discussed in detail in Chapter 6. Chapter 6 also discusses the Wolfenden Committee’s firm rejection of the common perception that homosexuality was a mental disorder, which could be “cured”, although it supported medical treatment which might make “the man more discreet or continent in his behaviour” and recommended the introduction of hormone treatment in prisons, for those who desired it. It was a significant historical moment when, in 1973, the American Psychiatric Association (“**APA**”) removed the diagnosis of “homosexuality” from the second edition of its internationally influential *Diagnostic and Statistical Manual of Mental Disorders* (“**DSM**”). In 1980, however, “transsexuality” was added.

⁵¹ E.g. In Tommy Dickinson’s *Curing Queers: Mental Nurses and their Patients* (2014), one of the interviewees who agreed to undergo psychiatric treatment for “homosexuality” to avoid a prison sentence, later medically and legally reassigned her gender. Confirmed in an email to the author from Tommy Dickinson, dated 8 January 2016.

The Medical Naming and Pathologisation of the “Transsexual”

Whilst the main focus of medical science and the criminal justice system in this period was on the “homosexual”, medical science had separately named the “transsexual” and started to develop a medical treatment pathway for their distinctive transformative desire, enabled by developments in endocrinology and surgical techniques. The German sexologist, Magnus Hirschfeld first used the term “transsexual” in 1923,⁵² and carried out the earliest documented gender reassignment surgeries in the 1930s, in Berlin’s Institute of Sexology, but it is the English medical history that is the focus of this chapter.⁵³

David Cauldwell, a general medical practitioner, is generally credited with bringing the term “transsexual” into English usage in 1949, and for enunciating their “irresistible desire to have their sex changed surgically” (1949: 274). He explicitly observed that transsexuals were not necessarily homosexual. As Stryker and Whittle have remarked, Cauldwell’s paper was an “excessively pathologising, anecdotal account of his experience with one transsexual person” and was “riddled with contradictions” (2006: 40), nevertheless, Cauldwell’s identification of *psychopathia transexualis* as an independent sexological category was “an important moment in transgender history” (Sharpe 2002:26).

⁵² Hirschfeld used the term to distinguish between what he regarded as the most common manifestation of “transvestism”, namely “the erotic drive to cross-dress”, and its most extreme form, “psychic transsexualism”, which comprised not only “an urge to dress” but also “a desire to live” in the opposite sex (1923). An earlier paper observed that those concerned “are often depressed by the fact that they do not physically belong to the desired sex” (1910:33). Hirschfeld believed that transsexuality was an example of nature’s diversity.

⁵³ A rich literature charts the medical history of the “transsexual”; Stryker and Whittle’s (2006) reader provides a particularly useful collection. See also Sharpe’s synopsis in a medico-legal context (2002:17-39) and Prosser’s referencing to medical history in exploring the “body narratives of transsexuality” (1998). For a contrary radical feminist reading, which argues that the “transsexual” was constructed by medical science, see Raymond (1979) and Jeffreys (2014:14-35).

Cauldwell himself was opposed to gender reassignment surgery, but such developments were already underway in England. Michael Dillon, the first person to undergo gender reassignment surgery in England, underwent a series of surgeries between 1946 and 1949. He is also believed to be the first person to take testosterone, in 1939, not long after it had been synthesised and come on the pharmaceutical market (Dillon and Jivaka 2016: 6). Dillon's book *Self: A Study in Endocrinology and Ethics* (1946) contributed to the "logic of treatment" that had started to be advanced in the 1930s and 40s (Rubin 2003:33). He argued that inversion was an innate condition which could not be rectified by psychoanalysis: "surely", he argued, "where the mind cannot be made to fit the body, the body should be made to fit, approximately at any rate, to the mind" (1946: 53). In 1951, with Dillon remarkably acting as her surgeon, Roberta Cowell became the first transgender woman to undergo gender reassignment surgery in England.⁵⁴

By the 1960s, several English people had travelled overseas for surgery, including fashion model April Ashley, whose gender reassignment was "outed" by a hostile press in 1961 and whose marriage to Arthur Corbett was annulled in *Corbett* (1970).⁵⁵ By 1970, gender reassignment surgical techniques were becoming more firmly established in England and a specialist team offered the procedure out of Charing Cross hospital in London. Giving evidence to the court in *Corbett*, Dr Randall reported that his team had performed gender reassignment surgery on at least 15 people by 1970.

⁵⁴The remarkable stories of these transgender pioneers were told in a Channel 4 television documentary, *Sex Change Spitfire Ace: Secret History* (Oct 2015).

⁵⁵ Jan Morris, the travel writer, travelled to the same surgeon in Morocco, in 1970, after British surgeons refused to operate on her unless she divorced her wife (Morris 1974/2002).

It was not until the late 1960s that Harry Benjamin's work more firmly entrenched the term "transsexual" in both medical and popular discourse in England. Benjamin (earlier a colleague of Hirschfeld at the Institute of Sexology in Berlin) had first referred to transsexualism in a paper published in the *International Journal of Sexology* (1953), but it was his book-length consideration of the subject, *The Transsexual Phenomenon* (1966), which popularised the term. The "transsexualist", he argued in his earlier paper, "is primarily interested in having a conversion-operation performed" (1953: 51). Oestrogen treatment was also required, since it must be remembered that "castration produces a eunuch and not a woman" (*ibid*:52). Rejecting psychoanalysis as an effective treatment – which to his knowledge had "proved useless" (*ibid*) – Benjamin proposed that the condition required "psychiatric help, reinforced by hormone treatment, and in some cases, by surgery" (*ibid*). This lay the ground for the *Harry Benjamin Standards of Care*, which were first published in 1979, and have since been internationally relied upon as good practice in the medical treatment of transgender people, including in the UK (NHS 2017).

Notwithstanding Benjamin's influence in the field, the psychoanalytic school of thought persisted in its conflation of transvestism and transsexualism with homosexuality well into the 1970s, and in its general opposition to gender reassignment surgery. American psychologist, Robert Stoller (who later worked closely with the Harry Benjamin International Gender Dysphoria Association) developed an influential theory within the psychoanalytic school, which carved out a space for the "true" or "primary" transsexual, who was deserving of surgical treatment. However, this concept of the "true" transsexual was restricted, *inter alia*, to those who identified themselves as belonging to the other sex/gender from very early childhood and whose "gender behaviour" reflected that identification (Stoller 1968:

139-40). This so-called “discovery story of transsexuality” (King 1993:93) privileged a particular transgender narrative which many transgender people have since felt a need to convey to the medical profession, in order to gain access to medical treatment and legal recognition (Prosser 1998: 108; Spade 2003), placing the medical profession in the powerful position of gatekeeper. As discussed later, this gatekeeping role was given legal authority in the Gender Recognition Act 2004, which requires transgender people to obtain a medical diagnosis of “gender dysphoria” before they apply for legal recognition.

The concept of “gender dysphoria”, which was introduced by psychiatrist Norman Fisk in 1973, supported a much wider group’s access to surgery than before, and focused on ascertaining the sexed body in which it was best for the person to live in the future (King 1993:63). Although it liberalised access to gender reassignment surgery, the concept of gender dysphoria produced negative discursive effects, translating the desire to transform one’s body into need and disorder (Sharpe 2002:30). Thus, when the Harry Benjamin International Gender Dysphoria Association (now the World Professional Association for Transgender Health, “**WPATH**”) first adopted the concept of gender dysphoria in 1979, it did so within its *Standards of Care for Gender Identity Disorders* (emphasis added).⁵⁶ Meanwhile, the APA included “transsexuality”, then “gender identity disorder”, and now “gender dysphoria”, in its internationally influential *Diagnostic and Statistics Manual of Mental Disorders* (respectively DSM 3: 1980; DSM 4: 1994; DSM 5: 2013, emphasis added).⁵⁷ This medical discourse, including its pathologising language of disorder and

⁵⁶ In 2011, WPATH replaced the reference to “gender identity disorders” and renamed its standards: *Standards of Care for Transsexual, Transgender and Gender Non-Conforming People* (version 7).

⁵⁷ Whilst the APA recently changed its terminology to “gender dysphoria” (DSM 5: 2013), finally bringing the DSM in line with WPATH’s *Standards of Care* it still does so within an overall schema of mental disorders. This is recognised as a tricky issue: on the one hand, it perpetuates a pathologising discourse, but on the other

dysphoria, was taken up by the law, in its first construction of the “transsexual”, further entrenching its normative power.

Corbett and the first “Transsexual of Law”

Although named by medical science in 1949, there was no “transsexual of law” (to borrow from Moran 1996) until *Corbett v Corbett* (1970). Since the legal status of transsexual people who had changed their sexed bodies had not been contemplated by the legislature, it was left to a sole judge sitting in the High Court to determine this important question. This seminal case established that a “transsexual” person’s legal sex was to be determined by particular biological factors at birth, and could never be changed, even if they had undergone gender reassignment surgery. Thus, *Corbett* established the first medico-legal construction of “transsexuality”.

Corbett concerned the validity of a marriage under English law. Ms Ashley had taken oestrogen hormones since the 1950s and had undergone gender reassignment surgery overseas in 1960. Mr Corbett was fully aware of Ms Ashley’s transgender history when he married her in 1963, but subsequently petitioned the court for a declaration that the marriage was null and void on the basis that Ms Ashley was of the male sex or, alternatively, that that the marriage had not been consummated. It is not necessary to go into the legal arguments in any detail here. What is important for the purpose of this thesis, is, first, *Corbett’s* definition of legal sex, and second, the deeper insights the judgment provides into law’s first encounter with, and construction of, the “transsexual”.

hand, it facilitates access to medical treatment for some transgender people, including under private medical insurance, see e.g. Spade 2013, and further discussion in Chapter 6.

Unlike in Bolton and Park, medical knowledge and opinion was central to the court's deliberations in **Corbett**, and the court readily accepted the medical understanding of transsexuality as a "psychological abnormality" (para 42) or "psychological disorder" (para 43). It also adopted medicine's "wrong body" narrative and "discovery story". For example, Ormrod J referred to transsexual people as thinking of themselves "as females imprisoned in male bodies, or *vice versa*" (para 42). **Corbett** established a biological legal definition of sex, based on a congruence of chromosomal, gonadal and genital factors at birth, which governed the regulation of sex/gender until the Gender Recognition Act 2004. Whilst medical expert knowledge ostensibly gave an objective, scientific basis for this legal test of "true sex" (para 35), the medical opinions presented to the court were actually divided on many matters. In reality, it was Ormrod J, sitting as sole judge on the case, who exercised the power of selection between the possible criteria for determining legal sex, and who privileged the "truth" of a particular biological past over present psychological and social reality, as well as hormonal sex. Applying this test, he held that Ms Ashley was legally male and her marriage was void, as a same-sex marriage.

Sharpe has argued that, notwithstanding the tripartite biological test of legal sex established in **Corbett**, the judgment "belies a preoccupation with genitalia" (2002:42). This is evident both in the fixation on genitalia in the marriage aspects of the case, but also in Ormrod J's finding that, in the event of any incongruence between the three biological criteria, genitalia at birth would prevail (**Corbett**, para 48). Notably, it is genitalia *at birth*, not *current* genitalia, which defines legal sex. And yet, as Sharpe has observed (2002: 41-42), Ormrod J appears to bestow some social significance on Ms Ashley's surgical "sex change", since he refers to Ms Ashley in the male pronoun before gender/ genital reassignment surgery and in

the female pronoun afterwards. It seems that the physical embodiment of her “psychological gender” renders her socially recognisable as a woman, but Ormrod J did not consider it sufficient to actually make her a woman: “socially ... she is living *and passing as* a woman more or less successfully (**Corbett**, para 47, emphasis added). This thesis will argue in Chapter 4, that, historically, genitalia have also been central to the governance of sex/gender in the prison, but that, in deciding where to allocate transgender prisoners within the prison estate, the prison administration privileged social recognition of embodied sex/gender, based on current genitalia, over **Corbett’s** legal definition of sex by reference to genitalia at birth.

Beyond the legal test of sex established in **Corbett**, a close textual analysis of the judgment discloses a great deal about law’s first construction of the “transsexual”, and its resonance with both historical and contemporary discourse around transgender people. Notwithstanding the seemingly objective, medical scientific description of “transsexuality”, the historically-charged language of abnormality, sexual deviance, inauthenticity and impersonation reverberates through the judgment. Ms Ashley is described as belonging to “the society of sexual deviants” (para 37). Adopting the terminology proffered by the medical experts, Ormrod J describes Ms Ashley not only as a “*male transsexual*”, but as a “*male homosexual transsexualist*” (paras 43 and 44, emphasis added). She is effectively regarded not as a heterosexual transgender woman, but as a homosexual man whose body has been surgically altered, perpetuating the long-standing historical conflation between (homo)sexuality and (trans)gender. This is underscored when Ormrod J opines that “the

difference between sexual intercourse” using her surgically constructed vagina “and anal ... intercourse is, in my judgment, to be measured in centimetres” (para 49).⁵⁸

Ormrod J’s comments about Ms Ashley’s body and gender expression are also highly revealing. Although Ormrod J accepted the medical consensus that Ms Ashley’s body was “more like a female than male as a result of very skilful surgery”, he persistently underscored the inauthenticity and otherness of her “so-called ‘artificial vagina’” (para 36), “pouch” (*ibid*) and “artificial cavity” (para 37). This discourse of inauthenticity leads to Ormrod J’s legal finding that the respondent was physically incapable of consummating her marriage, as intercourse using such an “artificially constructed cavity” could never constitute true intercourse (para 49). Significantly for the purpose of this thesis, the apparent inauthenticity of Ms Ashley’s gender presentation as a woman is also used to bolster Ormrod’s J primary legal finding that she is legally male. Having determined Ms Ashley’s legal sex by reference to his tripartite biological test, he subjected her gender expression to his own gaze. At first, he remarked, the “pastiche of femininity was convincing” (para 47), but “on closer and longer examination in the witness box it was much less so. The voice, manner, gestures and attitude became increasingly reminiscent of *the accomplished female impersonator*” (*ibid*, emphasis added). Ormrod J concluded this passage by repeating the “medical consensus” that the “biological sexual constitution is fixed at birth”, and “cannot be changed”, and that the respondent’s operation “cannot affect her true sex” (*ibid*). His view that Ms Ashley’s gender presentation was inauthentic effectively confirmed his decision to declare that she was not legally a woman.

⁵⁸ It will be recalled that homosexuality had only just been decriminalised between consenting adults, in the Sexual Offences Act 1967.

Ormrod J remarked in **Corbett** that he was “not concerned to determine the legal sex of the respondent at large”, but only for the purpose of marriage (a special relationship “which depends on sex and not gender”) (para 48). However, **Corbett’s** legal test of sex/gender was gradually judicially applied across all fields of English law, and dominated the legal regulation of sex/gender for the next 34 years, rendering transgender people “gender outlaws” (to borrow from Bornstein 1994/2016).

Conclusion

This chapter has charted a brief history of law’s criminalisation and punishment of sexually and gender non-conforming people, through to the partial decriminalisation of homosexuality in the Sexual Offences Act 1967 and its depathologisation in DSM 1973. It has described how the increasing influence of the psychoanalytical school of thought led to the courts’ co-option of medical power in the 1940s onwards, to pursue the “treatment” (disciplining) of “homosexual offenders” through hormone and psychiatric treatment. The chapter has provided a brief history of medical developments which led to the naming of the “transsexual” in British medical science in 1949. In particular, it introduced sexology’s early conceptualisation of the “sexual invert” as a natural human variation, and it discussed the lasting explanatory power, within prisons, of sexology’s theory that same-sex sexual relations proliferate in prisons due to a lack of heterosexual opportunities, and that “congenital inverts” or “constitutional homosexuals” could be distinguished from “situational homosexuals” or “acquired homosexuals” on the basis of their perceived effeminate gender expression. It analysed law’s first construction of the “transsexual” in **Corbett** (1970), which reproduced the dominant medical view of transsexual people as psychologically abnormal or disordered and in need of medical “sex change” treatment, and

adopted a strongly disapproving language of deviance, inauthenticity, artificiality and impersonation to depict transgender people's sexual behaviour, bodies and gender expression. It showed how **Corbett's** legal definition of sex placed transgender people outside the law.

In Chapter 3, this thesis will continue law's story, and consider the way in which later human rights-based developments broadened law's conceptualisation of sex/gender, so as to make space for (certain) transgender people, but also reproduced a medicalised, historically pathologising model of transgender, in the very moment of reform. It will examine various human rights-based legal developments through to the courts' first direct encounter with the transgender prisoner in 2009. First, it is important to set out the three theoretical pillars, and related literature, which inform and structure the thesis, and to explain the theoretical insights they offer to an analysis of the power, and limits, of law and human rights to transform the liveability of trans/gendered lives in prison.

Chapter 2: Three Theoretical Pillars: Law, Gender, and Risk

As noted in the Introduction, this thesis adopts a Foucauldian-based power analysis as its conceptual framework, as subsequently developed in legal, feminist, queer and transgender scholarship, and in prison governance and risk literature. This chapter outlines the three theoretical pillars which underpin the thesis, and inform and shape its analysis of the potential transformative effects, and limits, of law and human rights in relation to the lives of transgender prisoners. It draws on three corresponding bodies of literature; first, on Foucault, law and rights; second, on the construction, performance and embodiment of gender; and third, on prison governance and risk. Whilst Foucault's work is not widely associated with law or human rights, and he did not specifically deal with gender as distinct from sex and sexuality, this chapter will show how his insights into power, discourse and the subject provide a valuable theoretical thread between these three seemingly disparate fields.

This chapter has four parts. The first part outlines Foucault's core concepts and shows how a Foucauldian approach can be applied to law, and can enrich the current analysis, by approaching law as a productive power, with normative effects. The second part expounds on this idea. Drawing on post-Foucauldian legal scholarship, it argues that, whatever reading one takes of Foucault's own position on law and rights, it is now widely accepted that law is a powerful discourse in contemporary society, and that human rights have considerable political purchase. The thesis is particularly influenced by Carol Smart's pioneering work, *Feminism and the Power of Law* (1989), which provides a blueprint for deconstructing the discursive power of law. However, it argues, *contra* Smart, that law and

rights have transformative potential in contemporary society, even if they cannot provide a complete solution to social issues, and even if recourse to law and rights may entail costs. The third part examines the highly contested terrain around the construction, performance and embodiment of gender. It is particularly inspired by Judith Butler's innovative work (1990/1999; 1993; 2004) on the power of the heteronormative gender order, which renders certain gendered lives "culturally intelligible" and others "impossible, illegible, unrealisable, unreal and illegitimate" (1990/1999: viii). It builds on important insights from the transgender literature on the significance of the materiality of the body (Prosser 1998) and the prevalence of "cissexism" and "trans-misogyny" in contemporary society (Serano 2007). It also addresses the trans-exclusionary radical feminist view that transgender women's gender is inauthentic and their bodies are risky. Part four outlines the significance of risk discourse in contemporary "risk society" (Beck 1992) and under the continuing conditions of the "new penology" first described by Feeley and Simon in 1992. It argues that risk is a powerful discourse in prison management, and dominates the discursive terrain on which law and human rights must compete in changing the regulation of sex/gender in the prison, and improving transgender prisoners' lives. Drawing predominantly on the governmentality approach to risk (Foucault 1991; Ewald 1991; Castel 1991), but also on the cultural approach to risk (Douglas 1969; 1969), this part concludes with a preliminary analysis of the prison administration's production of the "risky" transgender prisoner, which paves the way for a deeper analysis of the emerging tension between rights and risk in three specific areas, namely prison allocation and segregation (Chapter 4), presentation of the self (Chapter 5) and access to medical gender reassignment treatment, if desired (Chapter 6).

Foucault's Core Concepts

This thesis is informed and shaped by Foucault's core concepts of discourse, truth, power and the subject; and his thesis of modern power as a productive, normative power over individual lives and bodies (disciplinary power) and the population as a whole (bio-power), as later developed in his work on governmentality. A substantial body of literature exists in this field, so only a brief synopsis is provided here, to anchor the Foucauldian analysis, before applying it to law.

Discourse and its production of the subject

Foucault's early work on the history of knowledge in the human sciences examined the structure of discourse. It was another decade until he explicitly raised questions of power. Understanding law as a discourse is fundamental to this thesis, and warrants explanation, since its specific Foucauldian meaning tends to be obscured by its pervasive usage in ordinary parlance, and Foucault's work does not tend to be addressed in legal education.

In *The Archaeology of Knowledge* (1972), Foucault examined the epistemic context within which certain bodies of knowledge and their associated sets of concepts and statements became intelligible and authoritative, and how certain people came to be regarded as the authorised knowers and speakers in the particular field. These "discursive formations" govern the possibilities for talking seriously about things, and importantly for the purpose of this thesis, include the "subject" of the particular discourse – here, the transgender person and prisoner. Foucault did not believe in the existence of pre-existing or pre-discursive subjects, which simply became the focus of inquiry and knowledge over time, but rather proposed that subjects were themselves defined and produced ("constructed") through

discourse. This principle can also be applied to law; law does not simply represent subjects, but defines and produces them. Beyond its direct, instrumental effects, which occur through legislation and case law, law's power to include and exclude has powerful *normative* effects, in constructing and perpetuating the boundaries of intelligible sex and gender, and, in Butlerian terms, ultimately determining who is humanly thinkable or unthinkable (1993: xvii).

Truth and power

Foucault argued that discourse generates truth, or more precisely truth-claims, for he did not believe in the existence of any singular "truths" waiting to be "discovered" (1980:132). On Foucault's account, discourse becomes powerful not through its claim to speak the truth *per se*, but through society's acceptance, internalisation and perpetuation of that particular version of the truth. Discourses and their accepted truth-claims (which can be equated with "norms") have real effects and structure the possibility of what (or who) gets included and excluded, and what gets done or remains undone; "they impose themselves upon social life, and produce what it is possible to think, speak and do" (Hunt and Wickham 1994: 9). This idea is indispensable to my thesis, in analysing the power of law's "truth-claims" over society's understanding of gender and how law affects "what it is possible to think, speak and do" in relation to transgender people as prisoners.

Foucault was particularly interested in how certain discourses or truth-claims came to discount or subjugate other discourses and other concepts of truth, and thus enable particular exercises of power in society. His portrayal of discourses as multiple and "discontinuous practices", which cross, collide, clash and compete with each other (1981:

67), is very useful for this thesis in conceptualising the relationship between human rights discourse and risk discourse in regulating transgender prisoners' lives, and in defining the "truth" of the sex and gender order more broadly. Human rights discourse and prison risk discourse, together with powerful medical and pathologising discourses around transgender people, set up what is to be argued and fought about; on this contested terrain, "discourse is the power which is to be seized" (*ibid*: 52-53).

Foucault argued that it was the claim to be a science and to speak the objective, rational scientific truth about human behaviour which gave knowledge its discursive power over other non-scientific truths, such as morality, religion or belief, in defining what (and who) is normal and what (and who) is abnormal (1966), but this thesis will argue that law is also high on the hierarchy of knowledge and capable of subjugating other truths, including other truths about sex and gender. As Smart argued in her pioneering monograph, *Feminism and the Power of Law* (1989), Foucault's ideas can readily be transposed to law, as it has its own "discursive formations", e.g. legal texts, legal methods and procedures, and legal language, and makes similar claims to objectivity and rationality as the human sciences, and indeed often co-opts them to its cause, fortifying and expanding its power domain. The very fact that "the law" is often spoken of in the singular suggests it has a special, and unified, power. Through a number of case studies, Smart demonstrated that law has the ability to impose its own definition of events on everyday life, and to not only ignore, but actively negate and disqualify women's experience and knowledge. This thesis aims to look beneath the surface of law, in terms of its legislative rules and judgments, so as to excavate law's truth claims in relation to sex and gender, and specifically its truth claims about transgender people and

prisoners, and to consider the extent to which law delegitimises other truths, knowledges and experiences.

Foucault showed how things which we believe today to be self-evident “truths” are in fact the cumulative effect of discursive power; that they are contingent on historical moments, and are not the inevitable outcome of rational scientific discovery within a grand narrative of progressive history. Although Foucault was interested in the history of sexuality (1979), and the history of the prison (1977), he was not particularly interested in law’s part in that history, as will be discussed below. However, law has its own history, its own story to tell. As Smart observes, the history of law and rights is often similarly constructed as a “force of linear progress, a beacon to lead us out of darkness” (1989:12), but, she warns, it must be closely examined and interrogated.

Smart described her task as “deconstructing the discursive power of law” (1989:5). She sought to expose the way in which law’s discourse causes harm to women, and to debunk the widely-held belief that “law is extending rights, rather than creating wrongs” (1989:12). Whilst following Smart’s approach to deconstructing the discursive power of law, this thesis adopts a more optimistic starting point regarding the positive transformative power of law and rights.

Power as productive and dispersed

In thinking about law as a form of power, Foucault’s theory on the changing nature of power in modernity, developed in the “genealogical” or power-analytics period of his work, is indispensable to this thesis. The thesis will draw primarily on *Discipline and Punish: The Birth of the Prison* (1977), *The Will to Knowledge: The History of Sexuality: Part One* (1979), and

Foucault's two lectures on Power/Knowledge (Foucault 1980). These ground-breaking texts articulated Foucault's understanding of power, and its relationship to knowledge and discourse, in contexts – the prison and sex/sexuality – which have clear relevance for this thesis.

Foucault propounded the idea that not only does knowledge produce power, but power also produces knowledge, which in turn enriches and expands power. It was this dynamic relationship of “power/knowledge” that Foucault sought to investigate; the circular, cyclical and cumulative process of “power/knowledge spirals”. Discourse bound these spirals together:

it is in discourse that power and knowledge are joined together ... discourse can be both an instrument and an effect of power .. Discourse transmits and produces power; it reinforces it, but also undermines and exposes it, renders it fragile... (1979: 101)

Similarly, he proposed that truth (which, it will be recalled, is generated through discourse) “is linked in a circular relation with systems of power, which produce and sustain it, and to effects of power which it induces and which extend it” (1980:33). He called this dynamic relationship between power and truth a “regime of truth” (*ibid*) or a “ritual of truth” (1977: 194).

In propounding his power/knowledge theory, Foucault rejected the classic notion of power, which was characterised by the power of the monarch to command, possess, prohibit and punish. He called this “sovereign power” or “juridical power”, using the terms interchangeably (Gutting 1994: 100). Foucault proposed a radically new account of power,

which was productive, rather than repressive, and which consolidated knowledge and truth-claims in its production of reality, including in its construction of the subject, as captured by this pivotal quote from *Discipline and Punish*:

We must cease once and for all to describe the effects of power in negative terms: it excludes, it represses, it censors, it abstracts, it masks, it conceals. In fact, power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production (1977: 194)

Foucault also rejected the idea of the sovereign state from which all power derives, and argued that “power is everywhere, not because it embraces everything, but because it comes from everywhere” (1989: 93). He was particularly interested in “micro-mechanisms” of power, which he described as minute “capillaries” of power (1979:96-7), dispersed to the deepest level of being, making people who they are – such that gender non-conforming people internalise their categorisation by authoritative sources, e.g. as “deviant”, “criminal”, “mentally disordered”, “homosexual” or “transsexual”.

Foucault stated that a power analysis should not concern itself with centralised state power but “on the contrary ... should be concerned with power at its extremities ... where it is always less legal in character” (*ibid*). This idea is critical to this thesis, given that transgender prisoners occur at a crux of legal, cultural, medical and security/risk-based categories, emanating from different “authoritative” sources, and that these different systems produce different rationales for their control, regulation and fair treatment. In the above quotation, however, are the first signs that Foucault, in propounding his theory on the changing nature

of power in modernity, was not interested in law, at least in its “sovereign” form. Yet, following Smart, this thesis starts from the premise that law’s power is not only centred in the state, and concentrated around its institutions, but that its power is also diffused through society through its discursive, norm-producing effects. Law is not simply “law”, in terms of legislation and case law, but occupies a special conceptual place in our thinking, doing and being. Indeed, this thesis argues that it is this combination of macro- and micro-mechanisms of power, which renders law particularly powerful in the field of sex and gender.

Disciplinary power and bio-power

In thinking about law as a productive form of power, it is important to understand its relationship to Foucault’s concepts of disciplinary power and bio-power, which he developed, respectively, in the relevant contexts of the prison and sexuality. A brief summary suffices here.

Discipline and Punish introduces the concept of disciplinary power, which is a “power of normalisation” (1977: 297). Foucault detailed how the sovereign’s power to prohibit and to punish through the public spectacle of torture and death came to be replaced, by the mid-nineteenth century, with “an economy of suspended rights”, achieved through imprisonment (*ibid*: 11). He described this development as part of a new economy of power, which sought to discipline or normalise “subjects” into “docile bodies” through various disciplinary institutions, including schools, military barracks and prisons (*ibid*: 308) and through various new techniques of power over the body. In the prison, these techniques included a strict daily regime and constant surveillance. Prisoners would learn to adapt

their behaviours, so as to be seen to be performing in the manner expected of them. With constant repetition, they would ultimately internalise these “micro-mechanisms of power” and regulate themselves, assuring the “automatic functioning of power” (*ibid*: 201). Unlike the brute instrument of sovereign power wielded over bodies, then, disciplinary power was a silent, subtle, insidious mechanism of power which worked on the body through the soul. Foucault foresaw that it would ultimately extend beyond the disciplinary institutions and pervade all parts of society, bringing about the “universalising reign of the normative” (*ibid*: 304). Foucault did not consider the gendered nature of power, however, or the effects of power on gendered bodies in the prison.

History of Sexuality introduces the concept of bio-power, which involves knowledge of, and power over, the population as a whole:

Power would no longer be dealing simply with legal subjects over whom the ultimate dominion was death, but with living beings, and the mastery it would be able to exercise over them would have to be applied at the level of life itself (1979: 142-3)

This “power to take charge of life”, Foucault explained, “needs continuous regulatory and corrective mechanisms”, so as to distribute subjects “in the domain of value and utility” (*ibid*: 144). It is a power which “has to qualify, measure, appraise and hierarchize, rather than display itself in murderous splendour it effects distributions around the norm (*ibid*: 144). Bio-power, like disciplinary power, is a normalising power, but it operates at the level of the population as a whole, not on individual souls and bodies. Its ambit extends to sex, gender and sexuality. Foucault later developed the concept of “governmentality” to explain how disciplinary power and bio-power mutually reinforce each other through a wide

network of institutions, practices and techniques, which target both individuals and the population as a whole.

Resistance

Finally, it is important to note that, in *History of Sexuality*, Foucault added the concept of resistance to his account of power: for “where there is power, there is resistance” (1979: 95). He argued that resistance, like power, is exercised from multiple points and by multiple agents, and not just from the administrative centre but also from the margins. He added that “this resistance is never in a position of exteriority in relation to power” (*ibid*). This symbiotic relationship between power and resistance is important for this thesis, in explaining how institutional power is already and always altered by resistance against it, and how the subject cannot step outside relations of power, but is always formed in and through those power relations. Whilst prison creates less space for resistance, resistance to penal power is not extinguished: as Mary Corcoran (2006) has shown, for example, women political prisoners in Northern Ireland (1972-1998) demonstrated resistance to penal power in a myriad of ways, from ongoing resistance to their internment and classification as criminals, to active disengagement with the regime, bodily resistance in terms of “no wash strikes” and “dirty protests”, and rights-based litigation alleging sex discrimination. The thesis will explore recourse to law and human rights, especially through the courts, as a form of prisoner resistance, and reflect on its ability to alter institutional power.

Post-Foucauldian Legal Scholarship on the Power of Law

As this section has introduced the core Foucauldian concepts which underpin this thesis, it has gradually been linking them to law, in particular by reference to Smart (1989). Yet,

Foucault's work is not widely connected to law. He frequently referred to law, but law was never one of his explicit objects of inquiry. Indeed, in *History of Sexuality* he explicitly called upon us "to break free of the theoretical power of law and sovereignty, if we wish to analyse power within the concrete and historical framework of its operation" and "to construct an analytics of power that no longer takes law as a model and a code" (1979: 85-86). Many feminist and queer scholars in the humanities have subsequently regarded law as extraneous to their power analyses of sex, sexuality and gender (e.g. Butler). However, this thesis proceeds from the basis that this is a mistake, and that a power analysis which neglects law's normative role in regulating sex, sexuality and gender, is incomplete.

This section aims to demonstrate that an analysis of law's power is not futile or misconceived, and indeed that Foucault's rejection of law is not as clear-cut as the above quote would suggest. It discusses different interpretations of Foucault's view of law – a debate which has recently been revived by Golder and Fitzpatrick's *Foucault's Law* (2009) – and shows that, whatever interpretation is adopted of Foucault's *own* position on law, there is a broad consensus among post-Foucauldian legal scholars (perhaps unsurprisingly) that law remains a powerful force in contemporary society, and Foucault's conceptual framework is valuable to analyse its power effects. The author is most persuaded by Francois Ewald's (1991) and Victor Tadros's reading of Foucault and the law (1998), which purports that Foucault's relevance for legal scholarship is often overlooked, due to a common misconception that Foucault used the term "juridical" synonymously with "law". Tadros attributes this misunderstanding to Hunt and Wickham (1994), but it is also evident in Smart's earlier reading of Foucault (1989). Since Hunt and Wickham's thesis became the

dominant account of Foucault's position on law, the following passages outline their rationale, before turning to Ewald's and Tadros's counter-reading.

On Smart's reading, Foucault narrated the demise of the law. He saw law as part of the old order, as a negative, repressive form of power, which was gradually being replaced by new forms of productive power, both disciplinary and bio-power (1989:8). She challenged this "demise of law" thesis and argued, to the contrary, that law was extending its terrain in every direction, including into the private sphere, and that it was increasingly operating as mode of disciplinary regulation, incorporating the terms of medicine and the "psy" professions to enhance and expand its normative power (as already witnessed, for example, in Chapter 1, by law's co-option of the terms of medicine and psychiatry in its regulation of "homosexuals" and "transsexuals"). Smart showed that law's discourse is powerful and has real, exclusionary and damaging effects on women's lives. This analysis was developed in much greater depth (outside the feminist context) in Hunt and Wickham's monograph *Foucault and the Law* (1994).

On Hunt and Wickham's influential reading, Foucault regarded law purely as an expression of sovereign or juridical power. As part of the old regime, law was gradually being colonised by new, productive forms of power, namely disciplinary and bio-power, and would ultimately be rendered redundant, or play only a subordinate and marginal role in contemporary power relations. There is ample textual evidence to support this interpretation (for a detailed review see Hunt and Wickham 1994 and Golder and Fitzpatrick 2009). Only a few select quotes are offered by way of illustration here, to shed light on the different forms of power that law takes in this thesis.

In *History of Sexuality*, Foucault characterises legislation as “the pure form of power”:

Power acts by laying down the rule ... It speaks and that is the rule. *The pure form of power resides in the function of the legislator*: and its mode of action with regard to sex is of a juridico-discursive character (1979: 83, emphasis added).

On his account, law’s power is purely and *always* negative, it is a “law of prohibition” (*ibid*: 84), a “sombre law which always says no” (*ibid*: 72):

It is a power that only has the force of the negative on its side, a power to say no; in no condition to produce, capable only of posting limits ... it is a power whose model is essentially juridical, centred on nothing more than the statement of the law and the operation of taboos (*ibid*: 85).

Finally, Foucault law’s is always backed by violence. *Discipline and Punish* opens with a gruesome description of the sovereign’s power to torture and to condemn to death those who transgress the law and, in *History of Sexuality*, Foucault states that “law cannot help but be armed, and its arm, *par excellence*, is death The law always refers to the sword (*ibid*: 144). This idea is critical to the thesis, in considering the extent to which law has facilitated or legitimised cultural and institutional violence against transgender people and transgender prisoners.

Like Smart, Hunt and Wickham criticised Foucault for this one-dimensional and “inadequate conception of law” (1994: 60). They found Foucault’s reductionist account of the law “unhelpful” and at times “perverse”, as it neglected “the self-evident truth of the intimate connection between modern forms of power and legal mechanism” (1994: 62-3). They

called for “a new sociology of law as governance”, which informs the direction taken by this thesis, in approaching law’s power as an important element of the governance of sex/gender and transgender people’s lives.

On this influential reading of Foucault’s law, Foucault recounted the rise of disciplinary power and bio-power *at the expense of law*. Two particular descriptions of law’s decreasing power *vis à vis* disciplinary power in prison, taken from *Discipline and Punish*, are especially important for this thesis in thinking about the power of law and human rights in prison. First, is Foucault’s contention that the prison takes over from law, once it has passed its sentence on the criminal. With the introduction of the penal system, he stated, “justice is relieved of responsibility” for the penalty as soon as it is imposed, and its implementation is taken up by “a whole series of subsidiary authorities”, “none of whom shares the right to judge, but who are judges all the same” (1977: 21). These “judges of normality are present everywhere” (*Ibid*: 304), doctors, psychiatrists, chaplains, “all apparatuses of discipline” perpetually imposing the “penalty of the norm” (*ibid*: 183). The thesis will argue that law no longer concedes its power to the disciplines at the prison door, but that its power permeates the prison walls. Prison administrators now not only have a legal duty of care to keep prisoners safe from harm (“safeguarding”) but are also coming under increasing pressure to absorb prisoners’ human rights. Furthermore, not only are they monitored by HM Prison Inspectorate and IMB, but prison administrators are also held to account by the courts, through the power of judicial review, as discussed in Chapter 3.

The second important insight from *Discipline and Punish* involves Foucault’s depiction of the relationship between the disciplines and constitutional rights (introduced in eighteenth century France after the French revolution, e.g. the *Declaration of the Rights of Man and the*

Citizen, 1789). Foucault depicts rights as the hand-maiden of disciplinary power, as a convenient front for its darker, more sinister workings. The following well-known passage is key:

Historically, the process by which the bourgeoisie became in the course of the eighteenth century the politically dominant class was masked by the establishment of an explicit, coded and formal egalitarian juridical framework, made possible by the organisation of a parliamentary representative regime. But the development and generalisation of disciplinary mechanisms constitute the other, dark side of processes. The general juridical form that guaranteed *a system of rights* was supported by these tiny, every-day, physical mechanisms, by all those systems of micro-power that are essentially non-egalitarian and asymmetrical that we call the disciplines [and which]... provide, at the base, a guarantee of the submission of forces and bodies. (1977: 222, emphasis added).

In this passage, Foucault refers to the juridical guarantee of “a system of *rights*” in the plural. Hunt and Wickham note that, in his Power/Knowledge lectures, Foucault heavily critiques the “system of *right*” and “the King’s *right*” in the singular (1980: 94-95), before shifting to speak of “the legitimate *rights* of sovereignty” in the plural (*ibid*: 95-6). They contend that this “slippage” from “right” to “rights” has serious consequences (1994: 45; see also 63-65), and that, through it, Foucault inexorably ties the modern discourse of legal rights (both private rights and human rights) to the King’s right under the old sovereign order, where “the essential role of the theory of right... was to fix the legitimacy of power” (*ibid*). This leads Foucault “to disparage the transformative capacity of rights within modern

political systems” (*ibid*) and to “treat modern discourses and practices of rights as if they were nothing more than the repetition of the ‘old’ discourses of ‘right’” (*ibid*).

This point is important, and explains the standard reading of Foucault, namely that he saw rights as part and parcel of the old order which was being dismantled. In the new order, rights merely act as a front for disciplinary power, which is the true locus of power over bodies. This thesis seeks to question whether law and human rights have any real power effects in the prison, or only have the effect of masking disciplinary power. In doing so, it adopts Smart’s proposal that we should “think in terms of two parallel mechanisms of power, each with its own discourse, the discourse of rights and the discourse of normalisation” (1989: 8), and that we should explore the relationship, the interface between them, in specific scenarios, bearing in mind that “in some instances we may see a coalition, in others a conflict, and we cannot assume a pattern or clear signposts which will point us to an inevitable future” (*ibid*: 19).

Having considered Foucault’s comments on the demise of law *vis à vis* disciplinary power, in *History of Sexuality*, Foucault also portrayed bio-power as taking over from law: “another consequence of the development of bio-power”, he stated “was the growing importance assumed by the action of the norm, *at the expense of the juridical system of the law*” (emphasis added). Yet, crucially, he adds:

I do not mean to say that the law fades into the background, or that the institutions of justice tend to disappear, *rather that the law operates more and more as a norm* and that the judicial institution is increasingly incorporated into a continuum of

apparatuses (medical, administrative and so on) whose functions are for the most part regulatory (1979: 144, emphasis added).

Thus, Foucault explicitly recognises the continuing power of law, but in a regulatory and normative capacity, rather than in its previous, pure, juridical sense. Despite noting this and other discrepancies and contradictions in Foucault's treatment of law, Hunt and Wickham remained committed to their "expulsion thesis" that Foucault effectively expunged law from his account of modern power relations. However, as previously mentioned, the author finds the counter-reading of Foucault, proposed by Ewald (1981) and developed more fully by Tadros (1998), more persuasive.

This alternative reading of Foucault purports that Foucault did not use the term "juridical" synonymously with "law". Whilst Foucault frequently slips between these two terms, Tadros credibly argues that his references to the "juridical" describe "an arrangement and a representation of *power*, rather than the law" itself (1988:75, emphasis added), and that Foucault did not mean that law *in general* was on the decline, but only the narrow "Austinian" concept of law as "rules backed by sanctions". Once the term "juridical" is understood correctly, Tadros argues, the nature of modern law becomes an open question, and calls for a re-evaluation of the relationship between law and other mechanisms of power. He sees modern law as beginning "to operate in the perspective of the complete lives of individuals, rather than just to prevent certain actions", so that "law ... operates in accordance with what Foucault calls bio-power" (*ibid*).

In feminist legal scholarship, Vanessa Munro has criticised Smart for making the same interpretative error as Hunt and Wickham (2001). According to Munro, distinguishing the

legal from the juridical in the manner proposed by Ewald and Tadros, “allows appreciation of the continued role of the legal within Foucault’s critical landscape” and that “rather than asking his readers to abandon their concern with the operation of law in society, Foucault has asked only that they shake off the juridical discourse that tends to frame such operations” (2001: 556). This reading, she concludes, provides a “far more optimistic and empowered vision of the future of Foucaultian (*sic*) legal feminism” than Smart put forward (*ibid*:567), and is most salient to this thesis.

It should be mentioned, for completeness, that, in *Foucault’s Law* (2009), Golder and Fitzpatrick have proposed a radical re-reading of Foucault. They claim that Foucault developed a far more nuanced and coherent “theory” of law than he is generally credited with, which comprises both a “determinate and contained entity” and “a law of possibility, contingency and liability” (*ibid*: 2-3), and that it is in the “uneasy, ambivalent relation of these two opposed yet interacting ... legal dimensions”, that Foucault’s law is revealed as “a law of possibility ... as a law always open to the possibility of it being otherwise” (*ibid*). Reviews of *Foucault’s Law*, whilst recognising its valuable contribution to reigniting debate in the field, are generally sceptical of this interpretation of Foucault, as well as the utility of such a theory of law’s “illimitable openness” for analysing law’s power (e.g. Norrie 2009; Pottage 2009; Rosenkrantz 2010; Minkinnen 2011).

In the final analysis, however, whatever interpretation one takes of Foucault’s *own* position on law, it is now widely accepted that law is a powerful force in contemporary society, and operates in multiple ways to regulate our lives, including our sex, gender and sexuality. It clearly does so in both a negative, prohibitive manner, and in a productive, disciplinary, normative manner. And, whilst its institutional and instrumental power emanates from the

centre of the state, its discursive power permeates through to the micro-level of society, and has very real effects in terms of what it is possible to think, speak and do. Thus, even the criminal law, which is closest to the “juridical” in Foucault, not only prohibits and punishes certain acts (and correlating “identities”, Foucault 1979), but also regulates lives through its symbolic power, its very existence on the statute books. This was recognised by the UN Committee on Human Rights in *Toonen v Australia* (1994), which held that, even though a Tasmanian law prohibiting private sexual relations between men was never enforced, the statute acted like a communal chant, which reproduced a powerful normative understanding of “homosexual” individuals/acts as criminal, irrespective of its enforcement (see Morgan 1994).

The transformative power of law

So far, the thesis has accounted for different readings of Foucault and the law, and has followed Smart and other scholars in maintaining that law is a powerful discourse, and that it is useful to deconstruct its discursive power. However, it does not agree with Smart’s pessimistic prognosis of law’s transformative potential for feminism. Smart argues that engaging with law reinforces law’s power in society and its “androcentric standard” (1989:160); that “in accepting law’s terms in order to challenge law”, “feminism always concedes too much” and “loses the battle before it has begun” (*ibid*:5). She argues that feminism should not assume that “law functions to right wrongs”, but should recognise that law’s effects are exclusionary and harmful to women. Feminism, she concludes, should therefore “avoid the siren call of law” (*ibid*: 160), and “resist the temptation that law offers, namely the promise of a solution” (*ibid*: 165).

Whilst a recognition of law's role in producing androcentric standards, as well as heteronormative and cis-normative standards, is highly salient to this thesis, the thesis rejects Smart's rather nihilistic denunciation of law. Many feminist scholars (e.g. Sandland 1995; Munro; Hunter *et al* 2010) have recognised the merits of the Foucauldian approach embodied in Smart's thesis for deconstructing the discursive power of law, and have applied this approach in their scholarship. Alex Sharpe has specifically applied this approach to transgender jurisprudence (2002). These scholars, however, have firmly rejected Smart's view that feminism should abandon law, as being empty of reform potential. Ralph Sandland accepts that Smart is correct to be concerned about the "fetishisation of law" as a solution to all problems, but finds Smart's conclusions absolutist and defeatist. In his view, challenges to law must come from both within *and* outside the law, since "deconstruction which does not subsequently engage with law, leaves law functioning to undermine gains made elsewhere" and "unless these challenges are at some stage shifted to the legal arena, the power of law will remain fundamentally *unchallenged*" (1995:47, emphasis in original).

Foucault's critique of rights and the wider critique of human rights

Finally, it is important to address Foucault's critique of rights. However, before doing so, Foucault's critique of rights must be situated within the broader, and ever burgeoning, literature critiquing human rights. Philip Alston has recently observed that, in the past decade (after previously having been almost invisible in the mainstream social science literature) "social scientists have discovered human rights as a fertile and challenging subject for inquiry", and that much of the resulting literature has been of a "deeply critical nature" (2013: 2062). A detailed review of this substantial body of literature is far beyond the scope of this thesis, particularly if one accepts the established view that human rights

(and their critique) have a deep and rich ancestry, and did not simply emerge in a “big bang” in 1977, as Samuel Moyn controversially puts forward in his influential work *Human Rights in History: The Last Utopia* (2010; see also 2017). Central to Moyn’s argument is that human rights only emerged at this time as a replacement utopia, after other political utopias, such as socialism, nationalism and communism, had failed (2010: 227). As with the theory and politics of human rights, the historiography of human rights has itself now become a hotly contested topic – for a critical engagement with these historiographical debates, and a scathing critique of Moyn’s revisionist history of human rights, see Alston 2013.

Taking a longer view of the history of human rights, only a few core critiques be highlighted here. The universality of human rights, for example, has long been a contested site, as more recently revived in the “Asian values” and “African values” debate; critiques made in the name of cultural relativism have tended to regard human rights as a form of neo-imperialism. The nature and content of human rights has also long been disputed. A particular question which has continued to engage philosophers since the 17th century is whether human rights have an existence separate from their legal incarnation in formal declarations of rights; this “natural law” theory, propounded by Thomas Hobbes, was famously dismissed by Jeremy Bentham as “nonsense upon stilts” (Waldron 1987/2014). The French *Declaration on the Rights of Man and the Citizen* (1789), which many regard as a foundational moment in the history of human rights, was dismissed by Edmund Burke as abstract and meaningless, absent social and economic means of implementation (1790), whilst Karl Marx derided it as bourgeois ideology, which reduced rights to “the rights of egoistic man, of man as a member of bourgeois society, that is to say an individual

separated from his community and solely concerned with his self-interest” (1943) (for a classic compilation on Bentham, Burke and Marx, see Waldron (ed) 1987/2014).

Lacroix and Pranchère’s excellent work, *Human Rights on Trial: A Genealogy of the Critique of Human Rights* (2018), provides a concise analysis, or “intellectual map” (*ibid*: 23), of these and other main human rights critiques, from the French *Declaration* of 1789 onwards, with the aim of casting light on contemporary debates and dilemmas around human rights, and addressing the prevailing skepticism about human rights in contemporary political thought. Reaching an optimistic conclusion about “the richness and robustness of human rights, and their democratic and emancipatory potential” (Laborde, back cover), Lacroix and Pranchère conclude that, “whatever their potential for perversion and corruption”, the “crucial lineages” between the historical struggles of the 18th and 19th century and the struggles for emancipation today “continue to imbue human rights with the ‘explosive political force of a concrete utopia’” (246). They take the latter quote from Jürgen Habermas, who persuasively locates the “realistic utopia of human rights” in the concept of human dignity (2010: 466).

Lacroix and Pranchère’s (and Habermas’s) optimism contrasts starkly with Costas Douzinas’ bleak critique of contemporary human rights theory and practice, in *The End of Human Rights* (2000). After providing an alternative reading of the historical trajectory between classical natural law and contemporary human rights, and engaging with various philosophical approaches to human rights, Douzinas argues that the defensive and emancipatory role of human rights will come to an end if we do not re-event their utopian ideal. Calling on us to “take stock of the tradition of human rights” (*ibid*: 7) and to revive a critique of their philosophical foundations, he offers a re-conceptualisation of human rights,

through the ethics of otherness, which John Morss strongly critiques for being “doomed to failure” (2003: 889). Morss further admonishes Douzinas for taking such a negative approach to human rights and justice, and for being a false friend to human rights, at a time when human rights are coming under increasing threat, and a positive approach is required “in the face of a diversity of enemies” (2003: 889).

Whilst a lively and engaging debate, it is not necessary to go into detail here about competing historical philosophical critiques of human rights, or recent philosophical endeavours to ground the modern notion of human rights in theoretical terms (e.g. Sen 2004 and Beitz 2009). Lacroix and Pranchère draw a useful distinction between critiques of human rights themselves, and critiques on the use made of human right in contemporary democratic societies. As they persuasively argue, “few political theorists would endorse rejection of human rights *as such* – of the normative and legislative corpus, in other words, that forms the basis for the rule of law in democratic states ... it is the *use made of* human rights in contemporary democracies” that is disputed and the elevation of human rights “to the status of self-standing political ideal” (2: emphasis in the original). This thesis takes a similar starting point. Whilst philosophical critiques of human rights have their own validity, this thesis does not set out to critique the notion of human rights *per se*. Rather, accepting the privileged place of human rights in contemporary politics and the powerful discourse of rights in contemporary society, this thesis seeks to assess the potential, and the risks (both pragmatically and, albeit to a lesser extent, politically) of *using* human rights – here, in the concrete scenario of pursuing legal and policy reform through human rights, and pursuing litigation in the courts, in the quest for improvements in the everyday lives of transgender prisoners.

As Lacroix and Pranchère note, contemporary political critique of the use of human rights can be categorised into two main strands, the communitarian critique and the radical critique. The communitarian critique, whilst it does not question the legitimacy of human rights, is concerned with the primacy afforded to them in contemporary democracies, and with the egotism and social fragmentation that they see as being caused by an emphasis on individual rights claims. The radical critique, with which this thesis more directly engages, is “less concerned with social fragmentation” than with “the ideological and disciplinary function of a discourse of rights, which they see as turning their back on the promise of emancipation” (*ibid*: 31).

It is important to note at this juncture that, although radical critics regard liberal and neo-liberal rights discourse as an impoverished replacement for more radical visions of social justice and emancipation, they do not dismiss the use of human rights to ameliorate the position of oppressed and marginalised people. They remain highly alert to the unpredictability, the limits and the risks of turning to human rights, however – to the “paradox of rights” (Brown 2002). Many feminist and critical race scholars/activists take this critical stance towards human rights, as do many from the newer critical disabilities studies and transgender law field. A particularly good example in the transgender law field, is the work of transgender scholar and activist Dean Spade (e.g. 2009 and 2012), discussed in the Introduction.

As should already be clear, this strand of “radical” critique takes a distinctly Foucauldian approach. Broadly, it regards human rights a form of discursive power, which has harmful disciplinary effects, and which, whilst appearing attractive on the surface, fails to address systemic conditions of oppression. In the legal sphere, feminist scholarship and critical race

scholarship has, for example, critiqued earlier movements for focusing their law reform efforts on formal equality and anti-discrimination laws, which prohibit individual acts of discrimination on the basis of sex/gender and race, whilst leaving untouched - and indeed reinforcing and legitimising - broader historical and contemporary conditions of patriarchy, racism and colonialism.⁵⁹ Further, whilst the symbolic value of human rights for historically marginalised and oppressed groups is widely recognised (see, for example, Patricia Williams *The Alchemy of Rights* 1991),⁶⁰ scholars and activists from this school of thought see the desire for recognition and inclusion through human rights, as being in tension with the harmful tendency of human rights to consolidate regulative norms around (monolithic) identities, e.g. of women *qua* women, of transgender people *qua* transgender people (as post-structural feminist, queer and anti-racist critiques of “identity politics” attest).

Having given a brief overview of the broader context of human rights critique, it is time to return to Foucault’s critique of rights. It will be recalled from the passage quoted from *Discipline and Punish* above, that Foucault described constitutional “systems of rights” as a mere “mask” for disciplinary power, including in the prison. For Foucault, appeals to rights are fundamentally flawed, both because they fail to acknowledge the real *locus* of power in modern society, and because they reinforce the very sovereign power which they claimed to limit and contest. Recourse to rights discourse therefore places the subject in a “kind of blind alley” (Foucault 1980: 108).

⁵⁹ There have been attempts to address this well-recognised limitation of the traditional anti-discrimination model in both international human rights instruments (such as the UN *Convention on the Elimination of Discrimination against Women*), and in domestic laws, for example through state-sanctioned positive discrimination and state-based affirmative action programmes for historically oppressed groups. Another example is the Equality Act 2010’s positive “public sector equality duty”, discussed in Chapter 3.

⁶⁰ Williams powerfully argues that “for the historically disempowered, the conferring of rights is symbolic of all the denied aspects of their humanity; rights imply a respect that places one on the referential range of self and others, that elevates one’s status from human body to social being” (1991: 148).

Whilst Foucault was clearly dismissive of rights in his genealogical period, however, there is a broad consensus that Foucault engaged more extensively with human rights in his later work. Various examples of his mobilisation of the political vocabulary of rights can be found in his lectures and interviews from the late 1970s to early 1980s; indeed, he explicitly remarked on the importance of “the possibility – and the right – to choose one’s sexuality”, and the need for “all abuses of rights” to be eliminated in the prison (Keenan 1987: 29-30).

As Lacroix and Pranchère point out, some “leftist” critiques of human rights, “forget what Michel Foucault himself recognised, particularly if his works are read in the light of his own political activism: that campaigns for rights can, by their very unpredictability, be forces for emancipation” (2018:234). They argue that the contradiction which Foucault had earlier identified between discipline and law, and which had previously been concealed behind the notion of sovereignty, had now come strongly to the fore, and that Foucault saw the way forward as moving “in the direction of a new right, one which would be anti-disciplinary, but at the same time liberated from the principle of sovereignty” (*ibid*, citing Foucault, Lecture of 14 January 1976). Lacroix and Pranchère argue that at the end of his life, Foucault “appeared to think that recourse to human rights was indeed moving in this direction” (*ibid*).

Scholars have reached different conclusions as to what this late engagement with rights means for the Foucauldian subject. Eric Paras has equated Foucault’s belated acceptance of a “properly agentive” human subject, beyond “power and knowledge”, with a “return to rights” (Paras 2006; Golder 2010: 356). Golder agrees that the late Foucauldian subject is both “crafted and crafting” (citing Butler 2004) or “acted upon and acting” (*ibid*: 367), but rejects the notion that this represents a radical departure from Foucault’s earlier position,

and instead contends that it aligns with his militant anti-humanism, and represents a continuation of “his critical engagement with human rights, within and against existing human rights, in the name of an unfinished humanity” (*ibid*: 356) (see Golder 2000 for a comprehensive analysis).

On Golder’s reading, Foucault’s rights have an “illimitable quality”, whereby the “human” of human rights is “not determined, but contested”, whereby rights cannot be contained but must remain ever “unrestricted”, to allow for different ways of being. He therefore argues that Foucault’s late engagement with human rights is not the “return to the subject”, but rather the “undoing” of the subject. This politics of human rights, Golder argues, rejects recourse to an “absolutised human”, and embraces instead “the radical contingency of the human and the permeability of its borders” (2010: 373, see also Golder and Fitzpatrick 2009: 123-4). This conceptualisation of the “future of human rights” is certainly compelling in its inclusiveness and ethicality. Even if one is not entirely persuaded by Golder that this theory can be found in Foucault, others have, themselves, argued for a similar future for rights. William MacNeil, for example, calls for a similar re-theorisation of rights which would make rights discourse workable for postmodernity, by recognising the failure of the “rights-bearing identity”, the “fantasy”, the “nothingness” of the subject supplied by rights (1999:134). For MacNeil, “rights hold out the possibility of a politics which go beyond identity by interpolating an identity of non-identity” (*ibid*: 136). This ideal of a “politics beyond identity politics” shapes much queer thinking (e.g. Butler 2004), and informs its tendency to reject recourse to current, identity-based, rights as transformative. Whilst the author looks to a future where there will be an international and domestic right to self-determination of gender, which is free from medical or state intervention, the thesis will

examine whether human rights, in their current format, and in the current socio-political context, have transformative potential for the lives of transgender prisoners.

In contemporary society, as already noted above, it seems to be uncontroversial that human rights discourse has considerable power, and, in particular, enables marginalised sectors of society to make their voices heard. As Smart stated some years ago, “to claim that an issue is a matter of rights is to give the claim legitimacy” (1989: 143); by couching a claim in terms of rights, “it enters into a linguistic currency to which everyone has access” (*ibid*). In their excellent monograph, *Human Rights and the Criminal Justice System*, Amatrudo and Blake use the transgender prisoners’ rights case of **AB** (2009) to illustrate their argument that few areas of law, other than the law concerned with the human rights of prisoners, have more clearly demonstrated “how deeply embedded in the UK the culture of human rights has become” since the Human Rights Act 1998 came into force in 2000 (2015: 136).

In 1989, whilst Smart felt that rights still had some political purchase and consciousness-changing potential for feminism, and could help transform women from supplicants into self-determining people, she felt that the political climate had led to a “dilemma over rights” (1989: 158). On the one hand, it was difficult to abandon rights discourse, but on the other, she thought its efficacy was waning, as rights were increasingly defined as “unjustified and selfish prerogatives” (*ibid*: 158-159). Over twenty-five years later, the “dilemma over rights” (cf. Brown 2000, above, on “suffering rights as paradoxes”) has not been resolved. Whilst human rights and equality discourse has become firmly embedded in contemporary political, social and economic life, and rights consciousness has increased to the extent that one can comfortably speak of a rights culture in the UK (e.g. Amatrudo and Blake 2015: 136), the current political climate (as noted in the Introduction) is hostile to “undesirable”

and “undeserving” groups such as prisoners, terrorists, migrants and even refugees accessing human rights. Appeals to human rights by prisoners, as a group, have long been recognised as problematic. As Snider remarked in relation to the emergence of the rights-conscious, woman prisoner, “the very success of rights claims in public arena, the constitution of aware, resistance subjects, who no longer know their place, is a central component in the virulent and powerful backlash against all progressive movements” (2001:356). This tension between the transformative potential of rights, on the one hand, and the unpredictability of recourse to rights and potential backlash, will become only too evident in this thesis.

Theory around the Construction, Performativity, and Embodiment of Gender

The second theoretical pillar of this thesis comprises feminist, queer and transgender theory on the construction and performativity of gender, and in particular, the way in which these theories speak to embodied, lived realities of gender. So far, the chapter has laid out the rationale and conceptual foundations for approaching law not only as a power to lay down rules, but also as a productive power, with normative effects “at the level of life itself” (Foucault 1979:143). Chapter 1 has already discussed law’s restrictive definition of sex/gender, and its harmful exclusion of the “transsexual”, in its analysis of **Corbett** (1970), and, next, Chapter 3 will examine the impact of human rights on law’s re-conceptualisation of sex/gender in the Gender Recognition Act 2004. In order to contextualise the meaning and power of law’s changing “truths” regarding sex, gender and the transgender subject, it is imperative to situate them in the broader, contested, discursive field. For, as this thesis

will show, conflicting ideas of how to define sex and gender are not simply theoretical, but have very real effects on people's lives.

Whilst this thesis draws on many important conceptual insights from Foucault's work, gender is not one of them. However, a rich body of feminist, queer and transgender scholarship – much of it grounded in Foucauldian and/or poststructuralist thought – has interrogated the categories of sex and gender, contested their etiological foundations and cultural boundaries, and contemplated the significance of the material body. The problematisation of the transgender figure, or "The Transgender Question" as Namaste aptly calls it (2009), has been central to this exercise.

Despite the elision of gender in his theories of power, Foucault's core thesis in *History of Sexuality* is critical to the current analysis, and acted as a catalyst for later theorising around gender. Foucault contended that sexuality and sex are not natural, but are constituted through "regimes of truth", which create a "fictitious unity" of anatomy and sexual pleasure (1979: 154). He argued that the state constructed and naturalised the concept of heterosexuality in order to regulate sex, and to promote the reproductive output of the population. It used discourses of sexuality to entrench the notion of normative, oppositional sex categories, and governmentality techniques, such as the official registration of births, and the collation of other statistics, to fix these binary, biological sex categories. Bodies could either be male or female. In practice, this process focused on, and reinforced the significance of, genitals, erasing intersex and transgender bodies, identities and/or experiences.

Building on Foucault's ideas in *History of Sexuality*, and the poststructuralist project of deconstructing taken-for-granted categories, Judith Butler's iconic book *Gender Trouble* (1990/1999) interrogated traditional feminist assumptions about sex and gender, and the heteronormative matrix in which they tend to be situated. She challenged the central premise of second wave feminist scholarship and "praxis" (hooks 1984), which understood "sex" as a fixed and incontestable site, manifested in biologically differentiated male and female bodies, and understood "gender" (then called "sex roles") as a separate, socially constructed concept, designed and perpetuated by men to keep women in a subordinate position.

By making this conceptual and etiological distinction between sex and gender, feminism was able to counter the prevailing, essentialist position that male and female behaviours are naturally different, and are determined according to biological sex. For second-wave feminists (unlike Foucault, for whom power was "gender-neutral"), gender was the product of patriarchal power relations, which needed to be dismantled. Central to this political project was making visible women's experience of male oppression, including in the workplace and family, and in sexual and reproductive matters. However, second wave feminism faltered over its white, Western, middle-class, assumptions about the universal "woman" and women's "universal" experience of oppression (as best exemplified by hooks' 1984 critique of Betty Friedan's *The Feminine Mystique* 1963). In response to criticisms from black and "third world" feminists that their voices and experiences were absent/excluded, third wave feminism from the mid-1990s became more alive to intersectional issues in women's experience of oppression, including race, class and colonialism, and, most significantly for the purpose of this thesis, sexually and/or gender

non-normative women. This concern found its expression in “queer theory”, a term generally attributed to Teresa del Lauritis,⁶¹ but most associated with the work of Butler. From Butler’s rich and thought-provoking text, *Gender Trouble* (1990/1999) (and her later works *Bodies that Matter* (1993) and *Undoing Gender* (2004)) the following discussion is only able to distil the main ideas, and canvass the main critiques, that inform and animate this thesis in its analysis of the power of law and human rights to regulate whose trans/gendered lives are intelligible, legitimate and realisable, and whose are not.

Un/intelligible genders

Butler’s concern was that feminism’s formulation of a “stable” and “seamless” category of “women”, as the subject of its representational politics, excluded women whose gender expression, sexual desires and/or sexual practices did not neatly fit into the heteronormative framework. She believed that feminism was unwittingly contributing to the reification of gender into binary norms of “masculine” and “feminine” by working from within the existing, “buried”, field of power relations. Butler argued that feminism’s restrictive construction of gender was producing new forms of hierarchy and regimes of truth and presenting certain forms of gender expression as “false and derivative”, and others as “true and original” (1999: iii). She sought to uncover the ways in which “the very thinking of what is possible in gendered life is foreclosed by certain habitual presumptions”

⁶¹ After organising a conference under the same title, Del Lauritis edited a special issue of *differences: A Journal of Feminist Cultural Studies* on “Queer Theory: Lesbian and Gay Sexualities” (1991), in which she proposed *inter alia* that lesbian and gay studies could be understood and imagined as a form of resistance to cultural homogenisation, and to the construction of heterosexuality as the norm against which all other sexualities should be measured, and called for attention to the multiple ways in which race shapes sexual subjectivities, so as to “recast or reinvent the terms of our sexualities, to construct another discursive horizon, another way of thinking the sexual (iii-iv). Several years later, she reportedly abandoned the term, on the basis that it had had been taken over by the mainstream forces it was intended to resist, see Halperin 2003: 343.

and to “open up the field of possibility of gender” for all those who know what it is to live as “what is impossible, illegible, unrealizable, unreal and illegitimate” (1999: viii).

Developing Foucault’s thesis on governmentality, sexuality and sex, Butler examined how the regulatory practices that govern gender also govern “culturally intelligible notions of identity”, or what she usefully terms “intelligible genders” (1999: 23-24). “Inasmuch as ‘identity’ is assured through the stabilising concepts of sex, gender and sexuality”, she posits, “the very notion of the person is called into question by the cultural emergence of those “incoherent” or “discontinuous” gendered beings who appear to be persons, but who fail to conform to the gendered norms of cultural intelligibility by which people are defined”, including those “in which gender does not follow from sex” (1999:24). In her view, “the persistence and proliferation of those genders provide critical opportunities to expose the limits and regulatory aims of that domain of intelligibility” (1999:24).

Butler also argued that the persistence and proliferation of these “unintelligible genders” provide subversive potential “to open up ... rival and subversive matrices of gender disorder” and make “gender trouble” (1999:24).⁶² The “gender trouble” which Butler envisaged is becoming increasingly evident, as more and more gender (including a-gender, fluid and non-binary gender) possibilities are becoming visible in contemporary UK society, and exposing the myth of the binary gender order.⁶³ The disruptive effects of this challenge to the gender order are magnified in the prison. Transgender prisoners and gender non-conforming prisoners literally make visible the “non-sense” of the binary sex/gender order;

⁶² Others who celebrated the political potential of visible gender transgression include Stone 1991/2006, Feinberg 1993, Bornstein 1994/2016 and Stryker 1994.

⁶³ This proliferation of gender is becoming manifest in contemporary UK society; in 2014, Facebook introduced 71 gender options for UK users, replacing its previous two (Williams 2014). A recent government (Children’s Commission) survey asked teenagers to identify their gender by reference to 24 options (Boult 2016).

they trouble the prison administration's traditional allocation of sexed bodies to the male and female prison estate, and cast doubt on the binary gender-normative regimes on which it is built, simply by their presence.⁶⁴

Becoming gendered

Butler also advanced the idea that both sex *and* gender are culturally constructed, which challenged the established feminist model of sex ("biologically" fixed) and gender (social construct). In parallel with Foucault's thesis on sexuality and sex in *History of Sexuality*, she proposed the idea that gender precedes sex, and operates as the discursive/cultural means by which sex is made to appear natural, pre-given and irrefutable. "What if sex were gender all along?" she asks: "perhaps this construct called sex is as culturally constructed as gender, indeed perhaps it was already gender ... with the consequence that the distinction between sex and gender turns out to be no distinction at all" (1999: 9-10) – an insight which will be explored in Chapter 3, when the thesis discusses the collapsing of legal sex into gender through the Gender Recognition Act 2004. Further, through a creative re-working of de Beauvoir's well-known formulation "one is not born a woman, but rather becomes one" (1949), Butler proposes that there is no cultural compulsion to become a woman based on one's female anatomical body: "'woman' need not be the cultural construction of the female body", nor must 'man' be the cultural construction of the male body (1999:152). If sex and gender are distinct, as feminism has claimed, "it does not follow that to be a given sex is to become a given gender", rather, she moots, perhaps gender is free-floating, detached from bodies, "something one *becomes*, but can never be" (*ibid*). And, further, if it

⁶⁴ Whether or not they conceive of their gender as an act of political subversion of the type proposed by Butler.

is “a kind of becoming”, it is free “to proliferate beyond the binary limits imposed by the apparent binary of sex” (*ibid*).

Gender performativity and embodied gender

In considering how one *becomes* gendered, Butler proposed the idea that gender is performative. There is no “being” or “identity” behind the acts that supposedly “express” gender, she argues, rather gender is something anticipated and achieved by the subject in and through repetition (“citation”). The repetition of these acts *constitutes*, rather than *expresses*, the illusion of a core gender identity. On this account, naturalised knowledge of gender acts as a “pre-emptive and violent circumscription of reality”, and establishes “what will or will not be ‘intelligibly human’ and what will or will not be considered to be ‘real’” (1999: xxiv-xxv). For Butler, the transgender figure dramatises this process (*ibid*: x). Whereas the “constructedness” of normative (cis)gender is masked by the veil of naturalisation, the transgender figure reveals, indeed explicitly performs, its own constructedness, and brings into sharp relief the performativity of (all) gender. However, as the thesis will demonstrate, in the face of transgender’s denaturalisation of gender, law seeks to bolster cisgender identity, while simultaneously rendering artificial and unreal the lives of transgender people.

Butler’s theory of gender performativity, which became emblematic of queer theory, met with strong criticism in some quarters for trivialising transgender people’s lives and reducing their gender to mere performance or “drag”, to be donned and doffed at will. She was charged with overlooking many transgender people’s understanding and experience of their gender as inherent and inescapable, and for ignoring the importance of the material body in

their sex/gender crossings. Jay Prosser, who was prominent in challenging Butler's thesis, sought to "wrest the transsexual from its queer inscription of transgender" (1998: 56). Referring to queer's sense of its "higher purpose" of subverting the gender order and making "gender trouble", Prosser emphasised that "there are transgender trajectories, in particular transsexual trajectories, that aspire to that which this scheme devalues. Namely there are transsexuals who seek very pointedly to be non-performative, to be constative, quite simply, to *be*" (*ibid*: 32, emphasis in the original).⁶⁵

In *Bodies that Matter* (1993) and the preface to the second edition of *Gender Trouble* (1999), Butler addressed these "misinterpretations" of her gender performativity thesis, and stressed that we are *all* performing, all doing gender. By emphasising the constructiveness of sex and gender through the transgender figure, she stated, she did not mean to imply that gender is an artifice or that it can be chosen at will. Rather, her aim in *Gender Trouble* was to explore how agency might be derived from constructionist accounts of gender, how "gender practices" might be preserved "as sites of critical agency", when gender itself is produced through power (1999: ix). However, as Julia Serano has persuasively argued (2007; 2013), this performance-centric view of gender – even when it is said to apply to *all* gender performances – does not sufficiently account for how *others* perceive and interpret gender (2007: 190-193), and the higher stakes of a social constructionist account of gender for transgender people.

⁶⁵ See also Namaste 1996. For an excellent sociological analysis of the multiple ways in which transgender people in the UK experience and identify their gender, see e.g. Hines 2007 and, for a broader international collection on transgender identities, e.g. Hines and Stanger 2010.

Cis-sexism

Whilst transgender people's gender is no less real, no less authentic, than cisgender people's, Serano argues (2007), they still tend to be "read" as inauthentic by our cis-normative society, and to be placed lower down the "gender hierarchy". She draws attention to the cisgender "obsession" with "passing" as a double-standard, whereby the "gender work" of cisgender people is interpreted as natural and effortless, whilst that of transgender people is interpreted as artificial and deliberate (2007: 184-186). Indeed, as she observes, the very term "passing" is problematic as it carries connotations of deception and implies that one does not rightfully belong in the gender category. This thesis therefore uses the term being "read" as transgender, to put a focus on what cisgender people do in "reading" a person's gender, rather than shoring up an approximation to cisgender as the benchmark for transgender people to attain.

Serano introduces the useful term "cis-sexism" to describe the pervasive perception of transgender people's gender as inferior to, or less authentic than, those of cisgender people (2007: 12).⁶⁶ She contends that, by dismissing and delegitimising transgender people's gender as "fake", cisgender people seek to validate their own gender as real, natural and legitimate. A good example can be found in Greer's influential feminist exposition, *The Complete Woman* (1999). In a chapter disparagingly entitled "Pantomime Dames", Greer argues that women's "toleration" of "spurious femaleness" weakens her claim to have a sex of her own (1999: 73). This thesis will show how "cis-sexism" is evident in law – and

⁶⁶ Serano distinguishes "cis-sexism" from the broader-based concept of "transphobia", which refers to fear of, aversion to, or discrimination against people whose gender expression and/or behaviour differ from the norm. Cis-sexism is more narrowly targeted at transsexual and transgender people, whose gender does not align with that assigned to them at birth.

underpins both equality legislation and the courts' construction of transgender people's/prisoners' gender.

Trans-misogyny

Serano further argues that social stigma and “demonisation” is directed overwhelmingly at transgender women, whilst transgender men remain largely invisible (and under-theorised). This disparity in attention implies that transgender women are “culturally marked”, not for failing to conform to gender norms *per se*, but because of the specific direction of their gender transgression—that is, because of their feminine gender expression and/or female gender identities. She characterises this particular marginalisation of transgender women as “trans-misogyny” (2012). One example she gives of trans-misogyny, is the way in which transgender women’s motives for transitioning are routinely sexualised by the media. While transgender men may face a certain degree of media objectification, she argues, their motives for transitioning are not typically sexualised in the same manner. If anything, “those who do project ulterior motives onto transgender men” generally presume they transition in order to obtain male privilege, rather than for sexual reasons.⁶⁷ Thus, Serano proposes, the presumption that transgender women (but not transgender men) are sexually motivated in their transitions “appears to reflect the cultural assumption that a woman’s power and worth stems primarily from her ability to be sexualised by others” (*ibid*). This thesis will show how a presumption of sexual (and other suspect) motivations is evident in media reports of transgender women who transition whilst in prison and subsequently transfer to the female estate, and casts into doubt their trans/gender authenticity.

⁶⁷ This reflects the historical assumption that women took on male identities in order to access male employment opportunities, rather than for the “immoral purposes” pursued by men “impersonating women”, as noted in Chapter 1.

Materiality of the body

As mentioned earlier, the other aspect of Butler's thesis which was heavily critiqued in transgender scholarship was its failure to recognise the significance of the body in transgender people's sex/gender crossings. In *Second Skins: The Body Narratives of Transsexuality* (1998), Prosser took up the critical project of reclaiming the centrality of "sexed embodiment" for the "transsexual" subject and foregrounded the importance of the material body in narratives of transsexual people's gender crossings, and their desire for a "bodily home" (1998: 171-205). He called for a new "politics of home", which would "analyse the persistence of sexual difference" in the social world, and "the costs to the subject of not being clearly locatable in relation to sexual difference", and "above all, would not disavow the value of belonging as the basis for liveable identity" (*ibid*: 204; see also Namaste 2000, 2005 and 2009).⁶⁸

Butler responded in *Bodies that Matter* (1993) to criticisms that she had ignored the materiality of the sexed body, and set out to examine why the materiality of sex is so forcibly produced, and what bodies matter and why (*ibid*:ix). Building on Foucault's account of sex as a "regulatory ideal" (1979), she argues that sex is "not a simple fact or static condition of a body, but a process, whereby regulatory norms materialise sex", or "compel" its "materialisation" (1993: xii) "in the service of the consolidation of the heterosexual imperative" (*ibid*). Thus, whilst acknowledging that the body's fixed matter, its contours and movements are material, she calls on us to think of materiality "as the effects of power":

⁶⁸ For a valuable analysis of "transsexual experiences of personal, political and medico-legal embodiment" in the UK, see Davy (2011).

such that there is no way to understand 'gender' as a cultural construct imposed upon the surface of matter, understood as 'the body' or its given sex, rather once sex is understood in its normativity, the materiality of the body will not be thinkable apart from the materialisation of that regulatory norm and *sex will be one of the norms by which one becomes viable at all, that which qualifies a body for life within the domain of cultural intelligibility (ibid: xii, emphasis added).*

She recognises, therefore, that bodies are important, as only through assuming a normative sex, does a person's body become culturally intelligible. Meanwhile, the "exclusionary matrix by which subjects are formed requires the simultaneous production of a domain of abject beings" (1993: xii). It is through these "abject beings" that the normative domain is constituted, reaffirmed, reproduced, fortified: "the construction of the human produces the more and the less 'human', the 'inhuman' and the 'humanly unthinkable'" (*ibid: xvii*). She includes amongst these "abject beings" those "who do not appear properly gendered", adding that "it is their humanness that comes into question" (xviii), as "their bodies contest the norms that govern the intelligibility of sex and gender" (*ibid*). Thus, she argues, sexed bodies do matter, and are fundamental to the cultural intelligibility of gender.⁶⁹

This thesis will show that this is particularly true in the prison, where the norms which regulate culturally intelligible sex/gender are materialised in the allocation of bodies to the

⁶⁹ In a recent ethnography of facial feminisation surgery ("FFS"), Plemons (2017) argues that the growing popularity of FFS among transgender women in the US demonstrates a reconfiguration of the traditional medical model of "sex reassignment" which focused on genitalia as the site of "sex change", to a "social recognition" model centered on embodiment of femininity in the face. Interestingly, Plemmer portrays the development of these surgical practices as a contemporary materialisation of the performative model of gender theorised by Butler.

male and female estate and are profoundly challenged by incoherently sexed/gendered bodies.

Butler's ideas, and those of the other authors cited in this part of the chapter, were developed primarily in the cultural and social studies fields, and do not engage substantively with law. However, they provide a vital critical framework for this thesis, in its analysis of law's (and the prison administration's) production of sex/gender and the transgender subject.

Transgender bodies as risky bodies

Finally, the concept of "risk" is important to the thesis, in various constructions of transgender people's gender authenticity and bodies being "risky". This discourse finds particular expression in trans-exclusionary radical feminist literature and is also apparent in contemporary media-reporting relating to transgender women's presence in "women-only" spaces, including women's prisons. The thesis will also argue that hegemonic ideas of transgender women's bodies as especially risky bodies have informed penal governance. Thus, the topic of "risky bodies" provides a bridge between the second and third "theoretical pillars" of this thesis, and their respective literatures.

Janice Raymond's monograph *The Transsexual Empire: The Making of a She-Male* (1979) is the foundational text in what is now commonly referred to as trans-exclusionary radical feminism. Raymond portrayed transgender women as a threat to the category "women", on the basis that they are, in essence, men pretending to be women. "The male-to-constructed female transsexual", Raymond argues, "attempts to possess women in a bodily sense, whilst acting out the images into which men have moulded women" (*ibid*: 99).

According to Raymond, transgender women represent a danger to (cisgender)⁷⁰ women, not only by physically taking on the female form and associated “sex roles”, but also by “deceitfully” entering or “infiltrating” their spaces. These two themes coalesce in the following highly-charged passage:

Rape ... is a masculinist violation of bodily integrity. All transsexuals rape women's bodies by reducing the real female form to an artefact, appropriating this body for themselves ... Rape, although it is usually done by force, can also be accomplished by deception ... Because transsexuals have lost their physical “members” does not mean that they have lost their ability to penetrate women – women’s mind, women’s space, women’s sexuality. Transsexuals merely cut off the most obvious means of invading women, so that they seem non-invasive. (*ibid*: 103-4).

Increasingly, this view of transgender women is regarded as offensive. Greer, for example, has been heavily criticised for making similar derogatory remarks about transgender women (e.g. Oppenheim 2016). Nevertheless, the thesis will argue that this view finds more moderate (or sanitised) expression in relation to transgender women’s presence in “women-only spaces”, including the prison, both in certain radical feminist circles and in general public opinion.

Sheila Jeffreys’ monograph, *Gender Hurts: A Feminist Analysis of the Politics of Transgenderism* (2014), and various submissions by radical feminist groups to the WESC *Transgender Inquiry* (2015), provide a valuable window on contemporary trans-exclusionary radical feminist views objections to transgender women’s access to “women-only” spaces,

⁷⁰ Raymond would never use the term “cisgender”, since for her, transgender women are not women, obviating any need to describe “real” women as cisgender.

including public toilets, changing rooms and prisons. Following Raymond (1979), Jeffreys' objection to transgender women's access to women's spaces is not simply based on the premise that transgender women are not "real" women, but rather that, as "men", they intrinsically represent a psychological and physical threat to cisgender women, who she presents as especially vulnerable in such spaces. Illustrating the power of rights discourse in contemporary politics, Jeffreys specifically frames this as a rights issue. She strongly criticises the current situation in the UK where "a man's right to wear make-up and be housed with vulnerable women who are incarcerated, trumps the right of those women to be protected from violent men" (2014:161).

Far from being isolated or marginal, the thesis will argue that this radical feminist position seems to align with the general public's response to the presence of transgender women (and especially the possibility of transgender women with penises) in women's prisons, as evident in the press reporting of Jessica Winfield case outlined in the *Introduction* to the thesis.⁷¹ Drawing on Laurel Westbrook and Kristen Schilt's analysis of society's "gender panics" around transgender people's presence in sex/gender-segregated spaces (2014),⁷² the thesis will argue that society is more likely to use biology-based criteria, or anatomically-based criteria (particularly the presence or absence of a penis) to determine a person's sex/gender in such spaces, rather than identity-based criteria, which are commonly used in sex/gender-integrated spaces. It will further argue, that the deep-rooted essentialist belief that men are inherently dangerous and women are inherently vulnerable, has led to

⁷¹ A highly-charged debate about the presence of transgender women (particularly the possibility of transgender women with penises, or cisgender men pretending to be women for nefarious purposes) in "women-only spaces", similarly followed Top Shop's announcement that its changing rooms will be gender-neutral, and trans-friendly, e.g. Petter 2017; Brennan 2017; Jones 2017.

⁷² The authors chose not to examine the gender-segregated site of the prison, but they mention prisons in the broader context of the paper (2014:39).

“greater policing of transgender women’s access to women-only spaces” and, thus, “the greater ability of biology-based criteria” or genitalia-based criteria, “to quell gender panics” (2014: 40). Against this broader social context, Chapter 4 will examine how human rights-based developments (which enable a transgender person/prisoner to obtain legal gender recognition without gender reassignment surgery) have clashed with the traditional penal governance of gender (which was based on hegemonic notions of risk and on genitalia-based gender determination). This issue came before the courts in **AB** (2009).

Prison Governance, Risk and the Transgender Prisoner

The “inexorable logic of risk” (Ericson and Haggerty 1997) in society generally, and in the prison specifically, is a powerful, established discourse, with which the “new” human rights discourse must compete. In order to assess the power effects of law and human rights on transgender prisoners’ lives, it is imperative to have an understanding of this prior discursive terrain, as well as some conceptual tools to unpack the prison’s construction and governance of transgender prisoners as primarily risky. Thus, the third theoretical pillar which underpins this thesis is scholarship on prison governance and risk.

In contemporary “risk society” (Beck 1992), and under the continuing conditions of the “new penology” identified by Feeley and Simon (1992), risk has become a centripetal force in prison governance, pervading prison thinking at every level. Transgender prisoners, and particularly those with “gender-incongruent” bodies,⁷³ deeply trouble the prison’s binary sex/gender order and present new and uncertain challenges for prison management. This section provides a conceptual framework for understanding the prison administration’s

⁷³ I.e. those who have not undergone gender/genital reassignment surgery.

production and governance of the “risky” and “at risk” transgender prisoner, and paves the way for the next chapter, which considers the emergence of the transgender prisoner as human rights-bearer. In Chapters 4, 5 and 6, the thesis analyses the emerging tension between risk and rights in the construction of the transgender prisoner and the governance of trans/gendered lives, in three specific areas (prison allocation, presentation of the self, and access to medical treatment, respectively).

A vast body of sociological and criminological literature exists on risk, but there is little literature on the interplay between risk and human rights in prison management. Murphy and oel Whitty have remarked on this gap in the literature (2007), observing that scant attention has been paid to human rights in the literature on penal governance and risk, and, conversely, that risk is rarely referenced in the legal literature on prisoners’ human rights. An important, subsequent exception is Genders’ and Player’s analysis of the intersection between risk management, rehabilitation and human rights in the context of offending behaviour treatment programmes for prisoners with personality disorders (2014). Coyle’s handbook for prison staff, entitled *A Human Rights Approach to Prison Management* (2009), is also indicative of an increasing recognition of the role of human rights in daily prison management (see also Naylor 2016).

Modernity and the governance of risk

Perceptions of risk, and responses to risk, have changed over time, and are reflected in penalty. The following outlines some key developments which inform this thesis, in its general analysis of risk.

The modern age, which spanned the period from the late eighteenth-century “Age of Enlightenment” to the 1970s, was typified by known and calculable risks, which were predictable and controllable. It was characterised by faith in reason, scientific knowledge and the progressive discovery of “universal” truths. In the modern era, the social enemy was the “deviant”, a person who deviated from the norm and brought with them the “*multiple danger of disorder, crime and madness*” (Foucault 1977:300, emphasis added). As outlined in Chapter 1, the “gender deviant” was one such “abnormal” and therefore risky figure, who the state and its various apparatus collectively sought to manage and regulate through risk discourses and risk-reduction strategies. This so-called “governmentality perspective of risk”, as its name suggests, arose out of Foucault’s work on governmentality (Foucault 1991; Ewald 1991; Castel 1991), discussed further below.

Under the great carceral network envisaged by Foucault (1977), law and discipline would flow into one another, reproduce each other, and legitimise each other, so as to ensure “the universal reign of the normative” (*ibid*: 304). Criminals were therefore understood both as “a series of monsters” who had “fallen outside the social pact” (*ibid*:256) and needed to be *disciplined*, and as “juridical subjects”, who had broken the law and need to be *punished* (*ibid*). The “birth of the prison” made “it possible to join the two lines” (*ibid*) and, through the fabrication of the “delinquent”, gave criminal justice a “unitary field of objects, authenticated by the sciences” (*ibid*). This enabled it to function on a greater horizon of truth (*ibid*). Modern penality, from the mid-nineteenth century onwards, then, was concerned with both punishing prisoners for their past crime, and disciplining them, in order to reintegrate them back into society as useful, productive citizens. As already noted, this included disciplining prisoners along normative sex/gender lines. With growing social and

governmental concern about the threat posed by the “dangerous classes”, it was a time of great scientific inquiry into what made the criminal (e.g. Lombroso 1887, 1895; Ellis 1901), and the prison provided a literally captive pool of subjects for research and experimentation (Davie 2005).⁷⁴

Postmodernity and the governance of risk

The postmodern era is generally considered to have started somewhere between the late 1980s and the end of the twentieth century. It is characterised by a growing scepticism towards expert knowledge and claims to universal truths, and to the Enlightenment’s “grand narrative” of progressive reform. Postmodernity is also associated with the advent of a “politics of difference”, and increasing insecurity around pluralism and diversity, and its governance (Rose 2000), which has clear relevance for this thesis.

In his seminal work, *The Risk Society: Towards A New Modernity* (1992), Beck painted the late- or postmodern “risk society” as a society beset by new types of unpredictable, imperceptible, large-scale risks, from global warming to nuclear weaponry, and as a society facing increasingly complex risks from rapid industrial and technological development. Government and society had started to respond reflexively to these risks. Uncertainty and anxiety was leading to ever-more precautionary measures, aimed at minimising, or ideally averting, risk. This highly risk-aware, risk-adverse climate led to the “defensive risk management of everything” (Ericson 2007:17). Both the risk-society thesis and the

⁷⁴ Whilst the work of the Italian criminal anthropologist Lombroso, is most associated with this period, Havelock Ellis’s *The Criminal* (1901) (scorned by the British medical establishment) was so popular with the general British public, that it was in its fourth edition by 1910 (Davie 2005: 16). See generally Davie’s fascinating account of the rise of scientific criminology in Britain between 1860 and 1918 (*ibid*) and Garland (1985). The development of criminological theories around sexual and gender “deviance” is well-canvassed elsewhere, see in particular, Kunzel 2008: 45-75.

governmentality school of risk highlighted this development in government and society's response to risk. Ewald (a governmentality scholar), in his well-known paper on the philosophy of precaution, observed that precautionary logic urges one "to anticipate what one does not yet know, to take into account doubtful hypotheses and simple suspicions" (2002:288), such that "decisions are therefore not made in a context of certainty, nor even available knowledge" but in a context "of doubt, suspicion, premonition, foreboding, challenge, mistrust, fear and anxiety" (*ibid*: 294). This thesis will argue that this type of precautionary logic drives the management of transgender prisoners and the new and uncertain risks that they pose to prison administration; that management decisions about them are made in a context of "doubt, suspicion ... mistrust, fear and anxiety" (*ibid*).

The third approach to risk, which is most associated with the work of Mary Douglas (1992), emphasises risk as a cultural product, through a focus on lived experiences of risk, and emotional responses to risk. The cultural approach intersects with the risk society and governmentality approaches in various ways. For the purpose of this thesis, it particularly contributes to an understanding of the "blame culture" which characterises contemporary society. In her foundational work, *Risk and Blame: Essays in Cultural Theory* (1992), Douglas identified the rise of new adversarial patterns of blame allocation, which went hand-in-hand with society's increasing concern with risk. "Under the banner of risk reduction", Douglas wrote, a "new blaming system" has emerged: "whose fault, is the first question? Then, what action? Which means: what damages? what compensation? what restitution?" (16). Preventative action in the blame culture, she argues, translates into ever-more prolific and ever-more detailed legislation and policy, in an attempt to prognostically "code" risk. The blame culture also generates an increasing requirement for decision-makers to document

the rationale for their decisions, so as to provide a paper trail which will stand up to retrospective review. For, in contemporary society, risks are increasingly subject to “hindsight scrutiny” (Carson 1996), and a key test for risk decisions is their defensibility in terms of media scrutiny and litigation (Kemshall 2003:12). With the benefit of these insights, this thesis will consider whether recent policies are able to effect fundamental change in the governance of transgender prisoners, in terms of fostering respect for, and realisation, of their rights, or whether the policies are more likely to generate a greater emphasis on preventative action, precautionary logic, and documentation of risk-based decisions, so as to minimise the possibility of future “blame”.

The “New Penology” or “Postmodern Penalty”

In the late eighties and early nineties, some scholars (e.g. Rose 1996, 2000; Garland 1996, 2001), started to focus on the centrality of risk to emerging forms of government and control, and its implications for crime control, whilst others considered how late- or postmodern conditions and changes in the nature and reflexive response to risk were affecting penal trends (e.g. Simon 1988; Feeley and Simon 1992; Pratt 1995). Feeley and Simon’s paper on the “new penology” (1992) really captured the *Zeitgeist*. Whilst it examined emerging patterns in US penal rationale and practice, it chimed with UK criminologists, who were observing similar developments in penalty, as the “language of probability and risk” (*ibid*: 450) took hold.

The “new penology” described by Feeley and Simon is concerned with containing and managing the “dangerous classes”, rather than normalising them, as was the main objective of modern penalty. “The task is managerial, not transformative”, they declared, “it seeks to

regulate levels of deviance, not to intervene or respond to individual deviants” (*ibid*: 452, emphasis in the original). The new penology, they argued, relies on “variable detention, depending upon risk assessment” as its primary method (*ibid*: 457) and literally removes the dangerous classes as a risk to society, by incapacitating them in the prison and “delaying their resumption of criminal activity” (*ibid*: 458). The effects of this new method might be further intensified by a strategy of “selective incapacitation”, they suggested, aimed at identifying high-risk offenders and maintaining long-term control over them, whilst investing in shorter terms and less intrusive control over lower risk offenders (*ibid*). They also observed that the expert knowledge and disciplinary practices of modern penalty were starting to be replaced by actuarial techniques based on statistical risks of reoffending. Finally, as the prison became decoupled from its external social objectives, it was beginning to measure its success in terms of internal processes and output (*ibid*: 456-7).

Building on Feeley and Simon’s observations, Pratt argued (*contra* Garland 1995) that these new penal trends signalled the “arrival of postmodern penalty” (2000: 127 and 139).⁷⁵ Examining legal and penal responses to the changing construction of high risk offenders, he concluded that, in both sentencing decisions and prisoner security classification, it is “not so much the gravity of the particular offence”, but “the risk that one is thought to pose to the security of the community” which becomes of central concern in “postmodern penalty” (*ibid*: 138). Like Feeley and Simon, Pratt also highlighted the rise of a “new managerialism”, where prisons focus inwards on their organisational performance (*ibid*, 139-40). He

⁷⁵ Whether this period is described as late-modern, high-modern or postmodern depends on whether these developments are regarded as continuous or discontinuous with the conditions of modernity (see generally Giddens 1991). Scholars have debated whether the “new penology” described by Feeley and Simon marked a genuine watershed, or whether the trends they identified simply comprised an evolution of the risk-based thinking which had always defined penology (for a summary, see Kemshall 2003).

concluded that, “however fragmented these individual penal developments might be, their pragmatic emphasis on risk management”, rather than individually-focused justice, and their “emphasis on control and security at the expense of the grand narrative of reform and progress” would “seem to represent ways of thinking and acting that are postmodern” (*ibid*).

The contemporary penal landscape and risk

Although Feely and Simon’s paper is now 25 years old, the trends it identified continue to shape the contemporary penal landscape in England and Wales, albeit actuarial justice has not become as prominent as first envisaged (O’Malley 2010 46-47). Indeed, the last decade has witnessed the emergence of a “pre-crime society” (Zedner 2007), whereby pre-emptive, precautionary measures are being taken earlier and earlier, to forestall the risk of crime. This ranges from ever-expanding CCTV surveillance in public spaces, to the trend toward enlarging ‘inchoate’ crime, which capture the planning of criminal activity, as well as the attempted or actual commission of the offence. Such precautionary logic towards future risks has also been applied in the realm of sentencing. 2005 saw the controversial introduction of the “imprisonment for public protection” (“**IPP**”) sentence, a type of indeterminate sentence, primarily designed for those considered to be at high risk of *future* violent or sexual offending.⁷⁶ The IPP sentence, which is aimed at incapacitating high-risk offenders and maintaining long-term control over them, is a prime example of the “selective incapacitation” strategy, which Feeley and Simon identified in 1992. After IPP prisoners have served their minimum tariff, they remain in prison until the parole board is satisfied that they do not present a “significant risk of serious harm to members of the public”

⁷⁶ Criminal Justice Act 2003, s.225 (which came into effect in 2005).

through the commission of further offences.⁷⁷ After the European Court of Human Rights held, in 2012, that IPP sentences constitute a form of arbitrary detention, contrary to the right to liberty (art 5), if they do not make reasonable provision for prisoners' rehabilitation,⁷⁸ they were abolished.⁷⁹ However, some 4,000 prisoners are still serving IPP sentences,⁸⁰ including some transgender prisoners. Even under the new, extended sentences, which have a fixed term tariff, prisoners can be detained for up to eight more years, if they are deemed to represent a significant risk of serious harm to the public.

Whilst prisoners have always had to negotiate the every-day risks of prison life to their physical and mental well-being, they are now being responsabilised in much more pervasive, far-reaching ways than before. Under neo-liberalism, prison is no longer simply a matter of "serving time". Crewe argues that the systemic policies and institutional practices of self-governance have made the pains of imprisonment "tighter", as well as deeper and heavier, in the contemporary English prison (2011). The Incentives and Earned Privileges system ("IEP"), as amended in 2013 (PSI 30/2013), is a prime example of the increasing pressure on prisoners to self-govern; it requires prisoners to constantly monitor and adapt their own behaviour in order to earn and retain "privileges", such as the right to wear their own clothes, receive visits, watch in-cell television and spend money, and prisoners must actively "engage" with the prison regime and demonstrate "a commitment" to their rehabilitation (PSI 30/2013, paras 4.10 and 4.16), in order to progress (see Khan 2016 for a useful account of prisoners' perceptions of the IEP scheme).

⁷⁷ Between 2005 and 2008, IPP sentences were mandatory for a wide range of cases, leaving very little discretion to the sentencing judge. This situation was amended by the Criminal Justice and Immigration Act 2008. For an overview, see Epstein and Mitchell 2009.

⁷⁸ *James, Wells and Lee v UK*, App Nos 25119/09 57715/09 57877/09 [2012] ECHR 1706.

⁷⁹ Legal Aid, Sentencing and Punishment of Offenders Act 2012.

⁸⁰ Around 6,000 prisoners were sentenced under IPP from their introduction in 2005 to their abolition in 2012.

Elaine Genders and Elaine Player argue that the Government's recent renewed emphasis on rehabilitation and its expansion of accredited rehabilitative programmes in prison is driven not by a concern to promote the welfare of offenders, but by a broader disciplinary process that aims primarily to manage the risks such offenders pose to the public, and therefore still manifests itself "as a component of risk management within the new penology" (2014: 436).⁸¹ Pat O'Malley has argued that, whilst not perfect, some risk-based techniques provide a platform for a more positive approach to the governance of crime, and points to "risk-needs analysis" as "an optimistic alternative use of risk", that seeks to unite prisoners' needs and crime reduction needs through a focus on their "criminogenic needs" (2010: 45). Kelly Hannah-Moffat's work is particularly useful in this field. Whilst expressing some optimism about the revival of rehabilitation as a central feature of risk-needs management and penal control (e.g. 2005), she has argued previously in relation to women's imprisonment and risk assessment, that women's needs tend to be redefined as risks (1999).

Hannah-Moffat has also argued that the Canadian Corrections Service's ("CSC") well-intentioned, internationally-pioneering, and human rights-inspired reforms towards "women-centered prisons" and "gender-responsive" penalty have not translated into reality, due to a fundamental failure on the part of the prison authorities to consider *how* gender should be operationalised. She contends that, as a result, "conceptualisations of gendered risk permeate institutional narratives" (2010: 203), which are based on "normative femininities", and position "non-normative, 'masculine' conduct and resistance

⁸¹ Similarly, Garland (2001) has argued that even the welfare strategies under New Labour in the early 2000s were driven by concerns about security, and that rehabilitation was primarily a form of control, countenanced only if it served crime reduction.

to institutional authority” as “risky, rare and abnormal” and “difficult to manage” (*ibid*). She further argues that the rhetoric of gender-responsiveness has “the capacity to disguise and minimise systematic and interpersonal power relations” and that, “as time passes, the ideals of penal reformers and the intent of particular policies are abstracted from political, material and local interests”, and those “ideals evolve and are modified through the processes of institutionalisation” (*ibid*: 208). This thesis will build on Hannah-Moffat’s important insights to examine the way in which, in practice, transgender prisoners’ needs (and rights) tend to be translated into risks, and how, in turn, those risks tend to be informed by hegemonic norms about transgender prisoners and their bodies as “risky, rare and abnormal” and “difficult to manage”. It will reflect on whether the similarly well-intended, internationally-pioneering, and human rights-based policy reforms in relation to transgender prisoners in England and Wales are also likely to be diluted as their ideals are modified “through the processes of institutionalisation” (*ibid*).

The prison administration’s construction of the risky transgender prisoner

Against this broader background of risk society and the new penology, this section gives an overview of the way in which prison administration constructs transgender prisoners as risky. It argues that transgender prisoners present three types of risks to the prison. First, the very existence of transgender prisoners represents a risk to the fundamental sex/gender order of the prison. Second, in common with other prisoners, they pose risks to the imperatives on prison administration to maintain security, good order and safeguard all prisoners, but they reconfigure these risks in new ways. Third, they present an organisational risk, in terms of formal complaints, potential litigation, coroner’s inquests, media coverage, and associated reputational costs. This type of organisational risk has

arguably increased as prison administration has come under increasing pressure to absorb human rights, and external scrutiny in the current prison crisis has intensified.

Different approaches to risk

In painting the broader backdrop for this thesis, the three main approaches to understanding risk, namely the governmentality perspective, the risk society thesis and the cultural approach have been highlighted. Each approach has something to contribute, but the governmentality perspective of risk ties in particularly well with the overall, Foucauldian-based theoretical framework of this thesis. This is because governmentality scholars are primarily interested in the discursive construction of risk, and the power-knowledge nexus within which risk discourse is constituted and deployed. That is, they do not seek to identify which risks are “real” or “true”, although they do not discount the reality of risk. Further, the governmentality approach rejects the idea of a meta-narrative or totalising theory of risk (such as the risk society thesis), and focuses instead on the diverse and context-specific ways in which risk is deployed, and its repercussions at the micro-level. As O’Malley summarises it, the governmentality approach “looks at specific techniques through which subjects are controlled and shaped, and makes clear the costs to our lives of being imagined and moulded in such divergent ways” (2010: 14). This description neatly captures the aims of this thesis, as well as its intersection with Butler’s theorising around the costs of being culturally unintelligible to the liveability of gendered lives (2004).⁸²

There is a further important intersection, for this thesis, between the cultural approach to risk and sociological literature on the body (e.g. Grosz 1994) and radical feminist literature

⁸² She has further developed this theme in more recent work around precarious and liveable life, e.g. 2006 and 2009. For a good summary, see McNeilley (2016).

mentioned above, relating to the construction of the risky transgender body (e.g. Raymond 1979, Jeffreys 2014). As Lupton has remarked, not only are cultural fears and anxieties about risk and danger often directed at stigmatised and marginalised groups, or Others, but, they also “tend to emerge from and cohere around the *body*” (1999:124, emphasis added). The cultural perspective of risk is therefore important for this thesis, as it helps conceptualise the deep-seated emotional responses to transgender people’s bodies as being risky, however irrational such responses may be in scientific and statistical terms. It also encourages us to think about the extent to which such socio-political “categories of suspicion” affect the penal governance of risk (Zedner 2007: 47).

Beck felt that the governmentality approach to risk inadequately captured the changing nature and uncertainty of risk in “risk society”, but he was later at pains to emphasise that he did not totally discard the social constructionist approach to risk, but rather argued that *both* approaches should be adopted in order to fully comprehend the complex nature of risk in contemporary society (1995:76). Whilst real risks exist, he stated, they “only exist in terms of the knowledge about them. They can be changed, magnified, dramatised or minimised within knowledge, and to that extent they are particularly open to social definition and construction” (1992:23). In this regard, then, it is possible to combine a risk society perspective with a governmentality approach to risk. Further, although the risk society thesis is most often associated with societal distribution of risk at the macro level⁸³ and arguably inadequately accounts for the implications of risk for individuals at the micro-

⁸³ According to Beck, risk is a democratising force, which affects all members of society equally. He has argued that “class societies” would gradually transform into more egalitarian “risk societies”. Others have argued, that, to the contrary, social inequalities are likely to be exacerbated by risks in the risk society, because they become framed as individual choices rather than structural inequalities, and because of the expectation that individuals will negotiate and resolve such risks themselves (Kemshall 2003:13).

level (Engel and Strasser 1998), it is indispensable for understanding the broader context in which this thesis is situated. It helps explain the omnipresence of risk consciousness in society, the escalation of precautionary logic in responding to new and uncertain risks, and the significance of risk management at every level, and in every type of governance, from corporates and charities, through to schools, hospitals and prisons. As Power has remarked, we live in an age of “the risk management of everything” (2004). It is imperative to remember that it is within this highly risk-aware, risk-averse climate that policies are set, and decisions are made, in relation to transgender prisoners. This is a particularly important insight that the concept of the risk society offers to this thesis.

The risky transgender prisoner

A fairly substantial body of literature focuses on the legislative and penal management of dangerous, high risk offenders, especially sex offenders (e.g Pratt 1995 and 1996; Simon 1998; Lacombe 2008; Heberton and Seddon 2009). Transgender prisoners are, however, constructed as risky (and also *at risk*) simply by virtue of being transgender, regardless of the particular offence for which they are imprisoned. They are a risky prisoner population, not a risky offender population. There seems to be less literature in this field, outside Liebling’s foundational work on prisoners vulnerable to suicide and self-harm (1995). Thus, this thesis, in its analysis of transgender prisoners as a risky (and *at risk*) prison population, is somewhat exploratory in nature. Indeed, the kaleidoscope of risks presented to prison administration by transgender prisoners provides an unparalleled opportunity to explore the institutional tensions around the intersection between risk management and prisoners’ human rights. As a case study, transgender prisoners might be described as risk *par excellence*.

Some of the main ways in which transgender prisoners are produced and managed as both risky and at risk, and the tensions that such risk management creates with human rights and equality discourse, will be examined in detail in Chapters 4 to 6. Here, an overview is offered of the three main ways in which the transgender prisoner is constructed as risky, to anchor the later analysis.

First, the very existence of transgender prisoners represents a risk to the prison's binary sex and gender order (and also a risk to the broader governmentality of sex and gender). They are, to borrow Grosz's phrase, "a disorder that threatens all order" (1994: 203). As Chapter 4 (prison allocation) will illustrate, as soon as the first "transsexual" people were sent to prison, the prison administration did not know how to categorise or respond to them. In 1969, Rachel Gosling (who had had gender/ genital reassignment surgery) was first sent to a female prison, then, after prison medics decided she was male, was sent to a male prison. There, as a culturally unintelligible, and therefore risky, gendered person, she was placed in isolation. Later, as explored in Chapter 4, the prison adopted a more pragmatic approach, allocating prisoners according to their current genitalia, but those prisoners who were perceived to have incongruous bodies, or whose "transsexuality" was otherwise considered "obvious", were still constructed as Other and therefore problematic and risky. This led to a practice of segregating them from the main prison population, and excluding them from prison society. In cultural terms, this epitomises society's response to them as Other, as a risk, polluting the purity of social order.

Second, in common with other prisoners, transgender prisoners also pose other risks to prison management, in terms of security, good order and discipline, and safeguarding. However, the situation and needs of transgender prisoners reconfigure these risks in new

ways, posing new challenges for prison administration. In *Green* (2013), for example, the provision of gender-affirming clothing, tights, prosthetics and a wig to a transgender woman in the male prison estate was translated by prison administration into a whole host of risks. These included a security risk that other prisoners might use the wig to disguise themselves and escape; the risk that the tights might be used as a ligature, to cause self-harm or harm to other prisoners, and even that they might be used to brew “hooch” (alcohol); and the risk of the prisoner being given access to the internet to order “out-size” women’s clothing from a specialist supplier. In discussing *Green*, Chapter 5 (presentation of the self) will argue that a highly precautionary approach to risk management is incompatible with transgender prisoners’ rights, and undermines the stated aim of prison policy to permit and enable transgender prisoners to live and dress in their gender. It will also illustrate how meeting transgender prisoners’ needs/rights may be interpreted by other prisoners as special treatment, and therefore unfair. This may unsettle the equilibrium of the prison regime.

Third and finally, transgender prisoners’ rights themselves represent an organisational risk to the prison, in terms of potential litigation, possible coroner’s inquests, negative media coverage, and associated financial and reputational costs to the prison. Noel Whitty refers to these organisational risks collectively as “Legal Risk +” (2011), and proposes that prisons should be encouraged to think of human rights themselves in terms of organisational risk. Although recognising that such an instrumentalist approach to human rights might be controversial, he argues that encouraging prisons to absorb human rights into their risk management strategies, as a form of organisational risk, may produce reform. This thesis will reflect on the potential of Whitty’s argument in relation to the realisation of transgender prisoners’ rights. Notably, Whitty’s paper focuses on the organisational

(particularly legal and reputational) risks involved where the prison *fails* to meet prisoners' rights. However, this thesis will also argue that the risk of "human rights backlash", where the prison *realises* transgender prisoners' rights, is relevant in the current political climate. As Chapter 6 (medical treatment) illustrates, for example, the public continues to regard transgender prisoners as undeserving of gender reassignment surgery on the NHS, and undeserving of government-funded legal aid to bring complaints to court. In the final analysis, the very emergence of human rights in this field can be regarded as a risk for prison administration, changing not only the way in which things have previously been *done*, but also fundamentally challenging the way in which the sex/gender order and transgender prisoners have previously been *understood*. In this sense, human rights discourse presents a risk to the previous power/knowledge terrain.

Conclusion

This chapter set out the three theoretical "pillars" which structure the thesis, in its examination of the transformative potential, and limits, of human rights-based reforms, to transform the daily lives of transgender prisoners. It has shown how a Foucauldian-based approach links the three field of analysis together. First, the chapter addressed the way in which this thesis will approach the law and human rights not simply as a sovereign power, but also as a productive power. It drew on post-Foucauldian legal scholarship to argue that law has powerful norm-producing effects on the way that society thinks, speaks and acts about sex/gender and transgender people/prisoners. It has argued that human rights discourse has considerable political purchase and transformative potential in contemporary society, but has also warned that recourse to rights may involve a cost. The second part of the chapter drew on feminist, queer and transgender theory on the constitution,

performativity and embodiment of gender. Following Butler (2004), it argued that dominant scripts of sex/gender have restricted the possibilities of gendered lives, and rendered certain trans/gender lives and bodies “culturally unintelligible”, and hence, institutionally unintelligible in the prison. It also addressed the trans-exclusionary radical feminist discourse which argues that transgender women’s bodies present a physical and psychological risk to cisgender women in “women-only” spaces. Finally, the third part of the chapter introduced the concept of risk as a particular way of envisaging problems and formulating techniques of governance to respond to those problems. It argued that, in contemporary “risk society” (Beck 1992) and under the continuing conditions of “the new penology” (Feeley and Simon 1992), risk logic pervades prison thinking at every level and that prisoners’ needs and rights tend to be translated into, and managed, as risk. Approaching risk primarily from a governmentality perspective, the chapter argued that transgender prisoners represent a fundamental risk to the established sex/gender order of the prison. Against a broader backdrop of the risk society and its associated blame culture, it also contended that prisons are likely to adopt a highly precautionary approach towards risk-assessment and risk-management in relation to transgender prisoners, and the new, complex and uncertain risks that they pose.

The rest of the thesis will consider how imagining and moulding transgender prisoners in terms of risk subjects them to regimes which interrogate their gender authenticity and their bodies, and that whilst some of the risks may be real and need to be managed, a highly precautionary and defensive approach to risk comes at a high cost in terms of the liveability of transgender prisoners’ lives. This begs the question whether law, and its “new” human rights discourse, is capable of counteracting the “inexorable logic of risk” (Ericson and

Haggerty 1997) in prison governance, and specifically, whether it has the power to ensure that prison policies which promise to respect transgender prisoners' rights and to meet their needs do not become empty rhetoric.

The next chapter examines the emergence of this "new" human rights discourse in respect of transgender prisoners. It traces the developments in both transgender people's rights and prisoners' rights, which cumulatively led to judicial recognition of the transgender prisoner as a human-rights bearer in **AB** (2009), and subsequently to PSI 2011, the first formal prison policy on "the care and management of transsexual prisoners".

Chapter 3: The Emergence and Development of Transgender Prisoners' Human Rights

This chapter shines a spotlight on law and, specifically, the emergence and development of human rights in the legal governance of sex/gender and transgender people. It picks up law's story from Chapter 1, which concluded with an analysis of law's first direct encounter with, and legal construction of, the "transsexual" of medical science, in *Corbett* (1970). This chapter traces the slow but incremental gains made post-*Corbett* in law's recognition of transgender people's human rights and prisoners' human rights and shows how these developments cumulatively ameliorated the formal legal status of transgender *prisoners* and led to their explicit judicial recognition as human rights-bearers in *AB* (2009). Building on the theoretical framework set out in Chapter 2, the chapter analyses these developments both from a traditional legal perspective, i.e. in terms of judicial decisions made and legislation enacted, and from a Foucauldian perspective, looking at law as a discourse with power/knowledge effects. Through this two-pronged approach, this chapter seeks to highlight both the transformative power and negative discursive effects which recourse to human rights has entailed, and continues to entail, in relation to transgender law reform, and how this, in turn, has percolated through to transgender prisoners.

This chapter is divided into five parts. First, the chapter examines human rights-based shifts in the legal conceptualisation of sex/gender, highlighting the significance of the European Court of Human Rights' decision in *Goodwin v UK* and *I v UK* [2002] ECHR 28957/95 and 25680/94 (hereinafter *Goodwin*),⁸⁴ which led to the Gender Recognition Act 2004. Although

⁸⁴ Two separate applications were co-joined for the European Court's consideration.

the Gender Recognition Act makes legal space for (some) transgender people, the section critiques law's continued insistence of the "truth" of the gender binary, and its reliance on a pathologising discourse of "gender dysphoria". It also argues that, despite the Gender Recognition Act's ostensible delinking of legal gender recognition from bodies, bodies still matter in law. The second part traces developments in the protection of transgender people against discrimination from the European Court of Justice's decision in *P v S and Cornwall County Council* [1996] IRLR 447, through to the Equality Act 2010. This part argues that, underneath the surface of the Equality Act's progressive provisions, transgender people's gender performance is still not regarded as authentic as, or therefore equal to, cisgender people's, and that transgender bodies (especially women's bodies) are still considered risky. In part three, two key developments in prisoners' rights are discussed; first, the recognition of prisoners' right to challenge prison administration decisions through judicial review proceedings, and second, the introduction of a policy of NHS-equivalence in prisoner healthcare. The chapter shows how this new healthcare policy, together with the Court of Appeal's ruling in *NW Lancashire Health Authority v A, D & G* [1999] EWCA Civ 2022 ("*NW Lancashire*"), opened the way for prisoners to access gender reassignment surgery, but also reproduced transgender people as mentally disordered. Fourth, the chapter gives an overview of law's first direct encounter with a transgender prisoner, in *AB* (2009), both to illustrate the cumulative effects of the substantive and procedural human rights-based developments outlined in the chapter, and to provide a window onto law's first construction of the transgender prisoner as a human rights-bearer. However, it also highlights the emerging tension between human rights and risk in the prison's governance of the transgender prisoner. The fifth and final part provides an introduction to the

“transsexual prisoner” as the subject of PSI 2011, the first official prison policy on *The Care and Management of Transsexual Prisoners*.

The Legal Recognition of Transgender People’s Gender

Corbett’s restrictive, biological definition of sex⁸⁵ defined the legal landscape for transgender people in England and Wales for over thirty years. Adopting the position that “transsexuality” is a “psychological disorder” curable by “sex change surgery”, it entrenched and perpetuated a pathologising, medicalised model of transgender people. By refusing to recognise transgender people’s medically reassigned gender in law, it rendered them “gender outlaws” (Bornstein 1994/2016).

Goodwin and I v UK

Corbett was finally overturned by the European Court of Human Rights in **Goodwin** (2002). Prior to **Goodwin**, transgender activists had brought a number of complaints to the European Court about the legal status of transgender people in the UK,⁸⁶ but the European Court had repeatedly held that the Government’s refusal to alter the register of births or issue a new birth certificate to transgender people to reflect their changed sex/gender fell within its margin of appreciation, and did not breach the European Convention on Human Rights.⁸⁷ Nevertheless, the European Court repeatedly signalled its concern about the

⁸⁵ See Chapter 1.

⁸⁶ **Rees v UK**, judgment of 17 October 1986, Series A, no 106; **Cossey v UK**, judgment of 27 September 1990, Series A, no 184; **X, Y and Z v UK**, judgment of 22 April 1997, *Reports of Judgments and Decisions 1997-11*, and **Sheffield and Horsham v UK**, judgment of 30 July 1998, *Reports of Judgments and Decisions 1998-V*.

⁸⁷ Under this general principle of European Convention law, states enjoy a certain amount of discretion in giving domestic effect to European Convention rights, subject to the supervision of the European Court. The concept was developed through the jurisprudence of the European Court, and is currently pending formal recognition in the Preamble to the European Convention (*Protocol No.15, Amending the European Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 24 November 2013*).

situation of transgender people in the UK and asked the Government to keep the need for appropriate legal measures under review – a request to which it paid scant regard. In 1999, the Government did establish an Interdepartmental Working Group on Transsexual People to consider the issue, but this was mere window-dressing; it took no action whatsoever on any of the Working Group’s recommendations (*Bellinger v Bellinger* [2001] EWCA Civ 1140, paras 95-69). Whilst *Goodwin* was awaiting the European Court’s consideration, *Bellinger v Bellinger* (*ibid*) was progressing through the domestic courts. This comprised a direct challenge to *Corbett’s* definition of legal sex for marriage purposes. The Court of Appeal lamented the “profoundly unsatisfactory nature of the present position” (*ibid*, para 109), particularly in light of the European Court’s repeated calls for the Government to review the law, but concluded that it was for Parliament, not the courts, to reform the law, and that this should be done in a comprehensive, rather than a piece-meal fashion. The House of Lords’ judgment, on appeal, was pending when the *Goodwin* ruling was announced (*Bellinger v Bellinger* [2003] UKHL 21).

In *Goodwin*, the European Court finally took the view that “the sands of time have run out” for the UK Government (*Bellinger v Bellinger* (2003), para 21). It held that “the situation as it has evolved no longer falls within the UK’s margin of appreciation” (*Goodwin*, para 120), but comprised a violation of the applicants’ right to marry (article 12) and right to respect for private life (article 8) of the European Convention. In the twenty first century, it remarked, “the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable” (para 90).

For this thesis, the European Court’s interpretation of the right to respect for private life is particularly important. It observed that the “very essence of the Convention is respect for

human dignity and human freedom” (para 90) and that, “under Article 8 ... in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, *including the right to establish details of their identity as individual human beings*” (*ibid*, emphasis added). Emphasising the need for a “dynamic” approach to European Convention rights and the “crucial importance” of interpreting and applying the Convention in a manner which “renders its rights practical and effective, not theoretical and illusory” (para 74, see also para 92), the European Court held that the right to respect for private life includes the right to respect for establishing one’s “sexual identity” (what is now more usually termed “gender identity” in the human rights sphere).⁸⁸

As article 8 is not an absolute right, the European Court had to decide first, whether the Government’s refusal to legally recognise the applicants’ sex/gender had interfered with their private lives, and secondly, whether or not such interference was justified. On the first count, it held that a “serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity” (para 77). The “stress and alienation” arising from the disparity between the social and legal position of transgender people could not be regarded as “a minor inconvenience”, as the Government had suggested, but placed transgender people in an “anomalous position”, which could lead to experiences of “vulnerability, humiliation and anxiety” (*ibid*). The European Court was particularly struck by the fact that the government funded gender reassignment surgery

⁸⁸ International and regional human rights bodies, including the United Nations and the Council of Europe, now refer to “gender identity”. On 30 June 2016, under a historic resolution entitled “Protection against violence and discrimination based on sexual orientation and gender identity”, the UN Human Rights Council mandated the appointment of an independent expert on the subject (A/HRC/RES/32/2), building on two earlier resolutions on “Human rights, sexual orientation and gender identity” in 2011 (A/HRC/RES/17/19) and 2014 (A/HRC/RES/27/32). The internationally influential “Yogyakarta Principles” on the *Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (2006) also adopt this term.

through the NHS (see Chapter 6), but that such gender reassignment was not “met with full recognition in law”, which appeared “illogical” (para 78).

As to whether the interferences with the applicants’ private lives were justified, the European Court reviewed the Government’s public interest arguments for maintaining the *status quo*. It did not “underestimate the difficulties posed or the important repercussions” which its judgment would entail, not only in the field of birth registration, but also in other areas, including the criminal justice system (para 91). Nevertheless, it found that “society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost” (para 91).

Finding that the Government had unlawfully interfered with the applicants’ right to privacy by not legally recognising their medically reassigned sex/gender, the European Court left “the appropriate means for achieving recognition of the right”, i.e. the particular mechanics and criteria for legal recognition, at the government’s discretion (para 93). Subsequently, in ***Bellinger v Bellinger*** (2003), the House of Lords made a formal declaration that UK law was incompatible with the European Convention, but determined that it was beyond its judicial powers to interpret the Matrimonial Causes Act 1973 in line with ***Goodwin***, and that compliance could only be achieved through legislation. Adopting the same position as the Court of Appeal, the House of Lords felt that it was not clear in which circumstances gender reassignment should be recognised for the purposes of marriage, and, in particular, questioned whether the “completion of some sort of surgical intervention should be an essential prerequisite” (para 41). These were “deep waters” and the House was “not in a position to decide where the demarcation line could sensibly or reasonably be drawn”

(paras 42 and 43), nor could it determine what other pre-conditions should be attached to legal gender recognition. Secondly, recognition of gender reassignment for the purpose of marriage was “part of a wider problem”, which “should be considered as a whole and not dealt with in a piecemeal fashion” (para 45). Referring to other areas where a distinction is drawn between people on the basis of gender, it specifically mentioned “prison regulations” (*ibid*).

Gender Recognition Act 2004

In order to bring UK law in compliance with the European Court’s ruling in *Goodwin*, the Government enacted the Gender Recognition Act 2004. Whilst many now consider the Act out-dated (WESC 2016, para 30), and the Government has announced a consultation on its reform (Government Equalities Office 2017), at the time, it was internationally groundbreaking, and represented a major milestone in the recognition of transgender people’s rights. It marked the culmination of a long campaign by transgender advocacy groups to achieve legal recognition of transgender people’s gender, and for recognition not to be predicated on gender reassignment surgery or sterilisation, as was (and remains)⁸⁹ common in many jurisdictions. The Gender Recognition Act enables transgender people to apply to the Gender Recognition Panel (comprising legal and medical members), for legal recognition of their gender, if they are medically diagnosed with “gender dysphoria”, have lived in their

⁸⁹ On 6 April 2017, the European Court of Human Rights declared that a requirement of infertility in French gender recognition law is contrary to article 8 of the European Convention (*A.P., Garçon, Nicot v France*, App Nos 79885/12, 52471/13 et 52596/13). This ruling will affect 22 European states which still make sterilisation a pre-condition to legal gender recognition (Council of Europe 2017). The European Court held, however, that it was legitimate to require the applicant to provide evidence of the “existence and persistence” of the “syndrome of transsexuality”, and for the state to be entitled to order a medical report, as pre-conditions to gender recognition. (Cannoot 2017. Judgment in French.)

“acquired gender” for at least two years, and intend to continue to do so until death (s. 2).⁹⁰

A successful applicant is issued with a GRC, with the legal effect that “the person’s gender becomes *for all purposes* the acquired gender” (section 9, emphasis added).

The Gender Recognition Act ostensibly implemented a radically transformative shift in law’s regulation of sex/gender, by prioritising gender (psychology) over sex (biology and bodies).

As Whittle and Turner have argued, through the Gender Recognition Act, “gender identity becomes and *defines* legal sex” (Whittle and Turner 2007: para 1.4, emphasis added).

Whilst, for Sandland, this shift “from sex to gender as the primary mechanism by which men and women are differentiated from each other” is “a distinctly Butlerian approach which has been institutionalised and generalised in UK law” (2005: 47), as, under the Gender Recognition Act, “gender is the dynamic. Sex if anything, is the product” (*ibid*).

As noted above (see Chapter 2), this legal development was internationally pioneering at the time,⁹¹ as it did not require a transgender person to undergo any form of bodily transformation (whether through hormone treatment or gender reassignment surgery) in order to obtain legal recognition of their gender. This led Sandland to conclude that the Gender Recognition Act constructs a “radical divide between the public and private” (2005: 47). The Act, he argues, is concerned only with a “public politics of the presentational, the proper appearance of the gendered body, which trades only on that which is on public display. That which is below the surface, namely the body of the person in question, is deemed beyond the sphere of public regulation” and “for the purposes of the governmentality of gender, the body, and its biology does not exist” (*ibid*: 52).

⁹⁰ This is the standard route. Alternative routes also exist, see <https://www.gov.uk/apply-gender-recognition-certificate/overview> (last visited 1 Dec 2017).

⁹¹ The Irish Gender Recognition Act (2015) is now at the forefront of developments. Like Argentina, Denmark, Malta and Colombia, it allows transgender people to self-determine their gender, outside any medical process.

Sharpe cautioned at the time that Sandland's conclusion might be premature (2007: 82). Whilst the Gender Recognition Act ostensibly dispenses with the body, she contended, there is a disjunction between the Act's form and substance, which belies the transformative potential of the reform moment. The Gender Recognition Act, she argues, remains concerned with anatomically correct bodies, and law continues to construct the "truth" around sex in terms of a biological past. This thesis will argue that, however hard law tries, it cannot seem to erase these "truths" in sex-segregated sites such as the prison, where anatomically correct bodies, and certain biological features determined at birth, still very much matter.

Bodies still matter

As Sharpe has highlighted (2007), despite the apparent irrelevance of sexed bodies to the Gender Recognition Act's definition of legal gender, there is clearly an underlying expectation that some surgical treatment entailing modification of sexual characteristics will take place. This expectation is woven into the fabric of the Act's application process. The standard application route requires a diagnosis of gender dysphoria and two medical reports, one of which must detail what surgery has taken place or is planned (ss. 3(3) and 3B(4)). Where the applicant has *not* undergone or does *not* plan to undergo surgery, the Guidance Notes states that the medical report must include an explanation for *why* that is the case (HM Courts and Tribunals Service: 2014: 14). Thus, there is an assumption that surgery will take place and an onus on the applicant to explain, or arguably *justify*, why they do not intend to pursue surgery. The recently added alternative route⁹² for those who wish

⁹² Introduced by virtue of the *Marriage (Same Sex Couples) Act* 2013 (the GRA previously required a married transgender person to dissolve their marriage before they could obtain a full GRC).

to remain in a marriage post-certification requires a diagnosis of gender dysphoria *or* evidence of surgery to change sexual characteristics. Thus, gender reassignment surgery is taken in and of itself as evidence of gender dysphoria, the “truth” is written on the person’s body, and their authenticity is effectively proved by their willingness to undergo painful, complex surgery.

This interpretation of the Gender Recognition Act is given credence in ***Carpenter v Secretary of State for Justice*** [2015] EWHC 464 (Admin). In this case, the applicant challenged, by way of judicial review proceedings, the lawfulness of the Act’s requirement to produce evidence to the Gender Recognition Panel of surgery undertaken. The applicant had undergone surgery, but did not want to disclose details to the panel. She argued that since the Act did not require a person to undergo surgery in order to obtain a GRC, the Panel’s insistence that she produce evidence of her medical history, detailing the surgery she had undergone, constituted an unlawful interference with her private life, under article 8 of the European Convention. The High Court rejected her application, on the basis that “undergoing or intending to undergo surgery” is “*overwhelming evidence* of the existence now or previously of gender dysphoria and of the desire of the applicant to live in the acquired gender until death” (para 23, emphasis added). Where an applicant has undergone surgery, or plans to do so, the court held, “that fact is highly relevant, *if not central*, to his or her application” (para 24). ***Carpenter*** therefore underscored the centrality of gender reassignment surgery to legal gender recognition, notwithstanding the Gender Recognition Act’s apparent eschewal of the body.

Past biological “truth” as the unassailable “truth” of gender

Sharpe has further argued, that despite its ostensible shift from sex to gender, the Gender Recognition Act continues to construct a person’s past “biological” sex as the unassailable “truth” (2007). She locates this in its amendment to the Matrimonial Causes Act 1973, to provide that non-disclosure that a person was “previously of another gender” is ground for nullifying a marriage (2007: 74). Whilst Sharpe situates her analysis in the context of marriage (see also 2012),⁹³ this thesis will argue that *Corbett’s* legally-constructed concept of a past biological “truth” continues to have considerable normative power in society’s determination of “women-only” spaces, including women’s prisons (as argued by Westbrook and Schilt in relation to gender-segregated spaces more broadly, outside the prison context (2014)).

Persistence of binary gender order

The Gender Recognition Act also demonstrates how, in the very moment of reform, law reproduces and entrenches normative arrangements of power in the regulation of gender (Foucault 1978). Despite the significant progress achieved by the Gender Recognition Act in enabling (some) transgender people to obtain legal recognition of their gender, the Act has been rightfully criticised for reproducing the binary gender order, or what Butler refers to as the “reification of gender” (1990:171), as it recognises only two fixed genders (men and women), and legitimises only complete and permanent crossings from one gender to the

⁹³ The legal preoccupation with “correct” bodily anatomy and the past, biological “truth” of sex has also manifested itself in a series of criminal convictions for so-called “gender fraud”. Six such cases have been reported since 2012, in which the defendants were found to have fraudulently represented themselves as male, and therefore failed to obtain valid consent to sexual relations, on the basis that they did not disclose their “true” sex (both biological and anatomical) to the women they were intimately involved with. For further analysis of these cases, see Sharpe 2014, 2015, 2016, 2017.

other.⁹⁴ As discussed in part 5 below, this binary model of gender is faithfully reproduced in PSI 2011, although PSI 2016 has since made a radical break from law's binary conceptualisation of gender, and explicitly acknowledges the existence of prisoners with fluid and/or non-binary genders, and makes some provision for their needs.

The Gender Recognition Act exemplifies how law, in regulating gender, is a productive power, it has the power to produce – to demarcate, differentiate – the bodies it governs (Butler 1993: xii). That is, law does not merely *represent* the subject, it *produces* the subject. This political construction of the subject proceeds with both legitimising and exclusionary aims, which are then concealed and naturalised through law (Foucault 1978; Butler 1990). Thus, in granting legal recognition to *certain* transgender people's gender, the Gender Recognition Act appears transformative, but underneath, it creates "domains of exclusion" (Butler 1990). Like the subject of Butler's analysis (i.e. the heteronormative "woman" represented by traditional feminist politics), the transgender subject "turns out to be discursively constituted by the very political system which is supposed to facilitate its emancipation" (Butler 1990: 2). As Sandland has thus observed, the Gender Recognition Act "demonstrates the truism that any act of inclusion also excludes" (2005: 45); the Act's requirement for permanence and completeness in a person's transition from one gender category to the other separates the "lifers from the rest" (50). Any gender identity "between, above, below, and most significantly beyond a desire for life-long gendered conventionality", Sandland argues, remains not just "unrecognisable" but "unthinkable" within the new horizons set by the Gender Recognition Act, leaving "an abyss as deep and wide as ever it was, between conformity and deviance, or self and other" (*ibid*).

⁹⁴ Under s.2(1)(c), an applicant must intend to live in the "acquired gender" "until death", and swear this in a statutory declaration.

Retention of a medical model of “gender dysphoria”

Finally, criticism has been levied at the Gender Recognition Act’s insistence on a medical diagnosis of “gender dysphoria” as a prerequisite for legal gender recognition (e.g. Cowan 2005, 76-77; Sandland 2005: 49; Sharpe 2007; WESC 2016: paras 44-45). In July 2017, the Government announced a consultation on the Gender Recognition Act, which will consider *inter alia* de-medicalisation of the process (Government Equalities Office 2017). The consultation has not yet been launched. The imperative of a gender dysphoria diagnosis has a number of implications. First, it characterises the rights of transgender people as flowing from a diagnosis of a mental illness. Although the NHS specifically states that gender dysphoria is not a mental illness (NHS 2017), the diagnosis is associated with pathologising understandings of transgender people, and continues to carry negative, stigmatising connotations. Indeed, “gender dysphoria” is still categorised as a psychiatric condition in the internationally influential *Diagnostic and Statistical Manual of Mental Disorders V* (APA 2013) and the World Health Organisation’s *International Classification of Diseases*.⁹⁵ Second, by making legal recognition of a person’s gender conditional upon a diagnosis of gender dysphoria, the Gender Recognition Act retains the medical profession’s power of gatekeeping. The additional requirement that a person must live in their gender for two years before applying for a Gender Recognition Certificate also “points to gendered rites of passage, issues of passing and the negotiation of medical gatekeepers” (Sharpe 2007:71).

This thesis will argue that these gatekeeping issues are exacerbated for transgender

⁹⁵ The APA has explained its decision not to remove gender dysphoria from DSM V as a psychiatric condition on the basis that it would impede transgender people’s access to medical care, as a diagnosis is required for medical insurance purposes in many countries (APA 2013). On the human rights implications, see Green *et al* (2011). In the forthcoming 11th Revision to the *International Statistical Classification of Diseases and Related Health Problems* (ICD-11), due 2018, the World Health Organisation has proposed to remove “gender dysphoria” from the “Mental and Behavioural Disorders” chapter, and to include “gender incongruence” in a new, non-psychiatric chapter, entitled “Certain conditions related to Sexual Health” (WHO 2015).

prisoners, both as regards their ability to access a gender specialist and therefore obtain a diagnosis of gender dysphoria, and in demonstrating to the Gender Recognition Panel (and clinicians) that they have satisfactorily lived in their gender, given the restrictions of prison life (see Chapter 6).

The Inclusion of Transgender People under Equality Law

As with gender recognition, advances in transgender people's protection against discrimination were achieved, first, at the European level. This then prompted domestic reform. The pivotal judgment is *P v S and Cornwall County Council* [1996] IRLR 447 ("*P v S*"), in which the European Court of Justice held that the Equal Treatment Directive's⁹⁶ prohibition of "sex discrimination" encompassed discrimination based on a person's gender reassignment. The applicant had been dismissed when she informed her employers that she had started to medically reassign her gender. Under established English case law (*White v British Sugar Corporation* [1977] IRLR 121), the employment tribunal held that her employer was not liable for sex discrimination under the Sex Discrimination Act 1975, as they were able to demonstrate that they would also have dismissed a transgender man in these circumstances (the so-called "equal misery principle").⁹⁷

In an enlightened opinion to the European Court of Justice (*P v S* [1996] IRLR 447), Advocate General Tesouro regarded as "obsolete" the idea that the law should protect a woman who has suffered discrimination in comparison with a man, or *vice versa*, but should deny

⁹⁶ Council Directive 76/207/EEC of 9 February 1976. The European Court of Justice oversees the law of the European Union, and is based in Luxembourg. It is different from the European Court of Human Rights, which has jurisdiction over the European Convention on Human Rights, and is based in Strasbourg.

⁹⁷ This term originates from *Grant v South West Trains Ltd* Case C-249/96 [1998] ECR I-621 (1999), in which the European Court of Justice held that the train company's rules, which permitted opposite-sex but not same-sex partners of employees to receive travel perks, did not discriminate against Ms Grant on the grounds of sex, as the rules applied to both female and male employees with same-sex partners.

protection to those who are discriminated against because they fall outside the traditional man/woman dichotomy (para 17). In his view, it would be a “quibbling formalistic interpretation” and “a betrayal of the true essence” of the fundamental right to equality (para 20) to maintain that the unfavourable treatment suffered by P was not on grounds of sex. The European Court of Justice subsequently concluded that the Equal Treatment Directive applied to discrimination arising from gender reassignment, since “such discrimination is based, essentially if not exclusively, on the sex of the person concerned” (para 21). However, it retained a binary model of gender and the need for a male/female comparator, adding that:

Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably *by comparison with persons of the sex to which he or she was deemed to belong, before undergoing gender reassignment* (*ibid*, emphasis added).

The test was therefore not whether P was discriminated against because she fell outside the traditional male/female dyad (as proposed by the Advocate General), but whether P would have been dismissed if she remained male and had not undergone gender reassignment surgery. Whilst this test satisfactorily addressed the issue at hand, it was recently applied in **Green** (2013), leading the court to reach the perverse conclusion that a transgender woman prisoner housed in a men’s prison had not been discriminated against by being denied the same access to female clothing and other items as other female prisoners, since her situation should be compared to persons of the sex to which she belonged *before* gender reassignment, i.e. male prisoners (see Chapter 5).

The European Court of Justice’s ruling in *P v S* was subsequently formalised in the Sex Discrimination (Gender Reassignment) Regulations 1999 (now replaced by the Equality Act 2010, see below),⁹⁸ which prohibited employment-related discrimination against a person on the ground that they “intend to undergo, are in the process of undergoing or have undergone gender reassignment”. A person did not need to be undergoing gender reassignment *surgery* to benefit from their protection, but they did need to be under medical supervision.⁹⁹ This reproduced the medico-legal regulation of transgender, established in *Corbett* (1970).

Notably, the 1999 Regulations incorporated a series of exemptions into the Sex Discrimination Act,¹⁰⁰ which limited the law’s protection of transgender people against discrimination. The “genuine occupational requirement” exemption exposes the first cracks in law’s apparent extension of equal treatment to transgender people. The exemption explicitly applied, for example, to employment involving statutory powers to conduct intimate bodily searches,¹⁰¹ employment involving “physical or social contact” within a private home, and employment involving the provision of personal services to “vulnerable individuals” (undefined). This exemption perpetuates the idea that transgender people’s gender is inauthentic and that close physical and social contact with them is risky and potentially harmful, particularly for “vulnerable individuals” (for a detailed critique, see Whittle 2002: 120-130). Understanding this background is essential to the later analysis

⁹⁸ It was first applied domestically in the UK by the Employment Appeal Tribunal in *Chessington World of Adventures v Reed* [1997] IRLR 556.

⁹⁹ Sex Discrimination Act 1975, s.82 (as amended).

¹⁰⁰ Sections 7 and 19.

¹⁰¹ In *A v Chief Constable of West Yorkshire Police* [2004] UKHL 21, however, the House of Lords held that the Chief Constable’s rejection of a transgender woman’s application to become a police constable was discriminatory under the Sex Discrimination Act 1975, on the basis that she should be treated as female for the purpose of statutory duties which require that searches are conducted by a constable of the “same sex” as the person searched.

that transgender women prisoners (in particular) have consistently been constructed as a risk to “vulnerable” cisgender women prisoners, in the close and confined space of the prison (see Chapter 4).

The broadening of law’s protections against discrimination

It was not until 2008 that transgender people became legally protected against discrimination beyond the employment sphere. Amongst other things, the Sex Discrimination (Amendment of Legislation) Regulations 2008 prohibited discrimination in the provision of services, including public services. This is highly significant for this thesis, as it was not until 2008 that it became unlawful for the prison authorities to discriminate against transgender prisoners.

Only two years later, the Equality Act 2010 consolidated and expanded all previous anti-discrimination laws into a single equality act. Under the Equality Act, “gender reassignment” is included as a self-standing protected characteristic, separately from “sex”, for the first time. As well as prohibiting direct and indirect discrimination, the Equality Act prohibits harassment and victimisation against transgender people, and against people perceived to be transgender. This additional protection against “discrimination by perception” is important, but does not protect gender-fluid, non-binary or other gender non-conforming people against discrimination, unless they are perceived to be “transsexual” (WESC 2016, paras 95-100).

Whilst the Equality Act retains the gender binary (apart from scope for discrimination by perception), it no longer requires transgender people to be under medical supervision to benefit from its protections. This is a momentous legal development, with both

instrumental and symbolic effects. According to its Explanatory Notes, the Equality Act regards gender reassignment as a “personal and social process rather than a medical process” (para 43). Once a person starts living in their gender, they can benefit from its protections. Thus, the Equality Act abandoned the medico-legal model of transgender people which has dominated law’s construction of transgender people since **Corbett** (1970) and has shaped equality law since the 1999 Regulations first incorporated discrimination based on “gender reassignment” into the Sex Discrimination Act. The thesis will show that this development has been transformative for prison policy.

Unfortunately, however, the Equality Act is couched in medical language, using the terms of reassigning “sex”, changing “physiological or other attributes of sex” and “transsexual” (section 7), which all imply that medical gender reassignment is required, notwithstanding the Explanatory Notes’ assurances to the contrary. As WESC has remarked, this “outdated and confusing” language has given rise to an “apparently widespread misapprehension that the Act only provides protection to those trans people whose transition involves medical ‘gender reassignment’ treatment” (2016, paras 92-93). It also found this misapprehension to be apparent in the prison system and recommended that the language should be amended to clearly reflect the legal position (*ibid*: para 108).

Biology and normative gender performance still matter

Despite the advances in the protection afforded to transgender people by the Equality Act, law’s historical reluctance to recognise the authenticity of transgender people’s gender, and its tendency to revert to the “truth” of biological sex, resurfaces in its accompanying Explanatory Notes and the Equality and Human Rights Commission’s Codes of Practice. This is troubling. The Equality Act continues to allow employers to exclude transgender people

from applying for a job if they can demonstrate that the requirement to be cisgender is genuine, proportionate and in pursuit of a legitimate aim (schedule 9). The Explanatory Notes give as an example of a permitted “genuine occupational requirement”, the case of “a counsellor working with victims of rape” who “*might have to be a woman and not a transsexual person*, even if she has a Gender Recognition Certificate, in order to avoid causing them further distress” (para 789, emphasis added). This comment implies that a transgender woman is not a woman, even if she is legally certified as one, and perpetuates the belief that transgender women represent a source of distress for cisgender women who have experienced sexual violence. It constructs transgender women as men, and indiscriminately associates them with male violence. This viewpoint is clearly evident in historical and contemporary responses to transgender women prisoners who are allocated to the female prison estate.

Finally, the Explanatory Notes and Codes of Practice imply a “passing privilege” in relation to transgender people’s access to the Equality Act’s protections. This has been heavily criticised (see e.g. WESC 2016: paras 110-132). The Explanatory Notes state, for example, that a transgender man who has decided not to have surgery because he “successfully passes as a man” will be protected by the Act (para 23). Meanwhile, service providers are advised that, in providing separate sex or single sex services, they should be aware that “where a transgender person is visually and for all practical purposes indistinguishable from a non-transgender person of that gender, they should normally be treated according to their acquired gender” (Equality and Human Rights Commission 2010: para 13). These guidelines imply that the Act privileges transgender people who can be read as cisgender over those

who, because of their non-normative gender presentation or likelihood of being read as transgender, perhaps have greater need of its protection (WESC 2016: para 114).

Despite these various drawbacks, the Equality Act proved pivotal in finally securing an official prison policy on transgender prisoners, by virtue of its new public sector equality duty. Traditionally, anti-discrimination law has entailed only negative obligations on the state, i.e. the requirement not to discriminate. Legislative developments in the UK have since placed a positive “equality duty” on public authorities to eliminate discrimination in the fields of race (2001), disability (2006) and gender (2007). The Equality Act’s single “public sector equality duty” specifically extends to gender reassignment (s.149). Since both state-run prisons and prisons contracted to the private sector comprise “public authorities” within the terms of the Equality Act (schedule 19), they are bound by this new duty.

Broadly, the three limbs of the public sector equality duty, as applied to the current context, are to “consider taking steps”: (1) to eliminate unlawful discrimination and harassment against transgender prisoners; (2) to advance equality of opportunity between transgender and cisgender prisoners; and (3) to foster good relations between transgender and cisgender prisoners (s.149(1)). The second duty is given further legislative content, and requires prison authorities to consider taking steps “to meet the needs” of transgender prisoners, where these are different from the needs of cisgender prisoners (s. 149(3)). The voluntary sector organisations interviewed for the purpose of this project all shared the view that it was this new public sector equality duty (even if it is not a strongly worded duty, see Fredman 2011 for a detailed analysis of the public sector equality duty), that finally compelled NOMS to introduce its first official policy on transgender prisoners. This is borne

out by the timing of PSI 2011, which came into effect on 14 March 2011, only three weeks before the public sector equality duty came into force on 5 April 2011.

Advances in Prisoners' Rights

Having discussed legal human rights developments in relation to transgender people, the next section now considers two crucial developments in the prisoners' rights field, namely, their right to access the courts and to challenge decisions of the prison administration through judicial review proceedings, and their right to NHS-equivalent healthcare, both of which have been important for transgender prisoners.

Access to the courts

From the early twentieth century, prisoners could complain internally about their treatment to the governor and/or lodge a complaint with the prison's board of visitors or visiting committee, but it was not until the Crown Proceedings Act 1947 that prisoners were entitled to bring legal action against the prison. Even then, the Prison Commission established itself as gatekeeper, considering itself "free to decide on the merits of each case as to whether or not a prisoner should be allowed to initiate legal proceedings or seek legal advice" (Fox 1952:220). In the rare instance that a prisoner was given permission to pursue a legal complaint about their treatment, the courts tended to adopt a "hands-off" approach. Indeed, many judges openly questioned the role of the courts in overseeing the prison administration. Examples are abundant. In *Arbon v Anderson* [1943] KB 252, for example, the court held that a prisoner had no right of remedy against the Secretary of State for a breach of the Prison Rules, since, as Goddard LJ stated (at 255), "it would be fatal to all discipline in prisons if governors and warders had to perform their duty always with the fear

of an action before their eyes if they in any way deviated from the rules". In *Becker v Home Office* [1972] 2 ALL ER 676, Lord Diplock similarly declared (at 685) that "if the courts were to entertain actions by disgruntled prisoners, the governor's life would be made intolerable" and "the discipline of the prison would be undermined".¹⁰² By the late 1970s and early 1980s, however, the tide started to turn. As in the field of transgender rights, a European Court of Human Rights decision was central to domestic legal reform.

In *Golder v UK* [1975] 1 EHRR 524, the European Court of Human Rights affirmed for the first time that the right of access to the courts guaranteed in article 6 of the European Convention applies to prisoners and held that the UK Government had breached the Convention by denying a prisoner access to a lawyer, and therefore access to the courts. It took another decade for the European Court's decision in *Golder v UK* to be firmly established in domestic law. The break-through came in *ex parte St Germain* [1979] 1 All ER 701, when the courts first spoke of their role as "the ultimate custodians of the liberties of the subject, whatever his status" (at 716). As Quinn has observed, "if this was not 'hands on', it at least heralded that the courts were prepared to touch prisoners' rights with their fingertips" (1999: 3). Later cases gave further shape and definition to prisoners' right to access the courts, and removed various barriers placed in their way by the prison administration. In *Raymond v Honey* [1983] AC 1 and *ex parte Anderson* [1984] QB 778, prisoners' unfettered right to the courts was finally realised. *Raymond v Honey* also established the fundamental tenet in the prisoners' rights field that "a convicted prisoner retains all civil rights which are not taken away expressly or by necessary implication" (at 10), i.e. by virtue of legislation or imprisonment. These developments gave prisoners a

¹⁰² On the prisoners' rights movement in this era, see Jacobs 1980; and for an interesting personal account of early prison management responses to prisoners' rights and prisoners' legal representatives, see Quinn 1999.

formal channel to challenge prison decisions, which was external to, and independent of, the prison system, and which – unlike internal complaints procedures and complaints to the Prison and Probations Ombudsman (established in 1994) – results in legally binding judgments.

As for the role of the courts in judicial review proceedings, this is to scrutinise the impugned decision of the prison administration and to determine whether it is either *ultra vires* (i.e. without legal basis/ beyond official powers) or so unreasonable or irrational that no reasonable administrator could have made it, pursuant to the common law test of **Wednesbury** unreasonableness.¹⁰³ Notably, a breach of prison policy in the form of a Prison Service Order or Prison Service Instruction¹⁰⁴ is not legally actionable *per se*, but may contribute to a finding of **Wednesbury** unreasonableness (see Owen and MacDonald 2015: 26-28). Whilst prisoner resistance to prison power inevitably has to take place within the system and on its terms (and could therefore be challenged in Foucauldian terms as an illusory power), this thesis will argue that the transformative potential of prisoners' right to access the courts should not be underestimated.

Schone has argued that the early 1990s marked the “beginning of the end” of prisoners' rights (2001: 74). However, the Human Rights Act 1998, which came into force in 2000, gave new momentum to prisoner litigation. Previously, prisoners were only entitled to raise a breach of European Convention rights in the domestic courts insofar as it went to the issue of lawfulness of the prison's decision or action under the common law test of **Wednesbury**

¹⁰³ **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1948] 1 KB 223.

¹⁰⁴ PSOs, issued until 31 July 2009, are long-term mandatory instructions. They have no expiry date and remain in force until cancelled or replaced. PSIs lay down various rules, regulations and guidelines by which prisons are run, and have an expiry date.

reasonableness. Only once they had exhausted all domestic remedies could prisoners take a human rights-based case before the European Court of Human Rights in Strasbourg. This was a long, expensive and arduous route, which, for prisoners, was particularly prohibitive. By incorporating the European Convention into domestic law, the Human Rights Act empowers prisoners to claim *directly* before the English courts that their European Convention rights have been breached. Such a claim is *additional* to prisoners' right to challenge prison administration decisions on traditional **Wednesbury** grounds, fortifying their legal armoury against the prison. This dual legal approach was taken, for example, in **AB** (2009).

NHS-equivalent healthcare

In addition to judicial recognition of prisoners' right to access the courts, the Government's announcement in 1994 of its new policy of "NHS-equivalent healthcare" for prisoners (HM Prison Service 1994), was a fundamental development in the prisoners' rights field, if not a human right *per se*. As discussed in greater detail in Chapter 6, prisoner healthcare at the time was provided by the Prison Medical Service ("**PMS**"), which was staffed and run completely separately from the NHS. Sustained critique of the second class healthcare offered to prisoners by the PMS culminated in the HM Prisons Inspectorate's damning 1996 report *Patients or Prisoners: A New Strategy for Healthcare in Prisons* (1996), and set in motion the integration of the PMS and NHS, which was completed in 2013.¹⁰⁵ In 1999, a joint Prison Service and NHS document on the *Future Organisation of Prison Health Care* declared that the purpose of prison healthcare was "to give prisoners access to the same

¹⁰⁵ In 2003, the budget for prison healthcare transferred to the NHS, in 2006, prison health services in publicly-funded prisons were transferred, and in 2013, prison healthcare in privately-run prisons was also brought under NHS commissioning.

quality and range of health care services as the general public receive from the NHS” (HM Prison Service/ NHS 1999).¹⁰⁶

The reason that this cannot be described as a human right as such, is because the principle of equivalence between prisoner and community healthcare is laid down in various international human rights resolutions and instruments, including the influential United Nations’ *Basic Principles for the Treatment of Prisoners* (1990, principle 9) and *Standard Minimum Rules for the Treatment of Prisoners* (Mandela Rules 2015, rule 24), but it is not incorporated in any human rights treaties. It therefore does not constitute a legally binding human right which can be raised by a prisoner against the state.¹⁰⁷ In other words, it is “soft-law”. Nevertheless, lack of access to NHS-equivalent healthcare can be challenged by a prisoner, on the basis that it breaches prison policy, and is therefore **Wednesbury** unreasonable, which is why it is included here as a development in the prisoners’ rights field.

As discussed further in Chapter 6, this policy development paved the way for transgender prisoners to access medical gender reassignment treatment on an equivalent basis with transgender people in the outside community, after the Court of Appeal ruled, in **NW Lancashire** (1999), that gender reassignment treatment falls within the remit of the NHS.

Whilst this ruling was to be welcomed, **NW Lancashire** had one major downside, in that the very success of the case was built on the “the common ground that “transsexualism is an

¹⁰⁶ See Ginn 2012, and Birmingham *et al* 2006, for useful synopses of the developments, and a discussion of ethics and the principle of equivalence in prison medicine.

¹⁰⁷ For a comprehensive review of the nature and scope of the right to health of prisoners in international law, see Lines 2008. Interestingly, it was not until 2006, that the European Prison Rules specifically referred to the prison authorities’ obligation to safeguard the health of all prisoners (rule 39), however, the need for prison medical services to be organised in close relationship with the general public health administration (rule 40), has been part of the European Prison Rules since they were originally adopted in 1987 (rule 26).

illness in the nature of a mental disorder” (para 3). Thus, **NW Lancashire** entrenched a pathologising discourse of gender dysphoria, in the same moment that it secured important legal advances in terms of transgender people’s access to gender reassignment treatment.¹⁰⁸ However, it cannot be claimed that this development had anything to do with human rights. The court curtly dismissed the applicant’s attempts to refer to European Convention and European Union jurisprudence, and to invoke their rights to respect for private life, equality, and freedom from inhuman and degrading treatment. It felt this approach was “misguided” and had “no sensible connection to the issues in the case” (*per* Lord Justice Buxton, at paras 19-21). Whilst the court stated that it would take seriously any breach of European Convention rights in its consideration of **Wednesbury** rationality (the Human Rights Act 1998 had not yet entered into force), it criticised the applicant’s “unfocused recourse” to European Convention jurisprudence, as “positively unhelpful, cluttering up [the court’s] consideration of adequate and more precise domestic principles and authorities governing the issues at play” (*per* Lord Justice Auld, at 14).

The court’s approach in **NW Lancashire** can be contrasted to the post-Human Rights Act case of **AB**, ten years later in 2009. In **AB**, the right to respect for private life, under article 8 of the European Convention, lay at the very heart of the court’s finding that the prison authorities had unlawfully interfered with a transgender prisoner’s private life by refusing to transfer her to the female estate, where she could be considered for gender reassignment surgery, and over-shadowed the court’s separate finding of **Wednesbury** unreasonableness.

¹⁰⁸ On the internationally-recognised problem of the need to rely on a mental health model of gender dysphoria in order to access medical treatment and/or insurance coverage, see Spade 2003 and Butler 2004: 75-101.

Law's Construction of the Transgender Prisoner as a Human Rights-Bearer

So far, this chapter has shown how legal recognition of transgender people's human rights has gathered pace over the last twenty years, leading to important advances in gender recognition, protection against discrimination, and access to gender reassignment treatment on the NHS. Meanwhile, judicial recognition of prisoners' rights has been pivotal in enabling prisoners to challenge their treatment through the courts, and the Human Rights Act 1998 has enhanced their access to European Convention rights. The chapter has shown, however, that these significant legal achievements, both legislative and judicial, have come at a price; how law has entrenched and perpetuated a medical model of transgender people; how in making space for certain transgender people, law has excluded others; and how law has repeatedly reinforced the gender binary. The chapter has also argued that, whilst law has ostensibly eschewed any need for transgender people to "normalise" their bodies in order to benefit from its recognition and protections, law's preoccupation with a past "biological" truth of sex, anatomically "correct" bodies, and normative gender presentation still bubbles underneath its transformative surface. Even the most contemporary and progressive piece of legislation, the Equality Act 2010, uses the medicalised terminology of "transsexualism", even though its protections are not based on a medical model, and reproduces the Victorian notion that transgender people's gender is artifice, and that their bodies are risky to "vulnerable" others in confined spaces.

This section now turns to examine the judgment in **AB** (2009). Transgender prisoners did not become the specific, knowable subject of English law until this case; that is, just as there was no "transsexual of the law" until **Corbett** (1970), there was no "transgender *prisoner* of the

law” until **AB**. Whilst some transgender prisoners had previously commenced legal action against the prison authorities and prison administration, their cases were settled out of court.¹⁰⁹ Thus, the detailed facts of their complaints and the terms of the settlements did not reach the public domain.

AB involved a petition for judicial review by a transgender woman who had started to reassign her gender, both socially and medically, whilst serving a long-term prison sentence in a men’s prison. She had been medically diagnosed with gender dysphoria and had started to take feminising hormones in 2003, and was referred to the Gender Identity Clinic at Charing Cross in 2004. After living for the requisite two-year period as a woman in the male estate, **AB** had obtained a GRC, legally recognising her as a woman. She wished to transfer to a women’s prison, and also to be considered for gender reassignment surgery, which the Gender Identity Clinic would not contemplate unless she had first lived in a women’s prison, which the prison authorities refused to contemplate unless she had gender reassignment surgery in the male estate. At the eleventh hour, it conceded that it could transfer her to the female estate, but argued that she would need to be segregated on a long-term, perhaps indefinite basis, and the costs would be prohibitive.

The specific implications of **AB** in relation to transgender prisoners’ prison allocation and access to gender reassignment surgery are examined in detail in Chapters 4 and 6 respectively. For current purposes, **AB** usefully illustrates the cumulative effects of the procedural and substantive legal developments discussed in this chapter, which enabled **AB**

¹⁰⁹ E.g. A six-figure settlement was reached with a transgender woman prisoner raped in HMP Peterborough, a men’s prison, in the late 1990s (Interview with Press for Change, 26 October 2015, see Chapter 4); and legal action was commenced, in 1990s, by six transgender prisoners wanting access to gender reassignment surgery (see Chapter 6).

to bring her case before the courts, and resulted in the courts' first affirmation of transgender prisoners as human rights-bearers.

Procedurally, AB benefitted from the (by now) well-established right of prisoners to bring judicial review proceedings against decisions of the prison administration, naming both the Secretary of State and the Governor of HMP Manchester as defendants to the proceedings. The Human Rights Act 1998, which incorporated the European Convention into UK law, enabled her to challenge the prison authorities' decision not only on the traditional common law ground of **Wednesbury** unreasonableness, but also on the ground that the decision breached her rights to private life and equality under articles 8 and 14 of the European Convention.

Substantively, there was no question over AB's right to be *considered* for gender reassignment surgery, since, by this time, the policy of NHS-equivalent prisoner healthcare had long been established, and the courts had affirmed in **NW Lancashire** (1999) that gender reassignment surgery falls within the responsibility of the NHS. Further, the Gender Recognition Act 2004 had enabled her to obtain a GRC as a woman, whilst she was in prison. Indeed, the court in **AB** remarked that the Gender Recognition Act "marks an important milestone in the recognition of transgender rights" (para 30).

Drawing on European Convention jurisprudence in relation to the right to respect for private life (article 8), including **Goodwin** (2002), the court in **AB** noted that whilst AB did not have a right to gender reassignment surgery *per se*, the decision to retain her in the male prison estate effectively barred her from qualifying for surgery, which, it concluded, "interferes with her personal autonomy in a manner which goes beyond that which imprisonment is

intended to do” (para 49). This is an important re-articulation of the general principle expressed in *Raymond v Honey* (1983) that a prisoner retains all rights except those taken away “by necessary implication”. Although the court observed that the Secretary of State has “significant latitude” in balancing the “often competing interests of criminal justice, protection of the public, the prison estate, resources and the well-being and discipline of all prisoners” (para 77), and stated that it would not “interfere lightly” in the exercise of this discretion (para 83), it did not defer to the prison authorities’ decision in this particular case. “Where issues go so close to the identity of a prisoner as here”, and are “so intimately concerned with her personal autonomy”, the court stated, “the deployment of resources as a justification for the infringement of such rights must be clear and weighty in order to be proportionate. Here they are neither” (para 77). It held that that the decision was an unlawful interference with AB’s private life under article 8 of the European Convention, as well as being *Wednesbury* irrational, and ordered the prison authorities to transfer AB to a women’s prison forthwith.

AB was a landmark judgment in many ways, and not only because it achieved the outcome sought by AB. Its primary construction of AB, a transgender prisoner, as a human rights-bearer has enormous legal and symbolic significance. If it had been so-minded, the court could have confined itself to an administrative law finding, and dismissed AB’s human rights arguments, as the Court of Appeal did in *NW Lancashire*. This legal finding would have led to the same result for AB. However, the analysis of AB’s right to private life lies at the heart of its judgment, so much so, that (as mentioned in the Introduction), Armatrudo and Blake single out the case of **AB** to illustrate “how deeply embedded in the UK the culture of

human rights has become” since the Human Rights Act 1998 came into force in 2000 (2015: 136).

Despite these many positive aspects of the case, a closer analysis reveals three particularly harmful, regressive aspects of the court’s judgment, in terms of its general construction of the transgender prisoner. First, the court accepted the Secretary of State’s contention that a transgender prisoner’s “physical characteristics” might have “implications” for the “proper running or discipline of the prison estate” (para 31), and held that the prison authorities may have regard to those physical characteristics (here, a penis) where they have a “bearing on their responsibilities for prisons *and other prisoners*” (para 32, emphasis added). This reproduces the idea that transgender prisoners’ bodies (or at least penises) matter, and can even trump their legal gender, in the specific context of the prison. It suggests that they may disrupt the prison’s order, and may be risky in relation to other prisoners. Second, although the court refers to AB in the female pronoun throughout its judgment, it reproduces a nature/artifice distinction in relation to her gender performance, remarking that “in physical terms, the claimant presents *convincingly* as a woman” and “even within a male prison, she dresses and *passes herself off as* a woman” (para 4, emphasis added). This description is tinged with law’s historical discourse of impersonation, deception and fraud. Third, in considering whether AB had been discriminated against, the court stated that, “while it is true that the claimant was not treated in a manner equivalent *to a biological woman*, it is difficult to characterise the treatment as discriminatory since the claimant was treated as a woman *but in a pre-operative condition*” (para 80, emphasis added). Indeed, although this was AB’s desired outcome, it was AB’s ability to qualify for genital surgery which the court characterized as the “full” realisation of her gender” (para 64), not her GRC.

In conclusion, an analysis of **AB** shows that, on the one hand, the court delivers a progressive judgment which recognises and upholds the human rights of transgender prisoners, and results in a positive outcome for AB. On the other hand, its underlying discourse reproduces and further entrenches hegemonic norms.

The “Transsexual Prisoner” of PSI 2011

This chapter concludes with a broad analysis of the “transsexual prisoner” of England and Wales’ first official prison policy on transgender prisoners. The detailed content of PSI 2011 on *The Care and Management of Transsexual Prisoners*, and the way in which its provisions have unfolded in practice and altered the organisational and conceptual terrain of the prison, will be examined in subsequent chapters, in specific contexts. This section takes only a “bird’s-eye” view, by way of introduction.

First, it is important to note, given the policy’s human rights-based origins, that the language of rights is not employed in its title, or its Executive Summary. Instead, the title and policy is couched in terms of “care” and “management”. Whilst PSI 2011 does contain an appendix which refers to the human rights-based legislation and case-law in the field, rights are not mentioned anywhere the body of the policy.

As for the “transsexual” prisoner who is the subject of the policy, s/he is defined as “someone who lives or proposes to live in the gender opposite to the one assigned at birth” (para 1.1). Thus PSI 2011 reproduces law’s binary model of gender; it excludes from its scope prisoners with non-binary and/or fluid genders, whilst including, and providing for the “care” of, those who conform to the binary gender order. Further, whilst the term “transsexual” was undoubtedly adopted in order to maintain consistency with the

terminology used in the Gender Recognition Act 2004 and Equality Act 2010, it reproduces, in the first-ever prison policy on the treatment of transgender prisoners, the historical inference that the policy applies only to “transsexual” people pursuing medical gender reassignment. This misleading nomenclature undermines the policy’s broader, *non-medicalised* definition of a “transsexual prisoner”, and its specific statement that this includes transgender prisoners who “may or may not have been diagnosed with gender dysphoria” (para 1.1). Further, right from the start, PSI 2011 presents transgender prisoners as a risk in prison management terms. The Executive Summary states not only that PSI 2011 “clearly sets out how prisons can comply with the law” (para 1.4), but adds “*in a way that is safe* for the transsexual prisoner and others” (emphasis added). On the surface, this simply reflects the prison administration’s overarching, common law duty to safeguard all prisoners, but at a deeper, discursive level, it immediately produces the “transsexual prisoner” as a risky figure, whose safety, and the safety of “others”, needs to be secured.

Having briefly considered the “transsexual prisoner” of PSI 2011, the following outlines PSI 2011’s three sections, which map onto the three topics discussed in the remainder of the thesis. “Medical treatment” is the first area addressed by the policy, which arguably reinforces the primacy of a medical model of “transsexuality”. This section reaffirms the policy of NHS-equivalence in prisoner healthcare (para 2.2). It then usefully specifies what this means in relation to transgender prisoners’ access to medical treatment. This topic is addressed in detail in Chapter 6 of this thesis.

The next section is named “prisoners living in their acquired gender role”. Interestingly, PSI 2011’s use of the expression “acquired gender *role*” does not have its origins in law – the Gender Recognition Act simply refers to people living in their “acquired gender”. From a

Butlerian perspective of gender, this language is not problematic, since everyone's gender is acquired and everyone's gender is performative. In ordinary parlance, however, cisgender people do not tend to speak of their own gender as a "role", thus, arguably, the terminology reproduces a nature/artifice distinction. This is explored further in Chapter 5. Whilst explicitly invoking the Equality Act's relevance to the treatment of transgender prisoners, PSI 2011 also repeats, word for word, its problematic language (para 3.1.), again, giving the false impression that the policy protects only those "transsexual prisoners" who are undergoing or have undergone a medical "process" of reassigning their "sex". In fact, the section makes it mandatory for prison administrators to permit prisoners to live in their gender if "*they consider themselves transsexual*" (PSI 2011: para 3.2, emphasis added). This progressive provision includes allowing prisoners to "dress in clothes appropriate to their acquired gender and adopting gender-appropriate names and modes of address" (para 3.3.), whichever part of the prison estate they are housed in. However, "self-definition" still requires a person to identify with, or submit to, the narrow definition of "transsexual" stipulated in PSI 2011. Despite these limitations, the provision is ground-breaking as it ostensibly removes the power of professional gatekeeping over transgender prisoners' right to live and dress in their gender. How this provision plays out in practice, however, is explored in Chapter 5.

The final section on "location within the estate" states that "in most cases prisoners must be located according to their gender as recognised under UK law" (para 4.2). The policy specifies that "this is a legal issue rather than an anatomical one, and under no circumstances should a physical search or examination be conducted for this purpose" (para 4.5). Thus, it formally adheres to the Gender Recognition Act's eschewal of the body in its

regulation of gender. PSI 2011 further provides that a transgender prisoner with a GRC cannot be refused location within the appropriate estate, unless their security profile is such that a cisgender prisoner with the same security profile would also be refused location (para 4.3).¹¹⁰ It therefore requires transgender prisoners' risk to be assessed no differently from cisgender prisoners. Conversely, PSI 2011 provides that transgender prisoners who have not obtained a GRC must be treated for prison placement purposes according to the gender assigned to them at birth, although it recognises that some people "will be sufficiently advanced in the gender reassignment process that it may be appropriate to place them in the estate of their acquired gender, even if the law does not yet recognise they are of their acquired gender" (Annex D, para D.10). Where there are "issues to be resolved", a "multi-disciplinary risk assessment" must be completed "to determine how best to manage a transsexual prisoner's location" (para 4.2). Thus, risk is ruled out as a unique feature in relation to transgender prisoners with GRC, but not for those who do not have a GRC, i.e. whose gender has not been medically and legally certified, and who are therefore constructed as potentially risky. This topic is explored further in Chapter 4.

Conclusion

This chapter has shown how the formal situation of transgender prisoners has benefitted from various human rights-based legal developments over the years, culminating in 2011 in the Prison Service's first official policy on the *Care and Management of Transsexual Prisoners*. Yet, it has also demonstrated that recourse to law, and human rights, comes at a price, whether it is pursued in legislation, policy, or the courts. However progressive on the

¹¹⁰ It appears that this situation would only arise where a woman presents such a high security risk she cannot be housed securely in the female estate and has to be held in a Close Supervision Centre, an extreme form of custody, which is only available in the male estate. See Chapter 4.

surface, law reform in this area has repeatedly reproduced and reinforced the “truth” of the gender binary and excluded those who do not wish to commit to life-long gender convention. It has shored up a medical model of transgenderism, requiring transgender people to submit to a pathologising diagnosis of gender dysphoria, in order to access both legal recognition and NHS medical treatment. Whilst the Gender Recognition Act ostensibly makes bodies redundant to legal gender, law’s preoccupation with the biological “truth” of the past and “correct” anatomy continually resurfaces, and transgender bodies continue to be regarded as risky, both to the binary gender order, and to cisgender people. The language of impersonation, artifice and deception, which was evident in law’s first construction of the “transsexual” in *Corbett* (1970), continues to reverberate in contemporary legal discourse. This chapter has shown how many of these themes were reproduced in law’s first construction of the transgender prisoner in *AB* (2009). Despite being a landmark case in the transgender prisoners’ rights field, it perpetuated the view that transgender prisoners’ gender is inauthentic, and reasserted the significance of bodies and biology in the prison’s governance of gender.

The following three chapters will now examine, in detail, the extent to which these human rights-based legal developments, and the “new” discourse of human rights in relation to transgender prisoners have affected (or have the potential to affect) the prison administration’s construction and governance of transgender prisoners as primarily risky. The chapters will consider both the transformative potential, and the limits, of recourse to human rights in relation to improving transgender prisoners’ lives, in terms of allocation within the prison estate (Chapter 4), ability to express gender through clothing, hair etc. (Chapter 5) and access to medical treatment (Chapter 6).

Chapter 4: Prison Allocation and Segregation, and the Costs of Imagining Transgender Prisoners as Risky

This chapter examines the effects of law and recent human rights-based developments on the allocation of transgender prisoners to the male or female estate. Prison allocation is examined first, because it is the first decision that has to be made when a transgender person is sent to prison, and also because it is the most fundamental decision, with both practical and symbolic effects on transgender prisoners' lives. Indeed, whether a transgender prisoner is allocated to a gender-appropriate prison goes to the very heart of whether their gender is recognised as legitimate by the prison authorities. This chapter also analyses the common practice of separating transgender prisoners from the main prison population, ostensibly for their own protection. Whilst recent public, parliamentary and policy focus has been on the appropriate allocation of transgender prisoners to *either* the male *or* female estate, little attention has been paid to the circumstances of their housing *within* the particular prison they are allocated to, e.g. segregation or a vulnerable prisoners' unit. This is an extremely important issue, and a discussion of prison allocation is not complete without it.

This chapter argues that risk continues to be the primary lens through which transgender prisoners and their housing is viewed, and that the prison administration's construction of them as both at risk and risky has considerable costs to their lives. Whilst prison policy now requires prisons to allocate transgender prisoners according to their legal gender (i.e. to accept a GRC as determining gender, regardless of bodily status), the chapter argues that bodies, and particularly genitalia, still matter in prison. It argues that the construction of

transgender bodies as both at risk and risky continues to manifest itself in their routine separation from the main prison population. This practice subjects them to punitive segregation conditions or other regimes of “less eligibility” and excludes them, perpetuating the view that they are risky to the good order of the prison, and prison society. The chapter argues that it is in the women’s prison estate that transgender prisoners’ rights have most struggled to take root. It explores the biological or cultural essentialism seemingly at play, and examines a particularly acute suspicion around the trans/gender authenticity and motives of transgender women who transition whilst in prison, compared with those who have lived in their gender *prior* to imprisonment.

This chapter is divided into six parts. After a brief introduction to the origins of the sex-segregated prison estate in England and Wales, the first part shows how the prison’s regulation of trans/gender developed separately from law’s, and privileged transgender prisoners’ genitalia upon entry to prison, rather than their genitalia at birth (**Corbett** (1970)). Part two traces the emergence and evolution of official risk discourse around transgender prisoners’ allocation, and the perceived need for their protective segregation. Through an in-depth analysis of the High Court judgment in **AB** (2009), part three explores the construction of transgender women prisoners’ bodies as especially risky when placed in the female estate and addresses the parallel construction of transgender men’s bodies as being *at risk* in the male estate. The fourth part considers the established practice of separating transgender prisoners from the main prison population as a risk management technique and reflects on its practical and symbolic effects on transgender prisoners’ lives and on the prison’s governance of gender. The fifth part analyses attempts to balance rights and risk management in recent prison policy, and the creation of a new divide, in PSI 2011, between

those with a GRC (no longer risky) and those without a GRC (still risky). The sixth and final part discusses the limits of human rights in this field, through an analysis of *R (on the application of Hunnisett) v the Governor of HMP Frankland* [2017] EWHC 72 (“*Hunnisett*”) and an out-of-court settlement reached in *XT* (2017). These cases provide evidence of the continuing use, and harmful effects of segregating transgender prisoners as a risk management solution, rather than addressing transphobia in the main prison population.

The Sex-Segregated Prison Estate and Genitalia-Based Allocation

Today, it is taken for granted that the English and Welsh prison estate is divided into men’s and women’s prisons, although, as mentioned in Chapter 1, women and men were initially housed together in prison.¹¹¹ Current prison rules stipulate that female prisoners should “normally” be kept separate from male prisoners (Prison Rules 1999: Rule 12(1)), although the Secretary of State retains discretion to depart from the general rule. The Prison Rules do not define who is to be regarded as “female” or “male” for these purposes.

The segregation of male and female prisoners can be traced back to the Gaol Act 1823, which was enacted after prison reformists, such as Elizabeth Fry, campaigned for separate housing and a separate regime for women to meet their perceived gender-specific rehabilitative needs (1827a, 1827b). Sex-segregation also assisted the prison administration in its efforts to tackle widespread sexual abuse, corruption and prostitution of women in

¹¹¹ In England and Wales, HMP Peterborough, which is privately-run, is the only dual, purpose-built prison for men and women, but they are kept separate at all times. In 1986, a Howard League report on Women in the Penal System proposed that women’s prisons should take male prisoners to fill spare capacity, to prevent the closure of under-utilised women’s prisons, and to avoid women being imprisoned far from home. The report proposed that male and female prisoners would have separate living quarters, but would share opportunities for work, education, training and leisure, at the discretion of the governor (Howard League 1986). A similar proposal was considered, but rejected, recently, for Wales, as the lack of prison capacity in Wales means that many Welsh prisoners are housed in England (House of Commons Welsh Affairs Committee: 2015, para 30).

mixed-sex prisons (Zedner 1998: 297). Whilst the original intent behind sex-segregation was benevolent, it is well-established in the literature that, in practice, penal power was soon deployed to discipline women according to prevailing class and gender norms (see e.g. from the UK literature: Smart 1977; Carlen 1983; Dobash, Dobash and Gutteridge 1986; Bosworth 2000; Carlen and Worrell 2004; Corcoran 2010; from the US literature: Estelle 1977; Freedman 1981 and Rafter 1985; from the Canadian literature: Hannah-Moffat 2001). Whilst these past “regimes of femininity” (Carlen 1983) have been heavily critiqued, it continues to be widely believed, at both the international¹¹² and UK¹¹³ level, that a different approach is required towards women’s offending and imprisonment than men’s, and that sex-segregation is necessary to this end. However, Hannah-Moffat has argued that even the most progressive, contemporary, human rights-based approaches to women’s imprisonment (like the Correctional Services of Canada’s (“CSC”) “women-centered” prisons and “gender-responsive” regimes) tend to be based on “normative femininities”, which reproduce gender non-normative or more “masculine” women as risky (2010; as discussed earlier, in Chapter 2).

Literature on men’s prisons has similarly shown how relations of power and violence in the hyper-masculinised environment of the male prison relegate prisoners who are perceived to be “effeminate” to the bottom of the hierarchy, where they are vulnerable to sexual and other abuse (see e.g. regarding the English and Welsh prison system: Sim 1994; Newburn and Stanko 1994; Carrabine and Longhurst 1998; Bosworth and Carrabine 2011; Jewkes 2005; and Philipps 2012; and regarding the US prison system: Sabo, Kupers and London

¹¹² See e.g. the United Nations *Rules for the Treatment of Female Prisoners and Non-Custodial Measures for Female Offenders*, known as the *Bangkok Rules*, A/RES/65/229 (adopted Dec 2010).

¹¹³ See e.g. the *Corston Report* (Home Office 2007) and follow-up (House of Commons Justice Committee 2013); and the White Paper on *Prison Safety and Reform* (Home Office 2016, para 28).

(eds) 2001). It is only recently that the effects of sex-segregation, and gender-normative prison regimes and prison societies, on transgender, gender non-normative and intersex prisoners *specifically* have become a matter of international and domestic concern, as discussed earlier in the thesis (see Introduction and Chapter 3).

It is important to note at this juncture that the allocation of prisoners within the prison estate was always – and remains today – the responsibility of the prison authorities, not the courts. Thus, when Tara Hudson unsuccessfully appealed against her 12-week sentence for assault (which she was serving in HMP Bristol, a men’s prison), Bristol Crown Court recommended that the Prison Service reconsider *where* she serve her sentence, and invited “sensitive consideration” of the issue, but stated that it was for the Prison Service, and not the court, to decide (Morris 2015). Similarly, when Vikki Thompson’s solicitor asked the judge to send her to HMP New Hall, a women’s prison, the court stated that this was outside its purview (BBC News 2015).

Traditionally, a person’s sex was determined as part of the routine medical examination on their reception to prison and, in practice, was based on genitalia. Thus, as mentioned in Chapter 1, Bolton and Park were examined and declared male by the prison doctor on their arrest in 1871 for the offence of “personating a woman”, and placed in a men’s prison pending trial. Fear of the imminent medical examination prompted Bill Chapman, who was charged in 1835 for a public order offence unrelated to his gender expression, to declare his “true sex” as a woman to the arresting officer, before this “truth” would otherwise be revealed (Jackson 2014). After “transsexualism” was named by the English medical profession in 1949, and hormone treatment and gender reassignment surgery started to become available in the 1960s and 1970s (see Chapter 1), prison doctors were faced with

the new problem of classifying transgender people's hormonally and/or surgically altered bodies as male or female and allocating them appropriately within the sex-segregated prison estate.

In the absence of existing research, the following history of English prison allocation practices is collated from a wide range of sources. It cannot claim to be a definitive history. Nor do the patterns identified from sporadic reporting of prison administrators' responses to individual transgender prisoners necessarily represent widespread prison practice at the time. Nevertheless, these reports provide valuable insights into early prison practice and prison discourse around transgender bodies.

The first reported case in the press (at least as identified by the author) relates to Rachael Gosling, who came before the courts in 1969 for soliciting (Evening News Reporter 1969). She had lived as a woman for some years, had undergone three gender reassignment surgeries overseas and, according to her lawyer, "had all the physical attributes of a woman" (*ibid*). Although she was originally remanded to HMP Holloway, a women's prison, she was subsequently transferred to HMP Brixton, a men's prison, after prison doctors examined her and declared her male. There, she was placed in isolation. The courts criticised the Home Office's decision to transfer her to the male estate, but since there was no law or policy governing the sex/gender of transgender people at the time, penal/medical power prevailed in determining the "truth" of her sex/gender. Indeed, the prison doctors' insistence that she remained male, despite gender reassignment surgery, reflected the widespread view of the medical profession at the time, as demonstrated, one year later, in the medical evidence given to the court in **Corbett** (1970) (see Chapter 1).

Interestingly, despite the ruling in **Corbett** that a person's legal sex is fixed at birth, and can never be changed, even by gender reassignment surgery, all the cases identified after Gosling's indicate that prison allocation decisions were based on genitalia *at the time of imprisonment*, with the result that transgender people who had undergone genital reassignment surgery were placed in a gender-appropriate prison. Prison administrators seemingly ignored the legal test for sex laid down in **Corbett**, presumably because classifying a person's sex/gender according to their genitalia *at birth* did not make sense in prison, it did not translate. Thus, the prison set itself apart from law, made its own rules, and consolidated its own power over the location of transgender prisoners within the prison estate. This *status quo* was not legally challenged until **AB** (2009).

Meanwhile, two cases from the 1980s provide some insights into the effects of the prison authorities' genitalia-based allocation practice on transgender prisoners. In 1980, the press widely reported the case of Linda Gold, a West End nightclub hostess sentenced to 18 months' in prison for theft (Veitch 1980; LAGNA 1980; Smith 1980). Gold had lived as a woman, and been prescribed oestrogen by a private doctor, for five years before her imprisonment. She had developed breasts as a result, but because she had not had genital reassignment surgery, she was sent to HMP Wormwood Scrubs, a men's prison. There, prison doctors withdrew her hormone treatment, which led her secondary sex characteristics to revert. As discussed further in Chapter 6, this medical decision literally disciplined her body back into line with the prison's sex/gender order and the male prison to which she had been allocated. Press reports, which were sympathetic to Gold's plight, focused on the cruelty of withdrawing her hormones, as did the National Council of Civil Liberties (now Liberty), which took up her case. Her allocation to the male estate appears to

have been regarded as unproblematic. Although the public's response clearly indicated that she should be treated as female within the male estate, and that it was wrong for the prison "to punish her twice by trying to make a man of her" (LAGNA 1980), public opinion seemingly concurred with the prison medics' and prison administrators' view that Gold was not fully or truly female until she had had genital reassignment surgery, and was rightfully housed in the male estate.

Several years later, *R v Tan and Others* [1983] 2 All ER 12 ("*R v Tan*") came before the Court of Appeal. This case involved Gloria Greaves, a transgender woman who had undergone hormone treatment and also (unlike Gold) gender reassignment surgery. She and her co-defendants had been convicted of various gender-specific criminal offences relating to prostitution, which depended on the court classifying Greaves as a man. Applying *Corbett*, the Court of Appeal upheld the appellants' convictions and sentences on the basis that Greaves was legally male, and remained so, notwithstanding surgery. Interestingly, however, it was reported that Greaves was released on bail from a *women's* prison pending her appeal (Pace 1983:317, note 7). That is, notwithstanding the court's finding that she was legally male for the purposes of criminal law, she was treated as a woman for prison allocation purposes, due to her current genital status. Her legal sex was irrelevant in the prison, it was her current, anatomically sexed body which mattered.

References to transgender men's prison allocation are scarce. In a collection of prisoner narratives from HMP Holloway, a women's prison, one prisoner expresses concern about the treatment of a transgender man, Marc Santo, who was locked up on his own within the psychiatric unit at the prison (Padel and Stevenson 1988: 82). After his death there, in 1985, the coroner's verdict was "accidental death due to lack of care" (*ibid*: 73). Since genital

surgery (phalloplasty) for transgender men was more complicated and risk-laden than for transgender women, and the results often unsatisfactory, it was rarely undertaken in this period (see e.g. Rubin 2006: 496) and transgender men would have been allocated to the female estate.

In the absence of any official prison statements or policies in this era, sporadic press reports indicate that prison practice continued to be based on genital status on reception to prison throughout the 1980s and 1990s. In 1989, for example, Stephanie Booth, who had genital reassignment surgery in 1983, served a 12-week sentence for video-licensing offences in HMP Askham Grange, a women's prison (Meierhans 2015). In the 1990s, two transgender men were kept in conditions amounting to solitary confinement for seven and eleven years, respectively, in HMP Holloway. One of them decided to live as a woman, in order to return to the main estate, as he could no longer bear the solitude (Interview with Press for Change, 26 October 2015). In 1995, the press reported the case of Joanne Wray, who had lived as a woman for 12 years, had developed breasts through hormone treatment, and was awaiting genital reassignment surgery when she was imprisoned: "and that was the deciding factor. Because she still had a penis, she was a man and was sent to Hull [men's] prison" (Mills 1995).

In purely practical terms, this genitalia-based test established clear boundaries between, and thus easy categorisation of, male and female bodies: "fully" reassigned bodies could be slotted into the existing sex-segregated prison order, whereas "ambiguous" bodies could not. As discussed in Chapter 2, such incongruous bodies were not only "culturally unintelligible" (Butler 1994), but also represented a risk to the governmentality of sex/gender in prison, since they departed so far from the norm. To borrow Grosz's phrase, they

were a “disorder which threatens all order” (1994: 2003). Further, given the dominance of the medical model of “transsexuality”, a person’s willingness to undergo gender reassignment surgery seemingly proved their (trans)gender authenticity and rendered them deserving of social gender recognition, and also institutional gender recognition by the prison administration; the “truth” of a person’s sex/gender was effectively carved into their body, and was beyond question. Regardless of their genitalia, however, transgender bodies – particularly transgender *women’s* bodies – were still regarded as at risk and risky bodies, when placed in close proximity to other prisoners’ bodies, and this often led to their segregation (as discussed below).

Emergence and Evolution of Risk Discourse around Transgender Prisoners

It was not until the mid-1990s that official prison discourse started to emerge regarding the allocation of transgender prisoners. This seems to have been prompted by public concern over the widely-publicised cases of six prisoners who had started to socially and medically reassign their gender in the early 1990s, whilst serving long-term sentences in various men’s prisons (e.g. Evening Mail Reporter 1999). The public seems to have been sympathetic towards the provision of hormone treatment to prisoners, such as Linda Gold (mentioned above), who had started to medically reassign her gender *before* their imprisonment (whose (trans)gender authenticity was therefore seemingly not in doubt). However, the prospect of prisoners being allowed to transition *whilst* in prison, and particularly the possibility of them

having gender reassignment surgery whilst in prison, and potentially transferring to the opposite part of the prison estate, proved (and continues to prove) highly controversial.¹¹⁴

The first official statement to emanate from the Prison Service regarding the allocation of transgender prisoners appears to have been made in May 1994, when the Director General replied to several parliamentary questions raised by Alex Carlile MP, in relation to Kelly Denise Richards, a transgender woman who had socially reassigned her gender, and had started hormone therapy, whilst in HMP Parkhurst men’s prison. Carlile was sympathetic to Richard’s position, and was notably the first MP to advocate for transgender people’s rights.¹¹⁵ The Director General’s reply adopts the medical term “transsexual”, as was prevalent at the time, and is important to cite in full:

“Any transsexual is likely to have difficulties in adjusting to prison life, and it is more often than not necessary to segregate in a vulnerable prisoner unit or prison healthcare centre those whose transsexuality is obvious. We prefer to treat each case individually and the principal criteria [*sic*] is the most obvious physical characteristics of the person concerned and their ability to integrate with other inmates. A male-to-female transsexual who has undergone surgery and hormone treatment would therefore be more appropriately allocated to a female establishment. Conversely, a transsexual who has not undergone any form of treatment would be unlikely to be accepted by fellow inmates in an establishment for the gender of their choice” (Hansard, HC Deb 18 May 1994, vol 243, c460W).

¹¹⁴ See further Chapter 6.

¹¹⁵ In 1995/6, Carlile unsuccessfully introduced a Private Members Bill, on behalf of the transgender advocacy group Press for Change, to allow transgender people to change their birth certificates (for a vivid, first-hand account of the House of Common’s debate on the Bill, see Burns 1996).

The Director General's response offers a number of valuable insights into prison allocation practice itself, as well as its underlying rationale. At this time, the prison authorities did not officially operate a blanket policy, but treated each case individually, having regard to the person's "most obvious physical characteristics" and "their ability to integrate with other prisoners" in a gender-appropriate prison. From the context, it is clear that the reference to a person's "most obvious" physical characteristics is to their genitalia, as the given example is that a "male-to-female transsexual who has undergone surgery and hormone treatment" would be "more appropriately" allocated to the female estate. A prisoner's "ability to integrate with other prisoners" is also clearly linked to their medical and bodily status, as the passage states that "a transsexual who has not undergone any form of *treatment* would be unlikely to be accepted by fellow inmates" in a gender-appropriate prison (emphasis added). Furthermore, if their "transsexuality is obvious" (i.e. whether due to their bodily status and/or gender performance), they are likely to be segregated, either in a vulnerable prisoners' unit (which characterises them as *at risk*) or a healthcare centre (which produces them as ill, see below).

Whilst the Prison Service statement appears to be concerned with the difficulties transgender prisoners may experience in being accepted by fellow prisoners, subsequent developments show that prison practice was driven as much, if not more so, by the construction of transgender prisoners as *risky*, rather than vulnerable and *at risk*. This became evident in the report of the Interdepartmental Working Group on Transsexual People ("**IWG**") (Home Office 2000). The IWG was set up in 1999 to report to the Government on "the need for appropriate legal measures to address the problems experienced by transsexual people" (*ibid*). It was established in response to the European

Court of Human Rights' repeated criticisms of the UK Government for failing to keep the legal status of transgender people under review.¹¹⁶ The report noted that the Prison Service was in the process of drawing up guidelines for dealing with "transsexual prisoners" (para 2.74 - those which eventually became PSI 2011). Its description of current prison allocation practice (para 2.75) closely corresponds to the Director General's 1994 statement to Parliament, cited above. Importantly, however, the report adds a new observation to the mix, namely that "there may be problems in placing a male-to-female transsexual person in a female establishment, where she may not be accepted by other prisoners, *many of whom may have suffered violent or sexual abuse from men*" (*ibid*, emphasis added). That is, the presence of a transgender woman (specifically) is characterised as a problem, and by implication a threat or risk, to other (cisgender) women in the female estate. The emergence of this "new" risk discourse is highly significant, and seems to be based on a biological or cultural essentialist view which produces transgender women as men, and indiscriminately associates them with masculine violence and sexual abuse, and produces cisgender women as inherently and especially vulnerable in the "women-only" space of the prison.

This matter was explicitly put to the test before the Canadian Human Rights Tribunal in ***Kavanagh and Canadian Human Rights Commission v Attorney General of Canada*** (2001 CanLII 8496 (CHRT)) ("***Kavanagh***"). Although this ruling is Canadian (and, as a Commonwealth authority, persuasive, but not legally binding, on the English courts), it is

¹¹⁶ E.g. ***Rees*** (1986), para 47; ***Cossey*** (1990), para 17; ***Sheffield v Horsham*** (1998), para 45. The IWG's comprehensive report was left to gather dust, and no action was taken on any of its recommendations, much to the ECtHR's ire (***Goodwin*** (2002), para 92). In 2002, following ***Goodwin***, the IWG was reconvened, with a mandate to "re-examine the implications of granting full legal status to transsexual people in their acquired gender; and to make recommendations" (Home Office 2002), eventually leading to the GRA 2004.

invaluable for the current analysis. It considers – within a human rights framework, and some eight years before a similar legal challenge was launched in England – a comparable practice and rationale to that voiced by the English prison authorities at the time. The case concerned Synthia Kavanagh, who had lived as a woman for many years, was on hormone treatment, and had received conditional approval for gender reassignment surgery shortly before her conviction in 1989. CSC policy stated that “unless sex reassignment surgery has been completed, male inmates shall be held in male institutions”. On this basis, she was allocated to a men’s prison (*Kavanagh*, para 29). Since CSC’s policy also prohibited prisoners from accessing gender reassignment surgery during their incarceration, Kavanagh was effectively trapped in the male estate, where she “was regularly beaten, sexually assaulted and ridiculed” and spent long periods in protective custody and administrative segregation (paras 129 and 131). In conjunction with the Human Rights Commission, she challenged the lawfulness of CSC’s policy, on the basis that it discriminated against transgender prisoners on the basis of their sex under the Canadian Human Rights Act 1985.

Legally, the case succeeded; the Human Rights Tribunal declared CSC’s allocation policy discriminatory on the grounds of sex,¹¹⁷ as it failed to recognise “the special vulnerability of the pre-operative transsexual inmate population” and “the differential effect that housing inmates in accordance with their anatomy has on transsexual inmates” (para 166). However, the Tribunal only ordered CSC to revise its policy so as to individually assess the best type of housing for “pre-operative transsexuals” within the *male* prison system, and to

¹¹⁷ In fact, the Tribunal held that it was discriminatory on both sex and disability grounds – the claimant argued that “gender identity disorder” is a mental illness, and hence a disability. Due to space constraints, this part of the case is not analysed here (*cf.* discussion of *NW Lancashire* (1999) in Chapters 3 and 6), nor is the Tribunal’s separate, important finding that CSC’s policy of refusing access to gender reassignment surgery to prisoners was discriminatory.

take steps to ensure their safety (*ibid*) and house them in a manner which did not incur “undue hardship” to them within the *male* prison estate (para 192).¹¹⁸ Their exclusion from the *female* estate, it held, was justified, on the basis argued by CSC, namely that “the placement of pre-operative male-to-female transsexuals in female prisons would present a great risk of harm to the female inmates, many of whom have histories of having been sexually abused” (para 106, emphasis added). CSC therefore expressly raised the spectre of risk of *harm* to “female inmates”, and not simply risk of *non-acceptance* by those prisoners. It presented this risk as two-fold, comprising a risk of sexual harm, and a risk of psychological harm to “female inmates”, when placed in close proximity with anatomically male bodies, as expounded below.

First, CSC argued in *Kavanagh* that “pre-operative” transgender women posed a *sexual* risk to cisgender women, as hormone therapy did not guarantee that they “would not have erectile capacity” (para 101). Some prisoners “who were not truly transsexual”, it argued, might also seek to be placed in women’s prisons “for sexual purposes” (para 102) or to sexually “prey” on women (para 101). Whilst taking into account these arguments, the Human Rights Tribunal expressed particular concern about the second limb of CSC’s argument, namely the potential *psychological* impact on cisgender women prisoners. The Tribunal remarked that the “unique context created by the carceral setting” (para 157) meant that “female inmates [would] be asked to live, for extended periods of time, in very close quarters, with a person who is anatomically of the opposite sex” and that “leaving would not be an option” should the situation become “intolerable” (*ibid*). This echoes the

¹¹⁸ The Tribunal specifically ruled out the creation of “a dedicated facility for pre-operative transsexuals in transition” due to the small number of such prisoners and related logistics, distance from friends and family and possible “ghettoisation” (pars 162 and 163).

trajectory of English sex discrimination law, which (as discussed in Chapter 3) has historically re-produced the idea that transgender bodies are potentially intolerable and risky to cisgender people in close, personal spaces, such as private homes, and has given cisgender people the right to exclude them from employment in such spaces. The Tribunal rejected the Human Rights Commission's argument that CSC's policy gave legitimacy to the prejudicial attitudes of others, and that any fear and ignorance could be addressed through education. This was "overly simplistic", it felt, since female inmates' views were based not simply on "ignorance", but on "painful life experience", and "psychological damage" inflicted on them "as a consequence of the physical, psychological and sexual abuse they have suffered at the hands of men" (para 158).

As cogently argued by Allison Smith, the judgment in *Kavanagh* effectively endorses a "hierarchy of rights" (2014: 152), whereby the needs of cisgender women are ranked above the needs of transgender women, on the basis that the former are authentic, "real" women, whereas the latter are not. Whilst the Tribunal recognises that "pre-operative transsexual" women are discriminated against, it does not consider them to be discriminated against *as women*. This is cis-sexism in action (Serano 2007, see Chapter 2). Indeed, the Tribunal's judgment effectively reproduces them as men and, as Smith argues, indiscriminately associates transgender women with a penis with male violence and "defines them by their anatomy and all that is associated with this anatomy" (2014: 159).

Meanwhile, the English and Welsh prison authorities' genitalia-based allocation policy, which was based on the same rationale as CSC policy, escaped legal scrutiny, and appears to have been unaffected by the changes brought about by the Gender Recognition Act 2004, until the situation was finally challenged by way of judicial review in *AB* (2009). The

following analysis of **AB** argues that, like CSC, the English prison authorities constructed transgender women who had not had genital surgery as risky because of their anatomy (penis) and related associations of male violence, but also seem to have considered certain transgender women to be inherently risky, regardless of their genital status, based on biological or cultural essentialism.

Transgender Women’s Especially Risky Bodies

Although similar factually to *Kavanagh*, it will be recalled from Chapter 3 that AB had obtained legal recognition of her gender through a GRC, whereas Ms Kavanagh had not (and in Canada legally could not without gender reassignment surgery).¹¹⁹ AB was serving an automatic “two strikes” life sentence, imposed in 2003, for attempted rape of a female stranger, shortly after she had served a prison sentence for manslaughter of her male partner. During this second prison sentence, she had socially transitioned and lived as a woman for over two years in the male estate, before obtaining a GRC. Despite her legal status as a woman, the prison authorities refused to transfer her to the female estate. This meant that she could not be considered for her desired gender reassignment surgery, as the gender identity clinic insisted she first spend a further two years living as a woman in a *women’s* prison. The high bar set by gender identity clinicians for meeting the “real life” requirement whilst in prison is discussed further in Chapter 6. It is sufficient to recall here that the prison authorities would only contemplate AB having surgery in the male estate, before she could be transferred to the female estate, which would have enabled them to

¹¹⁹ It will be recalled from Chapter 3 that gender reassignment surgery is not a formal prerequisite for legal recognition under the UK’s Gender Recognition Act. By contrast, Alberta’s provincial legislation made gender reassignment surgery a prerequisite for legal gender recognition. This requirement was later declared unconstitutional, *CF v Alberta (Vital Statistics)*, 2014 ABQB 237.

maintain their established genitalia-based allocation policy. Despite the Gender Recognition Act's progressive de-coupling of gender and genitals, it was seemingly AB's penis which still defined her as a man for prison allocation purposes and rendered her risky. Like *Kavanagh*, AB was in a "Catch 22 situation". As she succinctly explained to the court: "the prison service ... will not consider me female until I have my penis removed ... notwithstanding my gender recognition certificate. Yet they resist moving me to the female estate which would enable the surgery to be arranged" (*AB* (2009), para 8).

Although AB successfully invoked both common law and human rights arguments to challenge the prison authorities' decision, the judgment is driven by human rights discourse, with the right to respect for private life (article 8 of the European Convention on Human Rights) at its core. The following analysis develops the preliminary review of *AB* in Chapter 3.

Shifting the rationale from risk to resources

The *AB* case started out in a similar vein to *Kavanagh* in terms of the prison authorities' rationale for refusing to transfer her to the female estate. Earlier in the proceedings, the prison authorities had argued that the claimant's risk profile "was such that it would not be *safe or appropriate* to accommodate her in a female prison" (para 16, emphasis added). Its reasoning is not given in the judgment, but cited pre-trial correspondence implies there was some discussion about AB's sexual functionality and the sexual threat she posed to cisgender women, as her solicitors argued that her conviction for attempted rape had not been based "on an ability to sustain an erection" and "appears to have been more inspired by feelings of frustration and jealousy than sexual desire" (para 24). However, the prison

authorities revised its rationale for keeping AB in the male estate at the eleventh hour (para 16).

Under their last-minute submissions, the prison authorities accepted in principle that AB could be housed in the female estate, but argued that, for her safety, she would need to be held in long-term segregation, which would have serious detrimental effects on her well-being (para 60). Thus, ostensibly, it was primarily for AB's well-being that she should not be transferred, not for the protection of *others* – still a regular refrain in the prison administration's governance of transgender prisoners. Nevertheless, Michael Spurr, Chief Operating Officer of NOMS acknowledged that whilst "the main issue that has been addressed in terms of risk is the Claimant's risk to herself, NOMS must also bear in mind the risk she poses to other prisoners" (para 24). At this point, the prison authorities' rationale starts to reveal the underlying construction of AB as both a sexual and psychological threat to cisgender women, as in *Kavanagh*.

Spurr described the risk AB posed to other women prisoners as "a significant risk, and a very unusual one", requiring long-term segregation (para 21). The need for such segregation was based on "the specifics of her offending history", "the lack of guarantees that her surgery will definitely proceed" and "concerns over how the female population would react to her generally, and also specifically if they become aware of her index offence" (para 22). Indeed, he concluded that there was "no guarantee that the Claimant, *either pre- or post-operatively*, would *ever* be suitable for integration into the general female prison population" (*ibid*, emphasis added). These comments go to the crux of the matter. Although the prison authorities were concerned about AB's genital status, their concerns seemingly went beyond this: even if she had gender reassignment surgery, she was still

potentially risky. Since cisgender women who have committed sexual and/or violent offences against women are housed in the female estate, AB's offending history (attempted rape of a woman) does not appear to have driven the prison authorities' decision. Rather, the "very unusual" risk that AB was perceived to present to cisgender women seems to have been due to her being a *transgender* woman with such an offending history.

In a prison system governed by genitalia-based sex-segregation – and also shaped by risk society's highly precautionary approach to risk and blame (see Chapter 2) – the prison authorities seemed to need a "guarantee" that surgery would proceed. Yet, the risk that AB presented for prison management was seemingly so uncertain, so unknowable, that even this level of assurance was not enough; it could not "guarantee" that AB would ever be suitable for integration. Long-term segregation was the only way the prison authorities could foresee managing such an immeasurable risk, as this would literally prevent her from being in close physical proximity to other prisoners, and thus contain any risks to and from her (containment of risk being one of the main objectives of the "new penology", also discussed in Chapter 2).

Since the prison authorities conceded at the last minute that AB could be moved to the female estate, but opposed her transfer on the basis that she would require long-term segregation and a special regime at "very considerable cost" (para 23), the court concluded that the prison authorities' core justification for retaining AB in the male estate was "primarily a resource consideration" (para 58). Thus, the court thus avoided a close review of the prison authorities' initial risk-based arguments for retaining AB in the male estate and focused instead on their resource-based arguments. It is impossible to know what significance to attach to the prison authorities' (or the court's) manoeuvre, and whether it

was precisely to circumvent this thorny issue. Nevertheless, a detailed analysis of **AB** (below) provides useful insights into the prison authorities' construction of the transgender woman prisoner as both at risk *and* risky. It also demonstrates the truism that recourse to law and human rights is always a wager, and that even a positive outcome for the particular litigant may entail broader, negative discursive effects.

Genitalia may trump legally-certified gender under the GRA

Section 9 of the Gender Recognition Act 2004 provides that once a GRC is issued, "the person's gender becomes for all purposes the acquired gender". Despite its apparent clarity, the court felt that the precise scope of section 9 was unclear and gave rise to difficulties "in cases such as this, where a person with acquired gender still retains physiological aspects of the former gender – in this case male genitalia" (para 31). It agreed in principle with the Secretary of State's contention that section 9 did not require the Prison Service "to disregard all the consequences of the claimant's physiology, nor the implications which they might have for the proper running or discipline of the prison estate". It acknowledged, however, that "this is undoubtedly a difficult line to draw, since if it were taken too far, it could undermine the purpose of [section 9] to provide comprehensive recognition of acquired gender" (para 31). The court concluded that the prison authorities may have regard to a transgender prisoner's physical characteristics, but only "to the limited extent that they have a bearing on their responsibilities for prisons *and other prisoners*" (para 32, emphasis added). The claimant was not to be regarded "*as anything other than a woman* except to the extent strictly necessitated by the specific relevance of [her] pre-operative physical state to the functioning of the prison" (para 31, emphasis added). This

effectively gave the prison authorities a “get-out clause”, as the court left open the circumstances in which this exception might apply.

The court’s finding that a transgender woman prisoner with a GRC might lawfully, albeit exceptionally, be treated as “something other than a woman” for the purpose of prison allocation, is extremely troubling, both instrumentally and discursively. In “pure” law terms, the judgment carves out a potential exception to the Gender Recognition Act’s comprehensive recognition of legally-certified gender. This resurrects the significance of genitals in defining who is a woman or man, notwithstanding their legally-certified gender, for prison allocation purposes. It concedes that law’s new “truth” – that gender does not depend on genitals – does not necessarily translate in the prison. It also leaves pre-existing power relations intact, yielding ultimate power over the determination of a prisoner’s gender to the prison authorities.

Normatively, the subtext of the judgment reproduces the idea that it is gender reassignment surgery which makes AB a woman, not her GRC. Thus, even though the court respects AB’s gender in its use of female pronouns throughout the judgment, right from the start, it describes her as a “*pre-operative transgender woman*” (para 1, emphasis added), who “*presents convincingly as a woman*” (para 4, emphasis added), and “*dresses and passes herself off as a woman*” (*ibid*, emphasis added). This has echoes of **Corbett**, giving the impression that she is not an authentic woman, despite the fact that the Gender Recognition Panel, another judicial body, has legally certified her as a woman.

The centrality of gender reassignment surgery to the right to private life

This medical model of transgender people, and the centrality of gender reassignment surgery to the full realisation of gender, underpins the remainder of the judgment. After reviewing the implications of section 9 of the Gender Recognition Act for the prison's governance of trans/gender, the court considered whether the prison authorities had unlawfully interfered with AB's private life under article 8 of the European Convention on Human Rights. Citing *Goodwin* (2002) and various other authorities, the court first established that the right to respect for private life has been "widely drawn" and entails respect for the "personal autonomy" and "personal sphere of each individual" (para 39).

AB's argument that the prison authorities had unlawfully interfered with her private life had two aspects. First, she argued that the refusal to transfer her, as a legally certified woman, to the female estate unlawfully interfered with her right to live as a woman *per se*. The prison authorities rejected this argument, stating that she was recognised and treated as a woman in the male estate, and that further adjustments could be made if necessary (paras 45 and 46). Unfortunately, the court side-stepped this crucial question and focused instead on the second limb of AB's argument, namely that the prison authorities' refusal to transfer her to the female estate prevented her from ever being assessed for gender reassignment surgery. This specific interference with AB's private life, it felt, was "a significant and personal one", which "goes to the heart of her identity" (para 53). Thus, crucially, it was her inability to progress towards gender reassignment surgery – or what the court later revealingly referred to as "realisation *in full* of her gender" (para 64, emphasis added) – that formed the plank of the court's finding that there had been an interference with her private life, not the non-recognition of her (legally certified) gender *per se*, nor the fact that she was

compelled to live in the male estate, an environment which, as her solicitors argued, is “constructed and tailored for men” (para 45). This is telling; the legacy of the medical model of transgender people seems to have resulted in the court giving more legal weight to the interference with her medical gender reassignment, than with the interference with AB’s daily life as a woman, *per se*.

It will be recalled from Chapter 3 that, pursuant to article 8(2) of the European Convention, the right to respect for private life is not absolute, but may lawfully be interfered with, if the interference pursues a legitimate aim, is in accordance with the law, and is proportionate to that aim. The court accepted that the Secretary of State’s considerations might serve a legitimate aim in terms of “economic” and (interestingly) “prevention of disorder” objectives, but held that the interference with AB’s private life was disproportionate to those aims. “When issues go so close to the identity of a prisoner as here” and are “so intimately concerned with her personal autonomy” (referring to the possibility of gendered embodiment through gender reassignment surgery), the court stated, “the deployment of resources as a justification for the infringement of such rights must be clear and weighty in order to be proportionate. Here they are neither” (para 77).

It also held that the Secretary of State’s decision was unlawful on common law **Wednesbury** grounds (irrationality in administrative decision-making) as it had failed to take into account a number of relevant factors in its cost calculations; for example, it had not considered the risks and costs entailed if AB remained indefinitely in the male estate. Increasing frustration might lead to greater risk of self-harm and harm to others, and, in turn, this might require her to be held in more stringent segregation conditions than on the vulnerable prisoners’ unit where she was currently housed. This would involve comparable costs to long-term

segregation in the female estate, yet, those costs had not been taken into account (para 60). This, the court concluded, was a “significant” omission (*ibid*) and made the risk assessment “somewhat one-sided” (para 76). Finally, there was no evidence that AB’s segregation in the female estate would need to be as long-term as the Secretary of State had assumed in its calculations (para 74); the clinicians had spoken of weeks or, at most, two months being sufficient (para 69-70), and, if a special regime were put in place, as proposed, the risks of segregation to the claimant’s mental health would be mitigated (para 75). Thus, the court did not simply defer to the prison authorities’ decision-making, but closely scrutinised its arguments and costings, and exposed them as a fallacy.

AB further argued that she had been discriminated against in relation to her private life on the basis of sex (*cf. Kavanagh*), by being refused a transfer to the female estate. Whilst the court did not determine this claim in full,¹²⁰ it makes several observations about the right to equality, which further reinforce the perception that AB is not fully a woman until she has gender/genital reassignment surgery. “While it is true that the claimant was not treated in a manner equivalent to *a biological woman*”, the court stated, “it is difficult to characterise the treatment as discriminatory since the claimant was treated as a woman *but in a pre-operative condition*” (para 80, emphasis added). Thus, the court (and various witnesses) continue to apply a biological test for sex, repeatedly contrasting AB’s status with that of a “biological female prisoner”, “a biological female offender” and a “biological woman” (e.g. paras 11, 27, 32 59, 77, 80). This demonstrates the enduring power of *Corbett’s* medico-legal definition of “biological” sex, despite the Gender Recognition Act’s entry in the field. It also exposes the emergence of fracture-lines *within* “the law”, which undermine the

¹²⁰ It did not fully consider this claim, since it had already found an unlawful interference in her private life *per se*. This is common practice in ECtHR jurisprudence. Notably, the Equality Act 2010 was not yet in force.

authoritative power of law's new "truth-claim" that gender does not depend on genitals. For, as discussed in Chapter 2, society's tendency to speak of "the law" in the singular shows law's power to present itself as a cohesive, singular, authoritative discourse, when the reality is often quite different (as here).

In sum, **AB** was a landmark judgment, in that it recognised transgender prisoners' human rights, and resulted in a positive outcome for AB, who was subsequently transferred to a women's prison. It rejected the historically entrenched argument that AB was uniquely risky because of her transgender history. The judgment also led to important changes to the (then draft) PSI 2011, as discussed below. Francesca Cooney, formerly of the Prison Reform Trust, remarked that "the impetus to get it [PSI 2011] finalised, finished, and out was the legal action, the **AB** case. NOMS has a long tradition of sorting out its policies when it has been to court ... it is a real motivator ... it definitely made a difference because they couldn't really hide behind it" (Interview, 17 Nov 2015).

Despite these important "sovereign" effects, however, the judgment also entails negative, discursive effects. It entrenches hegemonic norms around "true" gender, perpetuating the view that a transgender prisoner's gender is not fully realised unless and until they have gender reassignment surgery, and that, in some circumstances, legally-certified gender may not be enough when it comes to the right to access "women-only spaces" like women's prisons. It also implied that, as a "pre-operative transgender woman", AB was not worthy of equal treatment with a "biological" woman. This view continues to animate public discussion around transgender women's access to the female prison estate, as will be discussed below.

Transgender men: bodies *at* risk

It is important to note that there have been examples of transgender men challenging allocation decisions, even though they have not reached the courts. An interview with the Prisoners' Advice Service ("**PAS**") (Interview, 13 April 2016) identified a parallel 2008/2009 case to AB's, in which a transgender man was allocated to HMP Holloway (a women's prison), after being arrested at the airport for drug importation. Whilst there, he obtained a GRC legally recognising him as a man and contacted PAS to help secure his transfer to the male estate. According to PAS, he presented "fully as a man"¹²¹ and was on testosterone hormones but had not had genital surgery. HMP Pentonville (a men's prison) was not prepared to take him due to concerns over his physical security. After having genital reassignment surgery whilst in HMP Holloway,¹²² he was finally transferred. PAS resolved the situation at governor-to-governor level, without recourse to judicial review, by arguing that it was discriminatory under the Equality Act 2010 not to transfer him. Effectively, it was his genital surgery that finally secured his recognition and equal treatment as a man by the prison authorities, although his security classification also came into account. A fellow prisoner at HMP Holloway, interviewed whilst on day-release to a voluntary sector organisation, described how this particular man "really had to fight to move to the male estate. He absolutely wanted to move. He really had to battle; he fought and fought to move across. He was allowed only once he was eligible for open conditions because ... they

¹²¹ This description is mentioned, as it provides a parallel with the court's discussion of AB's gender expression being "convincing" and shows that gender performance matters to how people generally think and talk about this field.

¹²² It is interesting that this man was able to have gender reassignment surgery whilst housed in a women's prison, but that the gender identity clinic required AB to live in a women's prison before she could be considered for surgery. This differential approach to transgender men and women, in terms of meeting the "real life test", is discussed further in Chapter 6.

felt he would be safer, because there are many instances of FtM particularly, but also MtF,¹²³ being raped in the male estate” (interview with Joanne Roberts, 26 July 2014).

It would seem from these two interviews (no sources document the prison perspective), that concerns about sexual harm *to* the transgender prisoner from other prisoners dominated, and outweighed both his housing preference and his legally-certified gender. It was only once his gender was fully embodied through phalloplasty (surgical construction of a penis), that the prison authorities considered him less susceptible to harm, and his right to be recognised as a man and housed in the male estate was finally realised.

Whilst both these cases – one with the intervention of the courts (**AB**) and one at the intervention of a voluntary sector organisation (PAS) – ultimately resulted in a positive outcome for the individuals concerned, they demonstrate the historically entrenched significance of the medical model of gender reassignment, and hence genitalia, in prison allocation decisions. They show how the divide which already existed between the prison administration’s and law’s governance of trans/gender remained after the Gender Recognition Act entered the field. Indeed, perhaps human rights law’s most material effects in this field are witnessed in **AB** by the prison authorities’ and courts’ conceptual contortions, and the invention of legal lacunae in the Gender Recognition Act, to effectively retain the prison’s right (albeit in “exceptional” circumstances) to govern gender separately from the law, and to allocate prisoners according to genitalia, as had always been the case in the past. And yet, despite providing them with a future “get-out” clause, the court in **AB** did not take the easy way out by giving the prison authorities the benefit of this potential legal exception in **AB**’s case, but ordered her transfer to the female estate.

¹²³ These terms are used to mean female-to-male and male-to-female transgender people (see Glossary).

Two years later, PSI 2011 closed the legal loophole left open by the *dictum* in **AB**, and finally brought official prison allocation policy in line with the GRA. For the first time since **Corbett**, penal and legal governance of trans/gender converged in this field. Before turning to PSI 2011's (and PSI 2016's) effects in this field, however, it is important to integrate into the analysis some discussion of the long-standing practice of separating transgender prisoners from the main prison population as a risk management technique, for, as demonstrated in **AB**, a complete picture only emerges if allocation and segregation decisions are considered in tandem.

Segregation of Transgender Prisoners as a Risk Management Technique

In 1994, as cited above, the Prison Service's very first official statement regarding the placement of transgender prisoners remarked that "it is more often than not necessary to *segregate* in a vulnerable prisoner unit or prison healthcare centre those whose transsexuality is obvious". (Hansard, HC Deb 18 May 1994, vol 243 c460W, emphasis added). As evidenced by various examples given in this chapter, and indeed throughout this thesis, separating transgender prisoners from the main prison population is still routine, particularly transgender women.¹²⁴ Indeed, in 2015, the Ministry of Justice stated that "the usual practice is for [transgender prisoners] to be *held in a supportive environment away*

¹²⁴ The research established that transgender men are usually housed in the main prison population in women's prisons, and rarely housed in men's prisons. Transgender women are usually housed separately in men's prisons. Those allocated or transferred to the women's estate are likely to be housed separately initially, and then integrated into the main population. Numerous examples given in this thesis evidence this practice and, due to space constraints, are not repeated here.

from the main regime of the prison and protected from risk of harm from other prisoners”
(2015: para 9, emphasis).

It is important to note that various housing scenarios are often (especially historically) referred to loosely as “segregation”, including within official prison discourse. This tends to blur the distinctions between them, and hinders precise analysis of historical prison policy and practice. Official prison discourse now uses the term “segregation” more precisely, only when formal segregation is meant, but new confusion is caused by the rebranding of “segregation units” as “care and separation units”. Whilst the language has changed (arguably itself an effect of human rights discourse in the field, as discussed below), the official rationale remains the same, namely that housing transgender prisoners separately from the main prison population is necessary to protect them from harm from other prisoners.

There are three types of separate housing within the English and Welsh prison estate, which transgender prisoners may be placed in. Each has different practical and symbolic effects. Briefly, a formal segregation unit (or “care and separation unit”) is intended as a short-term facility to punish those who have breached prison rules by removing them from association with other prisoners, or for housing prisoners separately from the main estate on a short-term basis for reasons of safety, good order or discipline (called “GOOD”). According to the PPO, “prisoners will generally spend most of the time alone in their cell, leaving only to shower, use the telephone and exercise for a short period” (PPO 2015). Further, “many prisoners in segregation units do not have access to a radio or television or any meaningful activity, *regardless of the reason for their segregation*”, (HM Prison Inspectorate 2016: 25, emphasis added). As will be demonstrated in the cases of *Hunnisett* and *XY* below, the

punitive conditions of the segregation unit therefore apply even to vulnerable prisoners sent there for protection; thus, formally segregating transgender prisoners effectively punishes them for being transgender, and disturbing the good order or discipline of the prison.

Transgender women prisoners in men's prisons are most frequently housed on a vulnerable prisoner unit ("**VPU**"), which is a dedicated long-term facility for those considered too vulnerable to be safely housed in the main prison population. However, this may depend on the particular security category of the prison they are sent to. The VPU entails a more confined and intensely supervised space than in the main prison population, and greatly limits a prisoner's access to association, recreation, education and prison employment.¹²⁵ Lack of purposeful activity is currently a problem across the entire prison estate but is particularly pronounced on VPUs (Owen and MacDonald 2015: 5.05; 5.46-5.57; HMIP 2014-2015: 50). Further, placement of a transgender prisoner on a VPU, whilst ostensibly intended to protect them from harm from other prisoners, may actually expose them to harm, for example, prison management expressed reservations about transferring Vikki Thompson to the VPU, as it housed a number of sex offenders, but later acceded to her request to move there, after she complained of transphobic harassment on the main wing (West Yorkshire (Eastern) Coroner's Court 2017). Placement on a VPU effectively produces transgender prisoners as "less eligible", yet, notably, media reports, fuelled by the Prison Officers Association, portray transgender prisoners as having "special treatment" and "cushy privileges" on VPUs, such as single cells and private washing and laundry facilities

¹²⁵ Lack of a prison job means no prison salary, greatly limiting the prisoner's opportunity to purchase items from the prison canteen (shop) or catalogue. This may impact on a transgender prisoner's ability to buy gender affirming-items, such as clothing, makeup etc. See Chapter 5.

(Daubney 2014), and suggest that an increasing number of prisoners are claiming to be transgender as a “soft option for prison life” (Leake 2014).

The final option for separate housing is “healthcare”. In the past, transgender prisoners were regularly pathologised and placed in hospital wings or psychiatric units on a long-term basis, like Marc Sancto, mentioned earlier, or placed in healthcare due to lack of alternative options. In a 1995 BBC 2 television documentary, *Taking Liberties*, Joanne Wray recounted how, after being subjected to attempted rape and repeated sexual harassment during her year’s imprisonment in HMP Hull, a men’s prison, she was eventually transferred to the hospital wing for her own safety, which she found “a distressing place” (Mills 1995). Today, perhaps due to the gradual de-pathologisation of transgender people, placement in a psychiatric unit or in healthcare does not seem to be routine. In 2015, for example, prison management considered the option of the healthcare wing for Vikki Thompson, but were concerned about the lack of privacy, the nature of prisoners currently in healthcare, and, above all, the fact that she “was not ill” (West Yorkshire (Eastern) Coroner’s Court 2017). One month earlier, however, transgender prisoner Tara Hudson was placed on the Brunel Unit in HMP Bristol (a men’s prison), a small segregated unit for prisoners with complex mental and physical needs, of which she had neither (Curtis 2015). She was locked in her cell for 23 hours a day, surrounded by men who “taunted and mocked her” and, at times, felt suicidal (*ibid*). When she was transferred to a women’s prison, she was again placed in a segregated unit, alongside some of the prison’s most dangerous prisoners (*ibid*).

It seems to be taken for granted, internationally, that transgender prisoners will be at risk of harm in the general prison population. There is certainly evidence that such risk is real, e.g., in the UK, the Ministry of Justice reached a six-figure settlement in the 1990s with a

transgender woman raped by another prisoner in HMP Peterborough, a men's prison, on the ground that the Prison Service had neglected its duty of care towards her (Interview with Press for Change, 26 October 2015).¹²⁶ Yet, it also seems to be taken-for-granted that the risk to them can be managed (or contained) through separating them from the main regime, but there is evidence that this does not protect them from harm from prisoners, either, or from self-harm and suicide. This pre-emptive risk framework militates against the equal treatment of transgender prisoners and is exclusionary.

In 2013, the Israeli Supreme Court reduced a transgender man's prison sentence, compared with his co-accused, to reflect the fact that, under Israeli prison policy, he would serve his entire sentence in solitary confinement and that the conditions of his imprisonment would be much harsher than for his cisgender co-defendants (Judgment of the Supreme Court (in Hebrew),¹²⁷ Criminal Appeals Nos. 5833/12; 6207/12; 6227/12; Gross 2013; Winer 2013). Whilst ground-breaking its interpretation of the constitutional right to equality, the Supreme Court's judgment did not actually interrogate the solitary confinement policy itself, but seemingly regarded it as an obvious solution to keeping transgender prisoners safe from harm (see Yona 2016).¹²⁸ Yet, even the reduced nine month sentence it imposed would

¹²⁶ The seminal US Supreme Court judgment in *Farmer v Brennan* (1994), 511 US concerned a transgender woman who had been beaten and raped by her cell-mate two weeks after being placed in the general population of a men's prison. In the Canadian case of *Kavanagh* (2000), the applicant testified that she was "regularly beaten, sexually assaulted and ridiculed" in the main estate of the men's prison, and that during an earlier prison sentence, she had been raped by nine men (para 129). New Zealand's Department of Corrections policy recently came under scrutiny, after a transgender woman was allegedly raped after she was moved to the mainstream men's prison, having been housed separately during the earlier stages of her transition (Fisher 2015).

¹²⁷ Informal translation into English kindly provided for the author by Maya Barr (copy on file with the author).

¹²⁸ Arkles has argued that this bare equation of segregation with safety has similarly escaped question, challenge or critique in the US (2009). Constitutional challenges to the "administrative segregation" of transgender prisoners on the "equal protection" ground have consistently failed, on the basis that segregation is rationally linked to the legitimate aim of ensuring the safety of the transgender prisoner and other prisoners,

have been extremely harmful to the prisoner's mental health.¹²⁹ The decision effectively legitimises a policy which casts transgender prisoners as so far outside the realms of cultural and institutional intelligibility, and hence as so risky, that solitary confinement is the only option. It characterises transgender prisoners as the problem, rather than transphobia in the main prison population.

The United Nations Special Rapporteur on Torture has similarly drawn attention to this dilemma, and warned that whilst transgender women, especially, "are said to be at greater risk if placed within the general prison population in men's prisons", solitary confinement and administrative segregation of transgender prisoners is harmful and may constitute inhuman and degrading treatment, contrary to the international prohibition on torture (2001: para 23). Indeed, there is well-established jurisprudence that long-term segregation in conditions of solitary confinement can amount to inhuman and degrading treatment under article 3 of the European Convention (incorporated into UK domestic law through the Human Rights Act 1998) depending on its length, conditions and effects on the prisoner. As yet, no case has specifically determined the situation of a transgender prisoner held in long-term segregation. However, in an analogous case, the European Court of Human Rights held in *X v Turkey* (App No. 24626/09, judgment 9 October 2012), that the Turkish prison authorities had breached article 3 of the European Convention by placing a gay man in solitary confinement for 13 months, ostensibly for his own protection.

and maintaining the security of the prison (*ibid*:550-551, discussing *Estate of DiMarco v Wyoming Department of Corrections* 300 F.Supp 2d 1183 (2004)).

¹²⁹ In fact, he was later pardoned (e-mail to the author from Aeyal Gross, 12 Feb 2014).

This was a landmark judgment, but it must be noted that the conditions in which X was held were extreme. During his 13-month period of segregation, X was only allowed out of his small, poorly lit and rat-infested cell once a month for the purpose of his lawyer's visits. His mental and physical health suffered greatly. The prison authorities argued that his segregation was necessary for his own protection, and that it was the prisoner himself who had asked to be moved, following harassment from other prisoners. As the European Court observed, however, the prisoner's request was to share a cell with another gay prisoner, not to be placed in long-term isolation. It held that the "extreme" and "exceptional" conditions in which he was held constituted inhuman and degrading treatment under article 3 of the European Convention, both separately, and in conjunction with article 14 (protection from discrimination), on the basis that the Turkish authorities had discriminated against the applicant due to his sexual orientation. The main reason for his solitary confinement, it found, had been his sexual orientation, rather than his protection.¹³⁰ *X v Turkey* provides judicial authority for transgender prisoners to similarly challenge long-term solitary confinement under article 3 on its own, and in conjunction with article 14, particularly now that the European Court has expressly interpreted article 14 of the European Convention to encompass discrimination on the grounds of "gender identity", *Identoba v Georgia* (App no. 73235/12, judgment 12 May 2015).¹³¹

¹³⁰ As previously noted, since the European Convention's right to equality is not a free-standing right, but can only be brought in conjunction with another Convention right, the European Court's established practice is to decline to make a determination regarding the discrimination complaint, if it has already found a violation of the primary impugned article of the Convention. Its separate finding in *X v Turkey* that there was discrimination in X's detention conditions, due to his sexual orientation, broke new ground, and represents a significant development in the European Court's jurisprudence on gay and lesbian rights. See Johnson 2012.

¹³¹ It will be recalled from Chapter 3 that the Equality Act 2010 also provides domestic protection against discrimination on the grounds of "gender reassignment" as a free-standing right.

In the UK context, the WESC stated in its report on *Transgender Equality* that: “there is a clear risk of harm (including violence, sexual assault, self-harming and suicide) where trans [*sic*] prisoners are not located in a prison or other setting appropriate to their acquired/affirmed gender”, but “neither is it fair or appropriate for them to end up in solitary confinement solely as a result of their trans status” (2016, para 320). According to the Minister of Justice, however, “prisoners in England are never subject to solitary confinement”, although they may be placed in long-term segregation, subject to strict procedural requirements¹³² (Minister of State for Justice 2012).

In practice, whilst prisoners in England and Wales may never be formally subject to solitary confinement, the line between solitary confinement and segregation may be a fine one. Some prisoners in segregation are locked in their cells for 23 ½ hours a day, with only half an hour in a caged exercise yard (alone) to break the day (HM Inspector of Prisons 2015: 37). Indeed, this constitutes solitary confinement under the internationally influential (but not legally binding) UN *Nelson Mandela Rules* (A/RES/70/175) (previously the UN *Standard Minimum Rules for the Treatment of Prisoners*) (rule 44).¹³³ Several recent court cases (not involving transgender prisoners) have specifically tested whether long-term segregation in English prisons and young offenders’ institutes might amount to inhuman or degrading treatment under article 3, but with no success.¹³⁴ In *R (on the application of Joanne*

¹³² Under current Prison Rules (Rule 45), amended after the Supreme Court ruling in *R (on the application of Bourgass and another) v Secretary of State for Justice* [2015] UKSC 54, segregation for up to 42 days is permitted with governor approval (subject to regular reviews). Thereafter, Secretary of State authorisation is required.

¹³³ Solitary confinement is defined in the *Nelson Mandela Rules* as “the confinement of prisoners for 22 hours or more a day without meaningful human contact”.

¹³⁴ The courts have, however, ruled that failures to follow segregation rules breach administrative law, e.g. *R (on the application of “AB” a child, by his litigation friend v Secretary of State for Justice and Youth Justice Board* [2017] EWHC 1694 (Admin), *Bourgass* and *Dennehey*.

Dennehey) v Secretary of State for Justice and Sodexo Ltd [2016] EWHC 1219 (Admin), for example, the court stated (citing *Shahid v Scottish Ministers* [2016] AC 429)¹³⁵ that an extremely high threshold has to be met for long-term segregation to amount to inhuman or degrading treatment under article 3 of the European Convention, and held that Dennehey’s two years in segregation had not met this threshold, and was far from “total solitary confinement” since she had been allowed domestic visits and access to a library and gym, and had worked as a prison orderly (*Dennehey*, at para 41).¹³⁶ This chapter will shortly discuss two very recent (2017) cases, in which transgender prisoners were placed in long-term segregation in English prisons, but first, PSI 2011’s and PSI 2016’s formal provisions in relation to allocation and segregation will be examined.

Balancing Rights and Risk in PSI 2011 and PSI 2016

So far, this chapter has analysed historical, genitalia-based prison allocation practice, and has unpacked the effects of the prison authorities’ construction of transgender prisoners as both at risk and risky. It has reflected on the practice of segregating and separating transgender prisoners from the main prison population as a risk management technique, and argued that, whilst ostensibly for their own protection, it has exclusionary and harmful effects. This section examines official allocation policy, which was finally laid down in PSI 2011, two years after judgment was handed down in *AB*, and was recently revised in PSI

¹³⁵ The court described Shahid’s segregation period (11 months, followed by a further 45 months) as “exceptional”, but still held that the length and conditions of segregation did not amount to inhuman and degrading treatment.

¹³⁶ Applying *Shahid*, the court held that long-term segregation can also comprise an interference with private life, under article 8 of the European Convention, but concluded that Dennehey’s segregation was justified as it was lawful and proportionate to the extremely high security risk she posed (she had made specific plans to harm prison staff and escape).

2016. It analyses the attempt to align human rights-based developments with prisons' risk management imperatives.

Prisoners with a GRC: officially no longer risky

Referring to the Prison Rules, PSI 2011 provides that "in most cases, prisoners must be located according to their gender as recognised under UK law" (para 4.2). Thus, if they hold a GRC when they are sent to prison, they must be located to a gender-appropriate prison. If they acquire a GRC whilst in prison, they should again, "in most cases, be transferred to the estate of their acquired gender" (Annex D, para D.5.). PSI 2011 therefore formally aligns recognition of a person's gender for prison allocation purposes with law's recognition of their gender under the GRA. Legal gender, and its underlying respect for transgender people's right to respect for private life, is now what officially counts, not genitalia, a particular "biological" past, or offending history "*in most cases*". Whilst this phrase suggests that discretion is being let in through the backdoor (as the court implied was legally possible in **AB**), the exception is, in fact, extremely narrowly, and clearly, defined.

PSI 2011 provides that a transgender woman with a GRC "may be refused location in the female estate only on security grounds" (para 4.3),¹³⁷ and then, only where "it can be demonstrated that other women with the same security profile would also be held in the male estate" (ibid). This, it states, is likely to arise only in a "few very rare cases" (Annex D, para D.8). Whilst PSI 2011 does not give any examples, it seems this could only arise if a woman's risk profile is so exceptionally high that she needs to be housed in a Close Supervision Unit, as there are three such units in the male estate, but none in the female

¹³⁷ A transgender man with a GRC "may not be refused location in the male estate... because there are no security grounds that can prevent location in the male estate" (para 4.4).

estate.¹³⁸ PSI 2011 adds, crucially, and by explicit reference to **AB**, that “there are some women who are guilty of violent crimes against other women [who] are still managed safely in the female estate”, and that any “transsexual woman with a GRC who poses similar risks should be managed in a similar way in the female estate” (Annex D, para D.7).

This provision is highly significant, as it requires transgender women with a GRC to be treated the same as cisgender women in terms of risk assessment. It recognises them, through their GRC, as authentic women, as equal to cisgender women, and as no more risky than cisgender women. It therefore rejects both the broader narrative that transgender women *inherently* represent a risk to cisgender women which justifies their exclusion from the female estate, and the more specific narrative that transgender women who have “male” genitalia and/or a history of violence against women are too risky to be placed in the female estate. Indeed, PSI 2011 emphasises that a person’s gender “is a legal issue rather than an anatomical one” (para 4.6) and adds that “under no circumstances should a physical search or examination be conducted for this purpose” (*ibid*). This officially draws to a close historical reliance on current anatomy, especially genitalia, to determine gender for prison allocation purposes, and represents a new alignment between the legal and penal regulation of gender.

This development is progressive in terms of transgender prisoners’ human rights but is not without its critics. Jeffreys has heavily criticised PSI 2011’s requirement that a transgender woman’s risk profile be considered on the same basis as a cisgender woman’s (2014).

Whereas Smith (2014) criticised the *Kavanagh* judgment for subordinating transgender

¹³⁸ This research has not identified any cases in which a cisgender woman has ever been held in the male estate. Notably, the construction of risk is highly gendered across the prison estate, and the same risk levels are not applied uniformly in women’s and men’s prisons (see e.g. Corcoran 2006).

women's rights to cisgender women's rights, Jeffreys criticises the **AB** judgment and PSI 2011 for the opposite stance. She depicts **AB** as a "clear clash of rights ... in which a man's right to wear make-up and be housed with vulnerable women who are incarcerated trumps the right of those women to be protected from violent men" (159) and argues that the very "notion of human rights is trivialised thereby" (*ibid*). For Jeffreys, "it is a serious setback for the journey to women's equality when states protect gender in their legislation and proclaim that men's rights to personate women are 'human rights'" (161). This "subordinates the rights of women, persons of the female sex, to dignity, security and privacy, to the rights of (mostly) men who choose to act out a 'gender identity', a state of mind." (161).

Various submissions to the recent WESC inquiry into *Transgender Equality* have similarly framed the issue as a clash of rights between transgender women's right to be recognised as women, and cisgender women's rights to safe, female-only spaces and services (e.g. Jeffreys 2015; Radical Feminist Legal Support Network 2015, Campaign to End Rape 2015, Women Analysing Policy on Women ("**WAPW**") 2015, Scottish Women against Pornography 2015 and Women and Girls Equality Network 2015). WAPW's submission states that "prisons must take action to ensure the safety and well-being of transgender people serving a custodial sentence", this "cannot be at the expense of women prisoners, who are already an extremely vulnerable group" (2015, para 7.3.4.). There is a clearly a perceived tension here, in meeting the rights or needs of all women. Although presented, politically, by feminist groups as a clash of rights (which is arguably evidence, in itself, of the perceived power of rights discourse in contemporary society), this general line of argument continues to have considerable traction with the general public, particularly in relation to transgender

prisoners who transition in the male prison estate and request a transfer to the female estate. Suspicions around this group's trans/gender authenticity and motives seem particularly hard to shake. Accepting the authenticity of prisoners whose gender is not legally certified by a GRC also seems to be problematic for prison management. The next section argues that this again translates into a risk management issue, eclipsing transgender prisoners' rights and needs.

Prisoners without a GRC: still risky

PSI 2011's clear, strictly-drawn provisions apply only to prisoners with a GRC. It leaves the allocation of a transgender person *without* a GRC at the discretion of the prison authorities, and creates a new divide between those who have, and those who do not have, a GRC (another example of reform excluding as it includes). Although PSI 2011 makes it mandatory for prison management to hold a case conference if a prisoner requests a transfer to the estate opposite to their legal gender (para 4.5), in practice, this provision was largely ignored, as evident in Tara Hudson's, Vikki Thompson's and Jenny Swift's cases. Prisons simply interpreted the new allocation policy under PSI 2011 as a black-and-white test of "GRC or no GRC".

Arguably, PSI 2011 – whether by design or default – allowed previous power relations to prevail. It did not place a duty on prisons to inform transgender prisoners of their right to request a transfer to a gender-appropriate prison, nor did it provide any time-frames or deadlines for case conferences to be convened, where requested. Transgender prisoners did not have the right to be present, represented or even kept informed of developments, leaving them powerless, and prisons unaccountable (except in retrospect, as at the inquest

into Vikki Thompson's death, where the jury was critical of the co-ordination of the supposed "multi-disciplinary" case management meetings, and the absence of key staff, West Yorkshire (Eastern) Coroner's Court (2017)). PSI 2011 also gave wide discretion to prison management in deciding whether or not to transfer a prisoner between estates. Whilst flexibility is important, this discretion seems to have been regarded as a licence for prison management to govern trans/gender in the same way as before, subject only to the new caveat that prisoners *with a GRC* must be allocated to a gender-appropriate prison. Indeed, one firm of solicitors prepared a legal challenge to the lawfulness of PSI 2011, on the basis that its provisions regarding the allocation of prisoners without a GRC gave rise to "an unacceptable risk of unlawful decision-making", contrary to administrative law, but their client's case settled before the proposed judicial review application was filed (Ryan 2016).

A review of the case conference criteria (PSI 2011, Annex D, para D.13), reveals that, in contrast to prisoners with a GRC, PSI 2011 continues to construct transgender prisoners without a GRC as risky. The biggest risk seems to be that their gender is not authentic, as it is not medically or legally certified. The first criterion which should be considered in the allocation decision, for example, is whether the person would meet the conditions for obtaining a GRC, including a gender dysphoria diagnosis. The advice of the gender specialist and supervising psychiatrist should also be taken into account. Medico-judicial authority over (trans)gender authenticity is therefore retained, and privileged over self-determination of gender. Furthermore, whilst security issues may only be considered in exceptional circumstances in relation to transgender women prisoners *with a GRC* under PSI 2011 (and then only if a cisgender woman prisoner would be treated the same way), the risk to/from transgender prisoners *without a GRC* must be considered as part of the allocation decision.

This implies that they are risky for prison management purposes *because* they do not have a GRC confirming their (trans)gender authenticity.

PSI 2011 notes that not every transgender person will wish to be housed according to their self-identified gender. Whilst this is no doubt true, the example given is that “female-to-male transsexual people *with vaginas* may feel that they will be very vulnerable if placed in the estate of their acquired gender” (D.13, emphasis added). There is no correlating recognition of the possibility that transgender women (with or without penises) might feel vulnerable, and may therefore not wish to be housed, in a women’s prison. As in *Kavanagh* (2001), the equation of vagina with vulnerability (and penis with threat) is unproblematically assumed. This double-standard of risk is revealing of the deeply entrenched cultural coding of transgender women as aggressors and predators, and transgender men as vulnerable and at risk, reflecting an essentialist position (rejected by feminism) that certain gender behaviours stem from male or female “biological” sex. Whilst the reference to “female-to-male transsexual people with vaginas” has been removed in the revised version of the policy, PSI 2016 still states that transgender women may wish to remain in the male estate due to “the geographical location of the prison or familiarity with the male estate” (para 4.13), whilst transgender men may wish to remain in the female estate, due to “fear of location within a male establishment” (para 4.14). These may well amount to reasonable assumptions based on known facts, such as known risk differentials between the female and male estate. However, applying a governmentality approach to risk, as a discourse, it is necessary to consider the cost to transgender prisoners’ daily lives of constantly “being imagined and moulded”, and hence managed, as risky (O’Malley 2010:14).

PSI 2016 promises that NOMS will now take a “more flexible approach” (para 2.4) to prison allocation, noting that not all transgender people will have obtained legal recognition via a GRC, as it is a “costly and lengthy process” and “not a necessity of day-to-day living” (para 2.4). For transgender prisoners “who can demonstrate consistent evidence of living in the gender they identify with” (para 2.4), the absence of a GRC “does not automatically prevent” them from being located in a gender-appropriate prison (para 2.5). Nevertheless, “exceptional circumstances” must apply (para 6.1). This is not a self-determination test, and PSI 2016 emphasises that prisoners must be made aware that there is “no *obligation* for the prison authorities to locate them according to the gender they identify with” (para 4.9, emphasis added).

PSI 2016 greatly strengthens the procedural aspects of PSI 2011, providing clear procedures and time-lines to ensure early decision-making regarding allocation, with prisoner involvement.¹³⁹ A transgender prisoner without a GRC who wishes to be allocated to a gender-appropriate prison, must provide “consistent evidence of living in the gender they identify with” (para 4.8). Under Annex A, “full evidence” is still linked to a GRC, or an application for a GRC. “Strong evidence” comprises healthcare evidence”, such as advice from a general practitioner or gender identity clinic, hormone treatment, a diagnosis of gender dysphoria and gender reassignment surgery, and/or “actual life evidence”, such as change of name and appearance, consistent use of gendered spaces, and day-to-day living, such as bank cards. This evidence must be considered alongside “all known risk factors” (para 5.17).

¹³⁹ E.g. transgender case boards must be held at latest three days after the prisoner arrives at prison, and ideally beforehand (para 5), and transgender prisoners must be provided with an opportunity to participate or to make their views known to the board (paras 4.5, 4.6, 5.4, 5.7, 5.20).

PSI 2016 does not specify the risk factors that may appropriately be considered, but where a prisoner presents “a significant level of complexity and/or risk of harm”, a centrally-managed, “complex case” board must consider the case, rather than a local case board (para 5.19). This board is to be “chaired by the deputy director of custody for the women’s estate” (*ibid*), which, again, implies and perpetuates the view that “complex” and “risk of harm” issues are most likely to arise in respect of transgender women wishing to be housed in the women’s estate. Notably, the independent reviewers state in their report (Ministry of Justice 2016) that they “have seen no evidence that being transgender is, in itself, linked to risk”, and emphasise that risk assessments “must be free from assumptions or stereotyping” (*ibid*, para 6). Yet they also note that, in decisions to transfer serving prisoners between male and female prisons (or vice-versa), it will be necessary to factor in “the impact on, and risks to” other prisoners, “*especially, for instance, in the women’s estate, where many prisoners will have been the victims of domestic violence or sexual abuse and may continue to be exceptionally vulnerable*” (*ibid*, para 5, emphasis added). Thus, it is clear that the vulnerability of cisgender women prisoners remains a major concern, and that transgender women who wish to transfer to the female estate continue to be constructed as risky behind the scenes, even though this is not officially recognised in PSI 2016. Arguably, however much tighter the procedures are in PSI 2016, without a genuine commitment to allocating prisoners according to “consistent evidence” of their lived gender (i.e. not simply in “exceptional circumstances”), these developments are unlikely to have real power effects on this highly contested, discursive terrain, and hence on prison’s management of transgender prisoners without GRCs.

Segregation

Finally, reflecting international concerns (albeit without specifically referencing international human rights standards in the field, e.g. articles 3 and 8 ECHR), PSI 2011 cautions strongly against long-term segregation, stating that “particular care should be taken where the prisoner is likely to be put into long-term segregation as the effects of long-term segregation may have serious mental health consequences on the prisoner” (Annex D, para D.14). It also stipulates that “transsexual prisoners should be viewed as an ‘at-risk’ group in terms of suicide and self-harm” and should therefore not be placed in long-term segregation except in “exceptional circumstances” (Annex B, para B.9).¹⁴⁰ Such decisions must be made “very carefully” and must be “supported by legal advice” (Annex D, D.14). PSI 2016 strengthens the prison authorities’ stance, although its language is still conciliatory. It states that “it is *not advisable* to use Care and Separation as a method of managing risks to transgender prisoners from other prisoners” and that “in these circumstances, *where possible*, the establishment should seek to manage the prisoner in an appropriate supportive environment away from the main regime of the prison” (para 6.34, emphasis added). “Where it is necessary to locate a transgender prisoner in a Care and Separation Unit”, however, a referral “must be made” to a centrally managed Transgender Case Board within seven days of the decision (6.35). Thus, whilst not ruling out long-term segregation, PSI 2016 establishes additional procedural requirements, and relocates power over long-term segregation to a central body. Only time will tell whether this additional procedural safeguard will make any difference on the ground.

¹⁴⁰ Here, it cross-refers to PSO 1700 on *Segregation*, which advises against the segregation of prisoners at risk of suicide and self-harm wherever possible.

The Limits of Human Rights

The final section of this chapter reflects on the limited power of law and its human rights discourse to effect instrumental and normative change in this field, and the limited power of the courts to provide a remedy, when prison establishments do segregate transgender prisoners on a long-term basis. The research indicates that there are two fields in which PSI 2011, and now PSI 2016, do not appear to have shifted the discursive terrain, first in relation to the use of segregation as a default position, and second in relation to the motives and trans/gender authenticity of transgender women who transition whilst in the male estate, and are subsequently transferred to the female estate.

Segregation as a default position

Whilst PSI 2011 (and now PSI 2016) strongly caution against long-term segregation of transgender prisoners, it seems to still be used as a “default position” (Ryan 2016b), with highly punitive, exclusionary and harmful effects. In July 2017, the Ministry of Justice paid an undisclosed amount of compensation, and made an apology, in settlement of a legal case brought by a transgender woman housed in long-term segregation in a men’s prison between May 2014 and July 2015 (Bhatt Murphy 2017b). According to Bhatt Murphy’s press announcement (*ibid*), “XT” had lived as a woman for many years prior to her imprisonment, in 2013, for the offence of unlawfully possessing a firearm and ammunition. Contrary to PSI 2011, no case conference was held regarding her prison allocation or her management. Initially, she was locked in her cell for 23 hours per day, with one hour’s exercise. The cell was dirty, covered in graffiti, and had no internal electricity (and hence no radio or television). She was not given sufficient access to gender-affirming items for nine months.

She was subjected to abuse from other prisoners, including sexually explicit abuse and threats, and felt “scared, debased and persecuted because of who she was”. She described feeling “despairing and suicidal at times” (Fae 2017c). Despite repeated requests to move to the female estate, and even after she obtained a GRC legally certifying her as a woman in April 2015, the prison refused to transfer her and she was only moved, in July 2015, after her solicitors intervened (Bhatt Murphy 2017b).

The legal proceedings, brought by Bhatt Murphy on behalf of XT in May 2016, alleged misfeasance, negligence, breaches of the Equality Act 2010 and violations of articles 3, 8 and 14 of the European Convention. It is unfortunate for the purpose of this analysis (although not for XT), that this case did not proceed to a court hearing, as it might have set an important precedent regarding the long-term segregation of transgender prisoners in such severe conditions as being contrary to human rights and equality guarantees, where such segregation is simply due to a prisoner being transgender. By settling the case, the Ministry of Justice avoided such a precedent being established. Whilst law, including human rights- and equality-based arguments, led to a successful outcome for XT in *retrospective* terms, via compensation and an apology, it did not prevent her from suffering 14 months in extremely harsh conditions in segregation. It is hard to know if the settlement will have any future effects on prison practice towards transgender prisoners. Adopting Whitty’s suggestion that human rights might be conceived of as an organisational risk to the prison (2011), there was little “Legal Risk +” to the prison in this case, other than a compensation payment (of an undisclosed amount). As the prison is not named, it has not suffered any reputational damage, and, apart from *Gay Star News* (Fae 2017c), the case does not appear to have been reported in the press. Lack of press coverage further suggests that there is little public

concern about the conditions in which transgender prisoners are held, when they are ostensibly segregated for their own protection. Perhaps this is regarded as an inevitable, inescapable consequence of being transgender in prison (*cf.* the Israeli case above), since transgender prisoners are continually reproduced, through various governmental strategies, as both at risk and risky.

An earlier case in 2017 bolsters this argument. In February 2017, a transgender prisoner, Hunnisett, was denied leave by the High Court to pursue a judicial review of HMP Frankland's decision to retain her in "indefinite isolation" in segregation, rather than transfer her to the VP wing.

Somewhat unusually for this stage of proceedings,¹⁴¹ the court published a computer-generated transcript of its oral decision regarding the application, *Hunnissett*.¹⁴² This is highly informative for the purposes of this chapter.

Hunnissett was imprisoned for life in 2012 for the murder of a man whom she accused of being a paedophile. Since October 2015, she has identified as a woman (*ibid*, para 3). Due to threats to her safety, she could not be safely housed on an ordinary wing. Prison management refused to relocate her to the VP wing, due to her statements about, and threats against paedophiles, since many of the prisoners on the VP wing had been convicted of such offences. Consequently, she was placed in segregation, on a restricted regime, which meant that she could not access church, work and education in the same way as other prisoners, including those on the VP wing. She described to the court how desperate her

¹⁴¹ The court offered Hunnisett a transcript, covered by legal aid. Hunnisett's first name is not given.

¹⁴² An earlier court had refused leave to pursue judicial review proceedings "on the papers" (*Hunnissett*, para 1). Hunnisett appeared in person (via video-link) in the renewed proceedings.

situation was, and how she had attempted suicide (para 13). Hunnisett argued that placing her in long-term segregation breached article 3 (inhuman and degrading treatment) in conjunction with article 14 (non-discrimination) of the European Convention and/or that it breached article 8 (private life). She also argued that it discriminated against her on the grounds of gender reassignment, contrary to the Equality Act 2010. She was now housed in the prison hospital, where she had some freedom, but she was still limited in what she could do; she was able to work three hours a day as a hospital cleaner, but still did not have access to church and education (para 13).

Whilst she initially sought an order for the prison to transfer her to the VP wing, Hunnisett accepted, during the hearing, that it was unlikely that she could be relocated to the VP wing due to her repeated threats towards paedophiles (*ibid*, para 6). Her complaint, as she now put it to the court, related to the “whole of her treatment in prison” (para 12). In effect, she stated, the prison was “obliging her to run the risk”, if she wanted access to the full regime, “of being subject to threats from other prisoners who were unfamiliar with transgender people”, and of those threats being carried out (*ibid*). The court determined that the prison’s refusal to transfer her to the VP wing was lawful, whether one looked at article 3 or article 8 of the European Convention (para 18). Regarding article 8, the interference with her private life was justified, as it was a proportionate response to the need to protect other prisoners’ right to life (*ibid*). Thus, this was specifically recognised by the courts as an issue of competing rights. Nor could the court see from the papers that she had been discriminated against for being transgender; “it is a fact that she is transgender. It is a fact that, as a result of that, she may suffer a greater risk from other people than she otherwise should, or otherwise would, if not transgender” (para 21). Whilst it was “an obligation of

the prison to protect her so far as it can from such risks”, there was no arguable case which could be determined by judicial review (para 19). The court was not, “as part of its duties, required to manage prisons”, but only to review whether those decisions which had been made were lawful (para 18). She could pursue a separate claim for compensation if she had suffered injury, or seek an order requiring the prison service to behave in a different way towards her (para 22), but her application “as it stands” was for leave to pursue a judicial review of the prison’s refusal to transfer her to the VP wing. There was no realistic prospect of success in this claim, so the application had to be dismissed (para 23).

This case shows how human rights and equality arguments can only go so far if there is no suitable housing within the prison estate for a transgender prisoner with a risk profile such as Hunnisett’s. She was placed in an impossible legal situation, with no obvious solution, other than compensation after the event. Whilst it is easy to focus on the difficulty of placing Hunnisett on a VP wing, given her history of violence towards paedophiles, it is highly troubling that prison management felt it could not keep her safe in the main prison population, due to other prisoners’ hostility towards transgender prisoners, and felt that it had no other option. It is equally troubling that some elements of the press trivialised both her obvious distress at her situation and her recourse to human rights; the *Mirror*, for example, ran the headline “Jailed killer who chopped off own TESTICLES in DIY transgender op claims her rights are being violated” (Bazaara 2017).

In his 2015 Annual Report, HM Chief Inspector of Prisons spoke of the “upsurge of violence” in the main male estate in recent years and drew attention to the number of prisoners requesting to move into VPUs and even “self-segregating” by deliberately breaching prison rules (HMIP 2015-16: 8), and the exponential increase in self-harm and suicide among

prisoners in general. In the light of the current pressures on prison governance to manage risk in these conditions, and with ever-diminishing resources, it is not difficult to see that segregating or separating transgender prisoners is operationally more manageable than placing them in the main prison population. But it must be asked at what cost: this policy has not been shown to protect transgender prisoners from harm, despite protection being its official justification – as a risk management tool, it is not effective. Beyond its ineffectiveness as a harm-reduction strategy, removing transgender prisoners from the main estate entails a broader social cost, by reinforcing, rather than challenging, the marginalisation and stigmatisation of transgender prisoners, and effectively legitimising ignorance, prejudice and transphobia in the main estate.

Continuing suspicions of trans/gender authenticity

The other area in which the “new” human rights discourse of PSI 2011 and PSI 2016 seems to have made very little inroad, is in shifting the long-standing cultural construction that transgender women represent a threat to cisgender women in the “women only” space of the prison. Press reports in 2017 suggest that the prison authorities have started to transfer more transgender women into female estate, and therefore that PSI 2016 has had a “sovereign” effect on prison governance. However, public opinion does not seem to have changed, nor the opinion of certain “inside sources” feeding stories to the press.

On the one hand, those who have clearly lived in their gender before imprisonment, particularly those whose offences were relatively minor and/or not directed at women, appear to be regarded sympathetically, e.g. Tara Hudson, Vikki Thompson and Jenny Swift. Their authenticity is effectively proved by their lives prior to prison, and, in the public’s eye,

they appear deserving of respect for their gender, regardless of their legal or genital status. On the other hand, legal certification of gender through a GRC does not seem to assuage the deep-rooted fear that transgender women who have reassigned their gender *whilst* in prison (particularly, but not exclusively, those who have previously committed sexual and/or violent crimes against women) are suspicious and should not be housed in the female estate. This perceived threat seems to be greater if they have not had genital surgery, and still have a penis. One of the independent reviewers observed in a seminar that many of the prison staff they had interviewed for the purpose of the review of PSI 2011 had expressed concern about the risk of “sexual functionality” and “functional penises”, not simply in terms of risk of non-consensual sex, but also in terms of consensual sex, as sex is deemed to be illegal in prison,¹⁴³ and they were worried about a prisoner getting pregnant “on their watch” (author’s contemporaneous notes of Jay Stewart, Garden Court Chambers 2016).

PSI 2016 notes that “being transgender is independent of sexual orientation. Transgender people may identify as heterosexual, homosexual, bisexual, asexual or may not identify with conventional sexual orientation labels” (para 1.1, note 1). However, press reports perpetuate the view that a transgender woman who has sexual relations with another woman is not a genuine woman, and should be housed in the male estate. This seems to be rooted in a strong heteronormative assumption that that an “authentic” transgender woman would be sexually attracted to men, not women.¹⁴⁴ For example, in 2011, the *Mirror* reported that “Craig Bowman, who calls himself Emma” and who “is still thought to have male sex organs” has been “allowed to mix with women” in HMP New Hall (a women’s

¹⁴³ On the basis that it is regarded as sex in public, rather than in private. See Howard League for Penal Reform *Sex in Prison* research (2015).

¹⁴⁴ This might also be traced back to the sexologists’ construction of the homosexual as a “sexual invert”, see Chapter 1 (Ellis and Symonds 1987).

prison) and is having a close relationship with another prisoner (Dorman 2011). Concerns had consequently been raised as to her suitability for that prison; a prison source was cited as saying that “Bowman is causing staff concern. He [*sic*] is still a long way from having a complete sex change ... Staff believe he [*sic*] can still function as a man and that is quite scary in a prison full of female inmates. Bowman should not be in here” (*ibid*). Quite why she was “scary” when she had been imprisoned for a drugs-related offence, and was in a consensual relationship with another prisoner, is not clear. However, the fact that she had not had gender reassignment surgery and was engaging in a consensual relationship with a woman, seems to have meant to prison insiders that she was a man.

In April 2017, the press reported that five transgender women had been transferred to HMP New Hall, four of whom had not “fully physically transitioned”, and that apparently both prisoners and staff were “fearful” and feel “threatened” (Hamilton 2017). Although none of the transgender women prisoners had actually “misbehaved”, the prison source stated, there are “a lot of vulnerable women in there” (*ibid*). Then, in September 2017, the press took up Jessica Winfield’s case again. In March 2017, when she was first transferred to the female estate after obtaining a GRC, and gender reassignment surgery, the press – from the *Sun* to the *Telegraph* – disavowed her (legal) gender, by referring to her male name and using male pronouns to describe her. BBC Radio 4’s *PM* correspondent mis-gendered her 11 times, in a report lasting a mere one and a half minutes (Shaw 2017), and like most other reports, highlighted the fact that her transfer “has obviously provoked some alarm and distress among prisoners who are going to be sharing that prison with him [*sic*]” (Shaw 2017). In September, the press revealed the (highly personal) fact that her gender reassignment surgery had in fact only been partial, that she still had a penis, and that she

had been placed in segregation “for making sexual advances on women” (O’Donoghue 2017; Doran 2017; see Eleftheriou-Smith 2017, refuting this was the reason for her segregation). The “authenticity” of transgender women’s gender therefore remains under constant surveillance and scrutiny, and they are seemingly never free from others’ suspicions about their (sexual) motives.

Finally, on 31 October 2017, MP David Davies housed a House of Commons meeting on “Transgender Law Concerns” (Davies 2017), which *inter alia* expressed concerns about the number of sex offenders currently reassigning their gender whilst in prison and the potential impact on the female estate. “Segregation on the basis of gender identity cannot be an acceptable substitute for sex-segregation if we are to uphold the human rights of women prisoners and protect them from harm”, one speaker stated (Green 2017). The *Daily Express* ran a piece on the meeting, under the headline “Stay in jail until you have sex-op, sex offenders told” (Tominey 2017). Thus, whilst the prison authorities are seemingly following the policy laid down in PSI 2011 and PSI 2016, the widespread suspicion of transgender women who transition whilst in prison remains very much evident.

Conclusion

This chapter has shown how, historically prison governance of trans/gender was based on genitalia. It argued that transgender prisoners, particularly those with “incongruent” bodies, represented a risk to the governmentality of sex/gender, although the official justification for their routine segregation was that this would protect them from harm. This chapter traced the emergence and evolution of a particular risk discourse concerning the placement of transgender women in the female estate. It showed how these concerns

appear to be driven by cultural or biological essentialism, which codes transgender women as male, sexually predatory, and potentially violent, and codes cisgender women as vulnerable and in need of protection from such “men”. It discussed **AB’s** resolution of this tension, and portrayed it as a landmark decision, both because it recognised transgender prisoners’ rights and because it rejected the prison authorities’ risk- and resource-based justifications for retaining AB in the male estate and ordered her transfer to the female estate. However, it also argued that the judgment in **AB** had broader, detrimental effects, as it carved out a potential exception to the Gender Recognition Act 2004, and reproduced regressive discourses around bodies, biology, and risk. It seemed from **AB** that, however law has defined (**Corbett** (1970)) and redefined gender (Gender Recognition Act 2004), the old “truth” simply returns, and bodies, especially genitalia, still matter in prison. This old “truth” was even conceded by the courts in **AB**.

The chapter went on to show how PSI 2011 formally aligned penal and legal governance of transgender prisoners’ gender for the first time, and officially laid to rest previous prison discourse that transgender women (particularly those who have male genitalia and/or a history of violent offending against women) pose a unique risk to other women prisoners, which risk cannot be managed in the female estate. However, it argued that PSI 2011 resulted in a new divide, differentiating between transgender prisoners with a GRC (not risky) and those without a GRC (risky), and therefore, like many human rights-based developments, excluded as it included. It remains to be seen whether PSI 2016’s promise of “a more flexible approach” to prisoners without a GRC will be any more transformative. Even if prison administration becomes more flexible in its allocation practice, it seems that the “old” truth is likely to re-emerge in the segregation and separation of transgender

prisoners, as a risk-management technique, despite its harmful sovereign and discursive effects on transgender prisoners' lives.

The chapter also argued that there appears to be increasing social acceptance of the trans/gender authenticity of prisoners who have consistently lived as a woman *before* their imprisonment (regardless of their legal or genital status), and that they are considered "deserving" of gender recognition. However, the media's response to Jessica Winfield's transfer to the female estate in March 2017 indicates that whilst law and prison policy may attempt to redraw the gender lines in prison, a deep suspicion of trans/gender authenticity and motives remains in relation to those transgender women who transition whilst in prison. Under the powerful legacy of the medicalisation of transgender people, it would seem that such suspicions are only assuaged when the "truth" is carved into a transgender woman prisoner's body through genital reassignment surgery and, further, lacking a penis, she is no longer regarded as risky to cisgender women. However, the public response to Jessica Winfield's transfer to the female estate, when it was initially assumed that she had had complete genital reassignment surgery (and not only orchidectomy), suggests that transgender women with a history of violent or sexual offending against women cannot escape their cultural coding as male, predatory and risky to "vulnerable" (cisgender) women in the women's estate.

In conclusion, it is in sex/gender-segregated spaces that human rights discourse around trans/gender seems to meet its limits. Whilst human rights discourse can lead to law and policy reform, society seems to be struggling to move beyond the deeply-entrenched historical equation of genitalia with gender, and to leave behind the traditional cultural coding of men-penis-risk and women-vagina-vulnerability, and the heteronormative

framework which dictates that a transgender woman is not really a woman if she engages in sexual relationships with other women. The chapter has shown how progressing transgender prisoners' rights to gender recognition in prison allocation decisions has given rise to a political counter-discourse about the rights of "those of the female sex" (i.e. cisgender women) to safety and privacy in the sex-segregated space of the women's prison. Whilst contemporary society may be undergoing a "gender revolution", and official prison policy is at the forefront of change, it seems that the strict demarcation of gender, divided by a "flesh border" (Halberstam 1998: 164) and the "truth" of a certain biological past, remains stronger than law's new "truth" of gender at the very visceral site of the prison.

The next chapter, Chapter 5, turns to consider the disciplining of gender through prison dress, and specifically considers the effects of recent human rights and equality discourse in improving transgender prisoners' access to clothing and other items to present their gender, particularly when they are allocated to a prison which does not correspond to their gender.

Chapter 5: Law and Transgender Prisoners' Difficulties in Presenting their Gender in Prison

This chapter examines the effects of law and human rights on transgender prisoners' ability to present their gender through clothing, hair, cosmetics and other gender-affirming items (collectively referred to in this chapter as "*prison dress*").¹⁴⁵ Whilst often trivialised in the press, this chapter argues that the enforcement of gender norms through prison dress is harmful for transgender prisoners' personal autonomy, dignity, health and well-being, and that failures on the part of prison management to enable and support transgender prisoners to live and dress in their gender deeply affect the liveability of their lives. The chapter follows on from Chapter 4's discussion of prison allocation, as differences still exist between the male and female estate in terms of prison uniform and other prison dress regulations, which impact on (all) prisoners' self-expression. The chapter argues that prison dress in English and Welsh prisons is disciplined and controlled in much more subtle, pervasive ways than in the past, when prison uniform was mandatory for all prisoners.

This chapter examines recent human rights- and equality-based developments in prison policy (PSI 2011 and PSI 2016), which now require prisons to permit transgender prisoners to live and dress in their gender, whichever prison they are allocated to. Through an in-depth analysis of the second transgender prisoner case to reach the English High Court, *Green* (2013), the chapter argues that this progressive policy is undermined, in practice, by the prison administration's highly precautionary approach to the perceived risks of

¹⁴⁵ This chapter uses the term prison dress broadly, to include clothing (whether prison uniform or permitted personal clothing), shoes, hair, including beards and moustaches, and makeup.

providing transgender prisoners with access to gender-affirming items, and an over-reliance on its security exemption. Through *Green*, this chapter also reflects on whether the policy effectively sets prisoners up to fail, since the court continues to produce Ms Green's gender performance as inauthentic, artificial and imitative, despite acknowledging that she has "no access to female attire of the kind needed" (para 56). It also unhelpfully perpetuates the view that permitting and enabling transgender prisoners to live and dress in their gender is a "privilege", rather than a right.

This chapter is divided into five parts. The first part discusses the significance of gender expression to (transgender) prisoners' presentation of the self, by reference to a broader literature in this field. The second part presents a brief history of the legal and penal regulation of prison dress in England and Wales, to contextualise the way in which, historically, prison dress has been used to discipline and normalise prisoners according to gender-based norms. It concludes with the contemporary rules and disciplinary techniques over prison dress through the Incentives and Earned Privileges ("IEP") scheme. The third part examines evolving prison management responses, in the 1990s, to transgender women transitioning whilst in men's prisons. The fourth part considers the transformative potential of human rights and equality-based legal developments in relation to transgender prisoners' ability to present their gender, as reflected in PSI 2011. In the fifth and final part, the impact of PSI 2011 is examined, primarily through an analysis of *Green*, as well as the potential effects of PSI 2016's internationally ground-breaking requirement that prison administrators permit and enable prisoners with non-binary and fluid genders to live and dress in their gender, in addition to transgender prisoners in a more narrow sense.

The Significance of Gender Expression in Prison

Dress and hair have long been an important way of expressing individuality, as well as religious-, cultural-, class- and gender-belonging (or non-belonging/ subversion). Surprisingly, little literature or case law specifically examines prison regulations and restrictions on prisoners' freedom to express their *gender* through their clothing and hair (see, however, Ash's broader history of prison dress 2010), although there is a growing body of case law, internationally, in which prisoners have successfully challenged prison rules, on the grounds that they unduly restrict their freedom to express their *religion*.¹⁴⁶ Arkles' intersectional analysis of the enforcement of racialised gender norms through the regulation of prison dress in the US (2012) is an important exception, and discusses the effects on transgender prisoners, as well as other groups.¹⁴⁷ The regulation of prison dress in England and Wales has developed very differently from the US, however, and (at least in contemporary times) is not so "violently enforced" (*ibid*: 866). Nevertheless, prison dress continues to be disciplined in more subtle, insidious ways in England and Wales, through the IEP.

It has long been recognised in the classic sociology of the prison literature that prisons strip people of their previous bases of self-identification, and that this has profound effects on the psyche. Indeed, Gresham Sykes argues that the "destruction of the psyche" in the

¹⁴⁶ In a recent US case, *Holt v Hobbs*, 135.S.Ct 835 (2015) (prohibition of beard, Muslim prisoner), for example, the US Supreme Court held that prison officials had not proved that the restriction on the prisoner's exercise of religion was in pursuance of a compelling governmental interest, and the least restrictive means of meeting that interest, indeed they had offered no evidence that a short beard presented security risks or could serve as a hiding place for contraband, as they had initially argued.

¹⁴⁷ Arkles discusses how contemporary offences under various US state prison regulations include wearing dreadlocks or Afros, possessing nail varnish in a men's prison and wearing boxers in a women's prison, and how these are severely punished, including through solitary confinement (*ibid*, 861). He also describes how, in recent years, Native men, transgender women, and other people in men's prisons with long hair have had their heads forcibly shaved (*ibid*).

modern prison is “no less fearful than the bodily suffering inflicted in prison in the past” (1958: 64). Amongst prisoners’ shared “pains of imprisonment”, he lists the loss of material possessions, which, in modern Western society, “are such a large part of the individual’s conception of himself that to be stripped of them is to be attacked at the deepest layers of personality” (*ibid*, 69). Prison may meet the prisoner’s basic material needs, but the prisoner “wants – or needs, if you will – not just the necessities of life, but also the amenities: cigarettes and liquor as well as calories, interesting foods as well as sheer bulk, *individual clothing as well as adequate clothing*,” for “what is the value”, Sykes asks, “of a suit of clothing which is also a convict’s uniform with a stripe and stencilled number?” (*ibid*, 67, emphasis added). Erving Goffman similarly describes the process that occurs when an individual transitions from the outside community to the “total institution” of the prison as a “mortification of the self” (1961: 24); a prisoner not only experiences a profound attack on their internal, private sense of self, but also loses their “identity kit” for the management of their “personal front”, which means that they cannot present their usual external image to others, and are “dis-identified” (*ibid*, 31). This stripping of the prisoner’s usual appearance, and the equipment and services by which they maintain it, such as clothing, cosmetics and shaving equipment, has a deep psychological effect, and results in the prisoner’s “personal defacement” (*ibid*, 29).

This early (US) literature on the sociology of the prison considers the pains of imprisonment on prisoners’ gendered self, but does so within an androcentric and heteronormative framework. Gender non-conforming prisoners are only discussed in relation to sexual behaviour in prisons (e.g. Clemmer 1940; Sykes 1958: 70-72). This is also true of the earliest

sociological studies of the English prison, e.g. Morris and Morris 1963.¹⁴⁸ Sykes theorises that the male prisoner's image of himself may be endangered by the fact that he is "shut off from the world of women, which by its very polarity gives the male world much of its meaning" (*ibid*, 72). According to Sykes, "like most men, the inmate must search for his identity not simply within himself but also in the picture of himself which he finds reflected in the eyes of others" (*ibid*). Since a "significant half of his audience is denied him", the inmate's self-image is in danger of becoming a "partial identity", as "the prisoner's looking-glass ... is only that portion of the prisoner's personality which is recognised or appreciated by men" (*ibid*). This relational nature of masculinity seems to have continued relevance today. In a recent study of three men's prisons in England, Coretta Philipps (2012) found that whilst some prisoners felt an "acute need" to present a public image of themselves which was as close as possible to their image "on the outside", others took a "pragmatic" or "fatalistic view" to prison dress, stating that "in the absence of women or other important figures", there was no need to impress anyone (2012: 51-2).

In the only published empirical research to date on transgender prisoners' gender identities (a US, Californian study),¹⁴⁹ Jenness and Fenstermaker found that being recognised as a woman by male prisoners was of utmost importance to transgender women housed in

¹⁴⁸ In this early sociological study of HMP Pentonville, a men's prison, Morris and Morris found that the sexual behaviours of prisoners corresponded closely to Clemmer's schema, and identified around twenty-five to thirty "passive homosexuals" or "genuine inverts" who were given women's names, and were "invariably called 'she' by the staff and prisoners alike" (1963:187). These prisoners "behaved in a feminine way, walking seductively, rouging their lips and growing their fingernails to considerable length" (*ibid*). The authors did not discuss the prison administration's response.

¹⁴⁹ The study was originally commissioned by the California Department of Corrections, to help it determine where, as a matter of policy, it would be best to house transgender women prisoners, and was based on 315 interviews with transgender women housed in 27 different men's prisons in California (Jenness *et al* 2009; Sexton *et al* 2010; Jenness 2010). Jenness and Fenstermaker later went back to the interview material to try to make sense of their unexpected finding that the majority of transgender women stated a preference to remain in the male estate, notwithstanding the increased risk of violence to them (2014).

men's prisons (2014). The authors found this lent a particular, situated significance to transgender women's desire to express their femininity, and to be recognised as "the real deal", which was firmly based on binary gender norms, and traditional ideas of womanhood in terms of being deferential to men, and acting "like a lady" to garner their respect, and being grateful for their chivalry and protection. However, the research did not explore the significance of clothes, hair etc. to the women's gender presentation, or the prison administration's regulation of their prison dress.¹⁵⁰

Within the UK literature on women's prisons, there is only limited discussion of the disciplining of women's appearance and resistance thereto.¹⁵¹ Carlen has usefully identified the way in which women prisoners were "imprisoned within and without femininity" (1983: 103). In her study of Cornton Vale women's prison, Scotland, she notes the paradox whereby prison administrators promoted traditional female accomplishments such as baking and sewing, whilst simultaneously denying women "most of the sartorial and cosmetic props to femininity" (*ibid*, 104). They were supplied with "ill-fitting" and "unflattering" wrap-over dresses and prison-issues shoes,¹⁵² and were allowed access to only three cosmetic items. Razors, hair removal products and tweezers were not permitted.

¹⁵⁰ The author assumes, from the lack of discussion of this issue, that the Californian prison system leaves little scope for agency in relation to prisoners' appearance, and that transgender prisoners are required to wear standard prison uniform. It is unfortunate that the authors did not describe the prison regime in which the transgender women were situated, to contextualise their findings for an international readership. For an excellent comparison of the conditions of the general prison population and "KG6", a special unit for transgender and gay inmates, in LA County's Men's Central Jail, see Dolovich 2013. Dolovich describes how prisoners in KG6 are issued with a distinctive pale blue uniform, which distinguishes them from the general prison population (who wear dark blue). This stigmatises them and leads to harassment from prison staff and prisoners when they have to walk through the main prison population. However, some prisoners reportedly found this is a small price to pay for allocation to the KG6, and its more humane environment (*ibid*).

¹⁵¹ Such resistance that has been identified in the scholarly literature on women prisoners (e.g. Bosworth 1999), relates to *enhancing* their femininity, e.g. through adapting prison dress to make it more shapely, rather than *resisting* feminine norms.

¹⁵² Unlike their counterparts in England and Wales at the time (see below), women were still required to wear prison uniform in Scottish prisons.

Carlen astutely remarks that, in this way, the women's "femininity was engaged, played upon, and then denied" (*ibid*, 108). This provides a useful lens through which to view the way in which PSI 2011 effectively sets up some transgender prisoners to fail. Promised by PSI 2011 that they may live and dress in accordance with their gender, they are then denied many of the means to do so, on security grounds.

Earlier (e.g. Sim 1994) and more contemporary UK research discusses the significance of masculine gender performance in terms of prisoners' survival within the hyper-masculinised men's prison estate. "Conspicuous consumption" of designer clothing and branded trainers is a particular marker of masculinity and status, for those prisoners allowed to wear their own clothing (e.g. Jewkes 2005: 57; Crewe 2009: 277; Phillips 2012: 51-52). Jewkes argues that survival depends not only on the prisoner's ability to construct a public identity which allows them to fit in with the dominant, hyper-masculine culture, but also on their ability simultaneously to maintain and nurture a private, interior, and usually "non-macho", sense of self (2005). This reiterates Goffman's foundational dramaturgical conceptualisation of the "front-stage" and "back-stage" self (1956). Although the literature does not consider this particular implication, the dual aspect of negotiating both a public and private identity would have particular significance for transgender prisoners who decide to "do risk" (see Nygren et al 2017) by not living in accordance with their self-identified gender in prison. For example, although Senathooran Kanagasingham was diagnosed with gender dysphoria and had started to medically reassign her gender before she was imprisoned, she decided to live

as a man, and stopped taking hormones, when she was sent to HMP Belmarsh, a men's prison, fearing harassment from other prisoners. She died in custody (PPO 2015a).¹⁵³

Notwithstanding their significant contributions to the prisons literature, these studies have tended to take the subject of "women in prison" and "men in prison" as fixed, rather than fluid and contested sites. Their gender analyses have also tended to focus on femininity in women's prisons, and masculinity in men's prisons. Contemporary studies on the "gendered pains of imprisonment", whilst extremely valuable (e.g. Liebling 2009; Crewe 2011; Hulley and Wright 2017) have similarly focused on, and compared, the gendered pains of women in women's prisons and men in men's prisons, without unpacking those terms to consider the impact of the prison's binary gender order on transgender and gender non-normative prisoners, and the different type of gendered pain experienced by them. As Julia Oparah has argued, the cumulative effect of the literature on gender in prisons has been unwittingly to further reinforce the "rigid gender binary that violates gender non-conforming individuals" (2012: 242). As queer criminology takes root, this gap in the literature will hopefully start to close.

A Brief History of the Gender-normative Regulation of Prison Dress

Having introduced some specific ideas around the significance of gender expression in prison, this section demonstrates that there is a long history of prisoners' appearance being disciplined in a binary, gender-normative manner in English and Welsh prisons. It also

¹⁵³ When the author attended part of this inquest on 18 and 19 February 2015, one of the lawyers, upon asking what her interest in the case was, apologised that she had wasted her time, as the inquest was not about a transgender prisoner. It seems that because the prison had sent the prisoner to a gender identity clinic, where she had refused to engage (note that a prison officer was present, for security reasons), and had herself decided to live as a man, and to stop taking her hormones, in prison, her transgender history was not relevant to the inquest. To the author, however, this seemed like "the elephant in the room".

discusses the multiple and shifting justifications for regulating prison dress. This background is imperative for understanding the significance of the policy changes instigated by PSI 2011 and PSI 2016, and their actual and potential effects on the governance of gender through prison dress.

Subject to limiting abuse, and sketching the broad parameters in the field, law has always left the day-to-day regulation of prison clothing and haircuts to the prison administration. In 1865, Parliament ushered in sweeping, nationwide prison reforms through the Prisons Act 1865, and established the first Prison Rules. Whilst the first national penitentiary, Millbank, had already introduced its own prison uniform (Millbank Penitentiary Act 1816), the Prisons Act made prison uniform mandatory nationwide, for all convicted prisoners (Schedule 1, Regulation 23). Originally arising out of a benevolent concern of prison reformists to clothe prisoners cleanly and adequately (Howard 1777:31), prison uniform also fulfilled the utilitarian goal of preventing escape, and the disciplinary aim of distinguishing between different categories of prisoners, which reflected the preoccupation of penal reformists of this era with the identification and categorisation of the criminal class (Ash 2010:30).¹⁵⁴

Disciplining gender through prison uniform

Prison uniform was soon used to humiliate and punish the bodies of prisoners, both physically, through the deliberate use of coarse material and ill-fitting clothing, and

¹⁵⁴ E.g. to distinguish between remand and sentenced prisoners and/or between different types of offenders and/or to denote the level of their cooperation with the regime.

psychologically, through the use of stigmatising uniforms,¹⁵⁵ such as the jester-like “party-coloured dress”.¹⁵⁶ Parliament, wishing to curtail the humiliating and punitive use of such uniforms, intervened by legislating that party-coloured dress could only be used for serious felons, and other prisoners should be dressed in plain attire (Gaol Act 1823) Whilst uniform styles varied from prison to prison, the iconic “broad arrow” cloth was commonly used for making both men’s and women’s uniforms from the 1850s until its official abolition in 1921 and subsequent slow phasing out (Ash 2010:40; 22-23; 49-50; 63). The broad arrow, stamped on items ranging from wine to sheep, literally marked prisoners’ bodies as property of the Crown. Hobhouse reported to the Prison System Enquiry Committee in 1922 that the prison authorities denied that prison uniform was “intended or designed as a garb of shame”, but “crudely cut, untidy, ill-fitting and sprinkled with broad arrows, it emphatically gives that impression” (1922: 131).

Throughout, the overall style of prison uniform was both class- and gender-based, as described in depth in Ash’s history of prison dress (2010). In the Victorian era, for example, women were clothed in simple dresses, aprons and caps akin to those worn for domestic servitude (Mayhew and Binny 1862; Ash 2010:43) and men in the garb of manual labourers (Ash 2010:40). Women at this time were considered doubly deviant, having breached both the law and their “natural” gender role by committing crime. Consequently, they were disciplined much more harshly than men, including in relation to their appearance. There was a contradiction here – similar to that referred to earlier, in Carlen’s study of Cornton

¹⁵⁵The Millbank Penitentiary Act 1816 states that “every convict ... shall be clothed with a coarse and uniform apparel, with any distinguishing marks which may be deemed useful to facilitate discovery in case of escape” (para XXVI).

¹⁵⁶ This was comprised of alternate panels of differently coloured cloth, often black and white (and hence sometimes dubbed the “magpie outfit”), sometimes blue and yellow (Ash 2010:33).

Vale Prison, 1983 – between the prison administrations’ desire to punish women by taking away their femininity, and to discipline and normalise them back in line with feminine gender norms. Indeed, the prison authorities in the Victorian era “considered the vanity of women a sin that led to crime”, and “this ‘universal weakness’ was to be stamped out”, through shaving or close-cropping their hair and prohibiting any adornments or refinements in their dress and make-up (Dobash, Dobash and Gutteridge 1986: 81). Prison reformist Elizabeth Fry also advocated this approach: “ear-rings, curled hair, and all sorts of finery and superfluity of dress, in tried female prisoners, must be absolutely forbidden” (1827: 61). She also called for the cutting of convicted female felons’ hair as “a certain yet harmless punishment”, believing “humiliation of spirit” in such women was indispensable to their “improvement and reformation” (*ibid*). Such close haircuts not only branded them as criminals, but also deprived them symbolically of their femininity and sexuality.¹⁵⁷

Disciplining gender through hair

As with excessively stigmatising prison uniforms, Parliament intervened to limit the punitive use of enforced haircuts, particularly in relation to women. The Prison Act 1865 (Schedule 1, s.29), stipulated that haircuts for both men and women were only permitted for health and cleanliness reasons (i.e. “vermin” and “dirt”) and that additionally, women’s *express consent* had to be obtained. Men’s hair, meanwhile, was not to be “cut closer than may be necessary for purposes of health and cleanliness” (*ibid*). In debating whether visiting justices should have the power to sanction hair-cutting of female prisoners under the Act, Mundy, MP, opined that “female prisoners were sometimes so disorderly” that “the threat

¹⁵⁷ There is a long history of head-shaving to punish and humiliate women, particularly for adultery or for sexual liaisons with the enemy in wartime; it is widely recognised that loss of hair, symbolically, is a loss of sexuality (see e.g. Bevoor 2009).

of cutting off their hair might be usefully held over them *in terrorem*" (Hansard, HC Deb 9 June 1865, Vol 179, cc1328-35). Briscoe, MP, vehemently objected, as this "was the most cruel and severe punishment that could be inflicted on a woman" (*ibid*).

The special significance which hair was assumed to have for women, compared with men, is reflected in prison rules right up to 1999, all of which require a woman's express consent before her hair may be cut, but allow a man's hair to be cut for "neatness" or "good appearance" (e.g. 1949 Prison Rules, Rule 95; 1964 Prison Rules, Rule 26). This differential treatment of men and women prisoners in relation to hair seems to have been generally regarded as natural and unproblematic. When the Sex Discrimination Act 1975 was enacted, Kilroy-Silk, MP, asked the Secretary of State for the Home Department why he was not considering the elimination of sex discrimination in prison by amending the Prison Rules so that men's hair, as well as women's hair, would not be cut without their consent. The Home Secretary's unsatisfactory, evasive response was that "the present provision, which takes account of the consideration of safety at work, appears to be operating reasonably" (HC Deb 21, April 1975, vol 890, cc255-6W).¹⁵⁸ The 1999 Prison Rules finally brought parity in this field (Rule 28(3)), and the 2007 Prison Rules also extended the consent-requirement to facial hair (Rule 25(5)). Thus, in the English and Welsh prison estate, no prisoner's cranial or facial hair may now be cut without their express consent.

Differential treatment of women also took root in terms of prison uniform. After its phasing out in the 1920s and 1930s, the iconic broad arrow cloth was replaced with "everyday"

¹⁵⁸ Notably, prison administrators were careful not to infringe on prisoners' religious freedom at this time. In practice, male prisoners who were baptised as Sikh were exempted from haircuts (HC Deb, 6 February 1981, vol 998, cc233-4W) and prison governors were described in the early 1980s as generally having "a tolerant approach to long hair, including Rastafarian styles" (HL Deb 24 July 1981 vol 423 cc541-2WA).

materials, reflecting the idea that normalising prison clothing would aid prisoners' rehabilitation and their return to life outside the prison walls. This led to the abolition of prison uniform in women's prisons in 1971 (Ash 2010: 113). Prison uniform was not discontinued in the male estate until 1991, and even then, it continued to be used in high-security men's prisons. In 2013, however, prison uniform was re-introduced in the male estate, as discussed below.

Resistance to gender norms in the women's prison estate

Interestingly, soon after the abolition of women's uniform in 1971, concern emerged amongst prison administrators about women prisoners dressing in a "masculine" manner. This resistance to gender norms was regarded as a threat both to the good order of the prison, and to other prisoners. Reflecting a continuing conflation of gender and sexuality, masculine gender performance was also associated with lesbianism. Although seemingly not referenced in the literature on women's prisons, the LAGNA archives reveal a flurry of reports in the local and national press regarding the 1973 Prison Officers' Association conference, at which prison officers expressed consternation at "lesbians" being able to purchase male clothing with their £33 annual clothing allowance (available for those serving sentences of six months or more). In proposing a motion to prohibit such use of public funds (which was unanimously passed), Kendall, Governor of HMP Styal, a women's prison, stated that "the fact that a woman is allowed to wear civilian clothing is good for her morale, but in practice this is now giving cause for great concern, because lesbians wish to wear male clothing." (Guardian Reporter 1973). There was a danger that lesbian subculture, a faction which was "disruptive and anti-authority", would take over the prison. "To allow them to masquerade blatantly as men", Kendall argued (with echoes of historical discourse

around “men personating women”), “strengthens their influence over other vulnerable personalities” (*ibid*). Her concern was that “many normal, well-balanced women” were being “forced to live in an environment they find embarrassing and repulsive” (*ibid*), and that the Home Office was effectively giving its seal of approval to “transvestitism by delinquent lesbians” (Nottingham Guardian Journal Reporter 1973). Others prison officers felt that, whilst instructions were always stating “that what happened outside prisons should be allowed to happen inside, someone must draw the line” (Sandrock 1973, under the headline “State cash buys men’s clothes for lesbians”). The issue resurfaced in 1980, when prison officers expressed disappointment that the May Report¹⁵⁹ had not addressed the problem of “aggressive lesbians”¹⁶⁰ disrupting prison life, and made known their view that women prisoners “should be made to dress in women’s clothes” (Sandell 1980, under the headline “gang terror of jail girls in men’s clothing”). The Home Office reply was that “in an age of unisex clothes it would be difficult to lay down hard and fast rules” (*ibid*).

Contemporary disciplining of prisoners through prison dress

As noted, by 1991, neither the women’s or men’s prison estates had compulsory uniform, with the exception of high security men’s prisons. Prison-issue clothing was, however, available for those who needed it, or wished to wear it. The 2007 Prison Rules provide that prisoners may be allowed to wear their own clothing at the discretion of the prison governor, subject to the maintenance of good order and safe and secure custody (Rule 21(1)), and further stipulate that if a prisoner is not permitted to wear his or her own clothing under Rule 21(1), “he or she shall be provided with clothing adequate for warmth

¹⁵⁹ *The Report of the Committee of Inquiry into the United Kingdom Prison Service*, 1979.

¹⁶⁰ Cf Freedman (1996) on the construction of the “aggressive” prison lesbian in the US.

and maintenance of good health, and, in so far as is practicable, *of a kind that is generally worn by persons of his or her age and gender outside prison*” (Rule 21(3), emphasis added). This is the first time that the appropriateness of the clothing for a person’s *gender* is mentioned in any Prison Rules, and indeed the first time that the Prison Rules have reflected the long-established belief and practice of the prison authorities that prison dress should be normalised along the lines of that worn by the outside community. Whilst this provision might prevent misuse of prison dress to humiliate or ridicule prisoners,¹⁶¹ arguably it also encourages the enforcement of gender-normative prison dress (subject to PSI 2011’s and PSI 2016’s provision for transgender prisoners).

In 2013, Chris Grayling, Secretary for Justice, introduced various new measures to “toughen up” prisons and to further incentivise good behaviour under the IEP scheme, one of which was the reintroduction of prison uniform in the male estate, more than 20 years after its general abolition. PSI 30/2013 on *Incentives and Earned Privileges* now makes prison uniform mandatory in men’s prisons for all prisoners convicted of criminal offences¹⁶² in the first two weeks of imprisonment (so-called “entry-level”). The uniform usually comprises grey tracksuit bottoms, grey sweatshirt, T-shirt, underwear and socks. This represents a return to previous thinking that prisoners need to be “put in their place” when they enter prison – the uniform strips them of their previous identity, and brands them as a new

¹⁶¹ Whilst this research has not revealed any examples of such misuse in the history of UK prison dress, Joe Arpaio, a sheriff in Phoenix, Arizona, USA infamously introduced pink underwear and pink uniforms in men’s prisons. In a wrongful death suit relating to a prisoner forced into the pink uniform, *Wagner v Maricopa County*, No. 10-15501 D.C. No. 2:07-cv-00819- EHC, the 9th US Circuit Court of Appeals observed, as an aside, that the policy was potentially unconstitutional, since “unexplained and undefended, the dress-out in pink appears to be punishment without legal justification” (*ibid*, 3). It stated that it was fair to infer that the selection of pink as the underwear color was “meant to symbolise a loss of masculine identity and power, to shame and stigmatize the male prisoners as feminine” (*ibid*, 12).

¹⁶² As opposed to those on remand and those convicted of civil offences.

inmate. After the initial two-week “entry level” period, prisoners may earn the opportunity to wear their own clothes, on “standard level”, by demonstrating commitment towards their rehabilitation, engaging in purposeful activity, behaving well and helping other prisoners and staff members, and having “due regard for personal hygiene and health (*including appearance, neatness and suitability of clothing*)” (*ibid*, Annex B, Part A (Behavioural Expectations), emphasis added). Prisoners demoted to “basic level” (below “entry level”) for bad behaviour or lack of engagement with the regime are also required to wear uniform, which visually marks them out as non-compliant. This is reminiscent of the historical use of different prison uniform, to distinguish between different levels of co-operation with the regime.

This two-tier system of some prisoners wearing uniform, and others wearing their own clothes, is a new model of sartorial control. It places disciplinary power firmly in prison officers’ hands both to bestow and to withdraw the privilege of wearing one’s own clothing and to assess its “neatness” and “suitability”. Crewe has argued that the “all-encompassing and invasive power” of the prison works “like an invisible harness on the self”, demanding “self-regulation of all aspects of conduct, addressing both the psyche and the body”, and that it gives renewed authority to Foucault’s concept of governmentality (2011: 522). Indeed, the changes introduced by the 2013 IEP scheme mean that prisoners’ daily appearance is under constant scrutiny, and arguably operate as a much “deeper” and “tighter” mode of discipline (Crewe 2009 and 2011) than if all prisoners were required to wear uniform at all times.¹⁶³ Further restrictions, which apply to both the male and female

¹⁶³ Crewe has argued that contemporary penal practices and policies give rise to new pains of imprisonment, including the pains of self-government, which in turn generates a “tightness”, whereby prisoners experience feelings of tension and anxiety “generated by uncertainty, and the sense of not knowing which way to move,

estate, limit prisoners' choice in personal clothing. Now, clothes, makeup, toiletries etc. may only be purchased through the prison canteen (shop) or from the prison catalogue, and must be bought with the prisoner's earnings from prison work or their personal allowance, which is also linked to the IEP scheme. Friends and relatives are no longer allowed to send or bring in items of clothing, on the basis that this could undermine the purpose of the scheme (para 10.4), although an initial or subsequent parcel of clothes may be permitted, at the discretion of the governor.

Although the 2013 IEP scheme reintroduced prison uniform in the male estate, this change of policy was not extended to women's prisons. There is no publicly-available documentation on the rationale behind the differential treatment. In a reply to the author's request for information, NOMS' Equality, Rights and Decency Group stated that the decision not to reintroduce uniform in women's prisons maintained "a policy which had long been in place", reflecting "the understanding that the impact of imprisonment can be different for men and women", and that "the policy in respect of women's clothing was designed to avoid exposing women to a particular vulnerability which was considered likely to arise if they were required to wear prison clothing and which would result in the experience impacting more severely on them" (NOMS, email to the author, dated 4 December 2014). This reproduces the historical belief that women are more affected by limitations on their appearance than men.

for fear of getting things wrong" (2011: 522). Note also that routine IEP reviews now only require one member of prison staff, rather than two (para 1.9), rendering the individual officer's interpretative power even more significant.

It is important to understand this background, in order to place PSI 2011 and PSI 2016 in their broader context. It also helps explain emerging complaints from cisgender men prisoners that transgender women prisoners are being given “special” treatment and “privileges” as they are permitted to wear their own clothes in the male estate (see below).

Behind Closed Doors and Out of Sight: First Accounts of Prison Responses to Transgender Women in the Male Estate

So far, this chapter has provided a brief history of the way in which prison dress and haircuts have been used to discipline prisoners along gender-normative lines. It has shown how binary gender norms have been repeatedly reproduced through prison dress regulations and prison practice in England and Wales, and how women continue to be constructed as more vulnerable to restrictions on their appearance than men. This next section traces the first accounts of prison management responses to “transsexual” prisoners, in the late 1960s and 1970s.

It is difficult to draw any conclusions from early, isolated cases, other than the fact that some transgender prisoners were apparently given a degree of leeway to express their gender in some prisons, at the governor’s discretion. For example, in a 1968 newspaper article entitled “But this Jail ‘Bird’ is a Man”, a prisoner at HMP Dartmoor, a men’s prison, stated that he “saw a queer walking about with rouge on ‘her’ face”, and that “some of them even have bras and knickers made up in the tailor’s shop”. He also remarked that one prisoner “had a sex change inside. He was turning into a woman. We called him Rachel” (LAGNA 1968). In 1980, in a corruption trial against a prison officer, one of the witnesses stole the headlines when it was reported that “he wears a pinafore in jail, carries a handbag

and is known as Mary". The prisoner reportedly described herself as "a transsexual, not a homosexual" (Daily Telegraph Reporter 1980).

By the late 1990s, more details start to emerge of the case-by-case arrangements made by the prison administration with a number of transgender women who had started to transition whilst in men's prisons. The first accounts are of Jane Pilley. Housed at HMP Gartree in the mid-1990s, she was reportedly allowed to wear women's clothing whilst locked in her cell at night and had "signed a pledge" to wear "men's clothes", apart from underwear, during the day (English 1999). In 2006, in a case concerning a transgender patient at a high security psychiatric hospital, it was stated that earlier, whilst at HMP Altcourse, DB was "permitted to dress as a woman whilst in her cell" but only "to wear gender neutral clothing in public areas", *R (on the application of DB) v Secretary of State for the Home Department and Ashworth Hospital Authority ("DB")* [2006] EWHC 659 (Admin), para 3. In 2009, in HMP Manchester, AB was permitted to dress as a woman, but could only wear the "most feminine" items of clothing, "blouses and skirts etc.", within her own cell (*AB* (2009), para 5). And in 2013, in HMP Frankland, Kimberley Green was allowed to wear "female clothing and make-up" on the residential wing, but, in other parts of the prison, only female underwear, a bra, female trousers and unisex clothing on the "Girl Gear" list (*sic*) and "minimal make-up" (*Green* (2013), para 46). "Overtly female clothing" was not permitted outside the residential wing, on the grounds that it enhanced the risk of assault or sexual violence to her (*ibid*). The court added that she might also be subject to ridicule: "of course the other prisoners should not act like that, but... one has to be realistic" (*ibid*).

These cases suggest a gradual relaxation of local prison practice in comparable security male prisons between 1999 and 2009, but, in Goffmanesque terms, still required the prisoners to present a suitable “front-stage” self and to limit their real, “back-stage” self to the private confines of their cell, where they were unable to seek or receive reflection of their gender in the eyes of others (1956). As explicitly noted in *Green*, these restrictions appear to have been justified by prison management as measures to protect transgender women prisoners from risk of sexual and physical harm from other prisoners. Like segregation (Chapter 4), however, the risks to the transgender prisoner are contained by containing the transgender prisoner herself. This produces the transgender prisoner as both at risk *and* risky. Kept out of sight, literally behind cell doors (or, in the case of underwear, beneath an external façade of gender-normativity), transgender prisoners’ gender performance is produced as a risk to the established, binary gender order of prison society. These early restrictions on transgender prisoners’ gender performance imply a clear public/private distinction, whereby the right to respect for private life (article 8 of the ECHR) is interpreted minimally, as a toleration of gender autonomy behind closed doors, rather than a genuine respect for personal autonomy. PSI 2011 represented (at least on paper) a major development in this regard.

PSI 2011’s Requirement for Prisons to Permit Transgender Prisoners to Live and Dress in their Gender

By the time PSI 2011 was introduced in March 2011, it was already well-established that restrictions on transgender people’s gender expression through dress comprised an interference with the right to private life, pursuant to a European Court of Human Rights’ ruling, *Kara v UK* (1998) 27 EHRR CD 272. Whilst *Kara* was an employment case, the English

courts have subsequently applied article 8 in an institutional context, under the Human Rights Act 1998. In both *R (ex parte E) v Ashworth Hospital Authority* [2001] EWHC Admin 108 and *DB* (2006), they held that interferences in the private lives of transgender patients detained in a high security hospital (one was allowed to dress as a woman only in her room, the other was also allowed to wear gender-neutral clothing in public areas) were justified under article 8(2), due to the special therapeutic and security concerns of the institution. The courts implied that these special concerns distinguished them institutionally from prisons (for a brief summary, see Curtice and Sandford 2009).

Reflecting both transgender prisoners' right to respect for their private life, in terms of dress (art 8 ECHR), and their right not to be discriminated against on the grounds of "gender reassignment" under the Equality Act 2010, PSI 2011 makes it mandatory for prison administrators to permit transgender prisoners to live and dress in their gender, whichever part of the prison estate they are housed in (PSI 2011, section 3 and Annex B). This was a major development, it was the first time there had been any official policy in this field, and it was the first time that the prison authorities' governance of trans/gender through prison dress was explicitly informed by human rights, rather than as a case-by-case discretionary concession.

Furthermore, PSI 2011 provides that prisoners "*who consider themselves transsexual*" and who "wish to begin gender reassignment" must be permitted to "live permanently in their acquired gender" (para 3.2, emphasis added) and "to dress in clothes appropriate to their acquired gender" (para 3.3). This ground-breaking self-definition model reflects the broad definition of transgender people protected by the Equality Act, and means that transgender prisoners need neither a medical diagnosis of gender dysphoria, nor legal certification of

their gender via a GRC, to benefit from PSI 2011's provisions.¹⁶⁴ However, the law's gender binary is maintained, as they must still identify with, or submit to, PSI 2011's definition of a "transsexual", as a person who lives or proposes to live "in the gender opposite to the one assigned at birth" (para 1.1) on a permanent basis (para 3.2). Only permanent, binary gender crossings are contemplated, and considered deserving. The policy further implies that conventional, normative gender expression is expected afterwards; prisons must allow transgender prisoners to dress in clothes "appropriate" to their "acquired gender" (para 3.3) and to purchase "gender-appropriate clothing" from mail order catalogues (Annex B.2). Meanwhile, a statement that make-up may be used both by transgender men and women prisoners to "present more convincingly" in their "acquired gender" (Annex B.7) reproduces historical and contemporary legal discourse, that transgender people's gender expression is not real or authentic, but artificial and imitative of cisgender people's.

Whilst providing for transgender prisoners to live and dress in their gender, PSI 2011 leaves numerous pockets of discretion around what is "appropriate", "decent", "necessary" and "vital" in terms of a person's gender presentation. It would probably be difficult to define these terms in a policy document, but the subjective interpretation of these terms leaves scope for misuse/abuse of disciplinary power. For example, PSI 2011 provides that make-up which is "vital to presenting in the acquired gender, such as foundation to cover beard growth" may not be restricted through the IEP scheme, but that "non-vital" makeup is a privilege, capable of being withdrawn as a disciplinary measure (PSI 2011, Annex B, para B.7). In 2015, the PPO investigated a complaint from a transgender prisoner who had been downgraded an IEP level for wearing lipstick (PPO 2015c). Under her local transgender

¹⁶⁴ This can be contrasted with PSI 2011's allocation policy, which, as discussed in Chapter 4, relies primarily on the prisoner's *legal* gender, namely whether they possess a GRC.

“compact” (an individualised agreement between prisoner and prison), she was expected to wear “minimum makeup” at all times. The prison officer who disciplined her interpreted PSI 2011 to mean that she could *only* wear foundation. The prisoner complained that downgrading her IEP level was contrary to PSI 2011, as lipstick was “vital” to her gender presentation and pointed out the irony that the prison had allowed her to purchase lipstick. The PPO upheld her complaint and recommended that make-up should be in line with guidelines for female prisons, which do not place any restrictions on the *type* of makeup which may be worn, but only the quantity, such that “excessive amounts” of makeup are not allowed. (PPO 2015). On the other hand, this type of decision-making apparently troubles many prison officers in their day-to-day dealings with transgender prisoners. In an informal conversation which the author had with an equalities officer at a men’s prison (2014), she observed that prison officers were too concerned about potential complaints and legal action to act without seeking higher authority in this regard. They had approached her about speaking to a transgender prisoner about decency levels, as she had started wearing short skirts and her G-string was showing. Thus, the very introduction of PSI 2011 and the potential risk of complaints and litigation appear to have changed power relations in some prisons and may act as a pre-emptory brake on the exercise of disciplinary power at the prison officer level.

Finally, the most problematic provision, in terms of its potential to thwart the realisation of transgender prisoners’ right to live and dress in their gender, is arguably PSI 2011’s security exemption, which states that gender-affirming items may be restricted in “exceptional circumstances” (PSI 2011, Annex B, para B.5), where it can be demonstrated that they present a security risk which cannot be reasonably mitigated (para B.6). PSI 2011 even

warns prison administrators that any decision to restrict items could be subject to judicial review and must therefore be backed by “detailed and reasonable justifications” (para B.6.) – another example of pre-emptive action being required, to avoid risk of later blame/ legal liability (cf. long term segregation).

Green (2013): Security Trumps Prisoners’ Rights

It was this security exemption which came under judicial scrutiny in **Green** (2013), the second transgender prisoner case to be determined by the High Court. The case concerned Kimberley Green, who was housed in HMP Frankland, a high security men’s prison.¹⁶⁵ In 2011, Green had expressed the desire to be treated as a transgender prisoner, and to live and dress as a woman. She complained that the prison had denied her access to a range of gender-affirming items, including larger-size women’s clothing, tights, “intimate prostheses” (breasts and vagina) and a wig. The prison governor argued that restricting access to these items was justified under PSI 2011, as each presented security risks which could not reasonably be mitigated (para B.6). The legal issues before the court were whether the prison had acted in an unlawful manner (i.e. such that its decisions were **Wednesbury** unreasonable)¹⁶⁶ by placing barriers in the way of the claimant living in her gender, contrary to PSI 2011 and/or whether it had discriminated against her on the grounds of gender reassignment, contrary to the Equality Act 2010. The court held that the prison’s refusal to provide Green with all the items was justified on security grounds, and therefore lawful on both legal counts.

¹⁶⁵ The court notes that HMP Frankland housed five other transgender prisoners at the time (**Green**, para 22).

¹⁶⁶ As discussed in Chapter 3, the **Wednesbury** test is an administrative law test, which considers whether a decision is so unreasonable or irrational that no other public body would have made the decision. Whilst a claimant cannot bring a direct complaint for breach of PSI 2011, since it is a policy and not a legal document, breach of such a written policy goes to the reasonableness of the decision.

The **Green** case usefully captures the tension between PSI 2011's new mandate that prisons must permit transgender prisoners to live and dress in their gender, and the prison administration's long-established power to control prison dress along gender-normative lines. **Green** demonstrates how easily the policy can be stripped of its transformative potential, and the previous *status quo* reasserted. In making this overall argument, the analysis addresses three important aspects of the judgment; first, the court's deference to the prison administration's risk-based decisions, despite its serious concerns about the outcome for Green, personally, and for the future viability of PSI 2011; second, the court's construction of Green as a "man seeking to become a woman" who was not (yet) entitled to equal treatment with cisgender women prisoners; and third, its observations that Green was actually *advantaged* in terms of her prison dress and lifestyle, compared to cisgender men in the same prison.

Deference to prison administration's risk-based decisions

The judgment in **Green** starts by recognising that the "desire of a human being to change their gender is of profound import" (para 2) but continues that it is "at all times ... critical to remember the context" and the "serious security considerations" involved, for "what may happen in everyday life without too much difficulty, when translated to a prison suddenly poses truly difficult issues" (*ibid*). This opening remark sets the tone for the rest of the judgment.

The court (comprising Justice Richardson, sitting as a sole judge) deferred to all of the prison administration's decisions. It had no trouble finding that the prohibition of prosthetics and tights fell "entirely" within the security exception (para 47). The court accepted the prison's

argument that allowing the prosthetics would give rise to a “profound” risk of the prisoner concealing items for escape or for other illegitimate reasons “in intimate parts of the body” (*ibid*). Providing the items *and* maintaining security would demand more rigorous and invasive searches, which would affect the dignity of transgender prisoners, and should be avoided (para 28). Whilst the governor also argued that providing the prisoner with prosthetic breasts and vaginas would heighten the risk of sexual abuse and assault to Green by other prisoners (para 28), unfortunately the judge did not address this important issue. It also accepted that tights might be used to “provide a ligature, climbing aid and/or as a sieve for brewing alcohol” (an interesting and somewhat superfluous addition, since socks – which are in general circulation – are regularly used for this purpose), and, since tights could easily be concealed, it would be impossible to monitor their use (para 28).

However, the court found the prohibition of larger-size women’s clothing and a wig more taxing. The governor maintained that it was impossible to provide Green with access to “out-size” clothes, as the only suitable specialist supplier had only an on-line catalogue, and prisoners were not permitted to go on-line for security reasons. The court was willing to accept that preventing access to the website was an “entirely proportionate stand *at present*” and therefore “legitimate *at present*” but warned that “a longer-term solution has to be found or the policy (and it appears a very enlightened and good policy) will simply become a pious list of worthy hopes with no practical application” (para 58, emphasis added).

The question of the wig was what had caused the court the “greatest concern” and was the area where it had “wrestled the most with what is right” (para 50). Observing that “the outward appearance of an individual is such a core feature of a person’s being”, the court

felt that denying a transgender prisoner hair when “transitioning from one sex to the other is a fundamental denial of what is being legitimately allowed by PSI 07/2011” (para 48). Yet, ultimately, providing a wig in the prison context was “simply providing a hostage to fortune” (para 48), since a wig could be used by *other* prisoners to disguise themselves and facilitate escape, thus it deferred to the prison administration’s decision.¹⁶⁷

Some of the security risks raised by the prison administration to justify limiting access to the items appear more weighty than others;¹⁶⁸ some arguably might be described as risk possibilities rather than risk probabilities; some might be mitigated relatively easily, but the court deferred to the prison administration’s assessment of each risk, and its claim that the risk could not reasonably be mitigated.

Despite its findings, on numerous occasions, the court emphasised that “a more purposeful solution” needed to be searched for in relation to larger clothing and wigs, and that more work needed to be done to see if the security risks may be mitigated (paras 50 and 61).¹⁶⁹

The judgment is unusually tenuous, and the court is clearly conflicted in upholding what PSI 2011 seeks to achieve in terms of transgender prisoners’ rights, and deferring to prison

¹⁶⁷ Security issues are frequently raised as a justification for regulation of *natural* hair in other jurisdictions, on the basis that dreadlocks and long beards, for example, could be used to conceal contraband, and they have also been raised in relation to head-coverings (see Arkles 2012 for a good overview of US regulations and practice). Arkles mentions that wigs are allowed for medical reasons in some US state prisons, but that this argument has not been successful in terms of a wig being medically required to alleviate transgender prisoners’ gender dysphoria.

¹⁶⁸ Other high-security prisons have seemingly managed to mitigate the risks in providing wigs to transgender prisoners. In 2013, it was reported in the press that Emma Page “wore a blonde wig and was allowed to dress in skirts and blouses in the male Category A jail HMP Wakefield” (Slack 2013). This issue must also arise where prisoners request a wig for medical reasons, e.g. hair loss due to alopecia, or due to chemotherapy or radiotherapy treatment for cancer (indeed, for transgender prisoners diagnosed with gender dysphoria, access to a wig might be similarly pursued on medical grounds).

¹⁶⁹ HMP Frankland reportedly allows transgender prisoners to wear wigs, after a relaxation of rules post-*Green* (Johnson 2017, IMB HMP Frankland 2017, para 5.4). From an informal conversation with a doctoral student who has visited the prison (6 Dec 2017), the author understands that transgender prisoners are also allowed to wear wigs in HMP Littlehey.

management's power/knowledge in assessing and managing risk. It even remarks that refusing access to larger-size clothing and a wig results is a "fundamental denial" of what is permitted by PSI 2011 (para 48), and expresses concern that, although the governor had made "all sorts of worthy principled statements" to the court, "the simple fact is that [Green] has no access to female attire of the kind needed" (para 56). Yet, it concludes that there is "no question of the Governor compelling her to live as a man" (para 43), and nor has Green been *prevented* from living as a woman (para 60), though, "as was inelegantly, but perhaps accurately, described in the course of argument", she "is being expected to look like a bald drag artiste" (para 48). The court implicitly recognises that Green is left in an untenable position, that it is humiliating and in effect, punitive. Indeed, Green is visibly marked with stigma (Goffman 1963).

Undermining the right to equality

The second aspect of the judgment which bears scrutiny is the way in which it undermines Green's right to express her gender as a woman, and the troubling legal precedent it sets under the Equality Act 2010. Under the Equality Act, it must be established that the person was treated less favourably than "others" because of their gender reassignment. It is widely accepted that the Equality Act retains the need for an actual or hypothetical "comparator" (a person whose circumstances are the same or similar to the claimant's, but who does not have the same protected characteristic as the claimant) against whom the claimant's treatment can be compared (Equality and Human Rights Commission: Employment Statutory Code of Practice; Epstein and Masters 2011).¹⁷⁰ In some cases, the identification of

¹⁷⁰ With the exception of discrimination arising from disability, which does not require a comparator (Equality Act 2010, s.15).

a suitable comparator will be clear-cut. For example, it is well established that where a person is dismissed from their employment because they are undergoing gender reassignment, the comparator would be a person who is *not* undergoing gender reassignment (*P v S and Cornwall County Council* [1996] ECR 1-2143). Relying on a precedent from a very different context (i.e. the point at which a transgender woman should be entitled to access the women’s toilets at her workplace, during her transition, *Croft v Royal Mail Group PLC* (2003) EWCA (Civ) 1045), the court in *Green* rather perversely concluded that “the only possible comparator” is a male prisoner who is not undergoing gender reassignment (para 66); indeed, it added, it is “almost impossible to see how a female prisoner can be regarded as the appropriate comparator” (para 68). The rationale behind the court’s finding is worth citing in full. According to the court, Green 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 a man. A woman prisoner cannot conceivably be the comparator as the woman prisoner has ... already achieved what the claimant wishes. Male to female transsexuals are not automatically entitled to the same treatment as women – until they become women” (para 69).

The court therefore characterised Green’s gender as a “becoming” (not a “being”) and states that she does not become a woman, and therefore deserving of equal treatment with cisgender women, until she obtains a GRC, and is legally female. In the meantime, “he [*sic*] is still of the male gender and a male prisoner” (*ibid*).

It will be recalled that the Equality Act's protections against discrimination on grounds of gender reassignment apply regardless of legal gender (and medical supervision), and that this, in turn, is reflected in PSI 2011's self-definition test, whereby prisoners "who consider themselves transsexual" must be permitted to live and dress in their gender (para 3.2). Indeed, PSI 2011 clearly envisages that the comparator should be a cisgender woman prisoner, as it provides that prisons "should obtain from an equivalent opposite gender prison a set of guidelines for what clothing and makeup is acceptable" and notes that "such guidelines can often be adopted almost entirely for transsexual prisoners" (Annex B, para B.1). The PPO has also recently remarked that most of the complaints it has received from transgender women prisoners about restrictions placed on their gender expression, are based on security considerations, which "could have been resolved more effectively by learning from the female estate and considering what a female prison would do in the circumstances" (PPO 2017a). Thus, the court's decision to compare Green's position to a *male* prisoner not undergoing gender reassignment clearly conflicts with both the Equality Act and PSI 2011. Beyond that, it has deeply negative discursive effects, in refusing to recognise Green's identity as a woman, and insisting that she is a man, until she obtains a GRC. The paradox is that the court even observes that because of its judgment, she might struggle to satisfy the "real life test" required to obtain legal recognition of her gender under the Gender Recognition Act.

Perpetuating the myth that transgender prisoners are advantaged in dress and lifestyle

Aside from its legal questionability,¹⁷¹ the discursive effects of the *Green* judgment are extremely troubling, as they reassert transgender prisoners' rights as privileges, and reproduce cisgender people's gender performance as natural, and transgender people's as artificial. PSI 2011 specifically states (in Annex B, para B.4) that "allowing male to female transsexual prisoners to wear their own clothes" is "necessary to ensure that such prisoners can live in the gender role that they identify with", and that, where transgender women are housed in a men's prison, "it may be helpful to explain this to other prisoners who are required to wear prison uniform" (*ibid*).¹⁷² Thus, PSI 2011 specifically contemplates the possibility that other prisoners may feel the situation is unfair. Despite PSI 2011's explicit provisions, the court in *Green* perpetuates the view that transgender prisoners are indeed privileged; it concludes that Green has not been treated less favourably than other prisoners in the male estate, "*indeed the reverse*" (para 70, emphasis added), since:

"a male prisoner (who wishes to remain male as most do) does not need to express his gender identity in any purposeful way. He does so innately through the male clothes he wears and certainly does so via prison clothing. Transsexual prisoners are treated differently (and wish to be so) and as such have a number of *advantages* in terms of clothing and lifestyle not available to the remainder of the male population absent privileges" (para 69, emphasis added),

¹⁷¹ In the author's informal conversations with a number of solicitors and barristers with experience of advising transgender prisoners, they have also expressed concern about the court's interpretation of the Equality Act in *Green*. One barrister noted that legal aid is unlikely to be available to another prisoner wanting to bring a similar case, which limits the possibility of another court overturning the "bad" precedent set in *Green*.

¹⁷² This issue does not arise in women's prisons in the same way, as it will be recalled that women prisoners are not required to wear prison uniform.

This passage reveals the fundamental problem that transgender prisoners face in a cisgender society which cannot see cisgender people's gender as performative (only transgender people's) (Serano 2007). The cisgender male prisoner is able to express his normative masculine gender not "innately", as the above quote states, but because the prison clothing is designed with him in mind, and he does not need to express his gender in any "purposeful way" because the clothes he is provided with do that for him. The cisgender male prisoner's gender expression is perceived as natural, normal, and so innate that the *advantage* his cis-genderism confers is invisible. Conversely, and ironically, the transgender prisoner is seen as being the one who is at an advantage "in terms of clothing and lifestyle" (*ibid*).

Problems with prisoners asserting their rights

In addition to the detailed insights into penal governance of trans/gender offered by the **Green** case, other research sources indicate that whilst PSI 2011 has made a significant contribution by establishing formal policy in this area, the level of commitment of prison administrators to realising transgender prisoners' right to express their gender varies greatly from prison to prison, and from governor to governor. Some reports suggest that PSI 2011 has effected some small but positive instrumental changes in men's prisons which are known to house a number of transgender prisoners on a long-term basis, for example, HMP Littlehey's Equalities Team reportedly set up a pop-up shop for its six transgender inmates, to enable them to purchase women's clothing and order items from a catalogue (Panther 2016), and the Independent Monitoring Board for HMP Isle of Wight recommended that "a qualified hairdresser should attend one day a week to cater for the growing number in the

transgender population”, estimated to be around 11 (2015, para 5.1(c)), although it is not clear whether this has been implemented.

Reports suggest that transgender prisoners on remand or on short-term sentences in men’s prisons do not fare well (even though both remanded and convicted prisoners are covered by PSI 2011’s provisions on prison dress), particularly those housed in prisons which have limited experience of dealing with transgender prisoners, and which do not have established systems in place to respond to their needs, and rights, appropriately and quickly. Prisons may seriously underestimate the importance of gender-appropriate dress for transgender prisoners’ health and well-being. Jenny Swift allegedly refused to wear male prison uniform, and entered HMP Doncaster naked, demonstrating the ultimate resistance to the prison’s power (Halliday 2017). Whilst on remand, she took her own life. On reception to HMP Bristol, a men’s prison, Tara Hudson was offered the men’s prison uniform – a T shirt, tracksuit bottoms and boxer shorts – and “instead of wearing them, I didn’t take off my own clothes for the whole week I was in HMP Bristol” (Curtis 2015). The PPO investigation into Vikki Thompson’s death reported that her access to women’s clothing and make-up was limited, as she did not have a prison job (and therefore the ability to earn and purchase items from the catalogue) and had to rely on her partner to bring in clothes and money, which he failed to do (PPO 2017b). The inquest heard that she was offered a uniform from a nearby women’s prison, but that she refused, and instead adapted the men’s prison uniform, by cropping the prison jumper to show her midriff and rolling the trousers low on her hips (author’s contemporaneous notes of inquest West Yorkshire (Eastern) Coroner’s Court 2017), and padding out her bra with socks (PPO 2017b, para 69). Although staff recognised that she needed “to establish herself as a woman in a male prison”, and

supported her in various other ways, they were concerned about the negative attention she was receiving from other prisoners, and the fact that cutting and altering prison-issue clothing is also a disciplinary infraction. When spoken to by a prison officer, she agreed to comply with the compact she had signed (PPO 2017b, para 73). Having been remanded into custody on 27 October 2015, she did not receive the makeup she had ordered until 10 November, and was still waiting for her partner to bring in her clothes when she took her life on 12 November 2015.

The PPO observed in its *Learning Lessons Bulletin* (2017a) that lack of access to clothing, make-up, hair-dye and other gender-affirming items has been the greatest source of complaints from transgender prisoners. Press for Change reported a similar concentration of complaints in its correspondence with transgender prisoners (interview with the author, 26 October, 2015), and referred to the usefulness of PSI 2011 as leverage in its follow-up with prison governors. These early indications suggest that perhaps the biggest potential change in power relations effected by PSI 2011 is the fact that it sets an official policy and formal benchmark against which prisons can be inspected by the IMB and HMP Inspectorate, and upon which transgender prisoners (or their advocates) can found a complaint to the governor, IMP and HMP Inspectorate, PPO and courts.

However, this approach has its advantages and disadvantages. On the one hand, if prison administrators are repeatedly held to account then prison administration might strategically respond to their PSI 2011-based obligations as an organisational risk to be managed (Whitty 2011). This may be particularly true in prisons which house a number of long-term transgender prisoners, both from a prison management perspective, and because such prisoners have more time and incentive to pursue complaints and have more collective

“bargaining power”. On the other hand, asserting rights is risky, and often comes at a high personal cost, particularly for prisoners whose daily lives are governed by the very people they are complaining about. History shows that prisoners who assert their rights, and make formal complaints, are highly likely to be constituted by prison management as a vexatious group. This is likely to not only negatively affect their personal situation in prison, but also to reduce public sympathy for the situation of transgender prisoners in general (see for example Snider 2003 on this experience in relation to women prisoners’ recourse to rights). Indeed, Sarah Jane Baker, a transgender woman prisoner currently housed at HMP Isle of Wight, remarks that “any attempts to force prisons to acknowledge their legal responsibilities are seen as acts of manipulation and strongly resisted” (2017:18), whilst the Mail Online’s headline on **Green’s** case trivialises both her need for a wig, and her recourse to the courts, particularly at the taxpayer’s expense: “Transgender killer who tortured and killed his wife gets legal aid for his right to wear a WIG [*sic*] in prison, after complaining that he [*sic*] looks like a ‘bald drag artiste’” (Doughty 2013).

The other issue is that whilst there is some merit in Whitty’s “human rights as organisational risk” thesis (2011), the evidence to date indicates that it is highly unlikely that PSI 2011 and PSI 2016, and complaints and litigation by individual prisoners, can effect change at a deeper, discursive level, without prisons having a genuine, ethical commitment to transgender prisoners’ rights and well-being, and a genuine commitment to supporting gender diversity within the prison. The very fact that transgender prisoners’ access to gender-affirming items is translated into a risk issue, reveals the overwhelming logic of risk in the prison and the judgment in **Green** shows the power of security and risk discourse to subjugate the discourse of law and rights in this field.

Given the institutional and normative problems in implementing PSI 2011 on the ground, and the court's complete deference to the prison administration in *Green*, PSI 2016's internationally ground-breaking provisions to provide for a wider group to access to gender expression, only five years after PSI 2011's introduction, may ultimately do little more than widen the gap between rhetoric and reality. For prisoners who identify as non-binary, gender fluid or transvestite, PSI 2016 states that prison administration must seek agreement with them (again "subject to risk, security or operational assessments") to express themselves according to "the gender with which they identify" or "as gender-neutral" (para 6.19). It advises that a "fair approach" to facilitating gender presentation would include "not being unduly restrictive" and emphasises that there must be "genuine and weighty operational and/or security reasons" to refuse access to particular items, or to refuse a prisoner "to present in different genders intermittently" (*ibid*). These strengthened provisions seemingly respond to evidence of previous over-reliance on the security exemption to restrict and control transgender prisoners' gender presentation. PSI 2016 also established a Transgender Advisory Board, to address concerns of prisoners with regard to access to facilities in order to support their gender expression, and to consider the wider policy of provision of a gender-neutral prison uniform (12.1).¹⁷³ Beyond PSI 2016's translatability in instrumental terms, however, at a time when many prisons are suffering from extreme staff shortages, are stretched to the limit in maintaining a humane daily

¹⁷³ This policy board is chaired by the Deputy Director for Equalities in HM Prisons and Probation Service (formerly NOMS) and has two external members from transgender advocacy charities on its board. It has met several times already but has not issued any public documents for review (e-mail to the author from George Barrow, Vulnerable Officers Team, 30 Oct 2017). It is not yet clear how the TAB will inter-relate with the PPO in relation to complaints about access to gender-affirming prison dress, but hopefully, as with segregation decisions, this centralised body will be able to advance the situation, and rights of transgender prisoners, and ensure consistency of approach across the prison estate.

regime and safety and good order across the estate, this chapter has raised the more fundamental question of whether human rights and equality discourse in relation to prisoners' right to present their gender has the power to alter the pre-existing discursive terrain, which constitutes transgender prisoners' gender performance as inauthentic, and their access to gender-affirming items as risky – or arguably uses security and risk-based justifications as a pretext to retain its control over the gender order, and equilibrium of the prison, in the face of PSI 2011's (and now PSI 2016's broader) self-determination test.

Conclusion

This chapter has argued that, historically, prison dress has been used to discipline and normalise prisoners along binary, normative gender lines, and that despite the apparent liberalisation of penal regulation in this field, changes introduced to the IEP scheme in 2013 have led to prisoners' appearance being controlled in much more subtle, pervasive ways than before. The chapter also showed that the changes to the IEP scheme have reinstated differences between the male and female prison estate, and that these are based on the normative assumption that women are more affected by restrictions on their appearance than men.

It then argued that PSI 2011, and now PSI 2016, have potentially profound implications for the possibilities and liveability of trans/gendered lives in prison in relation to an aspect of their lives that is likely to hold considerable import, but tends to be trivialised in our cisgender society. By providing that access to gender-affirming clothing and other items must be made available to those who self-define as "transsexual", PSI 2011 unsettled the established medico-legal authority over trans/gender, but kept the gender order intact, by

requiring complete, permanent binary gender-crossings. Indeed, PSI 2016 is even more cutting-edge in the history of penal gender regulation, as it extends this right to prisoners who have “a more fluid or a neutral approach to their gender (including individuals who identify as non-binary, gender fluid and/or transvestite)” (PSI 2016, para 3.3).¹⁷⁴ Now, all “transgender prisoners”, in this much broader sense, must be “permitted” and positively “enabled” and “supported” to express “the gender they identify with (or neutral gender)”.

The chapter identified an emerging fault-line between the prison administration’s new mandatory human rights and equality-based duty to permit transgender prisoners to live and dress in their gender, and its long-established duty to maintain security, good order and discipline, and to safeguard all prisoners. It drew on the judgment in *Green* to illustrate that, in contemporary risk society, and in a prison system driven by the “inexorable logic of risk” (Ericson and Haggerty 1997), even a requirement to allow transgender prisoners to dress in accordance with their gender is translated into a risk, rather than a rights discourse. The chapter further argued that, despite the prison administration’s multiple security-based explanations for restricting transgender prisoners’ access to gender-affirming items, its highly precautionary response appears to be driven by a much more fundamental conceptualisation of transgender prisoners’ gender as risky to the established gender order, and to the equilibrium of the prison, or perhaps is simply a pretext for something which the prison does not fully believe in, and therefore does not wish to accommodate. The chapter further argued that judicial discourse in *Green* reproduces and perpetuates negative discourses about transgender prisoners, characterising their gender as artificial and

¹⁷⁴ Use of the term “transvestite” seems to be at odds with PSI 2016’s general approach to adopting more current, non-medicalised and non-pathologising terminology in prison policy. It is not clear why this term was adopted, instead of the less problematic term “cross-dressers”, for example.

performative, and contrasting it with cisgender prisoners' gender, which it portrays as natural and non-performative. It also reinforces the view, internally within the prison, and to the outside world, that PSI 2011 gives transgender prisoners' "advantages in clothing and lifestyle" that are not available to cisgender prisoners. Thus, the chapter has argued, recourse to law, rights and the courts not only resulted in a negative outcome for Green, but also has much broader regressive, discursive effects.

Having discussed the use of prison dress to discipline gender along normative lines, the next chapter, Chapter 6, turns to consider the powerful legacy of the medicalisation of transgender prisoners, and historical and contemporary barriers to transgender prisoners' access to gender reassignment treatment.

Chapter 6: The Legacy of Medicalisation and Barriers to Gender Reassignment Treatment for Transgender Prisoners

This chapter examines the legacy of the medicalisation of “transsexuality” (see Chapters 1 and 3) in the conception, treatment and control of transgender prisoners. It argues that past and present barriers to transgender prisoners’ access to medical gender reassignment treatment not only have serious consequences for their health, but also impact on other aspects of their lives in prison, particularly prison allocation. The thesis has argued that in prison, transgender bodies, and particularly “incongruous” transgender bodies, are problematic; defying normative categorisation, they represent a risk to the established order and regulation of gender. This chapter shows how, in the past, legal, medical and penal power converged in the disciplining, punishment and control of gender- and sexually-non-normative people as part of the governmentality of sex/gender. It argues that, despite the medical model of “transsexuality”, prison medical power was used to discipline and punish the first “transsexual” prisoners, rather than to treat them for their “transsexuality”, and situates this in a continuum of power over gender non-normative prisoners. This chapter then explores the effects of law, and human rights, in ameliorating access to medical gender reassignment treatment for those transgender prisoners who desire it, whilst critically engaging with the negative aspects of litigation, advocacy, and legal and policy reform.

Transgender prisoners now have a right to NHS-equivalent gender reassignment treatment, including diagnosis, counselling, hormone treatment,¹⁷⁵ and gender reassignment surgery,¹⁷⁵

¹⁷⁵ It is common for gender reassignment surgery to be referred to in the singular, and to be intended to mean *genital* reassignment surgery. However, a range of gender reassignment surgeries exists. See Glossary.

but access is beset by resource constraints and structural equality issues in the *general* provision of transgender healthcare and prisoner healthcare. Beyond this, the chapter argues that the realisation of transgender prisoners' rights to access gender reassignment treatment is hindered by three main factors: first, by a widespread public perception that they are "less eligible" or undeserving of expensive surgery on the NHS, second, by a deep-seated disbelief of the authenticity and motives of those who first express themselves as transgender whilst in prison (compared to those "deserving" prisoners who transitioned before prison), and third, by concerns that permitting transgender women housed in the male estate (in particular) to access gender reassignment treatment is risky, as it will lead to legal recognition of their gender,¹⁷⁶ and hence to their right to transfer to the female estate, with all the related perceived risks examined in Chapter 4. From an organisational risk perspective (Whitty 2011), the chapter argues that these concerns translate into a risk of public and political backlash, amid a resurgence of penal popularism, and a climate of fear around transgender women's bodies in "women-only spaces" (see Introduction).

This chapter overlaps with Chapter 4, which explored the centrality of genitalia, and hence genital reassignment surgery, to transgender prisoners' allocation within the prison estate, as challenged in **AB** (2009), and the shift to the centrality of legal gender recognition, which still requires a medical diagnosis of gender dysphoria, and the expectation that surgery will follow (see Chapter 3). The chapter also dovetails with Chapter 5, as gendered embodiment is not only important to some transgender people's health and well-being in terms of finding their "bodily home" (Prosser 1998) but is also important to some people in terms of being

¹⁷⁶ It will be recalled that, under the Gender Recognition Act, a medical diagnosis of "gender dysphoria" and two years living in one's gender is required, before an application may be made for a GRC.

“socially recognisable” in their gender and/or for feeling safe¹⁷⁷ (which is likely to be particularly true in the prison). However, for those transgender people who do not wish to medically transition, or to submit themselves to a pathologising medical diagnosis of gender dysphoria, legal gender recognition and hence the right¹⁷⁸ to be housed in a gender-appropriate prison is proscribed. Thus, the legacy of medicalisation has particularly enduring power in the prison.

This chapter is divided into six parts. The first part examines the way in which, historically, legal and medical power were used to enforce sexuality and gender norms on prisoners. Against this backdrop, the second part discusses the inhumane use of prison medical power, in the early 1980s, to discipline and punish “transsexual” prisoners with incongruous bodies by withdrawing hormone treatment, and the role of a human rights organisation in bringing public attention and sympathy to the issue. The third part charts developments in transgender prisoners’ right to access gender reassignment treatment through the introduction, in 1994, of a policy of “NHS-equivalence” in prisoner healthcare, and the ruling in *NW Lancashire* (1999) that gender reassignment surgery is covered by the NHS. It examines further prisoner litigation in this field, culminating in the human-rights infused judgment in *AB* (2009). This part also considers the costs of progress, including the claimant’s reliance on the argument that “transsexuality” is a mental disorder in *NW Lancashire*, and the court’s perpetuation in *AB* of the notion that “full” realisation of gender is achieved through gender reassignment surgery, not through a GRC. The fourth part

¹⁷⁷ Plemons has recently examined the growing demand for facial feminisation surgery in the US, as social recognition is becoming more important to many transgender people in their daily lives and social interactions, and genital reassignment surgery less so (2017). Facial feminisation and masculinisation surgery is not available on the NHS in the UK, and has to be privately funded, as in the US.

¹⁷⁸ Although, as discussed in Chapter 4, PSI 2011 and PSI 2016 contain a discretion for transgender prisoners to be allocated to a gender-appropriate prison, even if they do not a GRC.

examines the transformative potential of PSI 2011's and PSI 2016's specific provisions on transgender prisoners' access to medical gender reassignment treatment. The fifth part reflects on the limits of rights rhetoric in this field. It considers the effects of more subtle gatekeeping powers in relation to transgender prisoners' access to diagnosis, medical treatment, and genital reassignment surgery – which paradoxically, still acts as the ultimate litmus test of a transgender prisoner's authenticity in the eyes of the general public, despite the widespread objection to such surgery being provided in prison. In this regard, power relations are much more complex than in the previous two chapters, as the power/knowledge of specialist gender identity clinics is intertwined with that of primary healthcare services in prison, prison administration, and law. The sixth and final part asks whether prison may be the final frontier against the crumbling gender binary.

In the absence of previous research,¹⁷⁹ this chapter draws on a broader literature, and a wide range of primary sources, to inform its historical and contemporary analysis.

Disciplining Gender and Sexuality through Prison Medicine: An Historical Overview

This part starts by outlining the origins of prison medicine and discipline, and then turns to examine the specific use of prison medical power to enforce normative gender and sexuality

¹⁷⁹ Further historical research would be useful, along the lines of that undertaken by Dickinson, who explores patients' experiences of psychiatric treatment for "homosexuality" and "transvestism" carried out in UK "mental" institutions between 1935-74 (2014). Most of his participants were voluntary out-patients, but one undertook treatment after a close scrape with the law, and another as a formal term of their probation, after being convicted of a "homosexual offence". The field would also greatly benefit from empirical research into the contemporary medico-legal-penal governance of primary and secondary healthcare for transgender prisoners in England and Wales, incorporating prisoners' experiences, *c.f.* Jaffer *et al's* review of transgender healthcare in New York City's correctional system (2015) and Brown's analysis of transgender inmates' correspondence to a voluntary sector organisation, regarding their problems accessing appropriate healthcare (2014, and also Brown and McDuffie 2009).

on prisoners, with a particular focus on women and “homosexual offenders”. This background provides important context for understanding the sheer extent of medical power in disciplining, punishing and controlling prisoners’ minds and bodies. Understanding the history, and growing controversy, surrounding hormone treatment for “homosexual offenders” and other “sex offenders” from the 1940s through to the 1970s arguably also helps explain the Prison Medical Service’s refusal to prescribe hormones to the first “transsexual” people to be sent to prison, resulting in the return of their secondary sexual characteristics.

The origins of prison medicine and discipline

The legislature has been involved in prison healthcare since the late 18th century, when concerns about prisoners’ health and the rampant spread of disease (“gaol fever”) led to the *Health of Prisoners Act 1774* (14 Geo III C.59) and an act restricting jail fees. The *Health of Prisoners Act* provided for improved prison conditions, including cleanliness and ventilation of cells, regular healthcare through the appointment of a prison doctor, and the containment of disease through the provision of separate sick rooms, all to be overseen by justices of the peace. Prisons were required to paint and display the Act on a board, so that prisoners were aware of its provisions. “By those acts”, the prison reformist John Howard rather melodramatically proclaimed in his classic work *The State of The Prisons in England and Wales* (Howard 1777), “the tear was wiped from many an eye, and the legislature had for them the blessing of many that were ready to perish” (Howard 1777:2).

Both Foucault (1977), who considered the topic more broadly, across different institutional settings, and Ignatieff (1978), who specifically examined the English penitentiary from 1750-

1850, challenged the then dominant view that institutional medicine had evolved as a “benevolent set of practices and benign programmes”, and instead regarded healthcare, medical examinations and cell inspections as part of the wider imposition of discipline on the confined (Sim 1990: 5). Whilst Foucault argued that law conceded its power to the disciplines at the prison door, Ignatieff argued that the English magistracy was so heavily invested in the principle of “less eligibility”¹⁸⁰ that when the prison reformist, George Onesiphorus Paul, wanted to improve hygiene in Gloucestershire’s jails in the late 18th century following an outbreak of gaol fever, he first had to persuade his fellow magistrates that sanitary improvements would not reduce the pains of incarceration, or compromise the deterrent value of punishment (Ignatieff 1978: 100-102). Paul’s solution was to convince the magistrates that “hygienic rituals could be made to serve punitive functions” (*ibid*). Thus, medical rituals carried out on admission to the penitentiary – having one’s head shaved, being stripped naked, bathed, and examined by a doctor, and then dressed in institutional clothing – were endowed with “a latent but explicit purpose of humiliating prisoners” (1978: 100-102).¹⁸¹ These admission procedures brought home to offenders “the state’s power to subject every outward feature of their identity to control” (*ibid*), whilst the daily clean-ups and hygienic inspections were intended “not only to guard against disease” but also “to express the state’s power to order every feature of the institutional environment” (*ibid*). Foucault’s portrayal of the disciplinary purpose of medical power was somewhat different from Ignatieff’s. For Foucault, the routine medical examination was a

¹⁸⁰ It will be recalled from Chapter 1 that this principle (which applied to everything from food, to prison conditions, to healthcare, and access to the courts) reflected the widespread view that prisoners should not live in better conditions than on the outside, and continued to inform penal policy well into the 20th century.

¹⁸¹ See also the discussion of Sykes and Goffman’s respective theories on the “destruction of the psyche” and the “mortification of the self” in Chapter 5.

route to power/knowledge. This “slender” technique lay “at the heart of the procedures of discipline”, for, in it, “a whole domain of knowledge, a whole type of power is to be found”, and the “normalising gaze” made it “possible to qualify, to classify, and to punish” (1977:184-5).

It is important to note at this juncture that, in England, the Prison Medical Service was an entirely separate entity from the NHS, and prison doctors and nurses were paid by, and part of, the Prison Service. This situation allowed medical power to accumulate and consolidate in prison, and shielded it from the public gaze. In *Medical Power in Prisons: The Prison Medical Service in England 1774-1989* (1990), Sim developed the insights of Foucault and Ignatieff, and their rejection of the evolutionary model of medical benevolence, in the specific context of England’s Prison Medical Service, from its genesis in 1774 through to 1989. Sim’s work provides a crucial historical and critical plank for this chapter. He argues that prison medical workers were not only concerned with maintaining discipline and order within the prison, but were also informed and influenced in their work by broader penal ideologies of the time, particularly the discipline of “less eligibility” (which, as argued below, is still evident in penal populism today, despite a policy of NHS-equivalence in prison medical treatment). Sim also gives an important account of the various violent and coercive medical practices used to discipline and control prisoners’ bodies and minds, including practices directed at women and “homosexual offenders” as gender- and sexually-“deviant” prisoners. These particular insights are important, for whilst Foucault’s theory on the governmentality of sex and sexuality (1978) (as extended by Butler to gender (1999)) helps explain the part played by both law and prison medicine in punishing, pathologising and attempting to normalise these particularly “risky” categories of prisoners in the interests of

governmentality, neither Foucault nor Ignatieff specifically considered the disciplining of sex, sexuality or gender in their studies of prison medical power.

The pathologisation and medical disciplining of women prisoners

Before turning to the medico-legal disciplining of “homosexual offenders”, it is important to note that women prisoners, as a class, were constituted as having breached both the law and gender norms by engaging in crime. Building on earlier scholarship on women’s imprisonment in England (e.g. Smart 1976, Carlen 1983, Dobash, Dobash and Gutteridge 1986), Sim contends that penal power was deployed to “reshape the very spirit of the criminal woman back to the role for which she was seen to be biologically and sociologically suited – that of wife and mother” (1990: 130) and that, crucially, prison medical power was also deployed to this end. Women prisoners were disciplined and “normalised” into the feminine ideal, he argues, not only through moral instruction and domestic science education, but also through psychiatric treatment, straight-jackets and psychotropic drugs, which were used to break resistance and subdue the spirit (*ibid*: 129-176; see also Genders and Player 1987). As women prisoners who dressed in “men’s” clothing and/or cut their hair short were constructed by prison management in the 1970s as aggressive, disruptive and anti-authoritarian (see Chapter 5), it can safely be assumed that prison medicine would have been particularly heavily deployed in the discipline and control of such non-normative, “masculine”, women, and that this might have included people who would identify as transgender men in today’s terms. So strong was the construction of women prisoners as inherently pathological, that HMP Holloway, the first prison specifically designed for women, was finally re-opened in 1983, having been re-built as a “medically-orientated establishment with the comprehensive, versatile, and secure hospital as its central feature”,

on the matter-of-fact basis that “most women and girls in custody require some form of medical, psychiatric or remedial treatment” (Home Office 1969: 61-62; see further Sim 1990: 164-167 and Smart 1976).

The consolidation of legal and medical power in the medical disciplining of “homosexual offenders”

By contrast, the male prison population was not, as a whole, pathologised. However, men convicted of “homosexual offences” *were* pathologised, and medico-legal power was specifically directed at disciplining and controlling their sexuality. The medical disciplining of “homosexual offenders” provides particularly important context for this chapter, as men who cross-dressed or were perceived to be “effeminate” were disproportionately arrested and imprisoned for homosexual offences, particularly “importuning” (Schofield 1965: 12-14), and, inevitably, this would have included some people who would identify as transgender women in today’s terms. Further, “transsexualism” was not yet widely recognised within the legal and medical professions as distinct from homosexuality (see Chapter 1). Thus, whilst legal, penal and medical governance of homosexual and transgender prisoners later diverged, at this historical moment, they followed the same trajectory.

Following an extension of its powers over the terms of probation in the Criminal Justice Act 1948, the courts started to place homosexual offenders on community-based sentences, on the condition that they complete a course of psychiatric or hormone treatment as a term of their probation (on the effects of the Criminal Justice Act generally, see Sim 1990: 77-78). This practice came to widespread public attention in 2013, through the posthumous royal pardon granted to Alan Turing, the Enigma code-breaker, in relation to his 1952 conviction

for “gross indecency” for engaging in private, consensual sexual activity with another adult man. Like many other men convicted of homosexual offences at the time, Turing agreed to submit to hormone injections as part of his parole, in order to avoid imprisonment (Swinford 2013).¹⁸² He reportedly developed breasts and became depressed. Although the coroner recorded an open verdict, many consider that his death was suicide (e.g. Cook *et al* 2007: 166).

In addition to ordering psychiatric or hormone treatment as part of a community-based sentence, the courts tried to extend the arm of the law into the penal domain by making directions that “homosexual offenders” should receive psychiatric treatment in prison. This exercise of judicial power proved controversial, not because of the court’s intention that men should be treated for their “homosexuality” (for which there was widespread support at the time),¹⁸³ but because of the court’s lack of medical expertise and inability to guarantee that men would receive the psychiatric treatment proposed. The Wolfenden Committee was in favour of such treatment, although it firmly rejected the prevailing view that homosexuality was a mental “disease” or “illness” (Home Office 1957: 13-15 and 66; see generally, Moran 1996). Indeed, it found little medical evidence that treatment could result in a change in direction of sexual preference but remarked that simply “making the man more discreet or continent in his behaviour, without attempting any other change in

¹⁸² In January 2017, so-called “Turing’s law” – an amendment to the Policing and Crime Act 2017 – extended posthumous pardons to all men convicted of homosexual offences which are no longer on the statute books.

¹⁸³ Including within the prison authorities, e.g. the 1953 Report of the Commissioners of Prisons stated that the main “medical objectives” in this field were to determine “whether in any case psychiatric treatment was desired or practicable” and “to watch for evidence that any prisoner of latent homosexual tendencies was becoming involved” (139).

his nature” was “not to be despised as an objective, for if it is successful such treatment will reduce the number of homosexual offences and offenders” (*ibid*: 66-67).

Nevertheless, the Committee expressed serious concerns that the courts, on sentencing men convicted of homosexual offences, “sometimes intimated to an offender that he would receive medical treatment for his condition in prison”, and “in some cases, the courts even suggest that the offender is being sent to prison *for* this purpose” (Home Office 1957: 61-62), given the limited resources of the PMS,¹⁸⁴ and the small prospect of success (*ibid*).

It seems that some men were themselves hopeful of treatment, whilst others who *were* offered treatment resisted, by being uncooperative, or rejected treatment outright (Hansard, HC Deb 3 December 1953, vol 521, cc1295-9). The 1953 Report of the Commissioners of Prisons notes that efforts had been made that year to interview “all homosexuals who were potential cases for psychological assessment or treatment”, but who had previously refused the opportunity, but “so far, no prisoner was found who appeared to have a genuine desire for such treatment” (139).

There is little material on the precise nature of psychiatric treatment for “homosexual offenders” in prison. Dr. William Calder, Principle Medical Officer at Brixton Prison, declined to discuss the specifics in his 1957 lecture to psychiatrists (1957). There is evidence, however, that treatment was not always restricted to “talking therapy”. In 1974, Professor Alexander Leitch, a visiting psychologist at HMP Shepton Mallet, reported in the *Prison Medical Journal* how he had used aversion therapy in the case of two homosexual sexual

¹⁸⁴ The Committee noted that the Prison Medical Service was understaffed, few prison doctors had psychiatric training, and few were able to call upon psychiatric consultants from the NHS, given that the PMS and the NHS were not integrated and there was a national shortage of psychiatrists.

offenders, by presenting “provocative pictures of males” and applying a painful electric shock “whilst at the same time remarking that homosexual activities were disgusting, loathsome, and led to corruption of the young and later to conflicts with society and the law” (1974: 26).¹⁸⁵

The introduction of hormone treatment in prison

Although hormone treatment, as well as psychiatric treatment, was used to treat homosexual offenders in the community, the Wolfenden Report observed that, in 1957, it was banned in prison. The “reluctance of the authorities to permit the indiscriminate administration of oestrogens for this purpose”, it stated, “is understandable”, and “certainly there can be no question of departing from the general law that the consent of a patient must be given before medical treatment is administered” (Home Office 1957: 71). However, “if a prisoner himself clearly wishes to undergo oestrogen treatment, which may indeed have a beneficial effect, we think it wrong that he should not be afforded the opportunity” (*ibid*). The following year, in 1958, the Committee’s recommendation was implemented, and oestrogen treatment was made available in “suitable cases”, subject to Home Secretary approval and the prisoner’s informed, written consent (Hansard, HL Deb 12 May 1965, vol 266, cc 71-172). The paper trail then goes cold for a decade, when reports emerged of hormones being used to treat “sexual offenders” more broadly.

In the late 1960s and early 1970s, several visiting psychotherapists working in prisons, Dr. Field and Dr. White at HMP Wormwood Scrubs, Dr. Fitzgerald at HMP Dartmoor, and Dr.

¹⁸⁵ Dickinson recounts the horrifically debasing experiences of aversion therapy on men who either voluntarily, or by order of the court, attended psychiatric hospitals as out-patients for homosexuality and/or “transvestism”/ cross-dressing (2014). However, the author has not found any specific accounts of aversion therapy used on cross-dressing or “transvestism” in prison.

Leitch at HMP Shepton Mallet, published a series of reports in the *Prison Medical Journal* on the experimental use of hormones in the treatment of sexual offenders in prison. Dr. White reported that of the 40 men he had treated with oestradiol implants¹⁸⁶ in Wormwood Scrubs, most had been convicted of offences against children, but “homosexuals were also involved” (Daily Telegraph Reporter 1968), whilst Dr. Fitzgerald reported that oestradiol implants given to 28 prisoners at Exeter and Dartmoor were mainly directed at “pederasts”, although “exceptionally” he agreed to prescribe hormones to a male prostitute, who had not been convicted of any sexual offences (1974: 17). As the *Prison Medical Journal* was a confidential, in-house publication, circulated only to Prison Medical Service staff,¹⁸⁷ it took some time before the details of these experimental treatments on prisoners, and their serious side effects (see below), reached the public domain.

A *Sunday Times* article in 1978 seems to have been key to bringing public attention to the issue, under the headline “Worries Growing over Anti-Sex Drugs in Prisons” (Harriman 1978). The reporter explained that he had obtained copies of the restricted *Prison Medical Journal* articles mentioned above (*ibid*). Before then, the public had only been fed positive news. In 1969, for example, a Home Office white paper, entitled *People in Prison (England and Wales)*, described the “use of hormone therapy as an adjunct to psychotherapy” in the treatment of “abnormal sexual offenders” as “an area in which pioneering work is being done in the Prison Medical Service” (1969: 35), whilst a senior doctor in the Prison Medical Service, who was closely involved in the Wormwood Scrubs experiment, reported that the

¹⁸⁶ These were small pellets, inserted under the skin, which provided a slow release of oestrogen over a six-month period. Tablets and 3-monthly injections were also used.

¹⁸⁷ Even though the editor of the *Prison Medical Journal* called for “the powers that be” to make it publicly available (Hansard, HC Debates 4 Dec 1979, vol 975, c100W), its circulation remained restricted to PMS staff.

drugs were increasingly being used in other prisons, and commented that “this is no longer an experiment. We regard this as positive treatment” (Daily Telegraph Reporter 1968).

Serious side-effects, litigation and public controversy

Although the Wolfenden Committee had been assured by various medical experts that oestrogen treatment was safely being used in outside practice (Home Office 1957:71-72), it soon became clear that the use of oestrogens and later anti-androgens (which block the production of testosterone) had serious side effects. These ranged from nausea and sharp pains in the chest, stomach and testes (Harriman 1978), to blood clots and the development of breasts (“gynaecomastia”). These side effects were reported in the *Prison Medical Journal* articles mentioned above. Dr. Fitzgerald stated, for example, that oestradiol implants involved the “inevitable complication of gynaecomastia,” which “almost invariably reaches a state demanding surgery within twelve months of starting treatment” (1974:18-19). He did not regard this side-effect as problematic, however, and lamented the difficulty in obtaining mastectomies for such prisoners on the NHS, and in finding surgeons willing to undertake the operation (*ibid*). He remarked that many did not agree with the treatment on ethical grounds, but, in his view, they did not fully understand the context (*ibid*). Most of the mastectomies reportedly took place at HMP Grendon Underwood, and some took place at a small surgery in Devon (Smith 1978).

The need for surgical removal of hormonally-induced breasts in at least 10% of oestradiol implant cases became increasingly controversial and, in 1977, the National Association for Mental Health (“**MIND**”) announced that it was suing the Department of Health and Social Security for alleged negligence in the treatment of a patient, William Pale, at Broadmoor

secure hospital. MIND argued that Pale had not given valid consent to such implants, as he was not made fully aware of the possible risks and side-effects (General Practitioner Reporter 1977). Pale had been one of 12 patients at Broadmoor to take part in an “apparently experimental” treatment programme with sex offenders, in 1971 (*ibid*), which resulted in him having to have one breast surgically removed and left him with extensive scarring and pains in the chest (*ibid*). Two other patients also had to have breasts removed (*ibid*). Although a hearing date was set, the case had to be postponed shortly beforehand, as “British psychiatrists were hesitant to testify against their colleagues at Broadmoor” (*ibid*). The case does not appear to have proceeded and may have been settled out of court. However, it brought to the fore concerns about the side effects and the validity of consent, in scenarios where patients/ prisoners might consent to experimental treatment in the hope of early release (Berry 1978). Together with the leaked details of the treatments being conducted in prison (Harriman 1978), Pale’s case led to calls for oestrogen implants to be banned in secure hospitals and prisons (Smith 1978). Against the backdrop of this legal action, and the attendant negative publicity, it would appear that, by the late 1970s, the use of hormone treatment for sexual offenders was either officially banned or otherwise ceased in prisons.

The reasons for relaying this historical background in considerable detail are threefold. First, it helps contextualise the sheer extent of legal and medical power to discipline prisoners’ bodies. Second, due to the historical conflation of gender and sexuality, the medical disciplining of homosexual offenders in particular, but also of women perceived to depart most from the “feminine” norm, would inevitably have encompassed some prisoners who would describe themselves as transgender in contemporary terms. Third, this

background may help explain early prison medical responses to prisoners who identified as “transsexual” on reception to prison. These prisoners represented a new and uncertain challenge for the Prison Medical Service, and a new risk, particularly given public outcry and litigation over its previous use, and serious side effects, of oestrogen treatment on “homosexual offenders”.

Medical Power in the Disciplining and Punishment of “Transsexual” Prisoners

From the late 1960s, it is evident that transgender men and women were being sent to prison, some of whom had been on hormone treatment and/or had undertaken gender reassignment surgery prior to imprisonment,¹⁸⁸ and some of whom hoped to have such treatment. In 1969, for example, *The Guardian* reported (under the headline “Chance of Sex Change in Prison”) that a judge had recommended that the prison authorities “provide every facility for the medical requirements” of two transgender men, whom he had sentenced to two years’ imprisonment for obtaining a diamond ring by deception (Guardian Reporter 1969). The men (described as wearing men’s suits, with open necked shirts and short cropped hair) had reportedly committed the offences as a “short cut” to a new life: unable to obtain employment in traditional “men’s work”, they had turned to crime to try to fund gender reassignment surgery at Guys Hospital in London (*ibid*). There are no reports of what treatment, if any, they received in prison. Indeed, the *Prison Medical Journal* contains no references whatsoever to the medical treatment (if any) offered to transgender prisoners in its entire period of publication from 1965-1982. Apart from a brief reference, in

¹⁸⁸ E.g. Racheal Gosling (1969), whose case is discussed in Chapter 4. Unfortunately, there is no reference to the medical care she received in prison.

article about HMP Grendon's "F wing", that one inmate had a diagnosis of "sexual identity crises" (Wool 1978: 47), both the presence and medical treatment of transgender prisoners goes unmarked.

In 1968, Professor William Symmers, a specialist in the treatment of "transsexuality" at Charing Cross hospital (who later gave medical evidence to the court in *Corbett* (1970)) published an article about two transgender patients who had died from breast cancer five years after having had regular oestrogen implants overseas (1968). Symmers' paper is said to have caused concern among prison doctors using such oestrogen implants to reduce sex drive in male sexual offenders (Harriman 1978). Unfortunately, even though other types of hormone treatments were being developed and were being safely prescribed to transgender people in the outside community, Symmers' paper, and the controversy which later ensued around the side effects of oestrogen implants on sex offenders, seems to have contributed to a broader anxiety, and a heightened precautionary approach, to the use of *any* hormones in prison, including in the treatment of transgender prisoners. A less generous interpretation might be to regard prison medical responses to transgender prisoners as a continuum of prison medical power in disciplining non-normative gender and sexuality. Absent any published research in relation to the historical medical treatment of transgender prisoners, both interpretations are plausible, and may have co-existed.

In 1980, several newspapers reported the case of Linda Gold, a West End nightclub hostess sentenced to 18 months' imprisonment for theft. Press reports of this case, from the LAGNA archives, provide the first insights into the Prison Medical Service's specific response to "transsexual" prisoners. According to various reports (Veitch 1980; Smith 1980: LAGNA 1980), Gold had lived as a woman for five years before she was sent to prison, and had been

prescribed oestrogen on the NHS throughout that period. As she had not had gender reassignment surgery, she was treated by the prison authorities as a man and sent to HMP Wormwood Scrubs (see Chapter 4 on the centrality of genitalia to prison allocation decisions at this time). The prison doctor and the principal medical officer refused to continue her previous prescription, as there were “no clinical indications for prescribing oestrogens for this man [*sic*]” nor, in the latter’s medical opinion, was it “necessary to prescribe any treatment” at all for Gold (Veitch 1980). Her skin started to roughen, her body and facial hair return, and her breasts shrink, and she became severely depressed (*ibid*).

The National Council for Civil Liberties (“**NCCL**”, now “Liberty”) took up Linda Gold’s case, and petitioned both the Governor and Prison Department to allow her access to hormone treatment, describing it as “pointlessly cruel to force her to reacquire male secondary characteristics” (Veitch 1980). The Governor was not willing to intervene in the principal medical officer’s decision, however, and the Prison Department took a similar stance. A Home Office spokesperson remarked that Gold “does not suffer from any of the medical conditions for which female hormones are clinically indicated” and there were “special hazards” in the use of female sex hormones (*ibid*). Indeed, it continued, *no* prison medical officer at the time would prescribe hormonal treatment, as the possible side effects rendered it a “hazardous treatment for any prisoner” (*ibid*). Another article cited the Home Office spokesperson as saying that “it is a general clinical judgment that this treatment is hazardous and prison doctors will not give it” (Smith 1980). This official statement from the Home Office supports the author’s hypothesis that hormone treatment may have been banned in prisons and secure hospitals, after growing concerns about the experiments in

prison (Harriman 1978) and the MIND/ William Pale litigation in 1979. The harmful *withdrawal* effects from pre-existing (NHS-prescribed) hormone treatment did not seem to feature in the Home Office decision, however. Prison medical power was separate from the NHS, and absolute.

The NCCL's arguments that the Prison Department was being "cruel" and "doubly punishing" Gold by denying her proper treatment appear to be the first appearance of, and recourse to, human rights discourse in relation to the treatment of transgender prisoners. The language used by NCCL recalls the prohibition of "cruel, inhuman or degrading treatment or punishment" in the Universal Declaration of Human Rights (1948, article 5), the International Covenant on Civil and Political Rights (1977, article 7), and the European Convention on Human Rights (article 3). It also echoes the fundamental principle of prisoners' rights, confirmed by the English courts in *Raymond v Honey* (1983), that imprisonment should entail only loss of liberty and not additional punishment.¹⁸⁹

The outcome in Linda Gold's individual case is not clear,¹⁹⁰ but the case illustrates the effectiveness of an outside, human-rights based pressure group in bringing the situation of

¹⁸⁹Although this issue has yet not come before the UN Human Rights Committee or European Court of Human Rights, an application is currently pending before the European Court of Human Rights, under the article 3 prohibition of "inhuman and degrading treatment". It concerns the denial of hormone treatment to a transgender woman whilst held in custody in Russia, *Bogdanova v. Russia* (Application No. 63378/13). See the third party intervention by Transgender Europe *et al* (2015). A substantial body of US case-law also exists in this field, under the (broadly comparable) eighth amendment prohibition on "cruel and unusual" punishment. In 2015, the US Justice Department took the highly unusual step of intervening on behalf of Ashley Diamond, a transgender prisoner, in a federal lawsuit filed against Georgia correctional officials. Through a *Statement of Interest* (*Diamond v Owers et al.*, case 5.15.CV.00050.doc 29), the Justice Department advised the court that proscriptive "freeze-frame" policies were "facially unconstitutional" under the eighth amendment prohibition on "cruel and unusual punishment", "as they do not provide for individual assessment and treatment" (p.2). Another important case is *Fields v. Smith*, 653 F.3d 550, 557-58 (7th Cir. 2011), in which the Seventh Circuit struck down a Wisconsin state statute that prohibited the Department of Corrections from providing hormone therapy or gender reassignment surgery to any transgender prisoners.

¹⁹⁰ Unfortunately, searches at the Liberty Archives at the Hull History Centre, University of Hull, did not reveal any further documentation regarding Ms Gold's case (probably because it "would have been covered by legal

transgender prisoners to public attention, and persuading the press and public of the legitimacy of their cause, through human rights rhetoric. The general tone of press coverage is sympathetic and respectful of Gold's gender. One newspaper report described it as "less than constructive to deny Linda Gold the medically approved treatment [she received] before she went to gaol", as this would "lessen her chances of coping with society when she gets out of the gaol", and, moreover, would "punish her twice by trying to make a man of her" (Smith 1980). The latter statement captures in a nutshell the sheer extent of prison medical power to punish Gold for failing to conform to societal gender expectations, and to literally discipline her body back to her birth-assigned gender (so as to "make a man of her"), to reinstate the binary order of the prison, and render her less risky.

Hormone treatment *de novo* for transgender prisoners

Linda Gold's case involved withdrawal of hormone treatment, which she had been medically prescribed *before* she was imprisoned. By the 1990s, there is evidence that the Prison Medical Service had made hormone treatment available for such prisoners, although there was sometimes a harmful delay in the (re-)commencement of treatment in prison (Whittle and Stephens 2001). The research has not identified any prison statements, or other sources, which pinpoint precisely when this change in practice occurred. However, in the late 1990s, press reports emerged of six prisoners who had started to medically reassign their gender *whilst* serving long-term prison sentences in men's prisons, and who had commenced legal action against the Home Office for access to gender reassignment surgery.

privilege and never formed part of the archives", e-mail to the author from Verity Minniti, Hull History Centre, 21 Feb 2015), nor regarding NCCL's broader advocacy for policy reform in this area.

The issue of prisoners commencing medical gender reassignment treatment in prison (“*de novo*”) raised new problems, and potentially risks, for prison management.

HM Prisons Inspectorate reports of the prisons which housed these six particular transgender prisoners are silent as to their presence.¹⁹¹ However, press reports indicate that John/Jane Pilley¹⁹² (HMP Gartree) had been on hormones since 1992 (Evening Mail Reporter 1999; Burrell 1999) and that Kelley Denise Richards (HMP Parkhurst) had received Androcur (an anti-androgen or testosterone blocker) since 1993 (Burrell 1999; Ford 2006).¹⁹³ Pilley argued that, having had long-term hormone treatment which had feminised her body and given her breasts, the prison’s refusal to complete her bodily transformation through gender reassignment surgery was unfair, as it left her “in the limbo of being part-man and part-woman” (Burrell 1999). Like Linda Gold’s case, Pilley’s case highlights the sheer extent of prison medical power over transgender prisoners’ bodies; their power to provide, withhold and withdraw medical treatment.

Whilst the prison authorities/ Prison Medical Service were prepared to provide these transgender prisoners with hormone treatment *de novo*, they refused to provide gender reassignment surgery. An article in the *Independent* gives some possible insights into the prison authorities’ rationale. According to a Prison Service spokesperson, the “general approach is that the prisoner should wait for release, as it is not really a suitable environment to take such an irrevocable decision”, although she noted that “problems arise

¹⁹¹ Review of archived HM Prisons Inspectorate reports for Gartree (1990, 1993, 1996, 2001), kindly undertaken for the purposes of the author’s study by the library staff at the Prison Service College Library (e-mail to the author, dated 1 July 2015).

¹⁹² Both first names are referred to, as Pilley later returned to living as a man (see below).

¹⁹³ Other prisoners pursuing legal action against the Home Office for gender reassignment surgery, as reported widely in the press, included Tai Pilley (HMP Channings Wood), Matthew Richardson (HMP Gartree) and Philip Taplin (HMP Gartree). The latter’s male names are used here, as their female names were not reported.

with prisoners serving a long sentence” (Burrell 1999). Russell Reid, a consultant psychiatrist at the NHS Charing Cross Gender Identity Clinic stated that prison life made it very difficult, although not impossible, for inmates to satisfy the necessary criteria before they could be given such a life-changing operation, as they “must adjust successfully and live and work in their female role for two years before they can be considered for surgery” (*ibid*). Similar concerns about whether prison can provide a satisfactory “real life test” for the purposes of qualification for gender reassignment surgery are expressed by gender identity clinicians today (see below). Concerns about general reaction to the public expenditure involved may well have come into play as well, although not officially voiced. For whilst hormone treatment is relatively inexpensive, gender reassignment surgery cost around £10,000 at the time, under the NHS (Daily Mail Reporter 2000).

The Significance of NHS-Equivalent Medical Treatment for Transgender Prisoners

The Prison Service only changed its stance when it became legally untenable, after the ***North West Lancashire*** case (1999). At this stage, the Prison Service’s head of healthcare reportedly instructed the Treasury Solicitors representing the Prison Service to desist from contesting the case (Burrell 1999). It will be recalled from Chapter 3 that, in 1994, the Prison Service introduced a policy of NHS-equivalence in prisoner healthcare (HM Prison Service 1994). This policy was a significant milestone and responded to repeated criticisms of the second-rate healthcare provided by the Prison Medical Service, and also reflected the international principle of equivalence between prisoner and community healthcare laid down in various international human rights resolutions and instruments. The second important development, and the turning point for Pilley and the other transgender

prisoners who had been pursuing legal cases to access gender reassignment surgery, was the ruling in **NW Lancashire** that “gender dysphoria” is a medical condition eligible for treatment, including gender reassignment treatment, under the NHS (*unreported*, Queen’s Bench Division, 21 December 1998).

The Queen’s Bench decision in **NW Lancashire** was upheld on 29 July 1999 by the Court of Appeal.¹⁹⁴ The Court of Appeal held that regional health authorities were not obliged to fund gender reassignment surgery in *every* case, i.e. that there was not a right to gender reassignment surgery *per se*, but they were required to give proper consideration to an individual’s need for treatment, and could not operate a blanket policy – whether on paper in practice – of refusing funding for gender reassignment surgery. Such a blanket policy was irrational and unlawful under the common law principle of **Wednesday** unreasonableness. It followed, under the policy of “NHS-equivalence” in prisoner healthcare, that transgender prisoners were also entitled to be considered for gender reassignment surgery on an individual basis. Thus, when the Prison Service announced that Pilley would be granted permission for gender reassignment surgery, it specifically cited its obligation to give prisoners the same access to medical care as other members of the public (Burrell 1999; English 1999). It formally reiterated its commitment to equivalence between prison healthcare and NHS community healthcare in the House of Commons. In a response to a written question on the Home Office’s policy “in respect of requests by serving prisoners for

¹⁹⁴ There is evidence that a number of other cases had been settled out of court previously, regarding other regional health authorities’ policies of refusing funding for gender reassignment surgery; it was reported in the *British Medical Journal’s* news section in 1996 that a transgender person had been granted leave for judicial review against Gloucestershire Health Authority’s refusal to pay for gender reassignment surgery (Dyer 1996), and, reporting on the **NW Lancashire** decision, the BBC quoted the claimants’ solicitors as saying that they had “successfully settled a number of previous cases”, but this is “the first time the issue has been fully considered by the court” (BBC News 1998).

access to NHS sex change operations”, Boateng, Minister of State for the Home Office, replied:

Gender dysphoria is a recognised medical condition for which treatment, including gender reassignment surgery, is available on the NHS. The Prison Service aims to provide prisoners with access to the same range and quality of health services as the general public receives from the NHS. A prisoner who had been receiving treatment for gender dysphoria under the supervision of an NHS specialist would normally be permitted to have gender reassignment surgery on the recommendation of that specialist (Hansard, Written Answers, 28 Nov 2000, Col 485W-596W).

NHS guidelines subsequently published in 2000 gave further substance to the NHS transgender treatment pathway. They provided that transgender patients should be treated according to the international protocols laid down by the Harry Benjamin International Gender Dysphoria Association (now WPATH), and that, accordingly, after assessment and a diagnosis of gender dysphoria, patients should be provided with psychiatric counselling and prescribed hormones. Gender reassignment surgery should be provided for those “carefully selected” people “who reach the surgical stage” after living for at least two years in their gender (Annex A to NHS 2000).

Perpetuation of pathological model of transgender

Whilst recourse to the courts in *NW Lancashire* had a positive outcome in providing a legal basis for transgender people, and transgender prisoners, to access gender reassignment treatment, such progress came at a price. In order to achieve this legal outcome, the claimants had to argue that gender dysphoria was a mental illness under the Mental Health

Act 1983, and was therefore eligible for treatment under the NHS. Indeed, the very success of the case was built on the “common ground that transsexualism is an illness in the nature of a mental disorder” (*NW Lancashire* (1999): 3). The judgment therefore perpetuated the discourse that gender dysphoria is a mental illness in the same moment that it secured important legal advances for transgender people, so it cannot be regarded as an entirely unequivocal success. Indeed, it is a good example of Butler’s observation that transgender people who wish to access medical treatment (and/or legal gender recognition) are placed a bind and must be agree to be “undone” in order to “do” themselves (2004: 100). That is, they must subject themselves to the existing regulatory apparatus, its conditions and its labels (here a mental illness label), in order to exercise their right to personal autonomy.

Political and public backlash against gender reassignment surgery for prisoners

Aside from the negative discursive effects of *NW Lancashire*, the Prison Service’s recognition of transgender prisoners’ right to access gender reassignment surgery at tax payers’ expense was highly controversial and generated considerable political and public backlash. It was (and continues to be) clearly difficult to affect a shift in the public’s perception of prisoners as “less eligible”, as less deserving, of NHS medical treatment than law-abiding citizens.¹⁹⁵ The view that gender reassignment surgery is a lifestyle choice, rather than a genuine medical need, also persisted (and continues to persist) despite the *NW Lancashire* ruling. These opinions clashed with the Prison Service’s insistence on transgender prisoners’ right to NHS-equivalent healthcare, and with the views of advocates

¹⁹⁵ In a review of prison healthcare in England, Ginn remarks that “any successful health initiative runs the risk of being seen as too good for prisoners, who are portrayed as undeserving” (2012:2).

for transgender people's rights, as evident from the widespread press coverage of Jane Pilley's and Kelley Denise Richards' gender reassignment surgeries in 1999 and 2000.

In March 1999, Pilley became the first prisoner to be granted permission to undergo gender reassignment surgery on the NHS. Her surgery was due to take place in April 1999 (Burrell 1999; English 1999; Evening Mail Reporter 1999).¹⁹⁶ She was then transferred to HMP Holloway, a women's prison (Jenkins and Kay 2006). In announcing that her surgery would go ahead, the Prison Service stated that it was under an obligation to give prisoners the same access to medical care as other members of the public (Burrell 1999). Barrister and former Liberal Democrat MP, Alex Carlile, who had campaigned for transgender rights in parliament (see Chapter 4), remarked that the decision "was an important step towards giving transsexuals proper liberties" (*ibid*). Press for Change, the transgender advocacy group, also took a human rights stance on the issue, stating that prisoners "are supposed to lose their liberty, but they should not be further punished by the removal of treatment for a recognised medical condition from which they are suffering" (*ibid*).

Other press reports took a different view of transgender prisoners' access to gender reassignment surgery. The *Daily Mail* reported that Kelley Denise Richard's gender reassignment surgery, which took place in September 2000, had apparently "infuriated prison officers, who condemned it as an outrageous waste of NHS money" (Daily Mail Reporter 2000). Duncan Keys, assistant secretary of the Prison Officers' Association, was quoted as saying that "prisoners are in prison to be rehabilitated, not to have their sexual fantasies accommodated" (*ibid*). Keys contrasted this with the "worthy causes clamouring

¹⁹⁶ One press article reports that her surgery entailed an "orchiectomy", i.e. removal of the testicles, not full penectomy and vaginoplasty (Burrell 1999).

every day for health treatment, people who have genuine health problems, but who have to wait years” (*ibid*). The Victims of Crime Trust stated that “the country should hang its head in shame” after Richards, a “convicted armed robber”, had the operation (Times Reporter 2000). Richards had reportedly committed the crime to try and fund sex change surgery (Daily Mail Reporter 2000).

In an exclusive interview with *The Independent*, Chief Inspector of Prisons, Sir David Ramsbotham, stated that transgender prisoners risked serious health problems if they were denied treatment and should be given the same access to surgery as members of the public (Goodchild 2000). His views were “greeted with outrage” by the Conservative Home Affairs spokesman, who described sex changes for prisoners “as a complete waste of public money” and complained that it meant that “resources for thousands of law-abiding people who genuinely need operations would be sacrificed” (*ibid*). Ramsbotham recognised the problems involved but insisted that “if delay to treatment is going to cause damage to health, then I don’t think being in prison should be allowed to be the cause of delay” (*ibid*).

By 2007, 12 prisoners in total had reportedly completed gender reassignment surgery (Williams 2006). Unusually, Pilley underwent a reversal of the surgery in 2006 (Ford 2006). Reversal of gender reassignment is rare, but as Pilley was the first prisoner to undergo gender reassignment surgery, this development further fanned the flames of public perception that surgery for prisoners was an inappropriate use of tax payers’ money. A representative of the Taxpayer’s Alliance is quoted as saying that “it beggars belief that the Government can find money for two sex-change operations for a prisoner when life-saving medical treatments for honest taxpayers are deemed too expensive” (Daily Mail Reporter 2006). The Prison Service refused to comment (*ibid*).

Further, human rights-based, prisoner litigation

So far, this part has shown how, by the 2000s, prisoners had a firm legal basis on which to seek access to NHS-funded counselling, hormone treatment and gender reassignment surgery for the treatment of (the mental disorder) “gender dysphoria”. The Court of Appeal in **NW Lancashire** had not felt it necessary or desirable to draw on human rights in this field, given that the Human Rights Act 1998 had not yet entered into force, and there were “adequate and more precise domestic principles and authorities governing the issues at play” (*per* Lord Justice Auld, at 14). However, two cases brought by transgender prisoners after the Human Rights Act 1998 came into force in 2000, demonstrate how direct reliance on European Convention rights before the UK courts helped further advance transgender prisoners’ access to medical treatment.

In 2007, Clive¹⁹⁷ Watson, a prisoner at HMP Dovegate (a men’s prison), commenced judicial review proceedings against the Secretary of State for the Home Department and the prison, regarding their refusal to provide her with medical gender reassignment treatment, despite the fact that she had been diagnosed with gender dysphoria (Scotney 2007; Dolan 2007). Watson was serving a four-year sentence for driving offences and over 70 burglaries, which she said she had committed to fund the purchase of hormones on the internet, and to save up for gender reassignment surgery (Dolan 2007; Telegraph Reporter 2005). According to press reports, Watson claimed that the Prison Service had breached its own guidelines on NHS-equivalence in prisoner healthcare (and was therefore **Wednesbury** unreasonable). Additionally, she argued that it had unlawfully, and discriminatorily, interfered with her right to respect for her private life (articles 8 and 14), under the European Convention on Human

¹⁹⁷ Watson’s change of first name is not reported in the media, hence the .

Rights, by not referring her to the Primary Care Trust for specialist treatment, and for not providing her with private sessions with a psychologist to discuss her gender issues, as would be available to transgender people in the outside community (Uttoxeter Post Reporter 2007). The prison authorities' legal response, and underlying rationale, is not clear. It is possible that prison management felt she should wait until her release, given her relatively short sentence, and the views expressed by the Prison Service in relation to Pilley's case.

The judge held that Watson's complaints were actionable and gave her permission to take her case to a full judicial review hearing before the High Court, but the case was settled out of court.¹⁹⁸ Nevertheless, the fact that her case settled shows the power of impending litigation, and arguably the additional contribution of human rights-based arguments, to effect change. On the other hand, it illustrates continuing public and political backlash against transgender prisoners being granted access to public funding, whether in terms of legal aid or medical treatment, as exemplified by newspaper headlines such as the *Daily Mails'* "Prisoner sues over his 'human right' to have sex change" (Dolan 2007) and *Sunday Mercury's*: "Jailbird sues prison for not freeing him to have sex change: AND YOU'RE PAYING" (*sic*) (Scotney 2007). Opposition MPs also criticised the case. "It's nobody's fault but his own that he [*sic*] is in prison and there is no grounds whatsoever for expecting the prison service to facilitate sex changes", Ann Widdecombe, Conservative MP, commented (*ibid*), perpetuating a discourse of "less eligibility" in relation to transgender prisoners' healthcare.

¹⁹⁸Inquiries of the solicitors' firm and barrister who represented her, to establish more clearly the fact of the case, and when the case was settled (to the extent such details were not covered by client privilege), were not fruitful. Emails dated 18 May 2015, 29 April 2015 and 30 Sept 2014 on file with the author.

The case of **AB** has already been discussed at some length in previous chapters. What is noteworthy for the purpose of this chapter is that AB successfully argued that the prison authorities' refusal to transfer her to a women's prison, which barred her from progressing towards gender reassignment surgery, was both **Wednesbury** unreasonable at common law *and* comprised an unlawful interference with her right to respect for her private life under article 8 ECHR. Compared to the bench in **NW Lancashire**, ten years earlier, the court was highly receptive to the human rights-based arguments canvassed before it, particularly the right to respect for private life, which, by this time, had been interpreted by the European Court of Human Rights to encompass transgender people's right to personal autonomy, **Goodwin** (2002). Indeed, as Amatrudo and William-Blake have commented (2015: 136), "it is difficult to envisage how, even now, except by relying on the right to private life in article 8 ECHR, a prisoner who wished to undergo gender reassignment surgery could have achieved the result achieved by the claimant, AB, in **R (on the application of AB) v Secretary of State for Justice** (2009)".

It will be recalled from Chapter 4, that the prison authorities did not (apparently) object to AB having gender reassignment surgery *per se*, but would only contemplate her having surgery whilst she was in the male estate, as they considered it too risky to transfer her to the female estate without surgery. The prison authorities' stance conflicted with the gender identity clinic, which required her additionally to have sufficient "real life experience" as a woman in a women's prison before it would consider her suitability for surgery. The risk for the gender identity clinic was presumably that the decision might turn out to be wrong, as had happened in Pilley's case – although interestingly, the author's research revealed that the gender identity clinic permitted a transgender man to have gender reassignment

surgery, including a phalloplasty (surgical creation of a penis), in 2008/9, whilst housed in a women's prison, before transferring to the male estate (interviews with PAS, 13 April 2016, and Joanne Roberts 26 July 2015).

Drawing on *NW Lancashire*, the court noted that AB did not have a right to surgery *per se*, but held that the decision to retain her in the male prison estate effectively barred her from ever being considered for gender reassignment surgery, which, following *Raymond v Honey* (1983), “interferes with her personal autonomy in a manner which goes beyond that which imprisonment is intended to do” (para 49). This specific interference with AB's personal autonomy went “to the heart of her identity” (para 53) and to “realisation *in full* of her gender” (para 64, emphasis added). The court was not so concerned with the prison authorities' refusal to recognise her as a woman *per se*, as *per* her GRC. It is true that AB herself wanted gender reassignment surgery, nevertheless, it is significant that the medical model of transgender people took precedence in the court's determination of the issues, over and above the legal model prescribed by the Gender Recognition Act, and that, for the court, gender reassignment surgery represented the realisation in full of her gender, not legal recognition.

The Medical Implications of PSI 2011 for Transgender Prisoners

Several years after *AB* (2009), PSI 2011 came into force. Interestingly, PSI 2011 starts with “Medical Treatment” as its first topic, arguably reflecting this on-going tendency to think about transgender people primarily through a medical lens. Technically, PSI 2011 does not further advance transgender prisoners' right of access to gender-affirming medical treatment *per se*. Yet, its significance should not be overlooked, both symbolically, as an

official policy commitment to NHS-equivalence in *transgender* prisoner medical treatment, and practically, in terms of the specific, detailed obligations it places on prison primary healthcare and prison management. It also makes prison policy on transgender medical transparent, and provides an official benchmark against which prisons can be measured, and potentially held legally accountable through judicial review.¹⁹⁹

Furthermore, PSI 2011's provisions are firmly anchored in human rights rubric, making explicit the link between prisoners' rights and the accountability of prison power in this field. The section on "Medical Treatment" even commences with the statement that "a convicted prisoner retains all civil rights that are not taken away expressly or by necessary implication" (para 2.1), which is taken *verbatim* from Lord Wilberforce's famous *dictum* in the seminal prisoners' rights case of **Raymond v Honey** (1983).²⁰⁰ The core, mandatory provision of PSI 2011 (retained in PSI 2016) on medical treatment, which reflects the human rights-based principle of equivalence between prisoner and community healthcare, follows:

prisons must provide prisoners who have been diagnosed with gender dysphoria with the same quality of care (including counselling, pre-operative and post-operative care and continued access to hormone treatment) that they would expect to receive from the NHS if they had not been sent to prison (para 2.1).

Thus, medical diagnosis of gender dysphoria is the access point for the PSI 2011's provisions on medical treatment. Detailed guidance on medical treatment available under the NHS,

¹⁹⁹ It will be recalled that breach of a PSI is not legally actionable *per se*, but that there is an expectation that prison policies will be followed, which will be taken into account in any judicial review of the prison's actions under the common law test of **Wednesbury** unreasonableness or irrationality.

²⁰⁰ Interestingly, this opening sentence was deleted from PSI 2016.

and reference to the prevailing international and domestic professional standards of care, is usefully set out in Annex A to PSI 2011.

The main provisions of PSI 2011 specifically provide that, for prisoners who have commenced medical treatment for gender dysphoria *before* reception into prison, such treatment should normally be continued until the prisoner's gender specialist has been consulted on the appropriate way to manage the prisoner's treatment (para 2.4). This addresses the situation which used to arise in the 1990s and early 2000s, where a prisoner's hormone treatment would usually be suspended pending the gender specialist's advice (Whittle and Stephens 2001). PSI 2011 also makes it mandatory for the prison healthcare team to inform the relevant NHS commissioning authority of any prisoner's request to begin medical treatment for gender dysphoria (para 2.6), and for the prison doctor to refer all applications for medical gender reassignment treatment to a consultant specialising in gender dysphoria (para 2.8). These provisions are clearly intended to limit the prison's gatekeeping powers, evident in Watson's case (above).

Furthermore, PSI 2011 makes provision for prisoners to access private health services, if there are "sound and demonstrable clinical reasons for allowing access" and "evidence that this will improve the health of the individual", rather than such access being based on the "uninformed personal choice" of the prisoner (para 2.3).²⁰¹ Aside from the problematic, patronising tone of this small phrase (which is retained in PSI 2016, and acts as a reminder of the uneven power relations in prison), the interpretation of this important provision may not be straightforward. Medical opinion remains divided on the clinical necessity and

²⁰¹ In Canada, Synthia Kavanagh was ultimately given permission to privately fund her gender reassignment surgery, and was then transferred to the female estate (on *Kavanagh* (2001) generally, see Chapter 4).

effectiveness of certain procedures, particularly which side they fall on the clinical/ cosmetic divide. *AC v Berkshire West Primary Care Trust* [2010] EWHC 1162 (Admin), for example, challenged an NHS commissioning body's refusal to commission breast augmentation for a transgender woman, who was disappointed with the limited effects of hormone treatment, and felt it hindered her feminisation. Whilst observing that it is "inapt" to describe the surgery as "cosmetic" in this context, the court concluded that there was no general medical consensus as to the clinical effectiveness of breast augmentation surgery for gender dysphoria, and therefore that the Primary Care Trust's decision to categorise it as a cosmetic, non-core procedure for funding purposes was not *Wednesbury* irrational, particularly in light of its limited resources and budgetary obligations.²⁰²

Prison management's gatekeeping power over transgender prisoners' access to private treatment may also limit the potential of this provision. During a House of Commons debate on transgender prisoners in December 2015, Cat Smith MP read out a letter she had received from a transgender prisoner housed in a men's prison, who had been refused continuing access to hormone treatment, and to the final stages of gender reassignment surgery, which she had privately arranged before she was sent to prison (Hansard HC Deb 15 Dec 2015, Vol 603, Col 1526-7). Smith reported that the prisoner had obtained a county court judgment in her favour, on 29 October 2015, which stated that the Ministry of Justice has responsibility for providing access to private medication and private treatment outside

²⁰² Courts in the US are divided on the question of whether gender reassignment surgery itself is a "medically necessary" treatment for transgender people, and therefore whether its denial to prisoners contravenes the eighth amendment Constitutional prohibition of "cruel or unusual treatment". In 2014, the Massachusetts Federal Appeals Court overruled two lower court rulings that gender reassignment surgery was a medically necessary treatment and held instead that it comprises one of two suitable treatment regimes available to the prison authorities, the other being hormone treatment alone, *Michelle Kosilek v Spencer* (12-2194 16 Dec 2014).

prison, although the final decision rested with the prison governor, following a multi-disciplinary meeting. As of 10 December 2015, that meeting had yet to be facilitated (*ibid*).

This case illustrates the extent of prison power to deny prisoners' access to medical treatment, whether NHS or privately funded. It also suggests that sometimes, prison management concerns may not simply be about public backlash towards public spending on gender reassignment surgery but may be more about loss of power over the governance of gender in prison, and loss of control over individual prisoners' gender reassignment. It also indicates that there is much more at stake in this field than institutional or structural problems in realising transgender prisoners' rights, and that rights rhetoric may have limited power to change the discursive terrain, in which transgender prisoners are primarily constructed as a risk to good order and discipline in the prison, and a risk to the gender order itself.

The Limits of Rights Rhetoric: Remaining Barriers, Remaining Risks and Regressive Discourse

Although PSI 2016 substantially revises other areas of PSI 2011, it makes no substantive changes to the policy's provisions on medical treatment. Indeed, the sovereign effects of human rights-based developments in the field of transgender prisoner healthcare may well have reached their zenith in **AB** (2009) and PSI 2011. Transgender prisoners are promised NHS-equivalent medical treatment for "gender dysphoria", the continuation of pre-existing hormone treatment, and for those already diagnosed, or newly diagnosed in prison, referral to gender identity clinics for gender reassignment treatment. There is also scope for access to private medical treatment. On paper then, transgender prisoners in England and Wales

are in a strong, and perhaps internationally-envied, position. Unfortunately, despite the official rights rhetoric, numerous barriers remain; not only structural barriers, but broader socio-cultural barriers, particularly around the trans/gender authenticity of those who first express themselves as transgender in prison.

Human rights rhetoric seems to have had most impact in relation to transgender prisoners who are already living in their gender, and/or on hormones, when they are sent to prison. Withdrawal of pre-existing hormone treatment appears to be widely regarded as unfair, cruel and inhuman, as illustrated by the press coverage of Linda Gold's case, and more recently, Jenny Swift's case. As mentioned in the Introduction, Swift had been taking non-prescription hormone replacement treatment, purchased over the internet, when she was sent to HMP Doncaster, a men's prison, on remand in November 2016. The author understands from a prison doctor that it would not be ethical to prescribe hormones without a previous prescription, or specialist advice.²⁰³ She took her life on 30 December. At the recent inquest into her death (December 2017, the verdict was death by misadventure), two fellow inmates told the court that she had struggled without her medication for five weeks, and days before her death said she was "starting to turn back into a man" (Halliday 2017b). Shortly before she died, she had been informed that she would be receiving hormones on 3 January 2017 (*ibid*). However, it is not clear to what extent this sympathetic response is consciously grounded in rights, rather than, perhaps, in an underlying ethical belief that such prisoners are authentic and therefore "deserving" of humane treatment. The same can be said of the sympathetic response to Tara Hudson and

²⁰³ Informal conversation with a prison doctor at the inquest into Vikki Thompson's death (16 May 2017).

Vikki Thompson, who were allocated to men's prisons, despite having lived as women for many years before they were sent to prison.

In respect of prisoners who commence gender reassignment in prison, particularly those on long-term sentences for violent and/or sexual offences against women, human rights rhetoric seems, conversely, to have resulted in considerable public backlash. Not only has there been a resurgence of the popularist rhetoric of "less eligibility" in relation to prisoners in general (see Sim 2009: 71-96), but this particular category of prisoners are regarded as particularly "undeserving" of publicly-funded medical treatment (and legal aid), due to their violent crimes. Beyond this rhetoric of less eligibility, there appears to be a culturally immutable perception that this particular group of prisoners are suspect, both in terms of their (trans)gender authenticity, and in terms of their motives for transitioning. It is likely that these deep-seated cultural or emotional responses to (trans)gender authenticity and risk also inform some prison management responses to transgender prisoners who first express a desire to medically transition whilst in prison, and – whether consciously or not – contribute to the institutional barriers placed in their way.

Structural and institutional barriers to transgender healthcare

Transgender people in the outside community face many structural hurdles to accessing specialist gender services and treatment. Numerous reports have highlighted problems with NHS transgender healthcare over the years (e.g. Combes, Turner and Whittle 2008; Equality and Human Rights Commission 2011; WESC 2016). It is outside the scope of this

chapter to engage in a detailed review,²⁰⁴ but it is important to have a feel for the main issues, as they also affect transgender prisoners' access to specialist gender services and provide a structural and financial limit to whatever is promised in PSI 2011 and PSI 2016.

One major concern has been the long waiting times for a first appointment with a gender identity clinic (this is often one year to eighteen months after a GP's referral) and for gender reassignment surgery. Another has been the "NHS postcode lottery", whereby differences in regional commissioning policies resulted in uneven access to specialist gender services across the country (leading to the *NW Lancashire* case, above). The "postcode lottery" has now been addressed. In 2013, NHS England became sole commissioner for specialist gender identity services in England, replacing the 152 Primary Care Trusts and 10 Specialist Commissioning Groups which previously shared responsibility for commissioning in this area. It has a legal duty to ensure equitable access to treatment.²⁰⁵ In relation to long waiting times, in July 2017, NHS England launched a public consultation on its proposals to reform the provision of medical gender reassignment treatment, including the introduction of an 18 week referral-to-treatment standard along the entire transgender pathway (NHS 2017).²⁰⁶ Whilst an additional £4.4 million was invested in "genital reconstruction services" in 2015/16, NHS England has acknowledge that, in practice, it might take some time for waiting times to come down, due to increasing demand (*ibid*). Referrals have been

²⁰⁴ The WESC report on *Transgender Equality* provides a good synopsis of the current position (2016: Chapter 5).

²⁰⁵ In the absence of a service specification in this field, NHS England issued an *Interim Protocol* in November 2013.

²⁰⁶ After a national procurement process, the plan is that all newly NHS-commissioned gender identity services will "begin regular, consistent national reporting in 2018 so that there is absolute transparency about waiting times" (NHS England 2017).

increasing by an average 25–30 per cent per year across all gender identity clinics (WESC 2016: 189).

It is clear that these issues have also affected transgender prisoners' access to specialist treatment. For example, prior to NHS England becoming sole commissioner of gender identity services in April 2013, regional differences in funding policies meant that Billie Evans, a transgender prisoner who had started to live as a woman in October 2011 at HMP Full Sutton (a men's prison) was informed that the local Primary Care Trust did not fund gender reassignment treatment (PPO 2014: para 44). She became increasingly frustrated about the slow progress in her transition and committed suicide in March 2012 (*ibid*). In another case, a prisoner at HMP Dovegate (a men's prison) recounted that she had waited several years for each appointment with the gender identity clinic, and missed her third appointment, after being strip-searched and placed in a holding cell for two hours waiting for prison transport which did not materialise (Baker 2017: 81-82).

In other cases, it appears that deliberate obstructions have been placed in the way of transgender prisoners accessing specialist gender services. The Bent Bars Project reported to the WESC that one transgender prisoner was led to believe that the prison had been trying to make contact with a gender identity clinic, but on contacting the clinic after her release, she discovered that no contact had been made (Bent Bars Project 2015; WESC 2016: para 306).

According to Sarah Jane Baker, a transgender prisoner at HMP Elmley (a men's prison), the consultant at the gender identity clinic made it clear to her that even a *diagnosis* of gender dysphoria (yet alone treatment) would not be possible until she had lived as a woman

outside prison (2017: 94). After four appointments at the clinic did not result in a diagnosis, she took the decision to castrate herself (*ibid*: 92-95). At least three other prisoners have castrated themselves in the English and Welsh prison estate, due to frustrations over delays and denials of treatment,²⁰⁷ and Jenny Swift hanged herself after five weeks without hormone therapy. Whilst it is impossible to assess the clinical judgment made in Baker's case, it is a stark reminder of the despair, frustration and powerlessness that transgender prisoners may feel when treatment is denied or delayed.²⁰⁸

Is prison life real enough for the “real life test”?

The biggest remaining obstacle to transgender prisoners accessing genital reassignment surgery appears to be the question of whether they can satisfactorily meet the so-called “real life experience” or “real life test”, which is a pre-condition of surgery.²⁰⁹ From the author's telephone conversation with James Barrett (13 Oct 2015), lead clinician at Charing Cross gender identity clinic and president of the British Association of Gender Identity Specialists, it seems that under the current practice and leadership of gender identity clinics, transgender prisoners will only be granted full genital reassignment surgery in highly exceptional cases (for example, for prisoners on whole-life tariffs, for whom prison is their life). However, press reports indicate that some transgender prisoners may be given partial genital surgery, such as Jessica Winfield, who reportedly underwent an oridechtomy

²⁰⁷ Hunnisett (discussed below); Watson (discussed above); Amber McDonald (Daubney 2014); an anonymous prisoner, who corresponded with Cat Smith MP, described how she had injected bleach into her testicles and then tried to cut off her scrotum, after being denied hormone treatment, which she had been on prior to imprisonment (McLelland 2015).

²⁰⁸ See further Brown's US-based research on the increased risks of auto-castration and suicide amongst transgender prisoners following abrupt withdrawal of hormone treatment or lack of initiation of hormone therapy when medically necessary (2010).

²⁰⁹ Under the *Interim Protocol*, the expected period is “typically” 12 to 24 months (2013: 20).

(surgical castration) in March 2017 (Joseph 2017). In *Transsexual and Other Disorders of Gender Identity: A Practical Guide to Management* (2006), Barrett remarked that, aside from the institutional barriers to prisoners completing the real life test, “a major problem is the extent to which any sort of valid ‘real life experience’ can be conducted in a prison.” (*ibid*: 14). Whilst prisons are often thought to be “places where difference is not well tolerated”, those serving longer sentences often develop the ability to get on with disparate others, or else spend a lot of time alone (*ibid*). Furthermore, prisoners who start to transition in prison are likely to be placed with more tolerant prisoners, which, he remarked, protects them from the “unbridled opinion of others” and does not offer a real-life experience (*ibid*). He expressed similar views in the telephone conversation with the author. Whilst some cases were successful, there was a concern that sometimes things might “unravel on the outside” (13 Oct 2015).

WPATH’s *Standards of Care* state that the rationale for the “real life experience” is:

based on expert clinical consensus that this experience provides ample opportunity for patients to experience and socially adjust in their desired gender role, before undergoing irreversible surgery ... Changing gender role can have profound personal and social consequences, and the decision to do so should include an awareness of what the familial, interpersonal, educational, vocational, economic, and legal challenges are likely to be, so that people can function successfully in their gender role. The recommended duration of 12 months allows for a range of different life experiences and events that may occur throughout the year (e.g., family events, holidays, vacations, season-specific work or school experiences).

Significantly, the latest version of the WPATH *Standards of Care* (2011) includes a new section on transgender people living in institutional environments, which specifically states that “all elements of assessment and treatment described in the *Standards of Care* can be provided to people living in institutions” (p.67). Neither NHS England’s *Interim Protocol* (2013) nor its new, draft *Service Specifications* (2017), however, refer to the situation of people living in institutional environments, e.g. prisons and secure hospitals.

The question of whether the real-life test can satisfactorily be met in prison has not squarely come before the English courts, but it has arisen indirectly in **AB**, and directly in Canadian and US jurisprudence, in each case within a human rights/constitutional framework. These cases show how, in addition to – and interwoven with – clinical concerns about the risk of carrying out gender reassignment surgery on prisoners who have no “real life” experience in the outside community, prison management is driven by concerns about the risk of placing transgender women prisoners (specifically) in the female estate, whether pending or after genital surgery. The chapter concludes with some thoughts about whether the real-life test is effectively being used as a pretext, as a final frontier against “the crumbling gender binary”, as Judge Thompson fervently argued in *Kosilek II* (see below), and as a way of keeping transgender women out of the female estate.

Prison as the Final Frontier?

In **AB** (2009), it will be recalled that AB had completed two years of living as a woman in a men’s prison, but the gender identity clinic required her to live for a further two years as a woman *in a women’s prison*, before they would consider her suitability for gender reassignment surgery. In effect, the gender identity clinic required her to complete a four

year “real life test” rather than the standard two-year test. As both parties agreed that this was an appropriate requirement (para 7), the issue itself was not legally contentious. It was accepted that her experience of living as a woman in the male estate was not “real” enough for clinical purpose – although it had been “real” enough for her to obtain legal recognition of her gender from the Gender Recognition Panel, a judicial body, comprising both medical and legal members. This placed AB in the same stalemate as Synthia Kavanagh (Canada) and Michelle Kosilek (US), who were not allowed to transfer to the female estate unless they had gender reassignment surgery, but were not permitted to have surgery whilst in the male estate.

Medical opinion remains strongly divided over whether a prisoner can meet the real-life criteria for gender reassignment surgery, internationally. On the one hand, one medical expert interestingly testified before the Human Rights Tribunal in the Canadian case of *Kavanagh* (2002) that “the prison environment can, in some ways, provide an even better real-life experience than the outside community, “as prisoners are under much closer observation in prison, and thus in a better position to be assessed, and being accepted by other inmates is, in many ways, the hardest test” (para 51).

However, the Human Rights Tribunal in *Kavanagh* concurred with the medical experts called by Correctional Services Canada (“CSC”) that a transgender woman living in a men’s prison would not be able to fulfil the real-life experience. It accepted the CSC’s medical experts’ view that, “the artificial environment of the male prison” can “distort the experience of the individual in such a way as to render the real life experience an unreliable test of an individual’s resolve [and] capacity to function in the preferred gender” (para 57). In addition to concerns about the “reality” of the experience, given the controlled

nature of the prison environment and the highly regulated setting in which prisoners interact with each other, the Tribunal interestingly endorsed the heteronormative opinion of CSC's medical experts that the "availability of homosexual relations in the carceral setting" provides "pre-operative transsexual inmates with a level of acceptance that they would not experience in the community at large" (para 57) and that "this positive reinforcement may provide the inmate with a distorted perception of their ability to live successfully as a member of the opposite sex" (*ibid*), whereas, in the female estate, "they might find they do not fit in" (*ibid*). This completely contradicts Kavanagh's own evidence that she had been repeatedly subjected to rapes, assaults and discrimination in the male prison.

In *Kosilek v. Spencer*, 889 F.Supp.2d 190, 232 (D.Mass.2012), the US District Court of Massachusetts held that it was a violation of the constitutional prohibition on "cruel and unusual punishment" for Kosilek to be denied gender reassignment surgery, and that the Department of Corrections ("**DOC**") had engaged in a pattern of "pretence, pretext and prevarication" to deny her such treatment, after she had met all the criteria, including the real-life experience. It attributed the DOC's position to public and political pressure (*ibid*: 202). It rejected the view that a real-life experience could never be replicated in prison, on the basis that this did not take into account Kosilek's particular situation nor, more generally, the different realities of transgender prisoners, since "for someone like Kosilek, who is serving a sentence of life without the possibility of parole, prison is, and always will be, [her] real life" (*ibid*: 231). Although the US Court of Appeals for the First Circuit upheld the District Court's landmark decision, in a highly unusual move, it then reconvened, *en banc*, and reversed its own decision.

In its *en banc* decision of 16 December 2014 (No 12-2194), the Court of Appeals held that the DOC's non-surgical treatment of Kosilek's gender dysphoria (comprising hormone treatment, laser hair removal and permitting her to dress as a woman) did not demonstrate wanton disregard for her medical needs, but was one of two recognised medical routes for the treatment of gender dysphoria, and, most significantly, was "a measured response to the *valid security concerns* identified by the DOC" (*ibid*: 70, emphasis added). These included the risk that if she had surgery, she would probably be transferred to the female estate, where, *inter alia*, it might be easier for her to escape due to the less secure perimeter (even though she had not attempted escape in her 22 years of imprisonment), she might not be accepted by other women due to the fact she had murdered her wife, and she might be at risk of harm from other women (*ibid*: 104-105). There was also a concern that she had gained notoriety by litigating against the DOC (*ibid*: 104). If she stayed in the male estate, on the other hand, surgery might make her more vulnerable to sexual assault from other prisoners.

Judge Thompson wrote an impassioned dissent (*ibid*: 70-112), fiercely critiquing the use of the *en banc* review to effectively re-try the case *de novo*, and strongly objected to the majority opinion on multiple grounds, including the spurious, thinly-veiled security justifications which the District Court, he felt, had rightly rejected. He added that the fact "that Kosilek had gained notoriety by litigating against the DOC all these years – in other words, successfully pursuing her constitutional right to adequate medical care – hardly seems a compelling consideration" (*ibid*: 104). "The precedent the majority creates is damaging," he warned, "it paves the way for unprincipled grants of *en banc* relief, decimates the deference paid to a trial judge following a bench trial, aggrieves an already

marginalized community, and enables correctional systems to further postpone their adjustment to the crumbling gender binary” (*ibid*: 112).

Conclusion

This chapter has taken many twists and turns. Broadly, it has shown how legal, penal and medical power consolidated in the past to discipline prisoners’ bodies in line with sexual and gender norms, and how management of the transgender prisoner has now become normalised in this penal-medico-judicial nexus. It has demonstrated how recourse to human rights rhetoric helped NCCL, a human rights organisation, bring public attention to Linda Gold’s plight, and how the human rights-based principle of equivalence between prison and community healthcare, together with the **NW Lancashire** case (1999) (albeit *not* a human rights-based decision) helped secure a firmer footing for transgender prisoners’ right to access medical gender reassignment treatment, including surgery. It argued that, when the Human Rights Act 1998 came into force in 2000, this strengthened the grounds on which transgender prisoners could bring complaints about their access to medical treatment before the courts, culminating in **AB** (2009), and that PSI 2011 sealed these developments into prison policy. However, the chapter was careful to critically assess these developments, following Foucault (1977), Smart (1989) and Sim (1990), and not to assume that they form part of a linear, grand narrative of reform and progress.

The chapter showed how recourse to law and human rights often comes at a price, re-entrenching regressive discourses, such as the view that transgender people are mentally ill (**NW Lancashire**) and the unassailable truth that “full realisation of gender” is achieved through gender reassignment surgery not legal recognition (**AB**). Recourse to law and

human rights may also reignite harmful debates in public and political fora, particularly the view that transgender prisoners are “less eligible” or undeserving of NHS-funded medical gender reassignment treatment. The chapter showed how PSI 2011 also perpetuated a medicalised view of transgender prisoners, by using the term “transsexual” throughout, and placing medical treatment at the fore of the policy (albeit now amended by PSI 2016). The chapter demonstrated that policy promises and rights rhetoric is not necessarily met in practice, and that, aside from wider issues regarding waiting times and resource constraints in the general provision of transgender medical treatment on the NHS, various barriers appear to be placed in the way of transgender prisoners’ access to medical treatment, ranging from denial of pre-existing hormone treatment and refusal to allow access to private medical treatment, to micro-mechanisms of power, such as misleading a prisoner that contact has been made with a gender identity clinic, and (possibly) lack of transport to a scheduled appointment with a gender identity clinic. Meanwhile, the apparent current clinical compromise of providing only partial genital surgery (orchiectomy) to transgender women prisoners in the male estate, before they transfer to the female estate, seems to set them up to fail. There is a paradox here, where the general public seems to be opposed to NHS-funding for gender reassignment surgery for transgender prisoners, but still regards transgender women with suspicion, and as risky, if they still have a penis.

Judge Thompson’s powerful dissenting opinion in *Kosilek* tapped into the author’s growing suspicion that, when human rights developments threaten to erode the institutional gender order of the prison and the prison’s power over the regulation of gender (and perhaps when such developments are threaten to disrupt its internal logic of risk management, and its overriding prioritisation of security and control), medical and penal power collude to

maintain the *status quo*. In **Kosilek**, the Court of Appeals joined in this collusion, effectively using the *en banc* review process to overturn a decision which was politically unfavourable, and to place power firmly back in the prison authorities' hands. This meant that they could continue to refuse gender reassignment surgery to a transgender prisoner who had been pursuing her constitutional right to adequate healthcare for over twenty years.²¹⁰ However, perhaps the outlook is not so bleak. In England, the courts in **AB** did not defer to the prison authorities' decision, which – in conjunction with the gender identity clinic's view that life as a woman in a men's prison was not "real" enough – effectively barred her from ever being considered for gender reassignment surgery. Instead, the court ordered her transfer to the female estate. This was a bold, human-rights based decision, which stands out in the transgender prisoners' rights field, internationally, as does transgender prisoners' right to NHS-equivalent medical treatment, despite its limits in practice.

The next chapter presents the overall conclusion to the research.

²¹⁰ It must be noted that in the US, there is the additional, politically sensitive issue that granting gender reassignment surgery to transgender prisoners at the prison's (and thus taxpayers') expense, would place them in a *more* favourable position than transgender people in the outside community, who do not have access to publicly-funded surgery. Medicaid is now available for gender reassignment surgery in some states (most recently New Hampshire, Oct 2017) and court cases have been brought against the constitutionality of provisions which exclude it from other states' Medicaid coverage, e.g. Iowa (Sept 2017).

Conclusion: The Transformative Potential and Limits of Human Rights, and the Inexorable Logic of Risk

Charting recent human rights-based legal developments, and their translation into official prison policy on transgender prisoners, the thesis has examined both the transformative potential, and the limits and risks, of recourse to human rights to effect reform, and to improve the liveability of transgender prisoners' lives. It has also mapped the emergence of human rights as a new discourse in relation to the governance of transgender prisoners, and presented it as a new object for study and critique. The thesis has not only looked at law's "sovereign" effects on the prison administration's governance of trans/gender, but has also reflected on the deeper, discursive (norm-producing) power of law and human rights to alter the way in which the prison administration conceptualises gender and constructs transgender prisoners, and *therefore* governs them.

A particular issue that this thesis has identified and explored is the emerging tension between law's recent construction of the transgender prisoner as a human rights-bearer, and prison administration's established construction and governance of the transgender prisoner as primarily "risky" and "at risk". The thesis has examined a number of conflicts which have already arisen in this contested, discursive terrain, and has traced them as they have migrated to the courts for judicial resolution. It has also identified legal cases which settled out of court and complaints to the PPO and various voluntary sector organisations, to broaden the scope of the research. The thesis has asked whether the liberalisation of legal gender, and the rhetoric of transgender prisoners' human rights, is capable of

translating in the prison; whether human rights discourse has the power to alter the prison's internal risk logic, and reconfigure its risk management techniques.

The thesis has been set against a backdrop of continuing reports of self-harm and suicide among transgender prisoners,²¹¹ despite the introduction of PSI 2011 and the even more progressive PSI 2016. Its analysis has been conducted in the socio-political context of the current prison crisis and the hostile environment towards any further expansion of both transgender rights and prisoners' rights. The thesis has reflected on the widespread concern about the risks of transferring transgender women into the female prison estate, after they have transitioned in the male estate, as exemplified by the highly charged reaction to Jessica Winfield's transfer in March 2017, and subsequent reporting in September 2017 (see Chapter 4). Ironically, Winfield's transfer to the female estate was pursuant to a prison policy which was revised, in the autumn of 2015, due to public and political concern about the allocation of two transgender women to gender non-appropriate prisons. This has led the thesis to identify a significant distinction in public opinion between, on the one hand, transgender women (specifically) who have lived in their gender before imprisonment (whose gender is regarded as authentic, who are not seen to be risky to cisgender women, and who are regarded as deserving of rights and resources) and, on the other hand, those who transition in prison (whose authenticity and motives are regarded with suspicion, who are regarded as less eligible or non-deserving of rights and resources, and who are also constructed as risky).

²¹¹ On 30 September 2017, press reported the fourth suicide of a transgender prisoner since 2015. Jade Eatough had recently started to transition at HMP Parkhurst, and was on hormone treatment (Gardner 2017).

This conclusion has four parts. First, it recaps the origins and objects of the research. Second, it retraces the steps of the thesis, highlighting and consolidating its major findings along the way. The third part offers some broader, concluding reflections on the research. The fourth and final part discusses the contribution this research makes to the literature, and suggests potential avenues for further research.

Origins and Objectives

The research originated with an interest in, and concern for, the situation of transgender prisoners, and optimism at the human rights-based legal developments which had finally led to the introduction of official prison policy in this area, after years of prevarication and delay. The research sought to explore the transformative effects of law, and especially human rights, on the liveability of transgender prisoners' lives. It situated the analysis both in its historical context, and in the contemporary socio-political landscape, so as to trace the continuities and discontinuities in the story of law, human rights, and the transgender prisoner.

The first objective of the research was to examine the direct, "sovereign", effects of law and human rights on prison policy and practice. This objective was approached through a traditional legal analysis of human-rights based developments in legislation, prison policy (PSI 2011 and PSI 2016) and case-law, and through broader research into the instrumental effects of PSI 2011 and PSI 2016.

The second objective was to reflect on the power of law and human rights to re-conceptualise gender in the prison, and to change the way in which prison administration fundamentally understands, and *therefore* governs, transgender prisoners. This objective

was advanced through a Foucauldian analysis of law as a productive power, with normative effects. Chapter 2 (theory) explained how it is imperative to approach “the law” not simply as a “pure” power to “lay down rules” but also as a powerful, authoritative discourse in contemporary society. Drawing on Foucault and Smart (1989), it argued that law’s power not only flows through its major “arteries”, in terms of legislation made by parliament and rulings made by courts, but is also dispersed through its “minute capillaries” (Foucault 1979:96-7) to the deepest level of being, making people who they are, and producing “what it is possible to think, speak and do” (Hunt and Wickham 1994: 9).

The third objective of the thesis was to reflect on the transformative potential of law and human rights, as well as the limits and risks of turning to law and rights, as a solution to the problems presented/ experienced by transgender prisoners. As a sex-segregated institution, with a binary gender society/regime, the prison usefully magnifies the way in which transgender people and their bodies are problematised in broader society, and the challenges faced by law, and its human rights discourse, in changing historically entrenched cultural truths about gender and transgender people.

Retracing Steps and Discussing Findings

This second part retraces the course taken by the thesis, and discusses its major findings, or landmarks, along the way. This part shows how the first two objectives of the thesis were met in the thesis’s combined analysis of the sovereign and normative effects of law and human rights on the prison’s governance of gender and specifically, transgender prisoners. The next part (Concluding Reflections) draws some broader conclusions, in response to the third objective of the thesis. Whilst each chapter is approached in turn in this part, other

chapters' findings may be integrated into the analysis, in pursuit of developing a more cohesive synopsis of the research findings.

Chapter 1 started by setting the historical scene. It will have become clear during the course of this thesis that it is extremely important to have a sense of this historical background, both for contextualising later legal, medical and penal developments, and for understanding the deep historical roots of much contemporary discourse around transgender people, and particularly transgender women. This historical background has helped to explain why it is so hard for law and its "new" human rights discourse to shift many of the deeply-entrenched "truths" about sex/gender and transgender people – including its own prior legal "truths" – and why they repeatedly resurface, and are reproduced and perpetuated even in the moment of reform.

Chapter 1 demonstrated that the criminal justice system has been one of many regulatory mechanisms that have been collectively deployed to steer bodies into pre-determined binary sex/gender categories, as part of the governmentality of sex and gender (Foucault 1978), and to punish and discipline those who do not conform to the "norm". It identified three historical discourses which continue to have particularly enduring normative power in the conceptualisation of transgender people, as demonstrated through the remainder of the thesis. The first powerful discourse, explored through the 1870 prosecution of Bolton and Park, is produced through law's criminalisation of gender non-conforming men²¹² for "personating a woman for immoral purposes". Law's conceptualisation of transgender²¹³ women's gender (in particular) as inauthentic, artificial, imitative, and deceptive even, has

²¹² Those assigned male at birth.

²¹³ It will be recalled that Chapter 1 argued that Bolton and Park's case belongs more to a transgender, rather than a gay, history.

had remarkably enduring discursive power; so too its suspicion of their motives in accessing “women-only” spaces. The second important discourse identified in Chapter 1 is the pathologisation and medicalisation of transgender people in medical science, as later co-opted by law in *Corbett* (1970). This potent consolidation of medical and legal power still informs the governance of legal gender under the Gender Recognition Act 2004 and has deeply-entrenched, normative effects on society’s understanding of transgender people as suffering from a medical condition in the form of a mental disorder. The third powerful norm, produced in *Corbett*, is that sex/gender is binary and is fixed by a certain biological “truth” at birth that can never be changed. The thesis shows that this “truth” remains particularly powerful in social determinations of gender where access to “women-only” spaces, including women’s prisons, is involved.

Having outlined, in Chapter 1, the historical background to law’s first definition of sex/gender, and its first construction of the “transsexual” in *Corbett*, Chapter 2 introduced the three theories which have informed and shaped the analysis of law and rights, gender, and risk, in this thesis. It showed how Foucault’s work provides a common thread between the three fields, even though law and rights are not usually associated with his work. It is not necessary to revisit the theoretical framework in any detail here, as the individual and cumulative value of these three fields have been demonstrated throughout the analysis in this thesis. However, it is worth recalling that Chapter 2 introduced some particularly important ideas around the conceptualisation, performativity and embodiment of gender, which enriched the analysis of law’s role in not only reflecting, but also producing and perpetuating norms around gender and transgender people. The concept of “cis-sexism” (Serano 2007) has been particularly useful for drawing attention to law’s continuing

production of transgender people's gender as inauthentic, artificial and imitative, in order to bolster cisgender identity as natural, real and original. The judgment in *Green* (2013), discussed below, provided a particularly valuable example of cis-sexism in action in the field of transgender prisoners' rights.

Chapter 2 also introduced the concept of the transgender prisoner as "risky" and "at risk". Understanding the broader backdrop of the "risk society" (Beck 1992), the continuing conditions of the "new penology" (Feeley and Simon 1990), and the governmentality approach to risk, has helped explain why prison management conceptualises transgender prisoners and their bodies primarily in terms of risk, and why it adopts such a precautionary approach to the management of the diverse and uncertain risks that they are perceived to present to the good order, discipline and security of the prison. This theoretical framework enabled the thesis to juxtapose the "new" human rights discourse around transgender prisoners (examined in Chapter 3) against the prison's powerful, long-established discourse of risk, and to examine the emerging fault-lines between the two.

Chapter 3 charted the emergence and evolution of transgender people's human rights in UK law, which led, in *AB* (2009), to the court's specific recognition of the transgender prisoner as a human rights-bearer. It discussed the significance of the Human Rights Act 1998 in enabling prisoners (and others) to bring human rights cases directly before the domestic courts, and the important contribution made by the Gender Recognition Act 2004 in liberalising law's conception of gender, and providing a procedure for transgender people to obtain legal recognition of their gender. It showed how the Gender Recognition Act was pioneering at the time, as it did not require gender reassignment surgery, and seemed to dispense with the body and its biology in the governmentality of gender. Chapter 3 also

traced developments in transgender people's right to protection against discrimination, culminating in the Equality Act 2010. Significantly, the Equality Act broke free of law's traditional medicalisation of transgender people. It no longer requires transgender people to be under any form of medical supervision in order to benefit from its new, specific protections against discrimination on the grounds of "gender reassignment", and prohibits the prison authorities from discriminating against transgender prisoners on this broader basis. Furthermore, the Equality Act placed a new, positive public sector equality duty on the prison authorities to meet transgender prisoners' needs and to tackle discrimination, harassment and transphobia in the prison estate. It was this new duty, the thesis argued, which finally led to the introduction of PSI 2011, the first official policy on the "care and management of transsexual prisoners" in England and Wales.

Chapter 3 (and the remainder of the thesis) showed that this apparently rosy picture of the transformative power of human rights to effect legal and policy reform is only half the story. As will be recalled from Chapter 2, Smart has argued that law is often presented as "a force of linear progress, a beacon to lead us out of darkness" (Smart 1989:12). Remaining alert to Smart's warning that we should not be "seduced" by law as a solution to social problems, or assume that "rights" will correct "wrongs" (*ibid*), this thesis has closely scrutinised the way in which recourse to law and rights may have negative discursive effects, and re-entrench hegemonic norms, even in the very moment of reform. Thus, Chapter 3 not only examined the more obvious limits of these human rights-based legal and policy reforms, but also dug beneath their seemingly progressive surfaces, to unearth their subtexts, and their underlying construction of transgender people. This exercise laid the groundwork for

deconstructing the power of law and rights in Chapters 4 to 6. Four main themes emerged, which proved particularly significant for the thesis:

Gender as binary

First, both the Gender Recognition Act 2004 and Equality Act reproduce and perpetuate a binary concept of gender, even in the face of ever-expanding and/or increasingly visible gender diversity in British society. Transgender people are only granted legal recognition of their gender, and legal protection against discrimination, if they adhere to law's insistence on complete and permanent crossings from one gender to "the" other gender. This narrow construction of the transgender person who is deserving of rights is reproduced in PSI 2011's first construction of the "transsexual prisoner". Even though PSI 2011 allows for self-determination in relation to the right to live and dress in one's gender, a prisoner must define themselves on the policy's narrow terms, as a "transsexual" who intends to make (or has already made) a permanent, binary gender crossing, in order to benefit from its provisions. Chapter 5 discussed PSI 2016's pioneering breaking of the binary, through its recognition of both the existence and the needs of a much broader range of transgender prisoners people to live and dress in the gender they identify with, or as non-gender, including prisoners with non-binary and fluid genders, and also "transvestites".

Medicalisation and pathologisation of transgender people

Second, the Gender Recognition Act retains a medicalised model of transgender people. It makes legal gender recognition conditional on a pathologising, medical diagnosis of "gender dysphoria", and a two-year "real life test", which requires transgender people to prove their trans/gender authenticity, and, effectively, to prove that they are deserving of law's

recognition. Chapters 4, 5 and 6 demonstrated how much harder these “gendered rites of passage” (Sharpe 2007: 71) are for transgender prisoners transitioning in prison, and how much more difficult their negotiation of medical gatekeepers can be, in addition to the prison administration’s gatekeeping. Whilst there are inevitably certain structural barriers to transgender prisoners achieving legal and medical gender reassignment whilst in prison, the thesis suggests that transgender prisoners face deeper, cultural barriers to transitioning, as their trans/gender authenticity is regarded with suspicion, and as risky, particularly if they are transgender women who first start to transition whilst in prison.

Bodies and “biology” still matter

Third, Chapter 3 showed that, under its progressive veneer, the Gender Recognition Act 2004 has retained an expectation, if not a formal requirement, of gender reassignment surgery leading to “gender-congruent” bodies. It showed that this expectation is reproduced and perpetuated by the courts, both in relation to transgender people generally, e.g. in *Carpenter* (2015) and in relation to transgender prisoners specifically, e.g. *AB* (2009). Chapters 3 and 4 showed that the court’s main concern in *AB* (2009) was that she should be enabled to proceed towards gender reassignment surgery, so as to achieve “full realisation” of her gender. Her more fundamental desire to be recognised and to live as a woman in the female estate seemingly held less weight, even though she had a GRC legally recognising her as a woman. Further, whilst ordering the prison authorities to transfer AB to a women’s prison, the court conceded that “gender-incongruent” bodies may affect the proper running and discipline of the prison estate, and held that, exceptionally – and notwithstanding the patently clear provisions of the Gender Recognition Act 2004 to the contrary – genitalia may override legally-certified gender for the purposes of

maintaining order and discipline in prison. Thus, Chapter 3 found that Sharpe's prognosis in 2007 was right, and that bodies and the "truth" of a particular biological past continue to matter in the legal and penal governance of gender, and in society's prevailing understanding of gender. Chapter 3 further established that equality law has also repeatedly perpetuated the view that transgender women's bodies are potentially risky to cisgender women in women-only spaces, and that transgender women are not "real" women, or equal to "biological" women when it comes to accessing "women-only" spaces and services, especially where cisgender women are considered particularly vulnerable, having experienced male violence. This theme was explored further in Chapter 4.

Cis-sexism and the hierarchy of gender authenticity

Fourth and finally, Chapter 3 showed that, underneath the Equality Act's progressive surface, its explanatory notes and codes of practice reproduce and perpetuate the view that transgender people's gender is not authentic, and that equal treatment is predicated on being able to be read as cisgender. This theme was expanded upon in Chapter 5.

Developing these themes in three specific areas affecting transgender prisoners' lives

Chapters 4, 5 and 6 represented a shift in gear. They built on the more general framework established in the first three chapters, to advance the analysis, and develop the argument of the thesis, in three specific areas which affect transgender prisoners' lives, namely prison allocation and segregation (Chapter 4), gender presentation (Chapter 5) and access to medical treatment (Chapter 6). These chapters examined the way in which the new human rights discourse has started to unfold in practice in the prison, how it has altered, or has the potential to alter, not simply the instrumental management of transgender prisoners, but

also the previous discursive terrain. They analysed the effects of the “new” human rights discourse on the prison administration’s understanding and regulation of gender, and in particular, on its conceptualisation and governance of transgender prisoners, as primarily “risky” and “at risk”. The chapters considered whether the new discourse of transgender prisoners’ human rights has any real power over the prison’s “inexorable logic of risk”, and its priorities of maintaining security, good order and discipline in the prison estate, and keeping (particularly cisgender women) prisoners safe from harm.

Chapter 4 showed how, historically, the prison administration’s “truth” of sex/gender developed separately from law’s “truth”. Despite **Corbett’s** biological test of sex, which was based primarily on genitalia *at birth*, the prison administration maintained its historical practice of focusing on *current* genitalia to determine allocation within the prison estate. Law’s “truth” seemingly did not make internal sense in the prison. Even when law’s conceptualisation of sex/gender was liberalised through the Gender Recognition Act 2004, the prison continued to govern gender according to its own rules, in its separate sphere of power. It was not until **AB** (2009) that the prison administration’s practice was put to the test, where it had refused to transfer a transgender woman with a GRC to the female prison estate due to her male genitalia. The court in **AB** refused the prison administration’s construction of AB as uniquely risky in the female estate, and therefore requiring long-term segregation, and held that this was a risk that could be managed, like any other. This was a landmark, highly progressive ruling, leading to AB’s transfer to a women’s prison, and to PSI 2011, which specifically states that transgender women are not uniquely risky, and that their risk profiles must be determined on the same basis as cisgender women.

Despite its positive outcome, the court in **AB** held that there may be circumstances in which the prison authorities may lawfully take into account a prisoner's genitalia, notwithstanding their legally-certified gender. The court expressed concern that, if taken too far, this could undermine the comprehensive gender recognition regime intended by the Gender Recognition Act 2004, but nevertheless accepted that a prisoner's genitalia might have implications for maintaining order and discipline in prison and effectively provided the prison authorities with an opt-out clause (although not subsequently taken up in PSI 2011). The judgment had further negative discursive effects, as it shored up the perception that AB was not fully a woman, despite her GRC. As a "pre-operative" woman, she comprised "something other" than a "biological woman" and could not expect equal treatment with a "biological woman" under equality law. Thus, law's new "truth" of gender was not only refused by the prison administration, it was also diluted by the court, which perpetuated that notion that bodies and biology still matter at the specific site of the prison.

Whilst PSI 2011 and PSI 2016 now require transgender prisoners with a GRC to be allocated a gender-appropriate prison (and provide for discretion in other cases), Chapter 4 showed how the prison administration continues to exercise alternative techniques of power over the governance of gender, through its practice of separating transgender prisoners from the main prison population. It argued that this practice places transgender prisoners under conditions of "less eligibility" and is exclusionary. Whilst officially presented as a protective measure, it perpetuates the notion that transgender prisoners are risky. Placement in formal segregation conditions effectively punishes prisoners for being transgender, and, in the long term, has serious effects on their health and well-being. As inhuman treatment, this practice also potentially breaches transgender prisoners' human rights. Chapter 4

found that, to date, law and human rights have had limited effects in this field, and that the courts have been reluctant to interfere with prison management decisions to formally segregate transgender prisoners where they cannot see any viable alternative, as demonstrated by *Hunnisset* (2017). The out-of-court settlement reached in *XY* (2017) suggests that law and human rights have limited ability to effect change in this field; certainly compensation and apologies after the event are not a solution.

Chapter 5 examined the historical enforcement of gender norms through prison dress (including hair), and considered the emergence of much more subtle disciplinary powers over prison dress in the contemporary prison. It highlighted certain differences between the male and female estate in their regulation of prison dress, which have primarily impacted on transgender women housed in men's prisons. Examining the historical struggles of transgender women prisoners to present their gender in men's prisons, it identified the prison administration's early, meagre concession of permitting some transgender prisoners to dress as women only when alone in their cells, literally behind closed doors and out of sight. It argued that the Equality Act 2010 led to PSI 2011 and PSI 2016's potentially transformative provisions, which make it mandatory for prisons to permit (and now, under PSI 2016, to *enable*) transgender prisoners to live and dress in their gender, whichever prison they are housed in, and on a self-determination basis. Chapter 5 showed, however, that even the right to access gender-affirming clothing and items is translated by prison administrators into a risk which needs to be managed. An analysis of *Green* (2013) identified an emerging fault-line between rights and risk in this field, and the considerable power of the prison administration to re-establish its power over this aspect of gender regulation, through the back-door of PSI 2011's security exemption. Even though the court

expressed considerable concern that over-reliance on the security exemption might render PSI 2011 a “pious list of worthy hopes with no practical application” (para 58), it deferred to the prison administration on every count, and held that it was not unlawful for it to deny Green access to a wig, tights and larger sized clothing. Whilst observing that Green had “no access to female attire of the kind needed” (para 58), and that this might even prevent her from satisfying the “real life” test to obtain legal recognition of her gender through a GRC, the court nevertheless held that she had not been *prevented* from living as a woman. Further, it found no discrimination, on the basis that she was a “man becoming a woman”, and was not entitled to be treated as a woman until she obtained a GRC. The court even remarked that she had certain “advantages” in “dress and lifestyle” compared to the remainder of the male population (*ibid*). These findings not only contradict the Equality Act 2010 and PSI 2011, they also have very harmful discursive effects.

Chapter 6 examined the legacy of the medicalisation of transgender people, and the barriers to transgender prisoners’ access to medical treatment. It took the introduction, in 1994, of a policy of NHS-equivalent prisoner healthcare as its central reform moment, although the specific, detailed application of that policy to transgender prisoner healthcare in PSI 2011, was also significant. This chapter demonstrated the sheer extent of prison medical power, historically, to discipline and punish transgender prisoners’ minds and bodies, by withdrawing hormone treatment, and denying surgical embodiment of gender, despite the dominance of the medico-legal model of “transsexuality” at the time, which recognised medical gender reassignment as its “cure”. In risk terms, it argued that transgender bodies represent a risk to governance of the sex/gender binary, and need to be normalised. The chapter considered the continuing centrality of genital reassignment surgery to legal, penal

and public constructions of trans/gender authenticity, notwithstanding the Gender Recognition Act 2004's formal de-linking of gender from genitals.

Chapter 6 also illustrated the numerous ways in which transgender prisoners' access to gender-affirming medical treatment has continued to be restricted or denied, notwithstanding PSI 2011's (and PSI 2016's) promises. It argued that prison administration has seemingly shifted its techniques of power, so as to minimise the risks presented by prisoners who first express that they are transgender *whilst* they are in prison. Whilst this situation involves a number of complex management issues for prison administration, the thesis argues that the prison's response is informed by a deeply-entrenched institutional and cultural suspicion (or disbelief) of trans/gender authenticity, and a fundamental concern about the risk that transgender prisoners in the male estate might be pretending to be women in order to access the female prison estate for "immoral" (sexual and/or criminal) purposes. Finally, Chapter 6 reflected on the prison administration's power of gatekeeping over a prisoner's access to specialist gender services, and the power of gender identity clinics to determine whether prison life is a sufficiently "real life experience" for transgender prisoners to meet the requirements for gender reassignment surgery, and to determine what type of surgery they may receive, e.g. full or only partial gender reassignment surgery. Together, whether by design or by default, the thesis has argued that these acts frustrate prisoners' access to medical gender reassignment, and minimise the risk of public backlash against transgender women prisoners (specifically) transitioning in prison, accessing expensive NHS-treatment, and being transferred to the female estate. Thus, as in Chapter 5 (gender presentation) the transgender prisoner is effectively set up to fail.

Contribution to the Literature and Future Directions for Research

By mapping this previously uncharted field, this thesis makes a valuable contribution to the nascent literature on transgender prisoners in England and Wales, across the disciplines. It will help further the debate in a number of areas in relation to, for example, the power of law and human rights to effect genuine reform in the prison, the power of law and human rights to alter the cultural boundaries of gender and, particularly, the interface between trans/gender, bodies and risk. It is hoped that research and activism will continue to flourish in this field, and will help contribute to improving transgender prisoners' lives.

So many needs and possibilities exist for research in this field, that it is difficult to map them out fully here. However, as a priority (and as originally envisaged by the author in the context of this research project – see Introduction), qualitative research urgently needs to be conducted across a range of prisons into the experiences and views of transgender prisoners, those governing them, and those engaging with them in other capacities, e.g. prison healthcare.²¹⁴ As a continuation of the current research project, such research would significantly help further its assessment, and sharpen its critique, of the effects of recent human rights-based law and policy developments (including PSI 2011 and 2016), on the governance and daily lives of transgender prisoners. It would also help advance the current preliminary analysis of the efficacy and fate of the “new” human rights discourse, when pitched against (i.e. as a competing, rather than a “replacement” discourse) the established

²¹⁴ Shortly after submission, Community Innovations Enterprise (authored by Bashford, Hasan and Marriott) published *Inside Gender Identity: A Report on Meeting the Health and Social Care Needs of Transgender People in the Criminal Justice System* (2017). <https://www.ciellp.net/inside-gender-identity>. (20 June 2018). This report was commissioned by the NHS England, Public Health England and HMPSS to inform policy and practice, and to make recommendations relating to the health and social care needs of transgender prisoners, and other transgender people in the criminal justice system. It is a very useful addition to the literature, drawing on the views of 55 individuals from the health care sector, the criminal justice sector, the social sector, academia, government departments, and three transgender prisoners (Methods: 11).

discourse of transgender prisoners as risk subjects, embedded in regimes preoccupied with gender authenticity and bodies. It would be particularly important for such research to probe the perception and exercise of discretion by governors and other prison personnel, for example, in the context of transgender prisoners' (and, under PSI 2016, also gender-fluid and non-binary prisoners') gender presentation, where, as explored in Chapter 5, risk-based justifications are all too frequently relied upon to refuse transgender prisoners' access to gender-affirming clothing and other items, thus emptying PSI 2011 and PSI 2016 of their progressive potential. Conducting research from within the prison would also help ground the analysis in what the author has described in this thesis as the "visceral site of the prison", and would give a fuller account of the realities of making decisions/ living with those decisions in the context of the current prison crisis, where prisons are generally overcrowded, underfunded and understaffed, and their conditions, for both prisoners and staff, are becoming increasingly violent and dangerous.

A broader research project would also usefully take the current analysis beyond the confines of the prison, and more critically consider the tension between, on the one hand, human rights-based law reform, litigation and activism directed at improving the everyday lives of transgender prisoners in the here and now, and on the other hand, the more transformative, long-term project of deregulating trans/gender (which, by generally improving the liveability of transgender people's lives, would also lessen their potential pathways to prison) and undoing the normalisation of the prison as a gendered institution. Some would also add working towards prison abolition as part of this long-term vision. This tension is something that the author became increasingly aware of as the project progressed, and would like to develop further in future research.

Prison-based research could also take place outside the current legal/ human rights framework, of course, with the aim, for example, of exploring transgender prisoners' identities, views and experiences of gender in prison. The large-scale, mixed-methods research project undertaken by Sumner, Sexton and Jenness in California, US, offers a prime example of the potential of such research, and the many different avenues it could take (e.g. Jenness 2010 and 2014; Jenness and Fenstermaker 2014; Sumner and Jenness 2014 and Sumer and Sexton 2015). Such research would make a valuable contribution to current studies of gender in prison, which, as noted earlier in the thesis, still tend to take the subject of "women in prison" and "men in prison" as fixed, rather than fluid and contested sites, and thus further reinforce the gender binary.

As noted in the literature review, some prison-based research has recently started to be published (albeit not yet of the kind envisaged here). So far, it focuses on prisoners who have started to transition whilst serving long-term prison sentences in men's prisons, and the staff who work with them. Stephen Whittle of Press for Change has remarked that his greatest concern is for transgender people when they first enter prison, and when they are in prison for a short period, before appropriate arrangements are put in place (Interview, 26 Oct 2015). Tara Hudson's and Vikki Thompson's cases provide clear support for such concern. Future research in prisons would ideally capture a range of experiences, including those of short-term prisoners, and of transgender men, who remain a completely invisible population in current research.

Ideally, future research would also be intersectional, and examine other vectors of identity/power which may influence the experiences and governance of transgender prisoners, in addition to, or more accurately *coalescing with*, their identification/ regulated

status as “transgender prisoners”.²¹⁵ An exemplary piece of such interdisciplinary research, in the context of the English prison system is Coretta Phillips’ *The Multicultural Prison: Ethnicity, Masculinity, Race and Social Relations among Prisoners* (2012). Gabriel Arkles’ article on the regulation of prisoners’ race and gender through prison dress in the US (2012) offers a further excellent example.

Concluding Reflections

The thesis has covered a lot of ground and has followed many different strands of thought to reach its conclusion. Not all of these strands can be neatly tied together, which is frustrating, but not altogether surprising, as it reflects both the complexity of the field, and the challenge of researching a field with so little previous research to draw on. This section concludes with some broader reflections on the research (the third objective of the thesis): first, the limits (and risk) of recourse to law and rights to effect fundamental reform in this field; second, whether the tension between rights and risk might be resolved or reduced; third, the need to address transphobia as the problem (or, in prison management terms, the risk), rather than the transgender person/prisoner; and fourth and finally, the limits of law and its rights discourse in reforming the cultural boundaries of gender and, thus, improving transgender people’s lives.

The limits (and risks) of recourse to law and rights

First, the thesis has demonstrated that human rights-based developments have greatly advanced the formal position of transgender prisoners in recent years, both in terms of

²¹⁵ Notably, the Equality Act 2010 not only consolidates previously separate anti-discrimination legislation into one overall act, but formally recognises the concept of intersectionality, through a protection against multiple discrimination, on up to two grounds (section 14). This section has yet to come into force, however.

policy reform and in terms of prisoners' power to challenge prison administrative decisions before the courts. However, it has shown that, in the very moment of reform, recourse to human rights often further entrenches hegemonic norms. Both the Gender Recognition Act 2004 and Equality Act 2010 illustrate this dilemma of law reform, as they not only reproduce certain norms on their otherwise progressive legislative surface, but also do so, quietly and subtly, beneath, through their explanatory notes and guidelines.

Similarly, the thesis has shown how recourse to human rights through the courts may (occasionally, as in **AB**) assist individual prisoners, and may also have a wider, positive impact on policy reform or prison practice, but that, even then, it often comes at a price. Sometimes that price is known in advance, sometimes the price is the very uncertainty of the outcome for the individual and the very uncertainty of its potential cost to the broader "cause". For example, the price may be the need to rely on a regressive argument in order to achieve the desired outcome, such as in **NW Lancashire**, where the applicants relied on an argument that being transgender is a mental illness in order to bring gender reassignment treatment within the remit of the NHS. Or the price may be the negative discursive effects of the particular judgment, even if it is successful in its instrumental outcome. For example, the courts may reproduce and perpetuate the construction of transgender prisoners' gender as inauthentic, imitative and artificial (**AB** and **Green**), or endorse the negative view that transgender prisoners want to access special treatment, rather than simply asserting their rights (**Green**). The price may also be a legally perverse judgment, such as in **Green**, which set a regressive legal precedent in the field.

Despite the bold decision in **AB**, it is increasingly being seen that the courts are reluctant to intervene in what they regard as prison management decisions (**Green** and **Hunnisett**), and

to solve what appears to be the impossible in a prison system and prison society built on the basis of a rigid gender binary (*Hunnisett*). The very presence of transgender prisoners exposes the myth of that binary, and disrupts the established gender order and equilibrium of the prison; it is difficult for the court to resolve the fundamental risk that they represent to the prison's established governance of gender.

Resolving or reducing the tension between rights and risk

Whitty has argued that, in order to realise reform on the ground, prisons might be encouraged to think of human rights as an organisational risk, what he coins "Legal Risk +", so as to absorb them into prison risk management (2011). He recognises that this instrumentalist approach to human rights might be controversial. Certainly, this thesis would conclude that a deeper, genuine commitment to prisoners' rights is necessary for fundamental changes to take place in the governance of transgender prisoners. However, even if human rights *were* conceived of as organisational risk, the thesis has surely demonstrated that Legal Risk+ to the prison is minimal in the current political climate, and thus unlikely to have any real traction. Since the Government introduced sweeping cuts to legal aid for prisoners in 2013, the risk of prisoners bringing legal action against the prison has become even more distant than before, severely limiting their right of access to the courts. Indeed only three judicial review cases involving transgender prisoners have, to date, been fully heard by the High Court, and only **AB** succeeded in overturning the prison's decision.²¹⁶ As already noted, the other case discussed in this thesis, **Green**, together with

²¹⁶ The third reported case relating to a transgender prisoner in the English and Welsh prison estate, is **H and Secretary of State for Justice**. [2015] EWHC 1550 (Admin). "H", a transgender woman who started to transition whilst she was in prison at HMP Elmley, a men's prison, complained that the prison had not provided her with adequate access to a sex offender course, which she was required to complete as part of her

the court's latest refusal of judicial review in *Hunnisett*, indicate a reluctance on the part of the courts to intervene in prison management decisions, even if they express concern about the prisoner's situation.

Furthermore, in the current political climate, the organisational risk to a prison's reputation through negative media coverage, or voluntary sector reporting on transgender prisoners' rights issues, is arguably limited. The wave of public sympathy towards Tara Hudson's and Vikki Thompson's cases in 2015 seems to have been short-lived, and, from subsequent media reporting, particularly of Jessica Winfield's case, seems to be restricted to transgender prisoners who have lived in their gender before being imprisoned (i.e. whose trans/gender authenticity is not in question), and who are either on remand or serving short sentences (i.e. who have not been convicted of serious criminal offences, particularly violent offences against cisgender women).

Tackling transphobia as the problem (or the risk), not the transgender prisoner

Whilst human rights and equality-based arguments may enhance transgender prisoners' legal options in the courts, and may provide a remedy for individual prisoners, they offer no remedy for systemic discrimination, harassment and transphobia in the prison population as a whole. Until there is a fundamental change in how transgender prisoners are viewed and treated by other prisoners, prison staff and prison management, PSI 2016 is likely to have little effect, other than, perhaps, to add to management malaise about the administrative burden involved in housing transgender prisoners, and the considerable time required to

rehabilitation, and to progress towards her release. Her personal circumstances were very complex, and specific to her case. The broader issue of transgender prisoners' access to relevant rehabilitative courses, in order to progress through the system and towards parole, however, is an important one (although unfortunately outside the scope of this thesis).

manage the multiple and complex risks they pose, at a time when staff and resources are in particularly short supply, and the prison system as a whole is in severe crisis.²¹⁷

PSI 2011 recognised this broader problem, and required prisons to “put in place measures to manage the risk of transphobic harassment and transphobic hate crime” (para 3.5). It advised (in much weaker terms) that it “may be useful to have education and training about gender reassignment and the prevention of transphobia” for prison staff and prisoners (Appendix B, para B.1). When PSI 2011 was introduced, however, the Government stated that it did not envisage any nationwide prison training, on the basis that the PSI was “self-explanatory” (Hansard HC Deb 27 Jan 2010, Col 862W).²¹⁸ WESC expressed concern at the extent of misunderstanding and ignorance around PSI 2011’s provisions, and urged the Ministry of Justice to “ensure that staff are trained on [PSI 2016] and that its implementation is monitored” (para 321). Whilst PSI 2016 promises that “training, guidance and awareness materials for the care and management of transgender offenders will be made available to all staff within NOMS following the release of this instruction” (para 9.1), it is not clear whether this training has been rolled out, and/or whether it comprises only materials, more paper, for staff to digest.

Tackling transphobia in the main prison population requires a positive commitment to fostering equality and safety across the prison estate. As Arkles has persuasively argued, alternative forms of safety need to be institutionally recognised and supported, which are

²¹⁷ As at 20 June 2018, this dire situation shows no signs of abating. See e.g. Bulman 2018 and Savage and Townsend 2018.

²¹⁸ Some prisons have, however, invited voluntary sector organisations to conduct education and training for staff and prisoners (e.g. GIRES and Press for Change, interviews 15 and 26 Oct 2015 respectively).

built through relationships and solidarity with other prisoners “across gender lines” (2009: 531).

The limits of law and rights discourse in reforming the cultural boundaries of gender

Through the site of the prison, and the figure of the transgender prisoner, the thesis has illustrated the way in which the optimistic discourse of human rights meets with, competes with, and is often trumped by the unshakeable, inexorable, logic of risk. It has demonstrated that law, rights and prison policy can only achieve so much. This is not simply due to the precarious state of the prison system, and a dire lack of resources and staff time to devote to prisoner welfare. A fundamental change of mind-set is required to effect systemic, cultural and institutional change. Whilst there has been increasing social acceptance of transgender people in recent years, this seems to be predicated on a historical, narrow medical model of transgender people, which still expects genital reassignment surgery, as social proof of trans/gender authenticity, particularly when it comes to transgender women’s access to “women-only” spaces, like the prison.

The thesis has shown that, in the final analysis, there are certain inescapable “truths” that contemporary society can’t seem to get beyond, namely that “true” gender is about bodies and a certain (legally- and socially-constructed) “biological past”, that transgender people’s gender is inauthentic, artificial and imitative, and that transgender women’s bodies are risky to cisgender women in “women-only” spaces. These three truths return like a Foucauldian wheel of power; it is not simply that prison administration tends to revert to the way things were always *done* (a propensity termed “carceral clawback” by Carlen 2002), but that it returns to the way it has always *understood* sex/gender and transgender prisoners, and

therefore governed them. Certain norms are so culturally, socially and institutionally entrenched that the “new” human rights discourse simply does not (yet) make sense in the prison, or in wider society.

Whilst human rights and equality discourse has led to an apparently liberalising moment in the re-conceptualisation of gender, the situation of transgender prisoners highlights the fact that law and policy does not yet fully translate. The thesis demonstrates that the tensions are too great at this point, and that recourse to human rights always meets its limits on the ground. The very visceral site of the prison, with its historical, genitalia-based, “flesh” borders, and its hyper-gendered prison society, provides a prime example of this limit on law’s power. Indeed, prison may be the final frontier, where law and human rights struggle most to make their mark.

The thesis has shown how law’s ability to reform the cultural boundaries of sex/gender, and to open up the cultural possibilities and liveability of trans/gendered lives, is limited. However, it has hopefully demonstrated that human rights is not an empty discourse, that human rights are not illusory, but that changing the gender order is a slow legal, political and cultural struggle, in which law and its human rights discourse can play a valuable part, both within the prison and in broader society.



References

Adam, A., Beck, U. and Van Loon, J. (2000). *The Risk Society and Beyond: Critical Issues for Social Theory*. London: Sage.

Allen, V. (2009). "Transsexual killer and attempted rapist wins 'human rights' battle to be moved to women's prison." *Daily Mail*. 5 Sept 2009. <http://www.dailymail.co.uk/news/article-1211165/Transsexual-prisoner-wins-High-Court-battle-moved-womens-jail.html> (1 Dec 2017).

Allison, E. and Pidd, H. (2013) "Chelsea Manning: What Kind of Treatment can she expect in Jail?". *The Guardian*, 23 August 2013.

Alston, P. (2013). "Review: Does the Past Matter? On the Origins of Human Rights". 126(7) *Harvard Law Review*. 2043-2081.

Amatrudo, A. and Blake, L.W. (2015). *Human Rights and the Criminal Justice System*. Abingdon: Routledge.

American Association of Psychiatrists (2013). *Gender Identity Disorder Fact Sheet* available at www.dsm5.org/Documents/Gender-Dysphoria-Fact-Sheet.pdf (1 Dec 2015).

Arkles, G. (2009). "Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention". 18(2) *Temple Political and Civil Rights Law Review*, 515 - 560.

Arkles, G. (2012). "Correcting Race and Gender: Prison Regulation of Social Hierarchy through Dress". *New York Law Review*. 87(4): 859-959.

Armstrong, J. (2016). "Nine prisoners in same jail to have sex change operations on the NHS". 18 Jan 2016. <http://www.mirror.co.uk/news/uk-news/nine-prisoners-same-jail-sex-7201157>. (1 Dec 2017).

Arnold, C. (2010). *City of Sin: London and its Vices*. London: Simon and Schuster.

Ash, J. (2010). *Dress Behind Bars: Prison Clothing as Criminality*. London: IB Tauris.

Baker, S.J. (2017). *Transgender Behind Prison Walls*. Hook: Waterside Press.

Baker, T. and Simon, J. (eds) (2002). *Embracing Risk: The Changing Culture of Insurance and Responsibility*. Chicago: The University of Chicago Press.

Ball, M. (2014). "Queer Criminology, Critique and the 'Art of Not Being Governed'". *Critical Criminology*. 22: 21-34.

- Ball, M., Buist, C., and Woods, B. W. (2014). "Introduction to the Special Issue on Queer/ing Criminology: New Directions and Frameworks". *Critical Criminology*. 22: 1-4.
- Barrett, J. (2011). "A human right for sex-change jailbirds: mail-order dresses". *The Sunday Telegraph*. 6 March 2011: 7.
- Barrett, J. (2007). *Transsexual and Other Disorders of Gender Identity: A Practical Guide to Management*. Abingdon, Oxon: CRC Press, Radcliffe Publishing.
- Bauer, H. (2009). "Theorizing Female Inversion: Sexology, Discipline and Gender at the Fin de Siècle". *Journal of the History of Sexuality*. 18(1): 84-102.
- Baxi, U. (2006). *The Future of Human Rights*. Third edition. Oxford: Oxford University Press.
- Baynes, K. (2000). "Rights as Critique and the Critique of Rights: Karl Marx, Wendy Brown, and the Social Function of Rights". 28(4) *Political Theory*. 451-468.
- Bazaara, D. (2017). "Jailed killer who chopped off own TESTICLES in DIY transgender op claims her rights are being violated". *Mirror*. 22 Feb 2017. <http://www.mirror.co.uk/news/uk-news/jailed-killer-who-chopped-testicles-9882176> (1 Dec 2017).
- BBC News (1998). "Transsexuals win sex change case". *BBC News*. 21 Dec 1998. <http://news.bbc.co.uk/1/hi/health/239972.stm>. (1 Dec 2017).
- BBC News (2015). "Transgender Woman Vikki Thompson found dead at Armley jail". *BBC News*. 19 Nov 2015. <http://www.bbc.co.uk/news/uk-england-leeds-34869620>. (1 Dec 2017).
- Beck, U. (1992). *Risk Society: Towards a New Modernity*. London: Sage.
- Beck, U. (1995). *Ecological Politics in the Age of Risk*. Cambridge: Polity Press.
- Beitz, C. (2009). *The Idea of Human Rights*. New York, Oxford: Oxford University Press.
- Bent Bars Project. (2015). *Written Evidence submitted to the Transgender Equality Inquiry*. TRA0264. 10 November 2015. <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/written/24073.pdf>. (1 Dec 2017).
- Berry, A. (1978). "Call for release of man given female hormones". *Daily Telegraph*. 29 Nov 1978. LAGNA. Copy on file with the author.
- Berman, G and Dar, A. (2013). *Prison Population Statistics*. House of Commons Briefing Paper SN04334 (29 July 2013), available at

<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN04334> (last visited 25 July 2015).

Bhatt Murphy Solicitors (2017a). *Press Release: Transgender Discrimination during Strip Search*. 20 June 2017. Copy on file with the author.

Bhatt Murphy Solicitors (2017b). *Press Release: Transgender Woman Prisoner receives Settlement and Apologies from the Prison Service*. 31 Aug 2017. Copy on file with the author.

Birmingham, L., Wilson, S. and Adshead, G. (2005). "Prison Medicine: Ethics and Equivalence". *British Journal of Psychiatry*. 188(1): 4-6.

Blair-Woods, J. (2014). "Queer Contestations and the Future of a Critical 'Queer' Criminology". *Critical Criminology*. 22: 5-19.

Bland, L. and Doan, L. (eds) (1998). *Sexology in Culture: Labelling Bodies and Desires*. Chicago: University of Chicago Press.

Boldt, P. and Philipps, C. (2011). "Prison Accommodation for Transgender People", *The Journal of the Law Society of Scotland* (17 Jan 2011), available at <http://www.journalonline.co.uk/Magazine/56-1/1009076.aspx> (1 Dec 2017).

Bornstein, K. (1994/2016). "On Men, Women and the Rest of Us". New York: Vintage.

Bosworth, M. (1999). *Engendering Resistance: Agency and Power in Women's Prisons*. Aldershot: Dartmouth.

Bosworth, M. (2000). "Confining Femininity: A History of Gender, Power and Imprisonment". *Theoretical Criminology*. 4: 265 – 284.

Bosworth, M. and Carrabine, E. (2001). "Reassessing Resistance: Race, Gender and Sexuality in Prison". *Punishment and Society*. 3: 501-515.

Bosworth, M., Campbell, D., Demby, B *et al* (2005). "Doing Prison Research: Views from the Inside". *Qualitative Inquiry*. 11(2): 249-264.

Bowcott, C. (2016). "UK Bill of Rights delayed further by Brexit and Supreme Court Case". *The Guardian*. 9 Dec 2016. <https://www.theguardian.com/law/2016/dec/09/uk-bill-of-rights-delayed-further-brexit-supreme-court-case-jeremy-wright>. (1 Dec 2017).

Boult, A. (2016). "Government asks schoolchildren to define their gender and gives them 24 options to choose from". *The Telegraph*. 23 Dec 2016. <http://www.telegraph.co.uk/news/uknews/12127280/Government-asks-schoolchildren-to-define-their-gender-and-gives-them-24-options-to-choose-from.html>. (1 Dec 2017).

Brickell, C. (2005). "Masculinities, Performativity and Subversion: A Sociological Reappraisal". *Men and Masculinities*. 8: 24 – 43.

Brennan, S. (2017). "Top shop ABOLISHES [sic] women-only changing rooms in favour of gender-neutral spaces after pressure from transgender customers".

<http://www.dailymail.co.uk/femail/article-5061815/Topshop-ABOLISHES-women-changing-rooms.html>. (1 Dec 2017).

British Association of Gender Identity Specialists. *Written Evidence submitted to the Transgender Equality Inquiry*. TRA0149. 8 September 2015.

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/written/19532.pdf>

British Psychological Society. *Written Evidence submitted to the Transgender Equality Inquiry*. TRA0113 08 September 2015.

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/written/19471.pdf>. (1 Dec 2017).

Brown, G.R (2010). "Autocastration and Autopenectomy as Surgical Self-Treatment in Incarcerated Persons with Gender Identity Disorder" *International Journal of Transgenderism*. 12: 31 – 39.

Brown, G.R. (2014). "Qualitative Analysis of Transgender Inmates' Correspondence: Implications for Departments of Correction". *Journal of Correctional Health Care*. 2014: 1-9. Published online 18 July 2014.

Brown, G.R and McDuffie, E. (2009). "Health Care Policies Addressing Transgender Inmates in Prison Systems in the United States". *Journal of Correctional Health Care*. 15: 280 - 291. Published online 27 July 2009.

Brown, W. (2000). "Suffering Rights as Paradoxes". 7(2) *Constellations*. 230-241.

Bulman, M. (2017). "Queen's Speech: Chief Inspector of Prisons expresses fury after penal reforms dropped from agenda". *The Independent*. 21 June 2017.

<http://www.independent.co.uk/news/uk/home-news/queens-speech-latest-chief-inspector-prisons-their-name-furious-reform-theresa-may-legislative-a7800851.html>. (1 Dec 2017).

Bulman, M. (2018). "Prison crisis laid bare as Government ordered to act over inmate deaths and 'dramatic decline' in conditions". *The Independent*. 19 Jan 2018.

<https://www.independent.co.uk/news/uk/home-news/prison-crisis-laid-bare-as-government-issued-unprecedented-warning-over-dying-inmates-as-inspectors-a8166676.html>. (20 June 2018).

- Burns, C. (1996). "LGBT History Month: Key Events: Alex Carlile's Private Members Bill proposing means to correct transsexual people's birth certificates and status". http://www.lgbthistorymonth.org.uk/history/trans_pmb.htm. (1 Dec 2017).
- Burrell, I. (1999). "Murderer to Get Sex Swap on the NHS". *The Independent*. 12 March 1999. <http://www.independent.co.uk/news/murderer-to-get-sex-swap-on-the-nhs-1079940.html> (1 Dec 2017).
- Burrows, T. (2017). "Double rapist who had £10,000 sex change behind bars to become a woman is moved to female jail". *Mail Online*. 21 March 2017. <http://www.dailymail.co.uk/news/article-4333384/Double-rapist-10k-sex-change-moved-female-jail.html>. (1 Dec 2017).
- Butler, J. (1990). *Gender Trouble: Feminism and the Subversion of Identity*. New York and Abington: Routledge.
- Butler, J. (1993). *Bodies That Matter: On the Discursive Limits of Sex*. Abington: Routledge.
- Butler, J. (2001). "Doing Justice to Someone: Sex Reassignment and Allegories of Transsexuality". *Gay and Lesbian Quarterly*. 7(4): 621-636.
- Butler, J. (2004). *Undoing Gender*. Abington: Routledge.
- Calder, W. (1955). "The Sexual Offender: A Prison Medical Officer's Viewpoint". *British Journal of Delinquency*. 6: 26-40.
- Campaign to End Rape. (2015). *Written Evidence submitted to the Transgender Equality Inquiry*. TRA0210. 13 Oct 2015. <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/written/19637.pdf>. (1 Dec 2017).
- Cannoot, P. (2017). "A.P., Garçon and Nicot v. France: the Court draws a line for trans rights". *Strasbourg Observers*. <https://strasbourgobservers.com/2017/05/05/a-p-garcon-and-nicot-v-france-the-court-draws-a-line-for-trans-rights/> (1 Dec 2017).
- Carlen, P. (1983). *Women's Imprisonment: A Study in Social Control*. London: Routledge.
- Carlen, P. (1985). "Law, Psychiatry and Women's Imprisonment: A Sociological View". *British Journal of Psychiatry*. 146: 618-621
- Carlen, P. (ed). (2002a). *Women and Punishment: The Struggle for Justice*. Cullumpton: Willan Publishing.
- Carlen, P. (2002b). "Carceral Clawback: The Case of Women's Imprisonment in Canada". *Punishment and Society*. 4(1): 115-121.

Carlen, P. (2003). "Risk and Responsibility in Women's Prisons". *Current Issues in Criminal Justice*. 15(3): 258-266.

Carlen, P. (2005). "Imprisonment and the Penal Body Politic: The Cancer of Disciplinary Governance", in Alison Lieblich and Shadd Maruna, S. (eds) *The Effects of Imprisonment*. Willan Publishing: Cullompton, Devon. 421 – 442.

Carlen, P. (2008). "Imaginary Penalties and Risk-Crazed Governance" in Carlen, P.(ed) *Imaginary Penalties*. Cullompton: Willan. Chapter 1, 1-25.

Carlen, P. and Worrall, A. (1987). *Gender, Crime and Control*. Milton Keynes: Open University Press.

Carlen, P. and Worrall, A. (2004). *Analysing Women's Imprisonment*. Cullompton: Willan Publishing.

Carrabine, E. and Longhurst, B. (1998). "Gender and Prison Organisation: Some Comments on Masculinities and Prison Management". *Howard Journal* 37(2): 161-76.

Castel, R. (1991). "From Dangerousness to Risk" in *The Foucault Effect: Studies in Governmentality*. Burchell et al (eds). Hemel Hempstead: Harvester Wheatsheaf: 281-98.

Cauldwell, D. (1949). Psychopathia Transsexualis. Extract reproduced in Whittle, S. and Stryker, S. (eds). *The Transgender Studies Reader*. 2006: 40-45.

Chauncey, G. (1982). "From Sexual Inversion to Homosexuality: Medicine and the Changing Conceptualisation of Female Deviance". *Salmagundi* 58/59 (Fall 1982-Winter 1986): 114-146.

Clarke-Billings, L. (2015). "Transgender woman found dead in jail after asking to move to female prison". *The Telegraph*. 19 Nov 2015.

<http://www.telegraph.co.uk/news/uknews/12006813/Transgender-woman-found-dead-in-jail-after-asking-to-move-to-female-prison.html> (1 Dec 2017).

Cocks, H.G. (2010). *Nameless Offences: Homosexual Desire in the 19th Century*. London and New York: I.B.Tauris.

Cocks, H.G. and Houlbrook, M. (2006). *The Modern History of Sexuality*. Basingstoke. Palgrave MacMillan.

Cook, M. (2007). *A Gay History of Britain: Love and Sex between Men since the Middle Age*. Oxford: Greenwood World Publishing.

Cohen, E. (1993). *Talk on the Wilde Side*. New York, London: Routledge.

Coleman, C. (2015). "British courts can impose whole-life prison sentences". *BBC News*. 3 February 2015. <http://www.bbc.co.uk/news/uk-31110814>. (1 Dec 2017).

Combes, R., Turner, L. and Whittle, S. (2008). *Gender Identity Services in England: The Mapping Project Report, Prepared for the Department of Health, September 2008*. www.pfc.org.uk. (1 Dec 2017).

Commissioners of Prisons (1953). *Report of the Commissioners of Prisons*. Kindly provided by Prison College Service. On file with the author.

Conaghan, J. (2013). *Law and Gender*. Oxford: Oxford University Press.

Conway, Z. (2016). "Liz Truss urged to 'get a Grip' over Inmates kept in Jail beyond their Sentence". *BBC News*. 17 November 2016. <http://www.bbc.co.uk/news/uk-38006287>. (1 Dec 2017).

Cook, M., Mills, R., Trumbach, R. and Cocks, HG (2007). *A Gay History of Britain: Love and Sex between Men since the Middle-Ages*. Oxford/ Westport Connecticut: Greenwood World Publishing.

Cooney, F. (2009). "Transsexual Confusion". *Inside Time*. 21 Oct 2009. <https://insidetime.org/transsexual-confusion/>. (1 Dec 2017).

Corcoran, M. (2006). *Out of Order: The Political Imprisonment of Women in Northern Ireland 1972-1998*. Cullumpton, Devon: Willan Publishing.

Council of Europe (2017). "France: Court ruling on transgender birth certificate rights". 7 April 2017. <http://www.humanrightseurope.org/2017/04/france-court-ruling-on-transgender-birth-certificate-rights/> (1 Dec 2017).

Cowan, S. (2005). "Gender is no Substitute for Sex: A Comparative Human Rights Analysis of the Legal Regulation of Sexual Identity". *Feminist Legal Studies*. 13: 67-96.

Coyle, A. (2009). *A Human Rights Approach to Risk Management: Handbook for Prison Staff*. http://www.prisonstudies.org/sites/default/files/resources/downloads/human_rights_prison_management.pdf. (1 Dec 2017).

Craig, A. (1937). *The Banned Books of England*. London: George Allen & Unwin Ltd.

Crawley, E. and Sparks, R. (2005). "Hidden Injuries? Researching the Experiences of Older Men in English Prisons". *The Howard Journal of Criminal Justice*, 44: 345-56.

Crewe, B. (2009). *The Prisoner Society: Power, Adaption and Social Life in an English Prison*. Oxford: Oxford University Press.

- Crewe, B. (2011). "Depth, Weight, Tightness: Revisiting the Pains of Imprisonment" *Punishment and Society*. 13(5): 509-529.
- Crisp, Q. (1977). *The Naked Civil Servant*. London: Penguin.
- Crozier, I. (2001). "The Medical Construction of Homosexuality and its Relation to the Law in Nineteenth-Century England", *Medical History*, 45: 61-82.
- Currah, P. (2003). "The Transgender Rights Imaginary". 4 *Georgetown Journal of Gender and the Law*. 705-720.
- Curtice, M. and Sanford, J. (2009). "Article 8 of the Human Rights Act 1998: A Review of Case Law Related to Forensic Psychiatry and Prisoners in the United Kingdom". *Journal of the American Academy of Psychiatry and the Law*, 37: 223-8.
- Curtis, J. (2015). "Transgender woman sent to male prison says she was forced to flash at male lags because she was terrified of being raped". *Mail On-line*. 13 December 2015. <http://www.dailymail.co.uk/news/article-3358423/Transgender-woman-sent-men-s-prison-says-forced-flash-male-lags-terrified-raped.html>. (1 Dec 2015).
- Daily Mail Reporter. (2000). "Gun robber is given a sex change on the NHS". *Daily Mail*. 20 Oct 2000: 31.
- Daily Mail Reporter (2006). "Prisoner's double sex swop [sic]". *Daily Mail*. 12 Jan 2006.
- Daily Telegraph Reporter (1968). "Sex prisoners given female hormones". *The Daily Telegraph*. 28 Nov 1968. LAGNA. Copy on file with the author.
- Daily Telegraph Reporter (1980). "Male convict called Mary wore pinafore". 10 Oct 1980. *Daily Telegraph*. 10 Oct 1980. LAGNA. Copy on file with the author.
- Daily Telegraph Reporter (2005). "Four years for burglar in search of a sex change". *Daily Telegraph*. 6 Aug 2005. <http://www.telegraph.co.uk/news/uknews/1495614/Four-years-for-burglar-in-search-of-a-sex-change.html>. (1 Dec 2017).
- Daubney, M. (2014). "Prisoners in own bodies: Amazing rise in lags living as women in male jails". *The Sun*. 16 Aug 2014. <https://www.thesun.co.uk/archives/reallife/1038375/prisoners-in-own-bodies/>. (1 Dec 2017).
- Davie, N. (2005). *Tracing the Criminal: The Rise of Scientific Criminology in Britain: 1960-1918*. Oxford: The Bardwell Press.

Davies, D. (2017). *Caution urged over transgender law concerns*. House of Commons meeting. 31 Oct 2017. Summary and copy of talks. <https://www.david-davies.org.uk/news/caution-urged-over-transgender-law-concerns>. (1 Dec 2017).

Davy, Z. (2011). *Recognising Transsexuals: Personal, Political and Medicolegal Embodiment*. Farnham, Surrey: Ashgate.

Department of Health (2007). *Transgender Experiences: Information and Support for Trans People, their Families and Healthcare Staff*. GRES for the Department of Health. London: Department of Health. <http://www.beaumontsociety.org.uk/downloads/doh-transgender-experiences.pdf>. (1 Dec 2017).

Department of Health (2008). *Guidance for GPs, Other Clinicians and Health Professionals on the Care of Gender Variant People: Transgender Wellbeing and Healthcare*. GRES for the Department of Health. London: Department of Health. <http://www.beaumontsociety.org.uk/downloads/doh-guidelines-for-clinicians.pdf>. (1 Dec 2017).

Dickinson, T. (2014). *Curing Queers: Mental Nurses and their Patients, 1935-74*. Manchester: Manchester University Press.

Dillon, M. (1946). *Self: A Study in Endocrinology and Ethics*. London: William Heinemann Medical Books Ltd.

Dillon, M., Jivaka, L and Lau, J. (2016). *Out of the Ordinary: A Life of Gender and Spiritual Transitions*. New York: Fordham University Press.

Disspain, S., Shuker, R., and Wildgoose E. (2015). "Exploration of a Transfemale Prisoner's Experience of a Prison Therapeutic Community". *Prison Service Journal*. 219: 9–18.

Doan, L. and Prosser, J. (eds) (2001). *Palatable Poison: Critical Perspectives on "The Well of Loneliness"*. New York: Columbia Press.

Dobash, R., Dobash R., and Gutteridge, S. (1986). *The Imprisonment of Women*. Oxford: Basil Blackwell.

Dolan, A. (2007). "Prisoner sues over his 'human right' to have sex change". *Mail Online*. 9 July 2007. <http://www.dailymail.co.uk/news/article-467108/Prisoner-sues-human-right-sex-change.html>. (1 Dec 2017).

Dolovich, S. (2011). "Strategic Segregation in the Modern Prison". *American Criminal Law Review*. 48:1-89.

Dolovich, S. (2013). "Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail". *Journal of Criminal Law and Criminology*. 102(4): 965-1118.

Dorman, N. (2011). "Sex swap lorry driver's relationship with killer at women's jail". *Mirror*. 24 July 2011. <http://www.mirror.co.uk/news/world-news/sex-swap-lorry-drivers-relationship-1699232>. (1 Dec 2017).

Doran, S.P, et al (2017). "'A kick in the teeth': Victims' fury as double rapist who attacked two young girls is moved to a women-only jail after £10k NHS sex-change op". *The Sun*. 20 March 2017. <https://www.thesun.co.uk/news/3137217/victims-fury-as-double-rapist-who-attacked-two-young-girls-is-moved-to-a-women-only-jail-after-10k-nhs-sex-change-op/>. (1 Dec 2017).

Doran, S.P. (2017). "Rape Menace Moved: Transgender rapist moved to women's jail put in segregation after making 'unwanted advances' on other lags". *The Sun*, 5 Sept 2017. <https://www.thesun.co.uk/news/4400327/transgender-rapist-womens-prison/>. (1 Dec 2017).

Doughty, S. (2013). "Transgender killer who tortured and killed his wife gets legal aid for his right to wear a WIG in prison, after complaining that he looks like a 'bald drag artiste'". *Mail Online*. 27 Dec 2013. <http://www.dailymail.co.uk/news/article-2530101/Killer-tortured-killed-wife-gets-legal-aid-fight-wear-wig-prison.html>. (1 Dec 2017).

Douglas, M. (1966). *Purity and Danger: An Analysis of Concepts of Pollution and Taboo*. Abingdon, Oxon: Routledge.

Douglas, M. (1992). *Risk and Blame: Essays in Cultural Theory*. London: Routledge.

Douzinas, C. (2000). *The End of Human Rights*. Oxford: Hart Publishing.

Drury, I. "Transsexuals prisoners wear right to wear dresses and padded bras behind bars". *Mail*. 7 March 2011. <http://www.dailymail.co.uk/news/article-1363490/Ministry-Justice-issues-20-page-guidebook-rights-sex-change-inmates.html>. (1 Dec 2017).

Duffy, N. (2015). "Trans woman 'lived in fear of rape' in men's prison". *Pink News*. 13 Dec 2015. <http://www.pinknews.co.uk/2015/12/13/trans-woman-lived-in-fear-of-rape-in-all-male-prison/>. (1 Dec 2017).

Dunn, P. (2013). "Slipping off the Equalities Agenda? Work with LGBT Prisoners", *Prison Service Journal*. 206: 3-10.

Dyer, C. (1996). "Transsexual Goes to High Court over Operation Ban". *British Medical Journal*. 312: 1560.

Eady, D. (2007). "Prisoners' Rights since the Woolf Report: Progress or Procrastination?" *The Howard Journal* 46(3): 264-275.

Easton, S. (2011). *Prisoners' Rights: Principles and Practice*. Abingdon, Oxon: Routledge.

Edgar and Shalev (2015). *Deep Custody: Segregation Units and Close Supervision Centres in England and Wales*. For the Prison Reform Trust.

http://www.prisonreformtrust.org.uk/Portals/0/Documents/deep_custody_111215.pdf

(1 Dec 2017).

Edmond, G. (2004). "The Law-Set: The Legal-Scientific Production of Medical Propriety". *Science, Technology and Human Values*. 26(2) (Spring 2011): 191-226.

Edney, R. (2004). "To Keep Me Safe from Harm: Transgender Prisoners and the Experience of Imprisonment". *Deakin Law Review* 9(2): 327-38.

Ellis, H. (1901). *The Criminal*. London: Walter Scott. (Republished 2012 by Forgotten Books)

Ellis, H. and Symonds, J.A. (1897/2008). *Sexual Inversion: A Critical Edition*. I. Crozier ed. Basingstoke: Palgrave MacMillan.

Emerton, R. and Harris, M. (2016). "New Policy on Transgender Prisoners: Progressive, but can Prisons Keep Pace?" *Inherently Human*. 21 Nov 2016.

<https://inherentlyhuman.wordpress.com/2016/11/21/new-policy-on-transgender-prisoners-progressive-but-can-prisons-keep-pace/>. (20 June 2018).

Engel, U. and Strasser, H. (1998). "Global Risks and Social Inequality: Critical Remarks on the Risk-Society Hypothesis". *Canadian Journal of Sociology*. 23(1): 91-103.

English, R. (1999). "Outcry as jailed killers win sex swops [sic] on NHS". *Daily Mail*. 13 Mar 1999:32.

Epstein, R., and B. Mitchell. 2008. "Indeterminate sentence for public protection". *Criminal Law and Justice Weekly*. 173(20): 311.

Epstein, P. and Masters, D. (2014). *Direct Discrimination: A Practical Guide to Comparators*. UKEAT/0018/11/SM.

Equality and Human Rights Commission (2011). *A Review of Access to NHS Gender Reassignment Services (England Only)*. Updated Version – November 2011.

<https://www.equalityhumanrights.com/en/trans-inequalities-reviewed/review-access-nhs-gender-reassignment-services-england-only>. (1 Dec 2017).

Equality and Human Rights Commission (2010): *Equality Act 2010: Code of Practice: Services, Public Functions and Associations*.

https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf (1 Dec 2017).

Ericson, R. (2007). *Crime in an Insecure World*. Cambridge: Polity.

Ericson, R. and Haggerty, K. (1997). *Policing the Risk Society*. Oxford: Clarendon Press.

- Erni, J. (2013). "Legitimizing Transphobia: The Legal Disavowal of Transgender Rights in Prison". *Cultural Studies*. 27(1). 136-159.
- Evans, T. and Wallace, P. (2008). "A Prison within a Prison? The Masculinity Narratives of Male Prisoners". *Men and Masculinities*. 10: 484 – 507.
- Evening Mail Reporter (1999). "Jailed Kidnapper to get Sex Change", *Evening Mail*, 13 March 1999:4.
- Evening News Reporter (1969). "Baffling Case of Sex-Change Prisoner", *Evening News, London*, 1 April 1969. LAGNA. Copy on file with the author.
- Ewald, F. (1990). "Norms, Discipline and The Law" in *Representations, Special Issue: Law and the Order of Culture*: 138-161.
- Ewald, F. (1991). "Insurance and Risk" in *The Foucault Effect: Studies in Governmentality*, Burchell *et al* (eds). Hemel Hempstead: Harvester Wheatsheaf. 97-211 (Chapter 10).
- Ewald, F. (2002). "The Return of Descartes's Malicious Demon: An Outline of a Philosophy of Precaution". In Baker, T. and Simon, J. (eds). *Embracing Risk: The Changing Culture of Insurance and Responsibility*. 2002. Chicago: The University of Chicago Press. 273-301.
- Fae, J. (2017a). "Jenny Swift was a trans woman. She should not have died in a male prison." *The Guardian*. 9 Jan 2017.
<https://www.theguardian.com/commentisfree/2017/jan/09/transgender-woman-jenny-swift-prison-death>. (1 Dec 2017).
- Fae, J. (2017b). "Trans woman: police pinned me down and pulled of my bra". *Gay Star News*. 20 June 2017. <https://www.gaystarnews.com/article/trans-woman-police-pinned-pulled-off-bra/>. (1 Dec 2017).
- Fae, J. (2017c). "This trans woman faced abuse in a men's jail despite UK law". *Gay Star News*. 15 August 2017. <https://www.gaystarnews.com/article/trans-woman-faced-abuse-mens-jail-despite-uk-law/#gs.TS19qIE> (1 Dec 2017).
- Fair Play for Women and Girls. (2017). *Investigation into the number of trans-identifying males in prison in England and Wales and their offender profiles*. Report by N. Williams. 11 Nov 2017. <https://fairplayforwomen.com/prisons/transgender-prisoners>. (1 Dec 2017).
- Feeley, M. and Simon, J. (1992). "The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications". *Criminology*. 30(4): 449-474.
- Feinberg, L. (1993). *Stone Butch Blues*. New York: Firebrand.

Fenton, S. (2016). "The latest transgender suicide in prison proves that transgender is not a special 'snowflake situation', it's a form of violence that can kill". *The Independent*. 6 Jan 2017. <http://www.independent.co.uk/voices/trans-woman-prison-suicide-jenny-swift-doncaster-misgendering-can-kill-a7513441.html>. (1 Dec 2017).

Fisher, D. (2015). "Possible changes to system after transgender inmate's alleged rape". *New Zealand Herald*. 7 Oct 2015. http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11524653. (1 Dec 2017).

Fisher, E. (2010). *Risk Regulation and Administrative Constitutionalism*. Oxford: Hart.

Fitzgerald, O.W. (1974). "Treatment of Sex Offenders". *Prison Medical Service Journal*. 17-21. Kindly provided by Prison Service College Library. On file with the author.

Fitzgerald, O.W. (1977). "Chemical Treatment of Sexual Offenders". *Prison Medical Service Journal*. 18: 25-29. Kindly provided by Prison Service College Library. On file with the author.

Ford, R. (2006). "Inmate goes from man to woman and back on NHS". *The Times*. 12 Jan 2006: 23.

Forder, P. (ed) *Inside and Out: LGBT Writing from Parc*. <http://www.g4s.uk.com/> (search by title) (1 Dec 2017).

Forder, P. (2017). *Released Inside: Conversations with Transgender Prisoners and the Staff that care for them*. <http://www.g4s.uk.com/en/Media-Centre/News/2017/03/01/Released-Inside>. (1 Dec 2017).

Foucault, M. (1972). *The Archaeology of Knowledge*. (Translated by A. Sheridan). New York: Pantheon Books.

Foucault, M. (1976). *Two Lectures*. In *Michel Foucault: Power/Knowledge: Selected Interviews and Other Writings 1972-1977* by Michel Foucault. Gordon, C. (ed). Hemel Hempstead: Harvester Wheatsheaf.

Foucault, M. (1977). *Discipline and Punish: The Birth of the Prison*. (Translated by A. Sheridan). London: Penguin.

Foucault, M. (1978). *The Will to Knowledge: The History of Sexuality: 1*. (Translated by R. Hurley). London: Penguin.

Foucault, M. (1980). "Introduction" to *Herculine Barbin: Being the Recently Discovered Memoires of a Nineteenth-Century Hermaphrodite*. New York: Pantheon, 1980 (vii – xvii).

- Foucault, M. (1991). "Governmentality" in *The Foucault Effect: Studies in Governmentality*, Burchell *et al* (eds). Hemel Hempstead: Harvester Wheatsheaf. 87-104 (Chapter 4).
- Fox, A. (2017). "Rapist who underwent gender transition has been moved to a women's prison". *The Independent*. 21 March 2017. <http://www.independent.co.uk/news/uk/crime/rapist-jessica-winfield-martin-ponting-transgender-transition-womens-prison-moved-hmp-bronzefield-a7640706.html>. (1 Dec 2017).
- Fox, L.W (1952). *The English Prison and Borstal Systems*. London: Routledge & Kegan Paul.
- Fredman, S. (2011). "The Public Sector Equality Duty". *Industrial Law Journal*, 40(4): 405-427.
- Freedman, E. (1981). *Their Sisters' Keepers: Women's Prison Reform in America 1830 – 1930*. Ann Arbor: University of Michigan Press.
- Freedman, E. (1996) "The Prison Lesbian: Race, Class and the Construction of the Aggressive Female Homosexual". *Feminist Studies*. 22(2): 397 – 424.
- Freud, S. (1949). *Three Essays on the Theory of Sexuality*. Translated by James Strachey. Welwyn Garden City: Alcuin Press.
- Fry, E. (1827a). *Sketch of the Origin and Results of Ladies' Prison Associations: With Hints for the Formation of Local Associations*. London: John and Arthur Arch and Hatchard & Son.
- Fry, E. (1827b). *Observations on the Visiting, Superintendence, and Government of Female Prisoners*. London: John and Arthur Arch and Hatchard & Son.
- Gamson, A., Croteau, D., Hoynes, W. and Sasson, T. (1992) "Media Images and the Social Construction of Reality". *Annual Review of Sociology*. 18: 373-93.
- Gardner, A. (2017). "Transgender woman found dead in her cell at all male prison in fourth prison suicide". *Mirror*. 30 Sept 2017. <http://www.mirror.co.uk/news/uk-news/transgender-woman-found-dead-cell-11266405>. (1 Dec 2017).
- Garland, D. (1985). "The Criminal and his Science: A Critical Account of the Formation of Criminology at the End of the Nineteenth Century". *British Journal of Criminology*: 25:2. 109-137.
- Garland, D. (1996). The Limits of the Sovereign State. *British Journal of Criminology*. 36(4): 445-471.
- Garland, D. (2001). *The Culture of Control*. Oxford: Oxford University Press.

- Gayle, D. (2015). "Transgender prisoner at HMP Bristol being 'sexually harassed'". *The Guardian*. 29 Oct 2015. <https://www.theguardian.com/society/2015/oct/29/transgender-prisoner-tara-hudson-sexually-harassed-hmp-bristol>. (1 Dec 2017).
- Genders, E. and Player, E. (1987). "Women in Prison: The Treatment, The Control and the Experience" in P. Carlen and A. Worrall, *Gender Crime and Justice*. Milton Keynes: Open University Press: 161 – 175.
- Genders, E. and Player, E. (2010). "Therapy in Prison: Revisiting Grendon 20 Years On". *The Howard Journal*. 49(5): 431-450.
- Genders, E. and Player, E. (2014). "Rehabilitation, Risk Management and Prisoners' Rights". *Criminology and Criminal Justice*. 14(4): 434-457.
- General Practitioner Reporter. (1977). "DHSS sued over Broadmoor Patient". *General Practitioner*. 18 Feb 1977. LAGNA. Copy on file with the author.
- Giddens, A. (1991). *Modernity and Self-Identity*. Stanford, California: Stanford University Press.
- Gillingham, A. (2017). "Transgender Investigation: Up to half of trans inmates may be sex offenders: Plans to allow people to self-define their gender could put female prisoners at risk." *The Times*. 19 Nov 2017. <https://www.thetimes.co.uk/article/up-to-half-of-trans-inmates-may-be-sex-offenders-26rz2crhs>. (1 Dec 2017).
- Ginn, S. (2012). "Prison Environment and Health". *British Medical Journal*. 345:e5921.
- Goffman, E. (1956). *The Presentation of the Self in Everyday Life*. London: Penguin Press.
- Goffman, E. (1961). *Asylums*. Middlesex: Penguin Books.
- Goffman, E. (1963). *Stigma: Notes on the Management of Spoiled Identity*. London: Penguin Books.
- Golder, B. and Fitzpatrick, P. (2009). *Foucault's Law*. Abingdon: Routledge.
- Golder, B. (2010). "Foucault and the Unfinished Human of Rights". *Law, Culture and the Humanities*. 6: 354 – 374.
- Goodchild, S. (2000). "Prisons Inspector calls for Sex Change Ops". *The Independent*. 13 Feb 2000: 2.
- Gordon, C. Hughes, C., Roberts, D. and Dubberley, S. (2017). "A Literature Review of Transgender People in Prison: An 'Invisible' Population in England and Wales". *Prison Service Journal*. 232:11-22.

Government Equalities Office (2017) "New Action to Promote LGBT Equality". With RT Hon Justine Greening. 21 July 2017. <https://www.gov.uk/government/news/new-action-to-promote-lgbt-equality>. (1 Dec 2017).

Graham, I. (2011). "The Product of Text and 'Other' Statements: Discourse Analysis and the Critical Use of Foucault". *Educational Philosophy and Theory*. 43(6): 663-674.

Green, J. (2017). "Equality Act 2010 Exemptions Should Be Retained, Strengthened and Extended". Paper presented at House of Commons meeting on *Transgender Law Concerns*, 31 Oct 2017. <https://www.david-davies.org.uk/news/caution-urged-over-transgender-law-concerns>. (link at bottom of page) (1 Dec 2017).

Green, J., McGowan, S., Levi, J, Wallbank, R and Whittle, S. (2011) "Recommendations from the WPATH Consensus Process for Revision of the DSM Diagnosis of Gender Identity Disorders: Implications for Human Rights". *International Journal of Transgenderism*. 13(1): 1-4.

Greer, G. (1999). *The Whole Woman*. London: Doubleday.

Gross, A. (2013). "Israel should drop binary view of gender". *Ha'aretz* 16 Sept 2013. <https://www.haaretz.com/.premium-1.547164> (no longer available at 1 Dec 2017). Copy on file with the author.

Grosz, E. (1994). *Volatile Bodies: Towards a Corporeal Feminism*. Bloomington and Indianapolis: Indiana University Press.

Guardian Reporter (1969). "Chance of Sex Change in Prison". *The Guardian*. 4 March 1969. LAGNA. Copy on file with the author.

Guardian Reporter (1973). "Lesbian Gaol Dress worries Governor". *The Guardian*, 13 May 1973, LAGNA. Copy on file with the author.

Gutting, (1994). "The Cambridge Companion to Foucault". Cambridge: Cambridge University Press.

Habermas, J. (2010). "The Concept of Human Dignity and the Realistic Utopia of Human Rights". 41(4) *Metaphilosophy*. 464-480.

Halberstan, J. (1998). *Female Masculinity*. Durham: Duke University Press.

Halberstam, J. (2005). *In a Queer Time and Place*. New York: New York University Press.

Hall, R. (1928). *The Well of Loneliness*. Reprint, New York: Anchor Books 1990.

Hall, S. (2001). "Foucault: Power, Knowledge and Discourse" in Wetherell, M, Taylore, S. and Yates, S. *Discourse Theory and Practice: A Reader*. London: Sage. 72-81.

- Halliday, J. (2017a). "Transgender woman found dead in Doncaster prison cell". *The Guardian*. 5 Jan 2017. <https://www.theguardian.com/society/2017/jan/05/transgender-woman-jenny-swift-found-dead-at-doncaster-prison>. (1 Dec 2017).
- Halliday, J. (2017b). "Transgender inmate complained of bullying by guards, inquest told". *The Guardian*. 18 Dec 2017. <https://www.theguardian.com/society/2017/dec/18/transgender-inmate-complained-of-bullying-by-guards-inquest-told>. (26 Dec 2017).
- Halperin, D. (2003). "The Normalisation of Queer Theory". *Journal of Homosexuality*. 45 (2-4): 339-343.
- Hannah-Moffat, K. (1999). "Moral Agent or Actuarial Subject: Risk and Canadian Women's Imprisonment". *Theoretical Criminology*. 3(1): 71-94.
- Hannah-Moffat, K. (2001). *Punishment in Disguise: Penal Governance and Federal Imprisonment of Women in Canada*. Toronto: University of Toronto Press.
- Hannah-Moffat, K. (2002). "Creating choices, reflecting on choices", in Pat Carlen (ed) *Women and Punishment*. Cullhumpton: Willan Publishing.
- Hannah-Moffat, K. (2005). "Criminogenic Needs and the Transformative Risk Subject: Hybridizations of Risk/Need in Penalty". *Punishment and Society*. 7(1): 29-51.
- Hannah-Moffat, K. (2007). "Gendering Dynamic Risk: Assessing and Managing the Maternal Identities of Women Prisoners" in Hannah-Moffat, K. and O'Malley, P. (eds) (2007). *Gendered Risks*. Abingdon: Routledge- Cavendish, 230-247 (Chapter 11).
- Hannah-Moffat, K. (2010). "Sacrosanct or Flawed: Risk, Accountability and Gender-Responsive Penal Politics". *Current Issues in Criminal Justice*. 22(2): 193-215.
- Harman, R. (2016). "The Care and Management of Transgender Prisoners". *Inside Time*. 1 Dec 2016. <https://insidetime.org/the-care-and-management-of-transgender-prisoners/>. (1 Dec 2017).
- Harriman, E. (1978). "Worries growing over anti-sex drugs in prison". *Sunday Times*. 12 November 1978. LAGNA. Copy on file with the author.
- Harris, A. "From Stonewall to the Suburbs: Toward a Political Economy of Sexuality". 14 *William and Mary Bill of Rights Journal*. 1539-1582.
- Hart, H. (1961). *The Concept of Law*. Oxford: Oxford University Press.

Harvard Law Review. (2013-14). "Developments in the Law: Chapter Three: Classification and Housing of Transgender Inmates in American Prisons". *Harvard Law Review*. 127: 1680-1766.

Heberton, B. and Seddon, T. (2009). "From Dangerousness to Precaution: Managing Sexual and Violent Offenders in an Insecure and Uncertain Age". *British Journal of Criminology*. 49(3): 343-362.

Hill, P. (2017). "Eleven inmates in one prison are waiting for sex-change ops that'll cost taxpayers £110,000". *Mirror Online*. 29 July 2017. <http://www.mirror.co.uk/news/uk-news/jailhouse-frock-11-inmates-one-10896312>. (1 Dec 2017).

Hines, S. (2006). "What's the Difference? Bringing Particularity to Queer Studies of Transgenderism". *Journal of Gender Studies*. 15(1): 49-66.

Hines, S. (2013). *Gender Diversity, Recognition and Citizenship; Towards a Politics of Difference*. Basingstoke: Palgrave MacMillan.

Hines, S. (2007). *Transforming Gender: Transgender Practices of Identity, Intimacy and Care*. Policy Press.

Hines, S. and Stanger, T. (ed). 2010 *Transgender Identities: Towards a Social Analysis of Gender Diversity*. New York and London: Routledge.

Hirschfeld, M. (1910). "The Transvestites: The Erotic Desire to Cross- Dress". Extracts reproduced in S. Stryker and S. Whittle (eds). *The Transgender Studies Reader*. New York: Routledge. 2006.

Hirschfeld, M. (1923). "Die Intersexuelle Konstitution". *Jahrbuch für Sexuelle Zwischenstufen*, 23: 3-27.

HM Chief Inspector of Prisons (1996). *Patient or Prisoner? A New Strategy for Healthcare in Prisons*. London: Home Office. https://www.justiceinspectors.gov.uk/hmiprisoners/wp-content/uploads/sites/4/2014/08/patient_or_prisoner_rps.pdf. (1 Dec 2017).

HM Chief Inspector of Prisons for England and Wales (2015-16). *Annual Report 2015-16*. 19 July 2016. <https://www.justiceinspectors.gov.uk/hmiprisoners/inspections/annual-report-2015-2016/>. (1 Dec 2017).

HM Chief Inspector of Prisons for England and Wales (2016). *Report on an Unannounced Inspection of HMP Whatton, 15 – 26 Aug 2016*. <https://www.justiceinspectors.gov.uk/hmiprisoners/wp-content/uploads/sites/4/2016/12/HMP-Whatton-Web-2016.pdf>. (1 Dec 2017).

HM Chief Inspector of Prisons for England and Wales (2016-17). *Annual Report 2016-17*. 18 July 2016. <https://www.justiceinspectorates.gov.uk/hmiprisons/inspections/annual-report-2016-17/>. (1 Dec 2017).

HM Courts and Tribunals Service (2014). *Guidance on Completing the Standard Application Form for a Gender Recognition Certificate*. <https://www.gov.uk/apply-gender-recognition-certificate>. (1 Dec 2017).

HM Prison Service (1994). *Health Care Standards for Prisoners in England and Wales*. London: Home Office. (1 Dec 2017).

HM Prison Service and NHS Executive (1999). *The Future Organisation of Prison Health Care: Report by the Joint Prison Service and National Health Service Executive Working Group*. London: Home Office.
http://webarchive.nationalarchives.gov.uk/20110504020423/http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4106031.pdf. (1 Dec 2017).

Hobhouse, S. and Brockway, A.F. (1922). *English Prisons Today: Being the Report of the Prison System Enquiry Committee*. London: Longmans, Green & Co.

Holehouse, M. (2015). "David Cameron: I will ignore Europe's top court on prisoner voting". *The Telegraph*. 2 Oct 2015. <http://www.telegraph.co.uk/news/uknews/law-and-order/11911057/David-Cameron-I-will-ignore-Europes-top-court-on-prisoner-voting.html>. (1 Dec 2017).

Home Department (1932). *Report of the Departmental Committee on Persistent Offenders*. London: HM Stationery Office.

Home Office (1957). *Report of the Committee on Homosexual Offences and Prostitution (the "Wolfenden Report")*. London: HM Stationery Office.

Home Office (1969). *People in Prison (England and Wales)*. London: HM Stationery Office.

Home Office (1979). *The Report of the Committee of Inquiry into the United Kingdom Prison Services (the "May Report")*. 31 Oct 1979. London: HM Stationery Office.

Home Office (2000). *Report of the Interdepartmental Working Group of Transsexual People*, April 2000.

Home Office (2002). *Press Announcement on Interdepartmental Working Group of Transsexual People*. 20 June 2002.

Hooks, B. (2000). *Feminist Theory: From Margins to Center*. London: Pluto Press (2nd ed).

Hook, D. (2001). "Discourse, Knowledge, Materiality and History: Foucault and Discourse Analysis". *Theory and Psychology*. 11(4): 521-547.

Hope, C. (2017). "Britain to be bound by European Convention on Human Rights until 2022." *The Telegraph*. 26 April 2017. <http://www.telegraph.co.uk/news/2017/04/26/britain-likely-bound-european-convention-human-rights-2022/>. (1 Dec 2017).

Hope, T. and Sparks, R. (eds) (2000). *Crime, Risk and Insecurity*. London: Routledge.

Houlbrook, M. (2007). "The 'Man with the Powder Puff' in Interwar London". *Journal of History*. 50(1): 145-171.

House of Commons Justice Committee (2013). *Women Offenders: After the Corston Report, Second Report of Session 2013-14* (HC 92, 15 July 2013). London: The Stationery Office Ltd.

House of Commons Welsh Affairs Committee (2015). *Prisons in Wales and the treatment of Welsh offenders: Fourth Report of Session*. London: The Stationery Office Ltd. 17 March 2015. <https://publications.parliament.uk/pa/cm201415/cmselect/cmwelaf/113/113.pdf>. (1 Dec 2017.)

House of Commons Women and Equalities Select Committee ("WESC") (2015). *Transgender Equality: First Report of Session 2015-16*. London: The Stationery Office Ltd. 14 Jan 2016. <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>. (1 Dec 2017).

Howard, J. (1777). *The State of the Prisons in England and Wales* (3rd ed). Warrington: William Eyres (reproduced by ECCO, British Library).

Howard League for Penal Reform (2014). *Commission on Sex in Prison: Coercive Sex in Prison*. <https://howardleague.org/publications/coercive-sex-in-prison/>. (1 Dec 2017).

Howard League for Penal Reform. (2015). *Commission on Sex in Prisons: Sex in Prison: Experiences of Former Prisoners*. Report by Dr Alisa Stevens. <https://howardleague.org/publications/sex-in-prison-experiences-of-former-prisoners/>. (1 Dec 2017).

Howe, A. (1994). *Punish and Critique: Towards a Feminist Analysis of Penalty*. London: Routledge.

Hughes, L. (2017). "'Political correctness gone mad' – MPs hit out at proposal to remove 'sex question' in next census". *The Telegraph*. 8 Oct 2017. <http://www.telegraph.co.uk/news/2017/10/08/political-correctness-gone-mad-mps-hit-proposal-remove-sex/>. (1 Dec 2017).

Hunt, A. and Wickham, G. (1994). *Foucault and Law: Towards a Sociology of Law as Governance*. London: Pluto Press.

Hunter, R. (2010). "Feminist Judgments: An Introduction". In *Feminist Judgments: From Theory to Practice*. Hunter, R, McGlynn, C. and Rackley, E. (eds). Oxford: Hart Publishing.

Hunter, R. (2012). "The Power of Feminist Judgments?". *Feminist Legal Studies*. 20(2): 135-148.

Hunter, R. McGlynn, C. and Rackley, E. (eds). (2010). *Feminist Judgments: From Theory to Practice*. Oxford: Hart Publishing.

Ignatieff, M. (1978). *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750-1850*. New York: Pantheon Books.

Irish Penal Reform Trust (2016). *Out on the Inside: The Rights, Experiences and Needs of LGBT People in Prison*. Written by Dr Nicola Carr, Dr Siobhán McAlister and Dr Tanya Serisier. http://www.iprt.ie/files/IPRT_Out_on_the_Inside_2016_EMBARGO_TO_1030_Feb_02_2016.pdf. (1 June 2018).

Jackson, J. (2017). "Prisoner placed in 'Indefinite Isolation' because she is Transgender". *Pink News*. 22 Feb 2017. <http://www.pinknews.co.uk/2017/02/22/prisoner-placed-in-indefinite-isolation-because-she-is-transgender/>. (1 Dec 2017).

Jackson, L. (2015). *The Victorian Dictionary*. (search "Chapman") <http://www.victorianlondon.org/index-2012.htm>. (1 Dec 2017).

Jacobs, J. (1980). "The Prisoners' Rights Movement and Its Impacts: 1960-80", *Crime and Justice* 2: 429-70. Reproduced in J. Kleinig (ed). *Prisoners' Rights*. Abingdon Oxon: Routledge.

Jaffe, M. (2012). *Peer support and seeking help in prison: a study of the Listener scheme in four prisons in England: Thesis submitted for the Degree of Doctor of Philosophy in Criminology, December 2012, Keele University*. Samaritans: <http://www.samaritans.org/sites/default/files/kcfinder/files/research/Peer%20Support%20in%20Prison%20Communities%20-%20Listener%20Scheme%20Full%20Report%202012.pdf>. (8 June 2018).

Jaffer, M., Tungol, J., MacDonald, R., Dickey, N. and Venters, H. (2015). "Improving Transgender Healthcare in the New York City Correctional System". *LGBT Health*. 3(2):116-21.

Jeffreys, S. (2014). *Gender Hurts: A Feminist Analysis of the Politics of Transgenderism*. Abingdon, Oxon: Routledge.

- Jeffreys, S. (2015). *Written Evidence submitted to the Transgender Equality Inquiry*. TRA0131. 13 Oct 2015.
<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/written/19512.pdf>. (1 Dec 2017).
- Jenkins, E. and Kay, J. "Sex change lag's bid to swap back". *The Sun*. 11 Jan 2006: 24.
- Jenness, V. (2010). "From Policy to Prisoners to People: A 'Soft Mixed Methods' Approach to Studying Transgender Prisoners". *Journal of Contemporary Ethnography*. 39(5): 517-553.
- Jenness, V. and Fenstermaker, S. (2014). "Agnes goes to Prison: Gender Authenticity, Transgender Inmates in Prisons for Men, and Pursuit of the 'Real Deal'". *Gender and Society* 28(5): 5-31.
- Jenness, V. (2014). "Pesticides, Prisoners and Policy: Complexity and Praxis in Research on Transgender Prisoners and Beyond. *Sociological Perspectives*. 57(1) 6 – 26.
- Jennings, W., Gray, E., Farrall, S. and Hay, C. (2015). "Penal Populism and the Public Thermostat: Crime, Public Punitiveness and Public Policy", paper for *PSA Elections, Public Opinion and Parties Specialist Group Annual Conference*, Cardiff, 2015.
<http://sites.cardiff.ac.uk/epop2015/files/2016/02/Penal-Populism-and-the-Public-Thermostat-Crime-Public-Punitiveness-and-Public-Policy-Will-Jennings.pdf>. (1 Dec 2017).
- Jewkes, Y. (2005). "Men behind Bars: "Doing" Masculinity as an Adaption to Imprisonment". *Men and Masculinities*. 2005(8): 44-63.
- Johnston, I. (2017). "Transgender Inmates at Prison dubbed 'Monster Mansion' allowed to wear wigs to improve their living standards". *The Mirror*. 1 July 2017
<https://www.mirror.co.uk/news/uk-news/transgender-inmates-prison-dubbed-monster-10719145>. (1 Dec 2017).
- Johnson, P. (2012). "The Impact of *X v Turkey*: Homosexuality and the ECHR", *Jurist - Hotline*. 9 October 2012. <http://jurist.org/hotline/2012/10/paul-johnson-echr-turkey.php>. (1 Dec 2017).
- Jones, L. and Brookes, M. (2013). "Transgender Offenders: A Literature Review", *Prison Service Journal*. 206: 11-18.
- Jones 2017 (2017). "Topshop abolishes women-only changing rooms and makes ALL of them unisex – after pressure from transgender and gender-fluid customers". *The Sun*. 8 Nov 2017.
<https://www.thesun.co.uk/money/4872941/topshop-introduces-gender-neutral-fitting-rooms/>. (1 Dec 2017).
- Jorgensen, M. and Phillips, L. (2002). *Discourse Analysis as Theory and Method*. London: Sage.

Joseph, A. (2017). "Transgender rapist who was moved to women-only jail despite still having a penis is segregated after 'making unwanted sexual advances on female inmates'". *Daily Mail*. 6 Sept 2017.

<http://www.dailymail.co.uk/news/article-4856268/Transgender-rapist-moved-women-jail-segregated.html>. (1 Dec 2017).

Kaplan, M.B. (2005). *Sodom on the Thames: Sex, Love and Scandal in Wilde Times*. New York: Cornell University Press.

Kemshall, H. (2003). *Understanding Risk in Criminal Justice*. Buckingham: Open University Press.

Kennedy, H. (1988). *Ulrichs: The Life and Works of Karl Heinrich Ulrichs, Pioneer of the Modern Gay Movement*. Boston: Alyson Publications.

Khan, Z. (2016). "An Exploration of Prisoners' Perceptions of the Incentives and Earned Privileges (IEP) Scheme: The Role of Legitimacy". *Prison Service Journal*. 227:11-16.

King, M. et al (2004). "Treatments of Homosexuality in Britain since the 1950s: An Oral History: The Experience of Professionals". *British Medical Journal*. 328: 429.

King, R. and McDermott, K. (1995). *The State of our Prisons*. Oxford: Oxford University Press.

Krafft-Ebing, Von, R. (1965). Transl. Klaf, F.S. *Psychopathia Sexualis: The Classic Study of Deviant Sex*. New York: Arcade Publishing.

Kunzel, R. (2008). *Criminal Intimacy: Prison and the Uneven History of Modern American Sexuality*. Chicago: University of Chicago Press.

Lacombe, D. (2008). "Consumed with Sex: The Treatment of Sex Offenders in Risk Society". *British Journal of Criminology*. 48(1): 55-74.

Lacroix, J. and Pranchere, J.Y. (2018). *Human Rights on Trial: A Genealogy of the Critiques of Human Rights*. Cambridge: Cambridge University Press.

LAGNA (1980). "Double Punishment". *Unidentified newspaper*, Jan 1980, LAGNA. Copy on file with author.

Lamble, S. (2012). "Rethinking Gendered Prison Policies: Impacts on Transgender Prisoners", *The Howard League for Penal Reform: ECAN Bulletin*. 16 (August 2012): 7.

Lamble, S. (2013). "Queer Necropolitics and the Expanding Carceral State: Interrogating Sexual Investments in Punishment." *Law Critique*. 24: 229-253.

Lara, A. (2010). "Forced Integration of Gay, Bisexual and Transgendered Inmates in California State Prisons: from Protected Minority to Exposed Victims". *Southern California Interdisciplinary Law Journal*. 19: 589 - 614.

- Leake, J. (2014). "Male prisoners jump at transgender privileges". *The Times*. 27 July 2014. <https://www.thetimes.co.uk/article/male-prisoners-jump-at-transgender-privileges-5zxhkc0jp0n>. (1 Dec 2017).
- Lee, A. (2008). "Trans Models in Prison: The Medicalization of Gender Identity and the Eight Amendment Right to Sex Reassignment Therapy". *Harvard Journal of Law and Gender*. 31: 447-471.
- Leitch, S. (1974). "The Drug Treatment of Male Sexual Offenders". *Prison Service Medical Journal*. 22-27. Kindly provided by Prison Service College Library. On file with the author.
- Liebling, A. (1995). "Vulnerability and Prison Suicide". *British Journal of Criminology*. 35(2): 173-187.
- Liebling, A. (1999). "Doing Research in Prison: Breaking the Silence". *Theoretical Criminology*. 3(2); 147—173.
- Liebling, A. (2004). *Prisons and their Moral Performance: A Study of Values, Quality and Prison Life*. Oxford: Oxford University Press.
- Liebling, A. (2008). "Incentives and Earned Privileges Revisited: Fairness, Discretion and the Quality of Prison Life". *Journal of Scandinavian Studies in Criminology and Crime Prevention*. 9: 25-41.
- Liebling, A. (2011). "Moral Performance, Inhuman and Degrading Treatment, Prison Pain". *Punishment and Society*. 2011(13): 530-529.
- Liebling, A. and Maruna, S. (2005). *The Effects of Imprisonment*. Cullompton, Devon: Willan Publishing.
- Lines, R. (2006). "From Equivalence of Standards to Equivalence of Objectives: The Entitlement of Prisoners to Health Care Standards Higher than those outside Prison", *International Journal of Prisoner Health*. 2(4): 269 – 280.
- Lines, R. (2008). "The Right to Health of Prisoners in International Human Rights Law". *International Journal of Prisoner Health*. 4(1): 3-53.
- Livingstone, S. (2000). "Prisoners' Rights in the Context of the European Convention on Human Rights". *Punishment and Society*: 2(3): 309-324.
- Livingstone, S., Owen, T., and MacDonnell, A. (2008). *Prison Law*. Oxford: Oxford University Press. 4th edition.
- Lombroso, C. and Ferrero W. (1909). *The Female Offender*. New York: D Appleton and Company.
- Lombroso, C. and Ferrero, G. (2004). *Criminal Woman, The Prostitute and The Normal Woman*. Translated and edited by N. Hahn Rafter and M. Gibson. Durham and London: Duke University Press.

- Lupton, D. (ed) (2003). *Risk and Sociocultural Theory*. Cambridge: Cambridge University Press.
- MacNeil, W. (1999). "Taking Rights Symptomatically - Jouissance, Coupure, Objet Petit a [sic]". *8 Griffith Law Review*. 134-151.
- Mann, R. (2006). "The Treatment of Transgender Prisoners, Not just an American Problem: A Comparative Analysis of American, Australian and Canadian Prison Policies concerning the Treatment of Transgender Prisoners". *Law and Sexuality*. 15: 91 - 133.
- Manning, S. (2017). "Now BOYS can be Girl Guides if they think they're the wrong gender – and anyone who says they're a woman can be at girls' sleepovers, without telling parents". *Mail on Sunday*. 21 Jan 2017. <http://www.dailymail.co.uk/news/article-4144118/BOYS-Girl-Guides-think-wrong-gender.html>. (1 Dec 2017).
- Marlow, K., Winder, B., and Elliot HJ. (2017). "Working with transgendered sex offenders: Prison Staff Experiences." *17(3) Journal of Forensic Practice*. 241-254.
- Mason, R. (2017). "Let trans people self-identify their gender, Corbyn urges May". *The Guardian*. 19 July 2017. <https://www.theguardian.com/society/2017/jul/19/let-trans-people-self-identify-gender-corbyn-urges-may>. (1 Dec 2017).
- Matthews, A. (2017). "Half of transgender prisoners could be sex offenders: Predatory inmates are 'falsely' defining their gender to target vulnerable women, charity warns." *Daily Mail*. 19 Nov 2017. <http://www.dailymail.co.uk/news/article-5097213/Half-trans-prisoners-sex-offenders.html>. (1 Dec 2017).
- Mayhew, H. and Binny, J. (1862). *The Criminal Prisons of London: Scenes of Prison Life*. London: Charles Griffin.
- McLaren, M. (2002). *Feminism, Foucault and Embodied Subjectivity*. Albany: State University of New York Press.
- McLelland, E. (2015). "Transgender woman 'injected bleach into her testicles and tried to cut off her scrotum after being denied hormone therapy in male prison'". *Daily Mail*. 17 Dec 2015. <http://www.dailymail.co.uk/news/article-3363751/Transgender-woman-injected-bleach-testicles-tried-cut-scrotum-denied-hormone-therapy-male-prison.html>. (1 Dec 2017).
- McNeil, J., Bailey, L., Ellis, S., Morton, J. and Regan, M. (2012) *Trans Mental Health Study 2012*. Sept 2012. https://www.scottishtrans.org/trans_mh_study/. (8 June 2018).
- McNeilley, K. (2016). *Critical Legal Thinking*. Livability [sic]: Notes on the Thought of Judith Butler. <http://criticallegalthinking.com/2016/05/26/livability-judith-butler/>. (1 Dec 2017).
- Meierhans, J. (2015). "Is a gender recognition certificate crucial or cruel?". *BBC News*. 20 Nov 2015. <http://www.bbc.co.uk/news/uk-england-34832811>. (1 Dec 2017).
- Mills, H. "Jail nightmare for prisoners of gender". *The Independent*. 8 May 1995: 5.

Minister of State for Justice (2012). "Solitary Confinement and Isolation of Prisoners". Statement. 26 January 2012. Reproduced at: <http://www.stopisolation.org/blog/uk-response-260112/>. (1 Dec 2015).

Ministry of Justice (2015). *Review into the Care and Management of Transgender Prisoners: Written Statement by the Parliamentary Under-secretary of State for Justice, Caroline Dineage and Terms of Reference*. 8 Dec 2015. <https://www.gov.uk/government/speeches/review-into-the-care-and-management-of-transgender-offenders>. (1 Dec 2017).

Ministry of Justice (2016a). *Review on the Care and Management of Transgender Offenders* 9 Nov 2016. <https://www.gov.uk/government/publications/care-and-management-of-transgender-offenders>. (1 Dec 2017).

Ministry of Justice (2016b). *Prisoner Transgender Statistics, March/April 2016: England and Wales*. 9 Nov 2016. <https://www.gov.uk/government/statistics/prisoner-transgender-statistics-march-to-april-2016>. (1 Dec 2017).

Ministry of Justice (2017). *National Offender Management Service Annual Offender Equalities Report 2016/1*. 20 Nov 2017. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/663390/noms-offender-equalities-annual-report-2016-2017.pdf. (8 June 2018).

Ministry of Justice and National Offenders Management Service (2017). *Safety in Custody Statistics. Quarterly Bulletin: June 2017*. Published 26 Oct 2017. <https://www.gov.uk/government/collections/safety-in-custody-statistics>. (1 Dec 2017)

Minkinen, P. (2011). "Book Reviews: Ben Golder and Peter Fitzpatrick, *Foucault's Law*". *Social and Legal Studies*. 20(1): 117-136.

Mirror Reporter. (2011). "Mail order lingerie for sex-change prisoners: padded bras, frilly knickers and make-up are being offered to male prisoners who love being jailbirds". *Mirror*. 7 March 2011. <http://www.mirror.co.uk/news/uk-news/mail-order-lingerie-for-sex-change-prisoners-114691>. (1 Dec 2011).

Mitchell, M. and Howarth, C. (2009). *Trans Research Review: Research Report 27*. For the Equality and Human Rights Commission. <https://www.equalityhumanrights.com/en/publication-download/research-report-27-trans-research-review>. (1 Dec 2017).

Monro, S. (2006). "Transmuting Gender Binaries: the Theoretical Challenge", *Sociological Research Online*. 12(1).

Montagu, E. (2000). *Wheels within Wheels: An Unconventional Life*. London: Weidenfeld and Nicolson.

Moran, L.J. (1996). *The Homosexual(ity) of Law*. London and New York: Routledge.

- Morgan, W. (1994). "Law and Change: Identifying Evil for what it is: Tasmania, Sexual Perversity and the United Nations". *Melbourne Law Review*. 19: 740-757.
- Morris, J. (1974/2002). *Connundrum*. London: Faber and Faber.
- Morris, S. (2015). "Transgender woman who was sent to male prison is freed". *The Guardian*. 3 Dec 2015. <https://www.theguardian.com/society/2015/dec/03/transgender-woman-who-was-sent-to-male-prison-is-freed>. (1 Dec 2017).
- Morris, T. and Morris, P. (1963). *Pentonville: A Sociological Study of an English Prison*. London: Routledge.
- Morss, J. (2013). "Saving Human Rights from its Friends: A Critique of the Imaginary Justice of Costas Douzinas". *Melbourne University Law Review*. 27: 889-904.
- Moyes, S. (2016). "Lags' trans op: sex offenders in male jail planning gender reassignment surgery costing taxpayer £84,000". *The Sun*. 16 October 2016. <https://www.thesun.co.uk/news/1985669/sex-offenders-in-male-jail-planning-gender-reassignment-surgery-costing-taxpayer-84000/>. (1 Dec 2017).
- Moyn, S. (2010). *Human Rights in History: The Last Utopia*. Cambridge, Mass: Belknap Press of Harvard University Press.
- Moyn, S. (2017). *Human Rights and the Uses of History*. Expanded 2nd Ed. London, New York: Verso.
- Munro, V. (2001). "Legal Feminism and Foucault: A Critique of the Expulsion of Law". *Journal of Law and Society*. 28(4):546-567.
- Murphy, T. and Whitty, N. (2007). "Risk and Human Rights in UK Prison Governance." *British Journal of Criminology*. 47(5): 798-816.
- Lidington, D. (2017). "Prison Reform: Open Letter from the Justice Secretary". 21 June 2017. <https://www.gov.uk/government/speeches/prison-reform-open-letter-from-the-justice-secretary>. (1 Dec 2017).
- Namaste, V. (1996). "Tragic misreadings: Queer Theory's Erasure of Transgender Subjectivity", in B. Beemyn and M. Eliason (eds). *Queer Studies: A Lesbian, Gay, Bisexual and Transgender Anthology*. New York and London: New York University Press.
- Namaste, V. (2000). *Invisible Lives: The Erasure of Transsexual and Transgender People*. Chicago: University of Chicago Press.
- Namaste, V. (2005). *Sex Change, Social Change: Reflections on Identity, Institutions and Imperialism*. Toronto: Women's Press (2nd edition).
- Namaste, V. (2009). "Undoing Theory: The Transgender Question and the Epistemic Violence of Anglo-American Feminist Theory". *Hipatia* 24: 3: 11-32.

- National Preventative Mechanism (2015). *Monitoring Places of Detention: Sixth Annual*
- Naylor, B. (2016). "Human Rights and their Application in Prisons". *Prison Service Journal*. 227: 17-22.
- Newburn, T. and Stanko, E.A. (eds) (1994). *Just Boys doing Business? Men, Masculinities and Crime*. London: Routledge.
- Newman, R. and Jeory, T. (2016). "Fears of DIY transitioning as hormone drugs sold to transgender women without checks". *The Independent*. 16 Nov 2016. <http://www.independent.co.uk/news/uk/home-news/female-hormone-drug-transgender-online-pharmacy-progynova-asset-chemist-gmc-cqc-a7403366.html>. (1 Dec 2017).
- NHS England (2015). *National Partnership Agreement between the National Offender Management Service, NHS England and Public Health England for the Co-Commissioning and Delivery of Healthcare Services in Prisons in England*. <https://www.england.nhs.uk/commissioning/health-just/hj-resources/>. (1 Dec 2017).
- NHS England (2017). *Gender Identity Services for Adults*. <https://www.engage.england.nhs.uk/survey/gender-identity-services-for-adults/>. (1 Dec 2017).
- NHS (2017). *Gender Dysphoria: Overview*. <http://www.nhs.uk/Conditions/Gender-dysphoria/Pages/policy-guidelines.aspx>. (1 Dec 2017).
- Norrie, A. (2017). *Book Review Forum: Foucault's Law: Review Commentary One*. *Law, Social Justice and Global Development Journal*. Issue 14: 2009(2). https://warwick.ac.uk/fac/soc/law/elj/lgd/2009_2. (1 Dec 2017).
- Nottingham Guardian Journal Reporter (1973). "Lesbians get men's clothing: Prison staff protest". *Nottingham Guardian Journal*. 18 May 1973. LAGNA. Copy on file with the author.
- Nygren, K., Ohman, S and Olofsson, A. (2017). "Doing and undoing risk: the mutual constitution of risk and heteronormativity in contemporary society". *Journal of Risk Research*. 20:3: 418-432.
- Office for National Statistics ("ONS") (2017). *Qualitative Research on Gender Identity: Phase 1 Summary Report*. <https://www.ons.gov.uk/methodology/classificationsandstandards/measuringequality/genderidentity/qualitative-research-on-gender-identity-phase-1-summary-report>. (1 Dec 2017).
- Okamura, A. (2011). "Equality behind Bars: Improving the Legal Protections of Transgender Inmates in the California Prison System". 8 *Hastings Race and Poverty Law Journal*. 109 - 137.
- O'Malley, P. (ed). (1998). *Crime and the Risk Society*. Dartmouth: Ashgate.

- O'Malley, P. (2010). *Crime and Risk*. London: Sage.
- Oparah, J. (2012). "Feminism and the (Trans)gender Entrapment of Gender Non-Conforming Prisoners. *UCLA Women's Law Journal*. 18: 327 - 38.
- Oppenheim, M. (2016). "Germaine Greer says 'it's not fair' for trans people to determine their gender." *The Independent*. 12 April 2016. <http://www.independent.co.uk/news/people/germaine-greer-stirs-controversy-for-her-latest-transgender-remarks-and-defends-real-women-comments-a6980166.html>. (1 Dec 2016).
- Owen, T. and MacDonald, A. (eds) (2015). *Livingston, Owen and MacDonald on Prison Law* (5th ed). Oxford: Oxford University Press.
- Pace, P.J. (1983). "Sexual Identity and the Criminal Law". *Criminal Law Review*: 317-321.
- Padel, U. and Stevenson, P. (1988). *Insiders: Women's Experiences of Prison*. London: Virago Press.
- Panther, L. (2011). "Fury over NHS sex-change for evil killer". *The People*. 30 Oct 2011. <http://www.mirror.co.uk/news/world-news/fury-over-nhs-sex-change-1701689>. (1 Dec 2017).
- Paras, E. (2006). *Foucault 2.0: Beyond Power and Knowledge*. New York: Other Press.
- Pearson, A. (2017). "When will the madness end in this brave new transgender world?". *The Telegraph*. 18 Oct 2017: 23.
- Pemberton, S. (2013). "Enforcing Gender: The Constitution of Sex and Gender in Prison Regimes". *Signs*. 39(1): 151 – 175.
- Petter, O. (2017). "Top Shop removes women-only changing rooms". *The Independent*. 8 Nov 2017. <http://www.independent.co.uk/life-style/fashion/topshop-removes-women-only-changing-rooms-shops-policy-single-sex-high-street-gender-neutral-a8043771.html>. (1 Dec 2017).
- Phillips, C. (2012). *The Multicultural Prison: Ethnicity, Masculinity, Race and Social Relations among Prisoners*. Oxford: Oxford University Press.
- Phillips, C. and Earler, R. (2010). "Reading Difference Differently?" *British Journal of Criminology*. 50(2); 360-378.
- Pidd, H. (2017). "Transgender woman at male prison did not mean to kill herself, jury finds". *The Guardian*. 19 May 2017. <https://www.theguardian.com/uk-news/2017/may/19/jury-returns-verdict-on-transgender-woman-found-dead-in-male-prison>. (1 Dec 2017).
- Player, E and Jenkins, M. (eds). (1994). *Prisons after Woolf: Reform through Riot*. London: Routledge.

- Plemons, E. (2017). *The Look of a Woman: Facial Feminisation Surgery and the Aims of Trans Medicine*. Durham and London. Duke University Press.
- Poole, L., Whittle, S., and Stephens, P. (2002). "Working with Transgendered and Transsexual People as Offenders in the Probation Service". *Probation Journal* 49: 227.
- Pottage, A. (2011). "Book Review of Ben Golder and Peter Fitzpatrick, *Foucault's Law*". *The Modern Law Review*. 74(1):150-170.
- Power, M. (2004). *The Risk Management of Everything: Rethinking the Politics of Uncertainty*. London: Demos.
- Power, M. (2007). *Organised Uncertainty: Designing a World of Risk Management*. Oxford: Oxford University Press.
- Pratt, J. (1995). "Dangerousness, Risk and Technologies of Power". *The Australian and New Zealand Journal of Criminology*. 28: 3-31.
- Pratt, J. (1998). "The Rise and Fall of Homophobia and Sexual Psychopath Legislation in Postwar Society." *Psychology, Public Policy and Law*. 4 (1/2): 25-49.
- Pratt, J. (2000). "The Return of the Wheelbarrow Men; or the Arrival of Postmodern Penalty?" *British Journal of Criminology*. 40: 127-145.
- Pratt, J. and Dickson, M. (1997). "Dangerous, Inadequate, Invisible, Out". *Theoretical Criminology*. 1(3): 363-384.
- Prison Officers' Association (2016). Press Release: *POA National Executive reject health and safety proposals*. 15 Nov 2016. Available at http://www.poauk.org.uk/index.php?press-releases&newsdetail=20161115-10_poa-national-executive-reject-health-safety-proposals. (1 Dec 2017).
- Prisons and Probation Ombudsman ("PPO") (2008). *Investigation into the circumstances surrounding the death of a woman, who was a prisoner at HMP Eastwood Park, in October 2006*. (Lisa Woodhall). <https://www.ppo.gov.uk/app/uploads/2014/07/094-06-death-of-a-female-prisoner.pdf> (1 Dec 2017).
- Prisons and Probation Ombudsman ("PPO") (2015a). *Investigation into the death of a man at HMP Belmarsh in April 2013*. (Senthooran Kanagasingham). <http://www.ppo.gov.uk/app/uploads/2015/03/J008-13-Death-of-a-male-prisoner-Belmarsh-08-04-2013-SID-31-401.pdf>. (1 Dec 2017).
- Prisons and Probation Ombudsman ("PPO") (2015b). *Investigation into the circumstances surrounding the death of a woman at HMP Full Sutton in July 2012* (Billie Evans). <http://www.ppo.gov.uk/app/uploads/2014/07/H058-12-death-of-a-female-prisoner-fullsutton-12-07-2012-SID-41-50.pdf> (1 Dec 2017).

Prisons and Probation Ombudsman (“PPO”) (2015c). *Written Evidence submitted to the Transgender Equality Inquiry*. TRA0252. 13 October 2015. <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/written/22309.html>. (1 Dec 2015).

Prisons and Probation Ombudsman (“PPO”) (2016). *Independent investigation into the death of Ms Joanne Latham, a prisoner at HMP Woodhill, on 27 November 2015*. <http://www.ppo.gov.uk/app/uploads/2016/09/L215-15-Death-of-Ms-Joanne-Latham-Woodhill-27-11-2016-SID-31-40.pdf> (1 Dec 2017).

Prisons and Probation Ombudsman (“PPO”) (2017a). *Learning Lessons Bulletin: PPO Investigations Issue 3: Transgender Prisoners*. Jan 2017. <http://www.ppo.gov.uk/app/uploads/2017/01/PPO-Learning-Lessons-Bulletin-Transgender-prisoners-Final-WEB-Jan-17.pdf> (1 Dec 2017).

Prisons and Probation Ombudsman (“PPO”) (2017b). *Independent investigation into the death of Ms Vikki Thompson a prisoner at HMP Leeds on 15 November 2015*. Available at <http://www.ppo.gov.uk/app/uploads/2017/05/L204-15-Death-of-Ms-Vicky-Thompson-Leeds-13-11-2015-SID-18-21.pdf> (1 Dec 2017).

Prison Reform Trust (2015). *Written Evidence submitted to the Transgender Equality Inquiry*. TRA0198. 15 September 2015. <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/written/19621.pdf>. (1 Dec 2017).

Prison Reform Trust (2014). *Punishment without Purpose: The Incentives and Earned Privileges (IEP) Scheme and its Impact on Fairness, Decency and Rehabilitation behind Bars*. <http://www.prisonreformtrust.org.uk/Portals/0/Documents/punishment%20without%20purpose%20FINAL2941007.pdf> (1 Dec 2017).

Prison Reform Trust (2017). *PRT Briefing on the Prisons and Courts Bill*. 29 March 2016. <http://www.prisonreformtrust.org.uk/PressPolicy/News/vw/1/ItemID/416> (1 Dec 2017)

Prosser, J. (1998). *Second Skins: The Body Narratives of Transsexuality*. New York: Columbia University Press.

Quinn, B. (2015). “Partner of transgender woman found dead in prison calls for law change”. *The Guardian*. 15 Dec 2015. <https://www.theguardian.com/society/2015/nov/20/partner-transgender-woman-found-dead-prison-law-change-vicky-thompson>. (1 Dec 2017).

Quinn, P. (1999). “Wrongs and Rights”. *Prison Service Journal*. 121: 2-7.

Radical Feminist Legal Support Network (2015). *Written Evidence submitted to the Transgender Equality Inquiry*. TRA 0052. 13 Oct 2015.

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/written/19258.pdf>. (1 Dec 2017).

Rafter, N. (1985). *Partial Justice: State Prisons and Their Inmate, 1800 -1935*. Boston: North Eastern University Press.

Randell, J. (1959). "Transvestitism and Trans-sexualism: A Study of 50 Cases". *British Medical Journal*. 1448-1452.

Raymond, J. (1980). *The Transsexual Empire*. London: The Women's Press.

Ricciardelli, R., Maeier, K. and Hannah-Moffat, K. (2015). "Strategic Masculinities: Vulnerabilities, Risk and the Production of Prison Masculinities". 19(4): 491-513.

Roberts, R. (2017). "Census considering removal of sex question over discrimination against transgender and non-binary people". *The Guardian*. 8 Oct 2017.

<http://www.independent.co.uk/news/uk/home-news/census-gender-transgender-non-binary-concerns-women-written-out-of-existence-germaine-greer-a7988991.html>. (1 Dec 2017).

Robinson, M. (2015). "One in three cases lost by Britain at the European Court of Human Rights are [sic] brought by terrorists, prisoners or criminals". *Mail Online*. 18 August 2015. <http://www.dailymail.co.uk/news/article-3201918/One-three-cases-lost-Britain-European-Court-Human-Rights-brought-terrorists-prisoners-criminals.html>. (1 Dec 2017).

Rose, N. (1996). "Psychology as a Political Science: Advanced Liberalism and the Administration of Risk". *Psychiatry, Psychology and Law*. 5(2): 177-95.

Rose, N. (2000). "Government and Control". *British Journal of Criminology*. 40: 321-339.

Rosenblum, D. (2000). "Trapped in Sing Sing: Transgendered prisoners caught in the gender binarism". *Michigan Journal of Gender and Law*. 6: 499-571.

Rosenkrantz, M. (2010). "Review. Ben Golder and Peter Fitzpatrick, Foucault's Law 2009". *Foucault Studies*. 8: 146-150.

Rosenthal, S. (2014). "Approach to the Patient: Transgender Youth: Endocrine Considerations". *Journal of Clinical Endocrinology and Metabolism*. 99 (12): 4379-4389.

Rotondi, N., Bauer, G., Scanlon, K, Kaay, M., Travers, R. and Travers, A.(2013). "Non-prescribed hormone use and self-performed surgeries: "Do-It-Yourself" Transitions in Transgender Communities in Ontario, Canada". *American Journal of Public Health*. 103(10): 1830-1836.

Rowe, A. (2011). "Narratives of Self and Identity in Women's Prisons: Stigma and the Struggle for Self-Definition in Penal Regimes". *Punishment and Society*. 13: 571 -591.

Rubin, H. (2003). *Self-Made Men: Identity and Embodiment among Transsexual Men*. Nashville: Vanderbilt University Press.

- Ryan, J. (2016a). "Transgender Prisoners: Allocation and Segregation". Paper presented at TransJustice conference on *Current Challenges faced by trans and gender non-conforming people in the criminal justice system*, Garden Court Chambers, London, 20 May 2016.
- Ryan, J. (2016b). "Transgender Issues in the Criminal Justice System." *Legal Action* . Nov 2016: 14-15.
- Sabo, D., Kupers, T., and London, W. (eds) (2001). *Prison Masculinities*. Philadelphia: Temple University Press.
- Sandell, C. (1980). "Gang terror of jail girls in men's clothing". *News of the World*. 20 April 1980. LAGNA. Copy on file with the author.
- Sandland, R. (1995). "Between 'Truth' and 'Difference': Poststructuralism, Law and the Power of Feminism. *Feminist Legal Studies*. 3:3-47.
- Sandland, R. (2003). "Crossing and Not Crossing: Gender, Sexuality and Melancholy in the European Court of Human Rights". *Feminist Legal Studies*. 11: 191-209.
- Sandland, R. (2005). "Feminism and the Gender Recognition Act 2004". *Feminist Legal Studies* 13: 43 – 66.
- Sandrock, T. (1973). "State cash buys men's clothes for lesbians". *Manchester Daily Telegraph*. 18 May 1973. LAGNA. Copy on file with the author.
- Sanghani, R. (2016). "The harrowing reality of being a transgender woman in an all-male prison". *The Telegraph*. 15 Jan 2016. <http://www.telegraph.co.uk/women/life/tara-hudson-the-harrowing-reality-of-being-a-trans-woman-in-an-a/>. (1 Dec 2017).
- Savage, M. and Townsend, M. (2018). "Exclusive: shock figures reveal crisis state of prisons in England and Wales". *The Guardian*. 17 Feb 2018. <https://www.theguardian.com/society/2018/feb/17/uk-brutal-prisons-failing-violence-drugs-gangs>. (20 June 2018).
- Schofield, M. (1965). *Sociological Aspects of Homosexuality: A Comparative Study of Three Types of Homosexuals*. London: Longmans.
- Schone, J.M. (2001). "The Short Life and Painful Death of Prisoners' Rights". *The Howard Journal*. 40(1): 70 - 82.
- Scottish Women against Pornography. (2015). *Written Evidence submitted to the Transgender Equality Inquiry*. TRA0199. 13 October 2015. <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/written/19623.pdf>. (1 Dec 2017).
- Scotney, T. (2007). "Jailbird sues prison for not freeing him to have sex change: AND YOU'RE PAYING". *Sunday Mercury*. 8 July 2007: 21.

Scott, D. (2013). "The Politics of Prisoner Legal Rights". *Howard Journal of Criminal Justice*. 52(3): 233-250.

Scottish Prison Service (2014). *Gender Identity and Gender Reassignment Policy for those in our Custody*. <http://www.sps.gov.uk/Corporate/Publications/Publication-2561.aspx>. (8 June 2018).

Sedgwick, E. (1990). *Epistemology of the Closet*. Berkeley: University of California Press.

Sen, A. (2004). "Elements of a Theory of Human Rights". 32 *Philosophy and Public Affairs*. 315-356.

Serano, J. (2007). *Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity*. Berkeley, California: Seal Press.

Serano, J. (2012). *Trans-misogyny Primer*. <http://juliaserano.blogspot.co.uk/2012/04/trans-misogyny-primer.html>. (1 Dec 2017).

Serano, J. (2013). *Excluded: Making Feminist and Queer Movements more Inclusive*. Berkeley, California: Seal Press.

Sexton, L., Jenness, V. and Sumner, J. (2010). "Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men's Prisons". *Justice Quarterly* 27(6): 835-866.

Sexton, L. and Jenness, V. (2016). "'We're like community': Collective identity and collective efficacy among transgender women in prisons for men". *Punishment and Society*. 18(5): 544-577.

Sharpe, A. (2002). *Transgender Jurisprudence: Dysphoric Bodies of Law*. London: Cavendish.

Sharpe, A. (2007). "Endless Sex: The Gender Recognition Act 2004 and the Persistence of a Legal Category". *Feminist Legal Studies* 15: 57-84.

Sharpe, A. (2010). *Foucault's Monsters and the Challenge of Law*. Abingdon, Oxon: Routledge.

Sharpe, A. (2012). "Transgender Marriage and the Legal Obligation to Disclose Gender History". *Modern Law Review*. 75(1): 33-53.

Sharpe, A. (2014). "Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent". *Criminal Law Review*. 207-223.

Sharpe, A. (2015). "The Dark Truth behind the Convictions for Gender Fraud". *New Statesman*. 16 Dec 2015.

Sharpe, A. (2016). "Expanding Liability for Sexual Fraud through the Concept of 'Active Deception': A Flawed Approach". *Journal of Criminal Law*. 80(1): 28-44.

Sharpe A. (2017). "Queering Judgment: The Case of Gender Identity Fraud". *Journal of Criminal Law*. 81(5): 417-435.

- Sharpe, A., Emmerich, F. and Emerton, R. (2016). *Submission to Ministry of Justice Inquiry into the Care and Management of Transgender Offenders*.
- Shefer, G. (2012). "The Impact of Performance Management Culture on Prison-Based Therapeutic Prison Communities". *European Journal of Criminology*. 9: 407 – 424.
- Sheldrick, G. "NHS in new storm as burglar is allowed £20,000 sex-change surgery". 14 Aug 2013. *Sunday Express*. <https://www.express.co.uk/news/uk/421853/NHS-in-new-storm-as-burglar-is-allowed-20-000-sex-change-surgery> (1 Dec 2017).
- Shelley, C. (2008). *Transpeople: Repudiation, Trauma, Healing*. Toronto: University of Toronto Press.
- Sieh, E. (1989). "Less Eligibility: The Upper Limits of Penal Policy". *Criminal Justice Policy Review*. 3(2): 159-183.
- Sim, J. (1990). *Medical Power in Prisons: The Prison Medical Service in England 1774 – 1989*. Milton Keynes: Open University Press.
- Sim, J. (1994). "Tougher than the Rest? Men in Prison", in T. Newburn and E. Stanko (eds) *Just Boys Doing Business? Men, Masculinities and Crime*. London: Routledge. 100-117.
- Sim, J. (2009). *Punishment and Prisons; Power and the Carceral State*. London: Sage.
- Simon, J. (1998). "Managing the Monstrous: Sex Offenders and the New Penology". *Psychology, Public Policy and Law*. 4(1): 452-467.
- Slawson, N. (2015). "Transgender woman found dead in all-male prison". *The Guardian*. 19 Nov 2015. <https://www.theguardian.com/society/2015/nov/19/transgender-woman-found-dead-in-all-male-prison>. (1 Dec 2017).
- Smart, C. (1976). *Women, Crime and Criminology: A Feminist Critique*. Henley and London: Routledge and Kegan Paul.
- Smart, C. (1989). *Feminism and the Power of Law*. London: Routledge.
- Smith, A. (1978). "Bizarre drugs that 'cure' sex offenders must be banned, says psychiatrist". *Daily Mail*. 11 Nov 1978. LAGNA. Copy on file with the author.
- Smith, A. (1980). "Prison Torment of Sex-Change Linda: Docs Ban Hormone 'Fix'". *Daily Star*. 31 Jan 1980: 5.
- Smith, A. (2014). "Stories of Os: Transgender Women, Monstrous Bodies and the Canadian Prison System." *Dalhousie Journal of Legal Studies*. 23: 149 – 171.
- Smith, W. (2012). "In the Footsteps of *Johnson v California*: Why Classification and Segregation of Transgender Inmates warrants heightened Scrutiny". *The Journal of Gender, Race and Justice*. 15: 689-726.

- Snider, L. (2003). "Constituting the Punishable Woman: Atavistic Man Incarcerates Postmodern Woman". *British Journal of Criminology*. 43(2): 354-378.
- Souhami, D. (1998/2013). *The Trials of Radclyffe Hall*. London: Quercus.
- Spade, D. (2011/2015). *Normal Life: Administrative Violence, Critical Trans Politics and the Limits of the Law* (Brooklyn, NY: South End Press 2011/2015).
- Spade, D. (2003). "Resisting Medicine, Remodelling Gender". *Berkeley Women's Law Journal*. 18: 15-37.
- Spade, D. (2009). "Keynote Address: Trans Law Reform Strategies, Co-optation, and the Potential for Transformative Change". *Women's Rights Law Reporter*. 30: 288-414.
- Spade, D. (2012). "Law as Tactics". 21 *Columbia Journal of Gender and Law*. 40-71.
- Sparks, R. (2000). "Perspectives on Risk and Penal Politics" in T. Hope and R. Sparks (eds). *Crime, Risk and Insecurity*. London: Routledge.
- Sparks, R., Bottoms, A. and Hay, W. (1966). *Prisons and the Problem of Order*. Oxford: Clarendon Press.
- Stanley, E. and Smith, N. (eds). (2011). *Captive Genders: Trans Embodiment and the Prison Industrial Complex* (AK Press, Edinburgh, Oakland, Baltimore 2011).
- Stanley-Jones, D. (1947). "Homosexuals in Prison". *British Medical Journal*. Oct 25: 2 (4529): 671.
- Stone, J. (2016). "Plans to replace Human Rights Act with British Bill of Rights will go ahead, Justice Secretary confirms". *The Independent*. 22 Aug 2016. <http://www.independent.co.uk/news/uk/politics/scrap-human-rights-act-british-bill-of-rights-theresa-may-justice-secretary-liz-truss-a7204256.html>. (1 Dec 2017).
- Stone, S. (1996). "The Empire Strikes Back: A Post-transsexual Manifesto", in K. Straub and J. Epstein (eds). *Body Guards; The Cultural Politics of Sexual Ambiguity*. New York: Routledge 1996.
- Stonewall (2018). *LGBT in Britain: Trans Report*. <https://www.stonewall.org.uk/sites/default/files/lgbt-in-britain-trans.pdf>. (8 June 2018).
- Sumner, J. and Sexton, L. (2015). "Lost in Translation: Looking for Transgender Identity in Women's Prisons and Locating Aggressors in Prisoner Culture". *Critical Criminology*. 23:1-20.
- Sumner, J. and Jenness, V. (2014). "Gender Integration in Sex-Segregated US Prisons: The Paradox of Transgender Correctional Policy" in D. Peterson and V.R. Panfil (eds). *Handbook of LGBT Communities, Crime and Justice*. New York: Springer. 229: 269.

Sumner, J. and Sexton, L. (2016). "Same Difference: The 'Dilemma of Difference' and the Incarceration of Transgender Prisoners". *Law and Social Inquiry*. 41(3): 616-642.

Stohr, M.K. (2015). "The Hundred Years' War: The Etiology and Status of Assaults on Transgender Women in Men's Prisons. *Women and Criminal Justice*. 25: 120-129.

Strickland, P. (2016). *Transgender Prisoners: House of Commons Library Briefing Paper No 07420*. 28 Nov 2016.

<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7420> (8 June 2018).

Stryker, S. (1994). "My Words to Victor Frankenstein above the Village of Chamounix: Performing Transgender Rage". *GLQ* 1(3): 237-254.

Stryker, S. and Whittle, S. (eds). 2006. *The Transgender Studies Reader*. New York: Routledge.

Swinford, S. (2013). "Alan Turing granted Royal pardon by the Queen". *The Telegraph*. 24 Dec 2013. <http://www.telegraph.co.uk/history/world-war-two/10536246/Alan-Turing-granted-Royal-pardon-by-the-Queen.html>. (1 Dec 2017).

Sykes, G. (1958). *The Society of Captives: A Study of a Maximum Security Prison*. New Jersey: Princeton University Press.

Tadros, V. (1998) "Between Governance and Discipline: The Law and Michel Foucault". *Oxford Journal of Legal Studies*. 18: 75-103.

Tamplin, H. (2017). "Transgender prisoner found hanging in her cell died as a result of 'misadventure'". *Metro*. 22 Dec 2017. <http://metro.co.uk/2017/12/22/transgender-prisoner-found-hanging-cell-died-result-misadventure-7176281/>. (26 Dec 2017).

Tarzwel, S. (2006). "The Gender Lines are marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners". *Columbia Human Rights Law Review*. 38: 167-220.

Telegraph Reporter (2005). "Four Years for Burglar in Search of a Sex Change". *The Telegraph*. 6 Aug 2005.

Telegraph Reporter (2013). "Prisoners Seek Cash for Sex-Change Surgery". *The Telegraph*. 22 Mar 2013: 2.

Telegraph Reporters (2017a). "Transgender rapist moved to female prison 'after NHS sex change'. *The Telegraph*. 21 March 2017.

<http://www.telegraph.co.uk/news/2017/03/21/transgender-rapist-moved-female-prison-nhs-sex-change/>. (1 Dec 2017).

Telegraph Reporters (2017b). "All prisoners should be allowed to wear their own clothes because transgender inmates can, inspectors say". *The Telegraph*. 5 Jan 2017.

<http://www.telegraph.co.uk/news/2017/01/05/prisoners-should-allowed-wear-clothes-transgender-inmates-can/>. (1 Dec 2017).

Telegraph Reporters (2017c). “No sex on the census: ONS proposes making ‘intrusive’ question voluntary”. *The Telegraph*. 8 Oct 2017. <http://www.telegraph.co.uk/news/2017/10/08/no-sex-census-ons-proposes-making-intrusive-question-voluntary/>. (1 Dec 2017).

The Independent “Owl” Reporter (2017). “A recent study claimed that 41 per cent of transgender prisoners are sex offenders – this is why it’s false”. *The Independent*. 23 Nov 2017. <http://www.independent.co.uk/voices/41-per-cent-trans-transgender-trans-women-prisoners-sex-offenders-false-study-statistic-this-is-why-a8072431.html>. (1 Dec 2017).

Times Reporter (1978). “Prisoner lost breast after hormone treatment”. *The Times*. 29 Nov 1978. LAGNA. Copy on file with the author.

Times Reporter (2000). “Sex change row”. *The Times*. 20 Oct 2000: 8.

Tominey, C. (2017). “Stay in Jail until you have sex-op, sex offenders told”. *Daily Mail*. 5 Nov 2017. <https://www.express.co.uk/news/uk/875515/transgender-inmates-male-jails-until-op-sex-offenders>. (1 Dec 2017).

Townsend, M. (2018). “Transgender woman sues over ordeal in male prison”. *The Guardian*. <https://www.theguardian.com/society/2018/jan/20/tara-hudson-transgender-prisoner-sues-government>. (20 June 2018).

Tran, S. and Glazer, E. (2012). “Transgenderless”. *Harvard Journal of Law and Gender*. 35: 399-422.

Transgender Europe et al (2015). *In the European Court of Human Rights: Bogdanova v. Russia (Application No. 63378/13): Written Comments submitted jointly by Transgender Europe (TU), Coming Out, The European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) and The European Professional Association for Transgender Health (EPATH)*. 10 June 2015. https://tgeu.org/wp-content/uploads/2015/07/Bogdanova-v-Russia_third-party-intervention-FINAL.pdf. (1 Dec 2017).

Travis, A. (2016). “Prisons brought to brink of collapse by Tory Lord Chancellors, says ex-boss”. *The Guardian*. 12 Dec 2016. <https://www.theguardian.com/society/2016/dec/12/prisons-brought-to-brink-of-collapse-by-tory-lord-chancellors-says-ex-boss>. (1 Dec 2017).

Travis, A. (2017a). “Prison suicides in England and Wales reach record high”. *The Guardian*. 26 Jan 2017. <https://www.theguardian.com/society/2017/jan/26/prison-suicides-in-england-and-wales-reaches-record-high>. (1 Dec 2017).

- Travis, A. (2017b). "Up to 100 Prisoners on Short Sentences to be given Right to Vote". *The Guardian*. 2 Nov 2015. <https://www.theguardian.com/society/2017/nov/02/up-to-100-prisoners-on-short-sentences-to-be-given-right-to-vote>. (1 Dec 2017).
- Travis, A. and Bowcott, O. (2017). "Cuts to Legal Aid for Prisoners Ruled Unlawful". *The Guardian*. 10 April 2017. <https://www.theguardian.com/law/2017/apr/10/cuts-legal-aid-for-prisoners-unlawful-court-of-appeal>. (1 Dec 2017).
- Trumbach, R. (1991). "Sex, Gender, and Sexual Identity in Modern Culture: Male Sodomy and Female Prostitution in Enlightenment London". *Journal of the History of Sexuality*. 2(2): 186-203.
- Trumbach, R. (1998). "Sex and the Gender Revolution: Heterosexuality and the Third Gender in Enlightenment London". Chicago and London: The University of Chicago Press.
- United Nations ("UN"). Special Rapporteur on Torture (2001). *Question of torture and other cruel, inhuman or degrading treatment or punishment*. A/56/156 of 3 July 2001.
- Upchurch, C. (2000). "Forgetting the Unthinkable: Cross-dressers and British Society in the Case of *Queen v Boulton and Others*". *Gender and History*. 12(1): 127-157.
- Upchurch, C. (2009). *Before Wilde: Sex Between Men in Britain's Age of Reform*. Berkeley, Los Angeles, London: University of California Press.
- Uttoxeter Post Reporter (2007). "Cross-dressing Crook's Sex Fight". *Uttoxeter Post and Times*. 11 July 2007.
- Van Zyl Smit, D. and Snacken, S. (2009). *Principles of European Prison Law and Policy*. Oxford: Oxford University Press.
- Veitch, A. (1980). "A Blonde Locked up with 1,500 Men in the Scrubs". *Unidentified newspaper*. Jan 1980. LAGNA, copy on file with author.
- Vitulli, E.W. (2013). "Queering the Carceral: Intersecting Queer/Trans Studies and Critical Prison Studies". *GLQ: A Journal of Lesbian and Gay Studies*. 19(1): 111-123.
- Waldron, J. (1987/2014). *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man*. First published New York: Methuen; Abingdon, Oxon: Routledge Revivals.
- Watt, N. (2015). "Michael Gove to proceed with Tories' plans to scrap Human Rights Act". *The Guardian*. 10 May 2015. <https://www.theguardian.com/politics/2015/may/10/michael-gove-to-proceed-with-tories-plans-to-scrap-human-rights-act>. (1 Dec 2017).
- Watt, H. (2017). "Violence and self-harm in UK Prisons continues to surge." *The Guardian*. 26 Oct 2017. <https://www.theguardian.com/society/2017/oct/26/uk-prisons-violence-self-harm-continues-to-surge>. (1 Dec 2017).
- Weeks, J. (1977). *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present*. (London: Quartet Books).

Weeks, J. (1991). *Against Nature: Essays on History, Sexuality and Identity*. London: Rivers Oram Press.

Weeks, J. (1981/2012). *Sex, Politics and Society: The Regulation of Sexuality since 1800* (Third Edition). Harlow: Pearson Education Limited.

WESC (2015), see House of Commons Women's and Equalities Select Committee above.

Westbrook, L. and Schilt, K. (2014). "Doing Gender: Determining Gender: Transgender People, Gender Panics, and the Maintenance of the Sex/Gender/Sexuality System". *Gender and Society*. 28(1):32-57.

West Yorkshire (Eastern) Coroner's Court (2017a). *Narrative Conclusion of the Jury: Inquest touching the death of Vikki Louise Angie Jade Thompson (deceased), before Area Coroner, Jonathan Leach*: Case No 3304/15. 19 May 2017. On file with the author.

West Yorkshire (Eastern) Coroner's Court (2017b). Author's simultaneous notes of inquest touching the death of *touching the death of Vikki Louise Angie Jade Thompson (deceased), before Area Coroner, Jonathan Leach*: Case No 3304/15. 12 May, 15 May, 16 May and 17 May 2017.

White, M. (1977). "Sexual Offenders in Prison: An Experiment in Group Treatment". *Prison Medical Service Journal*. 19-25. Kindly provided by Prison Service College Library. On file with the author.

Whittle, S. and Stephens, P. (2001). *A Pilot Study of Provision for Transsexual and Transgender People in the Criminal Justice System, and the Needs of their Probation Officers*. Kindly provided by Dr Whittle. On file with the author.

Whittle, S. (2002). *Respect and Equality; Transsexual and Transgender Rights*. London: Cavendish.

Whittle, S. and Turner, L. (2007). "Sex Changes? Paradigm Shifts in 'Sex' and 'Gender' following the Gender Recognition Act". *Sociological Research Online*. 12(1).

Whittle, S., Turner, L. and Al-Alami, M. (2007). *The Equalities Review: Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination*. Press for Change. <http://www.pfc.org.uk/pdf/EngenderedPenalties.pdf> (1 Dec 2017).

Whittle, S. (2016). "Chris Wilson, convicted because of his clothes". Available at <http://whittlings.blogspot.co.uk/2013/04/chris-wilson-convicted-because-of-his.html>. (Last visited 1 Dec 2016).

Whittle, S. and Stryker, S. (eds) (2006). *The Transgender Studies Reader*. London/New York: Routledge.

Whitty, N. (2011). "Human rights as Risk: UK Prisons and the Management of Risks and Rights". *Punishment and Society* 13(2): 123-148.

- Wildeblood, P. (1955). *Against the Law*. Harmondsworth, Middlesex: Penguin Books Ltd.
- Williams, D. (2006) "Victims Condemn Prisoner's £50,000 Sex Swop" [sic]. *Daily Mail*. 13 Jan 2006: 8.
- Williams, P. J. (1991). *The Alchemy of Race and Rights*. Cambridge, Mass: Harvard University Press.
- Williams, R. (2014). "Facebook's 71 gender options come to UK". *The Telegraph*. 27 June 2014. <http://www.telegraph.co.uk/technology/facebook/10930654/Facebooks-71-gender-options-come-to-UK-users.html>. (1 Dec 2017).
- Winer, S. (2013). "Supreme Court rules leniency for transgender prisoner". *The Times of Israel*. 15 Sept 2013. <https://www.timesofisrael.com/supreme-court-rules-leniency-for-transgender-prisoner/> (1 Dec 2017).
- Wintemute, R. (1997). "Recognising New Kinds of Direct Discrimination: Transsexualism, Sexual Orientation and Dress Codes". *Modern Law Review*. 60(3): 334-359.
- Wintour, P and Sparrow W. (2012). "I won't give prisoners the vote, says David Cameron". *Guardian*. 24 Oct 2012.
- Women Analysing Policy on Women. (2015). *Written Evidence submitted to the Transgender Equality Inquiry*. TRA0086. 13 Oct 2015. <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/written/19382.pdf>. (1 Dec 2017).
- Women and Girls Equality Network (2015). *Written Evidence submitted to the Transgender Equality Inquiry*. TRA 0207. 13 Oct 2015. <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/written/19634.pdf>. (1 Dec 2015).
- Woods, J.B. (2014). "Queer Contestations and the Future of a Critical 'Queer Criminology'". *Critical Criminology*. 22: 5-19.
- Wool, R. (1978). "Grendon 'F' Wing". *Prison Medical Journal*. 19: 46-48. Access provided by Prison Service College Library. On file with the author.
- Wright, P. and Palumbo, D. (2016). "UK Prisons Crisis: Five Graphs showing why officers are striking as chaos erupts behind bars". *International Business Times*. 15 Nov 2016. <http://www.ibtimes.co.uk/uk-prisons-crisis-five-graphs-showing-why-officers-are-striking-chaos-erupts-behind-bars-1591687> (1 Dec 2017).
- Yona, L. (2016). "Keepin' it "real": Israel's Segregation of Transgender Prisoners and the Transgender/ Cisgender Binary". *Buffalo Journal of Gender, Law and Social Policy*. 24: 43-67.
- Yorkshire Post Reporter (1973). "Call for end to prison women in male dress". *Yorkshire Post*. 18 May 1973. LAGNA. On file with the author.

- Yorkshire Evening Post Reporter (1980). "Warder brought me perfume – ex-prisoner". *Yorkshire Evening Post*. 10 Oct 1980. LAGNA. Copy on file with the author.
- Zanghellini, A. (2009). "Queer, Antinormativity, Counter-Normativity and Abjection". 18(1). *Griffith Law Review*. 1-16.
- Zedner, L. (1991a). *Women, Crime and Custody in Victorian England*. Oxford: Clarendon Press.
- Zedner, L. (1991b). "Women, Crime and Penal Responses: A Historical Account". *Crime and Justice* 14: 307 – 362.
- Zedner, L. (2006). "Neither Safe nor Sound? The Perils and Possibilities of Risk." *Canadian Journal of Criminology and Criminal Justice*. 423-434.
- Zedner, L. (2007a). "Pre-Crime and Post-Criminology?" *Theoretical Criminology*. 11(2): 261-281.
- Zedner, L. (2007b). "Seeking Security by Eroding Rights: The Side-Stepping of Due Process" in Goold, B. and Lazarus. L. *Security and Human Rights*. Oxford: Hart.
- Zhou JN, Hofman MA, Gooren, LJ, Swaab DF (1995). "A sex difference in the human brain and its relation to transsexuality". *Nature* 1995 (378): 68-70.

Appendix A: Ethics Review Panel Approval



Ref: ERP2258

17th July 2015

Robyn Emerton
School of Law
Chancellors Building
Keele University
Staffordshire
ST5 5BG

Dear Robyn

Re: The role of Human Rights in Advocacy for Transgender Prisoners

Thank you for submitting your revised application for review.

I am pleased to inform you that your application has been approved by the Ethics Review Panel. The following documents have been reviewed and approved by the panel as follows:

Document(s)	Version Number	Date
Summary Document	2	8 th July 2015
Letter of Invitation	1	3 rd April 2015
Information Sheet	2	8 th July 2015
Consent Form	2	8 th July 2015
Interview Schedule/Questionnaire	1	20 th May 2015

If the fieldwork goes beyond the date stated in your application (1st October 2017), you must notify the Ethical Review Panel via the ERP administrator at uso.erps@keele.ac.uk stating ERP2 in the subject line of the e-mail.

If there are any other amendments to your study you must submit an 'application to amend study' form to the ERP administrator stating ERP2 in the subject line of the e-mail. This form is available via <http://www.keele.ac.uk/researchsupport/researchethics/>.

Directorate of Engagement & Partnerships
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If you have any queries, please do not hesitate to contact me via the ERP administrator on uso.erps@keele.ac.uk stating ERP2 in the subject line of the e-mail.

Yours sincerely



Dr Bernadette Bartlam
Chair – Ethical Review Panel 2

CC RI Manager
Supervisor

Appendix B: Interview Schedule

THE ROLE OF HUMAN RIGHTS IN ADVOCACY FOR TRANSGENDER PRISONERS

INTERVIEW SCHEDULE FOR VOLUNTARY SECTOR AND OTHER INDIVIDUALS ACTING IN A PROFESSIONAL CAPACITY (VERSION 1, 20 MAY 2015, APPROVED)

A. Advocating on behalf of individual transgender prisoners

1. Has your organisation ever been involved in assisting, advising or advocating on behalf of *individual* transgender prisoners?

If not - proceed to part B questions.

If so, please can you tell me about your organisation's involvement. In particular:-

- What sort of involvement has your organisation had, and when?
 - What triggered your organisation's involvement?
 - What type of issues have been raised with you by transgender people about their experiences in prison?
 - Have you been able to help, and in what way?
 - Have you relied on any human rights-based arguments in your advice to, or advocacy on behalf of, transgender prisoners?
 - If so, did you find the use of human rights arguments beneficial – if yes, in what way? And if not, why not?
 - How were the issues resolved? In your view, were the issues resolved satisfactorily?
2. Have you used PSI 07/2011 on the *Care and Management of Transsexual Prisoners* in your advice to, or advocacy on behalf of transgender prisoners? In what way? Has this PSI been useful in your work, and how? (Possible overlap with question A.1)
 3. In your general experience, what *benefits* (if any) arise from using human rights-based arguments to advocate on behalf of transgender prisoners?
 4. In your general experience what *problems* (if any) arise from using human rights-based arguments to advocate on behalf of transgender prisoners?

B. Advocacy for policy reform [Voluntary Sector Organisations only]

General Questions

1. Has your organisation ever been involved in campaigning for the reform of prison policy regarding transgender prisoners? If so, please can you tell me about your organisation's involvement? In particular:
 - When was this involvement, and in what way was/is your organisation involved?
 - What triggered your organisation's involvement?
 - What types of issues were you/ are you campaigning for?
 - Did you rely/ are you relying on any human rights-based arguments in your advocacy?
 - If so, has the use of human rights arguments been beneficial to your campaign – if so, in what way? And if not, why not?
 - What was the outcome of your organisation's involvement? (if relevant)

Specific Questions (possible overlap with B.1)

2. Was your organisation involved in the 1990s and 2000s in lobbying the Prison Service to adopt specific guidelines on the treatment of transgender prisoners? If so, please can you tell me about your organisation's involvement? In particular:
 - When was this, and in what way was your organisation involved?
 - What triggered your organisation's involvement?
 - Did you rely on any human rights-based arguments in your campaign?
 - If so, did you find the use of human rights arguments beneficial to your campaign – if so, in what way? And if not, why not?
3. Did your organisation participate in the formal consultation process for PSI 07/2011 on the *Care and Management of Transsexual Prisoners*? If so, please can you tell me about your organisation's involvement? In particular:
 - When and how was your organisation invited to take part in the consultation process?
 - What was the nature and extent of your organisation's involvement?
 - What was your experience of the consultation process?

- How important were human rights issues in the drafting and consultation process of the PSI?
- Did you find it productive for your organisation to be involved in the consultation process?
- Were you satisfied with the outcome? If not, what do you consider problematic? Was there anything significant that your organisation advocated for, which didn't end up in the PSI?

C. Other

1. How do you think transgender prisoners' needs could be better met within the prison system?
2. Is there anything else that you think it would be helpful for me to know about the treatment of transgender people in prison, for the purpose of my research?
3. Is there anyone you would recommend I speak to, for the purpose of my research?

Glossary²¹⁹

Being read as cisgender - if someone is regarded, at a glance, to be a cisgender man or cisgender woman. This might include physical gender cues, such as hair or clothing, and/or behaviour which is historically or culturally associated with a particular gender.

Cisgender – someone whose gender or gender identity is the same as the sex they were assigned at birth.

Cis-sexism – a term coined by Julia Serano to describe the pervasive perception of transsexual or transgender people’s gender as inferior to, or less authentic than, those of cisgender people (2007: 12).

Gender dysphoria – used to describe when a person experiences discomfort or distress because there is a mismatch between their sex assigned at birth and their gender/gender identity. This is also the clinical diagnosis for someone who doesn’t feel comfortable with the gender they were assigned at birth.

Gender expression, gender performance or gender presentation – how a person chooses to outwardly express their gender/gender identity, within the context of cultural and societal expectations of gender.

Gender/gender identity - a person’s sense of their own gender, whether male, female or something else (see non-binary below), which may or may not correspond to the sex

²¹⁹ Many of the explanations for these terms have been adopted or adapted from Stonewall’s glossary at <http://www.stonewall.org.uk/help-advice/glossary-terms>. (1 Dec 2017). Other terms and explanations have been added by the author for the purpose of this thesis, including by reference to Julia Serano’s glossary at <http://www.juliaserano.com/terminology.html>. (1 Dec 2017).

assigned at birth. In this thesis, the term “gender” is preferred, but the term “gender identity” is also widely used, including in international human rights law.

Gender reassignment – to undergo gender reassignment usually means to undergo some sort of medical intervention, but it can also mean changing names, pronouns, dressing differently and living in one’s self-identified gender. As will become evident in this thesis, the different meanings attributed to the term renders it problematic in law. In this thesis, “medical gender reassignment” and “legal gender reassignment” are used where precision is necessary, and “transition” is used as a general term to describe a person’s social transition, regardless of medical intervention or legal gender reassignment.

Gender Recognition Certificate (“GRC”) – this enables transgender people to be legally recognised in their gender (or to “legally reassign” their gender) and to be issued with a new birth certificate.

Gender reassignment treatment – under the NHS transgender pathway, this comprises counselling, diagnosis of “gender dysphoria”, hormone treatment and gender reassignment surgery. Whilst the term “gender-affirming medical treatment” is increasingly used in the US, and is preferable from the author’s point of view, “gender reassignment treatment” remains the standard terminology in the UK, both in the NHS and in the voluntary sector, and is adopted for the purpose of this thesis.

Gender reassignment surgery – it is common for gender reassignment surgery to be referred to in the singular, and to mean genital reassignment surgery (phalloplasty for transgender men, and oridechtomy and vaginoplasty for transgender women). A range of gender reassignment surgeries exists, however. These include double mastectomy and chest

reconstruction, hysterectomy and removal of ovaries for transgender men (available on the NHS, as a core treatment for those diagnosed with gender dysphoria); and breast augmentation, facial feminisation surgery, tracheal shave and vocal cord surgery for transgender women (non-core services, rarely provided by the NHS). For a full list, see Annex 2 to the *NHS Interim Gender Dysphoria Protocol and Service Guideline* (NHS 2013/14).

Homosexual – a historical, medical term used to describe someone who has an emotional, romantic and/or sexual orientation towards someone of the same gender.

Non-binary – an umbrella term for a person who does not identify as only male or only female, or who may identify as both.

Pronoun – words used to refer to a person's gender - for example, 'he' or 'she'. Some people may prefer others to refer to them in gender neutral language and use pronouns such as they/ their.

Sex/Gender – used in the thesis where the terms 'sex' and 'gender' are interchangeable, as they have become under the Gender Recognition Act 2004, for example.

Trans/gender – used to indicate that the issue relates both to transgender people specifically, and to gender more broadly. E.g. trans/gender authenticity refers both to whether the person is regarded as authentically transgender, and to whether their gender/gender identity is regarded as authentic.

Transgender – an umbrella term to describe people whose gender is not the same as, or does not sit comfortably with, the sex they were assigned at birth. Transgender people may describe themselves using one or more of a wide variety of terms, including, but not

limited to, transgender, transsexual, gender-queer, gender-fluid, non-binary, gender-variant, a-gender, bi-gender, trans man, trans woman, or they may simply prefer to be described as a man, woman or person. In this thesis, the terms “transgender woman”, “transgender man” and “transgender prisoner” etc. are used for the sake of clarity.

Transgender man – used to describe someone who is assigned female at birth but identifies and lives as a man.

Transgender woman – used to describe someone who is assigned male at birth but identifies and lives as a woman.

Transitioning – the steps a transgender person may take to live in the gender with which they identify. Each person’s transition will involve different things. For some this involves medical intervention, such as hormone therapy and surgeries, but not all transgender people want or are able to have this. Transitioning also might involve things such as changing one’s name, telling friends and family, dressing differently and changing official documents.

Trans-misogyny – a term coined by Julia Serano to describe various forms of sexism directed towards transgender women, and the way in which transgender women tend to be of particular “societal fascination, consternation, and demonisation” in considerations of transgender people (2007: 11-20).

Transphobia - the fear or dislike of someone based on the fact they are transgender, including the denial/refusal to accept their gender.

Transsexual – this was used in the past as a more medical term (similar to homosexual) to refer to someone who has medically transitioned and lives in the “opposite” gender to the one assigned at birth. Although many transgender people prefer the term trans or transgender, the term “transsexual” is still used by some people, and, notably, is still used in UK law. In this thesis, wherever possible, the term “transgender” is used to avoid the medical connotations of the term “transsexual” and to refer to a broader category of transgender people than those who medically reassign their gender. However, the thesis uses the term “transsexual” where specificity is required for the particular historical legal or medical context, or where it forms part of a quote.