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NOTE

Locked Away in SEG “For Their Own Protection”: How Congress Gave Federal Corrections the Discretion to House Transgender (Trans¹) Inmates in Gender-Inappropriate Facilities and Solitary Confinement

Ash Olli Kulak

INTRODUCTION

Incarcerated transgender people face a unique predicament the day they arrive at a corrections facility. First, they are processed by corrections officials² and are forced to undergo strip searches, often in front of both staff members and other inmates.³ It may take weeks of waiting in processing before officials are able to determine the gendered facility in which they will reside.⁴ They are usually sent to facilities according to their current genital configuration,⁵ where they await transphobic-motivated violence and degrading administrative procedures.⁶ Most

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1 “Transgender” (or trans) is a term used to describe someone who does not identify with his, her, or their gender assigned at birth. “Transsexual” is a term coined by medical professionals in the 1950s to pathologize transgender women as a way of justifying the necessity of medical intervention. *See generally* JOANNE MEYEROWITZ, *HOW SEX CHANGED* (2002). Many trans people seek medical resources to transition their bodies to a more desired outcome. Some trans people fall into two binary categories just like cisgender (or cis, defined as people who are not trans) people. A trans man was assigned female at birth (AFAB), and he identifies and lives authentically as a man. A trans woman was assigned male at birth (AMAB), and she identifies and lives authentically as a woman. Some trans people do not identify as binary and would prefer not to be gendered at all (nonbinary, genderqueer, and agender identities). Not all trans people are the same, although each face similar stigmas and barriers—be they cultural, familial, medical, financial—to pursue their authentic selves. This Note will focus on incarcerated trans people, and in particular trans women, since there is much more research and litigation surrounding the experiences of trans women in men’s prisons. *See* Richael Faithful, *Transitioning Our Prisons Toward Affirmative Law: Examining the Impact of Gender Classification Policies on U.S. Transgender Prisoners*, 5 AM. U. MOD. AM. 3, 3 (2009).

2 Drake Hagner, Note, *Fighting for Our Lives: The D.C. Trans Coalition’s Campaign for Humane Treatment of Transgender Inmates in District of Columbia Correctional Facilities*, 11 GEO. J. GENDER & L. 837, 846 (2010).

3 *Id.* at 848; *see also* Paula Rae Witherspoon, *My Story*, in *CAPTIVE GENDERS* 209, 211 (Eric A. Stanley & Nat Smith eds., 2011) (describing her experience being strip searched in front of 200 inmates).

4 Daren Rosenblum, “Trapped” in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 520 (2000).

5 *See infra* Part II, Section A.

6 *See* S. Lambie, *Transforming Carceral Logics*, in *CAPTIVE GENDERS*, *supra* note 3, at 243–44 (“[T]rans and gender non-conforming people are subject to widespread sexual assault, abuse, and other gross human rights violations, not only from other prisoners, but from prison staff as well.”); JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, *QUEER (IN)JUSTICE* 107 (Michael Bronski, ed., 2011) (“Within the sexually charged and violent environment of prisons, transgender women placed in men’s prisons are easily identifiable targets, relegated to ‘a virtual torture chamber’ of incessant sexual assault and humiliation at the hands of staff and other prisoners.”); Debra Sherman Tedeschi, *The Predicament of the Transsexual Prisoner*, 5 TEMP. POL. & CIV. RTS. REV. 27, 34 (1995) (“[O]nce a pre-operative, male-to-female transsexual is placed in an all-male prison population, problems ensue and constitutional claims

must choose—if they have the choice⁷—between the endless abuses in the general population or extreme isolation in protective custody, which is usually implemented by placing them in solitary confinement or maximum security (max) units.⁸ The damaging effects of continuous violence and isolation seriously deteriorate trans prisoners’ quality of life.⁹

To demonstrate this problem, this Note will focus on how the federal criminal justice system perpetuates these deteriorative health outcomes for transgender prisoners. This Note begins with the decision to sentence trans people to terms of incarceration.¹⁰ With streams of legislation starting with the Sentencing Reform Act of 1984 (SRA),¹¹ Congress has restricted judicial consideration of personal characteristics and rehabilitation so much that trial judges are anchored to using prison as the default solution to crime.¹² Judges sentence trans people to terms of incarceration without considering the near certainty of violence and discrimination in prison facilities.¹³ It is up to the Federal Bureau of Prisons (BOP) and private corrections corporations contracting with the federal government to ensure that this history of rights abuses is remedied.¹⁴ Their solution, for the most part, has been isolated segregation units.¹⁵

This Note will argue that (1) the Congressional rejection of rehabilitation as a purpose of punishment—in order to promote uniformity—has resulted in sentencing determinations without authority to consider factors that increase disparities in punishments after sentencing, like the high probability of rights violations in corrections facilities; (2) the Prison Rape Elimination Act (PREA) gives trans prisoners scant protections from rights violations because it gives the BOP and corrections corporations too much discretion to make individual “case-by-case”

are raised.”); Travis Wright Colopy, Note, *Setting Gender Identity Free: Expanding Treatment for Transsexual Inmates*, 22 HEALTH MATRIX 227, 268 (2012) (“A national survey reported that 16 percent [of trans women prisoners] were physically assaulted and 15 percent sexually assaulted.”).

7 Some transgender prisoners are automatically placed in segregation units upon arrival. See *infra* Part II, Section B.

8 This is not a real choice, and it has not changed since the 1990s. Tedeschi, *supra* note 6, at 43.

9 See Lamble, *supra* note 6, at 244 (“[P]rison is a serious health hazard for queer and trans people.”).

10 After *United States v. Booker*, 543 U.S. 220 (2004), a federal trial judge must go through a three-step process to determine a defendant’s sentence. REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 1, 46 (U.S. SENTENCING COMM’N 2011) [hereinafter U.S. SENTENCING COMM’N, REPORT]. The judge must first consider the appropriately formulated Guidelines range and then consider grounds for departures. The judge can only use remaining discretion to consider factors justifying variances from the range after these first two steps. This anchoring effect is purposeful.

11 See 18 U.S.C. § 3551 (2012) (establishing a determinate sentencing regime tied to the Sentencing Guidelines); 28 U.S.C. § 991 (2012) (establishing the United States Sentencing Commission).

12 18 U.S.C. § 3553(b)(2) (“[T]he court shall impose a sentence of the kind, and within the range, referred to in [the Sentencing Guidelines] unless the court finds that there exists an aggravating or mitigating circumstance.”).

13 See *Tapia v. United States*, 564 U.S. 319, 322 (2011) (“Congress did not intend [in 18 U.S.C. § 3582(a)] that courts consider offenders’ rehabilitative needs when imposing prison sentences.”).

14 For more information about the delegation of authority to punish to BOP and corrections facilities, see *infra* Part II.

15 See Lamble, *supra* note 6, at 244 (“Trans and gender non-conforming prisoners are regularly placed in solitary confinement as a ‘solution’ to the problem of sex-segregated prisons.”).

assessments that determine housing placements; (3) the resulting punishments are disproportionate to the original sentences imposed and cause disparities in punishment that conflict with Congress’s reasoning for imposing a determinate sentencing regime; and (4) disparities will continue to exist until case-specific actors at sentencing are allowed to consider the impact of “forbidden” factors on rates of incarceration.

I. CONSIDERATIONS AT SENTENCING

A. *Rejecting Rehabilitation at Sentencing*

Throughout the 1950s and ‘60s, the rehabilitative ideal and its indeterminate model of sentencing dominated United States criminal justice theory and practice,¹⁶ but rehabilitation started to lose favor among both the political left and right in the 1970s with concerns about disparate sentencing and the overall ineffectiveness of rehabilitating a person in an incarceration setting.¹⁷ The 1980s ended the era of indeterminate sentencing with the SRA’s creation of the Sentencing Commission and the—now advisory¹⁸—Sentencing Guidelines.¹⁹ The Act requires the Commission to ensure, when making the Guidelines, that a prison sentence is inappropriate “for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.”²⁰ It also abolishes parole in favor of a focus on “truth in sentencing.”²¹

Congress passed an act in 1987 that clarified the extent to which federal trial judges could rely on rehabilitation when crafting sentences of imprisonment.²² In

16 See Francis A. Allen, *The Decline of the Rehabilitative Ideal* 3–20 (1981), in NORA V. DEMLEITNER, DOUGLAS A. BERMAN, MARC L. MILLER & RONALD F. WRIGHT, *SENTENCING LAW AND POLICY* 147 (3d ed. 2013).

17 *Id.* at 147; Martin E. Frankel, *Criminal Sentences: Law Without Order* (1973), in DEMLEITNER ET AL., *supra* note 16, at 142–43.

18 See *United States v. Booker*, 543 U.S. 220 (2004) (holding that every factual finding necessary to increase a criminal defendant’s Guidelines sentence needs to be found beyond a reasonable doubt by the trier of fact, and holding that the remedy for such a violation is advisory—rather than binding—Guidelines).

19 28 U.S.C. § 994 (2012); see also U.S. SENTENCING COMM’N, REPORT, *supra* note 10, at 1 (explaining the scope of the Commission’s authority pursuant to § 994).

20 28 U.S.C. § 994(k) (2012).

21 FIFTEEN YEARS OF GUIDELINES SENTENCING 1, 11 (U.S. SENTENCING COMM’N 2004) [hereinafter FIFTEEN YEARS OF GUIDELINES SENTENCING]. Truth in sentencing refers to policies, like the abolishment of parole, that eliminate disparities between court-ordered sentences and the time actually served. Katherine J. Rosich & Kamala Mallik Kane, *Truth in Sentencing and State Sentencing Practices*, 252 NAT’L INST. JUST. J. 18, 18 (2005), <https://www.ncjrs.gov/pdffiles1/jr000252e.pdf>. The truth in sentencing goals of the 1980s brought changes to mandatory minimum penalties as well, with an increase in the number and severity of mandatory minimums for drug offenses and offenses committed with a firearm. U.S. SENTENCING COMM’N, REPORT, *supra* note 10, at 23. Congress justified the changes with appeals to sentencing uniformity. *Id.*

22 18 U.S.C. § 3582(a) (2012) (“The court . . . shall . . . recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation.”).

Tapia v. United States,²³ the Supreme Court interpreted this statute according to the text’s plain meaning, holding that “imprisonment is not suitable for the purpose of promoting . . . rehabilitation.”²⁴ *Tapia* determined that Congress’s message to trial judges since the enactment of the SRA has been to not consider prison as the source of a defendant’s rehabilitation.²⁵ The *Tapia* decision officially marked the end of sentencing decisions based solely on rehabilitating convicted defendants.²⁶

Without authority to rely on the rehabilitative model, case-specific actors at sentencing cannot consider the would-be rehabilitative—and, conversely, deleterious—effects of prisons on convicted transgender defendants. Regardless of the impact of implicit judicial bias or anchoring effects that incentivize sentences of incarceration over alternatives, trial judges do not even have the authority to refuse to send a transgender person to prison on the basis that all prisons are unsafe for transgender people (and that thus none will work to rehabilitate them). Even with vast prosecutorial discretion in the wake of determinate sentencing,²⁷ prosecutors still ordinarily have to bring charges that reflect “the most serious offense that is consistent with the nature of the defendant’s conduct, and that is likely to result in a sustainable conviction”²⁸ regardless of whether the subsequent punishment will actually reflect the severity of the crime.²⁹

Upon reentry to society, trans ex-prisoners are not only stacked with debts to the criminal justice system,³⁰ but they also have such devastating physical and mental health problems exacerbated by their experiences in prison³¹ that it is inevitable that at least some will participate in criminalized economies as a form of income and/or coping.³² High police surveillance of low-income communities³³ almost

23 564 U.S. 319 (2011).

24 *Id.* at 327.

25 *Id.* at 329–30 (quoting 28 U.S.C. § 994(k)).

26 *Id.* at 332 (“Congress did not intend that courts consider offenders’ rehabilitative needs when imposing prison sentences.”).

27 See James M. Anderson, Jeffrey R. Kling & Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 302 (1999) (“Reduced discretion for judges at the end of the process magnifies the importance of decisions made by the prosecutor, probation office, and law enforcement officials.”).

28 Memorandum from Eric Holder, Att’y Gen., Dep’t of Justice, to the U.S. Attorneys and Assistant Attorney General for the Criminal Division (Aug. 12, 2013).

29 For the common types of crimes committed by vulnerable transgender populations, see *infra* Part III, Section C.

30 MICHELLE ALEXANDER, *THE NEW JIM CROW* 154–57 (rev. ed., 2011).

31 Long-term physical and mental health problems can result from long-term solitary confinement and interference with hormone replacement therapies. See *infra* Part III.

32 See JAIME M. GRANT, LISA A. MOTTET & JUSTIN TANIS, *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 3 (2011)* (“16% [of participants in the survey] said they had been compelled to work in the underground economy for income (such as doing sex work or selling drugs).”).

33 See, e.g., Lori A. Saffin, *Identities Under Siege: Violence Against Trans Persons of Color*, in *CAPTIVE GENDERS*, *supra* note 3, at 150–52 (explaining that the economic need to survive drives low-income trans folks to criminalized ways of making an income that subject them to constant police surveillance); DEAN SPADE, *NORMAL LIFE* 120 (2011) (discussing how the War on Drugs in the 1980s gave law enforcement more tools to increase policing in poor communities and communities of color).

guarantees high rates of recidivism.³⁴ If sentencing actors had more discretion to consider rehabilitation as a purpose of punishment, then it would be possible to vary (even depart downward one hundred percent³⁵) from the Guidelines ranges for populations of defendants particularly vulnerable to incarceration cycles.³⁶ Regardless of how probable one hundred percent downward departures would be on these grounds, the current sentencing regime makes them impossible.³⁷

Rehabilitation concerns are the most pressing for trans people³⁸ and inmates in solitary, as the quality of life in confinement correlates with effective society reintegration.³⁹ The fact that trans people tend to be automatically placed in administrative segregation (SEG)⁴⁰ makes these concerns even more important. If the focus were on effective society reintegration and preventing recidivism, more emphasis would be placed on providing relevant health care and safe housing for trans people in prisons.⁴¹

The problem with rehabilitation as a purpose of punishment is that trial judges are given so much discretion to consider any and every detail about a person's life that they can drastically over-sentence based on biases and other subjective judgments about morality.⁴² The fear is that the sentence a person receives depends solely on the judge that person gets, since each judge comes with different moral codes.⁴³ The result is a disparity in sentencing, with alike defendants treated

34 See, e.g., SPADE, *supra* note 33, at 121–22 (explaining that the probability of arrest for people of color and poor folks is higher due to high levels of police surveillance, regardless of individual decisions to comply with or disregard legal norms, since criminalized behaviors are just as common in other places but surveillance rates are not); Alina Ball, Comment, *An Imperative Redefinition of “Community”: Incorporating Reentry Lawyers to Increase the Efficacy of Community Economic Development Initiatives*, 55 UCLA L. REV. 1883, 1904 (2008) (“In a criminal justice system where a significant portion of recidivism is attributed to technical or administrative parole violations, the increased parole supervision and police surveillance may accelerate the rate of recidivism.”).

35 The suggestion here is that trial judges should refuse to impose a term of incarceration in favor of alternatives to cages.

36 The likelihood of departures on these grounds will not be high without pressures on Congress to abandon “tough on crime” sentencing and on federal judges to pursue alternatives to incarceration over traditional prison sentences.

37 As it currently stands, 18 U.S.C. § 3553 gives judges limited authority to sentence below the statutory minimum only in cases where the prosecution has moved for a downward departure for “substantial assistance.” § 3553(e) (2012).

38 Colopy, *supra* note 6, at 270.

39 See Bernice B. Donald, *Rethinking Solitary Confinement*, 31 CRIM. JUST. 1, 1 (2016) (questioning whether confinement conditions will increase or decrease chances of living productive and healthy lives); Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325, 329 (2006) (discussing how confinement significantly impaired the inmates’ capacity to successfully adapt to society).

40 See Hagner, *supra* note 2, at 849.

41 Colopy, *supra* note 6, at 270.

42 See, e.g., *Williams v. New York*, 337 U.S. 241, 248 (1949) (holding that a New York trial judge’s imposition of a sentence of death for being a “menace to society” was acceptable because New York’s indeterminate sentencing regime’s focus on rehabilitation allowed for wide judicial discretion to find mitigating or aggravating factors). This decision effectively allowed trial judges under indeterminate sentencing regimes to use logic about rehabilitation to justify death sentences.

43 See FRANKEL, *supra* note 17; Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 7–8 (1972) (highlighting the concerns that too much judicial discretion produces disparities in sentencing based off of “variegated passions and prejudices”).

unlike.⁴⁴ Using rehabilitation could backfire and cause even more trans people to be sent to prison on the basis that biased, transphobic judges think that trans people are morally disgusting.

But there are Constitutional protections in place to prevent capital sentences for crimes like burglary or rape.⁴⁵ If Congress and trial judges had pressures to push for alternatives to incarceration, giving trial judges somewhat limited discretion to depart downward (rather than depart upward for “moral” reasons) would eliminate concerns about over-sentencing on the basis of transphobic bias. Providing at least some discretion to focus on rehabilitation also helps prevent the imposition of unwarranted uniformities (treating unlike defendants alike).⁴⁶ In oddball cases that Congress never would have expected or predicted, trial judges should not have to keep their hands tied: they should be able to consider factors that make defendants different and whose sentences should not be the exact same. Trans people are those defendants, since the deleterious effects of prison on trans people add up to punish trans inmates more than their cis counterparts.⁴⁷

Case-specific actors should have to fashion a sentence with full knowledge that *any* term of incarceration for trans people will likely lead to at least some—or even the entire—time spent in solitary or max, resulting in devastating mental health effects noted in Part III. Because of Congress’s obsession with uniformity since the 1980s, these concerns—no matter how important—cannot be the sole reasons for a downward departure. Cycles of incentivized criminalized behaviors and further incarceration are bound to perpetuate themselves without intervention.

B. *The Current Federal Sentencing Scheme Eschews Considerations of Gender Identity at Sentencing*

Gender, like race or socioeconomic status, is one of many “irrelevant” factors that many current criminal justice theorists believe should not be considered at sentencing.⁴⁸ Congress directed the U.S. Sentencing Commission in the SRA to make sure that certain personal characteristics would never be used by themselves in

44 See Frankel, *supra* note 43, at 7–8.

45 See *Furman v. Georgia*, 408 U.S. 238, 253–57 (1972) (holding the discretionary death penalty statutes unconstitutional in their application).

46 See Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 60–61 (2000) (“[S]entencing under the Guidelines produced unwarranted uniformity as offenders of differing culpability were given similar sentences.”).

47 See *infra* Part III, B.

48 U.S. SENTENCING GUIDELINES MANUAL § 5H1.10 (U.S. SENTENCING COMM’N 2016) [hereinafter SENTENCING GUIDELINES MANUAL]; see also Kathleen Daly & Michael Tonry, *Gender, Race, and Sentencing*, 22 CRIME & JUST. 201, 205 (1997) (“In every jurisdiction that changed its sentencing policies and attempted to establish sentencing guidelines, three propositions were taken as self-evident. First, race and gender were believed to be illegitimate considerations in sentencing. . . . [I]f race was a forbidden consideration, so self-evidently was gender.”).

sentencing decisions.⁴⁹ The Act also made sure that the Commission issued policy statements around the relevancy of certain defendant characteristics in judicial decisions to depart from the Guidelines.⁵⁰ Taking out almost all human characteristics of a person as “irrelevant” in most circumstances, Congress has directed the Sentencing Commission—in an effort to promote uniformity and reduce sentencing disparities—to gut individualized sentencing. The result of this push to end disparate sentencing has actually increased the severity of overall sentences by imposing harsh uniformities across the board.⁵¹

The Act still gives the sentencing court discretion to consider the “history and characteristics” of the defendant in 18 U.S.C. § 3553(a).⁵² But with very few defendant characteristics left to consider explicitly, “history and characteristics” have come to signify judicial consideration of criminal history categories,⁵³ career criminal offender guidelines,⁵⁴ and downward departures for defendant cooperation with the government and participation in the investigation as an informant.⁵⁵ None of these categories are accurate measures of a person’s unique life experience.⁵⁶

In practice, § 3553(a) does not give trial judges excessive discretion⁵⁷ to consider defendant characteristics when Congress has directed the Sentencing Commission to seriously downplay the appropriateness of most. Devaluing unique life situations as “not ordinarily relevant” at sentencing makes it difficult to empathize with the defendants. It becomes harder to understand the basic human incentives behind criminalized behaviors, especially crimes without victims, non-violent or low-level offenses associated with poverty and participation in informal

49 See SENTENCING GUIDELINES MANUAL, *supra* note 48, at §5H1 (2016) (citing 28 U.S.C. § 994(d)) (“[T]he Act directs the Commission to ensure that the guidelines and policy statements ‘are entirely neutral’ as to five characteristics—race, sex, national origin, creed, and socioeconomic status.”).

50 See *id.* (citing 28 U.S.C. § 994(d), (e)) (discussing the Commission’s task to determine whether eleven “specific offender characteristics” are relevant, and noting that five of those factors—education, skills, employment, family responsibilities, and community ties—are discouraged by the SRA as generally inappropriate to consider).

51 See, e.g., Chad Flanders, *Retribution and Reform*, 70 MD. L. REV. 87, 93 (2010) (“What many hoped would be a compromise resulting in uniform and moderate sentences instead led to uniformly harsh sentences.”).

52 See SENTENCING GUIDELINES MANUAL, *supra* note 48, at §5H1 (2016) (citing 18 U.S.C. § 3553(a)) (“[T]he Act also directs the sentencing court, in determining the particular sentence to be imposed, to consider, among other factors, ‘the history and characteristics of the defendant.’”).

53 See *id.* (citing 28 U.S.C. § 994(d)(10)) (discussing the importance of considering criminal history categories).

54 See *id.* (citing 28 U.S.C. § 994(d)(11)) (discussing the importance of considering career criminality).

55 These are only triggered if the prosecutor moves for a downward departure for “acceptance of responsibility” or “substantial assistance.” See *id.* at §§ 3E1.1, 5K1.1.

56 Selective policing in vulnerable neighborhoods and the lack of opportunity to make incomes in mainstream markets produce defendants’ visible criminal histories. See generally ALEXANDER, *supra* note 30; SPADE, *supra* note 33.

57 Although § 3553(a) has more authority than advisory policies, the Seventh Circuit in *U.S. v. Hurlburt* allowed for a vagueness challenge, implying that the Guidelines are laws susceptible to Constitutional challenges. 835 F.3d 715, 727–28 (7th Cir. 2016) (Hamilton, J., dissenting). The Supreme Court accepted certiorari on this issue in an Eleventh Circuit case, *Beckles v. United States*, 616 Fed. Appx. 415 (11th Cir. 2016), *cert. granted*, 136 S. Ct. 2510.

markets, and financial offenses in response to the high costs of becoming one’s authentic self.

Even if trial judges could explicitly consider gender at sentencing, the Guidelines calculations themselves have anchoring effects on trial judges that still result in punishments (usually prison sentences) tethered to the Guidelines ranges.⁵⁸ The Supreme Court has noted that the post-*Booker* three-step sentencing process was designed to produce an anchoring effect in order to “achieve uniformity” in sentencing decisions.⁵⁹ A trial judge’s first step is to determine the applicable Guidelines range.⁶⁰ This step anchors the trial judge who uses this initial determination to make subsequent decisions about the sentence.⁶¹ Just looking at suggested Guidelines ranges, which are usually terms of incarceration, will influence a trial judge to decide to send a trans person to prison rather than suggest an alternative. Even with discretion to vary from advisory Guidelines, the Guidelines’ anchoring effect influences trial judges to sentence trans people at or near the suggested incarceration ranges.

Trial judges have no incentives to make better—alternative—punishments for transgender defendants. After the sentencing hearing, trial judges relinquish any control of the defendant’s fate over to the Bureau of Prisons (BOP) or federally contracted private corrections corporations.⁶² Because they do not control what happens once the defendant takes one step outside of the courtroom door, trial judges need not consider the devastating impact of prisons on trans people. There is a legal history, both from Congress and the federal courts, to leave formal control over inmate housing and placement decisions up to correctional discretion.⁶³ Trial judges are never expected to be accountable for any rights violations that happen to trans prisoners because that responsibility is left up to the BOP or private corrections

58 The “anchoring effect” is a psychological heuristic, usually involving numbers, where a person’s decision-making process is undermined by reliance on information presented earlier, the anchor. See Alan Beggs & Kathryn Graddy, *Anchoring Effects: Evidence from Art*, 99 AM. ECON. REV. 1027, 1027 (2009) (explaining experiments in which subjects are given a random number who then show a bias in their final numerical estimates toward the number they originally saw). This effect is pronounced in sentencing. E.g., Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489 (2014) (arguing that the length and severity of sentences has not changed since *Booker*’s shift back to discretionary sentencing because trial judges are subconsciously anchored to the Guidelines ranges).

59 *Peugh v. United States*, 569 U.S. 530, 542 (2013) (“[T]he post-*Booker* federal sentencing scheme . . . aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines.”).

60 Bennett, *supra* note 58, at 518 (quoting *Gall v. United States*, 552 U.S. 38, 49–50 (2007)).

61 See *id.* at 523–29.

62 See Yvette K.W. Bourcicot & Daniel Hirotsu Woofter, *Prudent Policy: Accommodating Prisoners with Gender Dysphoria*, 12 STAN J.C.R. & C.L. 283, 317 (2016) (quoting *McLamore v. State*, 186 S.E.2d 250, 255 (S.C. 1972)) (“There is a longstanding policy of the courts not to interfere in prison administration and discipline at any level.”).

63 See 28 C.F.R. § 115.42(c) (2016) (giving corrections facilities discretion to place trans inmates in gender-segregated housing units); Bourcicot & Woofter, *supra* note 62, at 319 (“[C]ourts’ general deference to prisons is even more expansive for housing classification decisions regarding pre-operative transsexual inmates whose gender identities are not legally recognized.”); see also *MOGUL ET AL.*, *supra* note 6, at 106 (“Prison officials have virtually unbridled discretion over placement decisions.”).

corporation, so there is no reason for trial judges to even think about defendants' future safety. This allows trial judges to cop out of considering a trans person's high statistical probability of experiencing violence and isolation in prison.⁶⁴

II. DISCRETION IN THE HANDS OF CORRECTIONS FACILITIES

With unused judicial discretion to determine housing placement comes the implicit grant of that discretion to corrections. The Prison Rape Elimination Act of 2003 (PREA)⁶⁵ gives the BOP and federally contracted private corrections facilities the discretion to make several case-by-case analyses on what procedures to follow with housing and protections for transgender inmates.⁶⁶ Even before PREA, courts consistently deferred to corrections' discretionary administrative decisions about how to keep things running.⁶⁷

A. *Male or Female?*

To determine housing placement for transgender inmates, a trans person's "gender" (sex⁶⁸) must be determined. It has been both the practice of federal prison authorities and trial judges in civil court to determine a person's sex through reliance on whether a person has undergone sex-reassignment⁶⁹ surgery.⁷⁰ Although the test is the same in civil court, in criminal proceedings the sexual declaratory hearing differs because the judge relies on the presentencing report from processing.⁷¹ The judge therefore defers to decisions made by other officers in corrections departments to determine something—a trans person's sex—that will be the basis for another discretionary, case-by-case decision by corrections administrators⁷²—where that

64 The argument goes as follows: Because it is impossible to know what any given corrections facility will choose for its transgender inmates and how each will individually handle cases of violence, it is inappropriate to use the mere possibility of rights violations as a justification for altering downward a trans person's sentence. It would introduce sentencing disparities because transgender people will automatically get shorter sentences just because they are transgender. This Note argues, however, that this is the only necessary way to reduce the disparate punishments transgender inmates receive in comparison to cisgender inmates.

65 34 U.S.C. §§ 30301–30309 (2012).

66 28 C.F.R. §§ 115.41–.43 (2017).

67 Bourcicot & Woofter, *supra* note 62, at 317.

68 I distinguish between the words "sex" and "gender" in this Note. Sex is the socio-scientific construct of supposed biological "male" and "female" bodies (despite vast variations in 1–2% of the population with less binary features, *see generally* ANNE FAUSTO-STERLING, *SEXING THE BODY* 53 (2000)), while gender is the cultural coercively-assigned-at-birth construct of the (usually racialized) norms that "men" and "women" are supposed to play.

69 Sex-reassignment surgery (SRS) is used to denote that a trans person has altered his/her/their genital configuration. The availabilities and even possibilities of these surgeries vary widely across the nation, with different techniques espoused by a small number of doctors that perform these procedures.

70 Tedeschi, *supra* note 6, at 32–36.

71 *See* Rosenblum, *supra* note 4, at 520.

72 28 C.F.R. § 115.42(c) (2017).

trans person will be housed. This circular double deference to corrections results in unbridled discretion to place trans inmates literally wherever.⁷³

With the “test” of sex depending upon invasive surgical procedures on genitalia that many trans people either cannot afford or do not want,⁷⁴ many trans prisoners are sent to facilities that do not match their lived, full-time gender.⁷⁵ Many scholars have criticized the use of current genital configuration as the determinative factor of housing placement,⁷⁶ mostly because it leads to violence, isolation, and detrimental outcomes. PREA, however, gives corrections administrators complete discretion over decisions to place trans people in men’s or women’s wards “on a case-by-case basis.”⁷⁷ The pressure to change from a “genitalia” test to a gender identity test, however, will not come without challenges from conservatives who rely on transphobic and homophobic stereotypes of trans people, especially trans women, as predatory.⁷⁸

The argument for keeping the housing determinations based on genital configuration is threefold. First, corrections facilities do not want to make cisgender women feel uncomfortable or “unsafe” with the presence of trans women in their cells.⁷⁹ This assumes that trans women are deceptive and dangerous,⁸⁰ and plays on

73 MOGUL ET AL., *supra* note 6, at 106.

74 Julia C. Oparah, *Feminism and the (Trans)Gender Entrapment of Gender Nonconforming Prisoners*, 18 UCLA WOMEN’S L.J. 239, 261 (2012) (“Since many transsexuals do not chose [sic] or cannot afford ‘bottom surgery,’ prisoners who may have had hormone treatment and ‘top surgery’ (to remove or construct breasts) will be assigned to an institution according to a gender assignation based on one part of their body, that does not comport with their physical and emotional experience.”).

75 See e.g., VICTORIA LAW, RESISTANCE BEHIND BARS: THE STRUGGLES OF INCARCERATED WOMEN 206 (2d ed. 2012) (“The transgender women were housed with the men. ‘They will not house them with us [cis women] because, although some have breasts and live as women, they have not had full surgical change of genitals.’”) (quoting RJ); Rosenblum, *supra* note 4, at 522 (“An inmate with a penis is considered male; one with a vagina is considered female. It doesn’t matter whether nature or a surgeon provided the part.”) (quoting Brockenbrough); Tedeschi, *supra* note 6, at 34 (“[I]t is the ‘practice of federal prison authorities . . . to incarcerate persons who have completed sexual reassignment with prisoners of the transsexual’s new gender, but to incarcerate persons who have not completed it with prisoners of the transsexual’s original gender.’”) (quoting *Farmer v. Haas*, 990 F.2d 319, 320 (7th Cir. 1993)).

76 See, e.g., LAW, *supra* note 75, at 202; Oparah, *supra* note 74, at 261; Rosenblum, *supra* note 4, at 522–24; Nikko Harada, Comment, *Trans-Literacy Within Eighth Amendment Jurisprudence: De/Fusing Gender and Sex*, 36 N.M.L. REV. 627, 646 (2006).

77 28 C.F.R. § 115.42(c) (2017).

78 See Harada, *supra* note 76, at 646; see also Bourcicot & Woolter, *supra* note 62, at 319; Faithful, *supra* note 1, at 4 (“Lower court decisions have variably affirmed transgender prisoners’ rights to safer living conditions, but no ruling has definitively objected to the administrative status quo that allows and even promotes genitalia-based classification.”).

79 See Harada, *supra* note 76, at 646.

80 Compare Janice G. Raymond, *Sappho by Surgery*, in THE TRANSGENDER STUDIES READER 131 (Susan Stryker & Stephen Whittle eds., 2006) (claiming that all trans women are deceptive schemers who have “colonized” lesbian feminism and whose purpose is to appropriate the female body by raping cisgender women), with Sandy Stone *The Empire Strikes Back: A Posttranssexual Manifesto*, in THE TRANSGENDER STUDIES READER 221 (Stryker & Whittle, eds., 2006) (undermining the biologically deterministic assumptions that serve as the foundation for Raymond’s argument and proposing new forms of self-expression for trans people that transcend these narrow conceptualizations of the body and identity vulnerable to transphobic rhetoric of deception).

antiquated and patriarchal notions of protecting sacred and pure (white) femininity.⁸¹ Second, corrections facilities speculate that trans women will be violent toward cisgender women,⁸² which also plays into the notion that trans women are somehow inherently dangerous. Third, corrections facilities fear that mixing trans women with cis women in the general population will result in sexual activity.⁸³

These arguments tend to dominate conversation about gendered prison facilities for a few more specific reasons. First, fearing “sex” between inmates is code for sexual assault,⁸⁴ which again assumes that all trans women are dangerous and predatory. It not only ignores the historical prevalence of sexual activity between women in corrections facilities,⁸⁵ but it also deliberately ignores the plight of trans women who constantly experience sexual assault in men’s prisons.⁸⁶ Second, these arguments actually justify the amount of torture and assault trans women go through in men’s prisons, since—the argument goes—at least now the cis women are safe. Again, the reasoning behind this argument comes from the underlying assumption that cis women will be targeted and assaulted by trans women, stereotypically seen as dangerous and predatory, if both are housed together.⁸⁷

Third, the possibility of reproductive sexual intercourse in women’s prisons, by way of sex acts between women with differing sets of genitalia, is alarming to prison administrators.⁸⁸ The mere idea of procreative sex, pregnancies, and births in prison is controversial in a mainstream society that still debates over the right to contraceptives and abortions.⁸⁹ The mainstream American public could not handle the idea of keeping people locked away together in crowded cages if those people had

81 See Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 8 (1993) (discussing the historical context behind the purity of white women’s reproductive capacities in that white women were coerced into reproducing the master class and Black women were coerced into reproducing the slave class); Anti-Racist Collective, *White Supremacy and Protecting White Women*, ST. LOUIS AM., July 10, 2015, at A9 (tracing the history of justifying violence against indigenous nations and slaves by demonizing Black and Brown men as sexual threats to white women’s “purity”).

82 Harada, *supra* note 76, at 646.

83 *Id.*

84 See REGINA KUNZEL, CRIMINAL INTIMACY: PRISON AND THE UNEVEN HISTORY OF MODERN AMERICAN SEXUALITY 153 (2008) (“[R]ape would come to be understood as the defining practice of sex in men’s prisons.”).

85 See *id.* at 101, 113 (explaining the historical shifts in the way people viewed sexual relationships in women’s prisons starting from the 1940s).

86 MOGUL ET AL., *supra* note 6, at 107 (“[F]ramed as sexually degraded, transgender women are considered inviolable, thereby negating the concern for their safety in men’s institutions.”).

87 See Olivia Broustra, *Dear Trans Women (Trans Identified Males)*, MEDIUM (Aug. 13, 2017), <https://medium.com/@oliviabroustra/dear-trans-women-trans-identified-males-5d62e0f2ce57> (“[B]ecause a trans woman murderer and rapist was raped in a male prison, [cis women inmates] will now be put at risk of harm from this violent offender.”); see also Raymond, *supra* note 80, at 132–34 (reducing all transgender women to predators whose inherent “masculinity” infects and “rapes” women’s spaces).

88 See Rosenblum, *supra* note 4, at 532; Harada, *supra* note 76, at 646.

89 See, e.g., Robert Pear, Rebecca R. Ruiz, & Laurie Goodstein, *Trump Administration Rolls Back Birth Control Mandate*, N.Y. TIMES (Oct. 6, 2017), <https://www.nytimes.com/2017/10/06/us/politics/trump-contraception-birth-control.html>; Somini Sengupta, *Trump Revives Ban on Foreign Aid to Groups that Give Abortion Counseling*, N.Y. TIMES (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/world/trump-ban-foreign-aid-abortion.html>.

the opportunity to be highly sexually active—which most prisoners do, despite mainstream thoughts of prison as sex-free as a form of punishment or in order to repent for one’s sins⁹⁰—and the ability to reproduce generations after generations of “criminals.”⁹¹

The paternalistic notion of protecting cisgender women from the *possibility* of getting “knocked up” in prison can thus become the dominant conversation that justifies prison facility segregation by genitalia, all the while ignoring *actual* coerced sex acts in men’s prison facilities that oftentimes result in the spread of sexually transmitted infections.⁹² This fear of sexuality between prisoners does not hold when administrators ignore the fact that cis women can become pregnant from reproductive sex acts, consensual or otherwise, with male guards.⁹³ By this logic, forcing trans women to be housed with and raped by cisgender men (the effects of which can remain invisible and disinteresting to the majority of the public) is not a problem as long as there is somewhat less of a chance that cis women could get pregnant in prison, take the (eventually very visible) information to the press, and make state, local, or even national news headlines.

Giving corrections administrators discretion at sex-segregated housing placements arguably advances proportionality goals by allowing for individualized analyses in ambiguous cases, but it still causes disparities in punishment. Unlike cisgender people, trans people are most likely to be placed in sex-segregated facilities that do not match their identities, which can result in serious physical and emotional harms noted in Part III. Additionally, trans people across different jurisdictions and geographical areas will be housed—and thus treated—differently from one another depending on varying levels of transphobia in predominantly conservative or progressive locations. While proportionality goals can be important at sentencing,⁹⁴ at housing placement hearings they produce vast disparities in treatment. Trial judges should make these individualized assessments because they are much more visible⁹⁵ and much less partisan than administrators behind corrections facilities.

90 KUNZEL, *supra* note 84, at 15, 98.

91 See, e.g., Philip Jenkins, *Eugenics, Crime, and Ideology: The Case of Progressive Pennsylvania*, 51 PA. HIST. 64, 65–67 (1984) (tracing the historical evolution of the eugenicist arguments linking criminality with hereditary “defective mental states”).

92 See Rosenblum, *supra* note 4, at 523, 532 (noting that “sexual activity” between trans women and cis women may hinder gender affirming housing placement while also warning a few pages earlier about the “mortal dangers” of rape and violence from genitalia-based placement); see also MOGUL ET AL., *supra* note 6, at 100, 103, 107.

93 See LAW, *supra* note 75, at 60 (“Sexual aggression and abuse by male prison staff is a far greater problem than most are willing to admit.”).

94 Proponents for individualized sentencing—many of whom no longer dominate sentencing theory—believe that indeterminate sentencing is important for trial judges to make unique sentences for individual cases. See *Koon v. United States*, 518 U.S. 81, 113 (1996) (“[E]very convicted person [is] an individual and every case [is] a unique study in human failings.”); see also *Williams v. New York*, 337 U.S. 241, 247 (1949) (holding that trial judges may use evidence at sentencing—unallowable at trial—to garner information needed to make sentencing decisions).

95 With appointment and lifetime tenure, federal trial judges may not be able to be held as accountable as elected state judges.

B. General Population or SEG?

To determine whether a trans person should be housed in an administrative segregation unit, corrections facilities must comply with PREA’s regulations on protected custody.⁹⁶ In general, inmates at risk of victimization should not be placed in SEG against their will unless “there is no available alternative means of separation from likely abusers.”⁹⁷ Trans people should also not be placed in a specified “trans” wing against their will unless it is for their own protection.⁹⁸ These exceptions carve out spaces for corrections administrators to exercise discretion in ways that disproportionately segregate trans prisoners.⁹⁹ This is because corrections facilities have substantially over-relied on placing trans inmates in SEG as the only way to protect them from rape and violence in the general population.¹⁰⁰

Corrections institutions have so much discretion in housing decisions that PREA’s protective custody protections are toothless. First, corrections administrators can easily justify—and continue to justify at every review period—placement in SEG if there are “no available alternatives” for someone so vulnerable to violence in the general population.¹⁰¹ One trans woman, for instance, recounts her story about being placed in an all-male “safe prison” unit designed to house those needing “safe keeping.”¹⁰² While the unit was designed to comply with PREA, trans women with visible secondary sex characteristics were placed in cells with (usually sexually aggressive) cisgender male inmates who continuously sexually assaulted them.¹⁰³ Compliance with PREA is too easy, and it incentivizes prioritizing institutional safety (litigation avoidance) over individual safety.

Second, PREA does not give adequate protections to trans inmates who still lose privileges, like recreational time and basic human socialization, available to those in the general prison population.¹⁰⁴ Administrative segregation is still just that,

96 28 C.F.R. §§ 115.42(g), .43(a).

97 28 C.F.R. § 115.43(a).

98 28 C.F.R. § 115.42(g).

99 Bourcicot & Woofter, *supra* note 62, at 320–21 (“Prison officials generally have a large degree of discretion to make final segregation decisions This in turn may lead to segregation for unlawful or abusive purposes.”); *see also* MOGUL ET AL., *supra* note 6, at 108 (noting that trans people are oftentimes automatically placed in segregated units or medical wings against their will but “for their own safety”).

100 Hagner, *supra* note 2, at 849; *see also* Lambie, *supra* note 6, at 244; Faithful, *supra* note 1, at 5 (noting that many prisons use solitary as an alternative placement for trans prisoners as “the best available solution”); Harada, *supra* note 76, at 646 (noting that several scholars have proposed administrative segregation as a solution).

101 *See* 28 C.F.R. § 115.43(a), (c), (d), (e); *see also* Colopy, *supra* note 6, at 268–69 (“[A]n official’s constitutional duty to provide security to all inmates may override a single inmate’s constitutional rights.”).

102 Witherspoon, *supra* note 3, at 213.

103 *Id.* This is known as V-coding and will be discussed in more detail in Part III.

104 *See* MOGUL ET AL., *supra* note 6, at 108 (noting deprivation from human interaction, communal activities, and recreation time); Colopy, *supra* note 6, at 268 (noting denied socialization and outdoor activities); Faithful, *supra* note 1, at 5.

segregation. SEG is a disciplinary tool¹⁰⁵ designed to further punish inmates who violate prison rules by separating them from others and isolating them in a tiny cell with sometimes less than one hour of time outside of the cell per day.¹⁰⁶ Segregation oftentimes fails to truly protect even those who request it because correctional officers (COs) treat segregated prisoners more harshly, both because of the presumption that SEG prisoners are more dangerous and because there are fewer witnesses to hold COs accountable.¹⁰⁷ Using SEG for prisoners who need protections expands a system of punishment within the prison to those who have experienced, or are particularly vulnerable to, violence.¹⁰⁸

Third, while PREA specifically calls for the continuation of programs and services to inmates in SEG for protection,¹⁰⁹ many trans people in protective custody are still denied access to educational and vocational programs, work opportunities, and the opportunity to gain “good time credits” or qualifications for prerelease programs.¹¹⁰ The lack of opportunities to participate in these programs cannot be considered at sentencing, however, because trial judges cannot solely consider rehabilitation concerns.¹¹¹ It is once again at sentencing where the federal criminal justice system fails trans people, as statutorily demanded judicial deference to corrections administrators continues to result in the violence and subjugation of transgender prisoners.

III. EFFECTS

The effects of prisons on trans people are devastating. Not only do many have the false choice—if given one—between physical violence or extreme isolation, but many also have to cope with being strategically denied gender-affirming care and even punished for consensual same-sex sex acts. These disparate punishments contribute to high recidivism rates and getting lost in a cycle of never-ending incarceration and criminal justice supervision upon release.

105 See Lamble, *supra* note 6, at 244 (“Even when used for safety purposes, ‘protective custody’ constitutes a form of punishment”); see also MOGUL ET AL., *supra* note 6, at 108 (“[S]egregation units [are] purportedly designed to punish individuals who violate the rules”).

106 MOGUL ET AL., *supra* note 6, at 108; Grassian, *supra* note 39, at 246.

107 MOGUL ET AL., *supra* note 6, at 108.

108 See Colopy, *supra* note 6, at 268 (“Placing transsexual inmates in administrative segregation because of their transsexual status and not for any misconduct, even if it is for their protection, effectively punishes them for being transsexual.”).

109 28 C.F.R. § 115.43(b).

110 MOGUL ET AL., *supra* note 6, at 108; Faithful, *supra* note 1, at 5; Hagner, *supra* note 2, at 849.

111 *Tapia v. United States*, 564 U.S. 319, 327 (2011); see also *supra* notes 16–47 and accompanying text.

A. The “Choice” Between Violence and Isolation

PREA has failed to eliminate the false choice between violence in the general population and isolation (and oftentimes even further violence¹¹²) in solitary confinement.¹¹³

i. Physical Violence and Retaliation

Trans people, especially trans women in men’s prison facilities, are most likely to experience physical violence and sexual assault while incarcerated.¹¹⁴ This is true not just for horizontal violence between prisoners but also vertical violence among trans inmates and corrections staff.¹¹⁵ Even in the two-to-three year mark after PREA was passed, one in five AMAB and one in four AFAB folks still faced sexual assault in U.S. prisons.¹¹⁶ While transgender people only comprise 0.6 percent of the current U.S. population,¹¹⁷ up to five percent of trans women in U.S. prison facilities in 2005 had experienced sexual assault.¹¹⁸

Even PREA-compliant prison facilities can continue to use sexual violence as a management tool.¹¹⁹ Correctional officers function as gatekeepers to sexual activity, selectively choosing which sexual activity to write up and which to overlook.¹²⁰ One common tactic among men’s prison facilities is “V-coding,” or placing transgender women in cells with aggressive cisgender male inmates as a form of social control.¹²¹ V-coding is so common that it has become “a central part of a transwoman’s

112 See LAW, *supra* note 75, at 204 (“[Being] in solitary confinement . . . makes people more vulnerable to staff sexual abuse and other misconduct.”); MOGUL ET AL., *supra* note 6, at 108 (“Most disturbingly, such placement can increase, rather than decrease, the risk of violence to LGBT people in prisons.”).

113 See MOGUL ET AL., *supra* note 6, at 108 (noting the “catch-22” trans prisoners must face); see also Faithful, *supra* note 1, at 5 (discussing how little PREA and discretionary policies have improved the lives of trans prisoners “whose needs remain deeply misunderstood”).

114 MOGUL ET AL., *supra* note 6, at 100; Oparah, *supra* note 74, at 262; Rosenblum, *supra* note 4, at 522–24; Colopy, *supra* note 6, at 268; Hagner, *supra* note 2, at 849.

115 MOGUL ET AL., *supra* note 6, at 102 (“[P]risoners also must often submit to nonconsensual sex acts with guards or with other inmates for safety, to be free from disciplinary punishment or further harassment, or in return for drugs, commissary items, or other survival needs.”); see also Blake Nemeć, *No One Enters Like Them: Health, Gender Variance, and the PIC*, in CAPTIVE GENDERS, *supra* note 3, at 222 (“We’ve had so many transgenders [sic] that have been raped [by COs] and had proof. One of them even had the towel the CO wiped his semen on. Today I haven’t heard of one case that a transgender won against a law officer.”) (quoting Kim Love); Candi Raine Sweet, *Being an Incarcerated Transperson: Shouldn’t People Care?*, in CAPTIVE GENDERS, *supra* note 3, at 185–86 (“I have been cut by other prisoners for refusing to perform sexual acts for them, and I have been beaten and sexually assaulted (sodomized with the nightstick) by correctional staff.”).

116 Lamble, *supra* note 6, at 242.

117 Jan Hoffman, *Estimate of U.S. Transgender Population Doubles to 1.4 Million Adults*, N.Y. TIMES (June 30, 2016), http://www.nytimes.com/2016/07/01/health/transgender-population.html?_r=0.

118 See STOP PRISONER RAPE, IN THE SHADOWS: SEXUAL VIOLENCE IN U.S. DETENTION FACILITIES 5 (2006), <http://justdetention.org/wp-content/uploads/2015/10/In-The-Shadows-Sexual-Violence-in-U.S.-Detention-Facilities.pdf>.

119 See Witherspoon, *supra* note 3, at 212–13; see also Oparah, *supra* note 74, at 262.

120 MOGUL ET AL., *supra* note 6, at 100; Oparah, *supra* note 74, at 262.

121 LAW, *supra* note 75, at 203; see also Nemeć, *supra* note 115, at 222 (“The COs use the transgendered prisoners to keep the violence rate down. . . . They use us.”) (quoting Kim Love).

sentence.”¹²² The stories are all the same. Alexis Giraldo, for instance, was housed with a cisgender male prisoner who had status as an employee. The employee, and eventually one of his friends, requested she live with them. They then started raping her daily. Despite her several requests, she was never moved to a different cell.¹²³

Sexual violence in prison occurs within an environment that encourages objectifying and dehumanizing transfeminine bodies—especially trans women of color—through mandatory strip searches by male staff.¹²⁴ Strip searches tend to be “excessive, abusive, and invasive” and overtly transphobic, creating “highly sexualized and excessively hostile” prison environments.¹²⁵ They involve male COs groping “breasts, buttocks, or genitalia” and leering during shower, changing, and restroom times.¹²⁶ Orders to strip and then show off body parts, masturbate, or dance for COs are not unheard-of.¹²⁷ Trans bodies are often put on display for not just the COs but also the rest of the prison population who gawk, jeer, and shout obscenities at them.¹²⁸ Some scholars have suggested that strip-searching itself is not just an act of institutional violence but “a precursor to sexual assault.”¹²⁹ It does not take much to go from shouting sexual desires to making sexual advances, especially when the people who just stripped will soon share a cell with those men.

Trans prisoners oftentimes cannot escape violence even in administrative segregation. Traci Greene, for example, was placed in protective custody for her “feminine appearance” but was still attacked by another inmate with a mop handle and fifty pound fire extinguisher.¹³⁰ Placing victims of assault in SEG “often burdens the victims more than the aggressors”¹³¹ and fails to protect them from attacks by COs.¹³² When COs assault trans inmates, they can get away with it because of the power differentials between prison guards and prisoners.¹³³ The ultimate irony of protective custody for trans prisoners is that those tasked with protecting them can

122 Nemeć, *supra* note 115, at 228–9 (explaining how it is a prison norm and form of currency for goods and services).

123 Oparah, *supra* note 74, at 262.

124 *Id.* at 264. (“[F]ascination with the transgender body combines with racialized sexual exotification to further objectify transgender women of color.”).

125 MOGUL ET AL., *supra* note 6, at 101 (quoting Human Rights Watch).

126 *Id.*

127 *Id.*

128 See Witherspoon, *supra* note 3, at 211–12 (“I was put in a caged area where over 200 men witnessed, gawked, and made fun of me. Some made passes, some made lewd comments, and others made known their desire to have sex with me. . . . Then I was forced to strip off my clothes, bra, panties and stand nude in front of them while I changed clothes. This generated a lot of ‘cat calls,’ whistles, and more lewd comments.”).

129 Oparah, *supra* note 74, at 263–64.

130 Harada, *supra* note 76, at 637.

131 *Id.* at 646, n.197.

132 See, e.g., LAW, *supra* note 75, at 204; MOGUL ET AL., *supra* note 6, at 102; Nemeć, *supra* note 115, at 222; Sweet, *supra* note 115, at 185–86.

133 See Sweet, *supra* note 115, at 186 (“These very same prison staff do not even get punished for their violating actions. . . . If anything, the most that happens to employees is a suspension for a period of time, but that’s about it. Like nothing ever took place, like the world stopped as they hurt someone, they don’t face charges for their acts—they don’t even get fired, but they are simply let back to work, bragging about what they’ve done and/or how they did it, they sometimes even taunt the person harmed with other fellow employees.”).

still harm them.¹³⁴ SEG is a disciplinary tool designed more for punishment than for protection.

Prison policies and PREA still fail to adequately protect trans prisoners from violence,¹³⁵ and they cause even more punishment for those who engage in same-sex sexual acts. First, prisoners are punished for consensual sexual relationships among one another.¹³⁶ Since the passage of PREA, write-ups have increased in women's prisons that punish any physical contact as sexual misconduct.¹³⁷ The write-ups ultimately affect prisoners' ability to get good time credits, and some can result in charges for sexual abuse—resulting in time added to sentences—or sex offender labels that last a lifetime, impacting future chances of employment and housing upon release.¹³⁸ Second, victims of sexual assault tend to be automatically placed in solitary confinement “under the pretense that penal officials are providing them with protection during the investigation.”¹³⁹ Protective custody not only fails to protect them (see above), but it also sends a message that those who report assault will be punished by being placed in SEG.¹⁴⁰

The history of PREA makes it easy to see how this piece of legislation fails to offer adequate protections for trans prisoners. Its passage depended upon an “eclectic coalition of strange political bedfellows.”¹⁴¹ Liberal prison reformers, concerned about prison staff assaulting women, and conservative groups, hyper-anxious about same-sex sex between male inmates, banded together to pass the bill.¹⁴² Its passage ultimately depended upon framing prisons as “intrinsically queer spaces” characterized by “violent, victimizing, corrupting, and predatory sexuality.”¹⁴³ Giving corrections administrators discretion to write up and throw victims of rape and same-sex lovers in SEG sends a clear message that PREA—whose passage was motivated by fear and stigma of sex and HIV/AIDS¹⁴⁴—is designed to punish, not protect.

ii. Mental Health Degradation from Solitary Confinement

The extreme isolation and sensory deprivation of solitary confinement cause profound deteriorations in prisoners' mental health.¹⁴⁵ Several studies have suggested that solitary can cause “insomnia, anxiety, panic, withdrawal,

134 See *id.* at 186 (“Rapes, very nasty physical assaults, and beatings take place, by other inmates and by the very same prison personnel who are sworn to protect each and every inmate.”).

135 See MOGUL ET AL., *supra* note 6, at 103 (“The grim reality is that even though prison policies prohibit all sexual activity and violence, in practice prison officials not only allow and count on forcible sex, but use it to reinforce their own authority.”).

136 *Id.* at 109–10 (describing a prison facility in 2009 that sent women to isolation for violating the “no-sex” rule).

137 LAW, *supra* note 75, at 69.

138 *Id.* at 70–71.

139 MOGUL ET AL., *supra* note 6, at 103.

140 *Id.*

141 *Id.* at 105–06.

142 *Id.*

143 *Id.*

144 KUNZEL, *supra* note 84, at 234.

145 MOGUL ET AL., *supra* note 6, at 108–09.

hypersensitivity, ruminations, cognitive dysfunction, hallucinations, loss of control, aggression, rage, paranoia, hopelessness, lethargy, depression, emotional breakdowns, self-mutilation, and suicidal impulses.”¹⁴⁶ It can also cause a specific psychiatric syndrome associated with hyper-responsivity to external stimuli; perceptual distortions, illusions, and hallucinations; difficulties thinking, concentrating, and remembering; intrusive obsessive thoughts; overt paranoia; panic attacks; and less control over impulses.¹⁴⁷

The factors influencing the development of this syndrome and other adverse psychiatric consequences include the intensity and duration of sensory deprivation, the perceived intent of the isolation, and individual variability.¹⁴⁸ As length of time and the severity of sensory deprivation increases, so does the risk of deteriorated psychiatric conditions.¹⁴⁹ In addition, perceptions of malicious intent motivating the isolation and individuals with chaotic or fearful internal emotional lives also positively correlate with increased risk for psychiatric deterioration in solitary.¹⁵⁰ Because transgender prisoners are likely to spend substantial portions of their sentence in solitary¹⁵¹—for reasons that can reasonably be perceived as malicious intent on the part of transphobic guards or policies, especially if segregation is automatic¹⁵²—trans prisoners are most at risk to develop severe adverse psychiatric conditions as a result of a prison sentence.

The long-term effects of solitary confinement leave little hope for successful reentry into mainstream society. Symptoms of post-traumatic stress and persistent changes in personality may last for decades.¹⁵³ Other symptoms—like “flashbacks, chronic hypervigilance, and a pervasive sense of hopelessness” and “pattern[s] of intolerance of social interaction, [which] leav[e] the individual socially impoverished

146 Donald, *supra* note 39, at 33 (quoting Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 530 (1997)).

147 Grassian, *supra* note 39, at 333–37. Certified psychiatrist and former Harvard Medical School faculty member Stuart Grassian examined over two hundred prisoners in confinement conditions and observed that solitary “caused either severe exacerbation or recurrence of preexisting illness, or the appearance of an acute mental illness in individuals who had previously been free of any such illness.” *Id.* at 333. He concluded from his research that “[t]he restriction of environmental stimulation and social isolation associated with solitary are strikingly toxic to mental functioning, producing a stuporous condition associated with perceptual and cognitive impairment and affective disturbances.” *Id.* at 354.

148 *Id.* at 346–48.

149 *Id.*

150 *Id.*

151 See Harada, *supra* note 76, at 634 (describing how Miki Ann DiMarko spent fourteen months in confinement characterized as “stark, almost dungeon-like housing quarters”) (quoting *DiMarco v. Wyo. Dep’t of Corr.*, 300 F. Supp. 2d 1183, 1194 (D. Wyo. 2004)).

152 See *id.* at 645–46 (“Although the physical harm attendant to placement in the general population may be mitigated by placement in protective custody or administrative segregation, the denial of interaction with other human beings and extreme isolation may bring their own psychological harms. This may be especially acute for the transgender prisoner where that isolation is a result of transgender status alone.”).

153 Grassian, *supra* note 39, at 353.

and withdrawn, subtly angry, and fearful when forced into social interaction”¹⁵⁴—can severely impair a newly-released prisoner from being able to reintegrate into society.

It is hard enough for transgender people to get a job,¹⁵⁵ let alone with a criminal record and with lasting—and arguably legally disabling¹⁵⁶—psychological injuries from incarceration. The Congressional push away from rehabilitation has given trial judges at sentencing fewer incentives to investigate the injustices of confinement that detract from rehabilitative goals.¹⁵⁷ If sentencing is not about rehabilitation, then the damage of solitary is not questioned.

iii. Disparate Treatment in Prison is Disparate Treatment at Sentencing

The high degree of violence and isolation and the devastating health effects that they have on transgender prisoners disproportionately punishes trans people for their crimes.¹⁵⁸ Incarcerated trans people must contend with the dangers of physical and sexual assault—in conjunction with the mental harms from long-term, extreme sensory deprivation—even though these additional punishments are not written in the Guidelines or considered by trial judges as part of the original sentence.¹⁵⁹ Congress did not think about trans people when restricting judicial authority to make case-by-case sentencing decisions. The Congressional push away from concerns about rehabilitation has increased, rather than decreased, disparities in sentencing for trans folks because there are no checks at sentencing that would require case-specific actors to look into the devastating effects that prisons have on trans people.¹⁶⁰ While the Congressional push for uniform sentences may decrease disparities on paper, disparate punishments continue to proliferate within systems of punishment that directly translate into disparate sentencing for transgender inmates.

Trans prisoners are also likely to have their identities unacknowledged¹⁶¹ and their medical resources of transition either denied or sporadically offered.¹⁶² These

154 *Id.*

155 See NAT’L CTR. FOR TRANSGENDER EQUAL. & THE NAT’L GAY AND LESBIAN TASK FORCE, NATIONAL TRANSGENDER DISCRIMINATION SURVEY: PRELIMINARY FINDINGS 1–2 (2009), http://www.thetaskforce.org/static_html/downloads/reports/fact_sheets/transsurvey_prelim_findings.pdf.

156 The legal definition of disability, according to the amended Americans with Disabilities Act, is predicated upon an individual’s ability to perform “major life activities” like work. See 42 U.S.C. § 12102 (2009).

157 See Part I, *supra*.

158 Colopy, *supra* note 6, at 267.

159 *Id.* at 268.

160 See *supra* Part I, A.

161 MOGUL ET AL., *supra* note 6, at 110 (discussing the prison legal system’s refusal to recognize chosen names and gender identities and its refusal to offer clothing, especially undergarments, that matches chosen identities).

162 Blanket denials of essential medical treatments violate the Eighth Amendment, but corrections administrators are given so much discretion to weigh “ancillary factors”—like availability, cost, and security risks—that it is easy to avoid an Eighth Amendment violation. Bourcicot & Woofter, *supra* note 62, at 294; Colopy, *supra* note 6, at 250, 254–55. There is also no Eighth Amendment violation for denying hormone treatment to people who cannot prove via documentation that they obtained a legal prescription prior to incarceration. MOGUL ET AL., *supra* note 6, at 111–12. Obtaining hormones can be

denials result in not just psychological¹⁶³ but also physiological¹⁶⁴ damage. These harms are additional punishments¹⁶⁵ that cisgender prisoners do not have to face, even if they have committed similar crimes. These harms are—in addition to the violence and isolation discussed above—not part of trans inmates’ original punishment at sentencing, but they still contribute to trans folks’ overall experience of punishment in prisons.

Assuming the effects of disparate punishments did not exist, trans people still receive longer sentences on a whole than cisgender people.¹⁶⁶ Rather than due to judicial bias across the board—even though the presence of transphobic bias is statistically probable among judges¹⁶⁷—trans defendants spend longer time in prison because their—sometimes automatic—placement in SEG precludes participation in prerelease programs and can even result in stacking additional time onto their sentences.¹⁶⁸ The practical effects of spending the majority of a sentence in SEG, a punishment mechanism within a system of punishment, are that trans people are

an “insurmountable obstacle” for people who cannot afford to regularly see or who live far from endocrinologists willing to treat them. *Id.* Although it is BOP policy to continue treatment for those with a legal prescription, many trans people still get their hormones cut off upon entering prison because they started hormones underground. *Id.* Even for those who have adequate documentation, “[treatment] is often provided sporadically, inconsistently, at inappropriate dosages, and without accompanying psychological support, [which] endanger[s] transgender inmates’ health and wellbeing.” *Id.* Sometimes the guidelines for medical care for trans inmates can be “insufficient or not followed.” Lambie, *supra* note 6, at 244.

163 Some scholars have suggested that refusing to recognize a transgender person’s identity is “a psychological harm in and of itself.” Harada, *supra* note 76, at 645. In addition, the WPATH Standards of Care insist that hormone therapy be continued because discontinuance can cause “extreme mental distress and anguish,” including emotional instability, humiliating physical changes, and severe psychological reactions like depression, anxiety, and suicidal tendencies. MOGUL ET AL., *supra* note 6, at 112; Colopy, *supra* note 6, at 263–64; Hagner, *supra* note 2, at 850–51.

164 See LAW, *supra* note 75, at 202 (“For transgender women, whose bodies are accustomed to regular estrogen intake, [hormone] withdrawal can cause heart problems, irregular blood pressure, hot flashes, anxiety, panic attacks, hair loss, and difficulty with short-term memory and concentration.”).

165 See Colopy, *supra* note 6, at 268; Faithful, *supra* note 1, at 3 (“Our prison system . . . further sentences [trans people] to live within their own bodies’ betrayal.”); Hagner, *supra* note 2, at 850–51 (“Denial of gender affirming medical care can result in . . . a ‘very invasive loss of sovereignty over one’s own body.’”).

166 See, e.g., MOGUL ET AL., *supra* note 6, at 107–08 (SEG prevents participation in programs and other opportunities for early release); LAW, *supra* note 75, at 204 (SEG reduces access to programming and increases psychological distress); Lambie, *supra* note 6, at 244 (SEG is an additional system of punishment within prisons); Colopy, *supra* note 6, at 268 (automatic SEG placement is effectively punishment for being transgender).

167 Transphobia can manifest in implicit bias against transgender clients. See Byrgen Finkelman, *Transphobic Judges—A Worry Cis Folks Don’t Have*, TIMES UNION: TRANSGENDER TALK (Oct. 23, 2013), <http://blog.timesunion.com/transgender/transphobic-judges-a-worry-cis-folks-dont-have/1593> (“Cisgender people never have to think about how transphobia can derail something as simple as a name change and make a life unnecessarily difficult.”). The presence of federal judges vehemently against transgender rights advocacy has also increased in the first year of the Trump presidency. See, e.g., Kevin Diaz, *Trump Pick for Federal Judge in Texas Slammed Transgender Rights as ‘Satan’s Plan’*, MY SAN ANTONIO (Sept. 21, 2017, 12:00 A.M.), <http://www.mysanantonio.com/news/local/article/Trump-pick-for-federal-judge-in-Texas-slammed-12216466.php>.

168 See, e.g., LAW, *supra* note 75, at 204; MOGUL ET AL., *supra* note 6, at 108.

locked up longer and with more deleterious effects than their cisgender counterparts. In the end, trans people are disparately sentenced “for their own protection.”

Trans people are therefore punished more harshly than similarly situated cisgender defendants because they experience more violence, confinement, inadequate medical treatment, and devastating physical and mental health problems in prisons. If trial judges were able to consider these additional punishments at sentencing, Guidelines variances could be justified with concerns to avoid what is, in effect, disparate sentencing. But it does not seem like judges actually consider these abuses as disparate sentences—or there would be more Guidelines variances for trans defendants on these bases.

iv. Higher Rates of Recidivism out of Necessity to Survive

Many incarcerated transgender people committed financially-motivated crimes—like theft, credit card and identity fraud, sex work, and drug trafficking.¹⁶⁹ This is usually because medical procedures of transition are expensive and out-of-pocket,¹⁷⁰ but it is also because there is a cumulative effect on the ability for visible trans people to survive in a society where transphobic stigma produces discrimination in access—or unsafe access—to housing, employment, health care, education, and public benefits and safety nets like homeless and domestic violence shelters and

169 Taking hormones, if not provided by a doctor’s prescription, can put trans people behind bars for illicit drug activity. Suppliers, trans people who can obtain multiple prescriptions, are also at risk of incarceration. See Lori A. Saffin, *Identities Under Siege: Violence Against Transpersons of Color*, in CAPTIVE GENDERS, *supra* note 3, at 151.

170 In 2014, the Affordable Care Act lifted Medicaid’s broad coverage exclusions for transgender medical procedures like hormone replacement therapy and surgeries; but since then, only ten states (plus D.C.) amended their rules to remove these exclusions, with the remaining states still either explicitly excluding or not even mentioning coverage for gender-affirming medical procedures. See Kellan Baker, Ashe McGovern, Sharita Gruberg, & Andrew Cray, *The Medicaid Program and LGBT Communities: Overview and Policy Recommendations*, CTR. FOR AM. PROGRESS (Aug. 9, 2016), <https://www.americanprogress.org/issues/lgbt/reports/2016/08/09/142424/the-medicaid-program-and-lgbt-communities-overview-and-policy-recommendations>. Private insurers are also still able to broadly exclude coverage for trans-related medical procedures, and many couch exclusions in other neutral language like “cosmetic” or “[not] medically necessary.” OUT 2 ENROLL, REPORT ON TRANS EXCLUSIONS IN 2017 MARKETPLACE PLANS: SUMMARY OF FINDINGS 1 (2017), <https://out2enroll.org/out2enroll/wp-content/uploads/2015/10/Report-on-Trans-Exclusions-in-2017-Marketplace-Plans.pdf>. The out-of-pocket costs of transition vary based on what kinds of medical procedure each trans person needs to alleviate their dysphoria. The total cost of multiple gender-affirming surgeries—including facial, breast, fat distribution, and “bottom” surgeries—can add up to over \$100,000 depending on the type and number of procedures performed. See Alyssa Jackson, *The High Cost of Being Transgender*, CNN.COM (July 31, 2015) (citing *Female to Male Price List*, PHILA. CTR. FOR TRANSGENDER SURGERY, <http://www.thetransgendercenter.com/index.php/femaletomale1/ftm-price-list.html>; *Male to Female Price List*, PHILA. CTR. FOR TRANSGENDER SURGERY, <http://www.thetransgendercenter.com/index.php/mtf-price-list.html>), <http://www.cnn.com/2015/07/31/health/transgender-costs-irpt/index.html>. The cost of hormone replacement therapy—which once started is usually continued for the rest of a trans person’s life—depends on the frequency of doctor visits and required lab panels, which can add up to \$1500 per year or more. See Elle Bradford, *You Won’t Believe How Much It Costs to Be Transgender in America*, TEEN VOGUE (Nov. 24, 2015), <https://www.teenvogue.com/story/transgender-operations-hormone-therapy-costs> (documenting one trans woman’s experience with her financial costs of transition).

Medicaid.¹⁷¹ The lack of safety nets disproportionately affects trans people who tend to be poor, criminalized, and imprisoned at much higher rates.¹⁷²

Many low-income trans people have less normatively-accepted, “productive” labor skills—since some are forced to drop out of school early on due to abusive bullying or familial rejection¹⁷³—so they do not have as many opportunities to make incomes in mainstream markets.¹⁷⁴ Rampant employment discrimination prevents even normatively qualified trans people from getting jobs, and workplace abuse pushes trans people out of the jobs they already had.¹⁷⁵ Lack of employment opportunities incentivize criminalized behaviors to make an income, pay for transition, and/or cope with poverty.¹⁷⁶ Trans people are also much more likely to commit crimes associated with poverty like loitering, sleeping in public, and panhandling.¹⁷⁷ Contemporary studies have shown that specific vulnerable populations of queer and trans AMABs¹⁷⁸ are disproportionately at risk of being incarcerated for drug-, status-, and property-related crimes.¹⁷⁹

171 LAW, *supra* note 75, at 201–02; *see also* Colopy, *supra* note 6, at 236, 238; Saffin, *supra* note 169, at 151 (describing the economic need that propels many trans women of color into sex work as the only means for survival and how participation puts them at risk of harassment, violence, and constant surveillance from police). *See generally* GRANT ET AL., *supra* note 32, at 2–8 (executive summary of survey documenting rates of discrimination in employment, education, housing, public accommodations, health care, police response, and prison treatment).

172 LAW, *supra* note 75, at 201–02; Colopy, *supra* note 6, at 238–39 (“Comparing even the more common male-to-female transsexual birth rate of one in 12,000 to the estimated rate in federal prison of one in 2,100, it becomes evident that transsexual incarceration rates are disproportionate to those of the general population.”).

173 *See* GRANT ET AL., *supra* note 32, at 8, 10 (dropping out as a major negative life event listed).

174 *See* LAW, *supra* note 75, at 201–02.

175 NAT’L CTR. FOR TRANSGENDER EQUAL. & THE NAT’L GAY AND LESBIAN TASK FORCE, *supra* note 155, at 1–2; GRANT ET AL., *supra* note 32, at 53–62.

176 *See* GRANT ET AL., *supra* note 32, at 3, 64–66 (noting that sixteen percent of the total sample had experience in criminalized work and that almost thirty percent of respondents who were unemployed or had lost jobs due to bias had participated in underground economies).

177 LAW, *supra* note 75, at 201–02. The history of criminalizing poverty has its roots in the immediate aftermath of the Civil War, where white Southern legislatures responded with backlash to the emancipation of slaves by passing black codes and vagrancy laws criminalizing freedmen’s status as poor. *See* ALEXANDER, *supra* note 30, at 28.

178 Unfortunately, transgender women oftentimes get thrown in with “gay men” in research studies.

179 A 2008 study in Miami, Florida looked at gay and bisexual men’s involvement with the criminal justice system. Steven P. Kurtz, *Arrest Histories of High-Risk Gay and Bisexual Men in Miami: Unexpected Additional Evidence for Syndemic Theory*, 40 J. PSYCHOACTIVE DRUGS 513 (2008). This study looked a study in California that found that among gay and bisexual men, “(1) prior substance abuse treatment history was the strongest predictor of arrest; (2) current employment was a protective factor; and (3) sex exchanges for money and drugs and a history of STD infection were predictive of prior arrest.” *Id.* at 3 (citing Dennis G. Fisher et al., *Arrest History Among Men and Sexual Orientation*, 50 CRIME & DELINQUENCY 32 (2004)). The 2008 study also found that the largest predictors of criminal activity were substance abuse—especially crack and powder cocaine use—prior abuse, economic instability and homelessness, higher levels of mental health distress and sex sensation seeking, and lower education levels. The majority of crimes were drug and alcohol related (38.7% of participants), with possession and distribution arrests the highest (28.2%). Status crimes (37.1%) closely followed. Property crimes (28.2%) were more associated with theft than violence, with 46% arrested for larceny, shoplifting, burglary, or stolen goods. 19.4% were arrested for violent crimes, but arrests for aggravated and simple assault and battery (21.8%) far outnumbered those for robbery (6.5%). *Id.* at 13.

Once released from prison, transgender ex-prisoners are at a much higher risk of reoffending and returning to prison.¹⁸⁰ All ex-prisoners can be legally denied access to government welfare and housing programs, and private employment opportunities.¹⁸¹ This is particularly devastating for trans ex-prisoners whose difficulties getting a job and finding safe housing have increased exponentially.¹⁸² The “cycle of racialized gender policing, marginalization, and discrimination” starts over upon release,¹⁸³ when trans ex-prisoners have become even more isolated from networks and safety nets, making them even more likely to participate in underground economies to survive. Violating probation, reoffending, or even just being at the wrong place at the wrong time—because of high police surveillance rates of low-income communities¹⁸⁴—propels them right back into prison.

If trial judges at sentencing considered how trans people become so vulnerable to recidivism, because of how the stigma of criminality compounds with stigmas of gender non-conformity, then prison sentences could be shorter or even eliminated in favor of lesser sanctions. But trial judges are anchored to the Guidelines, never incentivized to think about anything more than what the Sentencing Commission—and thereby Congress—gives them. The fact that Congress has pushed for more “tough on crime” legislation¹⁸⁵ and has seriously devalued the importance of considering rehabilitation and specific defendant characteristics at sentencing speaks volumes when one remembers that ex-felons are legally barred from voting.¹⁸⁶

CONCLUSIONS – TRANSCEND THE SYSTEM

Congress’s obsession with uniformity is an attempt to reduce unwarranted sentencing disparities, but disparities continue to permeate the U.S. criminal justice system.¹⁸⁷ Forcing trial judges to be “blind” to issues of race, class, and gender does not eliminate oppression and instead allows judges to continue using racist, sexist, and classist rhetoric, but under a new, legitimized name.¹⁸⁸ As long as judges can come up with any reason other than race, sex, class, or other deviations from norms in order to sentence someone at the higher end of the range or give a longer sentence

180 Oparah, *supra* note 74, at 268.

181 See ALEXANDER, *supra* note 30, at 144–54; Oparah, *supra* note 74, at 266.

182 See Oparah, *supra* note 74, at 268 (“The stigma of a criminal record interacts with existing social stigmas related to race, class, and gender non-conformity to further sediment social exclusion and limit the range of available options.”).

183 *Id.*

184 See SPADE, *supra* note 33, at 120–21.

185 Oparah, *supra* note 74, at 268.

186 ALEXANDER, *supra* note 30, at 158–61.

187 See *supra*, Part I.

188 SPADE, *supra* note 33, at 113–14 (explaining that courts can uphold racist and sexist laws and programs as neutral and fair while relying on racist and sexist images that promoted the passage of these laws and programs).

than similarly situated defendants, then the sentence is justified.¹⁸⁹ Responding to active injustices of systemic marginalization with legal rules and policies that advocate for colorblindness or gender-blindness literally refuses to see the problem.

Trial judges should be given more discretion to consider systemic oppression that contributes to the criminalization of marginalized identities. The sentencing regime should anchor forward-looking, rather than backward-looking, thinking.¹⁹⁰ Judges should be encouraged to use their discretion to vary from the Guidelines.¹⁹¹ Lesser sanctions—and especially alternatives to punishment—should always be available to defendants whose unique positions in society put them at such a high risk of violence in, and damaging outcomes from, prison. No punishment involving cages, regardless of its purpose, would be effective for these kinds of defendants.¹⁹²

While judges are more visible and accountable than bureaucratic corrections institutions, there are definite limitations to framing a solution in terms of demanding judges to “be better.” First, clearly race- or gender-based sentencing would violate Fourteenth Amendment doctrine.¹⁹³ Second, no matter how much it is given to them, some judges might never use their discretion to vary in favor of lesser sanctions and may even go so far as to increase penalties.¹⁹⁴ Third, the President selects federal judges for lifetime tenure, and not many trans-friendly judges have been (or are likely to continue to be) appointed during this ultra-conservative and regressive political climate.¹⁹⁵

189 Judges can come up with a whole bunch of “legitimate” reasons to incarcerate a homeless trans person of color (who uses her stolen money for transition) longer than a blue collar white cis-male worker (using his stolen money to “provide” for his family), even if both of them committed similar crimes in similar circumstances.

190 Rather than look back to the offense and concoct an adequate punishment, the Guidelines should make judges look at the long-term consequences of prison to determine a sentence based off the likelihood of reintegration upon release. Structuring the Guidelines around long-term, rather than short-term, solutions makes sense when considering that most people in prison eventually get out with very little prospects for the future.

191 For trans people, unique risk factors associated with being transgender in a facility that does not match one’s preferred gender presentation should be adequate cause for Guidelines variances. Colopy, *supra* note 6, at 269.

192 Considering that most trans prisoners will spend the vast majority of their time in solitary and that long-term confinement results in devastating mental deterioration, trial judges should use deterrence concerns to justify Guidelines variances because solitary produces even more vulnerabilities that increase the likelihood of committing future survival crimes in relation to mental illness. *See supra* Part III.

193 *See Loving v. Virginia*, 388 U.S. 1 (1967) (holding race-based classifications subject to strict scrutiny); *Craig v. Boren* 429 U.S. 190 (1976) (holding gender-based classifications subject to intermediate scrutiny).

194 *See, e.g., Williams v. New York*, 337 U.S. 241, 248 (1949) (justifying the death penalty with individualist rehabilitation punishment theory).

195 According to Lambda Legal, the current president has nominated at least sixteen federal judges with anti-LGBT records. LAMBDA LEGAL, TRUMP’S JUDICIAL ASSAULT ON LGBT RIGHTS: A BRIEF ANALYSIS OF TRUMP’S RESHAPING OF THE COURTS ONE YEAR IN 3 (2017), https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/trumps_judicial_assault_on_lgbt_rights_2017.pdf. The newest Supreme Court Justice Neil Gorsuch has a long history of hostility toward LGBT people and other marginalized communities. LAMBDA LEGAL, *Neil Gorsuch Has an Unacceptable, Hostile Record Towards LGBT People*, LAMBDA LEGAL BLOG (Jan. 31, 2017), https://www.lambdalegal.org/blog/20170131_no-to-neil-gorsuch. In 2015, he

The structure of the entire criminal justice system needs to change. Prisons should be abolished, and punishment should no longer be at the crux of justice because it is a manipulative response to harm,¹⁹⁶ and it is ineffective at changing behaviors.¹⁹⁷ Lesser sanctions, while preferable to prisons, can also be inadequate because they “simply replace old cages with new ones.”¹⁹⁸ Punishment and its purposes should be altogether abandoned in favor of alternatives that instead promote providing people with adequate programs and care for the purposes of healing and reparative justice.¹⁹⁹

The problem starts with the entire system, and it is not going to go away by telling judges to use their discretion better. It starts not just with implicit judicial bias but also with heavy police surveillance of low-income neighborhoods of color²⁰⁰ and increased funding to policing and prosecution but decreased funding to public defense attorneys.²⁰¹ It starts with drug laws designed to criminalize people among racial and socioeconomic categories who supposedly use those drug forms more.²⁰² It will only go away if we dismantle the cages. Top-down reforms work about as well as trickle-down economics.²⁰³ Something gets lost along the way, whether it is money to offshore bank accounts or diffused responsibility for getting reparations to marginalized populations.

joined an opinion that rejected arguments made by a transgender prisoner that her Constitutional rights were violated by the Oklahoma DOC for denying her medically necessary hormone therapy and gender-appropriate clothing. LAMBDA LEGAL, *We Reviewed All of Gorsuch’s Record. Here’s What We Found*, LAMBDA LEGAL BLOG (Jan. 31, 2017), https://www.lambdalegal.org/blog/20170131_gorsuch-record. The opinion implied that the DOC’s housing and clothing choices for her were rationally related to a legitimate state purpose. *Id.* (quoting *Druley v. Patton*, 601 Fed. Appx. 632, 635–36 (10th Cir. 2015)).

196 ALEXANDER, *supra* note 30, at 7 (noting that governments primarily use punishment as a tool of social control).

197 Lamble, *supra* note 6, at 251 (noting how prisons are ineffective mechanisms for deterrence and rehabilitation).

198 *Id.* at 253 (referencing house arrest, surveillance cameras, probation, fines, etc. that can still lead to prison time).

199 *See id.* at 252–54 (“Creating abolitionist alternatives means encouraging non-punitive responses to harm [and] enacting community-based modes of accountability . . . [like] transformative justice initiatives, community-based restitution, social and economic support networks, affordable housing, community education projects, youth-led recreation programs, free accessible healthcare services, empowerment-based mental health, addiction and harm reduction programs, quality employment opportunities, and support for self-determination struggles.”).

200 SPADE, *supra* note 33, at 120–21.

201 The disparities are appalling in state systems that allocate the majority of their federal dollars to prosecution and law enforcement. THOMAS GIOVANNI & ROOPAL PATEL, *GIDEON AT 50: THREE REFORMS TO REVIVE THE RIGHT TO COUNSEL 4* (2013), http://www.brennancenter.org/sites/default/files/publications/Gideon_Report_040913.pdf.

202 *See* THE HOUSE I LIVE IN (BBC News 2012) (explaining the history of criminalizing drugs as a tool for race- and class-based oppression by associating smoking opium with Chinese laborers, marijuana with Latinx laborers, heroin and crack-cocaine with Black folks, and meth with queers and low-income rural white folks).

203 The assertion here is that all theories that assume giving to those with privilege will “eventually” get to those on the margins just do not work. *See* SPADE, *supra* note 33, at 91–92 (critiquing rights-based, top-down reforms in hate crimes legislation); Mehran Etebari, *Trickle-Down Economics: Four Reasons Why It Just Doesn’t Work*, FAIR ECON. (July 17, 2003), http://www.faireconomy.org/trickle_down_economics_four_reasons.

True uniformity will always fail, but so too does true proportionality. Codes of “morality” and considerations of a defendant’s worth—based off of expectations of productivity in a capitalist system that privileges conformity to norms of whiteness, respectability, and the ability to produce and reproduce white labor—still structure judicial decisions to sentence, regardless of whether judges are conscious of it. Congress’s focus on uniformity as the solution to sentencing disparities has only reduced disparities on paper; but in reality, it has increased disparities in actual punishments. The system will always be biased, and unless we replace cages and punishment with care and reparations, the injustices will never end.