

Article

Queer Theory and the Transition from Sex to Gender in English Prisons

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Abstract: Social theory describes and explains the world but can also transform it. The generative power of theory has been shown for disciplines that emulate natural sciences, like economics and psychiatry. I argue that queer theory has similar power, using the case of prison policy in England and Wales. The theory's privileging of gender over sex helped to transform the criteria for incarcerating males in women's prisons: from genital surgery to legal status, and then to gender identity. The implementation of queer theory enables us to unpack two distinct meanings of gender performance. The first is dramaturgical, where the individual gives off the appearance of femininity or masculinity through body modification, clothing, and gesture. The second meaning of performance is illocutionary, where the individual verbally declares themselves to be man or woman. This case demonstrates the impact of queer theory on institutional policy and elite opinion, even under a Conservative government.

Keywords: sex; gender; transgender; prisons

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The very subject of women is no longer understood in stable or abiding terms.

—Judith Butler, 1990¹

Her penis was erect and sticking out of the top of her trousers.

—Charlotte Dangerfield prosecuting Karen White, 2018²

¹ Butler, Judith. 1990. *Gender Trouble: Feminism and the Subversion of Identity*. New York: Routledge, p. 1.

² Evans, Martin, Kate McCann, and Olivia Rudgard. 2018. Transgender Person Accused of Rape Is Remanded into Female Prison and Sexually Assaults Inmates Within Days. *Daily Telegraph*, 6 September.

Social theory provides a model of the social world, and theory can also become a model for remaking it.³ In financial economics, for instance, the Black-Scholes-Merton model of option prices removed the stigma of gambling from the options exchange market; as traders adopted the model, actual prices converged on its predictions, at least for some years.⁴ In psychiatry, the novel diagnosis of Multiple Personality Disorder led to a huge increase in the number of patients exhibiting symptoms matching this diagnosis.⁵ These examples come from disciplines that aspire to the rigour of natural sciences. Queer theory, by contrast, rejects scientific pretensions. It also lacks a body of practitioners equivalent to traders or clinicians. I will argue that it nonetheless provides a model for a new kind of society. In queer theory, 'gender emerges as the term which absorbs and displaces "sex".⁶ The theory therefore leads institutions to replace sex by gender, namely the individual's performance of feminine- or masculine-coded behaviours or their stated identification as man or woman (or as something else).

The transformative power of queer theory is illustrated by the transition from sex to gender in the prison service in England and Wales from the 1990s to the 2010s.⁷ As one of the last domains in contemporary society to divide men from women, prison is a vital prize for queer theory to capture. The chief demand is for males who identify as women to be incarcerated in the women's estate. The inverse—for females who claim to be men—is not an issue, for two reasons. First, this group is small in number because so few prisoners are female: in England and Wales, females comprise 4.3% of the prison population.⁸ Second, these prisoners rarely wish to transfer to the men's estate because they appreciate their own vulnerability. The placement of males in women's prisons—in effect, the transition from a system based on sex to one based on gender—has occurred throughout the English-speaking world, from Australia to the United States.⁹ The English case is particularly intriguing because the queering of prisons accelerated under the Conservatives, who have held power at Westminster since 2010 (albeit in coalition until 2015). Scotland has followed a similar trajectory, but this is more readily explained because it occurred under a left-wing government which champions gender identity.¹⁰

The article begins by explicating the logic of queer theory, focusing on Judith Butler. Subsequent sections narrate three phases of policy, defined by the criteria for entry to women's prisons. In the first phase the criterion was genital surgery. Although queer theory was embraced by activists, policy was really changed by the unintended consequences of judicial decisions. Prisoners won the right to healthcare equal to that

³ Geertz, Clifford. 1966. Religion as a Cultural System. In *Anthropological Approaches to the Study of Religion*. Edited by Michael Banton, London: Tavistock Publications, pp. 1–46.

⁴ MacKenzie, Donald A. 2006. *An Engine, Not a Camera: How Financial Models Shape Markets*. Cambridge, MA: MIT Press.

⁵ Hacking, Ian. 1995. *Rewriting the Soul: Multiple Personality and the Sciences of Memory*. Princeton: Princeton University Press.

⁶ Butler, Judith. 1993. *Bodies That Matter: On the Discursive Limits of 'Sex'*. London: Routledge, p. xv.

⁷ The administrative jurisdiction is England and Wales, but no women's prison is located in Wales, and so the subject matter is in effect women's prisons in England.

⁸ Ministry of Justice. 2020. Prison Population, 31 December 2019. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/861890/Population_31Dec2019.xlsx.

⁹ Jeffreys, Sheila. 2014. *Gender Hurts: A Feminist Analysis of the Politics of Transgenderism*. London: Routledge, pp. 158–61; Taylor, Jami K., Donald P. Haider-Markel, and Daniel C. Lewis. 2018. *The Remarkable Rise of Transgender Rights*. Ann Arbor: University of Michigan Press, pp. 290–93.

¹⁰ Murray, Kath, and Lucy Hunter Blackburn. 2019. Losing Sight of Women's Rights: The Unregulated Introduction of Gender Self-Identification as a Case Study of Policy Capture in Scotland. *Scottish Affairs* 28: 262–89.

provided outside prison, while transsexual patients won the right to genital surgery. In combination, these cases established a right for prisoners to obtain genital surgery, which in turn enabled them to move to the women's estate. When clinicians decreed that the prerequisite for genital surgery—living as a woman—could not be fulfilled in a men's prison, then it naturally followed that male prisoners desiring genital surgery had to be transferred *before* surgery. This enabled the first rapist to enter a women's prison in 2009. (The crime of rape in the United Kingdom can be committed only by a male.¹¹) This judgment led to the second phase, where the criterion became legal sex. Queer theory now came into its own. It had shaped the formulation of the Gender Recognition Act, the first law in the world to allow someone to change legal sex without undergoing any physical change. Queer theory motivated activists to launch a social media campaign to transfer a violent male to the women's estate. This successful campaign was followed by two suicides in prison, sympathetically reported by the mainstream media. These events persuaded the government to revise prison regulations, advised by Gendered Intelligence—an organization founded upon queer theory. The revised regulations of 2016 ushered in the third phase, where the criterion became gender identity. These regulations allowed at least two dozen males into the women's estate, and facilitated several sexual assaults of female prisoners. The final section of the paper interrogates the performativity of gender. Two distinct meanings are delineated: dramaturgical, where the individual gives off the appearance of femininity or masculinity through body modification, clothing, and gesture; and illocutionary, where the individual verbally asserts a claim to be man or woman.

This article focuses narrowly on the incarceration of males in women's prisons. It excludes important topics pertaining to the treatment of transgender prisoners in the men's estate: segregation, as for example in a hospital wing or Vulnerable Prisoner Unit; rules for clothing and accoutrements like wigs and cosmetics; and the availability of cross-sex hormones. Likewise excluded is the effect of potential incarceration on sentencing: in some cases transgender males avoid a custodial sentence because that would be served in a men's prison.¹² The countermobilization by dissident feminists who reassert the primacy of sex over gender is also beyond the scope of this paper.

Terminology is inevitably controversial with this subject. I use the terms transsexual or transgender as appropriate for the era. Circumlocutions such as 'a pre-operative, pre-hormone therapy, male-to-female transgender prisoner'¹³ will be eschewed in favour of simple adjectives like male. The use of pronouns to affirm gender identity rather than denote biological sex reflects—and arguably enables—the policy shifts analysed here. Because the application of female pronouns to males erodes our ability to recognize differences in the propensity to violence and sexual predation, especially when dealing with men convicted of crimes against the person, I will not adhere to this convention. Instead, transsexual and transgender people are referred to by name. For males who

¹¹ Rape now requires penetration by a penis (Sexual Offences Act 2003), and previously was defined as perpetrated by a man (Sexual Offences Act 1956). In rare cases a female accomplice can be charged with rape under the doctrine of joint enterprise.

¹² E.g., Swerling, Gabriella. 2020. Hammer-Wielding Trans Woman Escapes Prison after Judge Hears There Was No Way to Confirm Her Gender. *Telegraph*, 27 February.

¹³ Law Society of Ireland. 2019. Male-bodied Transgender Inmate Housed with Women. *Gazette*, 18 October. <https://www.lawsociety.ie/gazette/top-stories/male-bodied-transgender-inmate-housed-with-women-prisoners>.

first declared a feminine identity after incarceration, I provide the name under which they were convicted as well as their subsequent feminine name.

1. Queer Theory

Queer theory resists definition. It will therefore help to focus specifically on Butler, who is most cited by those shaping prison policy. In the words of Kate More, an influential British activist, Butler's *Gender Trouble* 'was immediately an intellectual best-seller, arguably founding both Queer Theory and subsequently the new transgendered politics'.¹⁴ (The point holds even though the label 'queer theory' itself was coined after the book's publication.¹⁵) Butler's argument was distinctive in two ways.

Second-wave feminists had asserted that gender was socially constructed on a biological foundation; 'a taboo against the sameness of men and women', as Gayle Rubin put it, 'exacerbates biological differences between the sexes'.¹⁶ Butler, however, theorized gender as 'radically independent of sex', so that 'gender itself becomes a free-floating artifice, with the consequence that *man* and *masculine* might just as easily signify a female body as a male one, and *woman* and *feminine* a male body as easily as a female one'.¹⁷ Sex is merely 'a cultural norm which governs the materialization of bodies'.¹⁸ This claim itself was not novel, for Suzanne Kessler and Wendy McKenna had already argued that sex is entirely socially constructed, using transsexuals as a crucial case.¹⁹ They provided a descriptive and explanatory account, without drawing any prescriptive implications. The second distinctive aspect of Butler's argument was its normative commitment.

Sex is not just fictitious, according to Butler; it is also pernicious. The 'discursive ordering and production of bodies in accord with the category of sex is itself a material violence'.²⁰ Therefore we must 'disrupt the categories of the body, sex, gender, and sexuality and occasion their subversive resignification and proliferation beyond the binary frame'.²¹ The typical feminist imperative had been, in Rubin's words, to 'liberate human personality from the straightjacket [sic] of gender'.²² By contrast, Butler emphasizes 'how essential becoming a gender is to one's very sense of personhood'.²³ Gender is not only a source of oppression, it is also a means to liberation. In short, then, queer theory eradicates sex and enthrones gender.

¹⁴ More, Kate and Judith Butler. 1997. On Transsexuality: Excitable Speech. *Radical Deviance* 2: 134–43.

¹⁵ The term initially denoted theorizing about gay and lesbian sexuality but soon accrued the broader meaning used here. De Lauretis, Teresa. 1991. Queer Theory: Lesbian and Gay Sexualities. *differences: A Journal of Feminist Cultural Studies* 3 (2): iii–xviii; Jagose, Annamarie. 1997. *Queer Theory: An Introduction*. New York: New York University Press.

¹⁶ Rubin, Gayle. 1975. The Traffic in Women: Notes on the "Political Economy" of Sex. *Toward an Anthropology of Women*, Edited by Rayna Reiter, New York: Monthly Review Press, p. 178.

¹⁷ Butler, *Gender Trouble*, p. 6.

¹⁸ Butler, *Bodies That Matter*, p. xii.

¹⁹ Kessler, Suzanne J. J., and Wendy McKenna. 1978. *Gender: An Ethnomethodological Approach*. Chicago: University of Chicago Press.

²⁰ Butler, Judith. 1992. Contingent Foundations: Feminism and the Question of "Postmodernism". In *Feminists Theorize the Political*. Edited by Judith Butler and Joan Wallach Scott, London: Routledge, p. 17.

²¹ Butler, *Gender Trouble*, p. x.

²² Rubin, *The Traffic in Women*, p. 100.

²³ Butler, Judith. 2004. *Undoing Gender*. London: Routledge, p. 100.

If gender is paramount, what is it? Butler is best known for the notion of performativity. Most obviously, 'gender is a kind of a doing, an incessant activity performed'.²⁴ I will dub this dramaturgical performativity, as a nod to Erving Goffman. He described social institutions as creating 'scenes for the performance of genderisms by both sexes, many of these performances taking a ritual form which affirms beliefs about the differential human nature of the two sexes'.²⁵ (Goffman is not cited by Butler.) In *Bodies That Matter*, Butler draws on J. L. Austin's insight that speech acts can create new social facts.²⁶ This I will distinguish as illocutionary performativity. It raises the possibility that gender could involve merely a verbal assertion, without any concomitant activity. Illocutionary performativity requires a normative and legal apparatus to enforce the assertion of gender, so that the statement 'I am a woman' has the same force as (to take Austin's example) 'I pronounce you man and wife'.

Queer theory's academic success is indisputable.²⁷ According to Google Scholar, *Gender Trouble* has been cited 80,000 times. My argument is that the theory has also affected the world beyond universities. By insisting that sex is unstable, queer theory needs to destabilize those institutions and practices that are based on sex. They must be transformed to affirm gender as performed. What is initially justified as dramaturgical performance becomes ultimately reduced to illocutionary performance. This process will be illustrated by changes to the prison system in England and Wales.

2. Genital Surgery

'The women felons should be quite separate from the men' urged the famous eighteenth-century prison reformer, John Howard.²⁸ By the mid-twentieth century, separation by sex was one of the Standard Minimum Rules for the Treatment of Prisoners established by the United Nations.²⁹ Such rules do not specify how sex is determined, of course. In England, by the 1980s, males who had previously undergone genital surgery could be placed in a women's prison. Gloria Greaves was convicted of living off immoral earnings and sentenced to eighteen months in HMP (Her Majesty's Prison) Holloway, a women's prison, even though only a man could commit that specific crime.³⁰ Such cases were so rare they could be left to the discretion of prison officials. The first public statement of policy came in 1994. The Director General of the Prison Service told Parliament that 'the principal criteria is [sic] the most obvious physical characteristics of the person concerned and their ability to integrate with other inmates. A male-to-female transsexual who has undergone surgery and hormone treatment would therefore be more appropriately allocated to a female establishment'.³¹ The nature of this surgery was not specified, and so it is not clear whether orchidectomy would have sufficed, or whether vaginoplasty was

²⁴ Ibid., p.1.

²⁵ Goffman, Erving. 1977. The Arrangement Between the Sexes. *Theory and Society* 4: 325.

²⁶ Austin, J. L. 1962. *How to Do Things With Words*. Oxford: Clarendon Press.

²⁷ E.g., Halperin, David M. 2003. The Normalization of Queer Theory. *Journal of Homosexuality* 45: 339–43.

²⁸ Howard, John. 1777. *The State of the Prisons in England and Wales: With Preliminary Observations, and an Account of Some Foreign Prisons*. London: William Eyres, p. 44.

²⁹ United Nations. 1957. Standard Minimum Rules for the Treatment of Prisoners. <https://www.ohchr.org/EN/ProfessionalInterest/Pages/TreatmentOfPrisoners.aspx>.

³⁰ Greaves immediately appealed and eventually received a suspended sentence, and so presumably did not actually go to prison. Avery, Linda. 1982. The Legal Labyrinth that Faces the Transsexual. *Guardian*, 4 October; *Regina v Tan and Others*. 1983. Court of Appeal, Criminal Division. QBD 1053.

³¹ House of Commons Debate, 18 May 1994, 460W.

also required. There was no corresponding exception for female-to-male transsexuals, who would always be placed in the women's estate.³²

The Director General's statement was a response to activism that emerged in the early 1990s. Press for Change was founded by Stephen Whittle and others to campaign 'for the legal rights of transsexuals'.³³ The Parliamentary Forum on Transsexualism was created by Lynne Jones, a Labour MP. The main point of leverage was the European Court of Human Rights, to which transsexuals brought a series of cases (e.g., Rachel Horsham and the person known as 'I', both cases registered in 1994) demanding the right to change legal sex. Prisons were only a minor element in these cases, but perhaps the Conservative government hoped that explicit codification of prison policy would bolster its argument that transsexuals were not unfairly treated. Press for Change and the Parliamentary Forum seized the opportunity to craft a policy document for the Home Office. Its author was More, the leading British proponent of queer theory who co-edited the newsletter *Radical Deviance: A Journal of Transgendered Politics*. This exuberant magazine propagated novel ideas from France and the United States: 'once upon a time TSs needed to learn and create medical jargon to progress our culture, now that TS and TG politics has come of age, we need to talk of hegemonies, Queer, and Post-Modernism'.³⁴ When Butler visited London, she gave an interview to the magazine.³⁵ Despite such radical theoretical commitments, More's proposals for prison were modest. The document suggested that prisoners who identified as transsexual should be kept in the prison's hospital unit, and after clinical diagnosis should be moved to a specialist unit which 'could be attached to a women's prison'.³⁶ This fell short of the demand made by Jones, to 'house pre-operative transsexuals in the goals of their new gender if they have had two or more years of hormone therapy'.³⁷

Labour's accession to power in 1997 created a more favourable climate for transsexual activists—or transgender activists, as they began to prefer.³⁸ The Home Office commissioned research on prisons from Whittle, who had become law lecturer at Manchester Metropolitan University.³⁹ Whittle had also taken up queer theory, perhaps due to More's influence; they edited a book together.⁴⁰ For Whittle, who had come out as a lesbian before identifying as transsexual in the 1970s, the new ideas promised emancipation from feminist traditions that viewed transsexuals as either predatory or deluded. 'No solution could be offered to this impasse until Judith Butler made her huge contribution to Queer theory by compressing all gender into performativity.'⁴¹ Whittle eventually recommended that all prisoners 'post-transition but

³² McMullan, Melanie, and Stephen Whittle. 1994. *Transvestism, Transsexualism and the Law: A Handbook*. London: Beaumont Trust; Gender Trust.

³³ Ibid., p. 172.

³⁴ [More, Kate and Diane Crane]. 1996. Housekeeping. *Radical Deviance* 2: 46.

³⁵ More and Butler, On Transsexuality.

³⁶ More, Kate. 1996. Submission to Her Majesty's Prison Service: Proposals for HMPS Review of Guidelines Relating to Transsexual Prisoners. *Radical Deviance* 2: 82. More vanished from the scene at the end of the 1990s, and has not received due credit as a pioneering activist.

³⁷ House of Commons Debate, 22 May 1995, 496W.

³⁸ Burns, Christine. 2014. *Pressing Matters: A Trans Activism Memoir*. Christine Burns, vol. 2.

³⁹ Whittle, Stephen. 2002. *Respect and Equality: Transsexual and Transgender Rights*. New York: Cavendish Publishing.

⁴⁰ More, Kate, and Stephen Whittle. (eds.) 1999. *Reclaiming Genders: Transsexual Grammars at the Fin de Siècle*. London: Cassell.

⁴¹ Whittle, Stephen. 1998. Guest Editorial. *Journal of Gender Studies* 7: 270.

prior to completion of all desired surgical procedures' must be 'housed in facility of appropriate gender role'.⁴² This proposal, however, was ignored by the government. The official Interdepartmental Working Group on Transsexual People emphasized 'problems in placing a ['pre-operative'] male-to-female transsexual person in a female establishment, where she may not be accepted by other prisoners, many of whom may have suffered violent or sexual abuse from men'.⁴³

The exception for transsexuals who had previously undergone genital surgery applied to very few, of course. Besides Greaves, Stephanie Lloyd spent three months in HMP Askham Grange, a women's open prison, for selling transgender-themed adult videos;⁴⁴ another transsexual was sentenced to eight years in HMP Holloway for blackmail.⁴⁵ These were not violent crimes. Crucially, prisoners were not eligible for genital surgery. By the late 1990s, at least one male was pursuing legal action on this point. John Pilley had been sentenced (in 1981) to life for kidnapping a woman at knifepoint. In prison he took the name Jane Anne and was prescribed cross-sex hormones. Pilley then argued that it was unfair for the service to deny genital surgery—which would enable transfer to a women's prison.⁴⁶ Pilley prevailed in 1999, after a legal decision in another domain. Three patients launched a judicial review against their local health authority for refusing to fund genital surgery. They won the case in the High Court in 1998. The prison service was already committed to providing healthcare equivalent to that provided by the National Health Service (NHS), and therefore it could no longer refuse to provide genital surgery.⁴⁷ Pilley thus underwent surgery and was eventually transferred to HMP Holloway. A Liberal Democrat MP from the Parliamentary Forum on Transsexualism, Alex Carlile, declared this to be an 'important step towards giving transsexuals proper civil liberties'.⁴⁸ There was apparently no concern for the impact on the civil liberties of female prisoners.

The 1999 decision enabled prisoners serving lengthy sentences to transfer to women's prisons. For the NHS to approve genital surgery, the patient on cross-sex hormones would have to pass the 'real life' test, to 'live and work in their female role for two years'. According to the consultant psychiatrist Russell Reid, who advised inmates, this test 'is very difficult, though not impossible for them to fulfil'.⁴⁹ One candidate who passed the test was Douglas Wakefield, sentenced to life (in 1974) for beating and stabbing his uncle to death. In prison he strangled and beat to death another inmate, and attempted to kill a warden. To experience life as a woman, Wakefield took the name Tai, decorated the prison cell with lace curtains and flowers, and wore earrings. Genital surgery subsequently enabled Wakefield to relocate to a women's prison, HMP New Hall.⁵⁰

⁴² Whittle, *Respect and Equality*, p. 235.

⁴³ Interdepartmental Working Group. 2000. *Report of the Interdepartmental Working Group on Transsexual People*. London: Home Office, p. 14.

⁴⁴ Lloyd, Stephanie Ann. n.d. Stephanie's Autobiography. https://www.transformation.co.uk/pages/stephanie-s-story#chapter_127.

⁴⁵ Campbell, Duncan. 1996. Blackmailer Threatened to Infest Store with Fleas: Transsexual Jailed Over Harrods Plot. *Guardian*, 19 June.

⁴⁶ Burrell, Ian. 1999. Murderer to Get Sex Swap on the NHS. *Independent*, 12 March.

⁴⁷ Goodchild, Sophie. 2000. Prisons Inspector Calls for Sex Change Ops. *Independent on Sunday*, 13 February.

⁴⁸ Burrell, Ian. 1999. Murderer to Get Sex Swap on the NHS.

⁴⁹ Ibid.

⁵⁰ Francis, Bill. 2013. Sex-Swap Lag's Wedding Chop. *Daily Star*, 20 January.

3. Legal Sex

Press for Change's crowning success was the Gender Recognition Act of 2004, which enabled anyone to apply to be recognized legally as the opposite sex. A medical diagnosis was needed to obtain a gender recognition certificate and thereby an amended birth certificate, but endocrinological or surgical intervention was not required. It was the first law in the world to divorce legal sex from the physical body. As Whittle declared, 'the Gender Recognition Act is performative (see Butler 1990), in that as a form of speech-act, what it "does" is make gender into sex in law'.⁵¹ When the bill was debated, a Minister told the House of Commons that prisoners 'can apply and . . . will be subject to prison arrangements for their new acquired gender'.⁵² Press for Change therefore argued, quite logically, that male prisoners who obtained a gender recognition certificate should be transferred to a women's prison.⁵³ The prison service, however, ignored the new Act, and continued to use the criterion of genital surgery.

Change in policy came about, as in 1999, as the unintended consequences of a decision taken outside the prison system. Mark Jones had served a sentence for manslaughter, for strangling his boyfriend. A few days after release from prison, Jones attempted to rape a woman who worked in a shop selling transgender accoutrements. (The shop was owned by Stephanie Lloyd, mentioned above as an early transsexual prisoner.) Jones, now using the name Karen, was sentenced to life imprisonment. In prison, Jones was given cross-sex hormones and laser hair removal, and obtained a gender recognition certificate. But the NHS Gender Identity Clinic would not approve genital surgery, on the grounds that Jones could not pass the 'real life' test in a men's prison. This was a policy reversal, of course, because at least twelve male prisoners had undergone genital surgery while in the men's estate.⁵⁴ And the Clinic would soon approve a female prisoner's phalloplasty while the prisoner remained in a women's prison.⁵⁵ One wonders if the reversal in policy reflected embarrassment that the first prisoner to be approved for genital surgery, Pilley, subsequently renounced his feminine identity and required a phalloplasty in order to return to a men's prison.⁵⁶ Whatever the reason behind the reversal, it placed Jones in a double bind: 'They will not consider me as a female until I have my penis removed ... Yet they resist moving me to the female estate which would enable the surgery to be arranged'.⁵⁷

Jones contacted Whittle who helped orchestrate a judicial review, held in 2009.⁵⁸ The judge, David Elvin QC, viewed the case through the lens of Article 8 of the European Convention on Human Rights: 'Everyone has the right to respect for his private and family life, his home and his correspondence'. The landmark 2002 decision by the European

⁵¹ Whittle, Stephen, and Lewis Turner. 2007. "Sex Changes"? Paradigm Shifts in "Sex" and "Gender" Following the Gender Recognition Act? *Sociological Research Online* 12 (1): 8.7.

⁵² House of Commons Debate, 23 February 2004, c52.

⁵³ Whittle, Stephen, Lewis Turner, and Maryam Al-Alami. 2007. *Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination*. Wetherby: Equalities Review.

⁵⁴ Williams, David. 2006. Victims Condemn Prisoner's £50,000 Sex Swop [sic]. *Daily Mail*, 13 January.

⁵⁵ Emerton, Robyn. 2018. *Transgender Prisoners: Law, Prison Administration, and the Emerging Tension between Human Rights and Risk*. Ph.D. thesis, Keele University, Keele, UK, pp. 297–98.

⁵⁶ Ford, Richard. 2006. Inmate Goes from Man to Woman and Back on NHS. *Times*, 12 January.

⁵⁷ *AB v Secretary of State for Justice and Another*. 2009. High Court of Justice. EWHC 2220 (Admin), para 8.

⁵⁸ Whittle, Stephen. 2011. Message 'Re: Info Request' to trans-academic@JISCmail.ac.uk, 3 March. <https://www.jiscmail.ac.uk/cgi-bin/wa-jisc.exe?A2=ind1103&L=TRANS-ACADEMIC&P=R2>.

Court of Human Rights—which precipitated the Gender Recognition Act—had interpreted this article as creating a right to change legal sex. Elvin noted that the Act required Jones to be treated as a woman ‘for all purposes’.⁵⁹ Because the prison service had provided insufficient justification to retain Jones in the men’s estate, Elvin ordered Jones to be transferred to a women’s prison. The argument that Jones would be hard to manage in the women’s estate was dismissed on the grounds that Jones would pose still greater difficulties if thwarted, due to what the consultant forensic psychologist described as a personality with ‘narcissistic, compulsive, aggressive, violent and sadistic elements’.⁶⁰

The rights of the women who would share facilities with such a person were ignored. James Barrett, lead psychiatrist at the Gender Identity Clinic, had concern only for the welfare of Jones: ‘There will probably always be a small number of prisoners who will choose to make an issue of the matter because they are the sort of women who enjoy conflict. If this patient is able to cope with protracted close proximity [with] women of that sort I would judge her able to cope with the less prolonged, more avoidable, travails of the civilian world’.⁶¹ Attempting to rape a woman did not detract from the claim to be ‘a woman trapped inside a man’s body’, because Jones’ legal team had appealed against the length of the second sentence by using gender dysphoria to justify the crime.⁶² Apparently it was ‘more inspired by feelings of frustration and jealousy than sexual desire’.⁶³ After the verdict, Jones was transferred to HMP Holloway.

As a result of this judgment, in 2011 the prison service drafted the first official regulations for *The Care and Management of Transsexual Prisoners*. The criterion for placement shifted from genital surgery to legal sex. ‘A male to female transsexual person with a gender recognition certificate may be refused location in the female estate only on security grounds’.⁶⁴ Such a person was thus treated identically to a woman, as exceptionally dangerous females are held in special units within men’s prisons. Even without legal certification, a transsexual who was ‘sufficiently advanced in the gender reassignment process’ could request to transfer to the estate of the other sex and was promised a case conference.⁶⁵ In the following years, incidentally, NHS clinicians became more reluctant to approve genital surgery for prisoners. At a clinical meeting in 2014, Barrett and others agreed that time in prison—even in the women’s estate—‘would not often constitute proper lived experience’ as required for surgery.⁶⁶ But this no longer mattered. As the Prisons and Probation Ombudsman later declared, ‘a person’s gender is a legal rather than an anatomical question’. The Ombudsman took up the case of a prisoner held in the women’s estate, due to the possession of a gender recognition certificate, who wished to transfer to an open prison. This request had been refused on the grounds that a prisoner with penis and testicles was not suited for this establishment as its showers were communal and accommodation was unsupervised during the night, and

⁵⁹ *AB v Secretary of State for Justice and Another*, para 1.

⁶⁰ *Ibid.*, para 63.

⁶¹ *Ibid.*, para 70.

⁶² Whitehead, Tom. 2009. Transsexual Prisoner Wins Right to Be in Female Prison. *Telegraph*, 4 September.

⁶³ *AB v Secretary of State for Justice and Another*, para 24.

⁶⁴ Ministry of Justice. 2011. *The Care and Management of Transsexual Prisoners*. PSI 07/2011, p. 5.

⁶⁵ *Ibid.*, p. 16.

⁶⁶ *KK v Tavistock and Portman NHS Foundation Trust*. 2019. London: High Court of Justice. EWHC 3565 (Admin), para 60.

many of its female inmates had experienced sexual abuse. The Ombudsman supported the prisoner. 'She has a GRC and is therefore a woman, under UK law'.⁶⁷

The shift from genital surgery to legal sex in the 1990s and 2000s was most immediately caused by unintended interactions between the health system and the legal system. The changes were brought about piecemeal by judges and psychiatrists; if their actions were informed by theory, it was the liberal individualism of human rights. Queer theory was nevertheless crucial for shaping the Gender Recognition Act, which one of its authors—Whittle—viewed as the implementation of Butler's ideas. The Act legislated dramaturgical performativity, because it required someone to have 'lived in the acquired gender' for two years as a precondition for changing legal sex. This mysterious phrase was not specified, nor did advocates like Whittle explicate its meaning. Presumably it originated in the real-life test required for surgery by the Gender Identity Clinic, which also spanned two years. According to Barrett, success 'is achieved if the patient is treated by most others as if they are of the assumed sex'.⁶⁸ In Goffman's terms, an individual maintains face insofar as other participants in an encounter act to support it, regardless of their actual beliefs.⁶⁹

4. Gender Identity

Changes to prison policy in the 1990s and 2000s affected few individuals. These cases were sensationally reported by the tabloid press—emphasizing the cost of surgery to the taxpayer—but they attracted no significant public interest. This changed dramatically over the next decade. 'Increasing positive, well-informed representations of transgender people in the media' was the aim of Trans Media Watch, created in 2009.⁷⁰ A key figure in the organization was Paris Lees, who came out as transgender after serving time in borstal for violent robbery.⁷¹ Lees started writing for the *Guardian*, Britain's preeminent left-of-centre newspaper, in 2011. The newspaper also featured columns from a transgender prisoner across the Atlantic, Chelsea Manning, whose role in WikiLeaks ensured a sympathetic audience.⁷² The most famous transgender prisoner, however, was fictional. 'Orange Is the New Black', an American television series set in a women's prison, featured a character who had committed fraud to fund genital surgery, played by Laverne Cox. *Time* chose this actor to personify the 'transgender tipping point' in 2014. The series was a hit in Britain, and Cox was interviewed by the *Guardian* in 2015.⁷³

⁶⁷ Prisons and Probation Ombudsman. 2016. *Annual Report, 2015–16*. London: Prisons and Probation Ombudsman, p. 61.

⁶⁸ Barrett, James. 2007. *Transsexual and Other Disorders of Gender Identity: A Practical Guide to Management*. Abingdon: Radcliffe, p. 72.

⁶⁹ Goffman, Erving. 1967. *Interaction Ritual: Essays on Face-to-Face Behaviour*. New York: Doubleday.

⁷⁰ Trans Media Watch. n.d. Memorandum of Understanding. p. 4. <https://web.archive.org/web/20110726235255/https://www.transmediawatch.org/Documents/Memorandum%20of%20Understanding.pdf>.

⁷¹ Lees, Paris. 2013. From Bullied Child to Transgender Woman: My Coming of Age. *Guardian*, 15 December.

⁷² Lees, Paris. 2013. "I hope Chelsea Manning Gets the Help She Needs": Paris Lees, Transgender Former Prisoner, on Life Inside. *Guardian*, 23 August; Manning, Chelsea E. 2014. I Am a Transgender Woman and the Government Is Denying My Civil Rights. *Guardian*, 8 December.

⁷³ Nicholson, Rebecca. 2015. Laverne Cox: "Now I Have the Money to Feminise my Face I Don't Want to: I'm Happy That This Is the Face God Gave Me". *Guardian*, 14 June.

Just a few months after the interview, Tara Hudson was convicted of assault for headbutting a barman, causing serious dental injuries. Given Hudson's record of eight previous convictions, including battery, the court sentenced Hudson to twelve weeks in a men's prison. This news outraged Cerian Jenkins, an undergraduate at the University of Bath—located in Hudson's home town. She was already an activist, having founded the Bath Gender Equality Network 'for intersectional, sex-positive feminists';⁷⁴ Butler was one of her 'academic idols'.⁷⁵ She launched an online petition to demand Hudson's transfer to a women's prison. The hashtag #IseeTara proliferated on Twitter, with the first tweet directed at Parliament's Women and Equalities Committee, which by coincidence was holding an enquiry into transgender equality. The petition had extraordinary success, gaining 125,000 signatures within three days. Hudson's plight was publicized by newspapers from the *Guardian* on the left to the *Daily Telegraph* on the right.⁷⁶ Why did this particular case catch the public imagination? Hudson exemplified dramaturgical performativity: glamorous with long blonde hair and 'really big boobs' (in the words of Hudson's mother). The petition stated that Hudson had 'undergone six years of gender reconstruction surgery', which falsely implied genital surgery. Hudson's mother spoke eloquently in interviews. Conceivably Hudson also had a knack for publicity, as a tabloid newspaper had featured a story on Hudson's success in entertaining men on Playboy Television Chat.⁷⁷ Hudson was convicted and imprisoned in Bristol; the latter was home to a large progressive community, including transgender activist Cheryl Morgan.⁷⁸ A final consideration in Hudson's favour was that the victim was a man.

People who took up the cause were outraged because they viewed Hudson unambiguously as a woman. The petition stated that Hudson had 'lived as a woman all her adult life'. In a men's prison, therefore, Hudson would be subject to 'constant and terrifying sexual harassment'.⁷⁹ Hudson had taken cross-sex hormones for several years, but there are hints of a more ambiguous identity: 'When I'm modelling for glamour shoots I feel like the sexiest girl alive, no-one has any idea that I'm actually a bloke'.⁸⁰ Hudson advertised on adultwork.com as a 'shemale' with a '7inch surprise'.⁸¹ From the point of view of the prison system, the fact that Hudson had neither obtained a gender recognition certificate nor undergone genital surgery meant that Hudson should be treated as a man. In the men's prison, Hudson was given a private cell and initially not allowed to mingle

⁷⁴ J[enkins], Ceri[an]. 2015. Stop Transgender Woman Tara Hudson from Being Sent to an All-Male Prison in Bristol. <https://www.change.org/p/bath-magistrates-prison-governor-of-hm-prison-bristol-british-judicial-system-stop-transgender-woman-tara-hudson-from-being-sent-to-an-all-male-prison-in-bristol>; Jenkins, Cerian. 2015. Why I Started the Petition to Save a Trans Woman from an All-Male Prison. *Independent*, 29 October.

⁷⁵ Jenkins, Cerian. 2016. Judith Butler at the LSE. <https://web.archive.org/web/20161221174004/https://cerianjenkins.com/2016/11/17/judith-butler-at-the-lse>.

⁷⁶ Gayle, Damien. 2015. Transgender Prisoner at HMP Bristol "Being Sexually Harassed". *Guardian*, 29 October; Sanghani, Radhika. 2015. Tara Hudson: British Prisons Have a Serious Problem with Transgender People. *Telegraph*, 28 October.

⁷⁷ Saunders, Josh. 2015. Playboy TV Chat Glamour Model with 34E Breasts Who Has Seduced 1,000 Men Reveals "I'm Actually a Bloke". *Mirror*, 2 September.

⁷⁸ Morgan, Cheryl. 2015. Trans and the Law: Theory and Practice. *Cheryl's Mewsings*, 26 October. <https://www.cheryl-morgan.com/?p=21668>.

⁷⁹ Jenkins, Why I Started the Petition

⁸⁰ Saunders, Playboy TV Chat Glamour Model

⁸¹ Rea, Samantha. 2015. Mainstream Media a Mouthpiece for Tara Hudson's Mother. *Medium*, 22 November. https://medium.com/@Samantha_J_Rea/mainstream-media-a-mouthpiece-for-tara-hudson-s-mother-10b6c2c74147.

with other prisoners. ‘There was a lot of banter—one guy I knew from back home asked to see my boobs. . . . At the time I didn’t see it as harassment or aggression—it was just “we love you”, “we’re your fan club”, “try and come onto our wing” and so on’.⁸²

Hudson’s sentence was appealed. While the judges refused to grant the appeal due to Hudson’s extensive criminal record, they did suggest removal to a women’s prison.⁸³ There were demonstrations outside the court in Bristol and outside the Ministry of Justice in London. The latter protest was organized by C.N. Lester, a singer with a graduate degree from Goldsmiths who identified as genderqueer, and Ruth Pearce, a sociology student at the University of Warwick, writing a doctoral thesis on transgender health.⁸⁴ Hudson’s cause was taken up by the Conservative MP for Bath, who fortuitously sat on the Women and Equalities Committee. The Ministry of Justice quickly transferred Hudson to a women’s prison, HMP Eastwood Park. Hudson had spent just seven days in the men’s estate. Arguably this move was in accordance with the regulations which, after all, enabled ‘sufficiently advanced’ transsexuals to request transfer to a prison for the opposite sex. But discretionary transfer fell far short of the demand now made. For Hudson’s supporters, Hudson should have been automatically placed in a women’s prison because Hudson identified as a woman. ‘Girls show their emotions, they cry and they self-harm but males when they have got a problem they just let it out with violence’, according to Hudson.⁸⁵ The irony went unremarked.

Within a few weeks, two transgender inmates died in prison. Vicky Thompson, aged 21, was found hanged while on remand for theft. The offence had occurred while Thompson was serving a suspended sentence for assaulting and robbing two women. Thompson did not have a gender recognition certificate, and had never taken cross-sex hormones. According to a prison official, Thompson ‘did not want to go to a women’s prison because other prisoners would be “bitchy”’.⁸⁶ The tragic death—which an inquest later concluded was intended as self-harm rather than suicide⁸⁷—was interpreted through the transgender lens. Other contributing factors were ignored: bipolar disorder, heroin use, and sexual and physical abuse. Thompson had been taken into care as a baby and raped at the age of twelve. Stonewall, the prestigious campaigning organization for lesbian and gay rights, had embraced the transgender cause in 2013. It used Thompson’s death to reiterate the demand for gender recognition certificates to be issued automatically, on the individual’s declaration alone. ‘We now urgently need a change in

⁸² Sanghani, Radhika. 2016. Tara Hudson: “The Harrowing Reality of Being a Trans Woman in an All-Male Prison”. *Telegraph*, 15 January.

⁸³ Gayle, Damien, and Kevin Rawlinson. 2015. Transgender Woman Moved from Men’s to Women’s Prison. *Guardian*, 30 October.

⁸⁴ Lees, Paris. 2011. Interview: Genderqueer Performer CN Lester. *Pink News*, 11 March; Pearce, Ruth. 2016. (Im)Possible Patients? Negotiating Discourses of Trans Health in the UK. Ph.D. thesis, University of Warwick, Coventry, UK.

⁸⁵ Hopkins, Steven. 2015. Transgender Prisoners: Cases of Tara Hudson, Vicky Thomson and Joanne Latham Reveal Deepening Crisis. *Huffpost*, 14 December. https://www.huffingtonpost.co.uk/2015/12/14/transgender-women-prisons-tara-hudson-deaths_n_8760608.html.

⁸⁶ Prisons and Probation Ombudsman. 2015. *Independent Investigation into the Death of Ms Vicky Thompson, a Prisoner at HMP Leeds on 13 November 2015*. London: Prisons and Probation Ombudsman, p. 8.

⁸⁷ Pidd, Helen. 2017. Transgender Woman at Male Prison Did Not Mean to Kill Herself, Jury Finds. *Guardian*, 19 May.

the law to ensure trans people can live freely as themselves without fear of violence or intimidation'.⁸⁸

Edward Latham committed suicide while serving a life sentence for attempting to murder a woman and subsequently trying to kill two prison inmates. He was held in HMP Woodhill's Close Supervision Centre, designated for the most dangerous prisoners. Latham announced that he was Muslim early in 2015 and made plans to change his name, but three months later he asked to be recorded as having no religion. In August, Latham declared himself to be a woman, taking the name Joanne. The prison immediately supplied feminine clothing and cosmetics.⁸⁹ Transfer to a women's prison was out of the question; an equally dangerous female would also be held in the Close Supervision Centre of a men's prison. Nevertheless, Latham's death was cited as further evidence of systematic injustice against transgender people.⁹⁰

These two deaths were followed by the opening salvo in a judicial review of Hudson's treatment.⁹¹ In December the Conservative government gave way to pressure and announced a 'Review into the care and management of transgender offenders'.⁹² As an independent adviser, the government selected Jay Stewart, the chief executive and co-founder of Gendered Intelligence. Started in 2008 with funding from the Equality and Human Rights Commission, Gendered Intelligence exemplified how the transgender movement was embedded within the political system. Like Whittle, Stewart initially came out as a lesbian and subsequently identified as a man. 'Queer theory was the roadmap to my own self-understanding', declared Stewart.⁹³ Stewart had just earned a doctorate from Goldsmiths, with a thesis entitled 'Trans on Telly'.⁹⁴ It cites Butler 72 times, more than any other scholar.

The review took evidence from transgender prisoners, but apparently met no female prisoners. The ensuing report took 'as its starting presumption a wish to respect someone in the gender in which they identify'. This Butlerian premise led to the ineluctable conclusion. 'Allowing transgender offenders to experience the system in the gender in which they identify will, in the great majority of cases, represent the most humane and safest way to act'.⁹⁵ The brief report was then translated into detailed regulations for

⁸⁸ Quinn, Ben. 2015. Partner of Transgender Woman Found Dead in Prison Calls for Law Change. *Guardian*, 20 November.

⁸⁹ Prisons and Probation Ombudsman. 2016. *Independent Investigation into the Death of Ms Joanne Latham, a Prisoner at HMP Woodhill on 27 November 2015*. London: Prisons and Probation Ombudsman, pp. 6–7.

⁹⁰ Allison, Eric, and Helen Pidd. 2015. Second Transgender Prisoner Found Dead in Male Jail. *Guardian*, 1 December.

⁹¹ Hudson's 2015 legal action fizzled out, but was relaunched in 2018; the Ministry of Justice will disclose only that 'this claim has been concluded'. Bhatt Murphy. 2015. Tara Hudson Welcomes Transgender Policy Review. <https://bhattmurphy.co.uk/in-the-news/news-archive-4/archived-prisoners-rights-stories/tara-hudson-welcomes-transgender-policy-review>; Townsend, Mark. 2018. Transgender Woman Sues over Ordeal in Male Prison. *Observer*, 21 January; Ministry of Justice. 2020. Freedom of Information Act request. FOI 200226034. 24 March.

⁹² Ministry of Justice. 2015. Review into the Care and Management of Transgender Offenders: Written Statement made by the Parliamentary Under-Secretary of State for Justice, Minister for Women, Equalities and Family Justice (Caroline Dinenage). 8 December. <https://www.gov.uk/government/speeches/review-into-the-care-and-management-of-transgender-offenders>.

⁹³ Stewart, Jay. 2018. Gendered Intelligence. *Trans Britain: Our Journey from the Shadows*. Edited by Christine Burns, Amsterdam: Unbound, p. 278.

⁹⁴ Stewart, Jay. 2015. Trans on Telly: Popular Documentary and the Production of Transgender Knowledge. Ph.D. thesis, Goldsmiths College, University of London, London, UK.

⁹⁵ Ministry of Justice. 2016. *Review on the Care and Management of Transgender Offenders*, p. 4.

The Care and Management of Transgender Offenders. As had been the case since 2011, prisoners who possessed a gender recognition certificate would be allocated according to legal sex. Now it also sufficed to have applied for a certificate. Other transgender prisoners—defined as those who ‘wish to live consistently in the gender with which they identify (opposite to the sex assigned at birth)’—would be asked whether they preferred the men’s or the women’s estate. If a prisoner wished to be housed in the estate of the opposite sex, a Transgender Case Board would quickly convene to consider the evidence.⁹⁶ Genital surgery counted as strong evidence, but so did ‘advice from GP’ (what sort of advice was not specified). In accordance with dramaturgical performativity, strong evidence also included ‘presents in the gender identified with’. Other motivations for claiming a transgender identity were acknowledged, however. The list of counter-evidence included ‘may be linked to gaining access to future victims’, ‘seeking to undermine or test the policy’, and ‘personality disorder diagnosis and/or narcissistic traits’. The review had warned that ‘it will be necessary to factor-in the impact on and risks to those . . . in the women’s estate where many prisoners will have been the victims of domestic violence or sexual abuse’.⁹⁷ But such risks were not mentioned in the regulations.

Previous criteria for incarceration in a women’s prison—first genital surgery, then possession of a gender recognition certificate—were clear. Gender identity, by contrast, was inherently ambiguous. How the evidence could be evaluated by the Case Board in practice was left to the imagination. Moreover, officials would know that refusal to grant the wishes of a transgender prisoner would lead to negative media coverage and also to internal scrutiny. The National Offender Management Service created a Transgender Advisory Board—whose members included Stewart—‘to inform policy and establish best practice’.⁹⁸

Before the 2015 review was completed, there was already evidence that the motivations for proclaiming a transgender identity were not always benign. The British Psychological Society wrote about ‘a number of cases where men convicted of sex crimes have falsely claimed to be transgender females’. Motivations included ‘demonstrating reduced risk and so gaining parole; . . . explaining their sex offending aside from sexual gratification (e.g., wanting to “examine” young females); . . . separating their sex offending self (male) from their future self (female); . . . seeking better access to females and young children through presenting in an apparently female way’.⁹⁹ These risks were echoed by the president of the British Association of Gender Specialists.¹⁰⁰ This was none other than Barrett, who in 2009 had been unconcerned about women having to share facilities with a violent rapist. Now he described ‘the ever-increasing tide of referrals of patients in prison serving long or indeterminate sentences for serious sexual offences’. Some prisoners were motivated to ‘pretend transsexual status’ for the same reasons as were cited by the British Psychological Society. For one particular individual, there was ‘a plethora of prison

⁹⁶ Ministry of Justice. 2016. *The Care and Management of Transgender Offenders*. Al 13/2016; PSI 17/2016; PI 16/2016, p. 28.

⁹⁷ *Ibid.*, p. 5.

⁹⁸ Gendered Intelligence. 2017. *Annual Report, 2016–17*. <https://genderedintelligence.co.uk/static/images/2018/01/03/11-03-03-GI%20Annual%20Report%202016-17.pdf?>

⁹⁹ British Psychological Society. 2015. Written evidence submitted to the Women and Equalities Committee’s Transgender Equality Inquiry. 20 August.

¹⁰⁰ British Association of Gender Identity Specialists. 2015. Written evidence submitted to the Women and Equalities Committee’s Transgender Equality Inquiry. 20 August.

intelligence information suggesting that the driving force was a desire to make subsequent sexual offending very much easier'. The Women and Equalities Committee ignored these written submissions, just as it ignored submissions from dissident feminists.¹⁰¹ This is not surprising because the Committee's Specialist Advisor was Whittle.¹⁰² Its report concluded that 'There is a clear risk of harm (including violence, sexual assault, self-harming and suicide) where trans prisoners are not located in a prison or other setting appropriate to their acquired / affirmed gender'.¹⁰³ How this would affect women was not considered by the Women and Equalities Committee.

5. Consequences of Gender Identity

The new regulations for *The Care and Management of Transgender Offenders* came into force in January 2017. This coincided with an increase in transgender prisoners recognized by the prison service. In 2016 it had begun counting 'individuals currently living in, or are [sic] presenting in, a gender different to their sex assigned at birth and who have had a case conference'.¹⁰⁴ The number nearly doubled from 70 in April 2016 to 125 in April 2017.¹⁰⁵ The official statistics always exclude prisoners with a gender recognition certificate, like Jones. Although the number of males in the women's estate was not recorded, a dissident feminist organization, Fair Play For Women, combed through the reports of women's prisons and found at least 13 male prisoners.¹⁰⁶ The first official figures distinguishing between the men's and women's estates were provided for April 2018. The total number of transgender prisoners was then 139. There were 42 transgender prisoners in the women's estate: 22 of them reported a female gender identity, 17 a male one, and 3 gave no response.¹⁰⁷ Thus the total number of males in women's prisons, adding those with a gender recognition certificate, could have exceeded 30.

The consequences of incarcerating males with women were ignored or denied by transgender activists and by politicians and officials. Conceivably some assumed that transgender males, like Hudson, are sexually attracted to men. In fact, many are sexually attracted to women. Moreover, a disproportionate number had committed crimes of a sexual nature. From its own research, Fair Play For Women estimated that 41% of transgender males in prison were sex offenders. This proved to be an underestimate. Of the 125 transgender prisoners counted by the prison service in 2017, 60 had been convicted of sexual offences, including 27 convicted of rape.¹⁰⁸ In the overall prison

¹⁰¹ E.g., Campaign to End Rape. 2015. Written evidence submitted to the Women and Equalities Committee's Transgender Equality Inquiry. 21 August.

¹⁰² Women and Equalities Committee, House of Commons. 2016. *Transgender Equality: First Report of Session 2015–16*. London: The Stationery Office, p. 7.

¹⁰³ Ibid., p. 86.

¹⁰⁴ Ministry of Justice. 2016. *Official Statistics: Prisoner Transgender Statistics, March/April 2016, England and Wales*, p. 2.

¹⁰⁵ Ministry of Justice. 2017. *National Offender Management Service: Annual Offender Equalities Report, 2016/17*, p. 13.

¹⁰⁶ Fair Play For Women. 2017. Investigation into the Number of Trans-Identifying Males in Prison in England and Wales and Their Offender Profiles. <https://fairplayforwomen.com/transgender-prisoners>.

¹⁰⁷ Ministry of Justice. 2018. *Her Majesty's Prison and Probation Service: Offender Equalities Annual Report, 2017/18*, p. 17.

¹⁰⁸ BBC News. 2018. How Many Transgender Inmates Are There? *BBC News*, 13 August. <https://www.bbc.co.uk/news/uk-42221629>.

population, by comparison, 19% of males had been convicted of sexual crimes and only 4% of females.¹⁰⁹

The prevalence of sex offenders amongst transgender males has yet to be explained. Possibly sex offenders had an incentive to claim a transgender identity. One transgender inmate suggested that ‘trans-imposters’ sought the status in order to avoid taking the Sex Offenders Treatment Programme.¹¹⁰ This programme was open to transgender prisoners, however, and participation was an advantage when seeking parole.¹¹¹ Another explanation is that autogynephilia—‘a male’s propensity to be sexually aroused by the thought of himself as a female’¹¹²—is associated with other paraphilias that are in turn associated with sexual offending. There is evidence that men who are sexually aroused by dressing in feminine clothing are more likely than other men to be aroused by masochism, exhibitionism, and voyeurism.¹¹³ One inmate referred to the Gender Identity Clinic had been in and out of prison for three decades for offences such as sexually assaulting a twelve-year-old girl and downloading indecent images of children. The prisoner wanted cross-sex hormones and surgery so that ‘he would not need to resort to his offending in order to vicariously experience womanhood’.¹¹⁴ As a consultant psychiatrist noted, ‘it is by no means straightforward teasing out the gender identity factors from a sort of fetishization of pre-teen girlhood and a degree of sexual masochism’.¹¹⁵ The prisoner was eventually prescribed cross-sex hormones. Although Barrett (who by now was Director of the Gender Identity Clinic) declined to support an application for a gender recognition certificate, the prisoner was ‘free to approach another clinician either at this clinic, or another NHS or private Gender Specialist provider’¹¹⁶ for the medical report that would enable certification and thus guarantee transfer to a women’s prison.

For a transgender male who had not acquired a gender recognition certificate, the Transgender Case Board could take offending into account in deciding whether to grant a request to transfer to a women’s prison. Two cases from 2017 show that officials prioritized the new guiding principle: ‘a wish to respect someone in the gender in which they identify’. Kayleigh-Louise Woods was sentenced to serve a minimum of 26 years for murdering a woman, and within months was transferred to a women’s prison, HMP Eastwood Park.¹¹⁷ Karen White was charged with multiple counts of raping a woman, along with burglary and stabbing a man. White was remanded to a women’s prison, HMP New Hall, despite having previously served eighteen months in prison for sexually assaulting a child; the prison houses a mother-and-baby unit.

¹⁰⁹ Ministry of Justice. 2018b. *Prison Population*, 31 March 2018. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/702300/population-31-march-2018.ods.

¹¹⁰ Anonymous. 2016. Trans-imposters. *Inside Time*, 30 September; also TC. 2016. Trans-jesters. *Inside Time*, 1 December.

¹¹¹ *H v Secretary of State for Justice*. 2015. London: High Court of Justice. EWHC 1550 (Admin).

¹¹² Blanchard, Ray. 1989. The Concept of Autogynephilia and the Typology of Male Gender Dysphoria. *Journal of Nervous and Mental Disease* 177: 616.

¹¹³ Långström, Niklas, and Kenneth J. Zucker. 2005. Transvestic Fetishism in the General Population. *Journal of Sex and Marital Therapy* 31: 87–95.

¹¹⁴ *KK v Tavistock and Portman NHS Foundation Trust*, para 26.

¹¹⁵ *Ibid.*, para 30.

¹¹⁶ *Ibid.*, para 36.

¹¹⁷ Sims, Paul and Wells, Tom. 2019. Transgender Killer Romped with a Female Inmate Weeks after Switch to Women’s Jail. *Sun*, 2 June.

While remanded in prison, White sexually assaulted four inmates, hugging and groping them and displaying an erect penis.¹¹⁸ After two months White was transferred to the men's estate. White was subsequently convicted and sentenced to life imprisonment. The Prison Service recorded five additional sexual assaults by transgender prisoners in the women's estate.¹¹⁹ These records exclude assaults committed by male prisoners who had acquired a gender recognition certificate; the prison service refuses to differentiate them from females. A woman incarcerated in HMP Bronzefield later claimed to have been sexually assaulted by one such prisoner—'J'—in August 2017.¹²⁰ In the same prison in the same month, Jessica Winfield was placed in segregation for making sexual advances.¹²¹ Winfield had been sentenced to life in 1995, as Martin Ponting, for raping two girls.

White's case is illuminating for what it reveals about the performance of gender. It presents a clear contrast with Hudson's dramaturgical performativity. Notwithstanding violent aggression more typical of males, Hudson expressed a recognizable version of femininity—in physique (breast implants) and presentation (long hair and makeup). White's performance, by contrast, was perfunctory. According to Jenny-Anne Bishop, who led the local transgender support group, White 'insisted people referred to her in her acquired gender without trying terribly hard to present as a woman'.¹²² 'Other than wear a wig and put on women's clothing, she has made no more effort' reported a transgender neighbour. The neighbour described White as 'more transvestite than transsexual with no real desire to be a woman', observing that White had missed three appointments at a gender clinic.¹²³ In short, White's performance was illocutionary. 'David just walked into his flat one day as David and walked out the next day as Karen', as the transgender neighbour recalled.

The illocutionary act was felicitous—to use Austin's terminology—because it was backed by the power of the state.¹²⁴ Bishop noted that White 'would report people for a hate crime if they stumbled over which name to use'.¹²⁵ According to one neighbour, when an elderly man referred to White using the male pronoun, White called the police to report this 'hate crime'.¹²⁶ Strictly speaking, these would be classified as hate incidents—which the police define broadly as 'any non-crime incident which is perceived, by the victim or any other person, to be motivated by a hostility or prejudice against a person who is transgender or perceived to be transgender'.¹²⁷ How White's local force, the Greater Manchester Police, responded to White's reports is unknown, but its policy encouraged

¹¹⁸ White admitted two counts of indecent assault and two more counts were laid on file. Evans, Martin, Kate McCann, and Olivia Rudgard. 2018. Transgender Person Accused of Rape Is Remanded into Female Prison and Sexually Assaults Inmates Within Days. *Daily Telegraph*, 6 September; Howes, Scarlet. 2022. I Was Sexually Assaulted by a Transgender Rapist in a Women's Jail. *Mail on Sunday*, 15 January.

¹¹⁹ Brown, David. 2020. Seven Sex Attacks in Women's Jails by Transgender Convicts. *Times*, 11 May.

¹²⁰ *FDJ v Secretary of State for Justice and Another*. 2021. High Court of Justice. EWHC 1746 (Admin).

¹²¹ Doran, Sean-Paul. 2017. Transgender Rapist Moved to Women's Jail Put in Segregation After Making "Unwanted Advances" on Other Lags. *Sun*, 5 September.

¹²² Parveen, Nazia. 2018. Karen White: How "Manipulative" Transgender Inmate Attacked Again. *Guardian*, 11 October.

¹²³ Bannerman, Lucy, and Mark Lister. 2018. Rapist, Karen White, in Women's Jail "Was Trans Faker". *Times*, 10 September.

¹²⁴ Austin, *How to Do Things With Words*.

¹²⁵ Parveen, Karen White.

¹²⁶ Bannerman and Lister, Rapist, Karen White

¹²⁷ College of Policing. 2014. *Hate Crime Operational Guidance*, p. 3.

transgender people to report hate incidents as well as hate crimes.¹²⁸ Police forces in England record non-crime hate incidents on the alleged perpetrator's criminal record; in some circumstances this may be disclosed to potential employers.¹²⁹ Thus White's proclaimed identity as a woman was enforced by the state.

It is not fanciful to see White as the apotheosis of queer theory as implemented in English prisons. Indeed, a Reader in Criminology and Queer Theory at Birkbeck has vigorously endorsed White's claim to be a woman, and thereby White's right to be incarcerated with women. Lamble presented her argument at a seminar at Oxford entitled 'Trans prisoners, sex segregation and the queer politics of safety'; another version was given at Edinburgh.¹³⁰ Despite discoursing at length on 'the surface and depth of gender/sex embodiment', Lamble did not manage to articulate why White should be classified as a woman. She suggested that White's failure to attend the gender clinic should not detract from White's womanhood, just as a woman who misses an appointment for a cervical smear is not considered less female. In a similar fashion, Lamble asserted that the exclusion of White from the women's estate would require the exclusion of butch lesbians, because they too are masculine. This false equivalence illustrates a profound confusion between sex and gender. Although Lamble herself has criticized the LGBT movement's deployment of state power to punish hate crime,¹³¹ she did not mention how White exploited this power to enforce his illocutionary performance. She also omitted information on White's behaviour prior to claiming to be a woman. A therapist with access to White's record discerned 'a history of seeking access to mixed and women's institutions to find and abuse vulnerable people', including a psychiatric hospital where he allegedly raped a young woman.¹³² In short, Lamble's argument demonstrates how a 'queer transformative justice perspective' can transmute an extremely violent and sexually predatory male into a vulnerable victim deserving protection from the carceral state and from transphobic feminists. This transmutation is reminiscent of Foucault's account of Charles Jouy who 'almost, partly, or more or less raped' an eleven-year old girl, Sophie Adam. Foucault described the encounter as 'inconsequential bucolic pleasures', condemning Adam's parents and the mayor for their 'collective intolerance' in reporting it to the gendarmes.¹³³

¹²⁸ Greater Manchester Police. 2016. *Transphobic Hate Crime: A Study in the Under-Reporting of Transphobic Hate Crime, and Police Interactions with the Trans Community 2013–2015*. Greater Manchester Police. <https://www.report-it.org.uk/files/trans-report-interactive.pdf>.

¹²⁹ *Miller, Harry v College of Policing and Chief Constable of Humberside*. 2020. High Court of Justice. EWHC 225 (Admin).

¹³⁰ Lamble, Sarah. 2019. The Surface and Depth of Gender: Trans Prisoners, Sex Segregation and the Queer Politics of Safety. Seminar at the University of Oxford, 14 February; Lamble, Sarah. 2021. Old Discourses, New Tropes: Rethinking the Trans Prison Policy Debates and the Construction of Dangerous Others. Seminar at the University of Edinburgh, 25 January.

¹³¹ Lamble, Sarah. 2013. Queer Necropolitics and the Expanding Carceral State: Interrogating Sexual Investments in Punishment. *Law and Critique* 24: 229–253.

¹³² Gilligan, Andrew. 2018. Why Was Convicted Paedophile Allowed to Move to a Female Jail? *Sunday Times*, 9 September.

¹³³ The interpretation of this case—and of Foucault's reconstruction—is contested. Foucault, Michel. 1975. *Abnormal: Lectures at the Collège de France, 1974–1975*. Verso, p. 292; Foucault, Michel. 1976. *The History of Sexuality*, vol. 1: *An Introduction*. New York: Vintage Books, p. 31; Alcoff, Linda. 1996. Dangerous Pleasures: Foucault and the Politics of Pedophilia. In *Feminist Interpretations of Michel Foucault*. Edit by Susan J. Hekman, Pennsylvania State University Press, pp. 99–136; Taylor, Chloë. 2018. *Foucault, Feminism, and Sex Crimes: An Anti-Carceral Analysis*. London: Routledge.

6. Conclusion

From the 1990s to the 2010s, it became successively easier for males identifying as transgender to enter women's prisons—first by obtaining genital surgery in prison (Pilley), then by gaining a gender recognition certificate (Jones), then through performing femininity (Hudson), and finally by claiming to be a woman (White). These successive changes brought the prison service closer to the world envisaged by queer theory, in which 'gender emerges as the term which absorbs and displaces "sex"'.¹³⁴ My argument is that the convergence of prison policy with queer theory was no coincidence: the theory motivated and justified changes in policy. Just as theories in disciplines like economics and psychiatry can remake the world in their own image, so can queer theory.

Before recapitulating that argument, however, it should be acknowledged that policy was partially reversed after White's incarceration became public knowledge in 2018. Regulations were revised to emphasize 'a balanced approach which considers the safety and needs of those who are transgender, whilst ensuring that decisions do not negatively impact on the well-being and safety of others, particularly in custodial settings such as in women's prisons'.¹³⁵ The number of male transgender prisoners without a gender recognition certificate who were housed in the women's estate declined from 22 in 2018 to around 3 in 2021.¹³⁶ Those who had acquired a certificate, however, continued to 'be treated in accordance with their legally recognized gender in every respect'.¹³⁷ Their number is unknown, with official estimates ranging from under 10 to 23.¹³⁸ HMP Downview opened a dedicated wing for those prisoners with a certificate who 'present a high risk of harm to other women'.¹³⁹ This arrangement was designed to provide them with 'risk assessed association with other women', for example when using the gym.¹⁴⁰ This policy reversal—in effect a return to the 2016 regulations—is unlikely to outlast the Conservative government. Labour and the other major opposition parties (Liberal Democrat, Scottish Nationalist, Plaid Cymru, and Green) are committed to amending the Gender Recognition Act to make the illocutionary performance of gender override sex in all circumstances. Indeed, one of the three top candidates in Labour's most recent leadership contest explicitly stated that a man who raped a girl multiple times and then declared himself to be a woman deserved incarceration in a women's prison.¹⁴¹

The causal importance of queer theory in changing prison policy is clearly evidenced by the role played by individuals who were avowed enthusiasts of Butler. Whittle was the most influential for policymakers, followed by Stewart. Jenkins changed policy

¹³⁴ Butler. *Bodies That Matter*, p. xv.

¹³⁵ Ministry of Justice. 2019. *The Care and Management of Individuals Who Are Transgender*, p. 2.

¹³⁶ Ministry of Justice. 2018. *Offender Equalities Annual Report, 2017/18*, p. 17; Ministry of Justice. 2021. *Her Majesty's Prison and Probation Service: Offender Equalities Annual Report, 2020/21*, p. 8.

¹³⁷ Ministry of Justice. 2019. *Care and Management . . .*, p. 6.

¹³⁸ *FDJ v Secretary of State for Justice and Another*, para 13; Lyons, Izzy. 2021. Transgender Prison Population Climbs by a Fifth in Two Years, MoJ Figures Show. *Telegraph*, 24 November.

¹³⁹ National Offender Management Service. 2019. HMP Downview E Wing Equality Analysis version 16.0 for publication. <https://fairplayforwomen.com/wp-content/uploads/2020/10/Equality-Analysis-Document-E-Wing-Version-16.0-for-publication.pdf>.

¹⁴⁰ Ibid.; also Gilligan, Andrew. 2019. "Europe's First Jail in a Jail" for Trans Women. *Sunday Times*, 2 March; Hellen, Nicholas. 2019. Female Prisoner Takes Government to Court after Alleged Assault by Transgender Inmate. *Sunday Times*, 3 November.

¹⁴¹ Fisher, Lucy, and Fariha Karim. 2020. Change Law on Women's Spaces, Says Rebecca Long Bailey. *Times*, 17 February.

indirectly through her media campaign. More and Lambie are also noteworthy for their discursive contributions. Their activism was altruistic in the sense that they gained no direct benefit from changing prison policy, because none of them were prisoners or faced any realistic prospect of incarceration. Arguably they stood to gain indirectly from the institutionalization of queer theory, but only because it had informed their respective identities (transgender or queer).

Together these activists managed to embed the esoteric propositions of queer theory into the everyday operations of politicians and officials. One banal example is a report on ‘the health and social care needs’ of transgender prisoners produced by Community Innovations Enterprise, a Limited Liability Partnership controlled by Lord Patel of Bradford.¹⁴² The report acknowledged assistance from Gendered Intelligence and Whittle, and quoted Butler’s *Undoing Gender*. Patel launched the report by inviting Jones—convicted of manslaughter and attempted rape—to speak in Parliament.¹⁴³ A more consequential example comes from a recent judicial review challenging the placement of male sex offenders in the women’s estate. The Secretary of State for Justice’s legal team successfully argued that ‘enabling transgender individuals to live in their chosen gender’ was one of the policy’s ‘legitimate aims’.¹⁴⁴ This argument—advanced by a Conservative government—exactly recapitulates Butler’s emphasis on ‘how essential becoming a gender is to one’s very sense of personhood’.¹⁴⁵

Queer theory was not the only force driving the transition from sex to gender. The liberal individualism of human rights was important in the early phase. This discourse informed a series of legal decisions which erected a new domain of rights around gender identity. Thus Article 8 of the European Convention on Human Rights which guarantees respect for private and family life was interpreted as requiring the transfer of a violent rapist to a women’s prison. There is an affinity between the liberal discourse of human rights and the radical discourse of queer theory: they favour those who are construed as victims of formal institutions of power. From this perspective, it is progressive to champion the transgender prisoner contesting the power of the state and transgressing the dominant categories of society. The power that can be exercised among individuals, such as that exerted by one inmate over another, is ignored. Thus no consideration was given to women who would be confined with violent or sexually predatory males. Female prisoners were invariably treated as an audience obliged to validate the performance of gender identity.

One of queer theory’s effects was to suppress information about sex which could falsify the theory. Official data on the number of males in the women’s estate were collected only after pressure from dissident feminists.¹⁴⁶ These data are still incomplete because they omit prisoners with a gender recognition certificate, and of uncertain accuracy because they depend on transgender prisoners (those who have not acquired

¹⁴² Community Innovations Enterprise. 2017. *Inside Gender Identity: A Report on Meeting the Health and Social Care Needs of Transgender People in the Criminal Justice System*. https://www.ciellp.net/_files/ugd/cc3101_97d3c7c868bd434a843546100db510f2.pdf

¹⁴³ Hall, Emily, and James Fielding. 2018. Transgender Activist Jailed for Killing Her Boyfriend and Trying to Rape Shop Assistant Five Days after Being Released from Prison Is Invited to Speak at House of Lords. *Daily Mail*, 27 February.

¹⁴⁴ *FDJ v Secretary of State for Justice and Another*, para 62.

¹⁴⁵ Butler. *Undoing Gender*, p. 100.

¹⁴⁶ E.g., Fair Play For Women. Investigation into the Number . . . ; Keep Prisons Single Sex. 2020. Collecting and Reporting Data about Sex, Submission to Office for Statistics Regulation. <https://kpssinfo.org/osr-submission-pdf/>

a certificate) declaring their ‘legal gender’. Such confusion makes it harder to test the proposition that gender identity—and not sex—predicts behaviour. One obvious example is the proportion of sex offenders in the prison population. Queer theory would predict that males who identify as women would have the same low rate of sexual offending as females. This prediction is spectacularly false. The recent judicial review confirmed that 50% of transgender male prisoners have been convicted of sexual offences compared to under 5% of female prisoners.¹⁴⁷ Characteristically, Lamble intervened to argue that this comparison ‘is tainted by a lack of reliable data’.¹⁴⁸ The unreliability of data is one of queer theory’s achievements. This case provides a counterpoint to the insight that quantification is a powerful method for ‘making up people’.¹⁴⁹ It turns out that suppressing quantification can be equally generative.

One final irony is worth noting. Queer theory claims to offer a ‘radical critique of the categories of identity’.¹⁵⁰ In Lamble’s phrasing, “‘queerness’ is a political ethos that works to question and deconstruct identitarian logics’.¹⁵¹ Deconstructing the conventional meaning of woman (*qua* adult human female) requires constructing novel identities—‘woman’ (*qua* someone who declares themselves to be one) and ‘transgender’—ultimately derived from illocutionary performance. These identities are now rigorously enforced by the formal machinery of law, and in elite social circles by the informal compulsion of norms. If the women who had been sexually assaulted by White had testified in court, the judge would have ordered them to refer to their assailant with female pronouns.¹⁵² Thus queer theory recruits the power of the state to buttress its own identitarian logics.

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¹⁴⁷ *FDJ v Secretary of State for Justice and Another*, paras 13–14.

¹⁴⁸ *Ibid.*, para 49.

¹⁴⁹ Hacking, Ian. 2007. Kinds of People: Moving Targets. *Proceedings of the British Academy* 151: 285–318.

¹⁵⁰ Butler. *Gender Trouble*, p. ix.

¹⁵¹ Lamble, Sarah, Tanya Serisier, Alex Dymock, Nicola Carr, Julia Downes, and Avi Boukli. 2020. Queer Theory and Criminology. *Criminology and Criminal Justice* 20: 506.

¹⁵² Judicial College. 2013. *Equal Treatment Bench Book*, p. 8.1; Ward, Victoria. 2018. Radical Feminist Warned to Refer to Transgender Defendant as a “She” During Assault Case. *Telegraph*, 12 April.