Voices Beyond the Margins: Criminalizing Transgender identities

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The social construction of gender is evident in the scrutiny of gender non-conforming individuals, both by peers and through institutionalized ideals of gender and sexuality. Prisons exist as a site of control and regulation of individual identities as rooted in biological and medical conceptions of sex. These socially constructed identities within correctional facilities are represented in the neglectful treatment and targeting of transgender individuals. Through a language of exclusion appropriated by the state, individuals that identify as transgender are mistreated and neglected with inadequate access to appropriate and necessary medical transition related care in corrections. Due to hegemonic and heteronormative ideologies related to gender, race, and sexuality, individuals remain vulnerable to enter into pathways towards criminality that have a negative impact on their treatment by the law and other bodies.

A definitive relationship can be displayed between gender, race, sexuality, and the way that individuals become intertwined with the Canadian and American criminal justice systems. Certain pathways such as homelessness, poverty, and a history of physical or sexual assault, among others can lead individuals into engagement in high risk behaviours as a survival technique. Sociologists Lori Sexton, Valarie Jenness, and Jennifer Sumner expressed that transgender individuals fare worse in terms of their health and participation in these activities as due to these multiple intersecting factors. Together these elements create a pathway into vulnerability and criminal activities that continue to marginalize and victimize these individuals (26). It is essentially a cycle of disadvantage and transgender individuals occupy different positionality than the general population which, has a negative impact on their treatment within the prison environment and beyond. As a result of their differentiation from mainstream culture and society, individuals that identify as trans are disempowered due to their identity and their establishment outside of normative frameworks. It is this disempowerment that serves as a pathway into vulnerability and criminalization. This marginalized space in which transgender and other non-conforming gender identities occupy is an area of survival and criminality; the results from this see the disproportionate arrest, conviction, and incarceration of these individuals (Erni 154). The socio-economic environment where an individual resides has an important role in the way that this person comes to be intertwined with the law. Sexuality and gender are demonstrated as a social construction that serves as a method to limit power and resources to a dominant group while simultaneously disadvantaging those who exist beyond its framework.

The use of sex and gender to justify the marginalization of certain groups is in alignment with a patriarchal lens of identity and positions all individuals into a hierarchal framework. In the depiction of gender non-conforming individuals, the American Psychiatric Association used to describes people that associate with a gender identity different from that of their sex assigned at birth as transsexual and suffering from a psychiatric condition known as Gender Identity Disorder (GID). A 1996 survey conducted on several United States correctional institutions demonstrated a limited availability and access to resources for individuals suffering from this disorder; only 20% of facilities under review were shown to have any policy to address health care for transgender individuals (Browne & McDuffie 281). The use of this biomedical lens, while constructing transgender persons as being at odds with their body, also attempts to establish their social inferiority in their representation as sick and/or disabled. These medicalized depictions of identity become challenging with regards to the prosecution of these individuals, as the current legal system impedes these persons from equal access to resources and protection (Oparah 244). The social construction of sexuality and sexual norms through the biomedical and cultural understanding of the body, shapes the way that society approaches and understands people of a variety of sexualities and body types (Weeks 205). This view of the body and sexuality becomes particularly problematic as it continues to reinforce certain gender ideologies whilst attempting to regulate and control those that do not conform to these presumed norms pertaining to identity. This embedding of very specific and universalized values for identity expression through culture shapes the distinct relationships that individuals continue to have with themselves and their social environment. The biomedical approach to gender and sex is one that contin-
ues to present transgender and other queer persons in terms of disability and unacceptance in their renditions as atypical “bodies of science” under the regulatory control of the state.

Within the American and Canadian justice systems, queer youth continue to be targets for criminalization while being subjected to standards that promote certain gendered expressions. In one of Louisiana’s youth prisons, Allison Smith outlined that queer and trans youth are commonly subjected to ‘sexual identity confusion counseling’ with accusations that these individuals are confused and/or in need of rehabilitative care (164). Trans and queer youth in these institutions are scrutinized and disciplined if they do not conform to the ideals presented; in one such instance, a young male was punished for displaying feminine qualities (i.e. having long hair) (Smith 164). In the diagnosis of individuals with GID, they are placed within a conditioned category that must be treated medically through hormone therapy and sex reassignment surgery (SRS) in conjunction with psychological treatment. This approach to care can be challenging for individuals who are unable to obtain procedures and treatment due to economic disparities and as a result, remain fixed within this disordered categorization. Jordan Mintz asserted that prison institutions must provide appropriate professional assistance that allows the person the right to a psychological evaluation and treatment following incarceration; if this diagnosis and treatment recommendation involves any one of these medical therapies, inmates should have the right to acquire them (29). All individuals should have the ability to seek appropriate medical treatment while under government care. The provision of requested or necessary medical care is essential to ensure the safety and security of all individuals during their time in corrections.

As a result of gender identity, queer individuals are subject to increased persecution and marginalization by the law and law enforcement officials. Intersections can also be seen between gender and race as gender non-conforming individuals of color have a greater likelihood of being targeted by the police, sent to criminal court, as well as to serving time in corrections compared to that of other racial identities (Oparah 258). Cece McDonald was a survivor a vicious verbal and physical attack that was targeted based on her race and sexuality. In self-defense, McDonald accidentally killed one of her attackers; she was the only person arrested on scene. Following her arrest, she was denied access to appropriate medical treatment and her attacker’s history of violence was not deemed admissible as court evidence. In 2012 she pled guilty to second-degree manslaughter and was sentenced to serve 41 months in a men’s prison (Johnson 136). Due to intersections between gender and race, individuals are targeted on the basis of heteronormative ideals that are used to justify their mistreatment by the law and the community. Oparah emphasizes that there is a definitive link between conflicts among transgender individuals in their youth with peers and school authorities over gender identifications; this, with the pressure from various social groups, abuse by peers, and the law, these individuals are systematically marginalized and criminalized based on their gender and race (257). Alexis Giraldo, another transgender racialized woman who served two years in a California state prison filed a complaint within a California penitentiary that several prison staff members allowed her to be raped by her cellmates. Prison professionals avoided Giraldo even as she was told to endure daily beatings and assaults by cellmates while her request to be transferred to female housing unit was declined (Jenness 4). This gross neglect of safety and denial of rights based on race and gender identity contributes to inequalities within the current legal system with regards to transgender and queer individuals while allocating power to those that operate within state defined gender categories.

Correctional facilities are designed to prevent individuals from experiencing the freedoms and liberties of those on the outside. Within the prison environment, offenders become required to exist within clearly defined roles in attempt to normalize subjects and correct social deviance and corruption. Transgender and queer incarcerated men and women are depicted in terms of abnormality and nonconformity within this environment since typically the majority of offenders are placed within a two-tiered gender classification system including either male or female-housing units assigned based on genitalia. To all those who have not undergone gender reassignment surgery, they become placed within the gender-housing unit that corresponds to the sex they were assigned at birth (Mintz 5). Immediately from the initial booking process, transgender individuals are subjected to the horrors of sexual abuse and discrimination by officers. In the 2006 case of Forrester, a transgender woman was “split” strip search conducted by both female and male correctional officers of the Ontario police force due to her identification as a transgender female that continued to have male genitalia (Smith 151). It was during this time that one of the officers defined Forrester by an “incongruous 0”; it was unknown whether or not this refereed to a zero or an O, but in either instance the officer participated in the differentiation of this individual and constructed an ‘other’ narrative. Due to Ms. Forrester’s categorization outside of normativity and her establishment as unacceptable to procedural standards for women, her sex and gender were ultimately questioned and used in justification for the officers’ behaviours and her mistreatment. Marginalization and scrutiny from the state through correctional facilities systematically question gender identity in alignment with certain conceptions of sex and in doing so, reinforce institutionalized racism, sexism, and transphobia.

Upon entering corrections, transgender inmates are stripped of their identity resulting in a number of challenges for in their expression. Mintz described that men’s prisons are designed in a way that portray men as dominant, hyper-masculine beings; while women are seen within hegemonic roles of inferiority and evocation of weakness, passivity and dependency (3). These notions of masculinity enable men’s prisons to
be more violent which becomes particularly problematic for transgender females. Jacquie, a transgender woman in New York states that while she was incarcerated she had restricted access to feminine clothing. In addition, many transgender women have reported having their hair cut in order to assume a more masculine appearance upon entering men’s facilities (Rivera 31). In attempts to normalize offenders into two distinct groups based on gender and sex, the state establishes a discriminatory practice founded on hegemonic masculinity that becomes constructs queer individuals in differentiation from legal standards.

The practice of dehumanizing inmates and the systematic reproduction of “legal” violence is depicted within the treatment of homosexuality and gender-nonconforming prisoners within government institutions. Currently, homosexuality is prosecuted in 85 countries with many seeing imprisonment and punishment by death if identified by the state (Ungar 63). The paternalism of these institutions is demonstrated in the lack of power allocated to transgender inmates. In this regard, Foucault argues that this governmentality is an attempt to manage the population and regulate individual behavior’s and expressions; the exercise of which, is dependent on a network of institutions that reinforce notions of dominance and power while constructing and oppressing a group that is deemed inferior (as cited in Pemberton 157). The operation of unequal power relations through the law systematically categorizes individuals while privileging those that fall within the confines of normativity. The use of hierarchical control creates a division between the law and its subjects in the establishment of the ‘other’ in differentiation from the privileged class. Mark Ungar described these unequal perceptions of homosexuality as being framed outside of the law while giving regulations and the legal power for law enforcement officials to harass, detain and in horrific instances, kill those that identify as queer (64). In the marginalization and targeting of transgender people, privilege of cisgender individuals is evident. This privilege can be represented in the forceful adoption of specific gender binaries and the coercion of all gender identities as outlined through a cisgender model of sexuality.

Within the prison environment the assault on gender identity continues as transgender people are forced to endure harassment, abuse and humiliation by fellow inmates as well as prison staff members. There are different conditions under which male-to-female (MTF) and female-to-male (FTM) transgender individuals are forced to ascribe as the environment within male and female units vary greatly. FTM inmates often face harassment primarily from male prison staff where as MTF inmates largely experience abuse by both prison staff and other inmates, where they exist as a principal target (Mintz 6). Sexual assault remains something that is highly prevalent in prisons; transgender men and women are particularly vulnerable to these acts of violence as they defy traditional roles of masculinity and femininity which is used to justify their subversion and domination by other individuals within the prison environment. There is this system of ‘sexual terrorism’ that is seen within this environment where males attempt to terrify and dominate women on the basis of ‘femaleness’ which, is something that is employed in the construction of an individual as weak, unacceptable as well as gay or transgender (Erni, 2013). In this way, masculinity is established as the “norm” which, is used to differentiate “other” groups and assert its superiority over those who are established as deviant. A random sample of a California correctional facility found that 59% of transgender inmates stated that they had been victims of sexual assault within the prison; in comparison, only 4.4% of the general prison population stated that they had been a victim of this (Mintz 7). In avoidance of harm to all identities in state care, those who identify as transgender should be placed within a housing unit where they are at the least risk of being harmed or abused by peers.

Based on Christian conceptions of the body and sexuality that became embedded within historic and contemporary relations through the process of colonization, the body and its expressions become a subject to be objectified and scrutinized by a primarily male gaze. The climate presented in jails and prisons fosters a hegemonic environment whereby male staff and inmates uphold positions of privilege over female staff and inmates (Stohr 48). Evidence has also demonstrated the way in which women are presented in terms of femininity and traditional roles within the home; transgender women in this context are framed beyond this, into positions of hostility and masculinity (Smith 152). There is this negative aspect of corrections that is highly focused on an individual’s appearance and the ambiguity of their identity; those who do not conform to the regulatory control of the state and the community are inherently placed on this pedestal of inequality and unacceptability. Prison regulations participate in this in the restriction appearances and the forcing of men and women to conform to very strict qualities of identification; many transgender inmates have reported being banned for wearing clothing inconsistent with their state identified gender (Pemberton 167). Others have also stated being punished or credited with violations for wearing clothing or styling their hair in a way that conflicts with the traditional gender norms presented. These depictions of masculinity and femininity in corrections are harmful and discriminatory toward gender nonconforming people. Lori Girschick commented that femininity, in its association with weakness and passivity, contributes to the abuse of those who do not conform (as cited in Smith 157). With the hyper focus on certain attributes related to sex, transgender inmates are forced within roles that are not representative of their true identity, oppressing and regulating their true nature.

With the harsh environments that trans individuals are forced to endure in corrections, many, in desperation, turn to high risk behaviours in order to fulfill these strict gender requirements. Esinam Agbemenu communicated that there is this standardized method of assessing gender dysphoria
through the physical factors pertaining to health, with a focus on the symptoms that are apparent; given this regulation of medical assessment, it limits the resources and education for transgender individuals and only allows them appropriate and necessary access to aid unless there is a ‘serious medical need’ for such (18). An illustration of this can be demonstrated through Ophelia De’Londa, a transgender woman housed within a United States correctional facility; in her denial of surgery and hormone therapy accompanied with the pressures and abuse by peers, De’Londa attempted to castrate herself using a razor (Mintz 29). This is just a small representation of some of the feelings of inadequacy seen among transgender persons that become a pathway into dangerous behaviors. This, compounded with a lack of understanding and availability of appropriate medical services leads individuals into acts of desperation in order to cope. The courts often assess the health and medical need(s) of their detainees in a standardized approach that neglects to acknowledge individual mental and physical health difficulties that lie beneath the surface. Due to the nature of social perceptions related to gender and sexuality, transgender people are at a greater likelihood of suffering from mental health issues and struggle with depression than that of their cisgender counterparts (Brown 335). In this context there are both liability and health issues that have the potential to be avoided in the provision of necessary resources and treatment for those who suffering with GID while under government care.

In efforts to enable transgender and queer individuals to receive equal opportunity and access to health and social related services, the government should consider implementing new policies that work to reduce the criminalization and imprisonment of all gender non-conforming individuals. Sylvia Rivera contended that these measures should be adopted in the implementation of guidelines for addressing concerns for transgender people (34). These measures should include, but not be limited to, prohibiting discrimination, inappropriate searches as well as harassment and sexual abuse while enforcing the law in a way that is equitable for all citizens (36). In this improvement of services for non-cisgender individuals, they should have the ability to be housed within the gender unit that minimizes risk of harm for all parties. Also within this framework, gender identity should apply a more fluid approach in corrections where more inclusive protocol is adopted and all individuals become free to express whichever identity they recognize as their own. Through Bill 140 of the Transgendered Persons Protection Act gender expression and identity were approved in their recognition as part of the Nova Scotia Human Rights Act. Bill 140 allows for a greater scope of protection of transgender people; prior to this bill the “sex” category of the Human Rights Act was neglectful in allocations of protection for transgender people (Smith 163). The implementation of legal policies like Bill 140 are crucial in shifting perceptions of gender and sexuality as well as allowing a shift away from the discrimination, victimization and marginalization of the queer community.

In addressing the legal context of gender identity/expression and the implementation of better policy, it is important to understand and improve the correctional environment and its inherent bias toward transgender persons. As demonstrated, both male and female transgender persons are at risk for not only abuse by their fellow offenders, but officials within the facility as well. For these officers dealing directly with inmates there should be certain training and requirements in place to ensure that they do not perform bias in the prison environment and participate in the abuse of any offenders under their jurisdiction. This remains particularly important as violence is highly socialized; often the perpetuation of abuse toward transgender people evokes a socialized response of violence and abuse by fellow inmates (Shah 53). In the prevention of abuse and the prospering of safe environments for LGBT inmates, Schuster prose

“Correctional facilities will have to prohibit and directly address homophobic slurs and other verbal harassment; they will have to discipline and relocate the perpetrators of the harassment rather than isolating the victims for their own protection…”(qtd. Stohr 126).

Both Shah and Stohr suggested that there should be a mandatory training curriculum for deputies, guards and officers. With the use of interactive sessions with transgender persons, a model curriculum designed by the federal prison system in conjunction with both psychologists and activists, bi-yearly training would be provided to ensure the safety/security and prevention of humiliation and violence faced by transgender people while serving time (53; 126). By enforcing a more positive relationship with human sexualities, all individuals will have the ability to express their rights and liberties as outlined in s.7 of the Canadian Charter.

In understanding and forming effective solutions for the disparities that transgender individuals face with regards to access to health care, social, and equal opportunity, it is essential to recognize the deeply rooted margins of oppression and privilege of state identities as illustrated through biological model of sex. In the presentation of personal accounts and experiences of criminalized transgender inmates, the state control of identity grossly neglects transgender and queer people and places them at risk for marginalization, victimization and discrimination. The hostile environment of North American prisons serves as a method for state regulation and control of sexuality as well as gender identity in the depreciation and victimization of those who are unable to conform.
Works Cited


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