Gender-Diverse Individuals and the Carceral State: Conditions of Confinement and Sentencing Reform

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Content Warning: This article contains discussions that may be triggering for some readers. Please read with care.

Gender-diverse individuals are over-incarcerated and experience uniquely harsh conditions in prisons in comparison to cisgender individuals. This paper proposes using sentencing law as a tool to minimize these disparities, specifically through the use of individualized proportionality, to arrive at a fit and just sentence for the criminalized person. Specific ways in which gender-diverse individuals experience suffering in prisons include: placement in prisons that do not accord with gender identity; increased risk of physical, emotional, and sexual violence; the use of strip searches; increased use of solitary confinement under the guise of safety; and insufficient culturally competent, gender-affirming healthcare. These conditions of confinement of gender-diverse individuals should be considered in sentencing to conclude whether a custodial sentence is appropriate, and if so, for what period of time. This paper looks at case law in which gender identity is acknowledged as a circumstance of the criminalized person, and more recent case law that considers how the conditions of confinement will uniquely affect the gender-diverse individual before the court. A more consistent, proactive assessment of these conditions is appropriate and may reduce the suffering experienced by gender-diverse individuals at the hands of the carceral state.

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Introduction

Gender-diverse individuals[1] are overrepresented in the prison system. In 2011, it was estimated that about 16% of transgender individuals (21% of transgender women) had been incarcerated in their lifetime, in comparison to 2.7% of the general United States population.[2] In Canada, very little research has been done on the prevalence of lifetime incarceration for gender-diverse populations. A 2023 Canadian study found that 5.7% of transgender male participants, 10.6% of non-binary participants, and 19.7% of Two-Spirit participants reported being incarcerated in their lifetime, in comparison to

1. The term "gender-diverse" is used here to encompass transgender, gender non-binary, gender-fluid, Two-Spirit, and intersex individuals who do not identify as "cisgender" (i.e., do not identify with their sex assigned at birth or do not conform to the gender binary of male or female).

2. Jaime M Grant, Lisa A Mottet & Justin Tanis, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (Washington: National Centre for Transgender Equality and National Gay and Lesbian Task Force, 2011) at 163.

3.7% of cisgender non-Two-Spirit participants and 7.1% of Indigenous non-Two-Spirit participants.[3] The study did not assess the incarceration of transgender women.

Gender-diverse individuals face numerous barriers in society, including employment and educational discrimination, family rejection, and high rates of poverty and homelessness.[4] They frequently have difficulties in accessing social services, often because of gender markers on identification.[5] These barriers often leave gender-diverse individuals with few options and push them to engage in criminalized activity for survival.[6] These factors all contribute to the over-incarceration of gender-diverse individuals.

Within the prison system itself, gender-diverse individuals face significant hardships—some caused by Correctional Service Canada (CSC) policies and staff, some caused by other prisoners. Yet some hardships are the result of the inherent vulnerability of being a gender-diverse person within a system that is fundamentally abusive. As Linda Moore and Phil Scraton described:

> [T]he enforced removal of a person's liberty, a citizen's status and the erosion of personal identity through the allocation of a number, a cell and a set of clothes are inherently violent processes. They are administered through procedures established ostensibly to prioritise security, order and safety underpinned by regimes of isolation, suspicion and fear. Prisons are essentially places of deprivation in which rights and needs are redefined as privileges to be earned through compliance and conformity. The slightest opposition to authority, questioning a prison instruction or a guard's order, can be met with severe punishment via broad discretion embedded in the institution's disciplinary code . . . While the imagery of violence within prisons is that of prisoner-on-prisoner bullying, assault and wounding, the reality of violence, in scope and content, is not so specific. It extends to prisoner-on-staff and staff-on-prisoner violence. It includes acts of emotional, psychological and deeply personalised harm as well as physical or sexual

3. Kai Jacobsen et al, "Prevalence and Correlates of Incarceration Among Trans Men, Nonbinary People, and Two-Spirit People in Canada" (2023) 29:1 J Correctional Health Care 47 at 52.

4. Rae Rosenberg & Natalie Oswin, "Trans embodiment in carceral space: hypermasculinity and the US prison industrial complex" (2015) 22:9 Gender, Place & Culture 1269 at 1272.

5. *Ibid*.

6. *Ibid*.

> assault. It extends from verbal abuse to beatings and death. It also encompasses self-harm and suicide as consequences of institutionalised negligence, neglect and intimidation.[7]

The purpose of this paper is to explore the ways in which gender-diverse individuals are mistreated and abused by the prison system,[8] and ultimately why sentencing reform will better protect these vulnerable individuals from the carceral state. I will argue that the conditions of confinement for gender-diverse individuals, in conjunction with their individual circumstances, must be considered during sentencing to minimize disparities in the prison system with their cisgender counterparts. Doing so is necessary to reduce the suffering experienced by gender-diverse individuals during incarceration, which only serves to worsen their outcomes upon exiting prison. Though the harms of the carceral state cannot truly be removed until it itself is broken down, by considering the conditions and effects of confinement during sentencing, this can perhaps still lead to better protection for gender-diverse individuals until decarceration can become a reality.

Part I will briefly discuss sentencing principles and how conditions of confinement are not considered consistently when determining the appropriate sentence for a criminalized person. Incarceration affects different individuals in different ways based on certain characteristics, vulnerabilities, and historic trauma, and it is necessary for this to be accounted for when sentencing an individual to come to a "fit and just" sentence. This analysis is rooted in the doctrine of individualized proportionality, in which the gravity of the offence and moral culpability of the criminalized person are not the only measures for determining whether a sentence is proportionate.

Part II will specifically look at how gender-diverse individuals are treated in the prison system. First, I will address entry into prisons. Until very recently, placement in prisons occurred according to a person's genitalia and not based on their gender identity. In 2017, Bill C-16 was introduced to add gender identity and gender expression to the list of prohibited grounds of discrimination.[9] The response by the prison system was to allow individuals to

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7. Linda Moore & Phil Scraton, "The Imprisonment of Women and Girls in the North of Ireland: A 'Continuum of Violence'" in Phil Scraton & Jude McCulloch, eds, *The Violence of Incarceration* (New York: Routledge, 2008) 124 at 124.

8. This paper will mainly focus on federal prisons rather than provincial and territorial jails. Though some provinces and territories (specifically: Ontario, British Columbia, and the Yukon) have their own specific policies on trans prisoners, those policies have many similarities to the federal policies. Additionally, many of the experiences of gender-diverse individuals in federal prisons are broadly applicable to those in provincial jails.

9. Bill C-16, *An Act to amend the Canadian Human Rights Act and the Criminal Code*, 1st Sess, 42nd Parl, 2017, cls 2.1, 2.2 (assented to 19 June 2017).

choose for themselves where they want to be placed based on their gender identity. Unfortunately, this is often an illusory choice. This subsection will specifically focus on three different points in time in history—before Bill C-16, the introduction of the Bill, and placement after the Bill's Royal Assent. Second, I will address safety within prisons and how prisons are more dangerous for gender-diverse individuals. Third, I will address healthcare availability within prisons for gender-diverse individuals and how it is insufficient.

Part III of this paper will review sentencing jurisprudence that has considered and, at times, even applied an analysis that includes consideration of an individual's gender-diverse identity when calculating the appropriate length of the imposed sentence. I will argue that gender identity and the conditions of confinement for gender-diverse individuals must be considered and applied consistently in sentencing. I will then argue that proportionality in sentencing is not enough—there must be positive duties within prisons to enact change for gender-diverse individuals who enter the prison system.

Finally, I will conclude by acknowledging that Canadian courts have inched towards becoming more progressive in recognizing and validating the transphobia that exists within prisons. However, in order to truly minimize the harm gender-diverse individuals face at the hands of the criminal legal system, courts must be proactive, not merely reactive, in ensuring that the harms caused by the carceral state are minimized.

I. Sentencing Lacks Holistic Analysis

This section of the paper will introduce general sentencing principles and lay the foundation for why, in the case of gender-diverse individuals, consideration of the conditions of confinement and individual circumstances of the offence are necessary when considering the proportionality of a sentence. In Canada, sentencing judges apply the purpose and principles of sentencing—including the fundamental principle of proportionality—laid out in sections 718 to 718.201 of the *Criminal Code* to come to an "appropriate" sentence for a given criminalized person.[10] Additionally, a pre-sentence report may provide assistance to the court by outlining a specific person's individual circumstances.[11] For Indigenous criminalized persons, this includes a *Gladue* report, which allows a judge to take judicial notice of broad systemic and background factors that affect Indigenous persons, and how these factors may have played a role in bringing the particular person before the court.[12] For Black criminalized persons, an enhanced pre-sentence report can provide context regarding the

10. *Criminal Code*, RSC 1985, c C-46, ss 718–718.201 [*Criminal Code*].

11. *Ibid* at s 721(1).

12. See *R v Gladue*, 1999 CanLII 679 at para 93 (SCC).

existence and impact of anti-Black racism and how it has affected the particular person before the court.[13]

Section 718.1 of the *Criminal Code* articulates proportionality as a fundamental principle of sentencing, namely that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender".[14] However, this approach to proportionality only focuses on the quantum and form of punishment.[15] As Benjamin Berger frames it, proportionality is merely a quantitative assessment and this understanding of proportionality is disconnected with the reality of sentencing.[16] It fails to recognize that severity of sentencing is not fixated on length but in the suffering experienced by the individual, which is a consequence of the conditions of confinement and how the confinement affects the specific person.[17] Interpreted in this way, proportionality assessments as currently conducted in sentencing lack a holistic analysis.

Lisa Kerr has described prisons as generally being treated as a "black box" in punishment and sentencing theory—the function of prisons is presumed, but *how* prisons function is treated as an unknown.[18] This in turn leads to length being the focus of sentencing and not the administration or quality of the prison system at the time a person is sentenced.[19] An analysis of the vastly different ways in which prison affects different individuals is also neglected from punishment theory.[20] Kerr argues that for punishment theory to generate more useful tools for criminal justice reform, the conditions of confinement—including the impact of imprisonment on individuals and the variation across and within penal institutions—must be considered.[21]

As Chris Rudnicki observed, since the COVID-19 pandemic, there has been an emergence of jurisprudence in which judges have accounted for the qualitative conditions of prisons when sentencing a person and therefore, the "black box" has begun to open.[22] For example, in *R v Marfo*, the sentencing

13. *R v Morris*, 2021 ONCA 680 at para 13.

14. *Criminal Code*, *supra* note 10 at s 718.1.

15. Benjamin L Berger, "Judicial Discretion and the Rise of Individualization: The Canadian Sentencing Approach" in Kai Ambos, ed, *Sentencing: Anglo-American and German Insights* (Göttingen, Germany: Göttingen University Press, 2020) 249 at 263.

16. *Ibid*.

17. *Ibid*.

18. Lisa Kerr, "How the Prison is a Black Box in Punishment Theory" (2019) 69:1 UTLJ 85 at 86.

19. *Ibid* at 88.

20. *Ibid* at 86.

21. *Ibid* at 113.

22. Chris Rudnicki, "Confronting the Experience of Imprisonment in Sentencing: Lessons from the COVID-19 Jurisprudence" (2021) 99:3 Can Bar Rev 469.

judge considered the inequalities faced by Black prisoners, which he found to be highly relevant, and concluded that "[i]f a sentence is more onerous for a Black man because of systemic anti-Black racism in the correctional system, then any sentence [imposed on a Black man] must be shortened to recognize this fact".[23] Importantly, this was recently endorsed by the Supreme Court of Canada in *R v Hills*, in which the Court held that "[t]he principle of proportionality implies that where the impact of imprisonment is greater on a particular offender, a reduction in sentence may be appropriate" to "reflect the comparatively harsher experience of imprisonment for certain offenders".[24] Berger described this emergence of individualized proportionality—which shifts the focus from merely the gravity of the offence and the moral responsibility of the criminalized person to incorporate their individual circumstances and experience of suffering—as providing the necessary qualitative inquiry that can result in sanctions that are truly fit and just.[25]

In the case of gender-diverse persons, it is crucial to root the proportionality analysis in this doctrine of individualized proportionality because the person's individual circumstances—including lack of resources and familial support, experiences of discrimination, abuse, and trauma, and barriers to accessing culturally competent healthcare—relate both to the resort to criminalized activity and how the person will experience incarceration. These issues and barriers are experienced by gender-diverse individuals both in and out of prisons (the former being the focus of this paper), and must be accounted for in order to determine a truly "proportionate" sentence. Proportionality cannot simply be derived from looking at the gravity of the offence and moral culpability of the person in a vacuum. A more nuanced approach, as suggested by Berger, is required, particularly when it comes to gender-diverse individuals.

II. Gender-Diverse Individuals Receive Unfair Treatment in a Variety of Carceral Contexts

A. Entry Into Prisons

This section of the paper will discuss the issues surrounding placement for gender-diverse individuals into the prison system. In Canada, prisons are either labelled as men's or women's prisons. This binary choice, unsurprisingly, is one of the first issues that gender-diverse individuals face in their interactions

23. 2020 ONSC 5663 at para 52.

24. 2023 SCC 2 at para 135.

25. Berger, *supra* note 15 at 263.

with the carceral state. The turning point for how prisoners are placed with respect to sex and gender came with the introduction of Bill C-16. In this section, placement into prisons will be discussed in relation to this Bill, and how the placement of gender-diverse individuals has changed throughout the history of prisons.

(i) Reduced to Genitalia: Placement Prior to Bill C-16

For most of the history of Canada's prisons, individuals were placed based on their sex as assigned at birth (male or female) by relying on a person's genitals to decide placement. Allison Smith describes this notion as "the law's reliance on genitals as the primary signifier of gender" and argues that it contributes to the dehumanization of trans individuals in prisons.[26] This is certainly evident in earlier Canadian jurisprudence.

Kavanagh v Canada (Attorney General) (*Kavanagh*) is the leading case on prison placement for gender-diverse individuals.[27] Ms. Kavanagh was a trans woman who had been in the prison system for eleven years before her case was brought to the Canada Human Rights Tribunal (CHRT) in 2001.[28] She had undergone hormone therapy since she was thirteen and had been conditionally approved for gender affirmation surgery when she was sentenced. Despite the sentencing judge's recommendation that she be allowed to serve her sentence in a women's prison, she spent eleven years in various male prisons across Canada.

Throughout the *Kavanagh* judgment, the language of "pre-op" and "post-op" plays an important role in the reasoning of where Ms. Kavanagh, and other gender-diverse individuals, should be placed. Though the CHRT ultimately held that CSC needed to accommodate trans prisoners, it held that "pre-operative [trans individuals] should not be placed in target gender facilities".[29] This was due to concerns about the physical risk and psychological impact on *other* prisoners. The CHRT's lack of sensitivity and respect for gender-diverse individuals is highlighted by its reliance on the "pre-op"/"post-op" dichotomy, the discussion of Ms. Kavanagh's sexuality (noting that she might be bisexual and thereby a threat to women), and their fears that there was a risk that "pre-op" transgender women would "prey on female prisoners"[30] and that those who were "not truly [trans] would seek to be placed in women's prisons, for sexual purposes".[31]

26. Allison Smith, "Stories of 0s: Transgender women, Monstrous Bodies, and the Canadian Prison System" (2014) 23 Dal J Leg Stud 149 at 149.

27. 2001 CanLII 8496 (CHRT) [*Kavanagh*].

28. *Ibid*.

29. *Ibid* at para 192.

30. *Ibid* at para 101.

31. *Ibid* at para 102.

It is clear from the *Kavanagh* decision that there is a lack of understanding of the lived experiences of gender-diverse individuals. The focus on whether an individual has had gender-affirming surgery (the "pre-op"/"post-op" dichotomy) highlights an ignorant understanding that surgery is but one aspect of gender affirmation, and that not all gender-diverse individuals undergo surgery. Additionally, the protection of cisgender women acts as the foundation for the CHRT's decisions, to the detriment of trans women, such as Ms. Kavanagh. The dignity and protection of trans women are therefore treated as secondary.

(ii) Progressive Change?—The Introduction of Bill C-16

In 2017, Bill C-16 received Royal Assent and amended the *Canadian Human Rights Act* (*CHRA*)[32] to include gender identity and gender expression to the list of prohibited grounds of discrimination. Then Minister of Justice Jody Wilson-Raybould introduced the Bill as a reflection of Canada's commitment to diversity and equality and freedom from discrimination and violence for all Canadians, regardless of gender identity. She further explained how the amendments (to both the *CHRA* and *Criminal Code*) would bring Canada closer to this goal by "improv[ing] legal protections for trans and gender-diverse people" and "promot[ing] inclusion and respect for trans people who have so often been relegated to the margins, struggling for full recognition and participation in our society".[33] Bill C-16 was undoubtedly a monumental step towards recognizing and affirming the rights of gender-diverse individuals. However, its application in the prison setting remains unfulfilled.

(iii) The Aftermath—Placement After Bill C-16

In response to Bill C-16, CSC issued Interim Policy Bulletin 584 (IPB 584) in 2017. This policy made changes to fifteen existing policies, including those regarding clothing entitlements, transfer of prisoners, and health services. These changes were to be implemented through an individualized protocol which would be developed when a prisoner sought accommodation on the basis of gender identity or expression. The change regarding placement is of particular importance:

32. *Canadian Human Rights Act*, RSC 1985, c H-6.

33. "Bill C-16, An Act to Amend the Canadian Human Rights Act and the Criminal Code", 2nd reading, *House of Commons Debates*, 42-1, No 92 (18 October 2016) at 1005 (Hon Jody Wilson-Raybould).

> CSC has a duty to accommodate based on gender identity or expression, regardless of the person's anatomy (i.e. sex) or the gender marker on identification documents. This includes *placing offenders according to their gender identity* in a men's or women's institution, Community Correctional Centre of Community-Based Residential Facility, if that is their preference, *unless there are overriding health or safety concerns which cannot be resolved*.[34]

Though IPB 584 was a step in the right direction, gender-diverse individuals were still clearly at the mercy of CSC's discretion given the caveat about "overriding health or safety concerns". Marcella Daye, a Senior Policy Advisor for the Canadian Human Rights Commission, provides two useful cautions in considering this discretionary override of a gender-diverse individual's placement choice.[35] First, gender-diverse individuals should not be over-classified or stereotyped as being violent or predatory. Second, fear that the individual will be harmed by other prisoners and prison staff if they are transferred should not be automatically considered an overriding health or safety concern. Daye suggests that strong education is needed to combat the stigma and to ensure other individuals are not perpetrating violence on gender-diverse individuals.[36]

William Hébert characterizes the individual protocols as "rights-compliant accommodations" but identifies that IPB 584 incorporated a "substantial risk-centred caveat" that could deny rights-compliant accommodations.[37] He critiques the policy by noting ambiguity in the development of individualized protocols and the definition of "overriding health or safety concerns". Hébert interviewed prison authorities and found that the ambiguous policy resulted in discretion being the "true guiding principle of CSC's reform", and that prison administrators likely interpreted IPB 584's principles in a prudent and risk-averse manner.[38] He also found that prison administrators considered wider operational, legal, and financial risks during the assessment of transfer requests, as evidenced by their worry of the

34. Correctional Service Canada, *Interim Policy Bulletin 584 - Bill C-16 (Gender Identity or Expression)* (27 December 2017) online: <csc-scc.gc.ca> [perma.cc/LNA2-EHQB] [Correctional Service Canada, "Interim Policy Bulletin 584"] [emphasis added].

35. Senate, *Proceedings of the Standing Senate Committee on Human Rights*, 42-1, No 38 (30 January 2019) at 38:40 (Marcella Daye).

36. *Ibid*.

37. William Hébert, "Trans Rights as Risks: On the Ambivalent Implementation of Canada's Groundbreaking Trans Prison Reform" (2020) 35:2 CJLS 221 at 228.

38. *Ibid* at 230–31.

danger of pregnancy at men's prisons.[39] Hébert's interviews also noted that rights-protected accommodations for gender-diverse individuals appeared to some as special treatment, and that IPB 584 would now require the weighing of trans rights against other rights.[40] Conversely, trans interviewees generally described feeling like they were under more intensive scrutiny after the implementation of IPB 584 and staff avowed they were more vigilant around gender-diverse prisoners.[41]

Recent case law further demonstrates the lack of progress for gender-diverse prisoners despite policy reform. Though *Lovado v BC (Ministry of Public Safety & Solicitor General)* concerned a transgender woman at a provincial jail rather than a federal prison and was decided before Bill C-16 received Royal Assent, the decision includes a discussion about "overriding safety concerns".[42] At the time, British Columbia had a Corrections Branch Adult Custody Policy which addressed transgender prisoners, providing that they were to be placed according to their self-identified gender, barring overriding health and safety concerns—this mimics the language later used in IPB 584. Ms. Lovado was previously incarcerated and had successfully been transferred to a women's jail. A year later, when she was remanded into custody, she was held at a men's jail and denied a transfer to the women's jail she had already spent time in because of "overriding security and safety concerns".[43] Among the reasons from the warden were her "display of male persona while in custody . . . which can cause undue hardship to other female inmates who have experienced trauma and been subject to abuse by males".[44] Again, an emphasis is placed on the protection of cisgender women to the detriment of a trans woman's dignity and safety. The warden's reasoning is also harmful in suggesting that gender-diverse individuals have to appear a certain way and that any deviation means that they are not who they say they are. Hébert's study, in fact, found that trans women sometimes concealed or downplayed their identity to increase their safety by conforming to gender norms.[45] The warden also justified the transfer refusal because Ms. Lovado had refused to adhere to the direction to not engage in "relationship behavior" with other female prisoners.[46] Yet, as Ms. Lovado pointed out, despite the

39. *Ibid* at 232.
40. *Ibid* at 233.
41. *Ibid* at 239.
42. 2017 BCHRT 115 [*Lovado*].
43. *Ibid* at para 18.
44. *Ibid*.
45. Hébert, *supra* note 37 at 236.
46. *Lovado*, *supra* note 42 at para 18.

existence of a rule prohibiting relationship behaviour, ciswomen continued to engage in such "behaviour" and Ms. Lovado alone was punished.[47]

In *Boulachanis v Canada (Attorney General)* (*Boulachanis*),[48] a trans woman was denied transfer to a women's prison and was additionally subjected to administrative segregation (the latter will be discussed later in this paper). The Attorney General, on behalf of the CSC, argued that she posed too great a risk, particularly an escape risk, to be placed in a women's prison. Rightly, the judge found this to be prima facie discrimination, as all prisoners undergo a risk assessment to determine security classification. However, only transgender women are denied the possibility of being placed at a women's prison, unlike cisgender women, who are automatically placed at a women's prison, regardless of risk.[49] The judge also noted:

> I find it hard to believe that physical capability is so important in assessing the risk posed by an inmate that, for that reason alone, trans women inmates must be treated as men. Furthermore, I note that the assessment to determine Ms. Boulachanis's security classification makes no mention of her physical capabilities.
>
> Ultimately, the Attorney General's argument is based on the idea that a man will always be a man, despite a change in gender identity or expression and despite the philosophy behind the amendments made to the CHRA in 2017. In other words, according to the Attorney General, we should not consider trans women inmates as women because the risk they actually present is that which is associated with their biological sex. In his written reply to my question, the Attorney General stated that even a person who has completed the sex reassignment process prior to becoming an inmate, including surgery, should be assessed before being placed in a women's institution. In short, for the Service, chromosomes take precedence over gender identity or expression.[50]

47. *Ibid* at para 19.

48. 2019 FC 456 [*Boulachanis*].

49. *Ibid* at para 37.

50. *Ibid* at paras 45–46.

This passage emphasizes the harmful stereotyping perpetuated by CSC policy, especially the stereotype that trans women are inherently violent. In the case of Ms. Boulachanis, it additionally highlights the lack of evidence to justify her discriminatory treatment by CSC. It also demonstrates that though CSC has "implemented changes" since the assent of Bill C-16, these changes remain illusory in many instances. To address CSC's discriminatory discretionary policy, the Canadian Bar Association recommended that CSC implement a policy of placement based on gender identity, *without exception* (i.e., removing discretion based on "overriding health or safety concerns").[51] This would certainly be a welcomed change in ensuring that gender-diverse individuals have the right to self-determination and the ability to choose which environment will be the lesser of two evils for them.

In May 2022, CSC implemented its permanent policy, Policy Bulletin 685, Commissioner's Directive 100 – Gender Diverse Offenders ("CD 100"), which replaces IPB 584. Notably, the following procedures are included in CD 100, demonstrating the lack of progress in CSC policy over nearly five years:

> **Intake**
>
> 31. Prior to admission, staff will ensure that newly sentenced gender diverse offenders are provided with an opportunity to indicate if they have a preferred institution type (men's or women's). Should CSC have sufficient information to assess the offender's risks and needs, a case conference per Annex B will occur, without delay, to determine the type of intake site. *In cases where CSC cannot assess the offender's risks and needs, the intake site for initial assessment will be based on their current sex.* . . .
>
> 33. Gender diverse offenders returning to federal custody from the community will be sent to the institution type (men's or women's) that better aligns with their gender identity or expression, if that is their preference, *unless there are overriding health or safety concerns that cannot be resolved*. In such situations, a case conference per Annex B will be held without delay to determine the most appropriate institution type. . . .

51. Letter from the Canadian Bar Association to Carla Di Censo (4 December 2020), online: <cba.org> [perma.cc/CDH4-2NGK] at para 15(a) (recommendations sent to the Acting Director of the Strategic Policy Division, Correctional Service Canada).

Intake Assessment Process

> 36. After completing the intake assessment process, offenders will be placed according to their gender identity or expression in a men's or a women's institution, if that is their preference, regardless of their sex (i.e., anatomy) or the gender/sex marker on their identification documents. *In the event there are overriding health or safety concerns that cannot be resolved, the offender will be placed in a site that better aligns with their current sex (i.e., anatomy)*.[52]

B. Safety Within Prisons

(i) Violence Against Gender-Diverse Individuals in Prisons

Prisons are inherently dangerous places. But the danger increases drastically for certain populations, such as gender-diverse individuals, who have been recognized as a "vulnerable group" by the World Health Organization.[53] Gender-diverse individuals experience significant mistreatment by staff, the system, and other prisoners, and they face human rights violations and the erasure of their gender identity.[54] This mistreatment, in turn, leads to greater risk of trauma, suicide, and self-harm than the cisgender incarcerated population.[55] Julia Oparah notes that for gender-diverse individuals, "the experience of incarceration is likely to include a continuum of sexual violence and harassment that compounds the experiences of violence and trauma that may have contributed to their imprisonment".[56] This statement

52. Correctional Service Canada, *Commissioner's Directive 100 – Gender Diverse Offenders* (9 May 2022) at ss 31–36, online: <csc-scc.gc.ca> [perma.cc/6BJ9-E34Q] [emphasis added].

53. Stefan Enggist et al, eds, *Prisons and Health* (Copenhagen: World Health Organization, 2014) at 155.

54. Annette Brömdal et al, "Whole-incarceration-setting approaches to supporting and upholding the rights and health of incarcerated transgender people" (2019) 20:4 Intl J Transgenderism 341 at 341 [Brömdal et al, "Whole-incarceration-setting approaches"].

55. *Ibid.*

56. Julia C Oparah, "Feminism and the (Trans)gender Entrapment of Gender Nonconforming Prisoners" (2012) 18:2 UCLA Women's LJ 239 at 265.

is supported by a 2007 Californian study which found that sexual assault is thirteen times more prevalent for transgender prisoners.[57]

The likelihood of sexual violence is even greater for transgender women, especially trans women of colour.[58] This correlates with increased susceptibility to HIV and sexually transmitted infections—the risk of which is also increased by a lack of prevention methods, including physical protection from prison staff and barrier methods, such as condoms.[59] Additionally, Oparah found that the lack of protection by prison staff sometimes forces gender-diverse individuals to trade sexual services with other prisoners, including prison gangs, in return for protection.[60] This was confirmed in the Canadian context by the Office of the Correctional Investigator, which noted that CSC must develop a specific strategy to protect gender-diverse individuals, given their increased vulnerability for sexual victimization and discrimination.[61]

(ii) Strip Searches

Strip searching is another manner in which violence—specifically state violence—is perpetrated against prisoners, especially those who are gender-diverse. Oparah describes strip searches as "act[s] of state sexual violence".[62] The Supreme Court of Canada itself noted in *R v Golden* that strip searches are "inherently humiliating and degrading" and that they may be experienced as an equivalent to sexual assault.[63] Jessica Hutchison further describes strip searches as stripping prisoners of their humanity and thereby denying them justice.[64] For persons who menstruate, the harmful effects of

57. Valerie Jenness et al, *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* (Irvine, Cal: UC Irvine Centre for Evidence-Based Corrections, 2007) at 2, online:<cpb-us-e2.wpmucdn.com> [perma.cc/2DPH-3H3H].

58. Annette Brömdal et al, "Experiences of transgender prisoners and their knowledge, attitudes, and practices regarding sexual behaviors and HIV/STIs: A systematic review" (2019) 20:1 Intl J Transgenderism 4 at 6 [Brömdal et al, "Experiences of transgender prisoners"].

59. *Ibid* at 16.

60. Oparah, *supra* note 56 at 263.

61. Canada, Office of the Correctional Investigator, *Annual Report 2019-2020*, Catalogue No PS100E-PDF (Ottawa: OCI, 2020) at 47.

62. Oparah, *supra* note 56 at 263.

63. 2001 SCC 83 at para 90.

64. Jessica Hutchison, "'Bend Over and Spread Your Butt Cheeks': Access to Justice for Women Strip Searched in Prison" (2019) 8 Annual Rev Interdisciplinary Justice Research 65 at 81.

being strip searched are amplified during menstruation, especially for Indigenous persons, as menstruation (moon time) is a sacred time.[65]

Prior to the implementation of IPB 584, strip searches resulted in unparalleled levels of humiliation and degradation for gender-diverse individuals, especially for transgender women. This is evident in the 2006 case *Forrester v Peel (Regional Municipality) Police Services Board* (*Forrester*), in which a transgender woman who had undergone top surgery but not bottom surgery was subjected to a "split search", in which a female officer searched her waist up and a male officer searched her waist down, despite her protests.[66] Though the Police Board admitted liability, its proposed solution was to have female officers conduct strip searches for trans women, with the caveat that the officer could "opt out" if another female officer was available.[67] The Human Rights Tribunal of Ontario, however, recognized the danger in setting such a precedent, as it would sanction a "chain of discrimination"—allowing an opt-out of an involuntary service performed on gender-diverse individuals, when no such opt-out exists when performed on cisgender individuals.[68] The Tribunal recognized this was especially problematic given the historical disadvantage suffered by the gender-diverse community.[69] Strip searches are inherently degrading; however, *Forrester* shows that there has been some constructive change in the way courts and tribunals have become more attuned to the dignity of gender-diverse individuals.

In response to Bill C-16, one of the changes made by IPB 584 was to allow gender-diverse prisoners to "choose whether strip and frisk searches and urinalysis testing are conducted by a male or a female staff member".[70] However, in 2019, two years after the implementation of IPB 584, Jennifer Metcalfe, the Executive Director of West Coast Prison Justice Society, continued to receive reports of prison staff not allowing gender-diverse individuals the choice of the gender of staff who conduct a strip search, contrary to the policy.[71] This emphasizes the fact that the existing policy implemented by CSC is insufficient in protecting the basic dignity of gender-diverse prisoners.

65. *Ibid*.

66. 2006 HRTO 13.

67. *Ibid* at paras 36, 345.

68. *Ibid* at para 463.

69. *Ibid*.

70. Correctional Service Canada, "Interim Policy Bulletin 584", *supra* note 34.

71. Senate, *supra* note 35 at 38:36 (Jennifer Metcalfe).

(iii) Use of Administrative Segregation to "Create a Safe Environment"

Administrative segregation, a form of solitary confinement, is another means by which the carceral state has perpetrated abuse on prisoners. Solitary confinement is "exceptionally harmful to the physical, spiritual, emotional, and mental health" of gender-diverse individuals.[72] It is often justified as a means of "protecting" them from violence and threats from other prisoners, while in contrast, often used as a form of punishment for bad behaviour for the general prison population. Thus, by situating the protection of gender-diverse individuals in congruence with punishment, Oparah understands administrative segregation to be experienced by gender-diverse individuals as "another form of punishment for gender non-conformity".[73]

In *Boulachanis*, the applicant—a trans woman who was placed in a men's prison—had recently started hormone therapy and had begun to be more open with her gender identity. CSC became aware that threats had been made against her life and safety. For her supposed "protection", she was placed in administrative segregation. Ms. Boulachanis brought, and was granted, a motion for an interlocutory injunction to end her placement in administrative segregation and to be transferred to a women's prison. In his reasons ordering CSC to transfer Ms. Boulachanis to a women's prison, the judge noted that placing her in administrative segregation or keeping her in the general population at a men's prison constituted "irreparable harm".[74] Citing Cory J in *Winters v Legal Services Society* to further explain the harm of administrative segregation, he stated: "Its effects can be serious, debilitating and possibly permanent. They serve to both emphasize and support the conclusion that solitary confinement constitutes an additional and a severe restriction on a prisoner's liberty".[75] The potential for recurring harm warranted an order for Ms. Boulachanis' transfer to a women's prison.

Though the use of administrative segregation was deemed unconstitutional by appellate courts across the country in 2019[76] and eliminated by Bill C-83,[77] it was still replaced by yet another form of solitary

72. See Yvonne Boyer et al, "Vulnerable Targets: Trans Prisoner Safety, the Law, and Sexual Violence in the Prison System" (2019) 31:2 CJWL 386 at 390 (discussing the effects of CSC policies on trans prisoners in particular).

73. Oparah, *supra* note 56 at 265.

74. *Boulachanis*, *supra* note 48 at paras 3, 67.

75. *Ibid* at para 62, citing *Winters v Legal Services Society*, 1999 CanLII 656 at para 67 (SCC).

76. See *Canadian Civil Liberties Association v Canada (Attorney General)*, 2019 ONCA 243 [*CCLA*]; *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228.

77. Bill C-83, *An Act to amend the Corrections and Conditional Release Act and another Act*, 1st Sess, 42nd Parl, 2019 (assented to 21 June 2019).

confinement—"Structured Intervention Units" (SIUs).[78] Although the Court of Appeal for Ontario has held that solitary confinement over fifteen days is unconstitutional,[79] there is still room for gender-diverse individuals to be subjected to some forms of solitary confinement. This was increasingly an issue during the COVID-19 pandemic, as the use of solitary confinement was intensified as a means to address outbreaks in prisons.[80] Legal practitioners must therefore remain vigilant to this form of state-sanctioned harm and the implications of its use on gender-diverse individuals.

C. Access to Healthcare Within Prisons

The *Corrections and Conditional Release Act* provides that CSC is legally responsible for providing every prisoner with essential healthcare and reasonable access to non-essential healthcare.[81] However, healthcare providers are often uneducated on how to provide proper care to gender-diverse patients, and some even resist it.[82] Two-Spirit individuals also face unique barriers in accessing culturally-safe healthcare, and are at greater risk for negative mental and physical health outcomes in comparison to their non-Indigenous and non-gender-diverse Indigenous counterparts.[83] The following subsections will further explore the multitude of issues gender-diverse individuals face in accessing proper healthcare while incarcerated.

(i) Gender-Diverse Individuals Face Barriers in Accessing Healthcare in Prisons

Gender-diverse individuals face significant barriers in accessing adequate healthcare—both in and out of prisons. In their 2019 study, Annette Brömdal and colleagues indicated that the lack of general, mental, and gender-affirming healthcare may result from barriers such as structural stigma, heteronormative culture, and a shortage of staff with specialized training.[84]

78. Canada, Library of Parliament, *Bill C-83: An Act to amend the Corrections and Conditional Release Act and another Act*, Publication No 42-1-C83-E (Ottawa: Library of Parliament, 2019).

79. See *CCLA*, *supra* note 76 at para 4.

80. Justin Piché, Sarah Speigh & Kevin Walby, "The Prison in/as a Pandemic: Human Rights Implications of Carceral 'Solutions' in Response to COVID-19 in Canada" in John Packer, Alex Neve & David Westcott, eds, *2019/2021 Canadian Yearbook of Human Rights*, vol 3 (Ottawa: Human Rights Research and Education Centre, 2022) 134 at 134.

81. *Corrections and Conditional Release Act*, SC 1992, c 20, s 86.

82. Boyer, *supra* note 72 at 391.

83. *Ibid* at 388–89.

84. Brömdal et al, "Experiences of transgender prisoners", *supra* note 58 at 16.

These findings are reflected in *Dawson v Vancouver Police Board (No 2)*,[85] a case involving a police detention facility rather than a prison, but the treatment of the complainant, a transgender woman, is broadly applicable to all forms of detention. Ms. Dawson had undergone gender-affirming surgery and was required to perform necessary dilations on a strict schedule as part of her healing process. Shortly after her surgery, she was arrested and held in detention. Ms. Dawson was concerned about the long-term consequences of not following her strict dilation schedule. Severe stigma and lack of cultural competence are abundantly clear in the nurse's statement to police:

> On 29 March 2010 at 1745 I did a health assessment on Dawson, Jeffrey. This inmate used alias name as "Dawson, Angela", as he wrote his name on patient consent form.
>
> During initial assessment, inmate told me that he just had a transgender surgery from male into female at a clinic in Montreal on 8 March 2010. And he told me that he needed to be dilated [*sic*] his vagina every 4 hours because it was a brand new surgery.
>
> Inmate insisted to go to hospital for vaginal dilation but he refused letting me or other nursing staff for further physical examination including his genital part. Without checking his "vagina", I did not know whether inmate had a "real" surgery or not. This would imply to terminate [*sic*] our nurse client relationship. Based on my assessment and guidelines on the post transgender care from on-line resources, there was no subjective data to determine whether the client should send to hospital [*sic*] for vaginal dilation immediately.[86]

The nurse's discriminatory attitude and lack of training in working with gender-diverse patients is illustrated by the use of Ms. Dawson's dead name and incorrect pronouns, as well as the numerous quotation marks. The nurse failed to investigate what the post-surgical dilation involved and whether it could be accomplished at the detention facility and, instead, decided that terminating the nurse-patient relationship was the best approach. This shows a significant gap

85. 2015 BCHRT 54.

86. *Ibid* at para 105.

in ability to care for gender-diverse individuals, which can only be addressed by providing proper training and hiring staff equipped to provide care for these patients.

Kristy Clark, Jaclyn White Hughto, and John Pachankis' study on correctional healthcare providers found that, in addition to lack of training, institutional budget constraints were a significant structural barrier in providing adequate healthcare.[87] They concluded that the "overarching prison culture that prioritizes safety and security over treatment emerged as the dominant structural barrier to the provision of adequate care to transgender inmates".[88] When funding is consistently put towards reinforcing punishment rather than on improving health and circumstances, it is unsurprising that a cycle of trauma and incarceration continues to persist in the lives of so many marginalized and vulnerable individuals, including those who are gender-diverse.

(ii) Hormone Therapy

For many gender-diverse individuals, hormone therapy is an important part of gender affirmation. The World Professional Association for Transgender Health emphasizes the importance of continuing hormone therapy for individuals entering prison who are already on an appropriate regime, in addition to starting hormone therapy following the proper standard of care for individuals deemed appropriate for such therapy.[89] Further, "[t]he consequences of abrupt withdrawal of hormones or lack of initiation of hormone therapy when medically necessary include a high likelihood of negative outcomes such as surgical self-treatment by autocastration, depressed mood, dysphoria, and/or suicidality".[90] Clark, White Hughto, and Pachankis suggest that increased access to hormone therapy for gender-diverse prisoners can in fact reduce these consequences, which "in turn reduces costs associated with these negative health outcomes".[91]

87. Kirsty A Clark, Jaclyn M White Hughto & John E Pachankis, "'What's the right thing to do?' Correctional healthcare providers' knowledge, attitudes and experiences caring for transgender inmates" (2017) 193 Soc Science & Medicine 80 at 85–86.

88. *Ibid* at 83.

89. World Professional Association for Transgender Health, "Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, 7th Version" (2011) at 68, online (pdf): <wpath.org> [perma.cc/CHM5-VP78].

90. *Ibid*.

91. Clark, White Hughto & Pachankis, *supra* note 87 at 86.

The existing CSC policy permits a prisoner to initiate or continue hormone therapy as prescribed by a medical professional.[92] However, with the lack of specialized training being a significant problem in prisons, there exists significant room for improper discretion and ignorance by healthcare professionals working in prisons. This can lead to the improper denial of hormone therapy for gender-diverse individuals.

(iii) Gender-Affirming Surgery

A constructive change to how gender-diverse individuals are treated in the prison system is the availability of gender-affirming surgery.[93] Currently, the CSC policy regarding gender-affirming surgery states:

> 5. Sex reassignment surgery will be considered during incarceration when:
>
> a. a qualified health professional in the area of gender dysphoria has confirmed that the inmate has satisfied the criteria for surgery as set out in the most recent edition of the World Professional Association for Transgendered Health's Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, including the Standards' requirement that certain specified surgeries require documented proof that the individual has lived 12 continuous months in an identity-congruent gender role.
>
> b. the qualified health professional in the area of gender dysphoria recommends surgery during incarceration.

92. Correctional Services Canada, *Gender Dysphoria* (9 January 2017), online: <csc-scc. gc.ca> [perma.cc/9LYE-QJY9] [Correctional Services Canada, "Gender Dysphoria"].

93. Much of the literature (especially older literature) as well as cases and government documents refer to gender-affirming surgery as "sex-reassignment surgery". I have chosen to use the term gender-affirming, as it is the preferred term in the gender-diverse community and acknowledges that surgery is just one form of gender affirmation.

> 6. If the qualified health professional in the area of gender dysphoria provides an opinion that sex reassignment surgery is an essential medical service under CSC policy, CSC will pay the cost. In making the decision, the qualified health professional will consult with CSC.[94]

The existing policy is certainly a change from the *Kavanagh* era, in which the CSC policy expressly stipulated that "sex reassignment surgery will not be considered during the inmate's incarceration".[95] Though the freedom to have surgery, and the possibility that it will be state-funded, is a positive change, it is certainly not a readily available option for any gender-diverse individual seeking it in prison. Rather, for the cost of gender-affirming surgery to be covered by CSC, it must be deemed an essential service, leaving it to the discretion of a medical professional. No information is available on what the criteria is to deem gender-affirming surgery as essential, which certainly leaves room for transphobic bias and abuse of authority.[96]

(iv) Mental Health Care

In addition to physical healthcare, mental healthcare in prisons is lacking, which is especially problematic for vulnerable individuals, such as the gender-diverse population. As previously discussed, poor physical wellbeing caused by inadequate healthcare can lead to a whole host of mental health issues. This is exacerbated by the abuse faced by gender-diverse individuals in the prison system, and trauma previously faced prior to incarceration.

Clark, White Hughto, and Pachankis found that one barrier to adequate mental healthcare in prisons is the disconnect between prison staff and healthcare providers.[97] In their study, mental health providers reported that counselling and group therapy sessions were often cancelled suddenly by prison staff who did not understand the importance of mental healthcare.[98] The healthcare providers often felt disrespected and felt that prison staff undermined patient care; however, they avoided reporting these issues for fear of further

94. Correctional Service Canada, "Gender Dysphoria", *supra* note 92. It should be noted that, per Correctional Service Canada, "Interim Policy Bulletin 584", *supra* note 34, the guideline on gender dysphoria (GL 800-5 Gender Dysphoria) has been revoked. However, the criteria relating to gender affirmation surgery continues to apply.

95. *Kavanagh*, *supra* note 27 at para 35.

96. Boyer, *supra* note 72 at 409.

97. Clark, White Hughto & Pachankis, *supra* note 87 at 86.

98. *Ibid*.

limiting of patient care.[99] Access to robust physical and mental health support throughout the system is vital to promote the wellbeing of gender-diverse individuals in the prison system, and will ultimately lead to better outcomes when they leave the prison system.

III. Moving Forward: Improving the Existing Sentencing Framework

Thus far, this paper has introduced the idea that the conditions of confinement must be considered during sentencing. Specifically, given the mistreatment of gender-diverse individuals by the carceral state, factors that should be considered on sentencing must include one's placement in prisons, safety within prisons, and healthcare within prisons.

A. Some Judges Have Begun Considering a Person's Gender Identity in Sentencing

Though significant change needs to be made in how we approach the sentencing of gender-diverse individuals, some recent case law shows a shift in judicial thinking. Earlier cases show that some judges have acknowledged an individual's gender-diverse identity, without going much farther. Recent cases, however, have shown that some judges are considering gender-diverse identity, and its potential impact on a prisoner, to either reduce a custodial sentence or dismiss it as an appropriate sentence altogether.

The Court of Appeal for Ontario in *R v Chumbley* recently considered a criminalized person's transgender identity in reducing her sentence.[100] In her sentence appeal, Ms. Chumbley submitted a fresh evidence application regarding the conditions she endured in pre-trial custody and asked the Court for a reduction in sentence to reflect those hardships.

The Court recognized that a combination of mental illness, institutional housing offered to incarcerated transgender women, and Ms. Chumbley's continuing trauma resulting from being introduced to drugs at an early age by her father created "exceptional suffering" for her.[101] The Court considered the impact of her suffering in pre-trial custody and the lack of rehabilitative programs for her as a transgender person.[102] The Court, in admitting the fresh evidence, found that the "interests of justice require that we consider this evidence of intense human suffering", and had the sentencing judge had this

99. *Ibid*.

100. 2020 ONCA 474.

101. *Ibid* at para 3.

102. *Ibid*.

evidence, it "would have had an impact on the sentence imposed".[103] The Court concluded that "[g]iven the impact on [Ms. Chumbley], it is an appropriate case to give some credit against sentence to reflect the harsh conditions of presentence detention and the consequences for this appellant".[104] I note that the Court cited *R v Duncan* (*Duncan*)[105] as its authority to reduce Ms. Chumbley's sentence. *Duncan* involved the reduction of sentence of a criminalized person (whose gender identity was not mentioned) due to harsh conditions in pre-trial custody due to staffing issues. While it is important that Ms. Chumbley ultimately received a reduced sentence, I question the centrality of her transgender identity in coming to that decision. I also note the decision was merely reactive to harm already experienced while in custody, rather than proactively preventing harm.

In *R v Forster* (*Forster*), a trans woman pled guilty to the murder of her abusive former partner. At issue was the number of years of parole ineligibility to accompany her mandatory sentence of life imprisonment.[106] The case was decided in 2012 and, consequently, Ms. Forster's placement in federal prison would have been based on her genitalia rather than gender identity. At the sentencing hearing, the Crown submitted that the appropriate range of parole ineligibility was ten to twelve years, while Ms. Forster's counsel submitted that the minimum period of ten years was appropriate.[107]

Ms. Forster's lawyer argued that an important factor to consider, among others, was that: "Ms. Forster is in the very difficult position of presenting as a woman while still being required, because of her [anatomy], to be housed with male inmates. This will make whatever time she spends in prison an even greater hardship than it would otherwise be".[108] The sentencing judge acknowledged this vulnerability in his analysis: "[W]hile we do not know what arrangements will be made for Ms. Forster when serving her sentence, I accept as a matter of common sense that a [transgender] person will inevitably be vulnerable to predatory behaviour by male inmates and that her time in custody will be more difficult as a result".[109] While the judge appears to acknowledge Ms. Forster's vulnerability and the likelihood that the conditions of her confinement would be harsher as a trans woman, he ultimately sentenced Ms. Forster to a parole ineligibility period of twelve years—the high end of the range submitted by the Crown.

103. *Ibid* at para 6.

104. *Ibid* at para 7.

105. 2016 ONCA 754.

106. 2012 BCSC 1682 at para 3 [*Forster*].

107. *Ibid* at paras 31, 33. See also Section II.A(i) of this paper, "Reduced to Genitalia: Placement Prior to Bill C-16" (discussing the state of the law prior to 2017).

108. *Ibid* at para 34.

109. *Ibid* at para 56.

R v MacDonald (*MacDonald*) is a good example of a case that acknowledges and considers both the individual circumstances surrounding the offence and the potential conditions of confinement of a gender-diverse individual to arrive at a fit sentence.[110] In that case, a transgender man was charged with the production of marijuana before its legalization. The Crown recommended thirty days of incarceration, while counsel for Mr. MacDonald recommended a fine and probation. The sentencing judge took note that Mr. MacDonald's motivation for the charged offence was to assist in payment for a double mastectomy, which was not covered by the province at the time; thus, his motive for committing the offence directly related to the process of gender affirmation.[111] The sentencing judge noted the unique circumstances of Mr. MacDonald as a trans criminalized person:

> The difficulty in the present case is balancing the need for a strong statement of denunciation and general deterrence and addressing the offender's unique personal circumstances as well as the circumstances of this case. I am satisfied there are unusual circumstances in the present case. I do not doubt that changing one gender's identity is a life altering and difficult process. The offender is a member of the trans gender community. The offender's motive for committing the offence directly relates to the process of changing gender. The offender made a poor choice in attempting to achieve that goal.[112]

The judge was cognizant that Mr. MacDonald's transgender identity would cause personal difficulties for him if he were incarcerated, and held that a non-custodial sentence (a fine of $1,000 and a probationary period lasting twelve months) would achieve the purpose and principles of sentencing.[113]

In *R v Whaley*, a transgender woman entered guilty pleas on a number of counts, including several break and enters, thefts over and under $5,000, and breaches of recognizances.[114] The Crown sought a global sentence of seventeen to nineteen months in jail, while the defence argued that "incarceration is a sanction

110. 2013 NSSC 255 [*MacDonald*].

111. *Ibid* at paras 7, 16–17.

112. *Ibid* at para 15. Note that Mr. MacDonald was not "changing" gender, but rather affirming his gender. Thus, despite the overall positive outcome of this case, it is demonstrative of the lack of cultural competence regarding gender-diverse individuals that exists in the criminal legal system.

113. *Ibid* at paras 16–17, 19.

114. 2018 ABPC 63 [*Whaley*].

that would have an unduly punitive effect on Ms. Whaley, given that she is a [transgender] person", and therefore that a less restrictive sanction, such as a community sentence, should be imposed.[115]

A Functional Psychological Assessment was presented to the sentencing judge. Though it noted that Ms. Whaley was "not impacted by issues relating to her gender, and that she feels supported in her community for who she is", the author was "of the opinion that Ms. Whaley's difficulties likely stem[med] from her tumultuous childhood and gender identity struggles throughout her adolescence".[116] The defence argued that Ms. Whaley would face challenges if incarcerated, specifically on the issues of how body searches would be conducted and which pronouns would be used to address her.[117] In addition, a specific unit for trans prisoners existed at the Fort Saskatchewan Correctional Centre, a six-hour drive from Lethbridge where her cisgender counterparts would have been incarcerated—this posed a more significant burden for her family, making it more challenging for them to visit her.[118]

The sentencing judge, following the reasoning of *Forster*, concluded:

> In general, a person's gender is an irrelevant consideration before a sentencing court. However, I am prepared to follow the reasoning in the *Forster* and *Pelletier* cases that Ms. Whaley's time in custody will be more difficult and challenging because of the issues of body searches, having proper pronouns used by staff, and the distance for visitors to come to see her. These are circumstances that relate to Ms. Whaley's specific personal characteristics, and makes her more vulnerable, which this Court is required to take into account in sentencing. These factors must also be considered when exercising the principle of restraint in imposing a fit sentence which includes jail.[119]

Ultimately, the judge sentenced Ms. Whaley to a global sentence of eleven months in jail, reduced to ten months to account for her "guilty pleas, her mental health challenges, her youth, and her prospects for rehabilitation".[120] Notably, the difficulties Ms. Whaley would experience in custody as a trans woman were *not* included in the factors to reduce her sentence.

115. *Ibid* at paras 32–33.

116. *Ibid* at para 27.

117. *Ibid* at para 52.

118. *Ibid* at paras 52–53.

119. *Ibid* at para 53.

120. *Ibid* at para 103.

In *R v Klassen* (*Klassen*), a transgender, genderfluid person entered guilty pleas for charges of dangerous driving and evading police.[121] The Crown sought a custodial sentence of one year, followed by twelve months' probation, while the defence sought a sentence of time served or, alternatively, a community sentence order ("CSO").[122]

The sentencing judge noted Mx. Klassen's struggles with gender identity, mental health, and substance use.[123] In her analysis, she considered the mitigating circumstances, including that Mx. Klassen "ha[d] a plan in place to deal with one of the major sources of their mental health issues and one of the reasons for these offences, the plan to gender transition".[124] She noted that "[i]t is a generally accepted proposition that mental health concerns can be considered in determining the appropriate sentencing".[125] Importantly, she cited the Saskatchewan Court of Appeal's decision in *R v Fraser* (*Fraser*).[126] In *Fraser*, the Court held that one instance in which a sentence should be reduced on account of mental illness is "[i]f the effect of imprisonment or any other penalty would be disproportionately severe because of the offender's mental illness".[127] The sentencing judge in *Klassen* then made the following significant remarks:

> Arguably, in Klassen's case, mental health issues both contributed to the commission of the offence and the effect of imprisonment may be disproportionately severe on them. On the night in question, Klassen was not committing any offence nor driving inappropriately when the police decided to stop them. Klassen was facing a significant mental health crisis, contemplating suicide, in large part related to their gender identity issues and struggles. This impacted their irrational decisions on the night of the incident. *It is also a reasonable inference that can be drawn from Klassen currently transitioning from female to male morphology and at the state of that transition and the accompanying mental health challenges attended to that transition, that prison may be disproportionately severe to them*. . . .

121. 2021 SKQB 22 [*Klassen*].
122. *Ibid* at paras 26–27.
123. *Ibid* at para 9.
124. *Ibid* at para 49.
125. *Ibid* at para 50.
126. 2007 SKCA 113.
127. *Ibid* at para 35.

> Gender identity issues have been mentioned in Saskatchewan case law, albeit a very limited amount. However, it has been referred to as a mental disorder and discussed in more detail in cases from other jurisdictions. This too has been identified as a mitigating factor.[128]

The sentencing judge cited *MacDonald* as one such case, noting that in that case, the judge's reasoning that a prisoner's trans identity could result in difficulties while incarcerated was "directly applicable to Klassen's case and may support a less restrictive sanction than correctional facility imprisonment being imposed".[129] She continued:

> Suffice to say, mental health issues and *mental health issues relating to gender identity can be considered in determining the appropriate sentence*. In Klassen's case, there seems to be a strong argument that their mental health issues, including the crisis of contemplating suicide at the time of the offences, played a significant role in the commission of the offence. *It would also seem that as a result of Klassen's mental health issues related to gender identity, the effect of imprisonment would be disproportionately severe on them*.
>
> In relation to the principal that a sentence must separate offenders from society where necessary, I am not satisfied it is necessary to separate Klassen from society by way of an incarceral jail sentence. *Klassen's mental health and their significant actions subsequent to these offences to address their mental health, including proceeding with transitioning*, addressing their addictions and the abiding by stringent conditions over the last two years to name a few, *satisfies me that Klassen has reduced their risk to society*.[130]

The sentencing judge ultimately sentenced Mx. Klassen to a CSO of sixteen months, followed by twelve months' probation.[131]

Finally, in *R v HF*, a trans woman entered guilty pleas on two drug trafficking offences.[132] The Crown sought a three-year custodial sentence while

128. *Klassen*, *supra* note 121 at paras 54–55 [emphasis added].

129. *Ibid* at para 64.

130. *Ibid* at paras 66–67 [emphasis added].

131. *Ibid* at para 85.

132. 2021 ABPC 68 at para 1.

the defence argued that this was a suitable case for a suspended sentence.[133] Defence counsel submitted that the impact of transitioning would affect HF's circumstances while incarcerated because she would be treated differently than cisgender prisoners and "would suffer undeserved hardship for no reason other than her transgender circumstance".[134] Relying on testimony from the deputy of security for a jail in the jurisdiction, the defence argued that HF would likely spend a significant, if not most, of her time in custody in administrative segregation and would suffer inappropriately and disproportionately because of her gender circumstances.[135] The defence argued that HF's placement in administrative segregation would likely exacerbate her existing mental health issues and create further trauma.[136]

The Crown, on the other hand, agreed that HF's background and mental health issues should be considered but submitted that "it is up to correctional services to decide how [HF's time] is served and that it would be speculative for the Court to consider that she will likely serve her sentence in a fashion that imposes hardship and suffering on her as a consequence of who she is as opposed to what she has done".[137] Importantly, the sentencing judge rejected this approach, finding that this was "an exceptional situation given the antecedent history of HF, her severe mental health issues, including her gender transition circumstances and the stressors attached thereto, as well as the likely disproportionate consequence to her in terms of her incarceration as a result of her transgender circumstances, that is, her gender identity".[138] The sentencing judge concluded that a suspended sentence was a fit and just sentence for reasons including "the likely disproportionate sentence [HF] will serve if incarcerated as a consequence of her gender transition".[139]

The sentencing judge then proceeded to discuss HF's mental health (including a finding that her mental health issues, antecedent trauma, and the circumstances of her transition contributed to the criminal acts committed) and the circumstances of incarceration that she would likely face.[140] He concluded that the extended hardship, suffering, and mental health consequences that were likely to result from HF's probable administrative segregation "are part of her individual circumstances to be considered in the proportionality assessment

133. *Ibid* at paras 30–31.

134. *Ibid* at para 8.

135. *Ibid* at para 33.

136. *Ibid*.

137. *Ibid* at para 56.

138. *Ibid* at paras 57–58.

139. *Ibid* at para 59.

140. *Ibid* at para 66.

in sentencing".[141] The sentencing judge concluded the judgment with this caveat: "This is not to say that no person who is in a transgender situation with accompanying mental health issues related thereto or otherwise should never go to jail, that of course depends upon all the circumstances. It does not represent in and of itself a 'get out of jail' free card".[142] This case is a fitting example of how the conditions of confinement for a gender-diverse individual are considered and accounted for in their sentencing, despite the judge's conclusory remarks that this type of analysis will not be applied in a blanket fashion for all gender-diverse individuals.

In some cases discussed above, the criminalized persons were Indigenous. It is unclear if the acknowledgment of their gender-diverse identity was considered separately, or as part of the *Gladue* analysis. Additionally, in many cases, it appears that a person's gender-diverse identity is considered under the broader consideration of mental illness, which poses the risk of the further medicalization of gender diversity. While mental health and its effects on the individual (for everyone, regardless of gender identity) both in and out of prison should certainly be considered, it would be inappropriate to cast a broad "mental health" umbrella over the different ways in which a gender-diverse individual will suffer in prison due to their gender identity.

It is clear that some judges are beginning to consider how incarceration will affect a gender-diverse individual, regardless of the umbrella category that the consideration is placed under, when determining whether a custodial sentence is the most appropriate means of achieving the purpose of sentencing. As suggested by Berger, sentencing judges should begin considering the actual conditions inside prisons and the foreseeable experiences that a criminalized person will face.[143] This includes considering the living conditions, practices of confinement, available programming and healthcare, and existing levels of violence in the specific prison or jail.[144] Though this suggestion may seem radical, it is faithful to the purpose and principles of sentencing while also ensuring that state-sanctioned violence against gender-diverse individuals is minimized. However, doing so may impose an additional onus on criminalized persons to harness evidence and provide witnesses who can testify to the likely harms that a gender-diverse person may face while incarcerated.

B. Implementing Positive Duties

Kerr suggests that adjusting the length of a sentence cannot be the only answer to addressing whether a sentence is proportional in relation to

141. *Ibid* at para 91.

142. *Ibid* at para 97.

143. Berger, *supra* note 15 at 276.

144. *Ibid*.

the conditions of confinement, because that would suggest "that time is the only or most meaningful control on the severity of imprisonment".[145] Rather, she argues that courts should recognize positive duties towards prisoners, which include facilitating familial relationships, delivering community-level healthcare, and staffing and funding prisons to eliminate disparities for vulnerable populations.[146] Clark, White Hughto, and Pachankis suggest that providing adequate care in prisons is vital for achieving rehabilitation and reducing recidivism, especially with vulnerable populations.[147] For example, by offering direct mental health services and continuity of care upon leaving the prison system, the prison system can have positive health effects on formerly incarcerated individuals.[148] When gender-diverse individuals are denied gender-affirming care and adequate mental health treatment, it results in increased psychological distress, which could lead to increased isolation and disciplinary citations, and ultimately result in longer periods of incarceration.[149] This could broadly be said about the incarceration system as a whole—prisons only exist to keep marginalized individuals in a cycle of incarceration. But perhaps by recognizing positive duties, the cycle will begin to break. However, this is by no means to say that increased funding to prisons is a better alternative to decarceration. It is only a means by which to improve the lives and outcomes of individuals in the system while we work to break the system itself.

Conclusion

I have summarized existing sentencing principles which use an impersonalized understanding of proportionality to determine an appropriate length of incarceration. Sentencing, until very recently, has failed to consider the conditions of confinement and how incarceration can affect individuals differently, especially vulnerable individuals. These considerations are also not consistently made by sentencing judges across the country. However, an individualized understanding of proportionality, which focuses on the individual circumstances of the criminalized person and the suffering that will be experienced in a carceral setting, should be used in the proportionality analysis in sentencing to obtain a fit and just sentence. This paper then explored how conditions of confinement affect gender-diverse individuals. It showed how the carceral state sanctions institutionalized violence on gender-diverse individuals starting from when they are placed in prisons—often in prisons that

145. Kerr, *supra* note 18 at 115.

146. *Ibid*.

147. Clark, White Hughto, & Pachankis, *supra* note 87 at 86.

148. *Ibid*.

149. *Ibid*.

contradict gender identity—and throughout their time in the prison system. Violence against gender-diverse individuals manifests in several different ways in the prison system, including through physical and sexual assault, strip searching, and administrative segregation. Additionally, inadequate healthcare, especially gender-affirming healthcare and mental healthcare, exacerbate the already abysmal conditions for these vulnerable individuals.

We have begun to see more awareness and progressive decisions stemming from Canadian courts in recent years. However, most of these decisions remain reactionary—only after gender-diverse people have been violated and degraded by the carceral state have they received some form of recognition. To truly minimize the harm gender-diverse individuals face, not only must the conditions of confinement change, but their gender-diverse identities must be recognized and accounted for when determining if a custodial sentence is appropriate, and if so, for how long. It is not enough for courts to simply acknowledge and condone transphobia—courts must be proactive in combatting it in all contexts, both inside and outside of prisons. Canadian courts must ultimately play a more active role to ensure the safety of the gender-diverse community.