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FEMINISM AND THE (TRANS)GENDER ENTRAPMENT OF GENDER NONCONFORMING PRISONERS

Julia C. Oparah*

TABLE OF CONTENTS

I. INTRODUCTION.....	239
II. DEFINING TRANSGENDER: AN INTERSECTIONAL ANALYSIS	244
III. FEMINIST ENCOUNTERS WITH THE OTHER(ED) WOMAN.....	249
IV. GENDER POLICING AND RACIALIZED PUNISHMENT	256
V. GENDER VIOLENCE BEHIND THE WALLS	260
VI. POST-INCARCERATION SENTENCES	265
VII. RETHINKING FEMINIST RESPONSES TO GENDER VIOLENCE.....	269

I. INTRODUCTION

[So] you have male and female prisons. I ain't male or female, so which one do I get to go to? And you're housed according to your genitalia, which to me does not connote gender. I could have anything and I'ma still be me. I could have a penis and I would feel weird. . . I might like having a penis though sometimes [laughs]. I don't think I'm a man, male, but I know parts of me are.¹

Bakari is a formerly incarcerated activist who works with the California Coalition for Women Prisoners, a non-profit organiza-

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1. Julia Sudbury, *Maroon Abolitionists: Black Gender-oppressed Activists in the Anti-prison Movement in the U.S. and Canada*, 9 (1) *Meridians: Feminism, Race, Transnationalism* 1, 15 (2009) (quoting from an interview that was carried out as part of a research project on black women and transgender anti-prison activists. Bakari is a pseudonym).

tion that “challenges the institutional violence imposed on women, transgender people, and communities of color by the prison industrial complex.”² Growing up in a multiracial, working class small town in California, Bakari questioned their³ sexual orientation and gender identity from a young age. By high school, Bakari identified as a lesbian, an identity that was not accepted by their traditional Christian African American mother. The struggle to find a positive self-identity was made more complex by sexual violence experienced in the home. Struggling with family violence and policing, internalized homophobia and social isolation, Bakari turned to drugs and alcohol as a form of self-medication for anxiety, fear and feelings of low self-esteem. Moving out of the family home due to tensions with her mother, Bakari soon faced financial difficulties and made an impulsive decision to rob a retail store to pay the rent. As a result, Bakari served a two-year prison term in a southern California women’s facility.

At the time of their arrest, Bakari identified as genderqueer, an identity that rejects classification into either male or female gender categories. However, since penal systems are premised on the existence of a rigid gender binary, s/he was assigned to a “women’s prison” alongside other prisoners assumed to have female genitalia.⁴ Bakari’s gender was reduced by the state to biological sex, as determined by a medical professional at birth. Thus, implying that gender is fixed and physiologically determined. Bakari’s own experience of gender and sex is very different from the state’s determination. S/he rejects the biological determinism associated with her assignation, and instead asserts the right to gender self-determination, including the right to embrace a shifting and fluid gender identity:

Initially when I came out I identified as a lesbian and then a butch lesbian. Today I more identify as genderqueer. I don’t identify as a transman. . . I don’t fit either. I don’t fit male or female, I’m all and both and none. That’s how I look at my

2. California Coalition for Women Prisoners, *Our Mission*, <http://www.women-prisoners.org/about/> (last visited June 2, 2009).

3. “Their” is commonly used as a gender-neutral possessive pronoun by transgender and genderqueer scholars and activists. I follow Bakari’s preference in the use of s/he as a subject pronoun that embraces the presence of both male and female elements in Bakari’s gender identity.

4. Darren Rosenblum, “Trapped” in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 522 (2000).

gender. They haven't named it because they don't believe in the fluidity of gender and I think there's many genders.⁵

In prison, Bakari quickly found that gender ambiguity would not be tolerated. Instead, the prison regime attempted to enforce a realignment between Bakari's biological sex and gender expression, by confiscating their boxers as contraband and forcing Bakari to enter the general population wearing panties and what s/he describes as "an old lady housedress."⁶ All prisoners experience the temporary loss of items associated with their "free" identities—clothes, jewelry, personal items, and even names—as a part of the privations of imprisonment. However, for Bakari, induction into the prison regime included the psychological violence of being forced to inhabit a gender identity that s/he had rejected as a fundamental part of their sense of selfhood. During their two-year sentence, Bakari witnessed other forms of policing of gender non-conformity. This policing manifested itself in physical violence directed toward prisoners with masculine gender expression—"butch" women, genderqueer prisoners and transmen—as well as the use of institutional sanctions including administrative segregation for transgressive behavior such a growing facial hair.

This article explores the challenges for feminism presented by Bakari's experiences of gender violence in and out of the prison system. Beginning in the midst of the second wave women's liberation movement, feminist scholars in the U.S., U.K. and Canada began to critique what they named "malestream" criminology, and to generate new methodologies for understanding the lives of "women in conflict with the law."⁷ Studies by pioneers such as Frances Heidensohn, Dorie Klein and Carol Smart pointed to the sexism of theories of crime and punishment, and argued that previous scholarship had taken men as the normative subject of criminological theorizing.⁸ In seeking to rectify this gender bias, feminist scholars have developed a body of research during the past four decades that takes women and girls

5. Interview with Bakari, 07/14/2007, Oakland, CA.

6. Sudbury, *supra* note 1, at 145.

7. Elizabeth Comack, *The Feminist Engagement with Criminology*, in *CRIMINALIZING WOMEN, GENDER AND (IN)JUSTICE IN NEO-LIBERAL TIMES*, 22, 28, 40-43 (Gillian Balfour & Elizabeth Comack eds., 2006).

8. See FRANCES HEIDENSOHN, *WOMEN AND CRIME* 110-44 (1985); CAROL SMART, *WOMEN, CRIME AND CRIMINOLOGY: A FEMINIST CRITIQUE*, at 1-3, 176-78 (1976); DORIE KLEIN, *The Etiology of Female Crime: A Review of the Literature*, 8 (3) *ISSUES CRIMINOLOGY* (Fall 1973).

seriously as the subjects of knowledge production.⁹ This work has made significant strides toward investigating the relationship between the social construction of gender, criminalization and punishment regimes. However, it has failed to interrogate the category of “woman” as a stable basis and foundation for feminist research.¹⁰ Because we have taken the subject of “women in prison” as fixed rather than fluid and contested, feminist scholars have relied upon and further legitimated the rigid gender binary that violates gender nonconforming individuals like Bakari entering the criminal justice system. By assuming, erroneously, that *all people incarcerated in women’s prisons are women*, and that *all imprisoned women are in women’s prisons*, we have overlooked and misrepresented the gender fluidity and multiplicity that exists in men’s and women’s prisons, jails and detention centers.¹¹

In this article, I develop an alternative “antiracist gender-queer” theoretical framework for feminist engagements with crime and punishment. I first provide a discussion of transgender as a collective political identity that is internally differentiated by race, class, gender, nationality, and citizenship. I then explore feminist resistance to embracing a more inclusive and complex understanding of gender identity. Third, building on feminist research into the “pathways to imprisonment” of women in conflict with the law, I elucidate three stages of gender policing and racialized punishment in the lives of gender nonconforming people: 1) marginalization and discrimination from childhood onward, 2) imprisonment and 3) post-incarceration sentences. These processes constitute what I call the (trans)gender entrap-

9. See Ellen Adelburg & Claudia Currie, *Too Few To Count: Canadian Women in Conflict with the Law* (1987); Karlene Faith, *Unruly Women: The Politics of Confinement and Resistance* (1993); Pat Carlen, *Sledgehammer: Women’s Imprisonment at the Millennium* (1998); Mary Bosworth, *Engendering Resistance: Agency and Power in Women’s Prisons* (1999); Katheryn Watterson & Meda Chesney-Lind, *Women in Prison: Inside the Concrete Womb* (1996); Paula Johnson, *Inner Lives: Voices of African American Women in Prison* (2004); Julia Sudbury, *Global Lockdown: Race, Gender and the Prison-Industrial Complex* (2006) for a transnational discussion of women’s imprisonment.

10. Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* 2 (2006).

11. See Julia Sudbury, *From “Women in Prison” to “People in Women’s Prisons”: Challenging the Gender Binary in Anti-prison Research and Activism*, in *RAZOR WIRE WOMEN: PRISONERS, ACTIVISTS, SCHOLARS AND ARTISTS* (Jodie Lawton, ed., forthcoming) for a lengthier discussion.

ment of gender nonconforming prisoners. Finally, I explore the implications of this discussion for feminist scholarship.

My overarching goal is to consider what it would take for feminists to “think with, rather than against the transgender community.”¹² This agenda recalls the question posed by Howard Becker four decades ago: “Whose side are we on?”¹³ Becker posed this question to encourage sociologists to question the assumption that responsible scholarship should serve the interests of the officials seeking effective means to control and manage deviant populations, rather than privileging the interpretations and priorities of the subordinated. For early feminist scholars, the answer to this question was shaped by dual commitments to making women’s experiences visible and ending patriarchal violence and oppression.¹⁴ Since the 1980s, antiracist and transnational feminists have again raised Becker’s question in an effort to hold white and western feminists accountable for the national, class and racial privilege that has compromised solidarity with women of color and “third world” women.¹⁵ By expanding feminism’s remit to include opposition to multiple oppressions, they have expanded feminist scholarship to “side” with women who are marginalized in multiple ways and to criticize the ways in which dominant women achieve liberation at the expense of immigrant, indigenous and third world women and women of color.¹⁶

I argue that feminism once again finds itself at a critical point of contestation regarding “whose side we are on.” The catalyst for this challenge has been the work of transgender activists and scholars who are pushing feminists to acknowledge the violent border policing that creates and maintains “women” as a stable and unitary political subject. If, as feminists, we stand against

12. Graham Mayeda, *Re-Imagining Feminist Theory: Transgender Identity, Feminism, and the Law*, 17 *CJWL* 423, 423 (2005).

13. Howard S. Becker, *Whose Side Are We On?* 14 (3) *SOC. PROBS.* 234, 239 (1967); See also Alison Liebling, *Whose Side Are We On? Theory, Practice and Allegiances in Prisons Research*, 41 *BRIT. J. CRIMINOLOGY*. 472, 472 (2001).

14. Liz Kelly, Sheila Burton & Linda Regan, *Researching Women’s Lives or Studying Women’s Oppression?*, in *RESEARCHING WOMEN’S LIVES FROM A FEMINIST PERSPECTIVE* 27, 28 (1994).

15. All the Women Are White, All the Blacks Are Men, But Some Of Us Are Brave: Black Women’s Studies (Gloria T. Hull, Patricia Bell Scott & Barbara Smith eds., Feminist Press 1982); Bell Hooks, *Ain’t I a Woman: Black Women and Feminism* (S. End Press 1998); *Feminist Genealogies, Colonial Legacies, Democratic Futures* (M. Jacqui Alexander & Chandra Talpade Mohanty eds., 1996).

16. Deborah King, *Multiple Jeopardy, Multiple Consciousness: The Context of Black Feminist Ideology*, in *WORDS OF FIRE: AN ANTHOLOGY OF AFRICAN-AMERICAN FEMINIST THOUGHT* 294, 299-307 (Beverly Guy-Sheftall ed., 1995),

all forms of racialized and heteropatriarchal violence, then, I argue, we are called to move beyond gender dualism. This transformation will entail developing a politics founded on a shared experience of and resistance to all forms of gender oppression, including violence and exclusion based on refusal to conform to the binary gender system. Such a shift would require a new theoretical framework for feminist research in relation to women's imprisonment.

II. DEFINING TRANSGENDER: AN INTERSECTIONAL ANALYSIS

The term "transgender" refers to "individuals whose gender identity or expression does not conform to the social expectations for their assigned sex at birth."¹⁷ The term is an umbrella for a broad range of identities that challenge the binary categorization system that seeks to divide humanity into two stable and discrete genders. This gender binary is founded in EuroAmerican medical and legal systems that require all newborns to be designated as either male and female.¹⁸ It is reinforced throughout the lifespan through social practices that reward conformity and punish misalignment between the sex assigned at birth and subsequent gender identification and expression.¹⁹ Because the binary relies upon the existence of distinct biological differences between the sexes, intersex newborns who are born with ambiguous or non-definitive physiology are surgically altered in order to facilitate their assignation to one category or the other.²⁰ These infant genital surgeries indicate the manmade and coercive nature of what is often deemed a "God-given" distinction between the two sexes.

It is in this context that transgender has emerged as a collective political identity that has become the basis of a vibrant social movement.²¹ The trans liberation movement seeks to end violence against, and win civil rights for, those who transgress normative expectations of sex/ gender congruence.²² The trans

17. Paisley Currah et al., *Introduction*, in *TRANSGENDER RIGHTS* at xiii, xiv (Paisley Currah et al. eds., 2006)

18. Julie A. Greenberg, *The Roads Less Traveled; The Problem with Binary Sex Categories*, in *TRANSGENDER RIGHTS* 52-53 (Paisley Currah et al. eds., 2006).

19. Rosenblum, *supra* note 4.

20. Suzanne J. Kessler, *Lessons from the Intersexed*, 52-76 (2000).

21. Leslie Feinberg, *Trans Liberation: Beyond Pink or Blue* 5, 132-36 (1999).

22. Organizations that work toward these goals include the National Center for Transgender Equality, <http://transequality.org>, Transgender Law Center, <http://www.transgenderlawcenter.org>, Transgender Law and Policy Institute, <http://www.transgenderlawcenter.org>

liberation movement has opened up space for the recognition and articulation of a multiplicity of genders, including those who identify as transsexual, transvestite, trans, genderqueer, two-spirit, cross-dressers, FTM (female-to-male) and MTF (male-to-female).²³

Like the women's movement, the transgender movement has been critiqued by transgender people of color for popularizing an understanding of transgender identity and political priorities that is rooted in the limited experiences of middle class whites.²⁴ This unitary conception of transgender identity disregards differences based on race, ethnicity, class, national origins, citizenship status and ability in favor of a universalized white experience. Transgender is not a uni-dimensional category. Rather, it is internally differentiated and marked by both marginalization and privilege. Such distinctions can have significant implications,²⁵ leading to very different life chances for a low income street-involved transgender young person versus a white transgender professional, for example. In order to build a more inclusive basis for activism, organizations working on issues relating to transgender imprisonment use the term transgender alongside other descriptors such as gender variant, gender nonconforming and genderqueer.²⁶ This terminology seeks to include people of color who experience policing and punishment based on gender non-conformity, but may not identify as transgender, such as "butches, studs, gressors, A.G.s, queens, divas, gay boys, and others."²⁷

www.transgenderlaw.org, Transgender, Gender Variant and Intersex Justice Project, <http://www.tgijp.org>, and the Sylvia Rivera Law Project, <http://srlp.org>.

23. Susan Stryker, *(De)Subjugated Knowledges: an Introduction to Transgender Studies*, in THE TRANSGENDER STUDIES READER 1, 4 (Susan Stryker & Stephen Whittle eds., 2006).

24. Emi Koyama, *Whose Feminism is it Anyway? The Unspoken Racism of the Trans Inclusion Debate*, in THE TRANSGENDER STUDIES READER 698 (Susan Stryker & Stephen Whittle eds., 2006).

25. See Bobby Noble, *Strange Sisters and Odd Fellows: Trans-Activisms as Antiracist Pedagogy*, in ACTIVIST SCHOLARSHIP: ANTIRACISM, FEMINISM AND SOCIAL CHANGE 149 (Julia Sudbury & Margo Okazawa-Rey eds., 2009) (for a useful intersectional analysis of transgender as an internally differentiated category).

26. Organizations promoting transgender rights include The Sylvia Rivera Law Center, <http://srlp.org> (last visited Sept. 6, 2009); Transgender Law and Policy Center, <http://www.transgenderlaw.org> (last visited Sept. 6, 2009); GenderPAC, <http://www.gpac.org> (last visited Sept. 6, 2009); and the Transgender, Gender Variant and Intersex Justice Project, <http://www.tgijp.org> (last visited Sept. 6, 2009).

27. See Trans/Gender Variant in Prison Committee, <http://www.tgijp.org/tip/> (last visited Sept. 4, 2009).

The differential access to resources along race and class lines within the transgender community is mirrored by the differential treatment of post-operative versus non- or pre-operative transgendered people. Although transgender and transsexual are not synonyms, case law generally focuses on the experiences of male-to-female transsexuals.²⁸ Transgender identity is therefore discussed in the legal context using medical definitions that describe transsexuals as people who are “cruelly imprisoned within a body incompatible with their real gender identity”.²⁹ The American Psychiatric Association identifies transsexuals as suffering from Gender Identity Disorder (GID) (formerly Gender Dysphoria), a condition in which the individual suffers from “persistent cross-gender identification” and “persistent discomfort” with their assigned sex.³⁰ This “condition” is diagnosed and treated medically using hormone treatment and sex reassignment surgery (SRS) alongside psychological treatment.³¹ Although SRS is commonly known as a “sex change”, it could more accurately be described as a “sex correction” since transsexuals who seek medical treatment view themselves as transitioning their bodies to match to their true gender.³² While courts have used evidence provided by doctors and psychiatrists to support transsexuals in their quest for recognition of their new gender and protection from discrimination, the medical approach has been found to be problematic. In identifying transgendered people as sick or mentally disabled, this approach reasserts the primacy of normative gendered behaviors and increases the regulation and control of those who do not conform to them.³³ Rather than challenging the gender binary and making visible the work involved in propping it up, GID continues to pathologize those who transgress the norm, even as it provides legitimacy for more generous treatment for

28. Rosenblum, *supra* note 16, at 512.

29. *Farmer v. Moritsugu*, 163 F.3d 610, 611 (D.C. Cir. 1998) (quoting MERCK MANUAL OF MEDICAL INFORMATION 418 (Robert Berkow ed., 1997)).

30. Judith Butler, *Undiagnosing Gender*, in *TRANSGENDER RIGHTS*, *supra* note 15, at 276, 289-91.

31. Lori Girshick, *Transgender Voices: Beyond Women and Men* 75-79, 82-88 (2008).

32. *Id.* at 71-73

33. Butler, *supra* note 15, at 292-95 (housing transgender prisoners in medical or mental health wards that further stigmatize them within the prison population is one outcome of this approach); see Alexander Lee, *Gendered Crime and Punishment: Strategies to Protect Transgender, Gender Variant and Intersex People in America's Prisons*, 4 GIC TIP J. 1, 11-12 (2004).

those affected.³⁴ Thus, the medical model undermines the oppositional and liberatory potentiality of transgender identities even as it offers the potential for more compassionate treatment.³⁵

Second, by producing a class of individuals who have been diagnosed with GID, and are undergoing or have completed SRS, the medical model creates a hierarchy of transgendered people. Since the courts rely on evidence provided by medical experts regarding the legitimacy of a transgender individual's claim, those who are not under a doctor's care are excluded from legal protections.³⁶ Those precluded from legal protection include transgendered people who do not believe that they have a medical condition that requires treatment, those who prefer to use non-medical forms of physical transformation, from binding breasts to using cosmetics, clothing and wigs, and those who embrace gender fluidity and complexity as the basis for a "gender-queer" identity.³⁷ Also excluded are those who do seek medical treatment, but do not have access to legal medical care for economic reasons or because they are undocumented.³⁸ For example, an immigrant transgender woman who is involved in the sex and drug economies may use street hormones rather than legally acquired prescriptions and may not have the resources to undergo vaginoplasty ("bottom surgery"). If she is arrested and imprisoned, she will be sent to a male prison and denied access to hormones because she is not undergoing documented medical

34. Butler, *supra* note 15, at 294-95.

35. The use of state civil rights laws that prohibit discrimination on the basis of disability to provide protections for transgender people is another example of this double bind. Notwithstanding efforts to destigmatize disability, many transgender people and their advocates who make use of disability law express concerns that this approach pathologizes transgender people by defining them as impaired. See Jennifer L. Levi & Bennett H. Klein, *Pursuing Protection for Transgender People Through Disability Laws*, in *TRANSGENER RIGHTS*, *supra* note 17, at 80-83.

36. Abby Lloyd, *Defining the Human: Are Transgender People Strangers to the Law?* 20 Berkeley J. Gender L. & Just. 150, 185, 194 (2005).

37. *Id.*, *passim* (exploring lack of legal protections available for "Josh", a male-to-female transgender man who does not have a diagnosis of GID or accept the disability model of transgender, when he experiences discrimination in the workplace).

38. Transgender identity increases the likelihood of being uninsured. For example, a survey of over 150 transgender people in San Francisco carried out by the Transgender Law Center and the National Center for Lesbian Rights found that Forty-three percent—double the proportion in the general population—were uninsured. SHANNON MINTER & CHRISTOPHER DALEY, *TRANS REALITIES: A LEGAL NEEDS ASSESSMENT OF SAN FRANCISCO'S TRANSGENDER COMMUNITIES* 44 (2003).

treatment, regardless of her gender identity and presentation.³⁹ Similarly, a transman of color who chooses to alter his appearance by binding his breasts, and takes street hormones to lower his voice and build muscle mass, will not be able to change his gender in court, on his passport or on his driver's license without certification from a medical professional.⁴⁰ He will therefore be forced to utilize legal documents that identify him as a woman (even if he has obtained a legal name change), and risks being accused of using stolen documents or being exposed to transphobic violence. This situation is exacerbated for transgender youth under 18 years old, and those under criminal justice supervision who need permission from a parent/guardian or warden or parole officer in order to change either their name or gender.⁴¹

While the term transgender implies shared experiences of oppression and resistance, transgendered people have different histories in relation to gender socialization and identification over time. These different experiences lead to gender stratification among transgendered people that is reflected in activism and in the media as well as the medical and legal professions. This marginalization of transgendered masculinity is reflected in popular media, which most often depicts white middle or upper class transwomen as representative of transgender experiences.⁴² Similarly, the medical profession has focused disproportionately on MTF transitions.⁴³ This may be due in part to the relative difficulty of phalloplasty (FTM bottom surgery), and the lower incomes of female-to-male transgender people.⁴⁴ Finally, since legal cases focus almost exclusively on providing civil rights—from the right to marry to freedom from workplace harassment—to post-operative transsexual women,⁴⁵ the legal profession also

39. Richard Edney, *To Keep Me Safe From Harm? Transgender Prisoners and the Experience of Imprisonment*, 9 (2) *DEAKIN L. REV.* 224, 327-331 (2004).

40. Transgender Law Center, *ID Please: A Guide to Changing California and Federal Identity Documents to Match your Gender Identity* 16, 40, 27 (2009). <http://www.transgenderlawcenter.org/pdf/TLC%20ID%20Guide.pdf>

41. *Id.* at 11, 13.

42. Julie Hollar, *Transforming Coverage, Extra!*, Nov./Dec. 2007, available at <http://www.fair.org/index.php?page=3216> (last visited Jan. 27, 2010).

43. See Rosenblum, *supra* note 16, at 512-13.

44. *Id.*

45. Katie Koch & Richard Bales, *Transgender Employment Discrimination*, 17 *UCLA Women's L.J.* 243, passim (2008); Mary Coombs, *Emerging Issues in Sexual Orientation Law: Sexual Dis-Orientation: Transgender People and Same-Sex Marriage*, 8 *UCLA WOMEN'S L.J.* 219, passim (1998).

contributes to the sedimentation of FTMs, in particular low-income FTMs and female-bodied genderqueers of color like Bakari, to the lowest rungs of the transgender stratification system. One consequence of the over-privileging of the stories and experiences of white middle class transwomen is that second wave feminists have tended to view the transgender movement as representing the rights of privileged (former) men to parody and appropriate women's experiences and to think of transgender people as existing outside of feminist collectivity.⁴⁶ This misapprehension has the unfortunate outcome of generating hostility in feminist circles toward transgender claims for inclusion. In the next section, I turn to a discussion of feminist reactions to the challenges posed by transgender activism.

III. FEMINIST ENCOUNTERS WITH THE OTHER(ED) WOMAN

From the late 1960s onwards, feminist scholars worked to carve out spaces dedicated to the study of women's experiences, including women's studies programs, conferences and journals.⁴⁷ At the same time, feminist activists fought to create and maintain women-only spaces in the community. Many of these spaces, including rape crisis centers, battered women's shelters and health clinics, were formed as a part of the anti-violence and women's health movements.⁴⁸ Others, such as women's music festivals, bookstores and retreat centers, aimed to celebrate women's unique culture, self-expression and spirituality. By the 21st century, however, these hard-won facilities were under threat from chronic under-funding caused by decades of neoliberal cutbacks to social welfare spending as well as the "post-feminist" generation's ambivalent relationship to women-only spaces. This led to closures and mergers of women's bookstores, colleges and community centers.⁴⁹ In the context of these fraught political and economic struggles, feminist activists have often reacted to demands for "transgender inclusion" in "women's spaces" with defensiveness or hostility.⁵⁰

46. Susan Stryker, *Transgender History* 101-11 (2008).

47. Mari Jo Buhle, *Introduction*, in *THE POLITICS OF WOMEN'S STUDIES: TESTIMONY FROM 30 FOUNDING MOTHERS* xv-xxvi (Florence Howe ed., 2000).

48. Nancy Matthews, *Confronting Rape: The Feminist Anti-Rape Movement and the State* 9-15 (1994); Sandra Morgen, *Into Our Own Hands: The Women's Health Movement in the United States, 1969-1990*, at 20-40 (2002).

49. See, e.g., *CHALLENGED BY COEDUCATION: WOMEN'S COLLEGES SINCE THE 1960s* (Leslie Miller-Bernal & Susan L. Poulson eds., 2007).

50. STRYKER, *supra* note 46, at 101-05.

This section will examine two high profile events in which feminist politics and transgender rights collided. These cases demonstrate that while feminist scholars have shown gender roles and identities to be socially constructed rather than biologically determined, everyday feminist praxis continues to rely on essentialist notions of male and female that conflate sex and gender. They are particularly useful theoretically because they make visible the work involved in policing the boundaries of the category “woman”, and thus reveal “woman” to be a highly contested, unstable site of struggle. They also reveal the limitations of the conception of womanhood that formed the basis of second wave feminism and the organizations that it fostered. In this sense, they push us to be explicit about which “women” we include and exclude when we embark on feminist research on imprisonment.

The first case is *Vancouver Rape Relief Society v. Nixon*.⁵¹ Kimberly Nixon, a white, post-operative transsexual woman, brought a complaint to the British Columbia Human Rights Tribunal against the Vancouver Rape Relief and Women's Shelter (VRR), an organization founded in 1975, when she was denied access to its peer counselor training program.⁵² Although she successfully passed the screening for the program, Nixon was asked to leave the first session after one of the facilitators identified her as transgender on the basis of her appearance.⁵³ VRR maintained that “only a woman, born so, and who grew up understanding what it means to be a girl and a woman in an oppressive society, could understand Rape Relief's political view of male violence and, therefore qualify as a ‘peer’”.⁵⁴ Nixon was a survivor of both intimate violence by a male partner and sexual assault, and had received eight months of counseling from another battered women's agency.⁵⁵ Nevertheless, she was excluded from the organization's definition of “peer” because she “had not been a woman since birth” and had lived part of her life “as a man.”⁵⁶

51. *Vancouver Rape Relief Society v. Nixon*, [2002] B.C.H.R.T. 1; [2003] B.C.J. No. 2899; [2005] B.C.C.A. 601.

52. Lori Chambers, *Unprincipled Exclusions: Feminist Theory, Transgender Jurisprudence and Kimberly Nixon*, 19 (2) *CAN. J. WOMEN & L.* 305, 305 (2007).

53. *Nixon*, [2002] B.C.H.R.T. ¶ 26.

54. *Id.* at ¶ 44.

55. *Id.* at ¶ 21.

56. *Id.* at ¶ 26.

VRR did not dispute that Nixon was treated differently than other women because she was a transsexual woman. Instead, they argued that they were not in contravention of the Human Rights Code, because section 41 of the Code allows for charitable organizations that promote the welfare of “an identifiable group or class of persons characterized by. . . a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin” to grant preferences to that group, in this instance “women born women.”⁵⁷ While women’s groups usually rely on this clause to justify the exclusion of men from women-only spaces, VRR did not argue that Nixon was a man, rather they asserted that she existed on a different point on the gender continuum than the women they served:

[A]ll parties appear to agree that sex/gender is not binary. That is, humans are not sexed or gendered along binary male-female distinctions; rather, sex and gender fall on a continuum. Hence, they submit that the distinction they made against male to female transsexuals is not discriminatory.⁵⁸

In making this argument, VRR implicitly invoked the concept of a “third sex,”⁵⁹ neither normatively male nor female, and therefore justifiably excluded from an organization dedicated to the emancipation of women with a shared life history of gender oppression. The tribunal ruled against VRR, finding that women who did not have masculine features were not required to demonstrate a common life history, and that Nixon was excluded “because she was not ‘woman’ enough to be a peer of the women at Rape Relief.”⁶⁰ The tribunal identified this denial as part of a wider “historical pattern of discrimination that the transgendered among us have experienced” and thus awarded Nixon \$7500 and ordered VRR to cease discriminatory actions under the Code.⁶¹ This decision was subsequently overruled by the British Columbia Supreme Court, which found that Nixon was not a member of the “identifiable group” served by VRR, both because of her male sexual history, and because she did not pass the “community acceptance” test.⁶² In other words, Nixon’s exclusion was le-

57. HUMAN RIGHTS CODE c210 (RSBC 1996).

58. Nixon, [2002] B.C.H.R.T. ¶ 91.

59. See generally *THIRD SEX THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY* (Gilbert Herdt ed., 1994) (providing a cross-cultural elaboration of this concept).

60. Nixon, [2002] B.C.H.R.T. ¶ 146.

61. *Id.*

62. Vancouver Rape Relief Society v. Nixon, [2003] BCSC 1936 ¶107.

gitimate because her inability to prove she was born biologically female and lack of acceptance into the "women's community" demonstrated that she was not a "woman" as defined by VRR. Nixon refuted the assertion she was not a "woman born woman," arguing that regardless of her male genitalia, she was born female, knew from an early age that her gender identity did not match her biological sex and identified with girls growing up.⁶³ In the Supreme Court's ruling, however, biological notions of sex trumped social and relational meanings in determining which gender Nixon inhabited as a child.⁶⁴ VRR's ardent defense of their limited definition of womanhood fixed Nixon's gender identity as permanently other(ed), a designation that was upheld by the Supreme Court's ruling.

The Nixon case focused a media spotlight on the question of "trans inclusion" in women-only spaces and polarized second wave feminist and transgender agendas. Nixon's legal counsel, feminist lawyer and transgender advocate Barbara Findlay named Nixon the "Rosa Parks of transwomen," suggesting that the case was only the beginning of a movement for full recognition of non-normative forms of womanhood.⁶⁵ In contrast, many feminists viewed Nixon's claim as a potential Trojan horse for future incursions by men into women-only spaces, defined as spaces for women born and socialized from birth as female.⁶⁶ By rooting gender identity in the condition of an individual at birth, the concept "woman born woman" reifies biological sexual difference, ignores the fluidity and complexity of gender identity, and constructs and maintains impermeable borders around "womanhood." In defending this conception of "woman," VRR has popularized a feminist rationale for exclusionary practices that replicate traditional exclusions of transgender women as inauthentic, deviant or imposters.⁶⁷ These practices are mirrored in the case of Michigan Womyn's Festival.

63. Nixon, [2002] B.C.H.R.T. ¶ 10.

64. See Mayeda, *supra* note 11, at 454-62 for a detailed discussion.

65. Shannon Rupp, *Transsexual Loses Battle with Women's Shelter*, The Tyee (Feb. 3, 2007), available at <http://thetyee.ca/News/2007/02/03/Nixon/> (last visited Jan. 27, 2010).

66. Carissima Mathen, *Transgendered Persons and Feminist Strategy*, 16 (2) Can J. Women & L. 291, 308-09 (2004).

67. For a survey of the depiction of transgender people as monstrous and deviant see LLOYD, *supra* note 36. Several feminists have depicted transsexual women as anti-feminist and inauthentic caricatures of femininity. See e.g., GERMAINE GREER, *THE WHOLE WOMAN* 70-80 (1999); JANICE RAYMOND, *THE TRANSEXUAL EMPIRE: THE MAKING OF THE SHE-MALE* (1994).

Michigan Womyn's Festival (the Festival) is an annual week-long outdoor celebration of women's music, film and culture that has taken place since 1976.⁶⁸ Since the early 1990s, Camp Trans has been held on land adjacent to the Festival. The Camp was formed to protest the expulsion of Nancy Burholder, a transsexual woman from the Festival, and continues to demand inclusion of "all womyn, regardless of color, economic, religious or trans status."⁶⁹ In 2006, in response to direct action by Camp Trans activists, Festival founder Lisa Vogel released a statement that called on the activists to "respect that womon born womon is a valid and honorable gender identity. I also ask that you respect that womyn born womyn deeply need our space—as do all communities who create space to gather, whether that be womyn of color, trans womyn or trans men."⁷⁰ While claiming that the Festival honors "gender outlaws" whose gender expression is non-conformist "either because of their sexual orientation (lesbian, bisexual, polyamorous etc) or their gender presentation (butch, bearded, androgynous, femme and everything in between)," Festival organizers drew the line at accepting transgender identities, rejecting transmen because they are no longer deemed part of the women's community, and transwomen because they are only newly female and have not "lived their entire life experience as womyn."⁷¹

The battle over who should have access to the Festival has generated dissent on both sides of the debate. Many of the women who attend the Festival also support Camp Trans, which has become an affirming space for a range of queer and trans identities.⁷² At the same time, transgender activists have not been united in their demands for inclusion. As transgender activist Emi Koyama documents, the early days of the camp were marred by divisions between post-operative transsexuals who felt that the Festival should allow participation by those who did not have male genitalia, and those who demanded a more expansive ad-

68. Lisa Vogel, *Michigan Womyn's Festival Sets the Record Straight*, TRANS-GENDER TAPESTRY, Aug. 22, 2006, <http://www.ifge.org/Article275.phtml> (last visited May 25, 2009).

69. Emilia Lombardi, *Camp Trans To Confront Transphobia At Women's Music Festival*, INDEPENDENT MEDIA CENTER, June 28, 2006, <http://indymedia.org/de/2006/06/841615.shtml> (last visited Mar. 24, 2010).

70. Vogel, *supra* note 68.

71. *Id.*

72. Camp Trans History: Trans Inclusion in Womyn's Music and MWMF, <http://www.camp-trans.org/pages/ct-history.html> (last visited Dec. 15, 2009).

missions policy.⁷³ The former claimed that exclusion of pre- or non-operative transgender individuals was legitimate, because “male genitals can be so emblematic of male power and sexual dominance that their presence at the festival. . . is inappropriate.”⁷⁴ By privileging transsexuals who had the resources for surgery, the proposed policy would have discriminated against low-income transsexuals and transsexuals of color, as well as those individuals who prefer to inhabit a more interstitial gender identity. Regardless of their willingness to jettison those whose sex and gender remained incongruent, the post-operative transwomen’s attempt to relocate the border-line of gender identity foundered on the rock of biologically determined birth sex. Like Nixon, they were fixed as permanently othered, not male, yet “not woman enough” to gain admittance to women-only space.

These two cases are emblematic of the limitations of second wave feminism’s conceptualization of gender. Rather than embracing a fluid notion of gender that could morph to engage the challenges of the transgender movement, feminists in both cases doggedly defended a gender politics formed in and unchanged since the 1970s. In so doing, they privileged the (putative but undocumented) desire of women whose gender identity has been affirmed since birth to inhabit a space free of individuals who do not share that experience,⁷⁵ rather than exploring the possibility of building solidarity among those differently oppressed by gender policing and violence. The productive possibilities of such exploration can be seen in the different trajectory taken by the California Coalition for Women Prisoners (CCWP).

Founded in 1995, and involving many feminists who had been active since the early days of the second wave feminist movement, CCWP was formed to pursue a lawsuit to support women prisoners at Central California Women’s Facility and California Institution for Women who were fighting for decent medical care.⁷⁶ Although the organization initially identified as a

73. Koyama, *supra* note 24.

74. *Id.*

75. *Id.*

76. Women prisoners filed a class action lawsuit under 42 U.S.C. § 1983 in the U.S. District Court for the Eastern District of California against the governor of California and California prison officials regarding medical neglect by the California Department of Corrections (DOC) at the Central California Women’s Facility (CCWF) in Chowchilla, CA and the California Institution for Women (CIW) in Frontera, CA. See *Shumate v. Wilson* No. Civ. S-95-619 WBS JFM (E.D. Cal.), <http://www.clearinghouse.net/detail.php?id=582>.

feminist organization working on behalf of women in prison, challenges presented by transgender and gender nonconforming activists, who had been incarcerated at the women's prisons targeted by the organization, prompted a reexamination of CCWP's mission and values. Over time, CCWP altered its mission to challenge "the institutional violence imposed on women, transgender people and communities of color" within a framework of "racial and gender justice."⁷⁷ This required the organization to rethink the language used to describe those held in women's prisons. The phrase "people in women's prisons" was introduced in recognition and support of the gender diversity and self-determination of those coerced by the state into the category "female inmates". Subsequently, CCWP has produced a special edition of its newsletter *The Fire Inside* on the experiences of transgender prisoners.⁷⁸ The organization has also participated in Transforming Justice, a conference that brought together transgender and anti-prison activists to share strategies on confronting the discrimination and criminalization confronted by transgender people, in particular those from communities most affected by the prison-industrial complex.⁷⁹

The transformation of CCWP presents an alternative trajectory for feminist praxis. Rather than bolstering exclusionary arguments by falling back on the fiction of immutable biological difference as a basis for gender identity, feminist scholars and activists have the opportunity to learn from the insights generated by encounters with gender non-conformity.

Feminist resistance to transgender identities replicates early reactions by white feminists to feminists of color. Like transgender activists, feminists of color challenged mainstream (white) feminism's narrow conceptualization of women's experiences and issues.⁸⁰ In so doing, we risked ostracism and accusations of divisiveness and disloyalty. Women of color were

77. Cal. Coal. for Women Prisoners: About Us, *supra* note 2.

78. Cal. Coal. for Women Prisoners, *Editorial - Fight to End Gender Oppression*, 35 THE FIRE INSIDE, Spring/Summer 2007, <http://www.womenprisoners.org/fire/000685.html>.

79. See Shawna S., *Transforming Justice Conference*, 36 THE FIRE INSIDE, Fall 2007/Winter 2008, <http://www.womenprisoners.org/fire/000703.html>.

80. See generally Hazel Carby, *White Woman Listen! Black Feminism and the Boundaries of Sisterhood*, in BLACK BRITISH FEMINISM: A READER 45 (Heidi Safia Mirza ed., 1997), Deborah K. King, *Multiple Jeopardy, Multiple Consciousness: The Context of Black Feminist Ideology*, in WORDS OF FIRE: AN ANTHOLOGY OF AFRICAN AMERICAN FEMINIST THOUGHT 294, 299-307 (Beverly Guy-Sheftall ed., 1995).

deemed inadequately feminist.⁸¹ Our⁸² preferences for alliances with men of color, our differential analysis of the family as a site of resistance, not just one of oppression, and our defense of a motherhood that had often been denied us, made women of color overly “male identified” and therefore suspect to feminism in its narrow second wave manifestation.⁸³

Over time, mainstream feminist understandings of “women’s lives” have grown to incorporate the differences embodied by women of color, and feminism has become more complex and accountable as a result. It has become the new feminist common sense that women’s lives are shaped by an intersection of multiple oppressions, and that differentially located women experience both oppression and privilege in relation to these interlocking systems.⁸⁴ In the field of prison studies, this intersectional analysis has been applied by feminists of color to examine how racial disadvantage, gender violence, poverty, migration and/or addiction articulate to produce racialized patterns of women’s criminalization and imprisonment.⁸⁵ This analysis can be further enriched by incorporating the insights produced by encounters with gender non-conformity.⁸⁶ In order to do so, I now turn to an exploration of the lives of transgender individuals in conflict with the law.

IV. GENDER POLICING AND RACIALIZED PUNISHMENT

At the Transforming Justice conference described above, formerly incarcerated transwomen screened videojournals of their lives featuring a collage of photographs, documents and

81. Julia Sudbury, *Other Kinds of Dreams: Black Women’s Organisations and the Politics of Transformation* 177-223 (1998).

82. The author uses “we” and “our” here to acknowledge her social location in relation to these debates as a feminist of color involved in black women’s organizing from the 1980s.

83. See, e.g., *TRANSGENDER RIGHTS* (Paisley Currah et al. eds., 2006).

84. See PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT passim* (2d ed. 2000); See also Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 *STAN. L. REV.* 1241, 1241 (1991).

85. See Juanita Díaz-Cotto, *Chicana Lives and Criminal Justice: voices from el barrio passim* (2006); Beth E. Richie, *Compelled to Crime: The Gender Entrapment of Battered Black Women passim* (1996); *Global Lockdown: Race, Gender, and the Prison-Industrial Complex passim* (Julia Sudbury ed., 2005).

86. For a useful intersectional analysis of transgender as an internally differentiated category, see Bobby Noble, *Strange Sisters and Odd Fellows: Trans-Activisms as Antiracist Pedagogy*, in *ACTIVIST SCHOLARSHIP: ANTIRACISM, FEMINISM AND SOCIAL CHANGE* (Julia Sudbury and Margo Okazawa-Rey eds., 2009).

memories from early childhood through their adult experiences with the criminal justice system.⁸⁷ The women's narratives illustrated a continuum of racialized gender violence and policing, beginning in the family and continuing in encounters with the police, courts and prisons. Policing the gender-binary begins at home where children are pressured to engage in culturally appropriate gendered behavior and play and to wear gender appropriate clothing.⁸⁸ For many gender nonconforming young people, the teenage years are when conflicts with parental and school authorities and peers over gender identification become most fraught, as behaviors that were seen as a childhood phase continue into adolescence.⁸⁹ Conflict and violence in the home over gender identification or sexual orientation, alongside other factors, often precipitates transgender youth being thrown out or running away.⁹⁰ This results in higher rates of street life, homelessness⁹¹ or dependency on a child welfare system that is ill equipped to meet the needs of gender variant youth.⁹² This, in turn, often leads to involvement in criminalized survival strategies, from sex work to petty theft, as well as using and selling drugs as a coping strategy.⁹³ Transgender and gender nonconforming young people who leave or are thrown out of home are also criminalized through "status offenses," which prohibit running away, truancy, alcohol consumption or "incorrigibility" (dis-

87. Sylvia Rivera Law Project, *Conference Report & Summary*, (2007) <http://srlp.org/transformingjustice>

88. Lori B. Girshik, *Transgender Voices: Beyond Women and Men* 52-54 (2008).

89. See Gerald P. Mallon & Teresa DeCrescenzo, *Transgender Children and Youth: A Child Welfare Practice Perspective*, 85 *CHILD WELFARE* 215 (2006); See also HUMAN RIGHTS WATCH, *HATRED IN THE HALLWAYS: VIOLENCE AND DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS IN U.S. SCHOOLS* (2001), available at <http://www.hrw.org/legacy/reports/2001/uslgbt/toc.htm>.

90. Nicholas Ray, Nat. Gay and Lesbian Task force Policy Institute & Nat. Coalition for the Homeless, Lesbian, Gay, Bisexual and Transgender youth: An Epidemic of Homelessness 16-20 (2006), available at <http://www.thetaskforce.org/downloads/HomelessYouth.pdf>.

91. A study of 375 homeless adolescents found that LGBT youth were more likely to leave home than their heterosexual counterparts, due to physical abuse, alcohol use in the home and conflicts over sexual orientation. See Bryan N. Cochran et al., *Challenges Faced by Homeless Sexual Minorities: Comparison of Gay, Lesbian, Bisexual, and Transgender Homeless Adolescents With Their Heterosexual Counterparts*, 92 *AM. J. PUB. HEALTH* 773-74 (2002).

92. Tara L. Quinn, *Sexual Orientation and Gender Identity: An Administrative Approach to Diversity*, 81 *CHILD. WELFARE* 913, 915 (2002); RAY, *supra* note 90, at 53.

93. RAY, *supra* note 90 at 59.

obeying parents).⁹⁴ The construction of these behaviors as offenses puts young people who have been abused or abandoned by parental figures in conflict with the law, often beginning a cycle of policing, appearances in the courts and institutionalization.⁹⁵ The criminalization of gender nonconforming young people, as with all young people, is racialized. Young people of color are more likely to be stopped by the police and to be sent to criminal court, and spend more time in detention.⁹⁶ Thus, gender variance in adolescence is most likely to lead to criminalization and institutionalization for young people of color.

While transgender young people face the challenge of age-related poverty, transgender and gender nonconforming adults continue to face poverty due to labor discrimination.⁹⁷ Pushed out of the labor market, some transwomen work in the sex industry as a means of survival, and also in order to experience the community and support of other transwomen.⁹⁸ Transwomen and men also face insecure housing or homelessness as a result of unstable or under-employment and discrimination by landlords.⁹⁹ The intersection of racial and transgender discrimination in the labor and housing markets creates a highly vulnerable

94. Shaun L. Gabbidon & Helen Taylor Greene, *Race and Crime* 270 (2005).

95. David J. Steinhart, *Status Offenses*, 6 *THE FUTURE OF CHILDREN* 86, at 86 (1996).

96. See Barry C. Feld, *Bad Kids: Race and the Transformation of the Juvenile Court passim* (1999); See also Heidi M. Hsia et al., Office of Juvenile Justice and Delinquency Prevention, *Disproportionate Minority Confinement, 2002 Update* (2004), <http://www.ncjrs.gov/pdffiles1/ojdp/201240.pdf>.

97. For example, a survey of 194 transgender people living or working in San Francisco found that nearly 60 percent were living in poverty, 40 percent did not have a bank account, only 25 percent were working full time and 9 percent had no source of income. While discrimination in housing and employment against transgender people is outlawed in thirteen states and the District of Columbia, low income and marginally housed transgender people have little access to such legal protections. Despite passage of the California Gender Non-Discrimination Act of 2003, 57 percent of those surveyed reported experiencing employment discrimination and only just over 12 percent had filed a complaint. SEE San Francisco Bay Guardian & Transgender Law Center, *Good Jobs Now! A Snapshot of the Economic Health of San Francisco's Transgender Communities* (2006), <http://www.transgenderlawcenter.org/pdf/Good%20Jobs%20NOW%20report.pdf>.

98. Lydia A. Sausa, JoAnne Keatley, & Don Operario, *Perceived Risks and Benefits of Sex Work Among Transgender Women of Color in San Francisco*, 36 *ARCHIVES SEXUAL BEHAV.* 768, 772-73 (2007).

99. SAN FRANCISCO BAY GUARDIAN, *supra* note 97, at 1. Ten percent of transgender people surveyed self-identified as homeless and another 31% were living in unstable situations. Nearly 27% reported experiencing housing discrimination, *id.*

positionality, which is exacerbated by the role of law enforcement.¹⁰⁰

The negative repercussions of racial discrimination and gender variance in labor and housing markets are compounded by the role of law enforcement. An investigation of police abuse and misconduct against LGBT people by Amnesty International documented widespread identity-based abuse related to sexual orientation, gender identity, race, age and economic status. The report concluded that: “Law enforcement officers profile LGBT individuals, in particular gender variant individuals and LGBT individuals of color, as criminal in a number of different contexts, and selectively enforce laws relating to ‘morals regulations,’ bars and social gatherings, demonstrations and ‘quality of life.’”¹⁰¹ This criminalization of non-normative gender identity, in a context of intersecting systems of oppression, leads to extremely high rates of incarceration for transpeople of color. While national statistics are not available, a survey of 515 transgender people in San Francisco found that sixty-five percent of the male-to-female respondents and twenty-nine percent of female-to-male respondents had been incarcerated.¹⁰²

In a study of incarcerated black women who were survivors of male violence, Beth Richie found that these women were coerced into crime by “their culturally expected gender roles, the violence in their intimate relationships, and their social position in the broader society.”¹⁰³ She labeled this process the “gender entrapment” of battered black women.¹⁰⁴ Transgender people are subjected to a similar process of coercion as a result of the pervasive interpersonal and systemic violence, poverty and stigmatization they experience throughout their lives. The conse-

100. John Yinger, *Housing Discrimination and Residential Segregation as Causes of Poverty*, in UNDERSTANDING POVERTY 359 (Sheldon H. Danziger & Robert H. Haveman, eds., 2001).

101. See AMNESTY INTERNATIONAL USA, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY AND TRANSGENDER PEOPLE IN THE U.S. (2005), <http://www.amnestyusa.org/outfront/stonewalled/report.pdf>; See also Incite! Women of Color Against Violence, *Law Enforcement Violence against Women of Color and Trans People of Color: A Critical Intersection of Gender Violence and State Violence* (2008), http://www.incite-national.org/media/docs/5341_pv-brochure-download.pdf.

102. SAN FRANCISCO DEPARTMENT OF PUBLIC HEALTH, THE TRANSGENDER COMMUNITY HEALTH PROJECT (1999), <http://hivinsite.ucsf.edu/InSite?page=cftg-02-02#S5.1X>; See also MINTER & DALEY, *supra* note 38, at 26-27.

103. RICHIE, *supra* note 85, at 133.

104. *Id.* at 132-33.

quences of this continuum of violence and exclusion are intensified for people of color who also experience racially discrepant policing and punishment. The cumulative effects of intolerance, abuse by peers, parents and schools, societal stigmatization, housing and labor discrimination, and targeting by law enforcement produce the racialized (trans)gender entrapment of gender nonconforming people.¹⁰⁵ This process systematically produces social marginalization, economic vulnerability, and criminalization in the lives of transgender and gender nonconforming youth and adults. When channeled by this process into juvenile halls, jails and prisons, these youth experience new institutionalized, and particularly violent, forms of gender policing.

V. GENDER VIOLENCE BEHIND THE WALLS

Criminologists have demonstrated the ways in which prison regimes are gendered, often seeking to induce appropriately feminine behaviors as a means of reforming "unruly women."¹⁰⁶ Yet this insight has infrequently led to questioning the role of the prison in (re)producing the binary gender system itself. The neat division of prison populations into two genders is achieved at the expense of transgender and gender nonconforming prisoners who are policed and punished because of the threat they pose to the gendered order of the penal system.

The violence of gender policing is psychological, emotional, physical and sexual. Transgender and gender nonconforming people are commonly assigned to a juvenile hall, prison or jail based on their genitalia.¹⁰⁷ As such, their self-definitions and lived experiences of gender are ignored in favor of a classification based on one component of their biology. The misalignment between a transgender prisoner's self-identity and appearance, and their government classification is frequently used by guards and other prisoners as a basis for psychological abuse.¹⁰⁸ Such

105. I use "trans" in parentheses to indicate that the primary focus of the gender violence experienced by gender nonconforming individuals relates to their transgression of gender norms.

106. See RUSSELL DOBASH ET AL., *The Imprisonment of Women PASSIM* (1986); Adrian Howe, *Punish and Critique: Towards a Feminist Analysis of Penalty passim* (1994); Karlene Faith, *Unruly Women: The Politics of Confinement and Resistance* (1993).

107. Christine Peek, *Breaking Out of the Prison Hierarchy: Transgender Prisoners, Rape and the Eighth Amendment*, 44 SANTA CLARA L. REV. 1211, 1212 (2004).

108. Lee, *supra* note 33 at 9.

abuse can manifest itself in numerous ways, for example, by calling a transgender woman “he” or “Sir”, or denying her access to hormones, cosmetics and appropriate clothing central to her sense of selfhood.

Assignment by genitalia rather than self-identity is particularly devastating for transsexual prisoners. Since many transsexuals do not chose or cannot afford “bottom surgery,” prisoners who may have had hormone treatment and “top surgery” (to remove or construct breasts) will be assigned to an institution according to a gender assignment based on one part of their body, that does not comport with their physical and emotional experience. This means that a prisoner who lives and works as a woman, and is known by friends and family as a woman, will be placed in a men’s prison. For example, Dee Farmer, a transsexual woman who wore women’s clothing, took estrogen, and had silicon breast implants, was assigned to a penitentiary with male prisoners because she had male genitalia.¹⁰⁹ After being transferred to the general population, Farmer was raped at knife-point.¹¹⁰ Yolanda Gonzalez, a participant at the Transforming Justice conference shared this experience:

Being a transgender woman with fully developed breasts upon entering prison, proved to be a nightmare for me. While I was still in the orientation, I had a Facility Captain . . . tell me that I was not going to be allowed onto the general population mainline due to my having breasts. And that due to feminine appearance, I would be in extreme danger of sexual attack, and/or being raped by other prisoners. Just my presence in the general population would jeopardize the safety and security of the prison.¹¹¹

Studies of rape in men’s prisons indicate that the creation of an environment of hypermasculine control and dominance contrib-

109. Farmer made an Eighth Amendment claim that her treatment constituted cruel and unusual punishment. *Farmer v. Brennan*, 511 U.S. 825 (1994)(rejecting Farmer’s claim and holding that “a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety.”) *Id.* at 837. *Farmer*, therefore, does not protect prisoners from placement based on genital sex, despite the documented connection between assignment to male prisons and rape of transgender women. *See also* Peek, *supra* note 107, at 1232-34.

110. *Farmer*, 511 U.S. at 825.

111. Letter from Yolanda Gonzalez to Transforming Justice Conference Attendees (Oct. 13, 2007), in *ENDING THE CRIMINALIZATION & IMPRISONMENT OF TRANSGENDER & GENDER NON-CONFORMING PEOPLE PROGRAM BOOK 8* (2007) <http://www.transformingjustice.org/100907.tjprogrambook.pdf> .

utes to the high rates of sexual assault against feminine, young and new prisoners.¹¹² The assignment of transgender women prisoners with female physical characteristics to male prisons makes them extremely vulnerable to sexual assault.¹¹³ In addition, practices like denying appropriate clothing such as bras in men's prisons adds to the sexual objectification of transgender prisoners.¹¹⁴

Rape and sexual exploitation are often overlooked or even encouraged by guards, who provide access and impunity as a means of controlling social hierarchies and maintaining order.¹¹⁵ Alexis Giraldo, a transgender woman, experienced "horrific sexual abuse" at the hands of her cellmates in Folsom State Prison.¹¹⁶ At the request of a prisoner employed as a lieutenant's clerk, she was assigned as his cellmate. He immediately began to harass, rape, and threaten her on a daily basis. Despite asking to be moved to another cell, she was kept in the same cell. Another prisoner, a friend of her rapist, was also moved to the cell at his request. This second cellmate also began to rape her daily.¹¹⁷ Giraldo filed action against the California Department of Corrections and Rehabilitation (CDCR) "challeng[ing] prison policies that place transgender inmates, such as [plaintiff], who have the physical appearance of women, in the male inmate population without any meaningful precaution to the obvious risk of sexual assault to them."¹¹⁸ Despite the litany of violence, the California Superior Court dismissed Giraldo's negligence claim against CDCR, finding that the "special relationship" necessary for such a claim was lacking.¹¹⁹ However the First District Court of Appeal overruled this finding, stating: "Prisoners are vulnera-

112. See generally PRISON MASCULINITIES (Don Sabo et al. eds., 2001).

113. See Valerie Jenness et al., Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault, 3 (2007), http://ucicorrections.seweb.uci.edu/pdf/FINAL_PREA_REPORT.pdf. A study of sexual assault in six California prisons found that 59% of transgender prisoners had experienced sexual assault while incarcerated compared to approximately 4% of all prisoners. Id.

114. See Christopher Daley, Dir. Transgender Law Ctr., Testimony Before the National Prison Rape Elimination Commission, 4 (Aug. 15, 2005), <http://transgenderlawcenter.org/pdf/prisonrape.pdf>

115. Alexander Lee, *Prickly Coalitions: Moving Prison Abolition Forward*, in ABOLITION NOW! TEN YEARS OF STRUGGLE AND STRATEGY AGAINST THE PRISON INDUSTRIAL COMPLEX 109, 109 (CR10 Publications Collective ed., 2008).

116. *Giraldo v. Cal. Dep't of Corr. & Rehab.*, 168 Cal. App. 4th 231, 238 (Cal. Ct. App. 2008).

117. Id. at 238-39.

118. Id. at 237.

119. Id. at 250.

ble. And dependent. Moreover, the relationship between them is protective by nature, such that the jailer has control over the prisoner, who is deprived of the normal opportunity to protect himself from harm inflicted by others.”¹²⁰ While this ruling opens the door to lawsuits by survivors of prison rape, the dangers and emotional burden of filing a formal complaint are likely to dissuade many survivors who are living with the trauma of serial sexual assault in the context of institutionalized complicity.¹²¹

In addition to this initial victimization, transgender prisoners experience secondary victimization when their reports of abuse are ignored or disbelieved. In another testimony from Transforming Justice, Nikkas described what happened when she reported multiple violent sexual assaults:

The officer went and told R. that I had reported him. R. assaulted and raped me the next day. . . I didn't report the incidents again because a correctional staff member told me that if I filed a formal report, I would be sent to Administrative Segregation (the “hole”) automatically and there would have to be an investigation for making “false allegations.”¹²²

The lack of protection by guards forces some transgender women to trade sexual services with prison gangs or other prisoners in return for protection.¹²³ In this way, rape and protection from rape becomes racialized. For example, a transgender Latina may be protected from rape by white or African American prisoners, but only in return for providing sexual services to Latino gangmembers.¹²⁴

Sexual violence against transgender prisoners is not limited to sexual assault by other prisoners. The Transgender Law Center describes the continuum of sexual violence in prison as follows: “rape, coercion, unnecessary strip searches and forced nudity, and harassment.”¹²⁵ In this sense, sexual assaults by other prisoners occur within an environment of objectification and dehumanization generated by the institutionalized sexual violence of the prison regime itself. Strip-searching can be described as an act of state sexual violence as well as a precursor to sexual as-

120. *Id.* at 250.

121. Peek, *supra* note 107, at 1244.

122. Letter from Nikkas Alamillo-Luchese to Transforming Justice Conference Attendees (Oct. 13, 2007), in *ENDING THE CRIMINALIZATION & IMPRISONMENT OF TRANSGENDER & GENDER NON-CONFORMING PEOPLE PROGRAM BOOK*, *supra* note 111 at 13.

123. See Daley, Transgender Law Ctr., *supra* note 114, at 7.

124. *Id.*

125. *Id.* at 1.

sault. For example, the Transgender Law Center reported that transmen are particularly targeted for strip searches, "conducted by deputies and medical personnel for no reason other than to seemingly satisfy curiosity."¹²⁶ Where gender expression and biological sex do not align in predictable ways, strip searches, particularly those performed in front of other prisoners or guards are likely to expose transgender individuals to humiliation, ridicule and sexual harassment.¹²⁷ Courts have recognized the right of prisoners to be free from unnecessary searches or exposure of their naked bodies, particularly by guards of the opposite sex.¹²⁸ However, the failure to place transgender individuals in prisons and jails that align with their gender identity means that they are particularly vulnerable to cross-gender searches. Strip searches of a transgender woman performed by male staff can act as a form of sexual objectification and titillation. In this context, fascination with the transgender body combines with racialized sexual objectification to further objectify transgender women of color.¹²⁹ As Alexander Lee, founder and former legal director of the Transgender, Gender Variant and Intersex Justice Project argues, "The fact that the overwhelming majority of the overwhelming majority of correctional officers who mistreat TGI prisoners are white men while many of the TGI prisoners they prey on are of color. . . strongly suggests that sexism and racism, as well as homophobia and transphobia, motivate these abuses."¹³⁰ The subjection of transgender prisoners to this racialized pornographic gaze by male correctional staff is evident in the case of a transgender woman of color who was forced to perform sex shows for the Sheriff's Deputy at the San Francisco County Jail.¹³¹

The presence of transgender prisoners has the potential to expose and disrupt the gender binary system upon which penal regimes are premised and thus poses a threat to the gendered

126. *Id.* at 7.

127. *Id.*

128. Lisa Krim, A Reasonable Woman's Version of Cruel and Unusual Punishment: Cross-Gender Clothed-Body Searches of Women Prisoners, 6 UCLA WOMEN'S L.J. 85, n.2 (1995).

129. In this sense, the abuse of transgender women of color has much in common with sex tourism, in which "othered" black and brown women are constructed by white Western males as exotic, available, untamed and "hot for it." See KAMALA KEMPADOO, SEXING THE CARIBBEAN: GENDER, RACE, AND SEXUAL LABOR 121-27 (2004).

130. Lee, *supra* note 33, at 10.

131. Daley, Transgender Law Ctr., *supra* note 114, at 7.

“order” of penal regimes.¹³² Treating their victimization, or potential victimization, as an indication of disorder rooted in the presence of the transgender person, masks the reality that the human rights violations suffered by transgender individuals are rooted in the violence of the gender binary system and a devaluation of those who do not conform to it. Having identified transgender prisoners as a both an at-risk population and a problem to the smooth functioning of the prison, administrators see removing the prisoner from the general population as the solution.¹³³ As a result, transgender prisoners are often placed in “protective” housing. This may be a cell block or unit reserved for those considered vulnerable to abuse, such as a gay/transgender unit or it may take the form of administrative segregation¹³⁴. Colloquially named “ad-seg” or the “hole,” administrative segregation is also where prisoners viewed as disruptive or violent are sent for punishment and stricter supervision. Transgender prisoners locked in administrative segregation or special units are denied many of the privileges available to other prisoners, including access to work, recreation, education and association with others.¹³⁵ Segregation is thus experienced by transgender prisoners as another form of punishment for gender non-conformity.

For transgender people, 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. Once released, transgender people face a continuation of the cycle of exclusion and social marginalization.

VI. POST-INCARCERATION SENTENCES

The third stage of the racialized (trans)gender entrapment experienced by transgender and gender nonconforming prisoners begins on their release from custody. Reflecting on the consequences of a two-year sentence, Bakari stated:

I had no idea at the time of my arrest the legal ramifications, what it was going to do to my life, ‘til today July 14, 2007 what it does to my life in terms of employability, credibility in some places. I had to say it to my current employer. . . You have a

132. Lee, *supra* note 33, at 12.

133. Lee, *supra* note 33, at 11-12.

134. Edney, *supra* note 39, at 333.

135. Lee, *supra* note 33 at 11.

right to look at my file. . . My current employer is looking at ways to look into employees and make them get a Livescan, that was not a requirement when I got hired, where you give your fingerprints and they can see whatever you did all over the world, whatever your file says. I think about that.¹³⁶

The huge increase in the imprisoned population in the past three decades has created vast challenges relating to re-entry for the approximately 600,000-700,000 people who return to their communities from prison each year.¹³⁷ Despite federal efforts to improve re-entry prospects,¹³⁸ the difficulties facing former prisoners continue to be exacerbated by what have been named “collateral consequences” or “post-incarceration sentences.”¹³⁹ These “sentences” are actually additional sanctions imposed on former prisoners, particularly those with drug convictions, following their release.¹⁴⁰ Post-incarceration sentences may deny former prisoners access to welfare, housing, educational grants, employment and voting. For example, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996—also known as the Welfare Reform Act of 1996—imposes a lifetime ban on receiving cash assistance and food stamps on persons convicted of a felony involving the possession, use or sale of drugs.¹⁴¹ The provision of the act continued the federal government’s misguided emphasis on the use of criminal justice sanctions—rather than treatment and support services—as the primary means to tackle drug abuse and addiction.¹⁴² A report by the Sentencing Project found that, as of 2002, 92,000 women, including a dispro-

136. Interview with Bakari, *supra* note 5.

137. William J. Sabol & Heather Couture, Department of Justice, *Prison Inmates at Midyear 2007*, BUREAU OF JUSTICE STATISTICS BULLETIN, June 2008, at 4, <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim07.pdf>. In 2006, 713,473 people were released from state and federal prisons. From 2000-2005, over 600,00 were released each year, *id.*

138. On April 9 2008, President Bush signed into law The Second Chance Act of 2007, which provides educational, literacy, vocational and substance abuse treatment opportunities in prisons, jails and juvenile facilities, as well as enhanced supervision and support on release. Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (codified as amended at 42 U.S.C.A. § 17501).

139. Patricia Allard, The Sentencing Project, *Life Sentences: Denying Welfare Benefits to Women Convicted of Drug Offenses 27* (2002), http://www.sentencingproject.org/doc/publications/women_lifesentences.pdf.

140. Robin Levi & Judith Appel, Drug Policy Alliance, *Collateral Consequences: Denial of Basic Social Services Based Upon Drug Use passim* (2003), http://drugpolicy.org/docUploads/Postincarceration_abuses_memo.pdf.

141. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended at 21 U.S.C.A. § 862a).

142. ALLARD, *supra* note 139, at 25.

portionate number of African American women and Latinas, had been denied access to transitional income assistance as a result of the act.¹⁴³ Many of these women were severely impacted by the ban as they struggled to rebuild their lives, recover from trauma and addiction, and house and feed themselves and their children after release.¹⁴⁴

While the study did not address their specific experiences, transgender people are at particular risk for substance abuse and its related consequences. Researchers have documented that drug use can be a coping mechanism to deal with emotional stress linked to the sexual assault and social stigmatization experienced by transgender people.¹⁴⁵ In addition, the greater exposure to policing faced by transgender people of color and those who are street-involved, heightens the likelihood of apprehension.¹⁴⁶ Having served a sentence for a drug related offense, a transgender person returns to the community with few resources and no access to governmental financial support, thus enhancing the possibility of relapse and further contact with the criminal justice system.¹⁴⁷ In this way, the lifetime welfare ban perpetuates the cycle of poverty, marginalization and criminalization.

A second key post-incarceration sentence is imposed by the “one-strike” initiative in public housing.¹⁴⁸ Announced by President Bill Clinton in 1996, the measure aimed to send a message “to drug dealers and to gangs: if you break the law, you no longer have a home in public housing, ‘one strike and you’re out.’”¹⁴⁹ The act empowers local public housing authorities to examine criminal records and drug treatment records in screening applicants, and to terminate a resident’s tenancy for any criminal activity that threatens “the health, safety or right to peaceful enjoyment of the premises by other residents” or illegal drug use

143. *Id.* at 1.

144. *Id.* at 1-2.

145. Douglas Bruce et al., Stigmatization, Substance Use, and Sexual Risk Behavior Among Latino Gay and Bisexual Men and Transgender Persons, 38 J. DRUG ISSUES 235 passim (2008).

146. Sylvia Rivera Law Project, *It’s War in Here: A Report on the Treatment of Transgender and Intersex People in New York State’s Men’s Prisons* 15 (2007), <http://srp.org/files/warinhere.pdf>.

147. ALLARD, *supra* note 139, at 21-26.

148. Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, 110 Stat. 834 (codified as amended at 42 U.S.C.A. § 1437d).

149. President’s Remarks Announcing the ‘One Strike and You’re Out’ Initiative in Public Housing, 32(13) WEEKLY COMP. PRES. DOC. 582 (March 28, 1996).

or alcohol abuse on or near the premises.¹⁵⁰ Critics of the act argue that it has been interpreted too broadly, in ways that penalize innocent residents for the actions of others, leading, for example, to evictions of elderly tenants as a result of drug use by an adult child in or near the home without the parent's consent.¹⁵¹ For transgender individuals, exclusion from public housing can be particularly detrimental because of discrimination in the private housing market. Transgender people of color are more at risk of housing exclusion because of the intersections of race and class that lead to greater targeting in the war on drugs, higher reliance on public housing and lower incomes resulting in fewer housing options.¹⁵² Without safe and affordable housing, it is harder for formerly incarcerated individuals to stay clean and find work, which may lead to a return to the coping mechanisms that initially led to conflict with the law.¹⁵³

In conclusion, transgender individuals who come into conflict with the law experience a cycle of racialized gender policing, marginalization, and discrimination that begins in early childhood. This racialized (trans)gender entrapment often propels transgender people, in particular low income people of color, to "choose" survival strategies that lead to criminalization and imprisonment. Once in prison or jail, these individuals experience violent forms of institutionally sanctioned gender policing and violence. Once released, the cycle continues as "tough-on-crime" policies combine with traditional employment practices to reinforce social and economic marginality. The stigma of a criminal record interacts with existing social stigmas related to race, class and gender non-conformity to further sediment social exclusion and limit the range of available options. Returning to the question I posed earlier, I now turn to a discussion of what it would take for feminist scholars to "think with rather than against" transgender individuals who have experienced this cycle of racialized gender policing, imprisonment and violence.

150. Housing Opportunity Program Extension Act, *supra* note 148, at 838.

151. Adam P. Hellegers, Reforming HUD's "One-Strike" Public Housing Evictions Through Tenant Participation, 90 J. CRIM. L. & CRIMINOLOGY, 323, 339-43 (1999).

152. ALLARD, *supra* note 139, at 11-19; MARC MAUER, THE SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS 4 (2009), http://www.sentencingproject.org/doc/dp_raceanddrugs.pdf; William Carter et al., *Polarisation, Public Housing and Racial Minorities in U.S. Cities*, 35 URBAN STUDIES 1889 (1998).

153. ALLARD, *supra* note 139, at 12.

VII. RETHINKING FEMINIST RESPONSES TO
GENDER VIOLENCE

This article has demonstrated that a substantive engagement with the challenges posed by transgender identities and experiences can transform feminist praxis in productive ways. Transgender identities are not, as premised by VRR, a third sex that can be neatly added alongside normative gender categories without fundamentally altering the existing formulation. Instead, they call into question the borders that differentiate male from female and make visible the demanding work of policing those boundaries, therefore troubling the meanings that underpin everyday social, political and legal practices. The disruptive potential of transgender identities is threatening to both the dominant social order, which is premised on a rigid and hierarchical racial/gender categorization system, and oppositional social movements that have created collective identities based on normative notions of coherently sexed, gendered and racialized bodies. For this reason, transgender individuals have been subjected to systemic and pervasive interventions, which aim to eliminate the challenges posed by gender non-conformity through policing, exclusion and violence.

In the context of the prison system, transgender people, and in particular transgender people of color, are vulnerable to a continuum of sexual violence that includes objectification and humiliation, verbal and physical abuse, sexual coercion and violent rape. The extreme forms of sexual violence experienced by transgender prisoners challenge feminist assumptions about patriarchal violence that implicitly equate male genitalia with male privilege and power. While VRR and Michigan Womyn's Festival both seek to base their feminist solidarities on the category of "woman born women," a political subject born and living free of male genitalia, the experiences of transgender prisoners reveal that gender oppression and violence is not limited to "woman born women." Instead, transgender women are forcibly placed in a location where they are likely to experience horrific sexual violence precisely because of their male genitalia, and where they are victimized because their female characteristics do not match their sex assignment as male. Similarly, transmen are subjected to violence because their masculinity is out of place in the context of the women's prison to which they have been assigned. These gender-bending experiences invite us to rethink our understandings of sexual violence, and to embrace new solidarities with gen-

der-oppressed political subjects who do not fit neatly into binary notions of male violence and female victimization.

This article seeks to model a new antiracist genderqueer framework for feminist research on prisons. This framework has five components. First, building on the work of feminists of color, it expands our intersectional lens to include gender identity and expression. This does not simply mean adding gender identity to the “shopping list” of oppressions. Rather, it means a rigorous theoretical interrogation of the ways that gender policing and the punishment of gender non-conformity structure racialized and class-based experiences of imprisonment.

Second, it recognizes the gender complexity and fluidity of human beings warehoused in prisons. Rather than adopting an unquestioning stance toward state-generated gender categorizations, researchers should adopt a gender self-determination model. This would require us to question how people in prison self-identify, rather than assuming that we can determine the person's gender from the prison in which they are incarcerated.

Third, and relatedly, it acknowledges the existence of female masculinity and gender non-conformity in women's prisons. Shifting our language, following CCWP, from “women in prison” to “people in women's prisons” is a starting point, but it is certainly not enough. More research is needed to document the experiences of gender nonconforming prisoners in women's prisons and to counter violence and policing on the basis of racialized gender identities.

Fourth, it pushes us to adopt a more expansive conceptualization of womanhood. If, as demonstrated in the testimonies in this essay, femininity does not depend on genitalia at birth or in present moment, then our solidarities with women prisoners would need to reach beyond the women's prison. By including the experiences of transwomen in our analyses of women in prison, we expand our understanding of the role of the criminal justice system in policing gender roles for all women. Our research can also serve to promote alliances and heal the wounds between feminist and transgender movements, by demonstrating that imprisoned trans- and “born” women share an interest in and commitment to gender justice and antiviolence work.

Finally, this research agenda is informed by the subordinated knowledge of transgender and gender nonconforming communities and anti-prison activists. This means learning from and working with organizations like CCWP that have shifted to-

ward a transgender solidarity model, as well as giving voice to the lived experiences of transgender prisoners. In this way, we can work toward feminist research that is “on the side of” all survivors of state-sanctioned gender violence.

