

# MARRIAGE AND MASS INCARCERATION

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In considering marriage litigation, it is critical to consider its impact on the most vulnerable members of LGBT communities and on other marginalized communities. My skepticism about the struggle for “same-sex”<sup>1</sup> marriage is grounded in my work against criminalization and imprisonment, particularly as they affect transgender people of color.

The United States incarcerates more people per capita than any other country in the world.<sup>2</sup> California, the seat of the controversy leading to *Perry v. Brown*,<sup>3</sup> held more people in prison than any other state in the country until recently.<sup>4</sup> We do not know how many trans people are in prisons and jails, but we know that the number is high. A San Francisco study found that 65% of trans women and 29% of trans men had a history of incarceration.<sup>5</sup> A national study found that 16% of trans people had a history of incarceration; while a lower rate than the San Francisco study, this percentage is still much higher than the overall rate of incarceration in the United States.<sup>6</sup>

Conditions of confinement for all prisoners are violent and at times deadly.<sup>7</sup> Conditions for incarcerated trans people, especially trans people of color, are

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1. The term “same-sex” is inherently limiting because it assumes a gender binary. This term, therefore, does not encompass the realities of trans people whose gender identity does not fit within a binary or is considered invalid by government agencies or courts. For example, even heterosexual marriages involving one or more trans person may be considered “same-sex” by the government. *See, e.g., B v. B*, 78 Misc. 2d 112, 118 (N.Y. Sup. Ct. 1974) (holding that a trans man’s marriage to a non-trans woman was invalid because he could not “function as a man for purposes of procreation”).

2. HUMAN RIGHTS WATCH, *World Report 2012: United States*, <http://www.hrw.org/world-report-2012/world-report-2012-united-states>.

3. *Perry v. Brown*, 671 F.3d 1052, 1078 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

4. Don Thompson, *California’s Prison Population Eclipsed By Texas*, HUFFINGTON POST (Jun. 13, 2012), [http://www.huffingtonpost.com/2012/06/13/california-prison-population\\_n\\_1594926.html](http://www.huffingtonpost.com/2012/06/13/california-prison-population_n_1594926.html).

5. San Francisco Department of Public Health, *The Transgender Community Health Project* (Feb. 18, 1999), *available at* <http://hivinsite.ucsf.edu/InSite?page=cftg-02-02>.

6. By contrast, 2.7% of the general American population is imprisoned at some point in life. JAIME M. GRANT, LISA A. MOTTET & JUSTIN TANIS, *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY* 163 (2011), *available at* [http://www.thetaskforce.org/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf).

7. Kent Imai, *Analysis of Year 2009 Inmate Death Reviews—California Prison Health Care System* (Sept. 2010), [http://www.cphcs.ca.gov/docs/resources/OTRES\\_DeathReviewAnalysisYear2009\\_20100907.pdf](http://www.cphcs.ca.gov/docs/resources/OTRES_DeathReviewAnalysisYear2009_20100907.pdf) (reviewing deaths in custody from 2009, including deaths from suicide, homicide, drug overdose, and preventable disease).

particularly damaging and dangerous.<sup>8</sup> Most trans women (59%) in California men's prisons have been sexually assaulted.<sup>9</sup> Some people in California women's prisons, including African-American trans men, have been subjected to nonconsensual sterilization.<sup>10</sup>

At worst, marriage can aggravate mass-incarceration. Reinforcing the dignity attached to one particular form of state-sanctioned, normative relationship may further the marginalization and criminalization of those people who continue to fall outside of those norms, including many low-income trans people of color. At best, marriage is a diversion of resources desperately needed elsewhere. While marriage may have some marginal benefits for those incarcerated trans people who seek to marry legally and who do not encounter other impediments<sup>11</sup> to doing so, it will not address the greatest threats to their survival, self-determination, life chances, and dignity. The focus of those seeking gender and sexual justice should not be on expanding the definition of marriage, but on ending the privileging of certain types of relationships over others and addressing issues identified as priorities by communities experiencing intersections<sup>12</sup> of oppression.

Marriage is a privileged status, as the holding in the Ninth Circuit's *Perry v. Brown* decision reinforces. If marriage "is the principal manner in which the State attaches respect and dignity to the highest form of a committed relationship and to the individuals who have entered into it,"<sup>13</sup> then it follows that other

8. See GRANT, MOTTET & TANIS, *supra* note 6, at 166–68 (describing the harassment and assault of trans prisoners at the hands of corrections officers and other prisoners).

9. VALERIE JENNESS, CHERYL MAXSON, KRISTY MATSUDA & JENNIFER MACY SUMNER, VIOLENCE IN CORRECTIONAL FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT 31 (2007), available at [http://ucicorrections.seweb.uci.edu/pdf/FINAL\\_PREA\\_REPORT.pdf](http://ucicorrections.seweb.uci.edu/pdf/FINAL_PREA_REPORT.pdf).

10. Human Rights Program at Justice Now, *Prisons As A Tool of Reproductive Oppression*, 5 STAN. J. C.R. & C.L. 309, 322 (2009) (describing the experiences of trans prisoners being sterilized or having hysterectomies performed in response to supposed medical problems that could have been treated with less severe measures).

11. Many prison systems do not allow people who are both incarcerated to marry, even if heterosexual. See, e.g., N.Y. Dep't of Corr. Serv., Directive No. 4201, Marriages During Confinement (June 2008), available at <http://www.doccs.ny.gov/Directives/4201.pdf>. Frequently the benefits that can accrue to marriage only apply if one spouse is significantly more privileged than the other. For example, an unemployed or underemployed spouse might be able to obtain health insurance through marriage to an employed and insured spouse, but not through marriage to another unemployed or underemployed person. An undocumented immigrant might be able to obtain immigration status in the US through marriage to a US citizen or lawful permanent resident, but not to another undocumented immigrant. See Marlon M. Bailey, Priya Kandaswamy & Mattie Udora Richardson, *Is Gay Marriage Racist?*, in THAT'S REVOLTING: QUEER STRATEGIES FOR RESISTING ASSIMILATION 163, 167–68 (Mattilda Bernstein Sycamore ed., 2008); DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 24 (2011).

12. For a foundational work on intersectionality, see generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

13. *Perry v. Brown*, 671 F.3d 1052, 1079 (9th Cir. 2012), cert. granted sub nom. *Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

relationships and the people in them are “lower” and thus less deserving of respect and dignity. If the importance of marriage is emphasized and its scope expanded to encompass some gays and lesbians, then condemnation of other arrangements for one’s sexual, reproductive, affectionate, family, and economic relations might be strengthened. The privilege our society grants to marital relationships does not and will not encompass expanded kinship networks, the house and ball community,<sup>14</sup> poor Black single mothers, sex workers, and any number of others.<sup>15</sup>

In a somewhat mystifying barrage of sexist wit from white male cultural greats apparently intended to prove the dignified status of marriage, the Ninth Circuit quotes Groucho Marx saying, “Marriage is a wonderful institution . . . but who wants to live in an institution?”<sup>16</sup> Marriage has never been a neutral factor in the operation of legal systems leading to literal institutionalization.

The condemnation of extramarital sexuality and the protection provided to those in traditional heterosexual marriages have a long history. White women were prosecuted for fornication if they had sex outside of marriage.<sup>17</sup> White men were free to beat and rape their wives, but could be held criminally responsible if they beat or raped white women to whom they were not married.<sup>18</sup> After slavery, African-American people had to register their marriages with the state to avoid prosecution.<sup>19</sup> Courts and other agencies have also been less inclined to harshly punish people in state-sanctioned marriages. A study of California prisoners in 1967 noted:

[P]risoners as a group tend to be quite different from the general population with respect to their marital status. They are more likely to be single or to have disrupted marriages . . . . It is interesting to note that a number of studies indicate that marital status itself plays a role in the screening process . . . . [T]he

14. Jonathan, *Maryland's Marriage Equality, The Ballroom Scene, & Legends* (Mar. 2, 2012), <http://www.blackyouthproject.com/2012/03/maryland%E2%80%99s-marriage-equality-the-ballroom-scene-legends/>.

15. See Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 143, 151 (1992) (discussing the hierarchical value system attached to sex acts in Western society, with “marital, reproductive heterosexuals” valued the most highly, and noting that the “most despised sexual castes currently include transsexuals, transvestites, fetishists, sadomasochists, sex workers such as prostitutes and porn models, and the lowliest of all, those whose eroticism transgresses generational boundaries”).

16. *Perry v. Brown*, 671 F.3d at 1078. The court also quotes William Shakespeare and Frank Sinatra on the miseries of marriage for men. *Id.*

17. See RICKIE SOLINGER, PREGNANCY AND POWER: A SHORT HISTORY OF REPRODUCTIVE POLITICS IN AMERICA 27–62 (2005); Vernetta D. Young & Zoe Spencer, *Multiple Jeopardy: The Impact of Race, Gender, and Slavery on the Punishment of Women in Antebellum America*, in RACE, GENDER, & PUNISHMENT 65, 67 (Mary Bosworth & Jeanne Flavin eds., 2007).

18. Reva B. Siegel, “*The Rule of Love*”: *Wife Beating As Prerogative and Privacy*, 105 YALE L.J. 2117, 2118–20 (1996).

19. Katherine M. Franke, *Becoming A Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251, 278 (1999).

recommendations of probation agencies and the dispositions of the courts tend to result in the placement of married offenders on probation and the commitment of unmarried offenders to prison.<sup>20</sup>

Some sexual relations outside of marriage are still punished, while matrimony confers benefits and insulates many people from prosecutions to which they might otherwise be subject. Marriage can help mitigate the criminal liability of men who kill an unfaithful wife and/or her lover.<sup>21</sup> Spousal privilege can decrease the extent to which the testimony of a married person's spouse can be used against them.<sup>22</sup> According to the Department of Justice, people sentenced to death in 2005 were unlikely to be married.<sup>23</sup> Combinations of economic and sexual exchange outside of marriage as well as other non-marital expressions of sexuality have been criminally punished in evolving—but never disappearing—ways over the course of time.<sup>24</sup> People of color, women, and gender nonconforming people have tended to be the targets of these forms of policing and punishment.<sup>25</sup>

The legal theories on which *Perry* relies have not only not helped criminalized trans people,<sup>26</sup> but also have been used to support government

20. NORMAN HOLT & DONALD MILLER, *EXPLORATIONS IN INMATE-FAMILY RELATIONS* (1972), available at <http://www.fcnetwork.org/reading/holt-miller/holt-miller2.html>.

21. See Deborah E. Milgate, *The Flame Flickers, but Burns on: Modern Judicial Application of the Ancient Heat of Passion Defense*, 51 *RUTGERS L. REV.* 193, 194 (1998).

22. See Milton C. Regan, Jr., *Spousal Privilege and the Meanings of Marriage*, 81 *VA. L. REV.* 2045, 2049 (1995).

23. TRACY SNELL, *CAPITAL PUNISHMENT*, 2005 6 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cp05.pdf> (last revised Jan. 30, 2007). More recent statistics on capital punishment from the DOJ did not address marriage.

24. See, e.g., Ann M. Lucas, *Race, Class, Gender, and Deviancy: The Criminalization of Prostitution*, 10 *BERKELEY WOMEN'S L.J.* 47, 50 (1995).

25. See PATRICIA COLLINS, *BLACK FEMINIST THOUGHT* 145 (2000) (discussing the relationship between race, gender, and sexual nonconformity from a European and American historical perspective, and how black women came to be linked with prostitution and sexual deviance and white women with the image of the pure virgin).

26. *Perry* has not been cited in any case brought by trans or gender nonconforming people incarcerated in California. *Clinton v. De La Cruz*, CV 08-4181, 2012 WL 1247142 (C.D. Cal. Mar. 7, 2012) report and recommendation adopted, CV 08-4181, 2012 WL 1246584 (C.D. Cal. Apr. 11, 2012) (denying motion to dismiss gender nonconforming prisoner's failure to protect claim); *Stevens v. Cate*, 2:12-CV-0239, 2012 WL 3962490 (E.D. Cal. Sept. 10, 2012) (dismissing trans prisoner's claim concerning access to gender affirming surgery); *Nailing v. Fosterer*, CIV S-09-2475, 2012 WL 1130655 (E.D. Cal. Mar. 2, 2012) report and recommendation adopted, 2:09-CV-02475, 2012 WL 1130653 (E.D. Cal. Mar. 29, 2012) (denying in part and granting in part motions to dismiss gender nonconforming prisoner of color's claims concerning failure to protect and denial of medical care for injuries); *Williams v. Bal*, 2:12-CV-1005, 2012 WL 2065051 (E.D. Cal. June 7, 2012) (dismissing trans person's claim concerning imminent physical harm); *Murillo v. Parkinson*, CV 11-10131, 2012 WL 469831 (C.D. Cal. Feb. 13, 2012) (dismissing with leave to amend prisoner's claim that guards beat her for being trans); *Jamison v. Davue*, CIV S-11-2056, 2012 WL 996383 (E.D. Cal. Mar. 23, 2012) (dismissing complaint of transgender Jewish prisoner about access to Kosher meals and gender-based harassment); *Brninburg v. Coalinga State Hosp.*, 1:08-CV-01457, 2012 WL 3911910 (E.D. Cal. Sept. 7, 2012) (granting summary judgment against

positions against criminalized people. One quarter of the cases that cite *Perry* so far are cases that involve some aspect of the criminal legal system. In each of these cases, *Perry* was used to support a ruling in favor of the government against the criminal defendant or prisoner.<sup>27</sup>

One of these cases brings into relief the limits of dignity around sexuality in a post-*Perry* world. In *Alexander v. California*, an imprisoned man brought a free speech and equal protection claim when the prison prohibited him from having sexually explicit heterosexual materials (pornographic magazines such as *Playboy*) he had previously enjoyed.<sup>28</sup> In rejecting his claim, the court cited *Perry*.<sup>29</sup>

Some sexuality that is heterosexual is nonetheless not heteronormative.<sup>30</sup> The sexuality of low-income people of color in particular is often stigmatized and used to further incarceration and control.<sup>31</sup> Condemnation of supposedly morally corrupt non-marital family and reproductive practices among communities of color has been used not only to create changes (e.g. welfare reform)<sup>32</sup> that push more people to survival crimes,<sup>33</sup> but also to justify

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HIV-positive transgender woman in maximum security psychiatric facility claiming failure to protect); *Williams v. Rodriguez*, 1:09-CV-01882, 2012 WL 2339742 (E.D. Cal. June 19, 2012) report and recommendation adopted, 1:09-CV-01882, 2012 WL 4026179 (E.D. Cal. Sept. 11, 2012) (dismissing most claims of transgender prisoner concerning retaliation, denial of medical care, and harassment); *Toth v. Schwarzenegger*, 1:11-CV-247, 2012 WL 3778869 (E.D. Cal. Aug. 31, 2012) (dismissing claim of transgender prisoner about “humiliation, unnecessary force, segregation placement, false reports, seizures, loss of property, cell searches, and assaults by other inmates”).

27. *Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 934 (8th Cir. 2012) (relying on *Perry* in ruling that a man did not have standing to sue the manufacturer of a faulty drug test that led to his incarceration for an alleged parole violation); *Miles v. Ryan*, 10-99016, 2012 WL 4465606, at \*1 (9th Cir. Sept. 28, 2012) (relying on *Perry* in rejecting motion for recusal of a judge in a capital case); *Adams v. Albertson*, C-10-4787, 2012 WL 1224892, at \*1 (N.D. Cal. Apr. 11, 2012) (relying on in rejecting motion to disqualify judge in case arising from alleged violations of civil rights subsequent to the plaintiff’s arrest).

28. *Alexander v. California Dept. of Corr.*, 2:08-CV-2773, 2012 WL 458432 (E.D. Cal. Feb. 10, 2012).

29. The plaintiff’s equal protection claim asserted that gay men in the prison could see naked men, so as a straight man he ought to be able to see naked women. Notably, the court did not apply an anti-subordination principle that would have rejected the “reverse homophobia” argument because straight men are not systematically disempowered in society, but instead relied on a perspective that reduced claims from people of all sexual orientations to mere rational basis review. The court relied on *Perry* for the proposition that sexual orientation is not a suspect classification meriting strict scrutiny. *See id.*

30. For example, the “welfare queen” and “deadbeat dad” archetypes imposed on poor black women and men mark out their sexualities and families as deviant even as they limit visions of black sexuality to the heterosexual (but not heteronormative). Cathy Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?*, 3 GLQ: J. LESBIAN & GAY STUD. 437, 455–56 (1997). *See also* RODERICK A. FERGUSON, *ABERRATIONS IN BLACK: TOWARD A QUEER OF COLOR CRITIQUE* 18 (2004) (discussing non-normative constructions of gender and sexuality as components of racialization).

31. Cohen, *supra* note 30; FERGUSON, *supra* note 30.

32. Welfare reform drastically slashed the availability of benefits to poor people and imposed onerous requirements for accessing those that remain. Politicians, academics, and the media

criminalization (e.g. prosecution of pregnant women for alcohol use).<sup>34</sup> Sodomy in a private home is insulated from prosecution (if the people engaging in it are not doing it for money, are adults, are HIV-negative, etc.).<sup>35</sup> It might even be entitled to state-sanctioned dignity if those two people are married. Masturbation in a prison cell, on the other hand, is still well outside the boundaries of tolerable sexuality.<sup>36</sup>

One further case citing *Perry* is worth noting in this discussion. In *Henderson v. Shinseki*, a man appealed denial of veteran's benefits to his domestic partner and her child. The court affirmed the denial on the basis that a domestic partnership was not the same as marriage under California law, relying on *Perry* to explain the distinction.<sup>37</sup> Marriage and domestic partnership have literally no distinctions between them in California law except for the name.<sup>38</sup> The *Perry* court, however, reasoned that the name itself is a meaningful and significant difference, which allowed the court in *Henderson* to rule that despite the identical legal consequences of marriage and domestic partnership under California law, the two were sufficiently different to justify a denial of benefits to the partner and child of a veteran. This case indicates how expansion of marriage can materially harm alternative family formations.

Denial of benefits, which deepens poverty, can also make people in these

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justified these measures through pathologizing black families and propagating the stereotype of the black "welfare queen." See Tamara K. Nopper, *Beyond the Access Narrative: Marriage Politics, Austerity, Surveillance*, FEMINIST WIRE (May 19, 2012), <http://thefeministwire.com/2012/05/beyond-the-access-narrative-marriage-politics-austerity-surveillance> (describing welfare reform as "push[ing] marriage among poor women as a solvent for poverty and female-headed households" and forcing poor women to become more dependent on men); 42 U.S.C.A. § 601 (West) (including among purposes of the act promotion of marriage, reduction of out-of-wedlock pregnancies, and encouragement of two-parent families); Holloway Sparks, *Queens, Teens, and Model Mothers: Race, Gender, and the Discourse of Welfare Reform*, in RACE AND THE POLITICS OF WELFARE REFORM 171 (Sanford S. Schram, Joe Soss, & Richard S. Fording, eds., 2003) (discussing racism and sexism in debate surrounding welfare reform).

33. Pooja Gehi, *Struggles from the Margins: Anti-Immigrant Legislation and the Impact on Low-Income Transgender People of Color*, 30 WOMEN'S RTS. L. REP. 315, 346 n.31 (2009) (defining survival crimes as "crimes poor people commit so that they can eat, have shelter, attain healthcare, ride public transportation, etc.").

34. See Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALA. L. REV. 999, 1042 (1999).

35. See *Lawrence v. Texas*, 539 U.S. 558 (2003); Gabriel Arkles, Pooja Gehi, & Elana Redfield, *The Role of Lawyers in Trans Liberation: Building A Transformative Movement for Social Change*, 8 SEATTLE J. FOR SOC. JUST. 579, 609 (2010) ("While *Lawrence* ended certain anti-sodomy laws, it resulted in the false impression that the criminal justice system was no longer homophobic.").

36. See REGINA KUNZEL, CRIMINAL INTIMACY: PRISON AND THE UNEVEN HISTORY OF MODERN AMERICAN SEXUALITY 22 (2008) (discussing early preoccupations with masturbation in prisons); Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUM. J. GENDER & L. 185, 186 (2006) (arguing that the government does not have a legitimate interest in suppressing much sexual expression in prison).

37. *Henderson v. Shinseki*, 10-3934, 2012 WL 1948875, at \*1 (Vet. App. May 31, 2012).

38. *Perry v. Brown*, 671 F.3d 1052, 1076 (9th Cir. 2012), cert. granted sub nom. *Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

alternative family formations more vulnerable to criminalization and incarceration. Poor people are incarcerated in numbers disproportionate to their membership in the general population because of police surveillance and profiling of poor people; the creation and enforcement of “quality of life” crimes targeting poor people; the higher likelihood that poor people will need to commit crimes to survive; and the lack of resources poor people have to avoid incarceration.<sup>39</sup>

Thus, while we have yet to find out if and how *Perry* will be applied directly in cases involving incarcerated trans people, we have no reason to believe it would be beneficial. It has already been used to further marginalize those with non-marital relationships or sexual desires. Slight expansion of the charmed circle of marriage abandons all those who remain outside of it.<sup>40</sup>

Even if the marriage agenda were not actively harmful to many of the most marginalized members of LGBT and other communities, it would still be an egregious misallocation of resources. Tens of millions of dollars have gone to

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39. See, e.g., The Nat’l Coalition for the Homeless & The Nat’l Law Ctr. on Homelessness & Poverty, *A Dream Denied: Criminalization of Homelessness in U.S. Cities* 8–9 (2006), available at <http://www.nationalhomeless.org/publications/crimreport/report.pdf> (describing laws that “target homeless persons by making it illegal to perform life sustaining activities in public”); David C. Leven, *Curing America’s Addiction to Prisons*, 20 FORDHAM URB. L.J. 641, 645–46 (1993) (describing over-incarceration of poor people); Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 519 (2009) (noting that most people in jail are pre-trial detainees too poor to pay bail).

40. See Sally Kohn, *Prop 8: Let’s Get Rid of Marriage Instead!*, WOMEN’S MEDIA CENTER (Aug. 6, 2010), <http://www.womensmediacenter.com/feature/entry/prop-8-lets-get-rid-of-marriage-instead> (advocating abolition of marriage completely in lieu of expanding a still-constricting definition of matrimony); Yasmin Nair, *Gay Marriage Hurts My Breasts*, <http://nomorepotlucks.org/site/gay-marriage-hurts-my-breasts> (last visited October 12, 2012) (stating that the pursuit of gay marriage does not increase access to critical health care for many queer women and in fact places blame on them for getting breast cancer). At the same time that marriage can insulate some married people from incarceration, it can also actually function to make certain married people, particularly women and others with less social and political power, more vulnerable to incarceration. For example, men have had their wives involuntarily committed to psychiatric institutions, often because they failed to submit to the husband’s authority in the home or otherwise became inconvenient. Valerie L. Collins, *Camouflaged Legitimacy: Civil Commitment, Property Rights, and Legal Isolation*, 52 HOW. L.J. 407, 415 (2009). Spouses still initiate involuntary commitment proceedings. See Alexander Tsesis, *Due Process in Civil Commitments*, 68 WASH. & LEE L. REV. 253, 277 (2011) (discussing Idaho and Alaska statutes that allow spouses to initiate involuntary commitment hearings and the abuse that can result). Entering into illicit marriages can also lead to incarceration. Interracial marriage was criminalized in many states until the 1960s. *Loving v. Virginia*, 388 U.S. 1, 3 (1967). People who marry multiple spouses as a part of minority religious practice or for other reasons are vulnerable to prosecution. Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 289 n.51 (2004) (listing statutes criminalizing bigamy). Recently, a transgender man was incarcerated for stating he was a man on his marriage certificate. Wyatt Riot, *Jailed for Being Trans and Married—Support Levi Gammons*, ORIGINAL PLUMBING (Aug. 20, 2012), <http://www.originalplumbing.com/2012/08/20/jailed-for-being-trans-and-married-support-levi-gammons/>.

the struggle for gay marriage in the past few years.<sup>41</sup> In that time, one of my former clients—a homeless, HIV-positive, black, effeminate gay person—stole a few cans of tuna fish from a drug store to eat when she was hungry. The cans of tuna were probably worth around \$10. She got caught and spent a year in prison as a result. Another former client—a young, disabled, Latina trans woman—spent months in jail because she couldn't afford to pay the \$1,000 bail. While there, guards repeatedly sexually assaulted her. If even just a tiny portion of the money raised for gay marriage had instead been redistributed to low-income trans and gender nonconforming people like the two I just described, we could have prevented enormous harm.

In addition to direct support for some of the most vulnerable members of LGBT communities, we could have used that money to fight for change in accordance with priorities that these vulnerable community members, rather than more privileged gay lawyers and other elites, have identified.<sup>42</sup> Some of the priorities that have emerged from currently and formerly incarcerated trans communities have included providing resources for trans people recently released from prison,<sup>43</sup> developing means of preventing and responding to violence without relying on imprisonment,<sup>44</sup> increasing access to hormone therapy and safer sex supplies in prisons,<sup>45</sup> and building greater voice and leadership of incarcerated trans people in advocacy for social change.<sup>46</sup>

As I write this article, two trans women activists imprisoned in San Diego are in their second week of a hunger strike.<sup>47</sup> Amazon and Cat are demanding they be allowed to stay in the same cell.<sup>48</sup> In their call for solidarity, they urge people to call the warden and insist on an end to discriminatory housing policies that keep trans women on single cell status against their will.<sup>49</sup> Amazon does not seek to justify or legitimate her relationship with Cat in her letter. She does not

41. Over \$44 million was raised to oppose Proposition 8 alone. *Tracking the Money: Final Numbers*, L.A. TIMES, <http://www.latimes.com/news/local/la-moneymap,0,2198220.htmlstory> (last updated Feb. 3, 2009).

42. See Arkles, Gehi & Redfield, *supra* note 35, at 582 (discussing why change must come from the mass mobilization of communities rather than from the elite served by strictly legal strategies).

43. Shawna S., *Transforming Justice Conference*, CALIFORNIA COALITION FOR WOMEN PRISONERS, <http://www.womenprisoners.org/fire/000703.html> (last updated Jan. 18, 2008); MAKE IT HAPPEN! (Transforming Justice 2011), available at <http://vimeo.com/16952110>.

44. See Shawna S., *supra* note 43; MAKE IT HAPPEN!, *supra* note 43.

45. PASCAL EMMER, ADRIAN LOWE & R. BARRETT MARSHALL, HEARTS ON A WIRE COLLECTIVE, THIS IS A PRISON, GLITTER IS NOT ALLOWED: EXPERIENCES OF TRANS AND GENDER VARIANT PEOPLE IN PENNSYLVANIA'S PRISON SYSTEMS 46 (2011), available at <http://www.tipphilly.org/thisisaprisson.pdf>.

46. *Id.* at 50.

47. Natasha Lennard, *Trans Women on Second Week of Prison Hunger Strike*, SALON (Oct. 1, 2012), [http://www.salon.com/2012/10/01/trans\\_women\\_on\\_second\\_week\\_of\\_prison\\_hunger\\_strike/singleton](http://www.salon.com/2012/10/01/trans_women_on_second_week_of_prison_hunger_strike/singleton).

48. *Id.*; Gender Anarchy, *URGENT: Support Gender Anarchy Collective Member Amazon and Inmate Catarina on DAY 8 of Hunger Strike* (Sept. 30, 2012), <http://genderanarchy.wordpress.com>.

49. Gender Anarchy, *supra* note 48.



claim that she and Cat are married or would like to be, that their relationship is “enduring,” or that they are in love. It is enough that they do not want to be isolated because they are trans; it is enough that they want to be with one another.<sup>50</sup> This demand offers an example of what it could mean to avoid hierarchical constructions of who does and does not deserve access to mutually-desired companionship and human contact. Our communities should be centering and honoring these kinds of unapologetic demands for community, self-determination, survival, and power, especially when they are made in the face of (almost) crushing state control.

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50. See Arkles, *Safety and Solidarity*, *supra* note 39, at 537–39 (describing harms of isolation through disruption of community building among prisoners).

