



RESEARCH ARTICLE / ARTICLE DE RECHERCHE

## “Coming Out as Female Has Been a Gradual Process”: Combating Trans Necropolitical Governance in Canadian Corrections

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### Abstract

This article examines Bianca Lovado’s human rights complaints as the first trans woman transferred from a men’s to a women’s remand facility in British Columbia, Canada. Despite the initial transfer, upon re-arrest, Ms. Lovado was inconsistently placed in men’s and women’s facilities and was denied gender-affirming care between 2015 and 2019. Drawing on theories of biopolitical and queer/trans necropolitical governance, I conduct a thematic analysis of her five complaints against BC Corrections. The paper investigates how, despite human rights legislation protecting gender identity and expression, cisnormative sex-based correctional logics regulate trans prisoners. Building on Foucault’s *institutions of power*, I identify how cisnormative *techniques of power* led Ms. Lovado to face necropolitical violence via incorrect prison placement and denial of gender-affirming care. Analyzing how Ms. Lovado uses the tribunal to combat necropolitical violence, this paper illustrates the consequences of sex as an institution of power governing over gender, despite equal protections in Canadian law.

**Keywords:** gender identity; gender expression; Canadian corrections; human rights; criminal justice; biopolitics; queer necropolitics

### Résumé

Cet article examine les plaintes pour violation de droits fondamentaux déposées par Bianca Lovado qui est la première femme trans à avoir été transférée d’un établissement de détention provisoire pour hommes vers un établissement pour femmes en Colombie-Britannique (Canada). En dépit de ce transfert initial, lors de sa ré-arrestation, Mme Lovado fut placée de manière irrégulière dans des établissements, tantôt pour hommes, tantôt pour femmes. Elle s’est aussi vu refuser des soins d’affirmation de genre de 2015 à 2019. M’appuyant sur les théories de la gouvernance biopolitique et nécropolitique

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queer/trans, j'ai mené une analyse thématique des cinq plaintes formulées par Mme Lovado contre les services correctionnels de la Colombie-Britannique. À travers cette analyse, j'explore comment les logiques correctionnelles cisnormatives basées sur le sexe continuent de régir le traitement des prisonniers trans malgré l'existence de droits fondamentaux protégeant l'identité et l'expression de genre. En particulier, je m'inspire des travaux de Foucault sur les dispositifs de pouvoir afin d'identifier comment les techniques de pouvoir cisnormatives ont exposé Mme Lovado à une violence nécropolitique, notamment via des placements inappropriés en prison et le refus de soins d'affirmation de genre. En analysant la manière dont Mme Lovado mobilise le tribunal pour contrer cette violence nécropolitique, cet article illustre les effets qu'a le sexe, en tant qu'institution du pouvoir, lorsqu'il régit le genre, et ce, en dépit des protections contre la discrimination inscrites dans le droit canadien.

**Mots-clés:** identité de genre; expression de genre; système correctionnel canadien; droits fondamentaux; justice pénale; biopolitique; nécropolitique queer

## Introduction

Carceral institutions are sexed and gendered by design (Jenness and Fenstermaker 2014; Maycock 2022; Pemberton 2013; Sumner and Sexton 2016). Reinforcing cisnormative binaries of male and female in determining prison placement, incarcerated individuals are generally segregated by their assigned sex at birth (Jenness and Fenstermaker 2014; Sanders et al. 2023; Sumner and Sexton 2016; Westbrook and Schilt 2014; White Hughto et al. 2018). The carceral institution's central assumption of the sex/gender<sup>1</sup> binary is a potent demonstration of how sex is an "institution of power" (Foucault 1981) in which cisnormative techniques of power are applied to legally and socially enforce rigid gender norms on prisoners. Consequently, this presents serious concerns for trans<sup>2</sup> prisoners, as they must navigate a space that subjugates and regulates their gender identities and expressions (Agbemenu 2015; Jenness and Fenstermaker 2014; Pemberton 2013; Sanders et al. 2023; Smith 2014; Spade 2015).

Many scholars draw on queer necropolitics—a corrective and supplementary analytical framework to Foucault's (1981) biopolitics—when examining the subjugation of trans bodies (Aizura 2014; Edelman 2014; Haritaworn et al. 2014; Hébert 2019; Zhang 2019). Foucault's biopolitics suggests that the governance of a nation-state over sexuality is mobilized as a form of population control, emphasizing how states control individuals' lives, bodies and health to maximize economic efficiency (Rainbow and Rose 2006). Building on Foucault's work, Mbembe's (2003) necropolitics and Puar's (2007) queer necropolitics describe

<sup>1</sup> In this paper, sex is defined as the biological characteristics of an individual (i.e. chromosomes, hormones, or anatomy), while gender captures the ways in which we identify and express according to, or against, the spectrums of masculinity and femininity. Importantly, both sex and gender are social constructs that are (re)produced through discourse and naturalized in law (Butler 1999; Meadow 2010; Pemberton 2013; Westbrook and Schilt 2014).

<sup>2</sup> I use "trans" as an umbrella term to refer to the broad range of individuals with gender variant identities, including but not limited to transgender, gender nonbinary, two-spirit, gender-nonconforming, genderqueer and gender fluid.

sovereign powers as concerned with governance over social and literal death (Haritaworn et al. 2014; Zhang 2019). In the context of queer and trans necropolitics, sovereign states engage in “practices of letting die” through social exclusion, abandonment and discourses of disposability (Haritaworn et al. 2014, 14). “Letting die” refers to the mundane ways in which sexual and gendered powers reproduce and regulate “viable” citizens and, through doing so, deem the deaths of those who are outside of the ideal as acceptable (Edelman 2014; Haritaworn et al. 2014). While there is a growing body of international literature—and given that the penal landscape in Canada is different from that of other countries—relatively few Canadian studies apply a biopolitical or necropolitical lens when examining the experiences of incarcerated trans people (Haritaworn et al. 2014; Hébert 2019; Lambie 2014; Pemberton 2013; Zhang 2019). More research is needed to understand how individuals combat necropolitical governance in corrections and to further “complicate arguments that trans prisoners are exemplary necropolitically-excluded subjects” (see Hébert 2019, 131). This is especially the case in Canada, where the passing of Bill C-16 amended the *Canadian Human Rights Act* to incorporate gender identity and gender expression as protected categories, thereby providing trans people with legal avenues through which to challenge institutional discrimination. Despite such changes, however, scholars repeatedly show that human rights laws are insufficient for addressing the intersectional and systemic barriers that are faced by trans people (Ashley 2018; Katri 2024; Singer 2020; Spade 2015; Vipond 2015).

This article argues that incarcerated trans people are not merely *docile bodies* (Foucault 1995) in the face of necropolitical violence. Instead, through analyzing the experiences of Ms. Bianca Lovado, an incarcerated trans woman, this paper demonstrates that she was an active agent and an advocate against the necropolitical violence that she faced while detained. To illustrate, this article examines the case of Ms. Lovado, who, on September 30, 2015, became the first trans woman to transfer from a men’s remand facility to a women’s facility in British Columbia, Canada (Lupick 2015). Despite this initial transfer, on several occasions, when Ms. Lovado was released on probation and subsequently rearrested, she was placed in men’s remand facilities. During her detentions, she was remanded in men’s facilities six times while only being placed in women’s facilities twice. Throughout both facilities, she also faced the denial of her gender identity and a lack of her time in gender-affirming care. As a result of her experiences within both men’s and women’s facilities, Ms. Lovado filed five human rights complaints. Unfortunately, none of Ms. Lovado’s complaints was adjudicated due to her untimely passing shortly after her release from remand.<sup>3</sup>

By analyzing the background information from Ms. Lovado’s publicly available tribunal decisions, this paper asks: How, despite human rights legislation affording protections to gender identity and expression, do cisnormative sex-based correctional logics govern the experiences of trans prisoners? Guided by

<sup>3</sup> When a claimant passes away in BC, the Human Rights Tribunal loses jurisdiction of the case and is required to dismiss it (see *Lovado v British Columbia*, 2020 BCHRTD 25; see also *British Columbia v Gregoire*, 2005 BCCA 585).

deductive thematic analyses (Gilgun 2019), I build on Foucault’s (1981) concept of *institutions of power*, arguing that sex, itself, is one of the most powerful institutions of the state. Sex, here, captures not only biological characteristics (which are themselves normative constructions), but, more importantly, also the legal category that is used to classify individuals on the basis of these characteristics (Katri 2024). By drawing from both biopolitical and necropolitical frameworks, this paper demonstrates how correctional facilities use *techniques of power* (Foucault 1981) to enforce the regulatory power of sex in law, thereby upholding the institution of sex. This paper argues that correctional techniques of power led to Ms. Lovado’s inconsistent placement within men’s and women’s custody facilities and a lack of gender-affirming care despite changes to Canadian law and policy. I also examine how Ms. Lovado—an out-and-proud trans woman—uses correctional resources and the British Columbia Human Rights Tribunal as a domain to combat necropolitical violence within Canadian corrections. Although Ms. Lovado’s experience does not represent all incarcerated trans people in Canada, her case highlights the limitations of human rights by illustrating the consequences of the governing power of sex over gender, despite receiving equal protections in Canadian law.<sup>4</sup>

### Biopolitical and necropolitical governance of trans bodies

Michel Foucault (1981, 140) theorized that the development of modern state powers—where the subjugation of bodies and population control became a necessary function of the state—marked “the beginning of an era of ‘bio-power’.” He conceptualized biopower as consisting of two basic forms of power over life. The first is disciplinary power, in which individuals are viewed as machines and are extorted, optimized and integrated into productive members of the state (Foucault 1981). The second, biopolitics, refers to regulatory powers used by nation-states to control populations, notably deriving from institutions such as education, health care and criminal justice (Foucault 1981; Rainbow and Rose 2006; Spade 2015; Zhang 2019). Through both disciplinary power and biopolitics, the state—and its institutions—employ techniques of power to produce conformity while also creating social hierarchies among populations (Foucault 1981; Pemberton 2013; Zhang 2019). In the context of governing gender, one technique of power is the pathologization or medicalization of trans bodies (Meadow 2010; Pemberton 2013; Zhang 2019). For instance, in Canada, depending on the province or territory, trans people are often required to provide medical corroboration to be acknowledged as the gender with which they identify (Ashley 2021; MacKinnon et al. 2022; Vipond 2015).<sup>5</sup> Consequently, as documented by Canadian and international research, trans people who do not

<sup>4</sup> Importantly, I do not challenge Butler’s (1999) assertion in which “sex” is itself a social construction that is derived from gender. Yet, sex as an “institution of power” captures how the legal concept of sex, and its embedded understandings, are used to (in)formally govern individual’s gender identities and expressions—thereby presenting a major obstacle to true gender self-determination.

<sup>5</sup> In Canada, changes to gender designation on formal IDs are provincially/territorially regulated. In BC, prior to 2022, section 27 of the *Vital Statistics Act* required medical corroboration by way of

legally change their gender or engage in somatechnics to modify their bodies risk having their gender identities denied by officials (Boyer et al. 2019; Pemberton 2013; Pitts-Taylor 2020; Smith 2014; Zhang 2019).

Although sex and gender are not addressed in Foucault's original analysis of biopolitics (Pemberton 2013), queer necropolitics focalizes them through queer analysis and critique (Haritaworn et al. 2014; Puar 2007). Queer necropolitics is inspired by Mbembe's (2003, 40) work on necropolitics, where he argues that sovereign powers produce "new and unique forms of social existence in which vast populations are subjected to conditions of life conferring upon them the status of living dead." Necropolitical violence constitutes any policies or practices that enable social or legal exclusion, creating conditions under which populations face slow deaths (Haritaworn et al. 2014; Zhang 2019). Building on Mbembe's central thesis, many scholars employ queer necropolitical frameworks to examine the consequences of the societal valorization of heteronormative and cisnormative bodies (Edelman 2014; Haritaworn et al. 2014; Lamble 2014; Zhang 2019). For example, Edelman (2014, 175) argues that "mainstream LGBT disinterest" in the necropolitical suffering of trans women—particularly racialized trans women—promotes the idea that only certain queer citizens are worthy of state protection: white, cisgender, sexual minorities. Those most vulnerable to violence—notably racialized, gender-nonconforming people—are often excluded from mainstream antidiscrimination activism (Aizura 2014; Edelman 2014; Haritaworn et al. 2014). Such exclusion has dire consequences, as racialized trans women experience high victimization rates (Haritaworn et al. 2014; Hughto et al. 2022; Reisner et al. 2014; Sevelius 2013). Importantly, however, some scholars argue that necropolitical governance does not limit the narratives of trans people to one of invisibility, dehumanization, or exclusion (Aizura 2014; Hébert 2019). Rather, necropolitical violence can be combated through uplifting and making visible the stories and lives of trans people, bringing them to the centre of discourse (Aizura 2014; Hébert 2019).

### Combating the regulation of gender in prison

Biologically essentialist<sup>6</sup> (herein bio-essentialist) logics are reinforced through the regulation of gender in prison (Hébert 2020; Jenness and Fenstermaker 2014; Sanders et al. 2023). For example, research from the United States, United Kingdom and Australia documents how incarcerated individuals are provided with clothing and hygiene products that reflect the gendered institution in which they are placed (Brooke et al. 2022; Rosenberg and Oswin 2015; Sanders et al. 2023; Sumner and Sexton 2016; Tarzwell 2006). These studies also find that

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documentation from a physician or psychologist in order to apply for a "change of sex." Today, medical corroboration in BC is only required for those aged twelve and under.

<sup>6</sup> Bio-essentialism refers to the normative restriction of masculine traits/characteristics to the male sex and feminine traits/characteristics to the female sex without any consideration of the respective biological and social complexities of both sex and gender (Westbrook and Schilt 2014; White Hughto et al. 2017).

programming and vocational opportunities differ between men’s and women’s institutions, reinforcing traditional gender roles (Pemberton 2013; Sumner and Sexton 2016; Tarzwell 2006). In Canada and abroad, prisons may also limit or deny access to gender-affirming care (Boyer et al. 2019; Rosenberg 2017; Sanders et al. 2023; Smith 2014; White Hughto et al. 2018). Incarcerated trans people often subvert bio-essentialist prison policies “to establish basic rights for themselves in their pursuit of safety and gender authenticity” (Agbemenu 2015, 12; see also Jenness and Fenstermaker 2014; Pemberton 2013; Sanders et al. 2023). For instance, some challenge institutional policies by altering their clothing, hair, or nails to align with their gender identity and expression (Agbemenu 2015; Jenness and Fenstermaker 2014; Jenness et al. 2019; Rosenberg and Oswin 2015; White Hughto et al. 2018).

The subversion of prison policies that regulate sex and gender enables the pursuit of “the real deal”—that is, affirmation of a trans person’s elective place within the gender binary (Jenness and Fenstermaker 2014, 28). International studies on the experiences of trans women in men’s facilities find that they exemplify a strong will to live as their preferred gender despite the risk of violence associated with being placed in the wrong facility (Hughto et al. 2022; Jenness and Fenstermaker 2014; Jenness and Gerlinger 2020; Maycock 2022; Pemberton 2013; Rosenberg and Oswin 2015; Sanders et al. 2023; White Hughto et al. 2018). Even in cases in which trans women are placed in facilities that are congruent with their lived gender, research from the United Kingdom and Canada shows that cisgender inmates and guards use factors such as appearance or genitalia to evaluate the authenticity of transitions and ultimately one’s belongingness (Maycock 2022; Ricciardelli et al. 2020). With prisons governing the parameters of gender through cishnormative frameworks, those who do not *pass* as their lived gender or those whose appearances or genitalia do not fit within the binary receive further scrutiny regarding their gender identity (Maycock 2022; Smith 2014; White Hughto et al. 2018). It also applies societal pressures to physically or medically transition, even though some who identify as trans may not wish to medically transition at all (Vipond 2015).

### Sex, gender identity and gender expression in Canadian law and correctional policies

In June 2017, Bill C-16, an Act to amend the *Canadian Human Rights Act* and the *Criminal Code*, assented to Canadian law. The amendment to the *Canadian Human Rights Act* added the terms “gender identity” and “gender expression” to the list of prohibited grounds against discrimination (Bill C-16 2017). This change in legislation came partly because of the many court and tribunal decisions that identified discriminatory treatment of individuals with gender variant identities (Cossman 2018; Kirkup 2018; McGill and Kirkup 2013). For instance, reflecting the biopolitical regulation of gender, the *Vital Statistics Act* required individuals who desired to change their sex designation on official documents to supply medical certificates to confirm that they had undergone “transsexual surgery” (McGill

and Kirkup 2013; see also *XY v Ontario* 2012 HRTO 726). Such legislation reduced trans identities to their genitalia, which, as laid out earlier, pathologizes them and perpetuates the cishnormative notion of the sex/gender binary.

In 2015, before Bill C-16, the provinces of Ontario and BC were the first to release trans rights-compliant correctional policies in response to earlier human rights complaints (Hébert 2020).<sup>7</sup> These revisions reflected more gender-affirming practices such as placing inmates in facilities that are congruent with their lived gender,<sup>8</sup> providing the opportunity to choose who performs frisk and strip searches, referring to inmates by their preferred name and pronouns, and being provided with effects such as clothing that align with their preferred gender. In December 2017, following the enactment of Bill C-16, the Correctional Service of Canada (CSC) also released *Interim Policy Bulletin 584—Bill C-16 (Gender Identity or Expression)*, which mandated a review of federal correctional policies in light of the changes to the *Canadian Human Rights Act*. Similarly to the provincial correctional policy revisions, this document highlighted that CSC must accommodate inmates based on their gender identities and expressions, thereby revoking prior policies such as *Guideline 800-5—Gender Dysphoria*, in which “pre-operative male to female offenders with gender dysphoria will be held in men’s institutions and pre-operative female to male offenders with gender dysphoria will be held in women’s institutions” (*Guideline 800-5*). Despite these substantive changes to Canadian human rights law and correctional policies to protect gender identity and expression, it appears that, in practice, as I will show, sex is an institution of power that hierarchicalizes itself over gender.

## Methodology

### Case study selection and method of inquiry

This paper stems from a larger project that was conducted by the author where they engage in a sociological study of Canadian trans jurisprudence.<sup>9</sup> The author systematically collected all Canadian court and tribunal decisions containing terms that capture gender variance, including: “gender identity,” “gender expression,” “gender-nonconforming,” “transgender,” “gender non-binary,” “two-spirit,” “genderqueer,” “gender fluid,” “intersex,” and “gender dysphoria.”<sup>10</sup> For data collection, the author used LexisNexis Advance Quicklaw,

<sup>7</sup> See Ontario, Ministry of Community Safety and Correctional Services, *Admission, Classification and Placement of Trans Inmates* (Ontario: Ontario Legislative Library, 2015) and British Columbia, Ministry of Justice Corrections Branch, *Adult Custody Policy* s 4.10: Case Management—Transgender Inmates (BC: Adult Custody Division, 2015).

<sup>8</sup> Both Ontario and BC outline that placement decisions can be overridden due to “health and/or safety” concerns. To date, limited research has examined what “overriding health or safety concerns” look like (see Hébert 2020).

<sup>9</sup> Trans jurisprudence refers to court and tribunal decisions in which gender identity or expression is procedurally or substantively addressed in the context of law (see Singer 2020).

<sup>10</sup> Searches were conducted in both English and French (the two official languages of Canada).



which is an extensive database of case law and legal precedents. Searching for legal and administrative decisions with the above-listed terms resulted in case decisions in which: (1) issues of gender identity or expression are addressed; (2) the gender identity or expression of an individual is mentioned but not raised as an issue in the case; and (3) gender identity and expression are irrelevant and appear in text only because the full statutes from the *Criminal Code*, *Canadian Human Rights Act*, or other statutes are referenced. Initial results yielded 1,386 cases across all provincial and federal courts and tribunals from June 19, 2017 (the date on which the amendments were codified into law) until October 1, 2022 (the date on which the author collected all cases from LexisNexis). The author reviewed all decisions and categorized them by year, legal topic, court level, presiding judge(s)/tribunal member(s) and their relevance to gender. Only cases that fitted under the first criterion above were included for analysis, as the purpose of the larger study is not to simply identify or out trans people, but rather to investigate cases that specifically address issues around gender identity or expression. The final result produced 219 cases. Of them, twelve involved human rights complaints in correctional contexts, five of which belonged to Ms. Lovado.

This present article engages in a case study of Bianca Lovado's five human rights complaints against BC Corrections. Case studies allow researchers to provide in-depth, detailed critiques of context-specific situations and, through doing so, they raise qualitative insights into critical issues (Creswell and Creswell 2018). There are two main justifications for why this analysis focuses on the cases of Ms. Lovado. First, in September 2015, two months before the release of the revised trans rights-compliant BC Adult Custody Policy (herein ACP) and almost two years before the passing of Bill C-16, news outlets reported that Ms. Lovado was the first trans woman in BC to be transferred from a men's remand facility to a women's facility (Lupick 2015). Second, while awaiting trial, Ms. Lovado was repeatedly detained both before and after the passing of Bill C-16. Her multiple interactions with the criminal justice system, during a period in which Canadian laws were changing, provides a unique case for a critical investigation of the pervasiveness of sex as an institution of power.

### Case descriptions and data analysis

The data for this analysis derive from five separate, publicly available court and tribunal decisions regarding various complaints against BC Corrections by Ms. Lovado. The first application (2017 BCHRTD 115) was a complaint against BC Corrections in which Ms. Lovado alleged discrimination in accommodation, service and facility while in a men's custody facility. In the second application (2019 BCHRTD 166), Ms. Lovado filed a complaint against BC Corrections alleging discrimination when they failed to accommodate her request for laser hair removal treatment in both men's and women's facilities. In the third application (2019 BCHRTD 167), Ms. Lovado filed a complaint against BC Corrections alleging discrimination when they failed to process a request for a halal diet within



reasonable time while in custody.<sup>11</sup> The fourth decision (2019 BCJ 2131) was rendered in the BC Supreme Court, in which Ms. Lovado sought prerogative relief with a decision to place her in a men's facility upon rearrest despite having spent time in women's facilities. In the fifth and final decision (2020 BCHRTD 25), Ms. Lovado's original complaint from the first application was dismissed. Her case was not without merit, but the tribunal lost jurisdiction over her case after her untimely death while released on probation. All of Ms. Lovado's publicly available cases were used in this analysis because they provide a timeline of her detentions and highlight various levels of insight into her experiences within both men's and women's facilities.<sup>12</sup>

The author employed a deductive thematic analysis framework guided by Gilgun's (2019) Deductive Qualitative Analysis. First, the author read the prevailing international literature on the experiences of incarcerated trans people. Based on the literature, the author developed preliminary hypotheses and conceptual frameworks. The author then imported all of Ms. Lovado's cases into QSR NVivo and thematically coded them. Several codes emerged that were consistent with existing literature, all falling under the parent code of "necropolitical violence" and subcodes including "sex-segregation," "pathologizing gender," "denial of gender identity," and "refusing gender-affirming care." Instead of providing a purely chronological analysis of Ms. Lovado's experiences, these codes were collapsed into one overarching theme of "sex as an institution of power" with two subthemes: (1) combating prison placement determinations and (2) combating the lack of gender-affirming care. Reflecting the literature, these subthemes are organized to allow an examination of how Ms. Lovado used the BC Human Rights Tribunal to combat necropolitical violence.

### Sex as an institution of power: the case of Bianca Lovado

Between July 20, 2015 and September 25, 2019, Bianca Lovado was arrested and detained in provincial remand facilities on eight separate occasions. Ms. Lovado was charged with various nonviolent crimes, including "mischief, breach of probation, possession of stolen property, resisting an officer, dealing with an identity document without lawful excuse and fraudulently obtaining food" (Brothen 2015).<sup>13</sup> She was detained in men's facilities six times and only placed

<sup>11</sup> Ms. Lovado did not identify as Muslim initially upon being detained. She did, however, meet with an imam on three separate occasions, and received an English Quran, prayer booklet and prayer scarf. By February 2017, the imam had accepted the legitimacy of her faith and approved her for a halal diet, but BC Corrections did not provide her with one (2019 BCHRTD 167). A final decision was not rendered in this case due to Ms. Lovado's untimely death.

<sup>12</sup> All of the cases, with the exception of 2019 BCHRTD 167, are directly cited. In that particular case, there was no background information that referred to Ms. Lovado's gender identity or expression. The case is still included because it helped to provide a timeline for her detentions and releases.

<sup>13</sup> Ms. Lovado's criminal case files are not publicly available, meaning that the actual charges according to Canada's *Criminal Code* are unavailable. The only information regarding her charges comes from one news article that repeatedly misgenders her.

in women's facilities twice. Notably, all of Ms. Lovado's detentions after the passing of Bill C-16 were in men's facilities. Her experience illustrates how correctional facilities biopolitically regulate people's identities and, more specifically, how correctional techniques of power are used to override gender self-determination. Consequently, the rigid application of sex and gender in the enforcement of correctional policies led to Ms. Lovado's inconsistent placement and the denial of gender-affirming care before and after Bill C-16. Her death—prior to receiving legal recognition from the Human Rights Tribunal and prison placement based on her gender identity—exemplifies the limits of human rights in materially improving trans lives. Her case also demonstrates how sex as an institution of power produces the conditions for slow deaths through necropolitical violence.

### **Combating prison placement determinations**

On July 20, 2015, before the passing of Bill C-16 and amendments to the ACP, Bianca Lovado was detained in Kamloops Regional Correctional Centre—a provincially regulated men's facility—after pleading guilty to several charges. Upon admission, formal documentation denotes that Ms. Lovado initially identified as male. She challenged the documentation, stating that she identified as female from April 2013 and emphasized that "coming out as female has been a gradual process" (2017 BCHRTD 115, at para 5). This is the first recorded instance in which Ms. Lovado's gender identity and expression were placed under scrutiny by correctional officials. Scholarship demonstrates how transitioning is a temporal process that takes time (Israeli-Nevo 2017; Pereira-García et al. 2021; Pitts-Taylor 2020). Operating under hegemonic, cisnormative understandings of the gender binary, expectations are placed on individuals to transition rather quickly to avoid remaining in the "liminal state 'in between genders'" (Israeli-Nevo 2017, 39). Reflecting the pathologization of gender as a technique of power, the lack of formal documentation affirming Ms. Lovado's gender identity led correctional officials to place her in the men's custody facility. In challenging her placement, she filed a request to transfer to the Alouette Correctional Centre for Women—a women's custody facility. The request was granted on September 30, 2015, making Ms. Lovado the first trans inmate to transfer from a men's facility to a women's facility in BC, two months prior to the November 2015 trans rights-compliant ACP revisions (Lupick 2015).<sup>14</sup> Ms. Lovado remained in the women's facility until she was released and placed on probation on February 5, 2016.

Several months later, on April 25, 2016, Ms. Lovado was detained and remanded into custody at a men's facility: the Surrey Pretrial Services Centre. From the outset of the intake process, Ms. Lovado identified as a trans woman. Correctional

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<sup>14</sup> Placement protocols as per the April 2005 ACP during Ms. Lovado's transfer required trans inmates to have begun the process of "surgical removal of sex organs," otherwise they would be placed in a facility that was "consistent with their original gender" (see BC, Ministry of Justice Corrections Branch, *Adult Custody Policy* s 9.17: Inmate Health Care Services—Transsexual Inmates (BC: Adult Custody Division, 2005)).

staff from the men's facility contacted the Alouette Centre to ascertain whether Ms. Lovado could be transferred there, but they declined, with the following rationale: "[B]ased on information it had received from Community Corrections that Ms. Lovado had been living in the community as a male. There is no documentation or further information about this exchange between the Pretrial Centre and the Alouette Centre" (2017 BCHRTD 115, at para 7).

Ms. Lovado contested this claim, insisting that she lived in the community as female. The Alouette Centre's rejection illustrates how correctional officials uphold the institution of sex through biopolitical regulation. Individuals who do not adhere to the cisnormative binaries of "male" or "female," or those who have not had the privilege or desire to undergo medical procedures, face heightened scrutiny regarding the validity of their lived gender (Jenness and Fenstermaker 2014; Kirkup 2009). Ms. Lovado was "clocked" (Jenness and Fenstermaker 2014) by corrections. "Clocking" refers to denying a trans person's lived gender, opting to identify them as their assigned sex at birth. For Ms. Lovado, being clocked when accused of "living in the community as male" is a form of necropolitical violence. It reflects a "panacea of punishment" in which the denial of Ms. Lovado's gender identity serves not only as a form of singular punishment, but also a widespread means to enforce conformity to cisnormative standards within corrections (Sanders et al. 2023, 749). Clocking is used to deny trans women a place within women's custody facilities, while simultaneously relegating them as "other" within men's facilities (Sanders et al. 2023). Consequently, clocking led to her being detained in a men's facility—sometimes in single-cell segregation<sup>15</sup>—despite already spending five months in a women's facility.

On May 9, 2016, Ms. Lovado requested written justification from the warden for rejecting her transfer. In response, the warden wrote:

Your request is extremely complex and it has taken some time to consider how we can support your request while at the same time meet our obligations to the women offender population at [Alouette Centre]. As a result of overriding security and safety concerns, your request has not been approved. This assessment, which included an exhaustive review of records and issues observed during your previous time in custody at [Alouette Centre] considered the following:

- your refusal or inability to adhere to direction not to engage in relationship behavior, including that with other vulnerable female inmates;
- your display of male persona while in custody... which can cause undue hardship to other female inmates who have experienced trauma and been subject to abuse by males; and

<sup>15</sup> In 2019, Corrections Canada abolished administrative and disciplinary segregation and replaced it with "Structured Intervention Units." However, Ms. Lovado's case files use the term "single-cell segregation" to describe instances in which she was voluntarily or forcibly removed from the general population.

- previous incidents of threatening violent behavior within a female communal living environment pose a continuing safety risk to inmates and correctional officers. (2017 BCHRTD 115, at para 18)

The decision to reject Ms. Lovado's transfer reflects techniques of power that draw upon heteronormative and cishnormative rationales to reinforce the governing power of sex and to uphold the sex/gender binary. They also reflect correctional risk-management logics that ultimately prioritize the safety and security of cisgender women over those of trans women (Hébert 2020; Smith 2014). First, the warden reproduces the notion of a stable trans identity (Crawford 2010; Sanders et al. 2023); they scrutinized Ms. Lovado's gender expression when suggesting that, if she embodied normative characteristics of femininity more consistently, then her transfer request would be less "complex." Second, cisgender women in the same facility would not be subject to the same punishment as Ms. Lovado. In the tribunal, she disputed the warden's response, arguing that two cisgender women who were engaged in relationship behaviour would not be "placed at a men's jail as a result of engaging in such behaviour" (2017 BCHRTD 115, at para 19). Additionally, neither masculine-presenting cisgender women nor cisgender women with incidents of threatening violent behaviour would be punished with placement in a men's facility. Yet, for Ms. Lovado, these factors had led correctional officials to reject her transfer. The warden's decision exemplifies an "ambivalent tension" (Hébert 2020, 235) between trans rights-compliant correctional policies such as BC's updated ACP and the pervasive assumptions of the sex/gender binary in sex-segregated institutions. It demonstrates the very essence of queer necropolitical governance—the notion that cishnormative bodies are more worthy of protection at the cost of trans women's dignities (Smith 2014). To correctional officials, Ms. Lovado—a trans woman who did not display the normative characteristics of femininity—posed "overriding security and safety concerns" and did not deserve to be placed in the women's facility. However, Ms. Lovado did not accept such justifications. In June 2016, she wrote to several correctional officials, including the Investigation and Standards Office, the director of mental health services, the deputy warden and the warden, concerning the lack of gender-affirming mental health services within the men's facility. Shortly afterwards, she filed a complaint to the British Columbia Human Rights Tribunal. After five months of back-and-forth communication, her transfer request was eventually granted.

Ms. Lovado spent the following six months in and out of remand in the women's facility until she was released from custody on March 27, 2017. In all four of Ms. Lovado's subsequent detentions, between November 6, 2017 and September 25, 2019, she was detained in a men's facility—the Surrey Pretrial Services Centre. Despite the 2015 ACP revisions and the enactment of Bill C-16 in June 2017, Ms. Lovado's gender identity was denied through her continual placement in the men's custody facility. The publicly available case files do not provide any explicit evidence for why Ms. Lovado was not placed in women's facilities from November 2017 onward. However, after Bill C-16 was entrenched, in September 2018, BC again updated the ACP. This updated ACP drastically changed placement policies and was cited in *Lovado v Surrey Pretrial Services Centre*

(2019 BCJ 2131) as the decision-making framework for transfer requests. According to section 4.10.4 of the ACP, at the time of Ms. Lovado's hearing:<sup>16</sup>

Transgender inmates' self-identification is a factor to be considered in placement. Placement decisions require consultation with a multi-disciplinary team and input from the inmate. A transgender inmate may be accommodated by a transfer to a different correctional centre, or they may be accommodated within the institution where they are currently housed if appropriate services and accommodation can be provided.

When a transfer is requested, an individualized assessment is required to determine appropriate placement. The individualized assessment involves consultation with a multi-disciplinary team which includes medical personnel from Corrections Health Services, the deputy wardens responsible for placement and classification at the holding centre and the possible receiving centre, and may include representations from BC Corrections headquarters and other correctional staff.

[...]

Following the preliminary placement, centre-based case managers refer the placement request to the multidisciplinary team. When considering placing an inmate whose birth gender is male in a female institution or female unit, assessment of safety and security implications of such a transfer on the individual as well as on the entire inmate population and staff is required. The multi-disciplinary team will consider all relevant behaviour and gender expression during the review of the placement request. (2019 BCJ 2131, at para 15)

The updated ACP that was cited in Ms. Lovado's case draws upon several risk-managerial and cisnormative logics which suggest that trans prisoners are a threat that must be controlled, regulated or eliminated. Borrowing terminology from Edelman (2014, 175), this policy designates and differentiates those who are "biopolitically worthy or necropolitically disposable." Necropolitical disposability in this context captures how the 2018 ACP further criminalizes trans bodies—especially trans women's bodies. Through the cisnormative gaze, correctional officials are authorized to evaluate the gender identity and expression of prisoners by drawing on bio-essentialist logics in determining prison placement. For Ms. Lovado, the ACP's framing in which "self-identification is a factor to be considered" permits officials to deprioritize her gender identity in favor of other factors, including her assigned sex at birth. Further illustrating the biopolitical prioritization of sex is the statement regarding how the multidisciplinary team "will consider all relevant behaviour and gender expression during the review of

<sup>16</sup> The Transgender Inmate Policy in BC was again updated in June 2019 and contains similar language to that of the September 2018 revisions. Notably, the 2019 revisions enable additional discretionary elements for correctional officials.

the placement request." With self-identification as only a factor to be considered and the gender expression of trans prisoners being placed under heightened scrutiny, the ACP reinforces sex as an institution of power. This policy suggests that only individuals who pass as their lived gender are biopolitically worthy of being able to transfer to a facility that is congruent with their gender identity. Individuals are deemed necropolitically disposable, and therefore face slow deaths, if they pose a risk to the cisnormative standards that are set out by corrections. This is particularly evident in the clause containing additional considerations to be imposed on trans women's prison placement. The consequence of such a policy effectively sanctions necropolitical violence by way of incorrect prison placement for those who are (1) in the early stages of physical transition, (2) unable or unwilling to begin the medicalized process of transitioning, or (3) are perceived by correctional officials to occupy the liminal space between the two dominant sex categories. For Ms. Lovado, her death—even if not directly associated with carceral violence—symbolizes how the heightened scrutinization and denial of trans identities in both correctional policy and practice create the conditions of letting die. Her continued placement in men's facilities demonstrated how correctional officials characterized her as necropolitically disposable. The cisgender subject is deemed to be morally deserving of gender-affirming prison placement while gender variant bodies are deemed undeserving.

### **Combating the denial of gender-affirming care**

Ms. Lovado's experiences in remand indicate the broad governing power that sex, as an institution, has over individuals. Her assigned sex at birth and anatomy dictated how correctional officials treated her within both the men's and women's facilities. In the men's facility, Ms. Lovado combated constant misgendering by staff, skin frisks that were performed by male guards and placement in single-cell segregation as a consequence of challenging the cisnormative logics of correctional officials. In both men's and women's facilities, she was also denied gender-affirming care. Advancements in Canadian case law maintain that gender-affirming care while incarcerated cannot be reasonably withheld,<sup>17</sup> yet examples of such denials in prisons again underscore how human rights laws alone are insufficient. The correctional facilities' regulation of gender identity, expression and gender-affirming care "serve as disciplinary attempts to erase trans futures" and uphold cisnormative hegemony (Rosenberg 2017, 91; see also Smith 2014). Denying gender-affirming care fulfills the necropolitical project both literally, through its detrimental impact on the mental and physical well-being of trans people, and socially, as it eliminates gender variance (Brooke et al. 2022; Rosenberg 2017; Smith 2014; Spade 2015).

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<sup>17</sup> See Smith's (2014) analysis of the 2001 *Kavanagh v Canada* decision. Synthia Kavanagh, a trans woman, filed a complaint against CSC for placing her in a men's facility due to her genitalia and denying her access to hormone therapy despite receiving it prior to incarceration. This case established a legal precedent in affirming the right to gender-affirming care while incarcerated, playing a significant role in human rights law.

On April 25, 2016—the first day on which Ms. Lovado was remanded in a men’s facility despite spending five months in the women’s facility—she was informed that a male officer would skin frisk her. She requested that a female officer conduct the frisk, but her request was denied. The following two excerpts from the Tribunal Member in Ms. Lovado’s case show a glimpse of her intake process and the warden’s subsequent response:

In an email dated April 26, 2016 from the Deputy Warden to a colleague, he notes that Ms. Lovado was “refusing to go through intake process so will be housed in segregation for now.” The Deputy Warden notes that Ms. Lovado had previously been at Alouette Centre, and concludes that while they have accepted her at the Pretrial Centre, it would have to be “investigated further.” (2017 BCHRTD 115, at para 9)

A separate e-mail dated April 26, 2016 from the Deputy Warden to the Assistant Deputy Warden noted that on intake, Ms. Lovado refused to be skin frisked by a male. The Deputy Warden says in that e-mail that he attended the change room and “explained that as [Ms. Lovado] had all the ‘equipment’ of a male that [she] would need to be frisked by a male.” The Deputy Warden says in the e-mail that during Ms. Lovado’s most recent stay at Alouette Centre she was only skin frisked by males, however since she refused to be skin frisked she was put in single cell segregation. The email refers to Ms. Lovado with masculine pronouns throughout. I note that section 9.17.3 of the ACP addresses searches, and provides that transgender individuals are given the opportunity to choose who performs any frisk or strip search and can choose to be searched by a male or female officer or both, and where both, the inmate can choose which body parts are searched by whom. (2017 BCHRTD 115, at para 10)

Ms. Lovado’s physical anatomy governed how the warden perceived her, how she was treated during the intake process and how she was indirectly referenced in official correspondence. In the warden’s email, it is explained that, due to Ms. Lovado’s anatomy, it was required that she be skin frisked by a male guard—despite the 2015 ACP at the time indicating that trans inmates are offered an opportunity to choose otherwise. Despite the ACP’s clear protocols, the warden drew on cisnormative logics to rationalize their stance. Their rationalization reinforces a binary understanding of gender in which trans women are “conceptually erased” through anatomy-based rhetoric (Smith 2014, 158). After refusing to be skin frisked by male guards, Ms. Lovado was placed in single-cell segregation as punishment. Single-cell segregation is a form of necropolitical violence that disproportionately targets trans prisoners who violate “prison-enforced binaried gender regulations” (Gossett 2014, 41; see also Rosenberg and Oswin 2015). While prisons are already considered a “site that produces the conditions of living death” (Lamble 2014, 161), single-cell segregation further dehumanizes prisoners, as it deprives them of human contact and can be a trigger for mental illness (Brooke et al. 2022; Rosenberg and Oswin 2015; Smith 2014; Zhang 2019). Correctional officials subjected Ms. Lovado to face deteriorating



physical and mental health as a consequence of her challenging their cisnormative ideals. While in segregation, Ms. Lovado did not stay silent—she used correctional resources to file an inmate complaint form to transfer out of the men's facility. In another complaint, she challenged the correctional officials' continual use of male pronouns when referring to her. On May 5, 2016, "Ms. Lovado filed a special request seeking to be referred to by female pronouns, to be placed on the 'female Alouette Centre diet', to be provided with bras and female undergarments, and to be given access to make-up from the canteen at Alouette Centre" (2017 BCHRTD 115, at para 14).

Despite this request, the response from the warden indicated that referring to Ms. Lovado in female pronouns would not be "appropriate." The Tribunal Member references the warden's response below:

[T]he Deputy Warden replied to Ms. Lovado's special request advising that it was not possible to provide her with a "female diet"; that it was most appropriate for staff to address her by her last name; and that if her canteen order had not yet been filled she should resubmit it. Corrections Branch provided Ms. Lovado with female underwear and a list of cosmetics from the Alouette Centre canteen. Notably, section 9.17.10 of the ACP provides that "inmates are referred to by their preferred name(s) and gender pronoun verbally and in all written documents, except in the rare cases that an inmate's legal name is required for identification purposes." (2017 BCHRTD 115, at para 15)

Rather than affirming Ms. Lovado's gender identity, the warden again contravenes the 2015 ACP by suggesting that the most appropriate response to her request was "for staff to address her by her last name." Referring to Ms. Lovado by her last name did not rectify her being misgendered. When misgendering is intentional, as is the warden's response, it serves as a tool to deny trans existence and suggests that the person poses "a symbolic threat to the notion of gender" (Ashley 2018, 15). Contradicting the ACP by denying Ms. Lovado a skin frisk by a female guard and continually misgendering her, the warden acts as an agent of the institution of sex. As a correctional official in a position of power, they use cisnormative techniques of power to categorically deny Ms. Lovado her gender-based legal rights. This is a potent demonstration of an attempt to erase Ms. Lovado's gender identity, opting to subjugate her through cisnormative logics that uphold the power of sex.

Ms. Lovado also fought against the lack of gender-affirming care in both the men's and women's facilities. In December 2015, two months after being transferred to the Alouette Centre for the first time, she filed a request with corrections staff to arrange an appointment to receive laser hair removal treatment from a clinic that agreed to provide the service at little to no cost. Ms. Lovado said she "sought the treatment because she considers facial and body hair to be a male characteristic of her body that she does not identify with" (2019 BCHRTD 166, at para 15). In response, corrections staff told her that her request could not be arranged while she was incarcerated for "a variety of reasons, including staff costs and because other inmates with facial hair issues use razors while they are in custody" (2019 BCHRTD 166, at para 16). She ultimately had not received the

treatment by the time she was released from the women's facility in February 2016. Shortly after returning to remand in the men's facility, in April 2016, Ms. Lovado again raised the issue of receiving gender-affirming care. She sought out support from her physician:

Ms. Lovado's physician wrote to the Medical Team at the [remand facility] to support her request for the treatment. In that letter, Ms. Lovado's physician stated she had been providing gender-affirming care to Ms. Lovado for two years. Ms. Lovado's physician also stated that Ms. Lovado had funding to attend [the laser hair removal clinic] and that in her opinion, the treatment was medically necessary and would help Ms. Lovado integrate into a women's correctional facility. (2019 BCHRTD 166, at para 19)

According to her physician's letter, dated May 2016, Ms. Lovado was provided with gender-affirming care for two years—meaning that she was receiving care for at least one year before her first detention in July 2015. The physician's letter supports studies that demonstrate how gender-affirming care can improve the mental and physical health of incarcerated trans women (Sevelius 2013; White Hughto et al. 2017). They note that the treatment was medically necessary and would support Ms. Lovado's integration into the women's facility. Notably, the very notion of integration within sex-segregated institutions speaks to the regulatory power of sex. To integrate, one must embody and express gendered characteristics in pursuit of the real deal (Jenness and Fenstermaker 2014), otherwise the authenticity of a transition is scrutinized by staff and other inmates (Maycock 2022). Such logic pathologizes, and can be used to invalidate, trans identities (Smith 2014).

Shortly after Ms. Lovado's eventual transfer to the women's facility in September 2016, she filed another inmate complaint form in November. Four months later, in response to Ms. Lovado's complaint:

[I]n February 2017, the Alouette Centre's Health Care Manager told her that her request for the treatment had not been approved. According to the Health Care Manager's notes, BC Corrections would not escort Ms. Lovado to receive the Treatment while she was incarcerated because its Medical Director was of the opinion that the Treatment was medically indicated but not medically required. (2019 BCHRTD 166, at para 29)

Notwithstanding Ms. Lovado's physician's recommendations, the medical director's opinion was that her treatment was "medically indicated" but not "medically required." Although the medical director based their decision on a distinction between "indicated" and "required," Canadian research emphasizes the difficulty in defining medical necessity in concrete terms (Caulfield and Zarzeczny 2014).<sup>18</sup> The lack of definitional clarity entitles individual agents who

<sup>18</sup> See also *Cameron v Nova Scotia* [1999] NSJ 297, in which the Nova Scotia Court of Appeal determined that it was not necessary to define the terms "medically necessary" or "medically required."

are in positions of power to discretionarily reject gender-affirming treatment for trans prisoners. Moreover, a paradoxical argument is embedded within the correctional officials' responses to Ms. Lovado. One of the reasons for rejecting her transfer to the women's facility after having already spent time there was her "display of male persona" while in custody. Yet, at the same time, correctional officials denied her the opportunity to engage in gender-affirming care that would allow her to embody a more normative feminine gender expression that, in turn, might have influenced the way in which they perceived her gendered persona. By restricting access to gender-affirming care, the women's facility biopolitically regulated Ms. Lovado's gender expression. It was then ultimately used as justification to reject her transfer.

## Discussion and conclusion

Ms. Lovado did not allow the necropolitical violence that she experienced to go unanswered. Whether through letters to correctional officials, inmate complaint forms, special requests or human rights complaints, Ms. Lovado demonstrated unwavering advocacy for trans rights in challenging every instance of discriminatory treatment. She challenged correctional officials' attempts to regulate her gender identity and expression by demanding that they follow trans rights-compliant policies on the use of proper pronouns, choosing the gender of the officer conducting skin frisks, placement determinations and gender-affirming care. Regarding the outcome of her human rights complaints, Ms. Lovado's cases were ultimately not adjudicated due to her untimely death. In closing her case, the Tribunal Member stated:

This is a truly unfortunate case. The rights of transgender people and the way in which they are viewed and treated within broader society has been a very public topic in this province in recent months. While making no findings of fact in this case, I would like to observe that it is clear to me Ms. Lovado encountered adversity in the course of her incarceration. It is also clear to me that there are people within Corrections working hard to navigate the best path forward. In losing the opportunity to render a decision here, I believe the Tribunal is losing an opportunity to shine light on the efforts, the successes, and the failures of people engaged with these issues. With regard to Ms. Lovado in particular, regardless of how the question of whether Corrections breached the Code in her case would have been answered, I observed in the interactions between Ms. Lovado and the Corrections staff who came to testify a sense of mutual respect and hope for a positive future that makes Ms. Lovado's death and this outcome all the more sad. (2020 BCHRTD 25, at para 60)

The Human Rights Tribunal was a critical path for Ms. Lovado to shape the biopolitical regulatory landscape in Canada. In doing so, she would also receive recognition from the state for the necropolitical violence that she endured. However, corroborating a growing body of critical trans scholarship, adjudication

is not the only answer to combating necropolitical violence, as the law is unable to identify and address systemic and structural harms (Ashley 2018; Singer 2020; Spade 2015; Vipond 2015).

BC Correction's inconsistent placement and treatment of Ms. Lovado after the amendments to the *Canadian Human Rights Act* and the BC Adult Custody Policy support findings by scholars who suggest that changes in human rights alone will not materially improve trans lives (Hébert 2020; Katri 2024; Singer 2020; Spade 2015; Vipond 2015). As Spade (2015) argues, actual substantive change must move beyond symbolic efforts around the politics of recognition and inclusion. This is particularly evident in the case of Ms. Lovado, where, despite amendments to law and policy, her experiences while detained were no less transphobic or transantagonistic. Although the enactment of human rights has the potential to push correctional institutions to change, Hébert (2020, 223) argues that rights-compliant reforms for trans prisoners in response to Bill C-16 are "fraught with ambivalence." On the one hand, updated policies provide much-needed legal safeguards for trans prisoners and, on the other, the correctional system still functions to manage risk and deprive certain liberties (Hébert 2020; Maurutto and Hannah-Moffat 2006). This paper has argued that the consequence of such ambivalence often leads to the prioritization of perceived risks—particularly to cisgender women—over compliance with trans rights (Hébert 2020).

As demonstrated in this analysis, the risks that are outlined by correctional officials all support the ongoing biopolitical regulation of gender and, ultimately, reinforce sex as an institution of power. Foucault (1981, 141) argues that institutions of power are "great instruments of the state" that are used to govern individuals at "every level of the social body." If we recognize sex as an institution, then it enables us to understand the disjoint between law and practice—or the continuation of transphobia in society despite legal protections for gender. Sex, as a legal category, systematically subordinates notions of gender identity and expression despite receiving equal protections in law (Katri 2024). Consequently, as an institution of power, it is a bulwark and enabler of transphobia and "transantagonism" (see Ashley 2018). Critical to the institution of sex, as discussed in this paper, is the role of both organizations and individual agents in preserving its governing power. In this case, individual agents that operate within sex-segregated institutions deploy techniques of power that uphold hegemonic understandings of sex and gender, and use these understandings to regulate and enforce people's gender identities and expressions. Correctional officials used Ms. Lovado's anatomy to identify her as a potential threat to cisgender hegemony that must be controlled. Their logic perpetuates the stereotype that the "presence of a penis entails the threat of violence" and erases trans people's identities, opting to identify them "by anatomy and all that is associated with this anatomy" (Smith 2014, 159).

For Ms. Lovado, correctional officials used cisnormative and heteronormative logics to govern the spaces that she, as a trans woman, could occupy. They categorized her according to the cisnormative gaze (Israeli-Nevo 2017), using their interpretations of gender expression to scrutinize her gender identity.

Yet, as Ms. Lovado herself argued, transitioning is not nearly as linear as cisnormative understandings suggest (Israeli-Nevo 2017; Pereira-García et al. 2021). It is the pathologization of gender in law and practice that dictates the necessity for a linear transition (Hébert 2020). Many scholars urge a nonlinear framework when conceptualizing trans temporalities, as the consequence of linear frameworks limits the embodiment of gender within a binary (Israeli-Nevo 2017; Pereira-García et al. 2021; Rosenberg 2017; Sundén 2015). Yet, correctional officials like those who denied Ms. Lovado's requests to receive gender-affirming care while incarcerated ultimately "freeze trans bodies in the present and send them back into the past" (Rosenberg 2017, 91). Limiting or restricting access to gender-affirming care while in detention creates even further barriers for those who are pursuing their gender authenticity (Jenness and Fenstermaker 2014; Rosenberg 2017; White Hughto et al. 2017). It also highlights how the biopolitical regulation of gender is a technique of power that is used to uphold cisnormative ideologies of sex and gender, consequently impacting the mental and physical health of trans people and erasing gender variance.

Ms. Lovado's combat against necropolitical violence while incarcerated outlines the fundamental need for gender self-determination beyond law and policy. Self-determination must be woven into the cultural fabric of our society, as Ms. Lovado's case is yet another demonstration of the limits of law in materially improving trans lives. While self-determination can be a tool to challenge the hegemony of binary sex/gender systems, if it is only operationalized as a legal concept in human rights law, then it will be insufficient to change the social and structural inequalities that are faced by trans people (Ashley 2018; Singer 2020; Spade 2015; Vipond 2015). This holds especially true if trans rights-compliant policies contain exceptions that are based on "over-riding security and safety concerns" that are effectively rooted in bio-essentialist logics. The social power that sex possesses over gender must be dismantled, not only so that sex and gender are treated equally in anti-discrimination law but, more importantly, so that sex and gender as constructs are devoid of social and institutional regulatory power, as societies will be closer to true gender self-determination once a person's gender is never compared to their assigned sex at birth. On May 9, 2022, CSC released a new directive called the *Commissioner's Directive 100: Gender Diverse Offenders*. This new federal directive entrenches several changes in the intake process that were first indicated in *Interim Policy Bulletin 584*, including the placing of individuals "according to their gender identity or expression [...] if that is their preference, regardless of their sex (i.e. anatomy) or the gender/sex marker on their identification documents" (*Commissioner's Directive 100*, Correctional Service of Canada). Evidently, this policy cites overriding health and safety concerns as being an exception for placement determinations. As long as sex remains an institution of power that governs gender, bio-essentialist logics will continue to pervade correctional decision-making and risk management—and the combat against necropolitical violence will continue.

## Limitations and future research directions

There are some limitations to this research that are worth mentioning. First and foremost, the data from this study are limited to one trans woman's experiences as documented through the BC human rights complaint process. However, this paper does not suggest that her experience is generalizable or representative of all incarcerated trans people in Canada. The purpose of analyzing Ms. Lovado's cases is to critique the law, policy and social cultures that reinforce sex as an institution of power and highlight the consequences for incarcerated trans people. Next, the data that informed this paper are limited to Ms. Lovado's publicly available legal records. Consequently, the analysis cannot identify all of the justifications for her prison placements and only offers a glimpse into her legal and personal combat against necropolitical violence. Future research should qualitatively examine the stories and lives of trans people with regard to how they continue to combat necropolitical governance in the era of trans rights-compliant legal reforms.

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