

**SAFETY AND SOLIDARITY ACROSS GENDER LINES:  
RETHINKING SEGREGATION OF TRANSGENDER  
PEOPLE IN DETENTION**

by GABRIEL ARKLES\*

*The correctional officers are the ones who are the most violent. They're the ones to be scared of. . . .*

*I'm raped on a daily basis, I've made complaint after complaint, but no response. No success. I'm scared to push forward with my complaints against officers for beating me up and raping me. I was in full restraints when the correctional officers assaulted me. Then after they said I assaulted them. All the officers say is "I didn't do it." The Inspector General said officers have a right to do that to me. That I'm just a man and shouldn't be dressing like this . . . .*

*When you get beat up real bad and they don't want to take you out to get checked out, they put you in the snake pit. They threw me in the snake pit for 6 months after beating me up. Six months! They're animals . . . I got beat up by 12 officers. I'm only 123 lbs.*

—Bianca<sup>1</sup>

INTRODUCTION

Over the past several decades in the United States we have seen mass incarceration balloon, to the point where we incarcerate more people per capita than any other nation in the world,<sup>2</sup> holding millions of people behind bars.<sup>3</sup> One in

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\* Gabriel Arkles is Staff Attorney at the Sylvia Rivera Law Project in New York City. He has done activism and advocacy around issues of gender, sexual orientation, and HIV for ten years. At the Sylvia Rivera Law Project, he has provided free legal services to hundreds of low-income transgender, intersex, and gender nonconforming people of color on issues such as name changes, identity documents, immigration, discrimination in sex-segregated facilities, and Medicaid. For the past two years, he has had the honor of working exclusively with imprisoned transgender, intersex, and gender nonconforming people and those recently released from detention. He has also done impact litigation and policy work to advance the rights of trans people, including participating in successful advocacy to create policies prohibiting discrimination against transgender youth in juvenile detention in New York. He graduated from NYU School of Law Order of the Coif and magna cum laude in 2004. While at NYU, he received the Tom Stoddard Arthur Garfield Hays Fellowship for work in sexual orientation and the law.

1. SYLVIA RIVERA LAW PROJECT, IT'S WAR IN HERE: A REPORT ON THE EXPERIENCES OF TRANSGENDER AND INTERSEX PEOPLE IN NYS MEN'S PRISONS 19-20 (2007), <http://www.srlp.org/files/warinhere.pdf>.

2. THE UNITED STATES STANDS ALONE ON HIGH INCARCERATION, *in* THE PRISON INDEX: TAKING THE PULSE OF THE CRIME CONTROL INDUSTRY (2003) [hereinafter THE PRISON INDEX: TAKING THE

every thirty-two people in the U.S. is under some form of correctional supervision.<sup>4</sup> While only five percent of the world population lives in the U.S., U.S. prisons and jails contain twenty-five percent of the world's population of imprisoned people.<sup>5</sup> Incarceration has had a particularly devastating effect on marginalized communities.<sup>6</sup> Transgender people,<sup>7</sup> particularly transgender people of color, have been hard hit by mass-incarceration.<sup>8</sup> Over the years, transgender people in prison have fought for their rights, often through bringing pro se law suits that have shaped the course of constitutional law,<sup>9</sup> and in recent years increasing numbers of advocacy groups and scholars have given some attention to the needs and demands of these communities.<sup>10</sup>

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PULSE], [http://www.prisonpolicy.org/articles/prisonindex\\_highincarceration.pdf](http://www.prisonpolicy.org/articles/prisonindex_highincarceration.pdf); The Sentencing Project, Facts about Prisons and Prisoners (2008), [http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cinc\\_factsaboutprisons.pdf](http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cinc_factsaboutprisons.pdf); Adam Liptak, *1 in 100 U.S. Adults Behind Bars, New Study Says*, N.Y. TIMES, Feb. 29, 2008, at A12.

3. WHY DOES PRISON BUILDING CONTINUE WHEN CRIME DROPS? *in* THE PRISON INDEX: TAKING THE PULSE, *supra* note 2, [http://www.prisonpolicy.org/articles/prisonindex\\_prisonbuilding.pdf](http://www.prisonpolicy.org/articles/prisonindex_prisonbuilding.pdf).

4. SILJA J.A. TALVI, WOMEN BEHIND BARS: THE CRISIS OF WOMEN IN THE U.S. PRISON SYSTEM xiv (2007).

5. *Id.*

6. *See infra* notes 29-32. Communities of color are particularly targeted for incarceration, to the point that young black men have a higher chance of going to prison than going to college. Prison Policy Initiative, Black Male Population, <http://www.prisonpolicy.org/graphs/blackmalepop.html> (last visited Apr. 4, 2009). Additionally, thirteen percent of black men have lost their right to vote because of a criminal conviction. ERIKA WOOD, RESTORING THE RIGHTS TO VOTE 8 (2008).

7. Transgender people, or trans people, are people who have a gender identity or gender expression that is different from that traditionally associated with their assigned sex at birth. *Transgender women* are transgender people who now identify as women. *Transgender men* are transgender people who now identify as men. Some transgender people do not identify as men or as women, but as both, neither, or another gender altogether. Transgender people are highly diverse in terms of sexual orientation, race, religion, class, national origin, age, (dis)ability, body type, and immigration status.

8. SYLVIA RIVERA LAW PROJECT, *supra* note 1, at 15-16; Sydney Tarzwell, Note, *The Gender Lines Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 170 (2006).

9. *See, e.g.*, *Farmer v. Brennan*, 511 U.S. 825 (1994) (establishing that prison officials can be held liable for denying humane conditions of confinement in violation of the Eighth Amendment if there is knowledge of substantial risk of injury).

10. *See generally* Anita C. Barnes, *The Sexual Continuum: Transsexual Prisoners*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 599 (1998) (proposing new policies for prisons with transgender prisoners); Alexander Lee, *Gendered Crime & Punishment*, 4 GIC TIP J. 1 (2004) [hereinafter Lee, *Gendered Crime*]; Rebecca Mann, *The Treatment of Transgender Prisoners, Not Just an American Problem—A Comparative Analysis of American, Australian, and Canadian Prison Policies Concerning the Treatment of Transgender Prisoners and a “Universal” Recommendation to Improve Treatment*, 15 LAW & SEXUALITY 91 (2006); Dana O’Day Senior, *The Forgotten Frontier? Healthcare for Transgender Detainees in Immigration and Customs Enforcement Detention*, 60 HASTINGS L.J. 453 (2008); Christine Peek, *Breaking out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 SANTA CLARA L. REV. 1211 (2004); Darren Rosenblum, “*Trapped in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*,” 6 MICH. J. GENDER & L. 499 (2000); Tarzwell, *supra* note 8; Alvin Lee, Comment, *Trans Models in Prison: The Medicalization of Gender Identity and the Eighth Amendment Right to Sex Reassignment Therapy*, 31 HARV. J.L. & GENDER 447 (2008).

That transgender people in detention experience horrific levels of violence is indisputable. A recent study showed that fifty-nine percent of transgender women<sup>11</sup> in California men's prisons have been sexually assaulted while incarcerated, as compared to four percent of a random sample of people incarcerated in California men's prisons.<sup>12</sup> Lesbians<sup>13</sup> and transgender people are also disproportionately targeted for sexual assault in women's detention facilities.<sup>14</sup> People with intersex conditions<sup>15</sup> and other gender nonconforming people<sup>16</sup> face similar problems.

One primary means that agencies employ and that courts endorse purportedly to increase safety in detention is solitary confinement.<sup>17</sup> Two basic premises can make solitary confinement seem like a reasonable measure to increase safety for

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11. More extensive research, litigation, and scholarship is available regarding transgender women than regarding other transgender people. In part, this fact is due to ways that transphobia manifests itself differently in different communities. Whereas trans women tend to receive some public if highly stigmatized and problematic attention, transgender men and trans people who do not identify as men or as women are frequently made almost entirely invisible in culture and law. See THE FTM SAFER SHELTER PROJECT RESEARCH TEAM, *INVISIBLE MEN: FTMS AND HOMELESSNESS IN TORONTO* 22 (2008), <http://wellesleyinstitute.com/files/invisible-men.pdf> (discussing the lack of awareness among homeless shelter staff of the existence of homeless female-to-male transgender people); ALEXANDER LEE, *NOWHERE TO GO BUT OUT: THE COLLISION BETWEEN TRANSGENDER & GENDER-VARIANT PRISONERS AND THE GENDER BINARY IN AMERICA'S PRISONS* 23 (2003) (discussing how overly narrow constructions of the term transgender as well as a lack of public representation of FTM spectrum people contribute to the scant attention transgender people in women's prisons receive) [hereinafter LEE, *NOWHERE TO GO BUT OUT*]. Additionally, trans men are usually placed in women's detention facilities, and women's detention facilities receive considerably less public attention than do men's. TALVI, *supra* note 4, at 4-5.

12. VALERIE JENNESS ET AL., *VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT* 3 (2007), *executive summary available at* [http://ucicorrections.seweb.uci.edu/pdf/Executive\\_Summary\\_of\\_Val\\_s\\_PREA\\_report.pdf](http://ucicorrections.seweb.uci.edu/pdf/Executive_Summary_of_Val_s_PREA_report.pdf).

13. Here and elsewhere in my Article I make some reference to research, cases, and other sources concerning the experiences of imprisoned people identified as gay, lesbian, bisexual, or queer and not as transgender. It is not my intention to conflate the distinct concepts and experiences of sexual orientation and gender identity. I do however believe that discussing the experiences of queer prisoners is often relevant even when focusing on trans issues, for three reasons. First, regardless of the actual sexual orientation of trans people, they are overwhelmingly perceived to be lesbian or gay by prison officials and face homophobia in addition to transphobia. Second, I am aware of more than one published case where the plaintiff was referred to only as gay, but where the plaintiff actually considered herself to be transgender, a fact I learned only through my personal acquaintance with the person. I believe that trans identities are excluded from judicial opinions and research far more often than the few times that I have personally noticed. Third, while many trans people are straight and most queer people are not trans, there is also significant overlap between these communities. Many trans people in detention also consider themselves to be gay, lesbian, bisexual, or queer. Many queer people in detention, even if they do not identify as trans, do not match gender norms in significant ways and experience transphobia as a result.

14. Tarzwell, *supra* note 8, at 178.

15. Intersex conditions or differences of sex development are a variety of physical conditions that can cause a child to be born with a reproductive or sexual anatomy and/or chromosome pattern that does not seem to fit typical definitions of male or female. Advocates for Informed Choice, *Frequently Asked Questions*, <http://www.aiclegal.org/faq.html> (last visited Apr. 4, 2009).

16. I use the term *gender nonconforming* to describe people who may experience discrimination because they present themselves in a way that does not fit dominant gender stereotypes, but who do not necessarily identify as transgender.

17. See *infra* Section V (describing problems of solitary confinement for transgender people).

transgender, intersex, and gender nonconforming (TIGNC) people. The first is that that isolation and control, rather than relationships and freedom, reduce violence. The second is that other prisoners rather than facility staff are the primary perpetrators of violence from whom TIGNC people need protection within detention systems.<sup>18</sup> In this Article, I argue that both of these premises are false. Involuntary segregation from other people in detention is in reality one of the greatest threats to the safety of TIGNC people in these systems.

TIGNC prisoners and other prisoners are at times able to form communities and relationships that resist violence and help people who are targets of violence to survive. The centrality of community-building in creating safety from violence is too often forgotten, not only by detention agencies and courts, but also at times by advocates and scholars. Means for creating community and building positive relationships must be a central consideration in developing ways to reduce violence against TIGNC people in detention.

This Article begins with a discussion of the causes and nature of violence within detention, both generally and specifically in terms of violence against TIGNC people. However, a narrow focus on violence within detention does not give us a complete picture. Therefore, I next consider the non-violent and anti-violent interactions that take place between and among TIGNC people and non-TIGNC people in detention and the ways that these interactions can help people to resist and survive the violence of detention. I also give a brief overview of the general lack of sympathy in the courts for claims to a right to these forms of positive relationships in detention. With this background, I move on to take a closer look at solitary confinement. I examine the ways that isolation frequently further endangers and harms, rather than protects, those subjected to it. I then review the reasons TIGNC people are disproportionately subject to placement in solitary confinement. I also look at legal analysis concerning solitary confinement, including the ways in which unfounded judicial equating of isolation with safety works to the detriment of imprisoned TIGNC litigants. Finally, I offer a number of recommendations to meaningfully decrease violence against TIGNC people in detention.

I approach this work as a white transgender man who has never been incarcerated. For five years, I have worked at the Sylvia Rivera Law Project providing free civil legal services to low-income TIGNC people of color. I have formed the conclusions I present in this Article based largely on my experience working with TIGNC people in detention. Because I believe that any scholarship should be grounded to the extent possible in the lived experiences of those impacted by the issues discussed, I make frequent reference to the experiences of my clients throughout this Article. To protect their identity, I have changed all names and some other minor details of the events described. Because most of my experience has involved working with people in New York State men's prisons and jails, most of my examples are drawn from that system. I have also included examples and based my analysis on some experiences from other systems, including women's facilities, facilities in other states, and forms of detention other

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18. *Id.*

than prisons and jails. While I believe my analysis has relevance to all of these settings, it is of course most relevant to those that it is most centered on. I encourage others to look more deeply into issues of segregation and community building for TIGNC people in systems outside New York State men's prisons and jails.

#### I. UNDERSTANDING VIOLENCE IN DETENTION

Proposals to reduce violence in detention are necessarily founded in implicit or explicit understandings of what causes and perpetuates violence in detention. Failing to carefully and consciously consider the causes of violence or relying on erroneous assumptions concerning those causes can lead to recommendations or implemented changes that are either ineffective or actually counter-productive in stemming the tide of violence against TIGNC people and others in detention.

##### *A. Prisoners Are not Inherently any More Prone to Violence than Members of the Public*

As a starting point, I wish to reject the premise that violence is prevalent in detention because individual prisoners, as people, are intrinsically more inclined toward violence than people who are not prisoners. The vast majority of people who are in prison are not there because they are bad or violent people who have done bad or violent things; they are there because they are people of color, poor people, people with disabilities, immigrants, trans people, women, queer people, or otherwise marginalized in society.<sup>19</sup> Most of the people who are incarcerated in prisons in the U.S. have been incarcerated for a non-violent crime, often drug-related.<sup>20</sup> Most of the people incarcerated in jails have not been convicted, but are pre-trial detainees too poor to pay bail.<sup>21</sup> People in police lock-ups commonly have not yet even been formally charged with a crime. In other forms of involuntary government custody such as commitment for psychiatric treatment, immigration detention, and juvenile detention, people are incarcerated civilly and, therefore, for no crime at all.

Among the minorities of those people in detention who have been convicted for violent crimes, a significant number are innocent of the crimes of which they were convicted.<sup>22</sup> Many of these false convictions happen all too easily because of stereotypes of black, Native American, and Latin@ people as untrustworthy,

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19. See MARC MAUER & RYAN S. KING, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY, [http://www.sentencingproject.org/Admin/Documents/publications/rd\\_state\\_ratesofincbyraceandethnicity.pdf](http://www.sentencingproject.org/Admin/Documents/publications/rd_state_ratesofincbyraceandethnicity.pdf) (showing proportion of Black and Hispanic prisoners to white prisoners) (last visited Apr. 4, 2009); David C. Leven, *Curing America's Addiction to Prisons*, 20 FORDHAM URB. L.J. 641, 645-46 (1993) (highlighting presence of poor people and people of color in prisons).

20. The Sentencing Project, *supra* note 2; Leven, *supra* note 2, at 646.

21. The Sentencing Project, *supra* note 2.

22. Innocence Project, Facts on Post-Conviction DNA Exonerations, <http://www.innocenceproject.org/Content/351.php> (last visited Apr. 4, 2009).

violent, dangerous, and sexually predatory toward white non-trans women.<sup>23</sup> Of the rest, many commit the crime to survive poverty (robberies and burglaries, for example, are typically considered violent crimes although the primary aim of these crimes is property-related).<sup>24</sup> Others have been violent only in order to defend themselves.<sup>25</sup> Many women and transgender people are arrested for fighting back against an abuser.<sup>26</sup> Some people are violent in a moment of extremity or anger and would be unlikely to repeat such an act regardless of whether or not they were punished.<sup>27</sup> Others did not realize they were doing anything illegal, and were not necessarily violent in the everyday sense of the word, as in the case of people whose convictions arise out of having consensual sex with another teenager only a couple of years younger than themselves.<sup>28</sup> Of course, some people in prison have deliberately perpetrated terrible acts of violence against other human beings. However, the same can be said about many people who are not incarcerated. In fact, it seems entirely fair to say that the vast majority of people who have perpetrated terrible acts of violence are not incarcerated for those acts.<sup>29</sup>

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23. See generally N. Jeremi Duru, *The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315 (2004) (discussing three infamous cases in American history of false imprisonment based, in part, on racial stereotyping).

24. See Leven, *supra* note 19, at 646 (highlighting the presence of poor and uneducated prisoners).

25. See *People v. Kemp*, 508 N.W.2d 184, 187-88 (Mich. 1993) (remanding the case due to an insufficient examination of the self-defense claim).

26. See Women in Prison Project, Correctional Association of New York, *Survivors of Abuse in Prison Fact Sheet*, 1 (2008), [http://www.correctionalassociation.org/publications/download/wipp/fact\\_sheets/Suivivors\\_of\\_Abuse\\_Fact\\_Sheet\\_2008.pdf](http://www.correctionalassociation.org/publications/download/wipp/fact_sheets/Suivivors_of_Abuse_Fact_Sheet_2008.pdf) (according to a 1996 study, the majority of women incarcerated in New York City engaged in unlawful acts due to violence, abuse, or coercion by their male counterparts); AMNESTY INT'L, *STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE IN THE UNITED STATES 12* (2005), available at <http://www.amnestyusa.org/outfront/stonewalled/report.pdf> (stating that police profile lesbian, gay, bisexual, and transgender (LGBT) people, particularly transgender and gender nonconforming people and LGBT people of color, as criminals in a number of contexts") [hereinafter AMNESTY INTERNATIONAL, *STONEWALLED*]; Julia Sudbury, *Rethinking Antiviolence Strategies: Lessons from the Black Women's Movement in Britain*, in *COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY 19* (2006) (stating "the majority of women prisoners are also survivors of violence"); TALVI, *supra* note 4, at 177. See generally Imani Henry, *Lesbians Sentenced for Self-Defense*, WORKERS WORLD June 28, 2007, at 1, 7, available at <http://www.workers.org/pdf/2007/ww062807.pdf> (discussing the example of four women being sentenced to prison for defending themselves against a man who assaulted them for being lesbians).

27. See Anton Forde & Trevor Mattis, *Transformation: Visions of What Could Be*, in *CELLING AMERICA'S SOUL: TORTURE AND TRANSFORMATION IN OUR PRISONS 210-17* (Judith Trustone ed., 2003) (discussing the implications of racial discrimination in the penal system and that many prisoners have been misunderstood by society).

28. See *Critics Decry States' Teen Sex Laws* (MSNBC television broadcast Oct. 29, 2007), available at <http://www.msnbc.msn.com/id/21535447/> (arguing that teenagers a couple of years apart in age having consensual sex should not be criminalized in the same way that people who molest children are). See generally *Age of Consent* (ABC News television broadcast) available at <http://abcnews.go.com/2020/ageofconsent/> (discussing the criminalization of consensual sex between two teenagers) (last visited Apr. 4, 2009); Niki Delson, *Age of Consent—Criminalizing Teen Sex*, [http://www.cfcamerica.org/index.php?option=com\\_content&view=article&id=432:age-of-consent-criminalizing-teen-sex&catid=11:teens-children&Itemid=88](http://www.cfcamerica.org/index.php?option=com_content&view=article&id=432:age-of-consent-criminalizing-teen-sex&catid=11:teens-children&Itemid=88) (discussing how normal sexual activity is being criminalized as "deviant").

29. Many acts of large-scale violence committed by Americans past and present, such as slavery,

Most of the people in prisons are people of color.<sup>30</sup> Black, Latin@, Native American, and, in some areas, Asian people are massively disproportionately represented in detention.<sup>31</sup> People with disabilities, particularly psychiatric disabilities, are also dramatically over-represented.<sup>32</sup> The number of people in women's prisons is rising at a staggering rate, even compared to the rate of increase of populations in men's prisons,<sup>33</sup> which many posit is at least in part a form of backlash against a perceived decrease in the private punishment of (domestic

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war, genocide, imprisonment/internment, forced relocation, etc., have been perpetrated by government actors acting in a legal or quasi-legal capacity. See Ray Luc Levasseur, *From USP Marion to ADX Florence*, in *THE CELLING OF AMERICA* 200, 201 (Daniel Burton-Rose ed., 1998) ("I've not met a convicted felon whose misdeeds were in any way comparable to the massive killing of civilians perpetrated by the likes of Nixon, Reagan, Bush, *et al.*"). Even when considering extra legal acts of violence perpetrated by private actors, however, most are not imprisoned. "The President's Commission on Causes and Prevention of Violence estimated that only 1.5 percent of the perpetrators of the approximately 9 million crimes committed annually ends up in prison." FAY HONEY KNOPP ET AL., *INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS* (Mark Morris ed., 1976), available at [http://www.prisonpolicy.org/scans/instead\\_of\\_prisons/index.shtml](http://www.prisonpolicy.org/scans/instead_of_prisons/index.shtml) [hereinafter *INSTEAD OF PRISONS*]. Very few rapes are actually reported, and an even smaller number result in the incarceration of the perpetrator. CALLIE MARIE RENNISON, U.S. DEPT. OF JUSTICE, *RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION 1992-2000*, at 1 (2002), <http://www.ojp.usdoj.gov/bjs/pub/pdf/rsarp00.pdf> (stating that only thirty-six percent of sexual assaults are reported); Men Against Sexual Assault, *Sexual Assault Statistics*, <http://www.sa.rochester.edu/masa/stats.php> (last visited Apr. 4, 2009) (stating that only sixteen percent of sexual assaults are reported).

30. See TALVI, *supra* note 4, at 58 (noting that, in most states, women and girls of color are disproportionately represented in prisons); SYLVIA RIVERA LAW PROJECT, *supra* note 1, at 10 (stating "white people represent 69.3% of the national population, and 37% of the imprisoned population").

31. TALVI, *supra* note 4, at 47. See Peter Wagner, *Incarceration is Not an Equal Opportunity Punishment* (June 28, 2005) <http://www.prisonpolicy.org/articles/notequal.html> (stating that as of 2004, there were 393 white people incarcerated per 100,000, 957 Latin@ people incarcerated per 100,000, and 2,531 black people incarcerated per 100,000); The Sentencing Project, *supra* note 2 (stating that the percentage of black and Hispanic males incarcerated as of 2007 was greater than the percentage of incarcerated white males); OMAR C. JADWAT, *THE ARBITRARY DETENTION OF IMMIGRANTS AFTER SEPTEMBER 11* at 1, <http://www.aclu.org/iclr/jadwat.pdf> (last visited Apr. 4, 2009) (stating that "post-September 11 detentions were arbitrary because arrests . . . disproportionately affected Muslim men from South Asian and Middle Eastern countries"); Leven, *supra* note 19, at 645-46 (stating that "[a]lthough minorities make up only a small percentage of the nation's population, close to half of the prisoners are African American"); Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex* (1998), available at [http://www.thirdworldtraveler.com/Prison\\_System/Masked\\_Racism\\_ADavis.html](http://www.thirdworldtraveler.com/Prison_System/Masked_Racism_ADavis.html) (stating that over 70% of the prison population consist of people of color).

32. See 42 U.S.C.A. § 15601(3) (2006) (stating "America's jails and prisons house more mentally ill individuals than all of the Nation's psychiatric hospitals combined"); TALVI, *supra* note 4, at 144 (noting that 75.4% of people in local women's jails and 62.8% of people in local men's jails exhibit mental health problems).

33. See TALVI, *supra* note 4, at 3 (stating from 1977 to 2004 the number of people in women's prisons has increased 757% and has continued to increase at roughly double the rate of people in men's prisons since 2000); THE SENTENCING PROJECT, *WOMEN IN THE CRIMINAL JUSTICE SYSTEM: AN OVERVIEW* 1, [http://www.sentencingproject.org/tmp/File/Women%20in%20CJ/women\\_cjs\\_overview\(1\).pdf](http://www.sentencingproject.org/tmp/File/Women%20in%20CJ/women_cjs_overview(1).pdf) (stating "[t]he number of women in prison has increased at nearly double the rate of men since 1985, 404% vs. 209%") (last visited Apr. 4, 2009); Leven, *supra* note 19, at 647 (stating that "[t]he number of women in prison more than tripled from 1980 to 1990").

violence against) women<sup>34</sup> as well as the incarceration of people who have been “deinstitutionalized” from psychiatric institutions, in which women have historically been over-represented.<sup>35</sup> While statistics are less available, it is nonetheless likely that trans and queer people are also present in prisons in highly disproportionate numbers.<sup>36</sup> To accept a “common sense” characterization of these millions of human beings as intrinsically prone to violence is to excuse a morally bankrupt system and to further the racist stereotypes that (re)create the mass-incarceration and enslavement<sup>37</sup> of people of color in this country.

### *B. Incarceration Itself Is Violent*

Prisons, jails, police lock-ups, and juvenile and immigration detention facilities are violent by their very nature. These facilities are places where people are torn from their communities and deprived of liberty, privacy, autonomy, and dignity. The use of force is intrinsic to their function.<sup>38</sup> Putting people into shackles or cages, forcing people to strip and bend over for agents of the state to inspect their naked bodies, and foreclosing a whole range of opportunities en masse to groups of marginalized people, particularly people of color, are all acts of violence.<sup>39</sup> While reform may somewhat lessen detention system violence, it is impossible to eliminate the violence altogether while retaining the system.

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34. See, e.g., Sudbury, *supra* note 26, at 16-17 (discussing the masculinist backlash and moral panic that portrayed women’s liberation as removing social and psychological constraints on women’s aggression and lead to perceptions of increased violence among women).

35. TALVI, *supra* note 4, at 145.

36. See SYLVIA RIVERA LAW PROJECT, *supra* note 1, at 16 (noting that transgender people are discriminated against and target by the police); WOMEN IN PRISON PROJECT, CORRECTIONAL ASSOCIATION OF NEW YORK, TRANSGENER ISSUES AND THE CRIMINAL JUSTICE SYSTEM 2 (2007), <http://correctionalassociation.org/publications/download/wipp/factsheets/Transgender%20Issues%20%20CJS%20FINAL.pdf> (stating “[p]olice frequently target transgender people for arrest and harassment”); Sally Kohn, *Greasing the Wheel: How the Criminal Justice System Hurts Gay, Lesbian, Bisexual and Transgendered People and Why Hate Crime Laws Won’t Save Them*, 27 N.Y.U. REV. L. & SOC. CHANGE 257, 259-60 (2002) (discussing how hate crime legislation does not adequately protect individuals and instead reinforces discrimination).

37. Slavery remains permissible under the Thirteenth Amendment for those who have been convicted of crimes. U.S. CONST. amend. XIII, § 1. Imprisonment and forced labor for private corporate as well as government interests has in many ways continued the legacy of enslavement of African Americans and other disenfranchised people in the U.S. See, e.g., ANGELA DAVIS, ARE PRISONS OBSOLETE? 29 (2003) (outlining the racialization of crime post-emancipation); Paul Wright, *Slaves of the State*, in THE CELLING OF AMERICA, *supra* note 29, at 102-06 (providing a description of the increased incarceration and subsequent forced labor of African American people in prisons after the civil war).

38. MARIE L. GRIFFIN, THE USE OF FORCE BY DETENTION OFFICERS 1 (2001). “Jails are coercive organizations, and even routine interactions between officers and inmates take place within an environment of structured conflict. Given the officer’s need to maintain control over inmates, the use or threatened use of force by detention officers against inmates is a routine part of daily operations.” *Id.*

39. See Cassandra Shaylor, “It’s Like Living in a Black Hole”: *Women of Color and Solitary Confinement in the Prison Industrial Complex*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 385, 407 (1998) (“Prisons do *perpetuate* violence, however, in the form of destruction of families, and in the wholesale destruction of economic and political power in the communities in which those families live.”) (emphasis in original).



### C. Systemic Factors Contribute to Extralegal Staff Violence

Violence beyond that which is legal is also built into the system. Staff violence against prisoners is extraordinarily widespread. While in theory the law constrains this violence to that which is in a “good faith effort to maintain or restore discipline,”<sup>40</sup> rape, sexual assault, beating, and even murder are also common.<sup>41</sup> These incidents are not simple individual aberrations.<sup>42</sup> Detention gives one group of people near absolute control over every aspect of life for another group of people. In many geographic areas, people in the former group are primarily white, straight, able-bodied, U.S. citizen non-transgender men<sup>43</sup> and the latter group are primarily poor people of color, also with disproportionate numbers of people who are trans, queer, immigrant, and disabled.<sup>44</sup> In intersection with all of the deep societal prejudices against these oppressed groups, our society has deeply ingrained notions that prisoners are violent, dangerous, and animalistic—less than human, in need of control, objects of fear, and deserving of contempt.<sup>45</sup> Staff members are required as a part of their job to do things to prisoners that they would probably never imagine doing to another human being in any other context.

While staff in correctional facilities are not by any stretch of the imagination evil people—most are simply working class people trying to make a living by taking some of the only jobs available in their communities—they are not immune to any of these societal prejudices. Combined with the great power they are given over prisoners and the violence the state forces them to perpetrate against prisoners to make their living,<sup>46</sup> it is reasonable to infer these prejudices make additional

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40. The Supreme Court has held that prison staff exercise “excessive physical force” in violation of the Eighth Amendment when the “force was [not] applied in a good-faith effort to maintain or restore discipline” but “maliciously and sadistically to cause harm.” *Hudson v. McMillian*, 503 U.S. 1, 7 (1992).

41. See Kate Randall, *Inside the U.S. Prison System—Frame-ups, Brutality, and Murder*, July 22, 1999, <http://www.wsws.org/articles/1999/jul1999/pris-j22.shtml> (discussing examples of horrific treatment of prisoners in the U.S. prison system); Dan Pens, *Mysterious New Syndrome Discovered!*, in *THE CELLING OF AMERICA*, *supra* note 29, at 173; AMNESTY INTERNATIONAL, “NOT PART OF MY SENTENCE:” VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY, (1999), available at <http://www.amnestyusa.org/document.php?id=D0F5C2222D1AABEA8025690000692FC4&lang=e> (discussing various human rights violations against women that take place in U.S. prisons such as sexual abuse).

42. The infamous Stanford Prison Experiment demonstrated that ordinary college students, when assigned the role of guard for eight hours a day, engaged in cruel and dehumanizing practices against their peers. Craig Haney et al., *Interpersonal Dynamics in a Simulated Prison*, 1 *INT’L J. CRIMINOLOGY & PENOLOGY* 69-97 (1973), available at <http://www.prisonexp.org/pdf/ijcp1973.pdf>. See also Ted Conover, *Guarding Sing Sing*, *NEW YORKER*, Apr. 3, 2000, at 55 (discussing the relationship in prison between guards and prisoners).

43. Melvina Sumter, *The Correctional Work Force Faces Challenges in the 21<sup>st</sup> Century*, 2008 [http://www.aca.org/research/pdf/ResearchNotes\\_Aug08.pdf](http://www.aca.org/research/pdf/ResearchNotes_Aug08.pdf) (“The data from the ACA work force study indicate that the typical correctional employee is a white, non-Hispanic, moderately educated male who is in his mid-30s.”).

44. *Id.*

45. One study on use of force among detention officers found that officers had more readiness to use force against people in detention if they had higher levels of alienation, fear of victimization, or role ambiguity. GRIFFIN, *supra* note 38, at 69.

46. See *id.* at 69-70 (discussing an officer’s readiness to use force against those imprisoned).

violence and abuses nearly certain. Retaliation against prisoners who complain about this violence and abuse also becomes likely.<sup>47</sup>

*D. Systemic Factors Contribute to Violence Among Prisoners*

Finally, prisoner-on-prisoner violence is also common. While perhaps not inevitable, this violence is certainly not surprising. Prisoners are a highly diverse group and are no more immune to societal prejudices or skilled at avoiding violence than prison staff or the general public. Additionally, prisoners have extreme pressures placed on them that can make violence more likely. Prisoners are taken away from their homes, families, communities, and support systems by force. They are degraded, treated in many ways like dangerous animals, and often packed in tightly with many other prisoners.<sup>48</sup> All prisoners have survived at least the *state's* violence of incarceration, and many have experienced a great deal of other forms of violence as well.<sup>49</sup> Many prisoners are justifiably angry and have little if anything in terms of positive outlets for their anger or ways available to cope with it—other prisoners are a safer target than staff for releasing these feelings. Many imprisoned people are also afraid of the violence in detention and ironically are therefore more likely to engage in it themselves, often in an attempt to forestall being seen as a victim.<sup>50</sup>

Additionally, staff often condone, actively encourage, and/or arrange prisoner-on-prisoner violence. At times members of the staff use racism as a way to provoke violence. As an imprisoned black man describes:

Usually racism is the best tool of the prison officials to control volatile prison populations. The warden and his guards intentionally keep up racial hostilities through rumors and provocation, and give a free hand within the prison to groups like the KKK and the Aryan Brotherhood to maim or kill Black prisoners. They use the racist white prisoners to confine both themselves and others, in return for

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47. Dan Pens & Paul Wright, *Total Power Corrupts: Guard Racism and Brutality*, in THE CELLING OF AMERICA, *supra* note 29, at 173; Gabriel Arkles, Testimony Before National Prison Rape Elimination Commission (Aug 15, 2005), available at [http://www.srlp.org/files/documents/NPREC\\_testimony\\_Arkles.pdf](http://www.srlp.org/files/documents/NPREC_testimony_Arkles.pdf) (discussing retaliation by prison officials against inmates for speaking up about abuse); Tom Watson, *Prison Appeal System – Part 1: Fear of Retaliation Discourages Prisoners from Filing Appeals and Other Problems*, [http://www.geocities.com/three\\_strikes\\_legal/fear\\_of\\_retaliation.htm](http://www.geocities.com/three_strikes_legal/fear_of_retaliation.htm) (last visited Apr. 4, 2009).

48. JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS 12 (2006), available at [http://www.prisoncommission.org/pdfs/Confronting\\_Confinement.pdf](http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf) (recommending an end to overcrowding as top priority for reducing violence in prisons); see also Craig Haney, *Prison Overcrowding: Harmful Consequences and Dysfunctional Reactions*, at 2-7, [http://www.prisoncommission.org/statements/haney\\_craig.pdf](http://www.prisoncommission.org/statements/haney_craig.pdf) (last visited Apr. 4, 2009) (discussing the detrimental impact of overcrowding in prisons and the damaging effects of imprisonment).

49. See Women in Prison Project, *supra* note 1, at 1 (discussing facts regarding those who have survived abuse prior to entering prison such as the number of women who experienced raped prior to being convicted and incarcerated).

50. Julie Kunselman et al., *Nonconsensual Sexual Behavior*, in PRISON SEX: PRACTICE AND POLICY 36-39 (Christopher Hensley ed., 2002).

special privileges and the fleeting feeling that they are “helping” the “white race” maintain control. . . . The officials can usually count on recruiting a steady supply of racist murderers and henchmen from the white prison population. . . . [The warden] even had a group of white inmates who acted as his “hit men” against whites who refused to conform to the racist line.<sup>51</sup>

Staff also often encourage gender-based violence. For example, one transgender woman client I worked with was “sold” by correctional officers as a forced prostitute with whom male prisoners could have sex. Another was stabbed by another prisoner in a shower, while a correctional officer looked on and smiled.

Violence can beget violence, as one act of violence can prompt other acts of violence intended to retaliate against and punish perpetrators and/or to defend someone or to send a message intended to forestall further violence, leading to cycles of escalating violence that in many ways mirror state responses to violence. For example, a transgender woman I worked with named Margaret was incarcerated in a male facility in Oklahoma when she was seventeen years old. She taught a pottery class for the men sentenced to life in prison. These men liked Margaret and thought of her as a little sister. When a newly admitted prisoner attacked, slashed, and forcibly raped Margaret, they were enraged that someone would hurt her so horribly and responded by arranging to have her attacker stabbed. He died following the retaliatory attack.

This combination of overall societal oppressive dynamics and the extreme pressures of detention can cause many imprisoned people to behave in violent ways even though they are not intrinsically especially violent people.

#### *E. Dynamics of Gender-Based Violence Against Trans People in Detention*

Transgender people often suffer extraordinary violence in detention, even compared to other prisoners. Transgender people are disproportionately exposed to the inherent violence of detention for multiple reasons. Loss of family support and severe and pervasive discrimination in every aspect of life, such as housing, health care, education, employment, identification, and public benefits, leads to widespread poverty and homelessness among transgender people.<sup>52</sup> Because poverty and homelessness are themselves criminalized in many ways,<sup>53</sup> transgender

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51. Lorenzo Kom'boa Ervin, *Back from Hell: Black Power and Treason to Whiteness Behind Prison Walls*, in RACE TREASON BEHIND PRISON WALLS 3-4, available at <http://www.zinelibrary.info/files/racetreasonbehindprisonwalls.pdf> (last visited Apr. 4, 2009). Cf. Abdul Olugbala Shakur, *The Pelican Bay Factor*, in THE CELLING OF AMERICA, *supra* note 29, at 189 (discussing prison officials' control over prisoners and encouragement of racist views among prisoners).

52. SYLVIA RIVERA LAW PROJECT, *supra* note 1, at 11; see Tarzwell, *supra* note 8, at 171 (discussing the problems faced by transgender youth such as being turned away by their families, facing shame from their communities, being expelled from school because of their gender transgressions, and harassment at school).

53. 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> (noting that over the last twenty-five years a trend has developed to “target homeless persons by making it illegal to

people are more likely to come into contact with the criminal legal system because of this disproportionate poverty.<sup>54</sup> In addition, police profiling of transgender and gender nonconforming people is very common.<sup>55</sup> Transgender women of color are frequently presumed to be engaging in sex work, irrespective of any basis in fact for these presumptions.<sup>56</sup> Transgender and gender nonconforming people are also often perceived to be violent and deceptive.<sup>57</sup> Many transgender and gender nonconforming victims of domestic violence or hate violence are arrested instead of their attackers.<sup>58</sup> Some transgender people are charged with crimes simply for using the restroom.<sup>59</sup> In addition, transgender people are more likely to be subject to immigration detention because of barriers to obtaining legal status in the U.S. that have a disproportionate impact on transgender people.<sup>60</sup>

Once incarcerated, transgender people are often targeted for violence by both facility staff and other people in detention. Gender motivated violence is a reality both inside and outside of detention. Profound cultural norms and systems of oppression serve to create expectations that non-trans men have a “right” to access bodies perceived as female and/or feminine, that sexual and other physical aggression is “natural” and therefore appropriate for non-trans men, that women have the burden of protecting their own safety or finding a man to protect them if they do not wish to submit to male violence and/or sexual desire, and that trans and gender nonconforming people ought not to exist at all and deserve to be punished for their violations of gender roles and norms.<sup>61</sup> Rape, beatings, and murders of women, including trans women, and of trans people other than women, are extraordinarily common outside of the context of detention and continue, often

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perform life sustaining activities in public” such as sleeping and eating).

54. See SYLVIA RIVERA LAW PROJECT, *supra* note 1, at 11-16 (noting that due to pervasive discrimination and targeting, transgender people are disproportionately poor and homeless). For example, due to discrimination throughout society, some transgender people engage in sex work because they are unable to find employment elsewhere. *Id.* at 11. Transgender people are targeted for abuse by family members and often do not maintain the same familial support system as non transgender people. *Id.* at 11-12. Transgender youth are often harassed at school and forced to drop out without obtaining an adequate education. *Id.* at 12.

55. *Id.* at 15.

56. AMNESTY INTERNATIONAL, STONEWALLED, *supra* note 26, at 12, 15.

57. *Id.* at 85.

58. See, e.g., Henry, *supra* note 26, at 1-7 (discussing the example of four women being sentenced to prison for defending themselves against a man who assaulted them for being lesbians); Amnesty International, *Help Stop Abuse of Transgender Women by NYC Police Officers*, <http://www.amnestyusa.org/lgbt-human-rights/stonewalled/help-stop-abuse-of-transgender-women-by-nyc-police-officers/page.do?id=1106632> (discussing the stories of two transgender women arrested by New York City police officers who committed “serious human rights violations” against both women) (last visited Apr. 4, 2009).

59. AMNESTY INTERNATIONAL, STONEWALLED, *supra* note 26, at 20.

60. Pooja Gehi, *Struggles from the Margins: Anti-Immigrant Legislation and the Impact on Low-Income, Transgender People of Color*, RUTGERS WOMEN’S RTS. L. REP. (publication forthcoming).

61. See generally STOP PRISONER RAPE & ACLU NATIONAL PRISON PROJECT, STILL IN DANGER: THE ONGOING THREAT OF SEXUAL VIOLENCE AGAINST TRANSGENDER PRISONERS 5 (2005), available at <http://www.justdetention.org/pdf/stillindanger.pdf> (discussing sexual violence faced by those transgender prisoners who do not enter protective relationships) [hereinafter STILL IN DANGER].

even more intensely, against the already dehumanized trans and/or female bodies trapped within it.<sup>62</sup>

In terms of staff violence, one common pattern is abusive searches of TIGNC people, such as repeated, unjustified strip searches for the purpose of satisfying curiosity about the person's body, humiliating the person, or the sexual arousal of the guard.<sup>63</sup> Other forms of abusive searches include groping and sexual assault during frisks and strip searches done in highly public settings.<sup>64</sup> Rape, severe beatings, threats, and sexual assault by guards of TIGNC prisoners are also common, as well as intense retaliation should the person report any of this abuse.<sup>65</sup> Verbal harassment, humiliation, and denial of basic necessities, such as food or showers, are other common forms of violence.<sup>66</sup> Violence from other prisoners can take some similar forms, including rape, beatings, stabbings, threats, and sexual assault.<sup>67</sup> Intimate partner violence and rape can occur in the form of "protective pairings," where one person "owns" the transgender person and gives her "protection" from violence in exchange for sexual and other services.<sup>68</sup>

### III. DETENTION AS A SITE OF SOLIDARITY, RESISTANCE, LOVE, AND MUTUAL SUPPORT

The violence described above does not tell the full story. Prisoners also form communities, families, and networks of resistance in solidarity with one another. At times people in detention are able to intervene and protect one another from violence perpetrated by other people in detention or directly by the state. Below is an example of each of these two types of intervention, one that I learned of from one of my clients, another that I learned of from other advocates and the media.

I asked Khadija, a Black transgender woman who was my client, about whether she had been sexually assaulted by other people in detention. She said there was just one time, when a man who propositioned her refused to take no for an answer and started grabbing her to force her to do what he wanted. The other

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62. See, e.g., INCITE! WOMEN OF COLOR AGAINST VIOLENCE, POLICE BRUTALITY AGAINST WOMEN OF COLOR & TRANS PEOPLE OF COLOR: A CRITICAL INTERSECTION OF GENDER VIOLENCE & STATE VIOLENCE, available at [http://www.incite-national.org/media/docs/5341\\_pv-brochure-download.pdf](http://www.incite-national.org/media/docs/5341_pv-brochure-download.pdf) (discussing police brutality against women of color and trans people of color in various situations) (last visited Apr. 4, 2009); INSTEAD OF PRISONS, *supra* note 29, at 31 (discussing the extreme levels of abuse that take place in prisons); STILL IN DANGER, *supra* note 61, at 1-6 (discussing *Farmer v. Brennan*, the resulting legislation, and the rape of transgender prisoners); STOP PRISONER RAPE, THE SEXUAL ABUSE OF FEMALE INMATES IN OHIO (2003), available at <http://www.justdetention.org/pdf/sexabuseohio.pdf> (discussing sexual abuse in an Ohio women's correctional facility).

63. Arkles, *supra* note 47 (discussing unnecessary strip searches); Tarzwell, *supra* note 8, at 180 (discussing demeaning acts performed by prison staff, including humiliating "gender checks," sexual assault, and rape); AMNESTY INTERNATIONAL, STONEWALLED, *supra* note 26, at 54 (discussing strip searches which involve inappropriate touching of an individual's genitalia).

64. AMNESTY INTERNATIONAL, STONEWALLED, *supra* note 26, at 54, 60.

65. Arkles, *supra* note 47.

66. AMNESTY INTERNATIONAL, STONEWALLED, *supra* note 26, at 39, 64.

67. *Id.* at 60.

68. Interview with Laura Stemple, J.D., Executive Director of Stop Prisoner Rape, 7 RES. & ADVOC. DIG. 3 (2005); SYLVIA RIVERA LAW PROJECT, *supra* note 1, at 25.

men in the area intervened, pulling the man off of her and telling him to leave her alone. Neither he nor any other prisoner ever tried to sexually assault her again during her time in prison.

Victoria Arrellano was a 23-year-old transgender woman originally from Mexico who was placed in a male facility in immigration detention.<sup>69</sup> She was HIV positive and was taking antibiotics prior to her detention to prevent pulmonary infections from developing into treatment-resistant pneumonia.<sup>70</sup> The staff at the detention facility refused to give Victoria these medications, despite repeated requests.<sup>71</sup> She grew gravely ill, such that she screamed in pain any time anyone moved her, vomited blood, and experienced diarrhea, fever, and other symptoms.<sup>72</sup> The men who were detained with Victoria cared for her, administering cold compresses to bring down her fever, cleaning up her blood and vomit, and helping her get to the bathroom.<sup>73</sup> They made requests for the infirmary to treat her. They created a petition for her demanding medical care, which seventy of them signed.<sup>74</sup> Finally, eighty of them organized and refused to line up for count, chanting, "Hospital," again and again until at last the facility complied and removed Victoria to the hospital.<sup>75</sup> That was an act of extraordinary bravery. Organized acts of resistance such as this one are often punished with extreme brutality in detention facilities.<sup>76</sup>

Unfortunately, while Victoria was eventually taken to the hospital, immigration detention and the facility staff had nonetheless succeeded in murdering her. By the time she got treatment, it was too late for the treatment to work. "She died shackled to her bed in the ICU."<sup>77</sup> The bravery and compassion of the men detained with Victoria, however, gave her whatever care, comfort, or hope she had in her last days. The outcry, media attention, and congressional hearing

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69. *Answers Sought in Trans Detainee's Death*, THE ADVOCATE, (Aug. 23, 2007), available at [http://www.advocate.com/news\\_detail\\_ektid48369.asp](http://www.advocate.com/news_detail_ektid48369.asp).

70. Letter from African American Hispanic Health Education Resource Center et al. to Julie L. Myers, Assistant Secretary, U.S. Immigration and Customs Enforcement (Sept. 11, 2007), <http://www.aidsinfonyc.org/tag/activism/arellanoltr.html> (protesting the death of Victoria Arrellano while in detention) [hereinafter Letter to Julie L. Myers].

71. *Id.*

72. *Id.*

73. Leslie Feinberg, *Death of Trans Immigrant in Detention Forges United Protests*, WORKERS WORLD, Sep. 13, 2007, at 5, available at <http://www.workers.org/pdf/2007/ww091307.pdf>.

74. Letter to Julie L. Meyers, *supra* note 70.

75. Feinberg, *supra* note 73, at 5.

76. See, e.g., Adrian Lomax, *Varied Forms of Rebellion and Resistance*, in THE CELLING OF AMERICA, *supra* note 29, at 226 (stating that "[n]onviolent protests by prisoners are not often heard of because prison administrators ruthlessly oppress prisoners who organize such actions") [hereinafter Lomax, *Varied Forms of Rebellion*]; Daniel Burton-Rose, *Queering the Underground: An Interview with George Jackson Brigade Veterans Rita "Bo" Brown and Ed Mead*, in THAT'S REVOLTING: QUEER STRATEGIES FOR RESISTING ASSIMILATION 19, 23 (Mattilda Bernstein Sycamore, ed., 2008) ("That rebellion was forcibly repressed, and the leaders were placed in segregation. While in the segregation unit they were brutalized. The type of brutalization was similar to that which occurred several years later, when guards used lead-lined gloves to beat prisoners, when they pulled one prisoner out of his cell and shoved a riot baton up his ass, creating a 5/8" tear.").

77. Letter to Julie L. Meyers, *supra* note 70.

that have followed her death, moreover, may not have come to pass without the testimony of the men who were her advocates.

These two examples of anti-violent interactions challenge assumptions about possibilities for relationships between transgender women and non-transgender men in detention. In truth, the relationships among TIGNC and non-TIGNC people in both men's and women's detention facilities are incredibly diverse.

Transgender people and non-transgender people often have friendships, consensual romantic and sexual relationships, familial relationships (chosen as well as biological), and political alliances with one another behind prison walls. All of these types of relationships can be tremendous sources of support, solace, and survival skills.<sup>78</sup> Transgender people often share information with one another about what different facilities and staff members are like, as well as tips for how to do their time and come out alive. Non-transgender people also share this information and at times aid in these networks of support. New friendships and romances are often formed in prisons and sometimes people are incarcerated with their friends or lovers from before.<sup>79</sup> Trans and non-trans people often become friends or lovers in prison as well as out of prison.<sup>80</sup> Any of these relationships may last years, beyond the time when the people are incarcerated, even a lifetime.<sup>81</sup> On the other end of the spectrum though, even the briefest and most purely sexual of encounters, when mutually desired and enjoyed, can still be a profoundly humanizing escape from the degradation of incarceration.<sup>82</sup>

Due to the targeting of particular communities of color for policing, it is not uncommon for people to have siblings, parents, cousins, uncles, or aunts who are also incarcerated in the same system.<sup>83</sup> One of my clients had a brother who was locked up in the same facility as she; they looked out for one another. Another had an uncle who was being held in a different facility, until he died following a beating by guards.

There is a long history of people in prison joining together to resist the violence of the state and its agents through organized non-violent collective action

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78. See TALVI, *supra* note 4, at 200 (noting that women prisoners have these relationships "in order to survive the emotional and physical stressors of incarceration").

79. *Id.* at 200, 202 (noting that "[f]emale prisons tend to be environments in which women build relationships of various kinds in order to survive the emotional and physical stressors of incarceration" and providing an example of a prisoner living in the same cell as her girlfriend for six months).

80. See *id.* (giving an example of a heterosexual woman in a long-term marriage who fell in love with a woman prisoner).

81. *Id.* at 201.

82. See Brenda Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUM. J. GENDER & L. 185, 233 (2006) (noting that "[f]or many prisoners sexual expression is a corollary of freedom") [hereinafter Smith, *Rethinking Prison Sex*]. See also Neil Edgar, *Inside the Box*, in THAT'S REVOLTING! QUEER STRATEGIES FOR RESISTING ASSIMILATION 139 (Mattilda aka Matt Bernstein Sycamore ed., 2004) ("Sex is like drinking down an ocean of cloudless Montana sky, soaring, expansive, ever onward.").

83. In 2003, there were thirty-five blocks in the poorest areas in Brooklyn where so many residents were incarcerated that the cost of their incarceration exceeded \$1,000,000—a phenomenon referred to as "million dollar blocks." Jennifer Gonnerman, *Million-Dollar Blocks*, VILLAGE VOICE, Nov. 9, 2004, available at <http://www.villagevoice.com/2004-11-09/news/million-dollar-blocks/1>.

as well as through direct confrontation and uprising often at great personal risk.<sup>84</sup> One trans woman client of mine filed a grievance against a guard who verbally abused her, calling her a faggot, making degrading sexual remarks about her body parts, and threatening to kill her. The men incarcerated in the cells to either side of her chose to testify against the guard, exposing themselves to the risk of retaliation. In fact, that guard and a friend of his beat one of these men severely a few days later shouting that this was what he got for being a witness against him. Another client of mine became a very adept jailhouse lawyer and assisted other transgender women as well as non-transgender men in her prison to file claims about mistreatment they were experiencing, particularly when they were denied needed medical care.

When the Sylvia Rivera Law Project began a Prisoner Advisory Committee,<sup>85</sup> we initially envisaged it as only open to currently incarcerated TIGNC people. However, as soon as we sent out invitations, a transgender woman invited a straight, non-transgender, non-intersex male friend of hers to join. When we wrote to the group to ask what they thought of the idea of having prisoners who were not transgender, intersex, or gender nonconforming join, I was struck by the strong response in favor of the idea. Nearly everyone wrote explaining the importance of having friends and allies who were not trans-identified in their lives, in the movement, and in political work on behalf of trans people in prison. I remember one Black transgender woman powerfully writing to tell us that all people in prison were a community to one another in a way, that many of the problems trans people in prison face are faced by all people in prison, and that liberation for trans people in prison could not be achieved without including people from this larger prison community as well. We changed our original vision for the Prisoner Advisory Committee and began welcoming imprisoned non-TIGNC allies to join.

The divisions between these groups (transgender and non-transgender) are not even particularly sharp; any binary in terms of gender at some point will prove false. Many people who do not fit gender norms do not identify as “transgender.” Some people are not certain of their gender identity or have a gender identity that changes over time. Some people consciously change their gender expression, either in a more or less gender conforming way, when they enter prison as they adapt to a very different cultural space and social structure.<sup>86</sup> One of the powerful

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84. Ervin, *supra* note 51, 3-4 (discussing race-based violence in prisons); TALVI, *supra* note 4, at 129 (“Former VSPW SHU prisoner Christina Francis explained to me that she joined in many unit-wide protests (banging on doors, screaming, and throwing food trays through food slots are usually the extent of those strategies) to try to help the ‘5150s,’ as the mentally ill are referred to in police code. These reasons for these protests included situations where women who had defecated all over their cells were being forcefully extracted from their cells.”); Burton-Rose, *Queering the Underground*, *supra* note 76, at 21 (“[W]here it really came to fruition was at the Washington State Penitentiary at Walla Walla in the development of Men Against Sexism, which confronted prisoner-on-prisoner rape, the bullying and selling of prisoners by other prisoners.”).

85. The Prisoner Advisory Committee is a group of currently imprisoned volunteers who join in the Sylvia Rivera Law Project’s work through giving us input on our priorities, helping us develop model policies and public education materials related to trans imprisonment issues, and producing a newsletter.

86. Several of my clients have chosen to try to pass as non-trans people who meet gender norms in order to avoid violence while in prison. Others, though, explore other gender expressions while in



transforming possibilities for relationships between trans and “non-trans” people in prison come to pass when people for the first time meet and speak with people whom they know to be transgender and find words and community that fit with their own experiences, leading them to realize that they are also transgender. I have met both trans men and trans women who were first able to come out because of conversations and support from other people in detention.

For all of these reasons, any concept that the only interactions possible between transgender and non-transgender prisoners are necessarily violent does disservice to the diversity and humanity of the people behind bars and plays into racist stereotypes. None of this, of course, is meant to imply that prisons are sometimes “safe”—they never are—or to downplay the very serious risks of violence from other people in prison that transgender people, particularly transgender women in men’s facilities, experience. It is intended, however, to suggest that without taking into account the role that community, positive relationships, and solidarity among prisoners can play in decreasing violence and increasing safety, the legal system and advocates can create policies and practices that inadvertently further violence often at the precise moments when we are seeking to prevent it.

#### IV. RESTRICTIONS ON COMMUNITY BUILDING

*The main things that the [prison administration] does is that they try to break down any kind of supportive relationship. It doesn't matter whether it's sisterly or sexual.*

—Linda Evans, imprisoned lesbian activist<sup>87</sup>

*Nonviolent protests by prisoners are not often heard of because prison administrators ruthlessly oppress prisoners who organize such actions . . . . Prison officials will inevitably become aware of the organizing, and when they do, they immediately lockdown the prison and conduct an investigation. Any prisoners who can be identified as organizers will be sentenced to long terms in segregation and transferred, usually to prisons in the federal system or in other states. Prison officials simply do not tolerate prisoners who organize nonviolent protests.*

—Adrian Lomax<sup>88</sup>

Far from encouraging these types of interactions, correctional systems and officials often actively seek to prevent and punish positive relationship-building, communications, consensual affectionate contact, formation of networks of

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prison for a variety of reasons. See, e.g., Edgar, *supra* note 82, at 139 (stating that someone who had been a queen in prison shaved off his braids and started growing stubble before he headed back to the “real world” where he was a “normal” Black man with a wife and kids).

87. TALVI, *supra* note 4, at 204.

88. Lomax, *Varied Forms of Rebellion*, *supra* note 76, at 226.

solidarity, and non-violent collective action among people in detention, thereby undermining the ability of people in prison to create meaningful safety and resist state-perpetrated violence. Overall, the courts have failed to set adequate limits to correctional systems' ability to restrain positive interactions among prisoners and at times actively endorse those efforts, further endangering all people in detention and particularly TIGNC people in detention.<sup>89</sup>

In *Turner v. Safley*,<sup>90</sup> the Supreme Court established that a different, lesser form of scrutiny applies to First Amendment claims when people in prison make them.<sup>91</sup> In this case, the Court held that infringements on the constitutional rights of prisoners are permissible whenever they are "reasonably related to legitimate penological interests."<sup>92</sup> The four factors the Court identified for making this determination are whether there is a valid rational connection between the prison regulation and legitimate penological purpose; whether there are alternative means available to the prisoner to exercise his or her constitutional rights; how accommodating the right would impact prison staff, other people in prison, and prison costs; and whether there are any obvious, easy alternatives to satisfying the penological objective without sacrificing the constitutional rights of the prisoner.<sup>93</sup>

Applying this test, the court upheld a prison regulation prohibiting correspondence between people in prison.<sup>94</sup> The court accepted the justification the defendants proffered—that correspondence between prisoners could be used to arrange assaults, escapes, and gang-related activity.<sup>95</sup> The Court also found that no easy alternative existed, since monitoring of correspondence would be unduly burdensome and subject to error.<sup>96</sup> The Court did invalidate a regulation that prohibited prisoners marrying unless the superintendent gave them permission based on compelling reasons for doing so.<sup>97</sup> While the Court clearly stated that restrictions on prisoners' right to marry may be justified, it held that in this case the regulation swept too broadly given the stated objectives of the regulation.<sup>98</sup>

Prohibitions on correspondence between prisoners can have a particularly severe impact on TIGNC people in prison who may be isolated and who may have few allies in their facility even if they are in general population. Many TIGNC people in prison write to us seeking any way to correspond with people in other facilities. Some want to be able to write friends they left behind in another facility; some are heartbroken when transferred away from a lover and are cut off from any form of contact with them; and many, especially those who are being held in some form of segregation or who are in a facility with few or no other TIGNC people,

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89. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 81-82 (1987) (restricting correspondence between prison inmates).

90. 482 U.S. 78.

91. *Id.* at 81.

92. *Id.* at 89.

93. *Id.* at 89-90.

94. *Id.* at 91-93.

95. *Id.* at 91.

96. *Turner*, 482 U.S. at 93.

97. *Id.* at 97.

98. *Id.*

seek to communicate with other imprisoned TIGNC people for mutual support and opportunities to share strategies for survival.

The Court has also been hostile to prisoners' claims to a right to organize with one another even when that organizing promotes safety. In *Jones v. North Carolina Prisoners' Labor Union, Inc.*,<sup>99</sup> the Supreme Court upheld North Carolina's rules prohibiting a union of prisoner workers from soliciting additional members, sending bulk mailings, or holding any meetings of its members.<sup>100</sup>

The facts in this case were undisputed. A multi-racial, democratically-lead association of thousands of prisoners in the custody of North Carolina had been organizing for several months, setting out:

[T]o secure meaningful rehabilitation programs, to defend human and civil rights of prisoners, to arrange for community based support groups to appear before legislative bodies in the interests of prison reform, to educate the public through the publication of a union newspaper and through news releases, to retain attorneys for the protection of prisoners' legal rights, and for the advancement of prisoners' economic, political, social, and cultural interests.<sup>101</sup>

As stated in the Appellee's brief:

In spite of appellants' vigorous efforts to suppress the Union, the evidence is uncontradicted that the Union had attained a measure of racial unity at North Carolina's large Central Prison; that personal responsibility of the membership had been enhanced by their participation in the democratic processes of the organization; and that the Union helped to build self-reliance among inmates by discussing problems of economic and racial tension, lack of education, lack of employment opportunities and by attempting to find peaceful and crime free alternatives to these problems.<sup>102</sup>

Prison officials claimed, without evidence, that at some point in the future the Union could become divisive and dangerous.<sup>103</sup> One explained that:

After the inmate Union has become established, there would probably be nothing this Department could do to terminate its existence, even if its activities became overtly subversive to the functioning of the Department. Work stoppages and mutinies are easily foreseeable. Riots and chaos would almost inevitably result. Thus, even if the purposes of the union are as stated in the

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99. 433 U.S. 119 (1977).

100. *Id.* at 119.

101. Brief of Appellee, *Jones*, 433 U.S. 119 (No. 75-1874), 1976 WL 181714, at \*9 (quoting Articles of Incorporation of the Union).

102. *Id.* at \*7-8.

103. *Jones*, 433 U.S. at 127.

Complaint, the potential for a dangerous situation exists, a situation which would not be brought under control.<sup>104</sup>

Confronted with these facts and with the Union's claims for violations of it and its members' First Amendment and Equal Protection rights, the Supreme Court ruled against the Union, chiding the lower court for failing to give sufficient deference to prison officials.<sup>105</sup> The Court minimized the rights of the Union and its members stating that "First Amendment speech rights [were] barely implicated in [the] case" and holding that the associational rights of the prisoners were necessarily constrained given their status as prisoners.<sup>106</sup>

It is notable that not only did all of the undisputed evidence show that in fact the association was actually decreasing violence rather than fomenting violence,<sup>107</sup> but that most of the fears claimed by the prison officials were not actually related to violence either.<sup>108</sup> In fact, most of the prison officials' fears were concerns about effective non-violent collective action for making changes in the operation of the facility. The Court was willing to sacrifice not only the First Amendment rights of the prisoners but also their safety in order to defer to the prison officials' concerns about losing the ability to effectively control and coerce forced labor from the prisoners without any ability of the prisoners to advocate effectively for their rights.<sup>109</sup>

I have heard from several trans people across the country who wanted to begin support or educational groups on gay/lesbian, bisexual, and transgender issues. They believed that these groups would go a long way toward not only allowing the trans, gay, and bi prisoners an opportunity to support one another and build self-esteem, but also toward educating their straight non-trans peers and decreasing the transphobia and homophobia in the facilities. In all cases, their facilities denied them permission to start such groups. Courts have consistently held that prisoners have no right to participate in any particular prison programs or indeed to any program at all.<sup>110</sup>

Another type of restriction with particular relevance to trans and queer prisoners is the prohibition on "homosexual contact" in force in jurisdictions across the United States.<sup>111</sup> In many jurisdictions it is not only prohibited to have sex with

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104. Brief of Appellants, *Jones*, 433 U.S. 119 (No. 75-1874), 1977 WL 189838, at \*15 (citing the testimony of Appellant David Jones, Secretary of the Department of Corrections).

105. *Jones*, 433 U.S. at 125-26.

106. *Id.* at 130.

107. See Brief of Appellee, *supra* note 101, at \*97-98 (stating that "the Union had attained a measure of racial unity" and the Union attempts to find peaceful solution in its discussion of multiple problems).

108. See *Jones*, 433 U.S. at 127 (noting that prisoner organizers could misuse their power and seeing work stoppage as a possibility).

109. See *id.* at 130 (The *Jones* court threw out the First Amendment and all other claims, reasoning that the prison guards' opinions regarding the need to keep order in the prison outweighed the needs or rights of the prisoners.).

110. See, e.g., *Hoptowit v. Ray*, 682 F.2d 1237, 1254 (9th Cir. 1982) (making it clear that the rights of prisoners to join in groups and activities are far outweighed by the need for safety and security in the prison environment).

111. Smith, *Rethinking Prison Sex*, *supra* note 82, at 193.

other people in prison, but also to have any other form of affectionate physical contact.<sup>112</sup> For example, in New York, it is prohibited to kiss, hug, or hold hands with another person in prison.<sup>113</sup> While of course it is not only or mainly trans prisoners who have sex with other people in prison, trans people are most likely to be perceived to be having sex (whether or not they are) and to be punished for it harshly.<sup>114</sup>

These prohibitions have been widely held or presumed to be constitutionally permissible. In one case, the Fourth Circuit rejected an Equal Protection claim by a gay male prisoner who was kept in a single cell rather than a double cell because of his gender and sexual orientation.<sup>115</sup> The court found, *inter alia*, “[t]here also is no fundamental right to engage in homosexual acts generally, and even if a right to engage in homosexual acts existed, it would not survive incarceration.”<sup>116</sup> Indeed, courts have approved complete restrictions on prisoners having sex even with their own spouses in heterosexual marriages<sup>117</sup> and have been singularly unsympathetic to claims by prisoners relating to sexual expression, even straight non-trans male sexuality.<sup>118</sup>

However, they often reserve particular venom when rejecting claims of those who are or who are perceived to be gay or trans. In one indicative case, *Dooley v. Quick*,<sup>119</sup> the District Court of Rhode Island rejected two gay male prisoners’ claims that their constitutional rights were denied when they were punished for sending each other notes, for signing to each other between their cells, and for speaking about their pending law suit in a “prohibited” area.<sup>120</sup> As the court stated, “[p]rison

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112. TALVI, *supra* note 4, at 196.

113. N.Y. COMP. CODES R. & REGS. tit. 7, § 270.2(B)(2)(iv) (2009).

114. TALVI, *supra* note 4, at 204.

115. *Veney v. Wyche*, 293 F.3d 726, 726-27 (4th Cir. 2002).

116. *Id.* at 732 n.4 (citation omitted).

117. *See, e.g., Hernandez v. Coughlin*, 18 F.3d 133, 137 (2d Cir. 1994) (finding that prisoners have no right to conjugal visits because “[r]ights of marital privacy . . . are necessarily and substantially abridged in the prison setting”).

118. *See, e.g., Giano v. Senkowski*, 54 F.3d 1050, 1057 (2d Cir. 2004) (upholding prohibition on possession by male prisoners of nude or semi-nude photographs of their girlfriends or wives); *Thompson v. Patteson*, 985 F.2d 202, 207 (5th Cir. 1993) (finding refusal to permit prisoner to possess copies of Penthouse Letters magazine permissible); *Frink v. Arnold*, 842 F. Supp. 1184, 1192 (S.D. Iowa 1994) (finding seizure by prison officials of fictional prose with sexual content written by a prisoner constitutionally permissible).

119. 598 F. Supp. 607 (D.R.I. 1984).

120. *Id.* at 611, 616-17. The court makes its attitude toward gay people and people in prison apparent in the paragraph where it proclaims its neutrality:

This case is one which implicates vital concerns: the need of a large, crowded penitentiary to maintain order and security; the pervasive threat which homosexuality poses in a custodial environment; and the right of prisoners—even overtly gay prisoners—to enjoy the benefits of the Constitution consistent with the legitimate constraints inherent in sound penological management. The ‘high ground of constitutional principle’ is all too easily beclouded when issues which, even in the abstract, kindle fiery emotions are viewed in the bright glare of such highly-charged elements as violent crime, hardened criminality, and unabashed homosexuality. Yet, the Constitution knows no sexual preference; and purely “subjective judgments are a luxury which the courts cannot indulge.”

*Id.* at 609 (quoting *Marcello v. Regan*, 574 F. Supp. 586, 596 (D.R.I. 1983)).

officials are generally concerned about homosexual contact within *any* sector of the prison, considering such incidents to be a grave threat to institutional discipline and security. These concerns are founded in reason, experience, and common sense.<sup>121</sup> In its opinion the court referenced what it perceived as the “pervasive threat which homosexuality poses in a custodial environment.”<sup>122</sup> While the court did find that the prison officials’ denial of the men’s ability to meet with one another to discuss their law suit presented some problems, the court only ordered the agency to develop regulations on the subject and denied the request for damages.<sup>123</sup> The men had also been refused access to Gay Community News, but because the prison had since reconsidered and allowed them to have the newspaper, the court dismissed this claim as moot, again finding that not being permitted to read newspapers for the gay community did not actually injure the men, and no damages were in order.<sup>124</sup> The court also dismissed all of their other claims.<sup>125</sup> It was implicit throughout the decision that preventing gay men from communicating with one another in any way that might further a romantic or sexual relationship was a necessary, legitimate, and desirable goal for prison officials to pursue.

The pervasive, judicially approved condemnation of sex between people in prison has dire consequences for the safety of trans people in prison. The prohibitions send the message that queer sexuality, not sexual violence, is the problem that prison administrators care about eliminating. Not only do they contribute to the disproportionate discipline and isolation of trans and gender nonconforming prisoners, but they also create yet another barrier to getting help in cases of sexual violence.<sup>126</sup> For example, after months of horrifying abuse from a male prisoner who raped, threatened, beat, and made rules for her, my client Regina gathered the courage to report the abuse to a staff member and ask for help. Instead of helping her, the staff member charged her with a disciplinary violation under the sex offense rule, which defines consensual sex and rape as the same offense, stating: “An inmate shall not engage in or encourage, solicit or attempt to force another to engage in sexual acts.”<sup>127</sup> At her hearing, the staff member introduced feminine clothing that Regina had in her cell as evidence that she had consented to the sexual contact. She was in fact found guilty and disciplined for having been raped.

## V. SOLITARY CONFINEMENT

*These people love the control that protective custody gives them.  
They can beat on us, rape us and push us around almost at will.*

—*Vanity, imprisoned transgender woman*<sup>128</sup>

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121. *Id.* at 613.

122. *Id.* at 609.

123. *Id.* at 619.

124. *Dooley*, 589 F. Supp. at 623.

125. *Id.* at 624.

126. Tarzwell, *supra* note 8, at 179.

127. N.Y. COMP. CODES R. & REGS. tit. 7, § 270.2(B)(2)(i).

128. *Vanity's Story*, 4 GIC TIP J. 4 (2004).

The most direct way of disrupting positive relationships within detention is forcibly keeping people isolated from one another. Indeed, solitary confinement is the punishment for most rules violations, including those described above related to correspondence, organizing, and consensual sexual or affectionate contact.

Like most people who have never been in detention, I had many erroneous assumptions before I began working with imprisoned people. For example, I had assumed that naturally trans people, particularly trans women in men's facilities, would prefer the "safety" of protective custody over the dangers of general population. However, in the course of my work, I have heard from significantly more TIGNC prisoners who were in some form of segregation against their will and seeking assistance to get out of it than I have TIGNC prisoners who were in general population and seeking to be placed in protective custody, although both do certainly happen. Of those TIGNC prisoners I have worked with in general population, including trans women in men's prisons who had been beaten, raped, and/or stabbed by other prisoners in the past, most (but not all) have *not* wanted to be placed in protective custody.<sup>129</sup> I had to learn about the nature of protective custody and other forms of segregation to understand how deeply flawed my assumptions were.

#### *A. How Isolation Furthers Violence and Abuse*

Although others who have commented on placements for transgender prisoners have pointed out some of the problematic aspects of isolating placements, they have often posed these problems as a trade-off for increased safety.<sup>130</sup> In some cases that is true; placement in solitary confinement can at times reduce certain forms of violence from other people in prison or move a prisoner to an area where an abusive staff member does not work. However, in many cases the opposite is true; not only are these placements almost always worse than general population in many other ways, but also they often lead to greater, not lesser, violence.

Placements in protective custody,<sup>131</sup> administrative segregation,<sup>132</sup> supermax facilities,<sup>133</sup> or punitive segregation<sup>134</sup> are usually highly isolating. While systems

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129. However, many have wanted some other change to improve their safety, such as a transfer to different block or unit, a transfer to a facility that was smaller or that had staff they believed were more trans-friendly, a transfer to a women's or trans-only facility, access to a private shower, access to a single cell within general population, or the ability to choose the person with whom they would share a cell.

130. *See, e.g.,* Rosenblum, *supra* note 10, at 530 ("Automatic segregation may provide an improvement in safety, but at a high comfort cost to the transgendered prisoner. Other concerns arise.").

131. Often included within "administrative segregation," protective custody refers to the segregation of imprisoned people in order to protect them from violence within the general population. At times "protective custody" is distinguished from "involuntary protective custody" based on whether or not the person has consented to the placement.

132. "The phrase 'administrative segregation,' as used by the state authorities here, appears to be something of a catchall: it may be used to protect the prisoner's safety, to protect other inmates from a particular prisoner, to break up potentially disruptive groups of inmates, or simply to await later classification or transfer." *Hewitt v. Helms*, 459 U.S. 460, 468 (1983).

133. Supermax facilities are typically used as a form of administrative segregation, although they

vary somewhat, people are commonly confined to a tiny cell for twenty-one to twenty-four hours a day. They often have little or no human contact except for highly limited (and often unpleasant) interactions with facility staff. Sometimes even this “contact” is limited to announcements through loudspeakers.<sup>135</sup> This isolation is profoundly psychologically damaging. The catastrophic consequences of isolation on human beings’ basic mental stability, health, and ability to function have been well documented.<sup>136</sup> As early as 1890, the U.S. Supreme Court commented on the impact of isolation on prisoners:

A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane, others, still, committed suicide, while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.<sup>137</sup>

The documented psychological effects of isolation, even for short periods of time, include intense anxiety, confusion, lethargy, panic, impaired memory, psychotic behavior, hallucinations and perceptual distortions, difficulty eating, inability to communicate, hypersensitivity to external stimuli, violent fantasies, and reduced impulse control.<sup>138</sup> This type of segregation itself is a form of

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may also be used for other forms of segregation. In 2000, Human Rights Watch described supermax prisons as follows:

There are currently more than twenty thousand prisoners in the United States, nearly two percent of the prison population, housed in special super-maximum security facilities or units. Prisoners in these facilities typically spend their waking and sleeping hours locked in small, sometimes windowless, cells sealed with solid steel doors. A few times a week they are let out for showers and solitary exercise in a small, enclosed space. Supermax prisoners have almost no access to educational or recreational activities or other sources of mental stimulation and are usually handcuffed, shackled and escorted by two or three correctional officers every time they leave their cells. Assignment to supermax housing is usually for an indefinite period that may continue for years. Although supermax facilities are ostensibly designed to house incorrigibly violent or dangerous inmates, many of the inmates confined in them do not meet those criteria.

HUMAN RIGHTS WATCH, *OUT OF SIGHT: SUPER-MAXIMUM SECURITY CONFINEMENT IN THE UNITED STATES*, at overview (2000), available at <http://www.hrw.org/en/reports/2000/02/01/out-sight-super-maximum-security-confinement-us> [hereinafter *OUT OF SIGHT*].

134. Punitive segregation, also known as disciplinary confinement, is a form of segregation imposed as a consequence for violation of a prison rule.

135. Shaylor, *supra* note 39, at 402.

136. See, e.g., Tracy Hresko, *In the Cellars of the Hollow Men: Use of Solitary Confinement in U.S. Prisons and Its Implications Under International Laws Against Torture*, 18 PACE INT’L L. REV. 1, 3 (2006) (“The devastating psychological and physical consequences of solitary confinement have been recognized since the mid-1800s.”).

137. *In re Medley*, 134 U.S. 160, 168 (1889).

138. Hresko, *supra* note 136, at 3; Alexander Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory?* 36 FORDHAM URB. L.J. 53, 82 (2009); Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 471 (2006).



psychological violence and can lead to prisoners violently harming or killing themselves.<sup>139</sup> International law condemns long sentences in solitary confinement.<sup>140</sup> As one transgender advocate and mental health provider stated: “Many trans people I’ve worked with prefer to be in general population because finding their place in the prison culture, although it is an exploited and vulnerable one, is preferable to the isolation of protective custody.”<sup>141</sup>

Isolation can also increase vulnerability to physical violence. It deprives people of any support systems, friendships, or opportunities for solidarity that could help them to avoid and survive violence. Other people in prison who might have helped talk someone through the aftermath of violence, shared strategies with the person to avoid future violence, sought help for that person if they were ill or injured, or intervened if a staff member or other person in prison was violent toward them, are simply no longer available. If Victoria Arrellano was segregated from the men with whom she was detained, she would have had no one fighting for her right to live at all.

It is far less possible to develop networks or communities that can help someone avoid violence in the future when they are cut off from the people with whom they might connect. Someone stabbed Alice, one of my clients, from behind. She did not know who her attacker was. The facility placed her in protective custody against her will. She thought that she would have been better off continuing to live in general population, where by talking to people she might have been able to find out who had attacked her and why. Not having that information left her in constant fear because she had no idea how to go about trying to avoid future attacks.

The very purpose of segregation is frequently to disrupt networks of solidarity and political resistance.<sup>142</sup> Jailhouse lawyers and prisoners who speak with the media are often targeted for solitary confinement.<sup>143</sup> One trans woman I worked with in New York who gave an interview with a magazine about her relationship with another prisoner was punished with years of intensive isolation. Adrian Lomax, an imprisoned non-trans man, describes a time when a group of prisoners tried to organize a mass hunger strike in a medium-security prison in Wisconsin to

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139. Shaylor, *supra* note 39, at 397 (“Research indicates that women *are* more prone to violent behavior as a result of confinement in solitary units, but violence against *themselves*.”); TALVI, *supra* note 4, at 140 (Men in solitary confinement “began to mutilate themselves, swallow sharp objects, or commit suicide.”); The Correctional Ass’n of N.Y., *Disciplinary Confinement in New York State Prisons* (Mar. 2004), <http://www.correctionalassociation.org/publications/download/pvp/factsheets/SHU-fact.pdf> (noting that between 1998 and 2001, more than half of the suicides in New York State prisons occurred in disciplinary confinement, although less than seven percent of prisoners were housed in these units).

140. Reinert, *supra* note 138, at 82.

141. SYLVIA RIVERA LAW PROJECT, *supra* note 1, at 19.

142. Shaylor, *supra* note 39, at 398.

143. *Id.* at 398-99. Jailhouse lawyers are the single largest group in disciplinary units. Mumia Abu-Jamal, *Campaign of Repression*, in *THE CELLING OF AMERICA*, *supra* note 29, at 191; *see also*, Adrian Lomax, *Report from the Hole*, in *THE CELLING OF AMERICA*, *supra* note 29, at 193 (discussing the author’s punishment with segregation for writing a newspaper article critical of a prison staff member [hereinafter Lomax, *Report from the Hole*]).

protest terrible conditions. Hunger strikes were permissible under the rules of the prison. Nonetheless, the organizers were identified, transferred to maximum security prisons, and sentenced to long terms in segregation.<sup>144</sup>

Some trans people have reported that they are more likely to be attacked in protective custody or other forms of segregation because it is easier for abusive correctional staff to access them alone and out of the sight of other prisoners or video surveillance.<sup>145</sup> Sometimes staff will deliberately place someone in segregation in order to gain greater access to that person for their own violent purposes. For example, in a women's prison in New York, a lesbian femme was targeted for sexual harassment by a male guard who left pornography on her pillow and made constant unwanted sexual advances. Her butch partner intervened effectively by staying near her and speaking up when the guard would proposition her calling the sexual harassment for what it was. The guard wrote up the femme on false disciplinary charges in the hopes that she would then be placed in segregation and that he would be able to access her away from the help of her partner.

Additionally, the increased surveillance, searches, and lack of privacy in segregation increase the frequency and level of explicitly state-sanctioned sexual violations. People in segregation are often required to endure a strip search any time they enter or leave their cell, even when they have had no contact with other people and when they are only going a short distance.<sup>146</sup> They are even less likely to have any visual privacy from guards when using the toilet, dressing, or showering than are people in general population.<sup>147</sup>

The devastating isolation from other people in prison is not always complete. However, segregation in these cases still has particular dangers. Cells can be exceptionally overcrowded. One Alaskan Aleut trans woman, convicted of murdering a lover who had abused her, spent almost all of her sentence in segregation.<sup>148</sup> She wrote: "There are three people to a cell that is about six feet by eight feet. The person on the floor (me) has a mattress that is up under the toilet. We get stepped on, [our] toothpaste is hard and chunky, [we have] no shampoo or deodorant [or] proper clothing."<sup>149</sup>

Protective custody is frequently literally the same as punitive segregation. Even when it is not, people can be deemed to need protection or to be appropriate for administrative segregation for a variety of reasons and people in segregation are rarely separated based on security classification. Therefore, sometimes the people who are the most vulnerable to violence are housed with those people who have been most violent in the past and who are most likely to be violent in the future, again decreasing safety. For example, Traci Greene was placed in protective custody because of her vulnerability to violence as a transgender woman.<sup>150</sup>

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144. Lomax, *Varied Forms of Rebellion*, *supra* note 76, at 226.

145. SYLVIA RIVERA LAW PROJECT, *supra* note 1, at 18.

146. TALVI, *supra* note 4, at 65-67.

147. *Id.*

148. *Id.* at 138.

149. *Id.*

150. *Greene v. Bowles*, 361 F.3d 290, 292 (6th Cir. 2004).

Another prisoner who had an extensive history of violence against other prisoners was also placed in protective custody because he had testified against other prisoners following a prison riot.<sup>151</sup> The latter prisoner beat Traci severely with a mop handle and fire extinguisher.<sup>152</sup> Sophia Brooks was raped by a man placed in protective custody with her: “I yelled for him to stop, but nobody heard me. He kept saying, ‘Yeah, you like that, bitch. I knew you wanted it.’ When he was done, he left, and . . . I cried all night. I was ashamed of feeling so helpless.”<sup>153</sup> She wants acknowledgement of “the problem of placing minimum-custody transsexuals into locked-down protective management areas with mixed custody levels.”<sup>154</sup>

Additionally, when people are released from protective custody, they may be labeled “victims” because they were placed there, which can make them even more likely to be targeted for violence in the future.<sup>155</sup> Segregation can also draw more attention to transgender people through this separation. One trans woman named Jessica was held in involuntary protective custody and reported being held in a cell surrounded by a chicken wire cage and kept from all direct contact with other prisoners. When people walked by, be they staff or prisoners, they would mock her and call out names and slurs for her. She felt that she was dehumanized and her difference exaggerated by this cage that surrounded her and no other prisoner, building hostility and barriers beyond the physical between her and others in the prison.

In addition to these immediate consequences of isolation, people who find themselves in segregation, whether for protection or punishment, also typically find their rights and “privileges” dramatically restricted. For example, phone calls, showers, group religious worship, and visitation may all be restricted or withdrawn.<sup>156</sup> As contact and community with other prisoners is nearly or completely eliminated, contact and community with friends and family members from outside prison is also narrowed and constrained, which further limits opportunities for those others to try to help people in detention cope with violence or to advocate for them with prison officials to try to end it.<sup>157</sup> While recreation in theory remains available, in practice it often is not offered or is only offered in the middle of the night—and if a prisoner is asleep, she is often said to have “refused” recreation.<sup>158</sup> The physical conditions are often much more harsh and less sanitary

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151. *Id.* at 292-93.

152. *Id.* at 292.

153. STOP PRISONER RAPE, IN THE SHADOWS: SEXUAL VIOLENCE IN U.S. DETENTION FACILITIES 9 (2006), available at [http://www.justdetention.org/pdf/in\\_the\\_shadows.pdf](http://www.justdetention.org/pdf/in_the_shadows.pdf) [hereinafter IN THE SHADOWS].

154. *Id.*

155. See ROBERT W. DUMOND, TESTIMONY REVIEW PANEL ON PRISON RAPE CALIFORNIA STATE PRISON 5 (2006), available at [http://www.ojp.usdoj.gov/reviewpanel/pdfs\\_nov06/written-dumond.pdf](http://www.ojp.usdoj.gov/reviewpanel/pdfs_nov06/written-dumond.pdf) (noting the increased labeling and stigmatization experienced by victims of sexual assault who enter protective custody).

156. See Scharff Smith, *supra* note 138, at 443 (describing conditions at supermax prison facilities).

157. *Id.*

158. See, e.g., *Tates*, 2003 WL 23864868, at \*5-6 (E.D. Cal. Mar. 11, 2003) (discussing a jail’s provision of “dayroom” access, which is used for leisure activities, late at night).

than in general population. One of my clients, an A.G.<sup>159</sup> named Terry, was falsely accused of sexually assaulting another person in her facility. During the investigation, Terry was held in a small room that was flooded with several inches of filthy water and that had no toilet. Access to healthcare can also be more difficult. A trans woman named Janet imprisoned in California reported that her hormones would be withheld whenever she was placed in administrative segregation or suicide watch.<sup>160</sup>

Participation in programs is rarely permitted.<sup>161</sup> Programs, while problematic (exploitative, unsafe, and forced prison labor is an example of a type of “program”),<sup>162</sup> are often extremely important to people in detention for several reasons. For one, it is one of the only ways to interrupt hours of deadening boredom with some sort of activity.<sup>163</sup> For another, certain programs can help build skills to increase the chance of success once released.<sup>164</sup> For another, while typically prisoners are only paid pennies an hour for their labor, these programs are virtually the only way to earn money to use in the commissary to buy such luxuries as shampoo, toothpaste, cigarettes, or stamps.<sup>165</sup> Finally, participation in certain programs can be mandatory to make parole or an early release date. Even when not mandatory, successful participation in prison programs is generally regarded as a very favorable factor in parole decisions. Periods of time in segregation in and of themselves, particularly when it is punitive segregation, often count against parole and can also result in loss of good time. In other words, segregation often leads to longer periods of time spent in prison, extending the violence of detention itself and the individuals’ exposure to the forms of violence prevalent within the system.

In some ways, the failure of solitary confinement to live up to its purported safety justifications<sup>166</sup> mirrors the failure of incarceration itself. The same logic—that segregation promotes safety—also undergirds two of the justifications of

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159. A.G. is an identity, in terms of gender and sexuality, used primarily by masculine people in urban lesbian communities of color.

160. Janet Loftin, *A Transsexual’s Experience in the California Department of Corrections (CDC)*, 4 GIC TIP J. at 2.

161. See SYLVIA RIVERA LAW PROJECT, *supra* note 1, at 18 (noting constraints on access to vocational and recreational programs for those in protective custody).

162. See Danny Cahill & Paul Wright, *Worked to Death*, in *THE CELLING OF AMERICA*, *supra* note 29, at 112 (describing several exploitative prison labor programs).

163. See Marilyn C. Moses & Cindy J. Smith, *Factories Behind Fences: Do Prison ‘Real Work’ Programs Work?*, 257 NAT’L INST. JUST. J. 32, 33 (2007), available at <http://www.ncjrs.gov/pdffiles1/nij/jr000257h.pdf> (noting one of the benefits of prisoner work programs is that they limit prisoner “idleness”).

164. *Id.*

165. See *Loving v. Johnson*, 455 F.3d 562, 563 (5th Cir. 2006) (holding that prisoners need not receive minimum wage for their work).

166. Safety is often cited as the reason why solitary confinement is necessary. Scharff Smith, *supra* note 138, at 443; Shaylor, *supra* note 39, at 397. However, it is often no more than a pretext for another, less humane motivation. See Scharff Smith, *supra* note 138, at 500 (describing problems of using solitary confinement as a means of extortion); Shaylor, *supra* note 39, at 398-99 (quoting a former warden who explains that supermax facilities are used as a means to “control revolutionary attitudes in the prison system and in the society at large”).

incarceration: incapacitation and deterrence.<sup>167</sup> The concept of incapacitation is that removing people from society prevents them from doing further harm to society. Keeping “criminals” off the streets is touted in political discourse as the way the government keeps “us” safe.<sup>168</sup> Incapacitation also underlies administrative and punitive segregation.<sup>169</sup>

The concept of deterrence is that if people are punished by being removed from their communities and stripped of their liberties, they will be less likely to commit further crimes when they return to society in the future—the punishment will have deterred them from future bad behavior (specific deterrence).<sup>170</sup> Furthermore, the knowledge that people are punished for crimes will prevent people from committing crimes in the first place (general deterrence).<sup>171</sup> Punitive segregation also relies on deterrence as a justification.

However, incarceration does not actually promote safety. As described above, most of the people who are imprisoned are not any more likely to be violent than most of the people who are not imprisoned.<sup>172</sup> Those who are inclined to be violent who are put in prison are not “incapable” of further violence during their time there. If that were the truth, the beatings, slashings, stabbings, rapes, and other forms of assaults that occur among prisoners would not exist. Detention in and of itself, as explained above, is a form of violence and creates a system that foments further violence.<sup>173</sup> Rates of incarceration do not correspond with changes in rates of violent crime.<sup>174</sup> As our use of incarceration has ballooned, people’s perceptions of their safety have remained largely unchanged.<sup>175</sup> In addition, incarceration has been used extensively as a means to disrupt social justice oriented organizing aimed at creating transformative change.<sup>176</sup>

The process of incarceration does not address any of the actual underlying reasons why people commit crimes or are violent, such as profound poverty, inadequate healthcare, or systemic oppression. In fact, because people are often further traumatized, deeper in poverty, and less connected with their communities

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167. One of the primary purposes of punishment in the U.S. criminal legal system is retribution. Rehabilitation is another goal, together with incapacitation and deterrence. MATTHEW LIPPMAN, CONTEMPORARY CRIMINAL LAW 59 (2007).

168. *See, e.g.*, Keeping New York Crime Fighting Ahead of the Curve: The Danger of Complacency, Remarks by Anthony Weiner at Citizens Crime Commission (Aug. 18, 2005), <http://mayor.anthonyweiner.com/speeches/show/12> (discussing a plan to hire more police officers).

169. OUT OF SIGHT, *supra* note 133, at Overview.

170. BLACK’S LAW DICTIONARY 481 (8th ed. 2004).

171. INSTEAD OF PRISONS, *supra* note 29, at 44.

172. *Id.*

173. *Id.*

174. Shaylor, *supra* note 39, at 407 (“Despite the imprisonment binge, the rate of violent crime has in fact remained steady.”).

175. *See* PRISON POLICY INITIATIVE, PRISON GROWTH DID NOT MAKE US FEEL SAFER 1965-2000, <http://www.prisonpolicy.org/graphs/feelingsafer.html> (citing Peter Wagner, THE PRISON INDEX 18 (2003) (showing that between 1965 and 2000 there was a 343% increase in incarceration and a 0% change in people being afraid to walk in the dark near their homes)).

176. *See* Lee, *Gendered Crime*, *supra* note 10, at 8 (noting that the government responded to political movements “through counterinsurgency that prioritized policing”); Mitzi Waltz, *Policing Activists: Think Global, Spy Local*, in POLICE STATE AMERICA 27 (Tom Burghardt, ed., 2002).

following periods of incarceration, incarceration can actually lead to greater likelihood of violence rather than less.<sup>177</sup> As a committee of the American Bar Association declared:

Baldly stated . . . if we, today, turned loose all of the inmates of our prisons without regard to the length of their sentences, and with some exceptions, without regard to their previous offenses, we might *reduce* the recidivism rate over what it would be if we kept each prisoner incarcerated until his sentence expired.<sup>178</sup>

Debates around incarceration as well as solitary confinement within detention invoke fundamental questions of civil rights and liberties: Does freedom and community or control and isolation lead to greater safety? Given the utter failure of incarceration and solitary confinement to deliver on their promise of safety and in fact the greater violence they have caused, our society would do well to reconsider our answers to those questions.

#### *B. Disproportionate Isolation of TIGNC Prisoners*

Mirroring the larger system of incarceration, the most marginalized and politically active groups within detention are also the most targeted for the extra incarceration of isolating segregation.<sup>179</sup> TIGNC people are far more likely than others to be put in isolating placements such as protective custody or punitive segregation. At times TIGNC people request to be segregated because they believe it will lead to less violence against them. Given the intense deprivations of protective custody, one can imagine how dire the circumstances commonly are leading to such requests.<sup>180</sup>

Other times, trans people are placed in involuntary protective custody or administrative segregation against their will, allegedly for their own good. Some systems have policies that anyone who is a victim of a violent attack is

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177. Some studies have found that recidivism increases with longer sentence lengths. LIN SONG, *RECIDIVISM: THE EFFECT OF INCARCERATION AND LENGTH OF TIME SERVED* 5-6 (1993), available at <http://www.wsipp.wa.gov/rptfiles/IncarcReclD.pdf>; see also Levasseur, *supra* note 29, at 202 (“Certainly the prisoners suffer. And much of it not played out in violent prison incidents is internalized in an organic time capsule. Eventually, they carry the years of abuse and neglect right on through their release dates. This is when it’s all brought home.”); Alphonse Gerhardtstein, *Leveraging Maximum Reform While Enforcing Minimum Standards*, 36 *FORDHAM URB. L. J.* 9, 13 (2009) (“Incarcerating low risk offenders has been shown to increase the risk of recidivism for that group.”).

178. *INSTEAD OF PRISONS*, *supra* note 29, at 39 (quoting an American Bar Association committee).

179. See Shaylor, *supra* note 39, at 398-99 (noting that certain categories of prisoners were found to be disproportionately placed in solitary confinement, including blacks, gays and lesbians, and political prisoners); TALVI, *supra* note 4, at 137 (stating that about one-fourth of prisoners in control units are mentally ill); Abu-Jamal, *supra* note 143, at 191 (noting that jailhouse lawyers, blacks, people with psychiatric disabilities, gang members, political prisoners, gay people and people with AIDS all had disproportionately large numbers in disciplinary units).

180. “Can you imagine what it must have been like for me to have requested that?” asked Sunday, a transgender woman who asked for protective custody when it seemed like the only alternative to death. SYLVIA RIVERA LAW PROJECT, *supra* note 1, at 18.

automatically placed in involuntary protective custody if they will not sign in voluntarily.<sup>181</sup> These policies, which effectively punish victims of violence and deter people in detention from reporting violence they experience, have a disproportionate impact on TIGNC people, particularly trans women in men's facilities, because they are disproportionately targeted for violence in prisons.<sup>182</sup> When Nicole, a transgender Muslim woman and jailhouse lawyer, reported that she had been raped in the mosque of the prison, the man who raped her was placed in punitive segregation. She, however, was placed against her will in an unusual form of solitary confinement supposedly for her own protection that was considerably more restrictive than either punitive segregation or normal protective custody. Unlike the man who raped her, she did not have access to her property, she did not have access to the law library, and she was not allowed to leave her cell at *all*, even for a few minutes of recreation. Not surprisingly, far from feeling protected, she felt that she was punished for getting raped.

Some systems automatically place all TIGNC people into some form of segregation without any form of individualized assessments of the person's needs.<sup>183</sup> Even when no such policies exist, TIGNC people can be perceived (often accurately) as vulnerable to violence, particularly in male facilities, and are therefore particularly likely (often counter-productively) to be placed in segregation against their will. TIGNC people are occasionally placed in administrative segregation when a system is uncertain how to classify the person's gender, or supposedly for the safety of other people in detention, particularly if the person is placed in a female facility.

Additionally, TIGNC people are disproportionately present in punitive segregation, for several reasons. One is that TIGNC people are commonly assumed to have sex with other prisoners, whether or not they are, as discussed above.<sup>184</sup> TIGNC people, particularly butches, A.G.s, and trans men of color in women's detention are profiled as rule breakers, potentially violent, and trouble makers because of their masculinity and are also subject to disproportionate punishment as a result. One person in a women's prison in Texas stated, "[w]e are still perceived under that patriarchal stigma of 'sugar-n-spice and everything nice,' and if you're not, then you're the lowest of the low."<sup>185</sup> TIGNC people are also

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181. See Brief of Defendant-Appellee, *Elgas v. Angelone*, 19 F.3d 26 (9th Cir. 1994) (No. 93-16532), 1993 WL 13103255, at \*8 (noting that plaintiff, a victim of an assault, was placed in involuntary protective custody "in accordance with current policy and procedures").

182. See STOP PRISONER RAPE, IN OUR EXPERIENCE: RECOMMENDATIONS BY PRISONER RAPE SURVIVORS TO THE NATIONAL PRISON RAPE ELIMINATION COMMISSION (2007), available at <http://www.justdetention.org/pdf/InOurExperience.pdf> (discussing how isolation and restrictions of protective custody deter reporting sexual assault).

183. See *Tates*, 2003 WL 23864868, at \*3 (noting that the Sacramento County Main Jail "automatically classifies all biologically male transgender inmates as T-sep, regardless of their behavior, criminal history, whether they pose a danger to others, or any other characteristic").

184. See *Lee*, *supra* note 10, at 24 (stating that transgender and gender-variant prisoners are treated as potential sexual predators by male correctional officers).

185. TALVI, *supra* note 4, at 20. See also, RAYMOND THOMPSON, WHAT TOOK YOU SO LONG?: A GIRL'S JOURNEY INTO MANHOOD 107-137 (1995) (describing correctional officers targeting a transsexual man in a women's prison in Wales, leading to multiple placements in punitive segregation).

disciplined with segregation for rules violations that involve nothing more than expressing their gender identity. For example, trans women and other gender nonconforming people assigned male at birth are held in punitive segregation for possession of a bra or other items of women's clothing or for using make up. Trans men and other gender nonconforming people assigned female at birth are held in punitive segregation for failing to eliminate their facial hair or for refusing to wear prison uniforms that are tight fitting or that involve skirts.

Fluvanna Correctional Center for Women in Virginia has created a segregated wing for prisoners who do not match feminine gender norms, whom prison staff refer to as "little boys."<sup>186</sup> Anyone who seems "butch," usually because of short hair or baggy clothes, is moved into the separate wing. They might be given a chance to change into sufficiently tight-fitting clothes to please a male officer and so avoid the segregation, but those who refuse to give in to such demands are moved. Once in this wing, they are considered last for any vocational or educational opportunities; they are subjected to much harsher punishments for infractions than people in other parts of the prison; and they are subjected to constant verbal harassment related to their gender expression.<sup>187</sup>

TIGNC people who are targeted for mistreatment will from time to time speak up about it. When they do, it is common for correctional staff to retaliate against them through setting them up or writing false disciplinary reports, resulting once again in segregation. That is what happened to Bianca, whose words appear at the beginning of this Article. To justify their brutal beating of her, the guards claimed that she had assaulted them, and they had her punished with six months in solitary confinement. Simply because of bias, TIGNC prisoners are more likely to be written up for any number of minor infractions that staff might overlook in other prisoners. For example, another transgender woman prisoner I worked with was assigned to a work program in her prison with a supervisor who despised having her in the program. The supervisor was determined to get my client kicked out of the program so she wrote her up repeatedly for infractions such as slight lateness or other minor violations that she routinely overlooked in the other people in the program. The supervisor did ultimately succeed in getting my client removed from the program and placed in segregation for one of the violations with which the supervisor charged her.

Other forms of segregation can also disproportionately impact TIGNC people. For example, some systems segregate HIV positive prisoners. Trans women experience extraordinarily high rates of HIV,<sup>188</sup> which means they also experience HIV segregation more often than others. Also, observation for people who are suicidal is a particularly intense form of segregation where a person can be stripped of all their clothing and belongings and placed alone in an empty cell and watched

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186. Telephone Interview with Helen Trainor, Director, Virginia Institutionalized Persons Project (Aug. 14, 2008).

187. *Id.*

188. See, e.g., K. Clements-Nolle et al., *HIV Prevalence, Risk Behaviors, Health Care Use, and Mental Health Status of Transgender Persons: Implications for Public Health Intervention*, 91 AM. J. PUB. HEALTH 915 (2001) (noting that male-to-female transgender people were found to have a HIV prevalence of thirty-five percent).



almost constantly by staff.<sup>189</sup> TIGNC people, who are often deprived of needed healthcare such as hormones and surgery, who are usually forced to live in every way as a gender with which they do not identify, and who are often targeted for intense violence and unceasing verbal harassment, can be particularly likely to engage in self-harm or suicide attempts that lead to placement in strip cells.<sup>190</sup> Self-harming behavior can also lead to disciplinary infractions and placement in punitive segregation.<sup>191</sup>

While beyond the scope of this Article, policies and practices of gender-based segregation in detention also pose severe problems for TIGNC people, who rarely fit easily into the system's conception of binary gender. Staff almost always make decisions about where to place TIGNC people based on their genitals and/or their assigned sex at birth without any consideration of which placement would do least harm to the individual's safety, health, or dignity. Alexander Lee's *Nowhere to Go but Out* provides particularly insightful treatment of this subject.<sup>192</sup>

### C. Inadequacy of Legal Framework for Challenging Segregation

The legal restraints on the ability of prisons to impose isolating forms of segregation on the people in their custody are extremely limited. One major flaw in the legal analysis of challenges to segregating placement is that to the extent courts consider issues of safety at all in their analysis they almost always assume that safety would be better served by isolation than by contact with others. The great deference the courts give to prison administrators is another major flaw particularly given the primary role of prison staff in perpetrating violence in prisons.

Conditions in solitary confinement can be challenged though the Eighth Amendment prohibition on cruel and unusual punishment.<sup>193</sup> In general, prison officials may be liable under the Eighth Amendment when they exhibit deliberate indifference to excessive risks to the health or safety of prisoners.<sup>194</sup> Serious deprivations of basic human needs, such as food, clothing, shelter, medical care, reasonable safety,<sup>195</sup> warmth,<sup>196</sup> exercise,<sup>197</sup> hygiene,<sup>198</sup> and sleep,<sup>199</sup> can constitute

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189. TALVI, *supra* note 4, at 130.

190. *See, e.g.*, Lofin, *supra* note 160 (reporting experiences where prisoners' hormones are withheld if placed on administrative segregation or suicide watch).

191. *See* TALVI, *supra* note 4, at 130 (noting a case where a woman cut her brachial artery in an attempt to kill herself and was later fined \$50 for medical expenses and given extra work).

192. LEE, *NOWHERE TO GO BUT OUT*, *supra* note 11, at 37. Many other articles have also been written on the subject. *See, e.g.*, Barnes, *supra* note 10, at 599 (exploring how courts and prisons struggle to fit transgender prisoners into a narrow definition of sex that are employed by prisons); Mann, *supra* note 10, at 91 (exploring policies with regard to transgender prisoners within the United States', Australian, and Canadian prison systems); Peek, *supra* note 10, at 1211 (studying how policies and legal rulings lead to rape of transgender people in prison); Rosenblum, *supra* note 10, at 49 (exploring placement and treatment issues faced by transgender people in prison); Tarzwell, *supra* note 8, at 167 (studying the state of prison management of transgender people).

193. U.S. CONST. amend. VIII.

194. *See, e.g.*, *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (discussing context of medical care); *Farmer*, 511 U.S. at 836 (discussing context of prisoner-on-prisoner assault); *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (discussing context of tobacco smoke).

195. *Helling*, 509 U.S. at 32 (citing *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S.

violations of the Eighth Amendment. However, courts have found even these kinds of deprivations permissible with sufficient penological justification.<sup>200</sup> While courts have at times found certain conditions within solitary confinement to violate Constitutional rights of certain groups of prisoners or individual prisoners, courts have consistently held that solitary confinement in and of itself does not constitute cruel and unusual punishment.<sup>201</sup> This acceptance of the basic legitimacy of the use of isolation as a tool for managing prisoners has greatly limited the potential utility of the Eighth Amendment for challenging these practices.

Another primary legal means of challenging isolating forms of segregation is procedural due process claims. The analysis differs depending on whether one is in an isolating placement because of discipline (punitive segregation) or for other reasons (administrative segregation). The first step in a procedural due process claim is proving that the plaintiff had a protected interest at stake.<sup>202</sup>

In *Sandin v. Conner*,<sup>203</sup> the Supreme Court limited the due process protections of prisoners holding that restraints deprive them of “liberty” within the meaning of the Due Process Clause only if they “impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.”<sup>204</sup> Circuits have varied in their application of this ruling to periods of time in isolation.<sup>205</sup> The Second Circuit has found that confinement in punitive segregation for periods of 101 days or less presumptively is not a deprivation of liberty under *Sandin*.<sup>206</sup> Confinement in punitive segregation for 305 days or more is presumptively a deprivation of liberty.<sup>207</sup> Intermediate periods require a more fact-intensive analysis.<sup>208</sup>

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189, 199-200 (1989)).

196. *Wilson v. Seiter*, 501 U.S. 294, 304 (1991); *Palmer v. Johnson*, 193 F.3d 346, 352-53 (5th Cir. 1999).

197. *Wilson*, 501 U.S. at 304; *Perkins v. Kansas Dep’t of Corr.*, 165 F.3d 803, 810 (10th Cir. 1999).

198. *Palmer*, 193 F.3d at 352 (quoting *Novak v. Beto*, 453 F.2d 661, 665 (5th Cir. 1971)); see *Harper v. Showers*, 174 F.3d 716, 717, 720 (5th Cir. 1999) (noting that housing in filthy, unsanitary cells might violate the Eighth Amendment depending on the facts).

199. *Harper*, 174 F.3d at 720.

200. John Boston, OVERVIEW OF PRISONER RIGHTS 6-7 (2008).

201. *Hutto v. Finney*, 437 U.S. 678, 686 (1978); *Madrid v. Gomez*, 889 F. Supp. 1146, 1261 (N.D. Cal. 1995) (“There is nothing *per se* improper about segregating inmates, even for lengthy or indefinite terms.”); Scharff Smith, *supra* note 138, at 443 (noting that although certain conditions in prisons violate the Eighth Amendment of the U.S. Constitution, long-term isolation is not illegal); Hresko, *supra* note 136, at 16 (noting that “courts that have considered the psychological harms of solitary confinement have tended to reject the notion that an Eighth Amendment violation results from them”).

202. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

203. 515 U.S. 472 (1995).

204. *Id.* at 484.

205. See *Skinner v. Cunningham*, 430 F.3d 483, 486 (1st Cir. 2005) (affirming the district court ruling that forty days confinement did not meet the test of “atypical and significant hardship”); *Hemphill v. Delo*, No. 95-3357, 1997 WL 581079, at \*2 (8th Cir. Sept. 22, 1997) (holding that four days locked in his housing unit, thirty days in disciplinary segregation, and approximately 290 days in administrative segregation do not constitute an “atypical and significant hardship”).

206. *Colon v. Howard*, 215 F.3d 227, 231 (2d Cir. 2000).

207. *Id.*

208. *Id.* at 232.

Once a deprivation of a liberty interest has been proven, the next step of the inquiry is to determine whether the plaintiff received the process that was due.<sup>209</sup> Here is where the analysis of disciplinary, as opposed to administrative, confinement differs significantly. In *Wolff v. McDonnell*,<sup>210</sup> the Supreme Court outlined the basic requirements for procedural due process in prison disciplinary proceedings where a liberty interest is at stake. These requirements include advance written notice of the claimed violation;<sup>211</sup> a written statement of the factfinders as to the evidence relied upon and the reasons for the disciplinary action taken;<sup>212</sup> the opportunity to call witnesses and present documentary evidence in defense when it would not be unduly hazardous to institutional safety or correctional goals;<sup>213</sup> assistance where an illiterate inmate is involved or the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary;<sup>214</sup> and an impartial decision-maker.<sup>215</sup> Confrontation of witnesses, cross examination, and representation of counsel are not required.<sup>216</sup>

The Supreme Court has ruled that less process is due in the context of administrative segregation. In *Hewitt v. Helms*,<sup>217</sup> the Court ruled that even where placement in administrative segregation does constitute a deprivation of liberty, the officials were “obligated to engage only in an informal, nonadversary review of the information supporting Respondent’s administrative confinement, including whatever statement respondent wished to submit, within a reasonable time after confining him to administrative segregation.”<sup>218</sup> Engaging in *Mathews v. Eldridge*<sup>219</sup> balancing, the Court reasoned that the “Respondent’s private interest is not one of great consequence” because he was “merely transferred . . . to an even more confined” environment than he had been in previously.<sup>220</sup> The Court distinguished this transfer from disciplinary confinement because of the lack of stigma from a finding of misconduct and the lack of any “significant” effect on parole opportunities.<sup>221</sup> The Court also reasoned that because of the highly subjective nature of the decision to place someone in administrative segregation, an adversarial-style proceeding would not be of any great assistance in making such decisions.<sup>222</sup>

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209. *Mathews*, 424 U.S. at 335.

210. 418 U.S. 539 (1974).

211. *Id.* at 563.

212. *Id.*

213. *Id.* at 566.

214. *Id.* at 570.

215. *Id.* at 570-71.

216. *Wolff*, 418 U.S. at 567.

217. 459 U.S. 460 (1983).

218. *Id.* at 472.

219. 424 U.S. at 334-35.

220. *Hewitt*, 459 U.S. at 473.

221. *Id.*

222. *Id.* at 474.

In *Wilkinson v. Austin*,<sup>223</sup> the Court again found that informal, non-adversarial procedures were adequate to satisfy constitutional due process for administrative segregation even when the segregation took the form of the exceedingly severe and isolated conditions of a supermax prison.<sup>224</sup> In this case, the Court considered the governmental interests in maintaining safety and avoiding increased costs to outweigh the individual's interest and any probable value of increased procedural safeguards.<sup>225</sup>

A closer look at cases brought by TIGNC prisoners seeking relief from some form of isolation demonstrates the severe limits of legal inquiry into these practices. One particularly striking example is the Tenth Circuit decision in *Estate of DiMarco v. Wyoming Department of Corrections*.<sup>226</sup> In this case Miki Ann DiMarco, a woman with an intersex condition, was incarcerated in a women's correctional facility in Wyoming for fourteen months.<sup>227</sup> On the initial intake evaluation form, she received a total score of one.<sup>228</sup> Because one was the lowest possible risk score, Ms. DiMarco was initially classified as a minimum security risk eligible for minimum security general population housing with the maximum allowable access to privileges and possessions.<sup>229</sup> She had previously been incarcerated with women in a general population setting without incident.<sup>230</sup> Nonetheless, during a search when she arrived at the facility, staff realized she had a penis and immediately placed her in segregation in the maximum security unit of the facility where she remained for the 438 days of her incarceration.<sup>231</sup> During trial, the defendants stated that her segregation was intended to protect the safety of other prisoners, guards, and Ms. DiMarco herself.<sup>232</sup> She was reclassified in the same way every ninety days without any hearing.<sup>233</sup>

Because of her placement in segregation, she was not allowed contact with other women in the prison, the opportunity to work for pay, access to the general population day room, access to the cafeteria or commissary, access to educational programs, or access to a hair cut.<sup>234</sup> She had to eat all meals in her cell while sitting on her cot or toilet because she did not have a table or chair.<sup>235</sup> She was not allowed to have everyday possessions that were allowed elsewhere in the facility.<sup>236</sup> She was not allowed to have any communication with other prisoners, and she was disciplined when she did speak with other prisoners who were in segregation.<sup>237</sup>

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223. 545 U.S. 209 (2005).

224. *Id.* at 229-30.

225. *Id.*

226. 473 F.3d 1334 (10th Cir. 2007).

227. *DiMarco v. Dep't of Corr.*, 300 F. Supp. 2d 1183, 1186-87 (D. Wyo. 2004).

228. *Id.* at 1188.

229. *Id.*

230. *Id.* at 1187.

231. *Id.*

232. *Id.* at 1191.

233. *DiMarco*, 300 F. Supp. 2d at 1189.

234. *Id.* at 1188.

235. *Id.*

236. *Id.*

237. *Id.* at 1191.

The trial court “reluctantly” rejected Ms. DiMarco’s Eighth Amendment cruel and unusual punishment claim because the basic necessities of food, shelter, clothing, and medical care had been provided to Ms. DiMarco.<sup>238</sup> In reaching this conclusion, the court stated, “[t]his Court understands that administrative segregation was necessary for the safety of both the inmates and Plaintiff but questions whether or not less harsh alternatives were available to the WWC staff.”<sup>239</sup> The court also rejected her Equal Protection claim, finding “that no equal protection violation occurred using the rational basis test because Defendants’ actions in placing Plaintiff in segregated confinement was rationally related to the legitimate purposes of ensuring the safety of Plaintiff and other inmates and maintaining the security of the facility.”<sup>240</sup> There is no analysis in the judge’s opinion, nor even any explanation in the brief of defendants, as to *how* placement in segregation could conceivably improve the safety of Ms. DiMarco, although the warden testified at trial that “a primary concern was that other inmates might try to harm DiMarco if they discovered her physical condition.”<sup>241</sup> The court did, however, find that Ms. DiMarco’s due process rights had been violated.<sup>242</sup>

Ms. DiMarco fared less well on appeal. After considering several factors, including the need for segregation based on safety concerns,<sup>243</sup> the Tenth Circuit described the deprivations Ms. DiMarco experienced as “petty” and concluded that they did not reach the *Sandin* standard for deprivation of a liberty interest.<sup>244</sup> The court went on to state that even if she had been deprived of her liberty, she would not have been entitled to any greater procedural safeguards than those she received.<sup>245</sup>

An even more typical result in claims such as these is *Murray v. U.S. Bureau of Prisoners*.<sup>246</sup> In this case, a transgender woman challenged her frequent placement in segregation.<sup>247</sup> Prison officials contended that segregation was ordered to protect her twice and to discipline her for refusing to wear a bra on other occasions.<sup>248</sup> With relatively little analysis, the court accepted these reasons as legitimate and affirmed the trial court’s grant of summary judgment to defendants.<sup>249</sup> Ms. Murray’s other claims concerned three instances of violence against her by staff, but it does not appear that she alleged any assaults by the other prisoners.<sup>250</sup>

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238. *Id.* at 1194.

239. *DiMarco*, 300 F. Supp. 2d at 1192.

240. *Id.* at 1197.

241. *DiMarco*, 473 F.3d at 1337.

242. *DiMarco*, 300 F. Supp. 2d at 1196.

243. *DiMarco*, 473 F.3d at 1342.

244. *Id.* at 1344.

245. *Id.* at 1344-45.

246. 106 F.3d 401 (tbl.), No. 95-5204, 1997 WL 34677 (6th Cir. Jan. 28, 1997).

247. *Id.* at \*1.

248. *Id.* at \*2.

249. *Id.* at \*5.

250. *Id.* at \*3; *cf.* *Lamb v. Maschner*, 633 F. Supp. 351, 353-54 (D. Kan. 1986) (granting summary judgment for defendant in a suit by a transgender woman seeking, among other claims, protection from sexual assault through any means other than administrative segregation). Although plaintiff’s

TIGNC prisoners have lost in several other published cases concerning involuntary segregation.<sup>251</sup> The plaintiff did not prevail even in the one published case where a court ruled that a transgender plaintiff's due process rights *were* violated through placement in segregation. In *Farmer v. Kavanagh*,<sup>252</sup> a transgender woman challenged her emergency transfer to a supermax facility after an informant provided information that she was involved in an identity theft scheme to obtain credit in the names of certain wardens.<sup>253</sup> The court found she was entitled to a review within a certain number of days of her transfer whereby the prison officials should have explained the reasons for her transfer and provided an opportunity for her to offer reasons why she should not have been transferred.<sup>254</sup> Ultimately, however, the court found for defendants on qualified immunity grounds.<sup>255</sup>

Ms. Farmer also presented a factually compelling but ultimately unsuccessful Eighth Amendment challenge to her placement in the supermax.<sup>256</sup> Ms. Farmer had HIV, depression, and other physical and mental health conditions.<sup>257</sup> A memorandum in her file stated that segregation was detrimental to her health.<sup>258</sup> According to Ms. Farmer, once she was transferred her viral load and depression did in fact worsen.<sup>259</sup> However, the court ruled that she did not meet the subjective component of the test for deliberate indifference because Ms. Farmer did not show that the officials actually knew that the supermax would have a serious negative impact on her health even if they should have known.<sup>260</sup>

There are a few cases that indicate a much greater understanding of the problems with isolation for TIGNC prisoners. In *Meriwether v. Faulkner*,<sup>261</sup> the Seventh Circuit reversed the trial court's dismissal of a transgender woman's claim

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administrative segregation claim became moot, the *Lamb* court noted that "[i]f plaintiff fears general population, he [sic] may request protective custody, but again, he [sic] will be segregated from the rest of general population. Plaintiff does not have a constitutional right to choose his [sic] place of confinement and prison officials may move a prisoner for any reason or no reason at all." *Lamb*, 633 F. Supp. at 353.

251. *See, e.g.*, Short v. Danberg, No. 08-106-JJF, 2008 WL 4722396, at \*3-5 (D. Del. Oct. 21, 2008) (dismissing an action asserting a violation of due process for detention in administrative segregation and isolation as frivolous and for failure to state a claim upon which relief can be granted; but dismissing without prejudice the claim that black lesbian inmates were subjected to administrative segregation and other discriminatory treatment in violation of the Equal Protection clause); *Farmer v. Carlson*, 685 F. Supp. 1335, 1344 (M.D. Pa. 1988) (dismissing a transgender woman's claim that her equal protection rights, due process rights, and right to be free from cruel and unusual punishment were violated on the grounds that she spent "only" four and a half months in administrative segregation).

252. 494 F. Supp. 2d 345.

253. *Id.* at 349.

254. *Id.* at 358-59.

255. *Id.* at 359-60 (ruling for defendants due to the lack of evidence showing that prison officials knew that the transfer would have eroded Ms. Farmer's liberty interest or Constitutional right at the time of her transfer).

256. *Id.* at 361-71.

257. *Id.* at 364.

258. *Farmer*, 494 F. Supp. 2d at 364.

259. *Id.* at 362-63 nn.38-39.

260. *Id.* at 364-65.

261. 821 F.2d 408 (7th Cir. 1987).

that her indefinite confinement in administrative segregation violated her rights.<sup>262</sup> Ms. Meriwether alleged that she experienced multiple assaults and ongoing harassment from both guards and prisoners while in general population and in administrative segregation.<sup>263</sup> She challenged her placement in administrative segregation—which could have lasted for the remaining thirty years of her sentence<sup>264</sup>—as well as the complete refusal of any gender-related medical treatment, such as hormone therapy.<sup>265</sup> She stated that being in segregation denied her “adequate recreation, living space, educational and occupational rehabilitation opportunities, and associational rights for nonpunitive reasons.”<sup>266</sup>

Concerning her confinement in administrative segregation, the court relied on precedent stating that lockdown restrictions, even if permanent, do not implicate a liberty interest subject to judicial review under due process.<sup>267</sup> However, the court was not prepared to dismiss the claim that such an extended period of time in administrative segregation could constitute a violation of her Eighth Amendment right to be free from cruel and unusual punishment.<sup>268</sup>

However, even in this case, the court’s understanding of the issues was distorted by an inability to imagine isolation as having a negative, rather than positive, effect on safety. As a result, the court expressed skepticism concerning the ultimate outcome of her claim about administrative segregation due to the potential lack of feasible alternatives.<sup>269</sup> The court also asserted that “[p]laintiff’s claim that the defendants have deliberately failed to protect her from sexual assault is somewhat in conflict with her desire not to remain in administrative segregation indefinitely.”<sup>270</sup> It is extremely problematic that our courts could consider a desire to be free from sexual assault to be incompatible with a desire to be free from solitary confinement, particularly when confronted directly with allegations of sexual assault by both guards and other prisoners in administrative segregation as well as general population.<sup>271</sup> Nonetheless, while the court’s dicta underscores disturbing trends, the actual holding allowing her claims to survive is encouraging.<sup>272</sup>

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262. *Id.* at 410-11.

263. *Id.*

264. *Id.* at 414-17.

265. *Id.* at 411-14.

266. *Id.* at 416.

267. *Meriwether*, 821 F.2d at 414.

268. *Id.* at 415.

269. *Id.* at 417 (“Given her transsexual identity and unique physical characteristics, her being housed among male inmates in a general population cell would undoubtedly create, in the words of the district court, ‘a volatile and explosive situation.’ Under such circumstances it is unlikely that prison officials would be able to protect her from the violence, sexual assault, and harassment about which she complains.”) (internal citation omitted).

270. *Id.* at 417-18.

271. *Id.* at 417.

272. *Id.* at 418. Further, the court suggested that plaintiff’s allegations of sexual assault be reviewed by the district court on remand prior to consideration of her administrative segregation and Eighth Amendment claims. *Meriwether*, 821 F.2d at 417.

By far the best cases in terms of involuntary segregation of trans people are *Tates v. Blanas* and *Medina-Tejada v. Sacramento County*,<sup>273</sup> which, unfortunately, are unreported district court decisions. In *Tates*, a transgender woman challenged her placement in “total separation” or T-Sep, the most restrictive placement in Sacramento County Jail.<sup>274</sup> The jail automatically placed all transgender detainees in T-Sep throughout their entire period of incarceration, rather than in protective custody or general population.<sup>275</sup> The defendants stated that they placed Ms. Tate in T-Sep “solely because [s]he is transgender, and Defendants fear [s]he might be harmed and they be held liable if [s]he were given a less restrictive classification.”<sup>276</sup> Although initially assuming that the defendants had made an appropriate decision, additional evidence and testimony motivated the court to conduct a genuine analysis of the situation.<sup>277</sup>

The court reviewed the differences between T-Sep and general population. Unlike those in other settings, people in T-Sep were shackled during transport; could not participate in group worship or religious services; had extremely little access to the day room, phones, and showers; were not permitted to interact with other prisoners even by speaking; and were given considerably less sanitary cells with no means to clean them.<sup>278</sup> The court also discussed the other forms of discriminatory treatment to which Ms. Tate was subjected including: receiving her food on the floor, denial of access to a bra, sexual assault, verbal harassment, and threats of violence from both guards and the detainees entrusted with delivering her food.<sup>279</sup> Ultimately, the court ruled against the defendants and ordered them to create a new classification scheme that would not discriminate against transgender detainees.<sup>280</sup> Without explicitly naming it as such, the court engaged in an Equal Protection analysis comparing the treatment of transgender detainees with the treatment of similarly situated non-transgender detainees.<sup>281</sup> Specifically, the court found that jail officials may not deny transgender detainees benefits available to all other detainees solely out of bias, that segregation of transgender detainees is not always required to protect transgender detainees, and that the duty to protect transgender detainees from harm may not be used to justify actions not reasonably related to accomplishing that purpose.<sup>282</sup>

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273. No. Civ.S-04-138FDC/DAD, 2006 WL 463158 (E.D. Cal. Feb. 27, 2006).

274. *Tates*, 2003 WL 23864868, at \*2.

275. *Id.* at \*3.

276. *Id.*

277. *Id.* at \*4.

278. *Id.* at \*4-7.

279. *Id.* at \*8.

280. *Tates*, 2003 WL 23864868, at \*10.

281. *Id.* The court stated:

Defendants can, and must, adopt a classification scheme that more appropriately addresses the special circumstances of transgender inmates. Transgender inmates should not routinely be shackled and chained in circumstances where other inmates would not be subjected to such treatment. Transgender inmates should be permitted to socialize with each other unless there are particular safety concerns that would create an undue risk of harm. Such determinations must be based upon facts, not phobias.

*Id.*

282. *Id.* at \*9.



Unfortunately, it appears that the jail continued its unconstitutional actions in direct violation of the court's order at least until another transgender woman, this time an immigration detainee held at the same jail, brought a lawsuit alleging automatic placement in T-Sep and other forms of abuse and mistreatment.<sup>283</sup> The Medina-Tejada court, relying on precedent from *Tates* and persuaded by the significant evidence put forth by Ms. Medina-Tejada, found that her classification was presumptively punitive.<sup>284</sup> The court left it to the jury to decide whether the restrictions faced by Ms. Medina-Tejada in T-Sep were "excessive in relation to the alleged safety purpose in keeping her segregated and [whether] this purpose could not have been achieved by alternative and less harsh methods."<sup>285</sup> Further, the court determined that the defendant jail official was not entitled to qualified immunity in light of the "fair warning" that *Tates* provided with respect to "the constitutional parameters for the classification and treatment of transgender inmates at the Sacramento County Main Jail."<sup>286</sup>

The courts in *Tates* and *Medina-Tejada* demonstrate the method of analysis in which all courts need to engage. Rather than blindly deferring to an unsupported assertion that isolation is required to promote "safety," they considered the actual motivations and impact of the policy of isolation.<sup>287</sup> The enforcement of the equal protection rights of transgender people subjected to involuntary isolating placement in segregation must expand consistent with *Tates* and *Medina-Tejada*. However, a new direction from the Supreme Court in considering the practice of solitary confinement as constituting cruel and unusual punishment would be even more useful.

## VII. RECOMMENDATIONS

Finding ways to meaningfully decrease violence against TIGNC people in detention is a delicate task. Avenues that may seem appealing at first can actually lead to greater violence. Despite my condemnation of the violence inherent in solitary confinement, I do not propose eliminating ways for TIGNC to be able to be voluntarily separated from some others for their safety. Rather, I propose a number of changes that will allow for less exposure to state violence, greater opportunities for non-violent and anti-violent community building, and greater opportunities for the people who are most expert in the area—TIGNC people in detention themselves—to determine what will most increase their safety.

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283. *Medina-Tejada*, 2006 WL 463158, at \*1.

284. *Id.* at \*9.

285. *Id.* (citing *Jones v. Blanas*, 393 F.3d 918, 934-35 (9th Cir. 2004)) (internal quotation marks omitted).

286. *Id.* at \*10.

287. See *Tates*, 2003 WL 23864868, at \*10 (noting that transgender inmates should be permitted to socialize with each other unless particular safety concerns would pose a risk of harm); *Medina-Tejada*, 2006 WL 463158, at \*6, \*9 (relying on *Tates* and adding that it is defendants' burden to prove that the restrictions imposed were not unduly disproportionate to the safety purpose they sought to achieve).

*A. For Improving Advocacy*

## 1. Focus on abolition.

The only way to truly end violence against transgender people in detention is to end detention. In making recommendations for reform, we must not lose sight of the damage, costs, and violence perpetrated through incarceration on our communities. Our ultimate goal must be prison abolition. Our recommendations for reform must support that ultimate vision, or at least not interfere with it, while easing some of the horrors that people experience in detention today.

## 2. Centralize the experiences and opinions of the people most impacted by the system that advocates seek to change.

We risk doing more damage than good if we act on assumptions based on our own experiences and perceptions rather than listening to and taking leadership from a variety of people who have direct experiences with the systems we seek to change. In this case, advocates should consult and respect the opinions of TIGNC people who are now or who have been in detention.

## 3. Avoid divisive tactics and form broad coalitions.

Work to end violence against TIGNC people in detention presents an excellent opportunity for building connections among multiple struggles, including those for immigrants' rights, reproductive justice, racial justice, economic justice, disability rights, and gender justice. Alliances among these movements present the potential for true transformative change in the systems that harm TIGNC people in and through detention. In order to create them, we must focus on the ways that all marginalized communities are harmed by current systems and avoid falling into the trap of scapegoating any of these groups.

## 4. Do not oversimplify interactions between trans people and non-trans people in detention.

Again, we must avoid racist or overly simplistic understandings of the possibilities for interactions between trans and non-trans people in detention. The importance of community building in reducing and surviving violence everywhere, including detention, must play a role in our analysis.

*B. For Improving Judicial Review*

## 1. Eliminate deference to prison officials in prisoners' rights cases and reject bare assertions equating isolation with safety.

Given the epidemic violence against people in detention, prison officials do not deserve the deference they currently receive from our courts. Courts must accept responsibility to look beyond bare assertions of "legitimate penological interests" and to determine what evidence supports the claims of officials and just how "legitimate" the interests are. Courts should acknowledge the dangers

isolation present and recognize that rights that touch on freedom of speech and assembly almost always also implicate a right to be free from violence.

2. Apply Equal Protection analysis to end isolation of people in detention solely because they are trans, intersex, or gender nonconforming.

When the state imposes the extreme conditions of solitary confinement on people in detention against their will solely because they are transgender, intersex, or gender nonconforming, the Fourteenth Amendment has been violated.

3. Recognize solitary confinement, in and of itself, as a form of cruel and unusual punishment.

Solitary confinement is a form of torture. It should be recognized as a form of cruel and unusual punishment and forbidden altogether. At the very least, *any* length of time in solitary confinement should be considered a deprivation of liberty sufficient to trigger a due process analysis.

### *C. For Improving Policies of Detention Agencies and Facilities*

1. End the use of solitary confinement.

Should people in prison need to be separated from one another for particular safety reasons, these separations should be made in a way that does not eliminate or drastically reduce human contact with those inside or outside the facility and that does not preclude participation in programs. Should people in detention need to be held accountable for violence, the means for doing so must be humane. Whenever possible the root causes of and systemic factors contributing to the violent behavior should be identified and addressed to prevent recurrences.

2. Eliminate involuntary protective custody.

Individuals who are at risk of and/or survivors of violence are the people who are best able to decide what will actually keep them safest. In recognition of this fact and the great risks of protective custody as it currently exists, no one should ever be placed in protective custody against his or her will. A narrow exception may need to be made for those rare individuals who are truly incapable of understanding the situation due to a disability and for whom protective custody truly would be in their best interests, but in such cases very strong safeguards would need to be in place.

3. Make available separate housing for vulnerable people in detention which does not isolate or otherwise punish the people in that housing.

Separate housing for people who are particularly vulnerable to violence in detention should be available on a voluntary basis. Any TIGNC person who seeks placement in such housing should receive it. However, this housing should not be isolating, should not restrict contact with the outside world, should not prevent participation in programs, and should not otherwise involve any worse treatment or

any longer periods of detention for those within it than for those who are not particularly vulnerable to violence. This separate housing also should not be used as an excuse for further prison construction; existing facilities should be utilized.

4. Eliminate state punishment, including segregation in detention, for consensual adult sexuality and affection.

There is simply no legitimate state interest in punishing consensual adult sexuality and affection. Undermining positive relationships undermines safety; punishing consensual sex undermines accountability for non-consensual sex. The disproportionate and discriminatory over-segregation of TIGNC and queer people within prisons could be significantly reduced if punishments were disallowed for consensual sexual or affectionate contact between adults.

5. Eliminate state punishment, including segregation in detention, for failure to conform to gender norms.

Again, there is simply no legitimate state interest in the enforcement of norms concerning gender roles. The ability to self-determine one's own gender identity and expression should be acknowledged as a fundamental human right. The disproportionate and discriminatory over-segregation of TIGNC people within prisons could be significantly reduced if infractions such as "possession of a bra" or "refusal to remove facial hair" were no longer punished.

6. Restrict interactions between staff and prisoners where no other prisoners can witness what is happening.

When staff can access people in detention privately, the potential for abuse increases as the potential for intervention and accountability decreases. Except in situations where privacy is needed and desired, such as during strip searches, staff should not be allowed to interact with people in detention alone.

7. Improve policies and practices for gender-based segregation.

Agencies with responsibility for any form of detention should work with local community members to develop specific, detailed policies for the placement of transgender people in male or female facilities. The paramount goal of this process must be to find the placement that will likely do the least possible harm to the safety, health, and dignity of each transgender person placed. The best placements will also be the ones where the person is more likely to be able to find allies and build community. The individuals' own assessment should receive primary consideration.

8. Reduce and address staff violence against TIGNC people in detention through policies, training, and enforcement.

Abusive staff practices, such as "gender check" strip searches of TIGNC people, should be clearly prohibited. Policies without training and enforcement accomplish little, if anything. Enforcement mechanisms must be meaningful and should not rely on punishment, prosecution, or imprisonment, which are no more

effective when applied to prison staff than when applied to others. The root causes of the behavior should be identified and addressed whenever possible. Staff members should not be permitted to continue to have access to prisoners whom they are alleged to have abused. Agencies should contract with qualified community-based organizations to provide them with the training they need.

9. Relieve restrictions on non-violent organizing and communications among people in detention.

Unless there is actual evidence that such activities are leading to violence, they should be presumed to be more likely to be preventing it. Any restrictions that remain in place should be narrowed to what is actually helpful toward the goal of reducing violence. Prisoner-initiated, outsider-supported trans and queer programming in detention, should be supported. The potential value of these types of groups for increasing understanding and support across gender lines cannot be underestimated.

#### *D. For Addressing Root Causes of Violence in Detention*

1. Increase access to free or affordable housing, employment and education opportunities, accurate ID, voluntary drug treatment, quality health care and income support for TIGNC communities and other marginalized communities.

Eliminating poverty and ensuring that people can meet their basic needs will go a long way to eliminating the cycles of incarceration that affect TIGNC and other marginalized communities.

2. Eliminate police profiling of trans and gender nonconforming people, homeless people, people of color, people with disabilities, and other marginalized communities.

Gender, racial, class, and (dis)ability-based police profiling is morally indefensible and must end. The disproportionate incarceration of trans and gender nonconforming people and members of other marginalized groups in detention and thus their exposure to the violence of detention would drop dramatically with the end of police profiling.

3. Build safety in communities in ways that do not rely on prosecution and incarceration.

Developing community-based responses to intimate-partner violence, intervening in instances of hate and police violence on the street, teaching self-defense and conflict resolution skills, providing free rides home late at night to people often targeted for street violence, training young people about trans awareness and anti-violence strategies, providing support to survivors of violence, and gathering data and raising awareness about violence are just a few of the ways that individuals and organizations across the county are finding to create real safety in communities outside of the criminal punishment system.

#### 4. Decrease incarceration.

In general, the toxic policies of mass incarceration must end. As steps toward that goal, non-violent crimes should be decriminalized—or at a minimum responded to with alternatives to detention; immigration detention should be eliminated and paths to legal status in the U.S. widened; and greater financial resources should go to schools, healthcare, and affordable housing and less to police, prisons, and prosecutors.

#### 5. Increase outside support for people in prison and accountability for staff.

Because staff are responsible for most of the violence against TIGNC people in detention, it is critical that outside, truly independent agencies with real enforcement powers have oversight over the actions of officials and staff in detention agencies and facilities. Survivors of violence and those vulnerable to violence in detention should be able to have easy, prompt, confidential, and cost-free access to supportive mental health and legal services from outside providers.

### CONCLUSION

In my work with TIGNC people in detention, I am regularly both horrified and inspired by their experiences and resistance. The power for true transformative change of our fundamentally violent and oppressive criminal legal system rests with them and with others in detention. Involuntary placement in isolating forms of segregation, despite claims to be necessary for the safety of TIGNC people in detention, is actually one of the greatest threats to their safety. The legal system and advocates must find ways to facilitate, not prevent, voluntary opportunities for trans and non-trans people in detention to build community and positive relationships with one another.