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QUEER LOCKDOWN: COMING TO TERMS WITH THE ONGOING CRIMINALIZATION OF LGBTQ COMMUNITIES

Ann Cammett [*]

INTRODUCTION

Activists have long engaged in a wide range of worthwhile initiatives in pursuit of social justice. However, it is less common that groups have an unambiguous mandate to develop a philosophical and strategic approach that integrates organizing *across* issues. In this paper, I argue that we must prioritize the concerns of low-income queer[1] people who have been profoundly affected by the criminal justice system. In doing so, activist scholars can expand on a tradition of articulating a comprehensive vision of social justice that encompasses the true needs of the most disenfranchised, while at the same time broadening the larger discourse around civil and human rights.

Any analysis that seeks to encompass a conceptual understanding of how socially constructed categories of oppression exact a toll on the most marginalized finds its root in the theory of "intersectionality." This theory[2]

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[1] In this article I use the term queer as shorthand to capture the breadth of all the communities that are Lesbian, Gay, Bisexual, Transgender, Intersex, Two-Spirit or Questioning.

[2] Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 6 (1991). The theory of intersectionality was likely first coined, but certainly gained a foothold, with Crenshaw's groundbreaking article, where she detailed the ways women of color seeking relief from

posits that these socially constructed categories interact on various levels to manifest as social (and political) inequality. Traditionally conceived modes of oppression such as gender, race, class, and sexual orientation and identity do not act independently of one another, but rather interrelate to create systematic discrimination for those with multiple identities.

Today, the principles developed in theories of intersectionality are especially relevant, and urgently need to be incorporated into coalition building within social justice movements.[3] Activists have not, on the whole, been effective in setting forth a political agenda in a way that puts the theory to practical use as part of their respective mandates.[4] The great difficulty in rights-based organizing arises from the inherent –and

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intimate partner violence were "sometimes erased within the political contestations between antiracism and racial hierarchy, and between feminism and patriarchy." She describes the failure of feminist domestic violence organizations to heed the particular needs of women of color. Simultaneously, she explains how antiracist organizations did not fully address the problem of domestic violence in an attempt to forestall racial stereotyping about violence in people of color communities. Crenshaw opines that, "these erasures are not always the direct or intended consequences of antiracism or feminism, but frequently the product of rhetorical and political strategies that fail to challenge race and gender hierarchies simultaneously."

[3] *The Combahee River Collective Statement*, *in* HOME GIRLS: A BLACK FEMINIST ANTHOLOGY 272 (Barbara Smith, ed. 1983). Intersectionality has historical links to the concepts advanced in 1977 by the Combahee River Collective, a group of Black feminist activists who issued a statement that has become a key document in black feminism and the development of "identity politics" as used by political organizers and social theorists. Notably, they describe an active commitment to "struggling against racial, sexual, heterosexual and class oppression" and their particular task as the "development of integrated analysis and practice based upon the fact that the major systems of oppression are interlocking." They concluded that, "[T]he synthesis of these oppressions creates the conditions of our lives. As Black women we see Black feminism as the logical political movement to combat the manifold and simultaneous oppressions that all women of color face."

[4] There are some notable exceptions to this claim. Grassroots organizations such as: Queers for Economic Justice, http://q4ej.org/; Critical Resistance, http://www.criticalresistance.org/; Sylvia Rivera Law Project, http://srlp.org/; Audre Lorde project, http://www.alp.org/about; and FIERCE, http://www.fiercenyc.org/, are some examples of groups with a broad vision of social justice organizing across race, class, and sexual and gender expression. (All sites last accessed on June 16, 2009).

conflicting– agendas and priorities within these movements. Many organizations that theoretically offer a vision of universal human rights remain focused on single-issue advocacy and miss opportunities to educate about connections between policies and social trends outside of their respective bailiwicks that do great harm to much of the populace, including their constituents. As I outline here, scholars and advocates would benefit from taking a closer look at the impact of mass incarceration which serves to marginalize all communities lacking in political power, but can also provide fertile ground for organizing and reconciliation among them.

I. PRISON NATION: HOMELAND OF AMERICA'S POOR AND DISENFRANCHISED

The prison state looms large in the United States and exacts a wildly disproportionate impact on the poor. In 2007 there were nearly 2.3 million people living directly under the auspices of the criminal justice system, and that number grows daily.[5] This renders the U.S. the world's number one jailer, both in total number of incarcerated and in prisoners per capita. This dubious distinction is not a coincidence, but rather a trend thirty years in the making. While it is tempting to link the exponential use of incarceration to an increase in crime over time, such a claim is simply not supported by the facts.[6] Violent crime has not increased commensurate with the rise in the

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[5] OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, PRISONERS IN 2007 (2008), *available at* http://www.ojp.usdoj.gov/bjs/pub/press/p07ppuspr.htm.

[6] *See* MARC MAUER, RACE TO INCARCERATE (2d ed. 2006) (examining three decades of prison expansion and the impact of the drug war on the African American community); *see generally* BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006) (arguing that the dramatic expansion of the prison population has deepened racial and class inequality); *see also* Becky Pettit & Bruce Western, *Mass Imprisonment And The Life Course: Race And Class Inequality In U.S. Incarceration*, 69 AM. SOC. REV. 151 (2004) (describing racial inequalities in imprisonment).

prison population. However, in a politically conservative era punitive lawmaking has held sway pursuant to "tough-on-crime" polices that target much of the population engaged in low-level property and drug crimes. Consequently, prisons have devolved into a warehouse for generations of poor people trapped by the so-called "war on drugs," mandatory minimum sentences, and aggressive policing of low-income communities which puts them at risk of increased criminal justice involvement.[7]

From an economic standpoint, the proliferation of the penal state has become the primary avenue for policymakers to address the depth and complexity of social problems –in particular the lack of job opportunities for a large percentage of the population unprepared for employment in the post-industrial age.[8] The fact that the overwhelming majority of incarcerated people are poor makes the continuation of this system possible, owing to their lack of political currency. That two-thirds are people of color makes it acceptable as a political matter, due to the persistence of racism in America and the historical correlation between race and servitude.[9]

No broad examination of economic justice for low-income people, queer or otherwise, can proceed without confronting this prison crisis and analyzing the economic foundation upon which our prison culture is built. Incarceration, operating now at an unprecedented level, is a direct expression of capitalism in its most crass iteration. What has come to be

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[7] Pettit and Western, *Life Course supra* note 6, at 151; *see also* CHRISTIAN PARENTI, LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS 57-58 (2000) (documents the advent of militarized policing, the war on drugs, and the growth of the prison population).

[8] *See* RUTH WILSON GILMORE, GLOBALISATION AND U.S. PRISON GROWTH: FROM MILITARY KEYNESIANISM TO POST-KEYNESIAN MILITARISM, 40 RACE & CLASS 171, 178 (1998/99); *see also* PARENTI, *supra* note 7, at 214.

[9] ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 22-24 (2003).

broadly referred to as the "prison industrial complex" references the fact that the prison boom is not a reflection of increased criminal activity, but rather the manifestation of a complex web of economic interests that has made prison construction a cornerstone of economic development in the last three decades.[10] Corporate (if not government)[11] wealth from prison construction skyrocketed, along with the various industries required to effect the administration and servicing of this system. The people inside the prisons can be said to provide a source of raw material, both for the cheap production of goods by prison labor, but also for the consumption of basic goods required by the burgeoning population of inmates themselves.[12]

Incarceration and post-incarceration stigma takes a huge toll on communities. Siphoning off enormous human resources from the low-income communities that need them most has become the touchstone of resistance to the expansion of the prison system. As a pragmatic *reaction* to mass incarceration, government, NGOs, and community-based organizations have focused on prisoner "reentry," a term that has emerged part of the criminal justice lexicon. Prisoner reentry, at its core, focuses on the reintegration of prisoners (typically returning to their communities of origin) after a term of incarceration. As a practical matter, release from prison should coincide with social and economic support, such as assistance

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[10] *Id.* at 84. *See generally* RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA (2007) (providing explanation for prison buildup by looking at how political and economic forces, ranging from global to local, conjoined to produce the prison boom).

[11] DAVIS, *supra* note 9, at 85. State governments have had financial difficulty maintaining the prison population. Recently, a federal three-judge panel ordered the California prison system to reduce overcrowding by as many as 55,000 inmates in order to provide a constitutional level of medical and mental health care. *See* Solomon Moore, *Court Orders California to Cut Prison Population*, N.Y. TIMES, February 10, 2009, *available at* http://www.nytimes.com/2009/02/10/us/10prison.html

[12] DAVIS, *supra* note 9, at 88.

with employment, housing, drug treatment, family reunification, and other priorities.[13] Reentry policy and practice does not directly focus on stemming the tide of mass incarceration, but rather provides an avenue to address the onerous impact of imprisonment on those who are formerly incarcerated (and their communities) by analyzing and advocating for economic and social service resources to assist them in avoiding re-arrest and to stem the tide of cyclical incarceration.[14]

There are special difficulties faced by those released from prison that are more hidden and less well understood. These are civil barriers associated with criminal convictions that present legal obstacles to reintegration.[15] These "collateral consequences" of conviction include restricted access to employment, bars to public and private housing, public benefits, family reunification, and restrictions on many of life's necessities that invariably create an environment inhospitable to successful reintegration.[16] Much has been written about voter disenfranchisement and

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[13] JEREMY TRAVIS ET AL., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 25, 31, 35 (2001), *available at* http://www.urban.org/UploadedPDF/from_prison_to_home.pdf.

[14] *See generally*, e.g. REPORT OF THE RE-ENTRY POLICY COUNCIL: CHARTING THE SAFE AND SUCCESSFUL RETURN OF PRISONERS TO THE COMMUNITY (2003), *available at* www.reentrypolicy.org.

[15] *See generally* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind, Eds. 2002) (an early compilation of essays of collateral consequences); *see also* Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623 (2006) (proposing an approach that fully integrates collateral consequences and reentry).

[16] *See generally* Nora V. Demleitmer, *Collateral Damage: No Reentry for Drug Offenders*, 47 VILL. L. REV. 1027 (2002); *Expanding Collateral Sanctions: The Hidden Costs of Child Support Enforcement Against Incarcerated Parents*, 13 GEO. J. ON POVERTY L. & POL'Y 313, 315-319 (2006) (prisoner's child support arrears constitute an additional barrier to reentry) [Hereinafter Cammett, *Costs*].

the impact it has on political deterioration in poor communities,[17] but many typical sanctions also create barriers on a more immediate and fundamental level. These roadblocks derive from a patchwork of federal, state, and regulatory frameworks that limit participation in critical areas of life and are difficult to address under a unified legal framework because their effects vary from state to state. Advocates have recently focused more attention on dismantling legal collateral sanctions to assist in reentry.[18]

A criminal conviction can also subject an individual to myriad other punishments that are not strictly collateral consequences. Hidden sanctions can appear in the form of fees owed to the state arising from imprisonment,[19] including payment for the cost of probation, parole and restitution, debt garnishment such as child support arrears, and other

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[17] *See* e.g. Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777 (2002). An estimated 5.3 million Americans are currently denied the right to vote because some laws prohibit voting by people with felony convictions. This obstacle to participation in democratic life is exacerbated by racial disparities in the criminal justice system, resulting in an estimated 13% of Black men unable to vote.

[18] Some examples are MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE (2006); LEGAL ACTION CENTER, AFTER PRISON: ROADBLOCKS TO REENTRY (2004) (addressing an array of sanctions in a state-by-by state survey), *available at* http://www.lac.org/roadblocks-to-reentry/ (last accessed on June 16, 2009); NATIONAL H.I.R.E. NETWORK, http://www.hirenetwork.org/ (providing employment resources for people with criminal convictions) (last accessed on June 16, 2009); CENTER FOR CONSTITUTIONAL RIGHTS, *The Campaign for Telephone Justice* (grassroots organizing to challenge excessive phone surcharges on family members receiving calls from N.Y. state prisons) *available at* http://ccrjustice.org/learn-more/videos/video%3A-40-years-ccr-telephone-justice-campaign (last accessed on June 16, 2009); Legal services offices are also integrating holistic services into criminal defense practice, e.g. BRONX DEFENDERS, *available at* http://bronxdefenders.org/?page=content&param=our_practice (last accessed on June 16, 2009); NEIGHBORHOOD DEFENDER SERVICE OF HARLEM, *available at* http://www.ndsny.org/programs.htm (last accessed on June 18, 2009); THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, *available at* http://www.pdsdc.org/PDS/CivilLegalServices.aspx (last accessed on June 16, 2009).

[19] Cammett, *Costs, supra* note 11, at 318; *See also* RACHEL L. MCLEAN AND MICHAEL D. THOMPSON, REPAYING DEBTS, COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER (2007), *available at* http://tools.reentrypolicy.org/repaying_debts/.

counterproductive sanctions like automatic suspension of driver's licenses for any drug conviction. Such barriers make it difficult for people to stay out of the criminal justice system after release. The vast majority of prisoners will come home eventually, but recidivism rates are high: of those leaving prison nearly two-thirds will return within three years.[20]

There is an inescapable nexus between entrenched poverty, the criminal justice system, and the sanctions that ultimately punish people simply because they are poor. One aspect of these civil disabilities should be of particular interest to anti-poverty advocates. Collateral sanctions – particularly against people with drug convictions– have an impact on poor people almost exclusively. Prisoners are overwhelmingly low-income;[21] but collateral sanctions deprive formerly incarcerated people of opportunities to lift themselves out of poverty. These same sanctions applied against those with financial and social resources will have a negligible impact. Consider just a few of the collateral consequences that have an effect on the areas of life most necessary to stabilize after a prison or jail sentence:

- Formerly incarcerated people are likely to find employment, if at all, in the low-wage economy. This is based on the level of work-related skills and education that the majority of them possess. Without the social connections available to people with more resources, returnees have a diminished ability to create opportunities less dependent on the wage economy. Therefore, they are far more negatively affected by the vast array of general restrictions on jobs (and even occupational

[20] TRAVIS ET AL., *supra* note 13, at 1.

[21] *Id.* at 9; In 1999 public defenders handled 82% of the 4.2 million cases in the largest 100 counties in the U.S. *See* OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, INDIGENT DEFENSE STATISTICS, *available at* http://www.ojp.gov/bjs/id.htm#findings.

licenses) for people with criminal records.

- Next to meaningful employment, secure housing is critical for successful reintegration. Most housing prohibitions for people with criminal records are directed against those seeking federally subsidized housing, and these are among the poorest of Americans. Further, the same housing restrictions prevent formerly incarcerated people from living with family members in public housing who will be at risk of eviction if they reside with them, even temporarily.

- Bans on public benefits, which in some states are total if you are convicted of a drug crime, preclude those who are poor and substance-addicted from obtaining meaningful drug treatment and recovery, since they are not able to pay for private rehabilitation centers that require health insurance.

Civil legal barriers create more restricted access to social support for low-income people with criminal records, and sometimes foreclose access entirely. Formerly incarcerated individuals arguably need social services and subsidies the most, owing to the lack of access to education, employment opportunities, and substance abuse treatment typically reported before entering the criminal justice system.[22] The rhetoric of redemption and specifically reentry suggests that those who have "paid their debt to society" deserve a second chance to make things right and live, if they *choose*, as law-abiding citizens. For many low-income people civil legal barriers, in addition to conviction-related stigma, make the promise of a new life an empty one.

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[22] TRAVIS ET AL., *supra* note 13, at 9.

The unprecedented number of people currently in prison, on probation or parole, or simply saddled with a criminal record means that incarceration is an issue that anti-poverty advocates must address if they are to develop any effective strategies to engender economic justice. Rethinking crime strategies may allow for specifically exploring the possibilities of restitution and "restorative justice" rather than simply locking up offenders.[23] This might serve to strengthen and protect poor communities more comprehensively in the long run. Aggressive jailing, without more, does nothing to rebuild communities damaged by violence and the effects of incarceration. Consequently, anti-poverty activists and scholars must begin to incorporate a different paradigm to address incarceration as both a consequence of poverty and a co-recurring factor in a vast majority of low-income communities[24] in the United States.

II. LGBTQ COMMUNITIES: WHAT'S QUEER GOT TO DO WITH IT?

In recent years the most visible contemporary gay rights movements have concentrated their focus and resources on a limited number of narrowly defined strategies as the ticket to liberation; namely marriage

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[23] *But see* e.g. Richard Delgado, *Prosecuting Violence: A Colloquy on Race, Community, and Justice*, 52 STAN. L. REV. 751 (2000) (comparative analysis of restorative justice principles and the traditional criminal justice system that includes critiques of both). "Restorative Justice advocates argue that incarceration offers little in the way of rehabilitative opportunities for offenders. Many emerge from prison more hardened and angry than when they entered, setting up a cycle of recidivism that serves neither them nor society. Moreover, although the victims' rights movement has begun to clamor for restitution as a part of court-ordered sentencing, relatively few victims receive compensation for their injuries, and fewer still receive anything resembling an apology from the perpetrator."

[24] *See* e.g. TODD R. CLEAR, BACKFIRE: HOW MASS INCARCERATION MAKES DISADVANTAGED COMMUNITIES WORSE (2007); *see also* Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1281 (2004) (examining theories of community harm and evidence of mounting harm to African American communities due to incarceration).

equality and the passage of federal hate crimes legislation. These strategies have consumed enormous energy[25] without a deep cost-benefit analysis of this approach as a community building strategy. This paper is not designed to be a specific critique of either. It important, however, to examine the needs of queer constituents for whom survival on the economic margins *is* the primary issue. The disproportionate presence of queer people affected by criminal justice system begs a different perspective on this problem.

Structural inequality operates through intersecting oppressions to make certain people most vulnerable to criminalization. The experience of living in poverty and the concomitant exposure to a variety of coercive governmental systems puts low-income and especially low-income people of color at risk of incarceration. What typically goes unexamined are the myriad ways that queer people are drawn into and experience the carceral system *because* of sexual identities and expression. The criminal justice system has a toxic effect on queer communities at every conceivable level: the marginalization and subsequent criminalization of queer youth; bias in the judicial system; trauma during incarceration in prisons and jails; and in disproportionate sentencing, particularly death penalty cases.

It may not be obvious that incarceration and the challenges flowing from involvement in the criminal justice system deserve pointed attention and resources from queer communities. As a political matter it is difficult to

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[25] A total of $73 million was spent on the battle over Proposition 8 in California. Randal C. Archibold & Abby Goodnough, *California voters Ban Gay Marriage*, N.Y. TIMES, November 5, 2008, *available at* http://www.nytimes.com/2008/11/06/us/politics/06ballot.html?_r=1&scp=5&sq=How%20much%20spent,%20Proposition%208?&st=cse. *See also* Richard Kim, *California Supreme Court Upholds Prop 8*, THE NATION MAGAZINE, May 26, 2009, *available at* http://www.thenation.com/blogs/notion/438620 (questioning the wisdom of committing massive resources toward an initiative to reverse Prop 8 in 2010 rather than other movement goals).

gain currency on the national stage featuring the concerns of prisoners —a reviled group with little political capital. However, a significant number of queer people do find themselves caught up in the criminal justice apparatus. It is only when we understand the class dimensions of homophobia and transphobia that it becomes clear why the criminal justice system presents an overarching issue that the queer community should come to terms with.

Queer youth frequently experience significant problems in response to expression of sexual and gender identity that puts them at risk of criminal justice involvement during their formative years. A recent report by the National Gay and Lesbian Task Force entitled, "Lesbian, Gay, Bisexual and Transgender Youth: An Epidemic of Homelessness,"[26] details the ubiquitous presence of homelessness among queer youth. It is estimated that in some cities in the US up to 40 percent of homeless youth are gay, lesbian, bisexual or transgender.[27] This condition is a direct result of the hardships associated with coming out as queer youth. Familial conflict is a significant factor that leads to homelessness and out-of home care, and this dislocation contributes to substance abuse and mental health challenges faced by these young people that often go unmet. Physical assaults upon disclosure of their sexuality within the home, at school, and in foster care placements can lead to young people to believe that they safer on the streets.[28] There they often must rely on survival through the sex trade and drug use, and may be

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[26] N. RAY, NATIONAL GAY AND LESBIAN TASK FORCE, LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS (2006) [hereinafter RAY, *Homeless Youth*], *available at* http://www.thetaskforce.org/downloads/HomelessYouth.pdf.

[27] *Id.* at 13.

[28] *Id.* at 2. *See also* HUMAN RIGHTS WATCH, HATRED IN THE HALLWAYS: VIOLENCE AND DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER STUDENTS IN U.S. SCHOOLS (2001), *available at* http://www.hrw.org/legacy/reports/2001/uslgbt/toc.htm.

harassed and re-victimized by law enforcement.[29]

As a result of the loss of family support queer youth are made vulnerable to being swept up by the juvenile and later criminal justice systems.[30] In this way, non-conforming sexual and gender expression can be a *predictor* of potential incarceration, and should be of great concern to anyone who works with young people in the queer community. Early contact with the criminal justice system sets up the cycle of incarceration referenced earlier, but in the case of queer youth provides access to even fewer targeted supportive services. As a result of a pattern of rejection and alienation, queer youth demonstrate reluctant to openly discuss their sexual orientation or gender identity with service providers.[31]

Moreover, the disengagement from family resources in tandem with criminal justice involvement have serious repercussions for the economic prospects of queer youth throughout their lives, which has ongoing impacts on their health and well-being as adults. Consequently, it is not hard to understand why adults that are queer are disproportionately at risk for incarceration, especially if they are transgender. As a group, transgender and gender non-conforming people are disproportionately poor, homeless, and criminalized. Due to persistent discrimination in employment and housing, many remain homeless or marginally housed[32] and are forced to survive in the underground economy, including sex work.[33] In some

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[29] RAY, *Homeless Youth*, *supra* note 26, at 70.

[30] *Id.* at 22, 40.

[31] *See* CORINNE MUFIOZ-PLAZA, ET AL., LESBIAN, GAY, BISEXUAL AND TRANSGENDER STUDENTS: PERCEIVED SOCIAL SUPPORT IN THE HIGH SCHOOL ENVIRONMENT 56 (2002).

[32] LISA MOTTET AND JOHN M. OHLE, TRANSITIONING OUR SHELTERS: A GUIDE TO MAKING HOMELESS SHELTERS SAFE FOR TRANSGENDER PEOPLE 3-4 (2003).

[33] AMNESTY INTERNATIONAL USA, STONEWALLED: POLICE ABUSE AND MISCONDUCT

localities it is possible that transgender adults are incarcerated at a rate even higher than the general population of African-American males.[34] In San Francisco, a 1997 study conducted by the City's Department of Public Health found that 67 percent of Male-to-Female transgender prisoners (MTFs) and 30 percent of Female-to-Male transgender prisoners (FTMs) respondents had been jailed in the past year.[35]

The threat of sexual abuse and violence are horrible realities for all people living in jails and prison. Research shows that prisoners who are gay, lesbian or transgender –or perceived to be– are at a higher risk for abuse and trauma in prison, simply because they are queer. A report issued in 2001 by Human Rights Watch, *No Escape: Male Rape in U.S. Prisons,*[36] charges that state authorities are responsible for widespread prisoner-on-prisoner sexual abuse in U.S. men's prisons.[37] Human Rights Watch warns that by failing to implement reasonable measures to prevent and punish rape—and, indeed, in many cases, taking actions that make sexual victimization likely—state authorities permit this physically and psychologically devastating abuse to occur.[38]

AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S. (2006), *available at* http://www.amnestyusa.org/outfront/stonewalled/report.pdf.

[34] Pettit and Western, *Life Course,* supra note 6, at 151-2.

[35] K. Clements-Nolle, et al., *HIV Prevalence, Risk Behaviors, Health Care Use, and Mental Health Status of Transgender Persons in San Francisco: Implications for Public Health Intervention*, 91 AMERICAN JOURNAL OF PUBLIC HEALTH 915 (2001); *see also* Tali Woodward, *Life in Hell*, SAN FRANCISCO BAY GUARDIAN, March 15, 2005, *available at* http://www.sfbg.com/40/24/cover_life.html.

[36] JOANNE MARINER, HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001), *available at* http://news.lp.findlaw.com/hdocs/docs/hrw/hrwmalerape0401.pdf.

[37] *Id.* The group's findings are based on correspondence with more than 200 prisoners spread among thirty-four states, inmate interviews, and a comprehensive survey of state correctional authorities.

[38] *Id.* "Rape is in no way an inevitable consequence of incarceration," notes Joanne

Apart from being targeted for abuse, transgender prisoners face discrimination, harassment, and abuse above and beyond that of the non-trans population. The findings in *No Escape* indicate that certain prisoners are targeted for sexual exploitation the moment they enter a correctional facility: their age, looks, sexual orientation or gender expression, and other characteristics mark them as candidates for abuse.[39] In 2007 the Sylvia Rivera Law Project (SRLP) issued, "It's War in Here: A Report on the Treatment of Transgender and Intersex People in New York State Men's Prisons."[40] In addition to illustrating the cycles of poverty and discrimination that result in the criminalization of transgendered people in New York State prisons,[41] the report documents the widespread harassment, physical and sexual abuse, discrimination, and violence that transgender, intersex, and gender non-conforming people face inside state custody.

Even for those willing to come forward, it is surprisingly difficult for an incarcerated individual to prove rape in prison. Consider the story of Roderick Johnson, a Navy veteran and gay man incarcerated in Texas for

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Mariner, the author of the report. "But it is a predictable one if prison and prosecutorial authorities do little to prevent and punish it." *See also* e.g. STOP PRISONER RAPE & ACLU NATIONAL PRISON PROJECT, STILL IN DANGER: THE ONGOING THREAT OF SEXUAL VIOLENCE AGAINST TRANSGENDER PRISONERS (2005) (noting that sexual violence in detention is still an alarming reality for transgender individuals throughout the U.S despite the Prisoner Rape Elimination Act).

[39] MARINER, *supra* note 36, at 11. The effectiveness of the PRISONER RAPE ELIMINATION ACT (PREA), P.L. 108-79 (2003) has yet to be determined. The act aimed to curb prison rape through a "zero-tolerance" policy, as well as through research and information gathering. It called for developing national standards to prevent and detect incidents of sexual violence in prison, making data on prison rape more available to prison administrators and corrections facilities more accountable for incidents of prison rape. It does not create a new course of action for prisoners seeking legal redress.

[40] D. MORGAN BASSICHIS, IT'S WAR IN HERE: A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN'S PRISONS (2007).

[41] *Id.* at 11-15. *See also*, Alexander L. Lee, *Nowhere to Go But Out: The Collision Between Transgender & Gender-Variant Prisoners and the Gender Binary in America's Prisons*, UNPUBLISHED JD THESIS, U. OF CAL., BERKELEY (2003) (on file with the author).

parole violations stemming from non-violent crimes. Johnson was given the female name of "Coco" and forced into sexual slavery and raped repeatedly for a period of 18 months by prison gangs in the Allred Unit, a Texas prison.[42] Despite begging officials seven times in writing to move him to protective housing, they refused, saying that his claims could not be corroborated. Officials even suggested that because he was gay he might be enjoying the rapes.[43]

Mr. Johnson filed suit in Federal Court in Texas claiming "deliberate indifference" to his health and safety under the Eighth Amendment of the U.S. Constitution.[44] Despite testimony from prison gang members corroborating the abuse, a Texas jury refused to hold six prison officials accountable. A juror noted that he didn't think there was enough evidence of the assaults, noting stating that "[h]e probably was raped, but he never came out with a rape test."[45] The Johnson case suggests that the deliberate indifference standard[46] will be difficult to meet for plaintiffs, especially those who are usually at ongoing risk while incarcerated. Queer and

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[42] Adam Liptak, *Ex-Inmate's Suit Offers View into Sexual Slavery in Prisons*, N.Y. TIMES, Oct. 16, 2004, *available at* http://www.nytimes.com/2004/10/16/national/16rape.html.

[43] *Id.*

[44] Farmer v. Brennan, 511 U.S. 825 (1994). In *Farmer* the Supreme Court held that prisoner rape is constitutionally unacceptable. However the court's ruling has proved troubling over the years. Some interpretations have shielded corrections officials from liability in all but the most extreme cases of deliberate indifference to threats of sexual violence. *See Still In Danger, supra* note 38, at 1; see *infra*, note 46.

[45] Angela K. Brown, *Jurors reject Texas Prison Rape Lawsuit,* ASSOCIATED PRESS, and October 18, 2005 (noting jurors criticism of Johnson for failure to introduce a rape test).

[46] The "deliberate indifference" standard requires that an official "knows of and disregards an excessive risk to prisoner health and safety; the official must be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists. And he must also draw the inference." *Farmer,* at 273, 288. Advocates have asserted that the rules create perverse incentives for the authorities to ignore the problem of abuse, leaving the prisoner to accomplish the difficult task of *proving* the subjective knowledge of the staff members. *Still In Danger, supra* note 38, at 4.

transgender prisoners are singled out for repeated sexual abuse within a dehumanizing system that relies on power and control to maintain order within its walls.

Correctional facilities have no clear standards for housing prisoners that are transgender, and the failure to create a thoughtful and uniform accommodation standard contributes to the harsh conditions that they endure. U.S. correctional facilities are sex-segregated, and house prisoners according to their birth-assigned sex or genitalia.[47] Transgender women who live and identify as women but who were identified as male at birth are generally placed in men's facilities. In men's they are frequent and visible targets for discrimination and violence, and are subject to daily refusals by correctional officers and other prisoners to recognize their gender identity.[48] Male-to-Female transgender prisoners (MTFs) rapidly become the targets of frequent sexual abuse.[49]

As for female-to-male transgender people [FTMs], "while they don't face the same type of violence [from fellow prisoners], they face a lot of oppression on the part of guards," explains Judy Greenspan, cofounder of the Trans/Gender Variant in Prison Committee (TIP). "When they're strip-searched, many FTMs who have had their breasts removed or take hormones are put on display. It's psychological brutality…They're demonized."[50]

Protective custody –also known as administrative segregation– is not

[47] BASSICHIS, *supra* note 39, at 17.

[48] *Id.* at 18.

[49] I*d.*

[50] Emily Alpert, *Gender Outlaws,* interview with Judy Greenspan, co-founder, Trans/Gender Variant in Prison Committee (TIP), INTHEFRAY MAGAZINE, November 20, 2005, *available at* http://inthefray.org/content/view/1381/39/

necessarily safer, much more restrictive, and often leads to the loss of privileges valued by inmates. The consistent use of isolation and solitary commencement and the resulting devastating psychological impacts have also been documented. Transgender prisoners are punished simply for being more at risk.[51]

Lesbian women, or women who transgress gender boundaries, are also singled out for sexual abuse and mistreatment in the form of coercive repression and sexual violence. Prisons are gendered institutions of oppression and lesbians are subject to significant dangers, both in the marginalization of them as women and as gender transgressors. *Not Part of Her Sentence*[52] details the pernicious presence of sexual abuse against incarcerated women. In this report Amnesty International documents categories of women who were likely targets for sexual abuse. Perceived or actual sexual orientation is one of the four categories that make a female prisoner a more likely target for sexual abuse, as well as a target for retaliation when she reports that abuse.[53] The irony is that the lesbian prisoner –so long stereotyped as a violent predator within the prison system– is at heightened risk of harassment and sexual abuse within its walls[54].

One such example of how sexual identity can subject a woman to

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[51] Bassichis, *supra* note 39, at 18-19.

[52] AMNESTY INTERNATIONAL, NOT PART OF HER SENTENCE: VIOLATION OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY: SEXUAL ABUSE AND WOMEN IN PRISON (1999), summary of report *available at* http://www.amnesty.org.ru/library/Index/ENGAMR510191999?open&of=ENG-390

[53] *Id.*

[54] Estelle Friedman, *The Prison Lesbian: Race, Class, and the Construction of the Aggressive Female Homosexual, 1915-1965*, FEMINIST STUDIES, VOL. 22 (1996) (detailing the historical emergence of the "predatory prison lesbian" stereotype).

further abuse or torture by prison guards is the case of Robin Lucas, who is African American. Prison guards taunted Ms. Lucas about her same-sex relationship by saying, "maybe we can change your mind." She was originally incarcerated for credit card fraud and placed in a special Housing Unit of the Pleasanton Federal Detention Center in California. Despite complaining to authorities about harassment and threats around her sexual orientation and her placement in a unit generally housing men, her pleas went unheeded. Three inmates unlocked her cell, handcuffed and raped and sodomized her, causing very severe injuries. Her attackers told her to keep her mouth shut and threatened her with further attacks if she alerted the authorities. The guards implicated in the abuse were simply transferred to another facility; no disciplinary action was taken. None of the guards or inmates was ever charged with a crime. A civil lawsuit was later settled in Robin Lucas' favor.[55] Despite the furor raised over the grotesque violence suffered by Ms. Lucas and many others, the problem of gendered violence rages on in women's prisons. Recently, ten women imprisoned in Michigan's Scott Correctional Facility in suburban Detroit won a $15.4 million jury award in a sexual assault lawsuit for rapes, sexual harassment, and verbal abuse they suffered at the hands of prison guards.[56]

Finally, it is likely that queer defendants are subject to discrimination throughout their engagement with the judicial system, including

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[55] *See* AMNESTY INTERNATIONAL, CRIMES OF HATE, CONSPIRACY OF SILENCE 30 (2001), *available at* http://www.amnesty.org/en/library/asset/ACT40/016/2001/en/cd954618-d961-11dd-a057-592cb671dd8b/act400162001ar.pdf

[56] Jeff Seidel, *Jury awarded $15.4 million to inmates*, DETROIT FREE PRESS, January 7, 2009, *available at* http://www.freep.com/article/20090107/NEWS06/901070395/. A juror took the unusual step of making this statement, "We the members of the jury," she began, "as representatives of the citizens of Michigan, would like to express our extreme regret and apologies for what you have been through."

vulnerability to harsher sentencing in criminal court.[57] Addressing systemic bias and hostility within the court system is of central importance to queer people. This bias, exhibited by key players in the legal system such as attorneys, judges, court personnel and juries make the courthouse a hostile environment for many in queer communities.[58] This type of bias, however, has rarely been objectively studied or addressed. The limited research that has been conducted on anti-queer and anti-trans bias, however, has yielded some startling findings.[59]

There have been at least two comprehensive statewide studies on the issue of bias against queer people within the legal system. One study conducted by the Judicial Council of California[60] found that thirty eight percent of gay and lesbian respondents reported feeling threatened by the courtroom setting because of their sexual orientation or gender expression. The California study also found that one out of five court employees heard derogatory terms, ridicule, snickering, or jokes about gays or lesbians in open court, with the comments being made most frequently by judges, lawyers, or court employees. A second statewide study, conducted by the State Bar of Arizona[61], found that seventy-seven percent of judges and

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[57] *Cf.* WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 88 (1999) (noting that poor and nonwhite gays have always fared worse than middle-class white gays in the criminal justice system).

[58] Michael Shortnacy, *Sexual Minorities, Criminal Justice, and the Death Penalty*, 32 FORDHAM URBAN L. J. 231 (2005) (noting instances of systematic bias against queers in the legal system).

[59] *Id.* at 232.

[60] JUDICIAL COUNCIL OF CAL. SEXUAL ORIENTATION FAIRNESS IN THE CALIFORNIA COURTS: FINAL REPORT OF THE JUDICIAL COUNCIL'S ACCESS AND FAIRNESS ADVISORY COMMITTEE 6-7 (2001), *available at* http://www.courtinfo.ca.gov/programs/access/documents/report.pdf.

[61] STATE BAR OF ARIZ. GAY AND LESBIAN TASK FORCE, REPORT TO THE BOARD OF GOVERNORS (April 1999), summary of findings *available at* http://www.myazbar.org/Content/SecComm/Committees/SOGI/summary.html.

attorneys reported that they heard disparaging comments about gays and lesbians. Forty-seven percent of those reporting hearing these disparaging comments also reported hearing them in open spaces of the courthouse.[62]

In its most serious form, homophobia and transphobia can ultimately affect the outcome of criminal prosecutions and may even encourage the imposition of death sentences for queer defendants deemed guilty of capital crimes.[63] There are no explicit restrictions on what personal information can be introduced about a defendant's sexuality or gender expression, and the rules against statements that might inflame a jury are not necessarily enforced when the defendant is queer.[64] Ambitious prosecutors are often free to play to stereotypical beliefs about queer people, and have reason to single out gender non-conforming defendants when deciding which cases might convince a jury to opt for execution.[65] Appeals to anti-queer and anti-trans animus have a notable impact on juries.[66] Moreover, nowhere is the identity of a lesbian more integral to her treatment than when she is facing

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[62] *Id.*

[63] *See* Victor L. Streib, *Death Penalty for Lesbians*, 1 NAT'L L.J. SEX. ORIENTATION L. 105 (1994) *available at* http://www.ibiblio.org/gaylaw/issue1/streib.html (noting lesbians may be "defeminized" by prosecutors by using their sexual orientation and then dehumanized for the crime, leaving a jury with a gender-neutral monster deserving of little or no human compassion) [hereinafter Streib, *Death Penalty*]; *see also* Richard Goldstein, *Queer on Death Row: In Murder Cases Being Gay can Seal a Defendant's Fate*, VILLAGE VOICE, March 13, 2001, at 38, *available at* http://www.villagevoice.com/2001-03-13/news/queer-on-death-row/, [hereinafter Goldstein, *Queer on Death Row*].

[64] Streib*, Death Penalty, supra* note 62*,* at 109-110.

[65] Goldstein*, Queer on Death Row, supra* note 62, at 38; Streib, *Death Penalty, supra* note 62, at 110-111; *see also* Tracy Baim, *Death Penalty Shocker*, WINDY CITY TIMES, January 15, 2003 (noting that the prosecution biased the jury with homophobia by repeatedly used Mata's lesbianism as her motive for killing a man, calling her a "Hard Core Lesbian" and "Man-hating Lesbian"), *available at* http://www.windycitymediagroup.com/gay/lesbian/news/ARTICLE.php?AID=1636.

[66] DECISIONQUEST AND THE NATIONAL LAW JOURNAL, 2000 ANNUAL JUROR OUTLOOK (2000), *available at* http://dqadmin.com/2000%20AJOS_web1.pdf (finding that twelve percent of jurors said they could not be fair to a lesbian or homosexual party in a case).

punishment for a capital crime. Lesbians are disproportionately represented among death row inmates. A staggering 40 percent of women on death row are lesbians or have had sexual orientation used as a factor against them in criminal sentencing.[67] In the case of Wanda Jean Allen, a lesbian defendant executed for the capital murder of her lover, the trial court admitted evidence that Allen was the "man" in the lesbian relationship. This evidence was apparently "used to show that [Allen] was the aggressive person in the relationship, while [her lover] was more passive." The appeals court reasoned that the evidence would "help the jury understand why each party acted the way she did both during events leading up to the shooting and the shooting itself."[68]

Although homophobia and transphobia have been used in the judicial system as aggravating factors in the trials of queer defendants, mainstream gay right groups have not typically demonstrated support for capital defendants. Law professor and criminal defense attorney Abbe Smith analyzes the case of Aileen Wournos, dubbed by the media as the first "female serial killer."[69] Wournos, a truck-stop prostitute (and also a victim of extraordinary sexual abuse throughout her life) was executed in 1992 for

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[67] Goldstein, *Queer on Death Row, supra* note 62, at 38. *See also* AMERICAN CIVIL LIBERTIES UNION AND AMERICAN FRIENDS SERVICE COMMITTEE, THE FORGOTTEN POPULATION: A LOOK AT DEATH ROW IN THE UNITED STATES THROUGH THE EXPERIENCES OF WOMEN 8 (2004) (noting that in several cases prosecutors appeared to use the woman's sexual orientation to prejudice the jury against her, and that bias may have made a difference in the outcome).

[68] Michael B. Shortnacy, *Guilty and Gay, A Recipe for Execution in American Courtrooms: Sexual Orientation as a Tool for Prosecutorial Misconduct in Death Penalty Cases*, 51 AM. U. L. REV. 309, 301-344 (2001) (Noting that the court concluded that given the circumstances of the crime, the probative value of the character evidence "was not substantially outweighed by its prejudicial effect.")

[69] Abbe Smith, *The "Monster" in All of Us: When Victims Become Perpetrators*, 38 SUFFOLK U. L. REV. 367, 378 (2005). Wournos was the subject of the major motion picture, "Monster" (2003). Actress Charlize Theron received numerous awards, including the Academy Award, for her portrayal of Wournos.

the murders of seven men in Florida. Despite her claims of self-defense,[70] Wournos was found guilty by a jury in one and one half hours, and sentenced to die in one hour and forty-eight minutes.[71] Wournos was also a lesbian, and Smith notes that mainstream feminists were not eager to be associated with a "man-hating" lesbian prostitute who killed seven men. Wournos presented the worst possible image of a lesbian killer. As one commentator declared, "her crimes were *male* (italics mine) in their commission: predatory, cold-blooded, premeditated, and malicious."[72] Media coverage focusing on Wournos's supposed predatory proclivities served to minimize the effects of psychological trauma she experienced due to the constant sexual violence that had been perpetrated against her.

The larger point in Smith's analysis is that in the rush to punish heinous crimes we often fail to examine the very direct link between victimhood and criminal behavior. Smith concludes that, "Victims and perpetrators… are often the same people. Those who claim to care about victims of child abuse, sexual assault, and domestic violence and who abandon them when they repeat the behavior by acting out against others fail to make these critical connections. Further, it is hypocritical to embrace people when they are 'victims' and blindly declare them to be 'predators' and 'criminals' when they become 'perpetrators.' Yet, sadly, this is what many prosecutors do. Even more disappointing is when thoughtful critics of the current

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[70] *Id.* at 379. "She was also diagnosed by both defense and state mental health experts as suffering from an emotional and/or mental disturbance at the time of the offenses and having an impaired ability to conform her conduct to the requirements of law. Both of these, as well as her history of physical and sexual abuse and alcoholism, could have been considered mitigating circumstances for sentencing purposes."

[71] *Id.* at 383. Smith notes that by comparison, the jury for Ted Bundy, tried in Florida for having killed more than twenty women, took seven hours to find him guilty and seven and a half more hours to sentence him to death.

[72] *Id.* at 382.

system, including feminists and advocates for victims –those whose life work is devoted to social reform– do this."[73]

The critique that Smith offers represents an example of a lost opportunity to draw attention to systemic bias in the criminal justice system. Though these high profile events often provide unsympathetic facts, it is important to demonstrate the trickle down effect of bias on the lives of queer people who experience daily injustices when confronting the justice system. These cases also remind us that caution should be exercised when relying solely on courts and law enforcement to address intractable social problems such as domestic violence.

III. LESSONS FROM THE TRENCHES: RELIANCE ON LAW ENFORCEMENT A DOUBLE-EDGED SWORD

Notwithstanding the fact that *Lawrence v. Texas*[74] overturned anti-sodomy laws that criminalized gay sex, the ongoing criminalization of queerness persists for those who fail to conform to mainstream notions of gender expression or, as writer and poet Audre Lorde described it, "the mythical norm."[75] As alluded to earlier, people living with multiple

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[73] *Id.* at 394. In her critique pointing out lack of response to the case Smith asks, "Why did feminists, battered women's advocates, or sexual assault victims rights advocates not get involved in the Wournos case? Why did they not help her to obtain counsel, raise money for expert testimony, visit her in jail, attend her trial, and, especially, protest her execution? Why did they not at least write an op-ed piece?"

[74] Lawrence v. Texas, 539 U.S. 558 (2003). In *Lawrence* the Supreme Court, in a 6-3 decision, declared unconstitutional a Texas law that prohibited sexual acts between same sex couples. Justice Anthony Kennedy, writing for the majority, held that the right to privacy protects a right for adults to engage in private, consensual homosexual activity.

[75] AUDRE LORDE, *Age, Race, Class and Sex, in* SISTER OUTSIDER: ESSAYS AND SPEECHES 116 (1984). Lorde opines that, "Somewhere on the edge of consciousness, there is what I call a 'mythical norm,' which each one of us knows 'that is not me.' In [A]merica this norm is usually defined as white, thin, male, young, heterosexual, Christian, and financially secure. It is within this mythical norm that the trappings of power lie within this society. Those of us who stand outside that power often identify one way in which

identities who are at risk of criminal justice involvement are often subject to harassment by the same law enforcement apparatus empowered to provide them with safety and security.

All communities are entitled to safety and security, but also to autonomy and self-definition. Bigotry and discrimination often drive police to act as an occupying army in some communities, at the time when they should be rendering aid. When confronting everyday violence, communities living on the margins have a well-founded reluctance to engage law enforcement. The fear of further victimization by the state in pursuit of safety has sometimes required people to seek immediate resolution of a crisis but acknowledge the risk that police intervention can do further harm.[76] The same concerns about police intrusion, bias, and brutality are relevant for the queer community, particularly poor queers of color. However, members of the community who are at-risk should not be alone in questioning the larger impact of criminal justice encroachment. The experience of activists in the anti-violence movement is instructive in identifying some of the critical problems with single-issue advocacy.

In the spring of 2000, thousands of scholars, activists, lawyers, and service providers descended on the University of California-Santa Cruz to attend a conference entitled, "The Color of Violence: Violence Against Women of Color." These participants were drawn from the social movements to combat sexual assault and domestic violence, but were

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we are different, and we assume that to be the primary cause of all oppression, forgetting other distortions around difference, some of which we ourselves may be practicing."

[76] *See* ANANNYA BHATTACHARJEE, AMERICAN FRIENDS SERVICE COMMITTEE AND THE COMMITTEE ON WOMEN, POPULATION AND THE ENVIRONMENT, WHOSE SAFETY? WOMEN OF COLOR AND THE VIOLENCE OF LAW ENFORCEMENT 51 (2001), *available at* http://safetyandjustice.org/info/nation/story/474.

frustrated by the inability of anti-violence organizations to effectively address the problem of routine violence in women's lives. In large measure that frustration stemmed from an analytical failure to address *state* violence in conjunction with private violence experienced within communities of color.[77] Conference organizers later went on to establish INCITE!,[78] a network of community organizations which continues to provide critical analysis and organizing tools to respond to violence. They frame the issue as responding to "the multiple forms of violence women of color experience in our lives, on our bodies, and in our communities."

One of the basic tenets arising from the conference (and later INCITE!) is a critique of the anti-violence movement's reliance on the criminal justice system as the front-line approach to ending violence against women.[79] They argue that as an overall strategy for ending violence criminalization has not worked. Over-incarceration has failed to stem the tide of violence against women in the U.S., on the borders, and abroad. Moreover, the criminalization approach has brought more women into conflict with the law. They note in particular the negative effect on "women of color, poor women, lesbians, sex workers, immigrant women, women with disabilities,

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[77] Organizers also critiqued the "professionalization" of anti-violence movement that some said was a barrier to women organizing to create more appropriate methods for dealing with violence.

[78] INCITE! Women of Color Against Violence is a "national activist organization of radical feminists of color advancing a movement to end violence against women of color and our communities through direct action, critical dialogue and grassroots organizing," *available at* http://www.incite-national.org/index.php?s=35 (last accessed on June 16, 2009). *See generally,* THE COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY (2006 Paperback).

[79] INCITE! Women of Color Against Violence and Critical Resistance: Statement on Gender Violence and the Prison Industrial Complex [hereinafter INCITE! Statement], *available at* http://www.incite-national.org/media/docs/5848_incite-cr-statement.pdf.

and other marginalized women."[80]

One negative impact on women, but also on queer people, results from "mandatory arrest" policies that are enacted by statute in many jurisdictions.[81] These laws originally came about at the urging of advocates lamenting the failure of law enforcement to treat family violence as a crime comparable to stranger violence. Mandatory arrest laws require the arrest of "perpetrators" of violence when there is evidence of a crime, typically when police respond to a domestic violence call. One concern about the implementation of this policy is that that police discretion about *who* to arrest can potentially result in the arrest of the victim if she fought back or was *falsely* accused of instigating the attack. For queer people such a situation can be especially problematic, due to gender stereotyping.[82] As a practical matter, mandatory arrest policies may result in some victims seeking less support and intervention from the authorities for fear that they too would be swept into the criminal process.[83]

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[80] *Id*.

[81] AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE, MANDATORY ARREST POLICIES BY STATE (2007), *available at* http://www.abanet.org/domviol/docs/Domestic_Violence_Arrest_Policies_by_State_11_07.pdf.

[82] SHARON STAPEL, CIVIL LEGAL REMEDIES FOR DOMESTIC VIOLENCE IN THE LESBIAN, GAY, BISEXUAL AND TRANSGENDER COMMUNITIES (2008). Stapel, Executive Director of the New York City Gay and Lesbian Anti-Violence Project (AVP), notes that "[a]ssuming that the more "butch" or masculine-acting (or identifying) partner in a lesbian relationship is an abuser, or assuming that the more effeminate-acting (or identifying) partner in a gay male relationship is the victim, creates not only a barrier to talking with clients, but also a potential erroneous analysis of who is the victim and who is the perpetrator in the relationship." *Available at* http://www.abanet.org/domviol/webinars/Stapel_Artcile_Summer_2008.pdf.

[83] *See* e.g. David Hirschel, et al., *Domestic violence and mandatory arrest laws: to what extent do they influence police arrest decisions?*, JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY (2007)(research suggests that the increased arrest rate is in part attributable to a disproportionate increase in arrests for females either as a single

Another dubious outcome from criminal justice encroachment in domestic violence cases is the *routine* prosecution of criminal domestic violence cases. All state courts have a parallel court system that allows victims to bring cases in civil court to obtain "orders of protection."[84] Generally those petitioning for such relief can get a restraining order and ancillary support to assist them in transitioning from a household where they are confronted with intrafamily violence.[85] In such a case, the criminal justice system is typically not implicated unless a respondent violates the order of protection.

However, when an arrest is made a prosecutor generally has the power not only to pursue a criminal conviction, but to also determine the scope of the penalty. This is the case even when victims are not disposed to prosecute. For many women civil restraining orders are adequate to protect their safety and other interests when confronting intrafamily violence. One concern often expressed by women faced with cooperating in a criminal prosecution is the effect of collateral sanctions, described earlier in this article. Employment, immigration, and other consequences that attach to the criminal defendant after a conviction might negatively affect a victim and

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offender or as part of what is known as a "dual arrest," the situation that occurs when the police arrest both parties involved in an incident for offenses committed against each other); *see also* LENORE SIMON, ET AL., UNINTENDED CONSEQUENCES OF MANDATORY ARREST POLICIES: ASSESSING THE WISDOM OF THE CRIMINALIZATION OF DOMESTIC VIOLENCE, paper presented at the annual meeting of the American Society of Criminology, November 14, 2007 (exploring the wisdom of criminalization trend in domestic violence).

[84] *See generally* AMERICAN BAR ASSOCIATION, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING VICTIMS OF DOMESTIC VIOLENCE, SEXUAL VIOLENCE AND STALKING IN CIVIL PROTECTION ORDER CASES (2007), *available at* http://www.abanet.org/domviol/docs/StandardsofPracticeBlackLetterFinal82407.pdf

[85] *Id.* Although allowable relief varies greatly from jurisdiction to jurisdiction it typically includes an order not to assault or contact the victim, temporary custody and child support for children, and other emergency support.

her family. Although she might be in the best position to determine how to proceed without undermining her own safety, the decision not to prosecute may be out of her hands. On balance, this represents a shift of control from the victim to the government.[86] Such a paradigm runs counter to the goals of safety and independence that defines the domestic violence movement.

Many advocates for survivors of violence recognize that the time has come to rethink the relationship between intimate partner violence and law enforcement. There are important lessons to be learned from the movement to combat violence against women. INCITE! notes that a tough law and order agenda can also lead to long punitive sentences for women convicted of killing their batterers. Moreover, as additional side effects, when public funding is channeled into policing and prisons, there are typically budget cuts for social programs —including women's shelters, welfare and public housing. These cutbacks leave women less able to escape violent relationships.[87] In the end over-reliance on law enforcement as the primary response to violence hinders the development of more community-based approaches.

CONCLUSION

In conclusion, low-income queer folks are being profoundly affected by our system of mass incarceration, and this problem deserves the attention of activists striving to build a stronger community. In securing more justice for all, do we need more punishment or less violence? Law enforcement cannot be the only or even first line of defense when addressing social problems.

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[86] It should be noted that the failure of a victim to testify against a defendant can –even in a misdemeanor domestic violence case– result in a finding contempt of court against that witness.

[87] INCITE! Statement, *supra* note 79.

Solutions to crime, poverty, and violence should arise from the communities that experience them. My point is not that there is no role for law enforcement in community policing, but rather that the carceral system has primary and unintended negative effects, many of which I have outlined here. Community groups and local governments are attempting to implement many forms of alternative dispute resolution, justice reinvestment, and organizing (such as a more thorough integration of men into the anti-violence movement). Those efforts should be supported and expanded. For our ultimate survival, advocates must recognize the limitations of the carceral state and begin to emphasize and develop approaches that lead to healthier, more involved, and more proactive communities.