The Limits of Transgender Incarceration Reform

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ABSTRACT: This Article explores the incarceration conditions of trans and gender-nonconforming (TGNC) people in Israel. The lived experience of TGNC people reflects the inherent incoherence of sex/gender and of the carceral system, two regimes of violence that derive power from their promise to provide stability and certitude to society. To uncover the practical meaning of these theoretical positions, the Article examines the Israel Prison Service (IPS) at a unique juncture: before and after an attempt to reform its policies regarding TGNC prisoners. An analysis of these reforms against the backdrop of the previous policy illustrates the carceral system's inability to meaningfully transform the treatment of TGNC prisoners. To demonstrate this systemic failure, the Article centers the voices of two incarcerated trans women: Dorin and Lena. Both women have lived in male and female facilities before and after the reform. Their demands for safe and dignified treatment have reshaped IPS practices. Following Dorin and Lena's stories, this Article argues that the IPS's inability to properly accommodate TGNC prisoners is rooted in the logic of carceral systems themselves, which relies upon gender segregation and isolation as means for protection and rehabilitation. This examination reveals the futility of attempts to define who are and are not "real" men and women. And, by examining the IPS's limited ability to reform its use of administrative segregation for TGNC prisoners, the theoretical inconsistencies and perniciousness of incarceration itself is exposed. Attempts to distinguish coherently between criminals and non-

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criminals, women and men, and trans and cis people, and to spatially segregate them according to such classifications, contradicts the heterogeneity and intersectionality of lived experiences and obscures the systemic use of institutional violence to hold these categories in place. Gender nonconformity is situated in this Article as a thread that, when pulled, unravels the carceral regime as a whole.

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INTRODUCTION

The trans symbol [⚧] . . . was carved into the walls of the ad seg[1] *cell in the blood of other trans women, because in ad seg . . . there's nothing you can carve with besides your fingernails . . . And on another wall, it said "Sister you're not alone here, close your eyes and remember I am here with you and I've been through it myself." All carved on the walls.*[2]

Dorin Bilia, a transgender (trans) woman, was arrested and detained for almost a week following a dispute with her neighbor. She was detained in an Israel Prison Service (IPS) facility designated for men, where she was held in administrative segregation because of her gender nonconformity. In the thirty-two-square-foot cell in which she was incarcerated, she found signs and slogans of the trans movement, bloody evidence of the reality of trans and gender-nonconforming (TGNC) individuals in prison.[3] Upon her release, Dorin broke the silence around TGNC incarceration by bringing her case to the Supreme Court of Israel, pushing forward a reform at the heart of this article.

When we began our research on the treatment of TGNC prisoners[4] under Israeli law, the IPS followed an unpublished policy which mandated administrative segregation for almost all TGNC prisoners.[5] In January 2018,

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1. Administrative segregation refers to situations in which prisoners are held separately from the rest of the prison population, often under conditions of isolated confinement in a small cell with no comforts, and sometimes for twenty-three hours a day.

2. Interview with Dorin Bilia in Ofakim, Isr. (Aug. 11, 2016) (conducted following her first arrest).

3. *Id.* Trans and gender non-conforming (TGNC) people are those whose experience and/or expression of their own gender is incompatible with the gendered standards expected from their birth-assigned sex. For example, a person who was assigned male but experiences herself as a woman or a person who was assigned female at birth but expresses themselves non-binary, neither a woman nor a man.

4. We refer to both prisoners and pretrial detainees as "prisoners" in this Article unless the two groups face disparate treatment, in which case we address them separately.

5. While the policy was never officially published, it came to public attention when excerpts of it were cited in a Supreme Court case dealing with the sentence appeal of a trans individual. File No. 5833/12 CA Doe v. Israel (Sep. 12, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.)

Dorin Bilia appealed this policy to the Israeli Supreme Court sitting as the High Court of Justice.[6] While the case was still pending, the Supreme Court ordered that the IPS publish its policy.[7] On March 5, 2018, IPS issued a new directive to replace the previous, unpublished one. The reformed policy, "Transgender Prisoner Intake and Standards Regarding Their Placement" (hereinafter referred to as the new directive or the reformed policy), facially reflects a complete shift in IPS standards. The new directive explicitly prohibits the isolation of TGNC prisoners, uses progressive language regarding transgender people, and sets more inclusive principles for their placement.[8]

In the short lifespan of this research, we had the rare privilege of taking an active role in pushing forward a significant reform.[9] A close reading of the reformed policy, however, reveals that it shares the same binary, linear disposition regarding TGNC people's experiences and the broader system of sex, gender, and sexuality. Moreover, its application reveals that, in practice, administrative segregation for TGNC prisoners prevails, despite the reformed policy's explicit prohibition thereof.

The reformed policy also reveals the ways in which any effort to reform the treatment of TGNC prisoners is limited by the structural confinement of incarceration and the segregating logics of dominant gender norms. To develop this claim, this Article explores the juxtaposition of carceral and gender systems from the perspective of segregated TGNC prisoners and the binary divisions that constitute their lived experiences. We argue that the failure to abolish TGNC segregation is not explained by bad faith on the part of the IPS, but rather by the exclusionary algorithms of categorization characterizing most carceral systems.

Prisons are built upon rigid binary divisions in the most material way: they physically segregate prisoners from free society, men from women, and, often,

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[hereinafter Doe 1]. *See also* Aviel Magnezi, "טרנסג'נדר לפני מאסר. לא אשרוד כלא" [*I Will Not Survive Prison: Transgender Before Incarceration*], YNET (Sept. 17, 2013), https://www.ynet.co.il/articles/0,7340,L-4430773,00.html [https://perma.cc/LJ44-L9PF].

6. Ido Katri, one of the authors, was part of the legal team representing Dorin Bilia, alongside Haya Ereaz and Hagai Kalai.

7. File No. 5480/17 HCJ, Bilia v. Israel (Jan. 2, 2018), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

8. ISR. PRISON SERV., 16075318, קליטת אסיר טרנסגינדר/ית ועקרונות בדבר שיבוצו - מדיניות [TRANSGENDER PRISONER INTAKE AND STANDARDS REGARDING THEIR PLACEMENT] (2018) (on file with authors).

9. We were not merely academic bystanders, observing this change from a distance. We took an active role in pushing the reform by serving on Dorin's legal and public engagement team, presenting our initial findings in the Israeli Parliament (COMM. ON THE STATUS OF WOMEN & GENDER EQUAL., פרוטוקול מס' 227 [PROTOCOL NO. 227] (20th Knesset, 4th sess., Feb. 20, 2018) (meeting points between the transgender community and State institutions)), writing an opinion piece in a major news outlet (Ido Katri & Lihi Yona, מה עושים בכלא עם א/נשים שונים מגדרית [*What Do They Do in Prison with Gender Variant Prisoners?*], HAARETZ (May 29, 2017), https://www.haaretz.co.il/opinions/.premium-1.4135843 [https://perma.cc/UPX4-69RE] (Isr.)), and collaborating with other lawyers (*see supra* text accompanying note 6), activists (including Nina Halevy, Elisha Alexander, Michal Stoler, and Mati Milstein), and non-governmental organizations (including the Gila Project for Trans Empowerment and Ma'avarim-Israeli Trans Community).

TGNC prisoners from cisgender prisoners. Upholding these division demands a constant process of constructing binaries and marking difference: between the law-abiding citizen and the criminal, between masculinity and femininity, and between gender conformity and nonconformity. These mechanisms of differentiation are a fundamental part of the operation of the prison system. Under these binary paradigms of categorization, TGNC prisoners are continuously constructed as inherently different from other prisoners. Within the highly gender-segregated space of prison—its very design inspired by a philosophy of isolation[10]—there is no room for the desire to transcend one's birth-assigned sex and the associated social expectations.[11] Accordingly, the IPS's inability to properly accommodate TGNC prisoners, we argue, is rooted in the inner logic of the carceral system itself.

The Israeli carceral system's mistreatment of TGNC prisoners is not unique.[12] Around the world, trans and non-binary people—especially women and feminine persons who are also racialized, indigenous, migrant, poor, or disabled—are disproportionately criminalized. TGNC people, who must employ a variety of strategies to navigate a tight intersectional web of anti-trans violence (such as self-defense and sex work), are heavily policed and penalized.[13] In the United States, TGNC people are more than twice as likely to be incarcerated than

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10. *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 236 (1995); *infra* Part III.C.2.

11. *See generally* Andrea Long Chu, *On Liking Women*, N+1 (Winter 2018), https://www.nplusonemag.com/issue-30/essays/on-liking-women [https://perma.cc/CG5D-N53S] (on the desire to transcend).

12. To be clear, this Article focuses on the IPS's treatment of prisoners within its "regular" prison system. In the territories under Israeli control, there is more than one legal system in operation, applied differently to the population according to national affiliation. For instance, military law applies to Palestinian residents of the West Bank while Israeli law applies to Israeli residents of the same areas. Likewise, within the IPS, there are also "security" prisons, where Palestinians are incarcerated in the name of Israeli national security. The situation experienced by the thousands of Palestinian security prisoners held in Israeli jails and prisons warrants scrutiny and critique, but due in part to limited information on TGNC security prisoners, the scope of this Article is limited to "regular" prisons run by the IPS.

13. While we use intersectional analysis in this Article, we also agree with Jasbir Puar's that social dynamics should be analyzed not only through the identities of the actors, but also through spatial and temporal conditions that construct the scene itself. *See* Jasbir K. Puar, *"I Would Rather Be a Cyborg than a Goddess": Becoming-Intersectional in Assemblage Theory*, 2 PHILOSOPHIA 49, 59-60 (2012); *see also* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1251-52 (1991). The case of Megan Bashari, a trans woman, provides an example of the disproportionate criminalization of TGNC people. Bashari sought to enter a nightclub but was refused entry by the hostess who made offensive remarks regarding Bashari's sexuality. Bashari reacted angrily and was subsequently arrested and charged with criminal threats. *See* File No. 32383-04-11 Magistrate Court (Tel Aviv), Israel v. Bashari (Feb. 5, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.); *see also* File No. 5304-09 Magistrate Court (Tel Aviv), Israel v. Bashari (Oct. 9, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.). In another case, a trans woman who visited a health clinic to receive syringes for a drug substitute she was taking was humiliated by the staff. She was subsequently arrested for theft and detained for several hours. *See* Telephone Interview with Nina Halevi, Trans Issues Coordinator, The Aguda – Israel's LGBT Task Force (Jan. 4, 2017).

cisgender people.[14] While no parallel data exists for Israeli prisons, the limited data we have acquired from the IPS and from our own experience in working with incarcerated trans women indicate the continuing presence of TGNC prisoners within the IPS.[15] As Assistant Commissioner and Commander of the Prisoners' Treatment Unit at the IPS stated in an interview, "this population [of transgender prisoners] for instance is growing. If before there was one every few years, today we have at least two a year. What are we doing with them?"[16] This Article scrutinizes this exact question.

The Article opens by presenting the stories of two trans women, Dorin and Lena,[17] who were imprisoned in IPS facilities. Their experiences and insights have informed our research, and their stories provide an illustration of the failures of the system that imprisoned them, both before and after its attempt to reform. Following their stories, this Article moves to examining IPS's reform.

The second section of this Article examines the IPS's policies with respect to the placement of TGNC prisoners—that is, the question of whether to place trans prisoners in male or female facilities. We closely examine the imperatives at the core of placement policies, and the normative social assumptions that underlie them. This section begins with an analysis of the IPS's previous policy and its pitfalls, followed by a review of the reformed policy and its implementation, revealing the challenges that persist. We conclude the second section by analyzing IPS's failure to remedy the problems of TGNC prison placement, arguing that the gender segregation of prisons severely limits any meaningful reform.

The third section of the Article focuses on administrative segregation, an incarceration practice to which a majority of TGNC prisoners are still subjected

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14. While less than 1 percent of the U.S. population is incarcerated (698 prisoners per 100,000 people, see Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/global/2018.html [https://perma.cc/5QKJ-DNXQ]), about two percent of the U.S. trans population is incarcerated, see Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUALITY 190 (Dec. 2016), https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF [https://perma.cc/3QK9-VCEC].Within this demographic, 9 percent of black, 6 percent of Native American, and 3 percent of Latinx trans persons were incarcerated in 2015. *See id.*

15. The IPS responded to the authors' freedom of information request with encoded data that does not allow for a concrete estimate. The reply did indicate, however, that three trans people were incarcerated within the IPS's female facility during 2016. In February 2017, that prison had 271 prisoners. *See* Nurit Yachimovich-Cohen, היבטים בכליאת נשים בישראל [*Aspects of the Incarceration of Women in Israel*], KNESSET RES. & INFO. CTR. (July 12, 2017), https://fs.knesset.gov.il/globaldocs/MMM/18920b68-1bde-e611-80cc-00155d0206a2/2_18920b68-1bde-e611-80cc-00155d0206a2_11_7010.pdf [https://perma.cc/XVE2-7NDB]. Based on these figures, the rate of TGNC prisoners is likely around one percent of the Israeli prisoner population.

16. *See* Limor Simone, ?דילמה: אסיר טרנסג'נדר לכלא נשים או גברים [*Dilemma: Transgender Prisoner to a Male or Female Facility?*] MYNET (Feb. 10, 2016, 7:33 AM), https://web.archive.org/web/20160211092059/http://www.mynet.co.il/articles/0,7340,L-4761084,00.html [https://perma.cc/4ZHF-BK95].

17. Lena is a pseudonym.

under the guise of ensuring their safety. In this section we also read the reformed policy prohibition on administrative segregation of TGNC prisoners against the backdrop of the previous policy. We show how protective justifications fail to withstand critical scrutiny, while administrative segregation adds an excessively punitive element to TGNC incarceration. Then, we review the reform regarding administrative segregation, and how segregation nevertheless prevails via IPS's on-the-ground discretion. We conclude this part with an analysis of why administrative segregation is still used, arguing that administrative segregation furthers the dichotomy between trans and cisgender prisoners, thus reaffirming the binary logic of sex-segregated prisons—a binary that echoes and is echoed in the rationales for incarceration itself.

Through our analysis, we suggest that the problem is far more systemic than can be remedied through simple reform. Nevertheless, we find it crucial to address the current needs of incarcerated TGNC people for safe and dignified treatment.[18] Accordingly, the fourth and final section of this Article is dedicated to concrete policy recommendations.

I. LIVED EXPERIENCES OF INCARCERATION

Centering the voices of incarcerated trans women themselves, this Article follows the stories of two women incarcerated at IPS facilities, Dorin and Lena. Because their experiences and insights have shaped the analysis and critique offered by this Article, their voices are interwoven within it. While their circumstances dramatically differ, both women have stood up against the prison authorities in demanding to be recognized and protected, demonstrating a resilience that cannot be confined.

A. Dorin

Dorin Billia is a self-educated, polyglot, Moroccan-Jewish, trans advocate living in a poor, peripheral, desert town. She was arrested by the local police and detained for almost a week following a dispute with a neighbor. The place chosen for her detention was a male IPS facility, where she was kept in complete segregation because of her gender nonconformity. In the thirty-two-square-foot cell in which she was incarcerated, she found signs and slogans of the trans

18. Even though the main objects of analysis in this Article are policies regarding TGNC incarceration, the experiences of trans people within the carceral system may be used as placeholders to raise systemic arguments about the nature of the carceral system itself and to question the sex/gender binary. Similar critiques are often raised within the field of trans studies by scholars who are themselves trans. *See generally* VIVIANE NAMASTE, INVISIBLE LIVES: THE ERASURE OF TRANSSEXUAL AND TRANSGENDERED PEOPLE (2000).

movement carved in the prison walls in blood, evidence of the long history of TGNC incarceration.

The prison authorities had no justification for keeping Dorin in administrative segregation other than the fact that she was trans. Yet, despite this implicit acknowledgement of her transness, they refused to provide her with gender-appropriate attire or access to the feminizing hormones and other medication she was prescribed. Dorin was also forced to undergo humiliating bodily searches by cisgender male prison guards.[19] As Dorin's mental and physical health started to deteriorate in administrative segregation, neighboring male prisoners reached out to her, sharing encouraging words with her through the walls and even providing her with women's attire. After a week of unjustified detention Dorin was released. She managed to survive, though her health had severely deteriorated. Dorin demanded change. Leading her community forward, Dorin contacted lawyers and nongovernmental organizations who helped bring her case to the Israeli Supreme Court. Her petition triggered a policy reform titled "Transgender Prisoner Intake and Standards Regarding Their Placement."[20]

Several months after the reform, and soon after Dorin had completed gender reassignment surgery, Dorin was arrested again and sentenced to seven months in prison. This time Dorin was placed in the only female facility in Israel and was allowed to cohabitate with the other women prisoners. She was even integrated into the therapeutic detox unit of the prison, a privilege she was not afforded as a free person.[21] Nonetheless, when Dorin asked to have access to a vaginal speculum, a postoperative requirement, prison authorities informed her that if she wished to use this device she would have to do so in administrative segregation.[22] According to the prison authorities, the phallic-shaped medical device could be used for assault and thus could only be used in segregation. Traumatized by her past incarceration experiences, Dorin refused. Dorin's body suffered irreversible damage.

Though Dorin did everything she could to avoid being sent to administrative segregation again, she nevertheless eventually ended up in segregation. While on cleaning duty, Dorin commented to a friend that she wished that the prison had as many pride flags as it had Israeli flags. A prison guard overheard Dorin's

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19. Interview with Dorin Bilia, *supra* note 2.

20. *See* ISR. PRISON SERV., *supra* note 8.

21. It is important to note that after her incarceration in administrative segregation, Dorin's mental health deteriorated and she began using drugs heavily. She approached local social services and asked to enroll in state-funded detox program. Dorin was informed that as these facilities are gender segregated, she would only be accepted as a trans woman if she agreed to be housed separately from both men and women. See Interview with Dorin Bilia, *supra* note 2.

22. Interview with Dorin Bilia, in Neve Tirtza, Ramla, Isr. (Jan. 16, 2019) (conducted during her second period of incarceration).

comment and she was sent to segregation.[23] Only when human rights lawyers intervened was Dorin allowed to return to the detox unit. After seven months in prison, she was released.

B. Lena

Lena is a Russian immigrant sentenced to twenty-three years in prison. At the time of arrest, Lena had yet to come to terms with her trans identity, which she had suppressed since childhood. At the time she was living as a man; thus, Lena was housed in the general population of a maximum-security male facility when she was first arrested and sentenced.

Coinciding with Dorin's first incarceration in 2016, six years after her incarceration began, Lena was integrated into the prison violence rehabilitation program. There, for the first time in her life, Lena participated in group and talk therapy. Eventually, Lena realized that she identified as a woman and shared her story with the program's professional staff. The staff called in the IPS chief psychologist, who diagnosed Lena as suffering from "gender dysphoria."[24] When she expressed the desire to transition socially and medically, Lena was ordered not to "externalize" her femininity in any way: not to talk to other prisoners about herself, not to grow her hair and fingernails long, and not to wear makeup. Lena was expelled from the violence rehabilitation program, being told that she must address her gender issues before participating in the program.

Two months after Dorin appealed to the Supreme Court, in July 2017, Lena officially asked the prison authorities to provide her the conditions to live as her authentic self. Under the previous policy, which was in effect at the time, the prison authorities refused to address Lena's request for gender-affirming care and treatment, and clarified that, if Lena wished to "externalize" her femininity, she would be sent to segregation for her own safety and for the safety of the prison.[25]

With the help of the Association for Civil Rights in Israel, in March 2018, Lena filed a prisoner's petition, demanding that the IPS allow her to affirm her

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23. The comment, the IPS argued, was a second "offense" for Dorin. Her first "offense," they said, was dying her hair without permission. This too is a gendered offense. *See id.*

24. Because TGNC people live in a society that considers the binary division into sex/gender categories as a reflection of "natural" truth, trans people often feel that something is "wrong" with them. This experience is referred to in medical literature as "gender dysphoria" and is understood as an indication of profound distress arising from incongruence between a person's biological sex and their gender identity—a feeling sometimes described as being "born in the wrong body." The sense of dysphoria and distress are the result not only of an internal "incongruence," but of the transgression of a heavily policed set of lifelong social expectations. Ido Katri, *Transgender Intrasectionality: Rethinking Anti-Discrimination Law and Litigation*, 20 U. PA. J.L. SOC. CHANGE 51, 57 (2017).

25. Prisoner's Petition at sec. 19, Anonymous v. Isr. Prison Serv., NO. PP 26994-03-18 (Dis. Ct. (Ctr.) Mar. 13, 2018) (on file with authors).

gender identity while ensuring her security, privacy, and dignity. By the time Lena's petition was heard, the IPS had already published its reformed policy.[26] The IPS's official position was that they were willing to recognize Lena as trans, but access to relevant gender-affirming medical care, as well as a reconsideration of her placement in a male facility, would be denied until after she "completed" a process of gender change—a process she was barred from engaging in due to her incarceration. In view of this conundrum, a judge ordered the IPS to refer Lena to gender-affirming medical care.[27] Despite having access only to hormone therapy, Lena's body nevertheless started to change: her body hair became thinner and she started developing breasts.

In the weeks leading up to her transfer date, a parade of senior IPS officials visited Lena in her cell. Lena felt that they all came to judge with their own eyes whether she was indeed feminine enough for a female facility. On at least one occasion, a staff member even advised her to prepare herself to look as feminine as she could for such a visit. Lena's breasts turned out to be a deciding factor for her transfer: just a day before a hearing of Lena's appeal was to be held, the IPS declared that she would be transferred to the women facility for a "trial period."[28]

Once she was transferred to the female facility, Lena was housed in a separated cell during the night despite the fact that the facility was already operating under the reformed policy, which barred TGNC prisoners from being held in segregation because of their gender identity. De facto, Lena was housed (and remains housed) in the administrative segregation section of the prison. While she is afforded access to integrated prison activities such as work, gardening courses, and a television in her room, Lena is nevertheless exposed to the harsh conditions of administrative segregation. At night, screaming prisoners are often heard through the walls. Due to lack of open public spaces she spends the majority of her day enclosed in her cell. On weekends, when there is no work or class, Lena is locked in her cell during the entire day. The IPS insists, however, that Lena is not housed in administrative segregation, but rather merely housed separately. Currently, the IPS is in the process of "exposing" Lena to the general population gradually, a process that can take years.

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26. *See* ISR. PRISON SERV., *supra* note 8.

27. The decision, which was not published, is referenced in an update notice sent to the court by Lena's attorneys. *See* Update Notice, Anonymous v. Isr. Prison Serv., NO. PP 18-03-26944 (Dis. Ct. (Ctr.) July 12, 2018) (on file with authors).

28. State Response, Anonymous v. Isr. Prison Serv., NO. PP 26944-03-18 (Dis. Ct. (Ctr.) Mar. 12, 2019). At the hearing held on March 13, 2019, Lena's attorney brought up the issue of her visible breasts and the court replied by ordering the state to find an immediate solution for the protection of Lena's safety. *See* Court Proceedings from Hearing, Anonymous v. Isr. Prison Serv., NO. PP 26944-03-18 (Dis. Ct. (Ctr.) Mar. 13, 2019).

II. THE QUESTION OF PLACEMENT

"I was placed with women, I was placed with men, I would rather be in a cell with human beings. Not to be alone."[29]

The IPS's attempts at addressing the question of placement resulted in confusing and incoherent policies that undermine TGNC prisoners' safety, autonomy, and self-determination. In this section, we detail the IPS's attempts at regulating the placement of TGNC prisoners and discuss the failure of these efforts. First, we review the previous policy for TGNC prisoners and its problematic assumptions and implications. As this policy was in place for many years (unlike the recently introduced directive that replaced it), some data exists concerning its implementation. Second, we examine the IPS's effort to amend the policy through the introduction of the new, more progressive directive regarding the placement and processing of TGNC prisoners. Reading the new directive alongside the previous policy allows us to track the contradictory and ambiguous dispositions that have prevailed throughout the reform.

A. The Previous (Unpublished) IPS Policy

Until March 2018, the IPS's policy regarding the placement of TGNC prisoners was an unpublished protocol. This policy was only brought to light during the 2013 Supreme Court criminal appeal of a trans defendant (hereinafter Doe 1).[30] According to the Supreme Court sitting as the High Court of Justice, the policy stated in part:

> 1. The IPS is a detention organization responsible for holding male and female prisoners. Over the years the IPS was required to intake various prisoners whose sexual identity is ambiguous, or prisoners who have changed their sexual identity.
>
> 2. The IPS protocols detail the manner in which these prisoners ought to be held. If the prisoner has undergone a change of identity and currently has a clear and unambiguous sexual identity (including surgery), the prisoner will be held in accordance with his or her current displayed sexual identity. A prisoner who is at various stages of changing his sexual identity, and whose sexual identity is ambiguous, is to be held according with his characteristics in a male/female prison. In any case where a prisoner with an ambiguous sexual identity is admitted, his holding in conditions of separation is required, for fear of harm to the prisoner or to other prisoners and his surroundings.[31]

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29. Interview with Dorin Bilia, *supra* note 2.

30. *See* Doe 1, *supra* note 5.

31. *Id.*

The previous IPS policy thus presented a two-stage procedure for processing TGNC prisoners. In the first stage, the question of facility placement was examined—that is, whether a prisoner ought to be incarcerated in a male or a female facility. This depended on whether the individual's "sexual identity" was ambiguous or clear. In "ambiguous" cases the decision was made on an individual basis, according to unspecified characteristics. Second, if a prisoner was deemed to have an "ambiguous sexual identity," the policy ordered that they be held in administrative segregation.[32]

1. The Ambiguity of "Sexual Identity"

The term "sexual identity" is not commonly used with regard to TGNC persons, and outside of the context of the IPS's protocol it might describe sexual orientation. Within the context of the previous policy, however, a "clear sexual identity" according to the IPS was achieved through surgical procedure(s). While the protocol itself did not detail what kind of surgery was sufficient for one's "sexual identity" to become clear, priority was given to genital surgery, as court cases applying the policy show.

The priority given to genitals under the previous policy is evident in both the case of Doe 1 and the case of Shiran Uzan.[33] In both of these cases, the prisoners had previously undergone nongenital surgeries and accessed hormonal therapy that enabled them to "pass,"[34] yet both prisoners' "sexual identities" were considered "ambiguous."[35] Confoundingly, both Doe 1, who was clearly identified as a man, and Shiran Uzan, who was clearly identified as a woman, were incarcerated in the segregation unit of the female facility.[36]

In the Uzan case, the court directly discussed the status of Uzan's genitals and their functionality as an indication of the level of risk she posed to other women prisoners.[37] The state's lawyers described Uzan as a person who had yet to undergo "surgery to change her sexual identity,"[38] presumably genital surgery. In the case of Doe 1, he was described by the Supreme Court as someone in the process of "changing her sex"[39] and as someone who "underwent breast removal

32. Conditions of administrative segregation vary from prison to prison and even within administrative segregation sections. Some prisoners do have access to comforts such as an actual bed and/or are allowed to participate in some activities during the day.

33. *See supra* note 5; *see also* File No. 26381-11-15 Administrative Court (Central District), Israel v. Uzan (Jan. 24, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

34. To "pass" as used in this context means to be identified by others as belonging to a different binary gender category from one's birth-assigned sex.

35. *See* Doe 1, *supra* note 5; Israel v. Uzan, *supra* note 33.

36. *Id.*

37. Israel v. Uzan, *supra* note 33, at pt. 1.

38. *Id.* at pt. 2.

39. Misgendering in original.

surgery in recent years,"[40] which the Court then described as "initial physical surgery for sex change."[41] That is, the Supreme Court presumed that further medical intervention—most likely genital surgery—was both required and desired by Doe 1 in order to transition fully to his desired gender identity.

The logic embedded in this concept of "sexual identity" reveals several problematic assumptions that warrant attention. Foremost, the previous policy's emphasis on medical interventions presupposed the primacy of biological sex. The policy preconditioned recognition on body modification, specifically modification of external genitals. Only a person who sufficiently modified their physical body using medical technologies was recognized as having a "clear sexual identity," as either a man or a woman. Queer theory has long challenged the hierarchy of sex over gender, and furthermore has questioned the stability and neutrality of these categories and their correlation.[42] Queer and feminist theory argue that it is not the possession of a vagina that produces womanhood; rather, a performance of femininity constructs the expectation that the subject has a vagina.[43] When a woman walks down the street, what is visible is her femininity, not her genitals or her chromosomes. We make unthinking assumptions about chromosomes and genitals from the way a person walks, talks, dress, styles her hair, and so on. The cis woman is no more "real" than the trans woman. Moreover, the cisgender woman does not have a more "clear and unambiguous sexual identity" than a trans woman: both continuously perform their femininity.

Furthermore, the claim that a surgical procedure can change one's biological sex betrays "biology" itself as an imagined category in this context. In current biological research and theory, there is a growing scientific consensus that considers sex to be a spectrum and questions the applicability of a binary division into two genders.[44] The category of sex itself, even from a conservative biological perspective, is not determined solely based on external genital physiognomy, but on a wide range of primary and secondary sexual attributes.[45] Biologists no longer refer solely to "male" and "female" as the only two possible sexual categories; instead, individuals can inhabit different points along a wide sexual spectrum, constituted of multiple, constantly shifting criteria.[46] In addition, even from a conservative scientific point of view, external genitals are no more a determining force in biological definitions of sex than hormones or

40. *See* Doe 1, *supra* note 5, at pt. 2.

41. *Id.* at pt. 6.

42. JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 9-11 (1990).

43. *Id.* at 9-11, 146.

44. *See* Maayan Sudai, *Toward a Functionalist Analysis of "Sex" in Federal Antidiscrimination Law*, 42 HARV. J.L. & GENDER 421, 443-453 (2019).

45. *See id.*

46. *See id.*

secondary sex characteristics such as breasts. The assumption that genital alteration provides a conclusive result has no basis in current medical or scientific practice.[47] The claim that medical technologies create biologically coherent bodies exposes the way scientific discourse is drafted into the project of affirming social norms, through surgeries assisting in the guise of biological "coherence" between sex and gender.[48]

Finally, the previous policy's differentiation between "clear" and "ambiguous" "sexual identity" revolved around the idea of "a change of identity" as a one-size-fits-all, linear, medicalized process of moving between two binary poles. In practice, TGNC individuals' use of medical technologies is diverse. TGNC persons may access hormonal therapy, as well as a variety of surgical and other procedures. These include chest surgery, feminization surgery, and hair implantation or removal.[49] Even within the standard medical protocol used in Israel and around the world, including the Standards of Care of the World Professional Association for Transgender Health, preference is no longer given to a certain kind of medical intervention or to medical intervention at all.[50] Instead, a personalized treatment plan is commonly designed to address the unique needs and desires of each applicant.

It should be noted that many TGNC individuals do not desire genital surgery. The prohibitive costs and complexity of genital surgery, as well as its effect on reproductive capabilities, all contribute to a minority of TGNC individuals' seeking these procedures.[51] In this context, it becomes more pressing to ask how and why genital surgery was privileged compared to other gender-affirming medical procedures for the purpose of carceral placement. The variability of TGNC individuals' use of medical technologies further calls into question a pivotal assumption at the heart of the previous IPS policy: the attempt to delineate a clear and stable marker for the category of trans. The problematic nature of this attempt is best understood through the juxtaposition of a similar attempt within medical discourse within the United States.

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47. *See id.*

48. We use "coherent" critically, as the present Article takes a stand against the very concept or expectation of coherence from bodies. Further, we aim to show that heteronormative concepts of coherence do not conform to that standard themselves. For more on this point, see generally Nicole Antonopoulos, *The Unconstitutionality of the Current Housing Arrangements for Intersex Prisoners*, 42 HASTING CONST. L.Q. 415 (2015); *"It's War in Here": A Report on the Treatment of Transgender and Intersex People in New York State Men's Prisons*, SYLVIA RIVERA LAW PROJECT (2007), https://srlp.org/files/warinhere.pdf [https://perma.cc/U9HQ-Z9DT].

49. Eli Coleman et al., *Standards of Care for the Heatlh of Transsexual, Transgender, and Gender-Nonconforming People, Version 7*, 13 INT'L J. TRANSGENDERISM 165, 171-72 (2012).

50. *Id.* at 170-72.

51. 2 percent of trans men and 10 percent of trans women in the United States seek these procedures. *See* James, *supra* note 14.

The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM) offers a classification for trans identity.[52] The most recent edition, the DSM V, refers to "gender dysphoria"—a temporary disorder originating from incongruence between one's expressed or desired gender identity and one's birth-assigned sex. While this definition reflects a degree of progress from other versions of the DSM,[53] it too shares the expectation that those seeking access to medical procedures will express a particular autobiographical narrative—usually some version of: "I always knew I was a girl, I secretly played with dolls from the age of two and have felt trapped in my own body."[54] This narrative privileges an experience of gender nonconformity that is expressed at an early age and remains constant and coherent throughout life. Patients are encouraged to affirm the most extreme and narrow form of sexist gender roles and to express them in every aspect of their gender performance, their personal narrative, and their ambitions. Thus, the diagnosis adopts a specific, linear, straight-forward life-narrative, forcing all potential recipients of medical treatment to fit their own experiences into this single mold.[55] Medical diagnosis also creates an imaginary divide between licit and illicit gender nonconformity and reinforces the false impression that cisgender people do not experience gender nonconformity.[56] When medical authorities attempt to single out trans people for "abnormal" behavior, they also reify societal perceptions of what "normal" gender performance means.

As U.S. trans activist Dean Spade argues, the regulatory power of medical diagnosis assumes that only trans people tend to challenge and explore their gender roles as part of their process of adolescence—as if only trans people wear clothes that do not correspond to their assigned gender, or play as children with playmates and toys for the "wrong" gender.[57] Far from serving as a depoliticized, "objective" tool of definition, the DSM is a tool for the establishment and enforcement of medical-institutional gender norms. The real experiences of TGNC people are coded into a set of medical expectations, while, at the same time, the medical system constructs the diagnosis as a condition for access to medical treatment.[58]

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52. AM. PSYCHOLOGICAL ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013) [hereinafter DSM 5].

53. For instance, in the fourth edition of the DSM, the relevant diagnosis for TGNC people was "gender identity disorder." *See* AM. PSYCHOLOGICAL ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532 (4th ed. 2000).

54. DSM 5, *supra* note 52, at 452.

55. *See* Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 24 (2003).

56. *See id.*

57. *Id.*

58. *Id.*

The DSM, in combination with Spade's insights, exposes the failure of medical interventions to account adequately and accurately for TGNC people's varying identities and experiences. It also exposes how conditioning access to medical technologies or adequate prison placement on performing a certain version of gender nonconformity creates new norms of conformity. TGNC people learn how to perform their identity according to authorities' expectations in order to get access to resources, and their performance in turn serves to justify the exclusion of others who fail to adhere to the same norms.

With regard to the previous policy, one overarching question remains: what marks a TGNC person as having a "clear sexual identity"? A wide and open-ended set of categories exists and evolves to refer to individuals' different gender identities, expressions, and practices, including but not limited to man, woman, queer, transgender, and transsexual.[59] None of these categories are contingent upon a particular medical intervention. The choice to adopt a particular gender identity or to pursue a particular gender performance is dependent on a whole array of life circumstances, personal experience of the body and the self, sense of community belonging, and access to resources and opportunities.[60] The attempt to establish a rigid definition of "what makes a trans person" or a set of criteria that delimit a "real" trans identity is not compatible with lived experiences. It instead reflects the apparatus of policing bodies that are over-policed to begin with: TGNC people in general and TGNC prisoners in particular.

The prioritization of one definition of trans identity by the IPS, and the extension of a dignifying and safe incarceration only to those trans people who perform this specific identity de facto constructs the identity of TGNC people along fixed boundaries. Recall Dorin's story: the fact that her body (during her first arrest) did not perform the IPS's specific identity of a "trans woman" under the previous policy—as she had yet to undergo genital surgery—allowed the IPS to label her body and her "sexual identity" as "unclear."[61] That labeling eventually led to her placement in a male facility, in isolation.

2. The Policy's Internal Inconsistencies

Upon closer examination, the distinction between prisoners with a "clear sexual identity" and those deemed "ambiguous" is, itself, very unclear. What are the criteria for establishing "sexual identity"? What is the causal connection between these criteria and the policy's imperatives? From courtroom discussions

59. *See* SUSAN STRYKER & STEPHEN WHITTLE, THE TRANSGENDER STUDIES READER xi (2006).

60. *See* Frederick L. Whitam, *Culturally Universal Aspects of Male Homosexual Transvestites and Transsexuals*, *in* GENDER BLENDING 189 (Bonnie Bullough, Vern L. Bullough & James Elias eds., 1997).

61. *See* Doe 1, *supra* note 5.

regarding placement of TGNC prisoners and from the safety imperative mentioned in the policy itself,[62] two main justifications may be derived: the protection of TGNC people from their fellow prisoners, and the protection of cisgender prisoners from their TGNC counterparts.[63]

It is unclear how trans prisoners might pose a specific threat to the general population in prison. They certainly do not pose a greater threat of violence to male prisoners than that posed by cisgender prisoners themselves. Perhaps the fear revolves less around the trans man in a male facility and more around the trans woman in a female facility. Such a reading of the policy is rooted in a perception of an inherent form of risk associated with the penis itself. Indeed, in a pivotal Canadian case,[64] as well as in a recent Israeli ruling[65] regarding trans female prisoners, the fact that hormonal treatment for trans women at times eliminates the possibility of penile erection had been used to argue against the assertion that trans female prisoners may pose a risk to other prisoners. Even disregarding this line of argument, the mere presence of a penis (erect or not) can hardly be considered an added risk of sexual assault, since many other means can be used by prisoners to achieve nonconsensual penetration. Thus, the focus on the penis as a defining precondition for risk of assault is misguided, at best.

From a normative, conservative view of sex and gender, some TGNC prisoners pose a sexual threat to other prisoners in that they might seduce them into illicit sexual contacts—that is, they might "trick" heterosexual cisgender prisoners into "homosexual" sex. But here, too, the attachment of such a risk to trans prisoners in particular seems arbitrary. This association disregards the fact that prisons are not asexual spaces but, on the contrary, spaces typically marked by the widespread visibility of sexual practices.[66] Moreover, from a conservative view of sex that assumes heterosexual sex is the norm, non-heterosexual sex in prisons is mostly possible because of the gender segregation of prisons, not due to TGNC prisoners' existence within these spaces.

The assumption that trans prisoners somehow create, by their very presence, an invitation to sexual promiscuity, or that they "trick" heterosexuals into homosexual sex, is an incorrect stereotype that should not serve as the basis of a

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62. The policy cited in Doe 1 states, "his holding in conditions of separation is required, for fear of harm to the prisoner or to other prisoners and his surroundings." Doe 1, *supra* note 5.

63. For example, in the Kavanagh case before the Canadian Human Rights Tribunal, the state argued that a trans woman who has not undergone surgery may cause cisgender women inmates with a history of sexual assault to experience significant fear. *See* Kavanagh v. Canada (Att'y Gen.), 2001 CanLII 8496, paras. 106-08 (Can. H.R.T.).

64. *Id.* at paras. 100-01.

65. *See* Israel v. Uzan, *supra* note 33.

66. *See generally* Angela Pardue, Bruce A. Arrigo & Daniel S. Murphy, *Sex and Sexuality in Women's Prisons: A Preliminary Typological Investigation*, 91.3 PRISON J. 279 (2011); Nina T. Harawa et al., *Sex and Condom Use in a Large Jail Unit for Men Who Have Sex with Men (MSM) and Male-to-Female Transgenders*, 21.3 J. HEALTH CARE FOR POOR & UNDERSERVED 1071 (2010).

governmental policy. This stereotype echoes the "trans panic defense":[67] a defense strategy used by defendants in cases dealing with assault or murder of TGNC people (mostly trans women). According to this defense, the defendant loses control over their actions when they realize that their sexual partner is trans. This defense supports the idea that TGNC people's presence creates a unique danger to cisgender people and that any violence stemming from such alleged danger should be excused.[68] This idea poses a grave risk to TGNC people. TGNC prisoners' "sexual identity" (defined as their surgical status) cannot predict the level of risk they pose, and therefore cannot operate as a relevant placement criteria.

The other possible objective of the previous IPS policy is to protect trans prisoners from the general correctional population. At first glance, this objective seems far more reasonable. TGNC prisoners are often more vulnerable in prisons. Gender nonconformity becomes all the more conspicuous in a supposedly homosocial environment. Men's prisons are especially dangerous for TGNC persons of any gender because of the hypermasculine culture that revolves around the use of physical force to establish social standing, hostility toward feminine characteristics, domination, and objectification.[69] Both trans men, due to the fact of being assigned female at birth and because many do not undergo genital surgery, and trans women, because of their femininity, might find themselves victims of the hypermasculine space. In women's facilities as well, both male- and female-identified TGNC prisoners may find themselves exposed to violence and harassment for their transgressive gender performance. Their nonconformity may be perceived as a threat.

Though the aim of protecting the safety of TGNC prisoners is essential, prison placement based on differentiating between "clear" and "ambiguous" gender identities is not justified because one's surgical condition is not an indication of the level of risk to which one may be exposed. For example, a trans woman who is only taking hormones is no less vulnerable than a trans woman who underwent genital surgery. Accordingly, designing a placement policy meant to secure the safety of TGNC prisoners that is based on arbitrary assumptions regarding TGNC bodies, rather on the causes of gender-based violence in prisons, fails to meet its declared goals. This line of thinking does not protect TGNC people, but instead exposes them to greater risks.[70]

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67. Cynthia Lee & Peter Kwan, *The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women*, 66 HASTINGS L.J. 77, 105 (2014).

68. Aimee Wodda & Vanessa R. Panfil, *"Don't Talk to Me About Deception": The Necessary Erosion of the Trans* Panic Defense*, 78.3 ALB. L. REV. 927, 932 (2014); Lee & Kwan, *supra* note 67, at 113; Aeyal Gross, *Rape by Deception and the Policing of Gender and Nationality Borders*, 24 TUL. J.L. & SEXUALITY 1, 13 (2015).

69. *See* Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 11-13 (2011).

70. *See infra* Part III.A.2.

Trans prisoners introduce a dilemma into the regime of gender segregation in prisons that cannot be resolved with an off-the-shelf policy. The wide range of TGNC needs and circumstances requires rethinking safety in TGNC terms. Some trans prisoners may feel safer in a male facility, while others may feel safer in a female facility. Since the range of gender identities and practices is so wide, we contend that the objective of safety requires the adoption of a flexible, case-by-case decision process centered around accommodating self-determination and the specific TGNC prisoner's needs. In any case, within a gender segregated prison system, TGNC prisoners are inherently constructed as others; ensuring their safety requires alternatives for incarceration. The distinction between those with supposedly coherent "sexual identities" and those with "ambiguous" sexual identities is unclear and unjustifiable—not least because it does not even begin to address the problem of trans vulnerability in prisons.

3. Inconsistency and Ambiguity in Application

Examining the application of the previous policy further reveals its internal ambiguity. Cases that provide a glimpse into where TGNC prisoners were placed by the IPS illuminate its incoherent application based on inconsistent criteria. In effect, the implementation of the previous IPS policy demonstrates that one of its byproducts was systemic incoherence (see Table 1).[71]

Analysis of these data exposes the incoherence of the application of the previous policy. For instance, examine Doe 1 and Shiran Uzan's placement: even though they represent opposite cases (their gender performances are opposite to one another on a binary scale), they were both placed in a female facility. In addition, Uzan was held in segregation during her first sentence and in the general population for parts of her second and third incarceration periods, despite no change in her characteristics. Dorin Bilia, on the other hand, has attributes similar to those of Shiran Uzan but was placed in a male facility. One may ask: is Uzan "more" of a woman or less "ambiguous" in her gender expression than Bilia is? In what way? A comparison of Doe 1 and Doe 2 is equally confusing: while they are identical in terms of characteristics and personal attributes, Doe 2 was placed in a male facility, while Doe 1 was placed in a female facility. Finally, Eden-Lee Katri is the only TGNC prisoner to be placed in the general population of a male prison. What, it may be asked, in their non-binary gender performance made them more suitable for, or less vulnerable in, such a placement?

71. Table 1 summarizes the cases that have been published or otherwise brought to our attention. This is a small sample that cannot attest to all the situations in which the previous policy was implemented, especially since we do not have official data on individuals held in custody for a matter of days. Generally, detainees held for short periods of time do not reach courts. It is safe to assume that the number of such cases is not insignificant.

Table 1. Characteristics of TGNC Prisoners and Their Carceral Placement

Name	Doe 1[72]	Shiran Uzan (1st period)[73]	Shiran Uzan (2nd & 3rd periods)[74]	Eden-Lee Katri[75]	Dorin Bilia[76]	Doe 2[77]
Gender performance	Female	Male	Male	Male	Male	Female
Sex assigned at birth	✓	✓	✓	✓	✓	✓
Hormonal treatment	✓	✓	✓	✗	✓	✓
Nongenital surgery	✗	✗	✗	✗	✗	✗
Male/female facility	Female	Female	Female	Male	Male	Male
Isolation/ segregation	✓	✓	✓ / ✗	✗	✓	✓

The inconsistency in the interpretation and implementation of previous IPS policy stems from the basic assumptions the policy makes regarding sex, gender, and sexuality, and regarding the fiction of a "clear and unambiguous sexual identity." The previous policy's attempt to enforce order and discipline on the inherently fluid axis of gender and sexuality, and to find a place for TGNC within the strict gender

72. The case of Doe 1 discussed above revolved around a trans man assigned female at birth. Doe underwent non-genital surgery and took male hormones. Despite his masculine appearance, he was placed in a female prison. *See* Doe 1, *supra* note 5.

73. Shiran Uzan, a trans woman assigned male at birth, has long identified as a woman. She had accessed hormonal treatment and non-genital surgery. *See* Israel v. Uzan, *supra* note 33. In all of her periods of incarceration, she was placed in a female prison. The first time she was in solitary confinement and the second and third times she began her incarceration in segregation and was later incorporated into the general population for a short period of time prior to her release. *See* Supplementary Notice on Behalf of the Petitioner, File No. 5480/17 HCJ, Bilia v. Isr. Prison Serv. (Jan. 1, 2017) (Isr.).

74. *Id.*

75. The case of Eden-Lee (Aiden) Katri took place in a military prison context, following their conscious objection to serving in the military. Eden-Lee, a genderqueer woman who was designated male at birth, identified as gender non-binary and had a beard at the time of imprisonment. They began alternative hormonal treatment but did not elect any surgical operations. They were placed in the general population of a male military prison, a placement Israel Defense Forces (IDF) authorities justified as following the IPS guidelines at the time (the previous policy). The IDF further argued that, according to the "stage he is currently in . . . he cannot be placed in the female platoon [inside the prison]." Petition for Order Nisi at sec. 18, File No. 2739/16 HCJ, Katri v. Golan Mimon Chief Military Police Officer (2016) (Isr.).

76. Dorin Bilia was also placed in a male prison during her detention. Bilia has taken hormones for years and has had nongenital surgery. She was placed in solitary confinement in a male prison. Interview with Dorin Bilia, *supra* note 2.

77. This case involved a trans man, Doe 2, who had nongenital gender-affirming surgeries and a masculine gender performance. He was placed in a male facility in a segregated cell with round-the-clock camera surveillance. *See* File No. 52704-08-15 Magistrate Court (Jerusalem), Israel v. Doe (Dec. 13, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.) [hereinafter Doe 2].

segregation characterizing prison geography, inevitably resulted in a confused application that placed TGNC prisoners in highly dangerous and/or inhuman conditions of incarceration. The incoherence in Table 1 also shows that almost all TGNC prisoners in IPS facilities were categorized as lacking a "clear sexual identity."

The problems presented thus far regarding the previous policy catalyzed the reform introduced by the IPS. A critical examination of this reform and its application, however, reveals the same underlying assumptions. A close reading of the new policy and its application also demonstrates how any attempt to impose arbitrary coherence on TGNC prisoners will always, ultimately, fail.

B. The New (Published) IPS Directive

Critiques of the previous policy eventually led to reform. This reform provides an opportunity to examine the IPS's ability to respond to critique. As this section will show, however, this ability was constrained by the gender segregation of prisons. This section will present and review the new policy introduced by the IPS and illustrate how, despite seemingly genuine efforts to change, the problems characterizing the previous policy continue to prevail in the new one.

1. Substance of the New Directive

The new directive comprises four sections: (1) a general section outlining the principles of the policy; (2) a section addressing intake and placement of detained TGNC individuals;[78] (3) a section addressing intake and placement of sentenced TGNC prisoners; and (4) a security directive dealing with searches of TGNC detainees and prisoners.[79]

i. Principles and Goals

The new directive opens by declaring that the overarching goal of the IPS is to incarcerate prisoners in a safe and adequate manner. Over the years, the document states, the organization has had to deal with detainees and prisoners "whose gender identity, on the face of it, is ambiguous, and have undergone a process for changing their gender identity."[80] Often, the new directive states,

78. The new policy uses the word "transgender." ISR. PRISON SERV., *supra* note 8.

79. *Id.*

80. *Id.*

these prisoners go through IPS intake procedures before said "process" has been completed.[81]

ii. Prisoner and Detainee Intake and Placement

The new policy sets forth a standard for TGNC prisoner intake and placement. Placement decisions are to be made on a case-by-case basis based on the individual's characteristics.[82] Relevant factors to the decision include: the prisoner's appearance, the way in which "the prisoner defines himself," and the stage of the "gender change process" in which the prisoner is.[83] The new policy also sets forth an exception to this standard: in cases where the "gender change" has been completed, the IPS will treat the prisoner in accordance with the gender they "belong to."[84]

The new directive details specific intake instructions for detainees awaiting sentencing or trial. The new policy provides that detainee intake should be in accordance with the standards laid out in the opening section of the directive, and adds that a medical report is required to decide on their placement.[85]

With respect to sentenced prisoners, the new directive adds to the considerations specified in the intake of detainees the nature and circumstances of the offenses committed by the TGNC prisoner.[86] It also notes that, if needed, the prisoner will be housed in a separated cell[87] and that, during their incarceration, TGNC prisoners are to be integrated into routine prison activity, including employment and education opportunities.

iii. Prisoner Searches

Under the new policy, the prisoner must be asked about their "gender identity during intake."[88] Prisoners must also be asked whether they wish for a male or female guard to search them and have their preference documented in writing. At the same time, the policy also states that the prisoner is to be informed that, if needed, body search will be performed by both a male and a female guard

81. *Id.*

82. *Id.*

83. *Id.* at art. 3.

84. *Id.* at art. 4.

85. *Id.* at art. 7.

86. This requirement is similar to the one set out in the general directive on the intake of prisoners. *See* ISR. PRISON SERV., 04.29.00, קליטת אסיר בבית הסוהר [PRISONER'S INTAKE WITHIN PRISON] 4-6 (Jan. 25, 2016).

87. *Id.* at art. 11d ("The wing commander will determine which cell the inmate will be placed in, and the location in the cell, considering his suitability for the population of prisoners with whom he will be placed.").

88. *Id.* at sec. 14.

"where each examines the body part that conforms to the prisoner's gender identity."[89] To explain this point, the directive provides the following example in bold print: "in the case of a male who is in the process of sex change but has not completed the process, his male parts would be examined by a man and his female parts by a woman, and vice versa." In cases where the "gender identity change" is complete, the prisoners will be searched in accordance to the gender they "belong to at that time."[90]

2. Unresolved Issues in the New Directive

The new directive reflects a more current discourse around TGNC people as well as a recognition of the rights of TGNC individuals to bodily autonomy. The new policy makes self-determination a key consideration in prisoner intake processes and placement decisions. It adopts an individualized model, implying recognition of the heterogeneity of identities, practices, needs, and circumstances. It replaces the old policy's use of "sexual identity" with "gender identity."[91] Rather than referring to "identity change," it refers to "gender change process" or "sex change." It does not make any references to surgery as a precondition for being considered "unambiguous," but instead relies on completion of an undefined process as a prerequisite for institutional confirmation of a prisoner's gender identity.[92] In this way, the new directive represents a progressive shift, at least in its language. Still, the problematic logic of the previous policy is clearly evident. In this section, we explore the main problems with the new directive and provide an explanation for the system's inability to offer an adequate solution to the challenge of TGNC prisoners' placement.

a. Ambiguity in the New Directive

The concept of gender ambiguity is central to the new policy. Article 2 begins by stating that the IPS had previously incarcerated prisoners "whose gender identity, on the face of it, [was] ambiguous."[93] This phrasing moves ambiguity away from the core of the policy, but ambiguity is nevertheless retained as a relevant fact to the introduction of the reformed policy. The presumed gender ambiguity of TGNC prisoners serves as an exonerating mechanism for the IPS's policies, both past and present. In opening the new

89. *Id.*

90. *Id.* at sec. 14d.

91. *Id.* at arts. 2, 3, 4, & 14a-d. *Cf.* Doe 1, *supra* note 5.

92. *Compare* ISR. PRISON SERV., *supra* note 8, at arts. 3, 4, 14a, & 14d, *with* Doe 1, *supra* note 5.

93. ISR. PRISON SERV., *supra* note 8, at art. 2.

policy by stating the ipso facto gender ambiguity of TGNC prisoners, the IPS places the blame for its past mishaps on the victims themselves. In a sense, the IPS said, "yes, perhaps our policies were flawed, but remember, their gender identity was so confusing."

The insistence on TGNC prisoners' gender identity as ambiguous foreshadows the rest of the new directive's treatment of TGNC prisoners. Their assumed gender ambiguity is reflected throughout the new policy guidelines. The differentiation of TGNC prisoners along "ambiguity" lines is most evident in the guidelines regarding body searches. As mentioned, article 14 of the directive states that a body search in cases where the "gender identity change" is not complete may be performed by both a male and female guard.[94]

The wording of the directive pays lip service to TGNC prisoners' autonomy and self-determination by requiring that the prisoner be asked for their preferences on the gender of the officer who searches them. Yet the actual procedure—dubbed by criminalized TGNC people as the "half/half" search—is humiliating. The idea that a TGNC prisoner or detainee is half male and half female until their "gender identity change" is "completed" marks them as occupying an in-between category in the eyes of the IPS, and as ambiguous until such time as their external body parts produce a mirage of coherence.

The practice of the half/half search demonstrates that, within the scope of the directive, the TGNC prisoner's body conveys more authority than their own voice. The IPS is willing to recognize prisoners' self-determination over their gender identity within the half/half search protocol, yet this is only a formal recognition. In substantial terms, the half/half protocol reveals that the IPS continues to consider gender identity a feature that is reflected through the existence of a penis or a vagina, a masculine chest or feminine breasts, and so on. For the IPS, gender identity can be derived from some undeniable "truth" of the body, based on a straightforward correlation between "biological" sex and gender.

Finally, with regard to the relevant criteria for placement, rather than differentiating between those whose "sexual identity" is ambiguous and unambiguous, the new directive differentiates in articles 3 and 4 between those who have "completed a process" and those who have not, with only the former guaranteed to be treated according to the gender identity they "belong to."[95] While article 3 stresses a case-by-case method of placement decision-making, the specific clarification in article 4 stipulates that only in those situations where a gender process is "complete" is a prisoner is to be treated according to the gender they "belong to," implying that, in all other cases, no such obligation

94. *Id.* at art. 14.

95. *Id.* at arts. 3-4.

exists.[96] Thus, while classification of ambiguous gender is not, on the face of it, part of the new directive, the tension between articles 3 and 4 allows for the idea of gender ambiguity to re-enter.

b. The Medicalization of TGNC Identity

While the new directive abandoned the term "sexual identity," its reliance on the "completion" of "a process" falls back on the medicalization of the previous policy, as well as on its fixation with genitals. The idea of a "sex change" as a linear progress from one binary point to another is preserved as part of an ongoing attempt to demarcate clear gendered lines vis-à-vis TGNC prisoners.

Though the new directive does not mention surgery, article 7 on detainee intakes states that decisions regarding longer-term placement will be made on the basis of a medical report, thus implying the centrality of medical interventions in what the directive defines as a "gender change" process.[97] No doubt, the removal of the explicit surgical condition from the directive reflects growing awareness of TGNC people's autonomy over their own bodies. However, the criterion of a completed "gender change process" is a step back in the direction of old medicalized standards.

c. The Association of TGNC Prisoners with Heightened Risk

As previously referenced, the new policy directs prison administration officers to consider the "nature and circumstances" of the offenses of which the TGNC prisoner was convicted when deciding on their placement in a single or shared cell. Considering a prisoner's offense when deciding on their placement is standard procedure for all prisoners.[98] The reiteration of this requirement in the TGNC protocol suggests that the specific offense committed by a TGNC prisoner is of particular importance.[99]

Reading the new directive against the backdrop of the previous policy helps to illuminate this requirement. One key imperative of the old policy's insistence on an "unambiguous sexual identity" revolved around the alleged risk TGNC prisoners pose to the general prison population. Inherent in the old policy was a fear of the TGNC prisoner's potential to sexually assault other prisoners (the

96. *Id.*

97. *Id.* at art. 7; *see also* Spade, *supra* note 55 (explaining problems rooted in the medical system's gatekeeping of trans identity).

98. *See* ISR. PRISON SERV., *supra* note 86, at 4-6.

99. *See* ISR. PRISON SERV., *supra* note 8, at art. 9.

penis being considered the epitome of sexual danger).[100] The reiteration of the need to consider the circumstances and nature of TGNC prisoners' offenses is perhaps reminiscent of this fear, signaling to the administration officer to examine whether the particular TGNC prisoner was convicted of sexual offenses. This consideration is not problematic per se, but stressing this with regard to TGNC prisoners reinforces the stereotypical assumption that these prisoners warrant specific attention beyond the regular protocol applying to all prisoners.

The new directive, in short, reflects both the IPS's progress with regard to TGNC prisoners and their self-determination and preferences, and, simultaneously, the carceral system's inability to provide an adequate solution. While the new policy marks a step forward, most of the paradigmatic problems that characterized the old policy still cling to the new one. This is no coincidence. The IPS's inability to provide a comprehensive solution to the placement of TGNC prisoners is reflective of the carceral system's gender-based segregation.

C. A Failed Reform: The Gender Binary of Prisons

Understanding the role of dominant norms of gender and sexuality in constituting the logic of incarceration, as well as in shaping its spatial features, is essential in order to understand how TGNC people are constructed as "others" in the carceral space. Structural accounts can perhaps explain the IPS reform's inevitable failure to fully address the needs of TGNC prisoners.

The Israeli carceral system, like most carceral systems, is premised on a gender binary. Its framework positions the female correctional facility as an aberration to the system as a whole, which is foundationally masculine. Most prisoners in Israel are men.[101] As of October 2018, around two hundred women were held at Israel's only female prison, the Neve Tirtza Correctional Facility. They constitute about 1.8% of criminal prisoners in the country.[102]

The gender segregation of carceral institutions evolved in conjunction with the widespread acceptance of ideas about the different personality traits of men and women and the different preferred methods of policing and penalizing each

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100. *See supra* Part II.A.2.

101. Ronit Matzliah, עם נשמה [*With Soul*], J. MINISTRY PUB. SECURITY, Jan. 2014, at 16 (Isr.).

102. *Id.* Note that Palestinian female prisoners convicted in security offenses are held both at Neve Tirtza and in the female wing of other "security prisons," in a semi-exception to the gender-segregation logic of the carceral system in Israel. *See* Yachimovich-Cohen, *supra* note 15. In general, the treatment of Palestinians within Israeli criminal and carceral systems is filled with such "exceptions." From the ability to imprison them for months without a claim that an offense has occurred (a practice known as administrative detention) to different procedural rules throughout the criminal process and a different set of conditions in incarceration (including lack of access to phone calls, vacations, or the option of early release), the experience of Palestinians incarcerated in Israel is different from that of Israelis. *See supra* text accompanying note 12.

in accordance with their societal roles.[103] This approach persists to this day, with women facilities rewarding prisoners' behavior that fits into stereotypes of "good femininity," thus reinforcing accepted gender norms.[104] For example, the women prisoners of Neve Tirtza are offered employment opportunities commonly associated with feminine social roles that are not available to their male counterparts in other prisons, such as sewing or cardboard-equipment assembly.[105] Moreover, the facility is not equipped with either a gym or conjugation rooms.[106] This implies that physical strength-traits and sexual needs stereotypically associated with masculinity have no place in the female facility. Assumptions about femininity and the legitimization of its performance in the female facility shape the space of Neve Tirtza and the experience of the prisoners living in it.[107]

Just as women's prisons are constructed through gendered norms and expectations of femininity, men's correctional facilities are hypermasculine spaces[108] that reproduce an extreme and strict form of hegemonic masculinity.[109] The very fact of gender segregation is one of the forces that shapes hegemonic masculinity within prisons, not unlike other homosocial institutions such as exclusively male military units.[110] Male and female correctional facilities are constructed as opposite spaces. The gender segregation of correctional facilities reflects the alleged legitimacy of a supposedly objective biological difference

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103. NICOLE HAHN RAFTER, PARTIAL JUSTICE: WOMEN, PRISONS AND SOCIAL CONTROL 23 (2d ed. 2017).

104. PAT CARLEN, SLEDGEHAMMER: WOMEN'S IMPRISONMENT AT THE MILLENIUM 46–47 (1998).

105. GILA CHEN & TOMER EINAT, כלא נשים: החצר האחורית של החברה בישראל [WOMEN'S PRISON: THE BACKYARD OF ISRAELI SOCIETY] 167-69 (2010) (Isr.). In contrast, within male facilities in Israel, prisoners are employed by Israel Prison Industries to produce commercial items such as office and garden furniture. *See Company Profile*, ISR. PRISON INDUSTRIES, https://www.tshabas.gov.il [https://perma.cc/46WS-WLPU]; *see also* Ori Tal-Spiro, תנאי הכליאה של אסירות– [*Female Prisoners' Conditions of Incarceration*], KNESSET RES. & INFO. CTR. (Oct. 25, 2010), https://fs.knesset.gov.il/globaldocs/MMM/014b6b58-e9f7-e411-80c8-00155d010977/2_014b6b58-e9f7-e411-80c8-00155d010977_11_6661.pdf [https://perma.cc/BW4Y-M7FN] (Isr.).

106. *Id.*

107. Despite stereotypes regarding femininity being an influential and constitutive factor in the space of the women's prison, prisons should not be mistaken for an inherently feminine space. The women's prison must be understood as an exception within a prison system, which is based on values of masculinity and violence. Women's imprisonment thus serves both as an exception and a continuation of these norms. Many prisoners at Neve Tirtza testify to the violence that prevails in the prison, the hierarchy among the prisoners, and the fact that masculine behavior or performance may render the period of imprisonment more tolerable. *See* CHEN & EINAT, *supra* note 105, at 104.

108. PRISON MASCULINITIES (Don Sabo, Terry A. Kupers & Willie London eds., 2001).

109. *See* Dolovich, *supra* note 69, at 15; *see also* Sarah Pemberton, *Enforcing Gender: The Constitution of Sex and Gender in Prison Regimes*, 39 SIGNS 151, 167-68 (2013).

110. The relationship between militarism and patriarchal masculinity is generally seen as mutually beneficial, with the military serving a role in the construction of masculinity in men, and, at the same time, "manipulat[ing] certain ideas of what constitutes femininity and masculinity in order to shape people in ways that serve military objectives." Orna Sasson-Levy, *Constructing Identities at the Margins: Masculinities and Citizenship in the Israeli Army*, 43 SOC. Q. 357, 358–59 (2002).

between male and female prisoners, and between male and female criminality, or how female and male "criminals" are socially understood and constructed.

Within the ubiquitous system of gender segregation in the carceral system, the question of placement for TGNC people becomes all the more acute. The dysphoric positioning of trans people in relation to a binary system of gender—feminine/female/women and masculine/male/men—becomes fully articulated in the encounter between TGNC bodies and the binary structure of the carceral system. Accordingly, attempts to reform inevitably fail. As we show later in this Article, the gender segregation of prisons is harmful not only to TGNC prisoners, but to all prisoners.[111] In the next section, we examine the practice of segregation, reading the new directive against the backdrop of the old policy, to explain lived realities within IPS walls.

III. THE QUESTION OF ADMINISTRATIVE SEGREGATION

"Isolating a person is taking their soul and crushing it."[112]

While the previous IPS policy set administrative segregation as a standard practice, the new directive directly prohibits it. Yet, within the gendered order of prisons, the IPS's ability to uphold its own standards proves problematic. To account for these dynamics, we read the new policy against the previous one. First, we briefly review the previous IPS policy on administrative segregation. Then, we present the conditions within the IPS segregation units, review the impact of segregation, and respond to the argument that segregation is needed to ensure the safety of TGNC prisoners. We argue that administrative segregation, especially administered through conditions of isolation, causes a variety of psychological consequences for TGNC prisoners while removing some of their mechanisms of survival, thus putting them at greater risk. Second, we examine the new directive, uncovering the traces of isolation practices still within in it. While the new directive has been implemented recently and its implications are yet to be fully realized, we are able to unpack its problems through the stories of Lena and Dorin discussed above. Showing how the practice of isolation continues even if prohibited in principle, we track the structural limits of TGNC incarceration reform. Finally, we turn to the broader philosophy of incarceration, mapping the connections between the prison as an apparatus of isolation and the practice of TGNC segregation.

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111. We detail the harms gender segregation inflicts on all prisoners when discussing the cycles of gendered violence in prisons, see *infra* Part III, and making policy recommendations, see *infra* Part IV.

112. Interview with Dorin Bilia, *supra* note 2.

A. The Previous (Unpublished) IPS Policy

The previous IPS policy required that prisoners whose "sexual identity" was "ambiguous" be incarcerated in administrative segregation.[113] The IPS justified its isolation practices in terms of "fear of harm to the prisoner or other prisoners and his surroundings."[114] The policy stated that TGNC prisoners were to be held in "conditions of separation," which in the majority of cases meant administrative segregation, where prisoners are often held in a cell alone.[115] As the previous section has shown, the available data demonstrates that the overwhelming majority of TGNC prisoners were considered to have an ambiguous "sexual identity." Further, while the IPS tried to argue at the Supreme Court that isolation practices were not the rule but the exception, affidavits submitted to the Court from past TGNC prisoners have shown otherwise.[116] The IPS also has asserted that the placement of TGNC prisoners in the general population is a safety issue, but we argue that placement of TGNC prisoners in administrative segregation as an alternative is a hazard to the health and safety of TGNC prisoners.

1. The Harms of Segregation

With respect to cisgender prisoners, Israeli law applies a high level of scrutiny to decisions to place them in isolation and segregation.[117] For instance,

113. *See* Doe 1, *supra* note 5.

114. *Id.*

115. Dayan similarly talks about the sanitization of violence in prison discourse and the ways in which "language constructs a person whose status—and more precisely whose very flesh and blood—must be distinct from the status of those outside the prison walls." COLIN DAYAN, THE LAW IS A WHITE DOG: HOW LEGAL RITUALS MAKE AND UNMAKE PERSONS 80 (2011).

116. Supplementary Notice on Behalf of the Petitioner, *supra* note 73.

117. In *Atias v. Israel Prison Service*, the court stated:

> Holding a prisoner in segregation is an exception to the principle according to which a prisoner will be kept in the general population. This principle stems from the recognition that the prisoner has a right to basic human existence within the prison walls, subject to the restrictions required by the prison itself and the denial of personal freedom resulting from it. Living within a human environment is a vital need for a person and can be denied or restricted only when there are special and heavyweight reasons for this. Even if such reasons exist, the holding of a prisoner in segregation must be limited to a necessary minimum, and the relevant authority should continuously examine the need and justification for segregation, in recognition of the obligation to minimize, as much as possible, the harm to the prisoner. Moreover, even given a clear need for segregation, the IPS must examine ways of alleviating the severity of the harm caused by it, for example, through transfer to partnered segregation or any other relief, as the circumstances may allow. The longer the separation period, the greater the burden on the relevant authority to indicate the existence of a vital need to continue holding the conditions of separation, in light of the inherent harm to the rights of the prisoner.

File No. 06/10 CA, Atias v. Isr. Prison Serv. (Sept. 5, 2006), Nevo Legal Database (by subscription, in Hebrew) (Isr.); *see also* File No. 5674/10 CA, Ifergan v. Isr. Prison Serv. (Jan. 29, 2010), Nevo

the general IPS ordinance states that segregation beyond ninety-six hours requires an administrative hearing, a period of over a month requires a hearing and consultation with several IPS officials, and a period of over six months requires court approval.[118] The generic IPS ordinance determines the type of prisoners to be held in segregation, either in solitary confinement or along with other prisoners (usually no more than two per cell) in a segregated unit.[119] With regard to the isolation of TGNC prisoners, however, the previous policy was much more draconian: the previous policy set no time limit for TGNC prisoner segregation or review process for their segregation. A 2012 public defender's report stated that a trans woman prisoner who was held in segregation was left alone in her cell without any connection with other prisoners for four-and-a-half months.[120]

The public defender's report further detailed the harsh conditions in the segregation unit: extreme heat and lack of air flow during the summer, extreme cold during the winter, poor sanitation, insufficient lighting, and structural conditions that did not allow prisoners to maintain their privacy.[121] A 2016 public defender's report stated that most of the problems detailed in the 2012 report had not been addressed. The report also stated that the conditions in most segregation units harm the basic dignity of prisoners and recommended that some of these units be shut down immediately.[122] Another report found that the psychological effects of isolation are detrimental and may potentially lead to psychotic outbursts and irreversible psychological disorders.[123] These findings reflect "isolation panic," a condition that may drive prisoners towards self-harm, delusions, and memory loss.[124] Other researchers have described administrative

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Legal Database (by subscription, in Hebrew) (Isr.); File No. 30287-08-10 Administrative Court (Naz.), Isr. Prison Serv. v. Saad (Oct. 20, 2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

118. Prisons Ordinance [New Version] 5732-1971 sec. B1, *in* 21 DINE MEDINAT YISRAEL, NUSAH HADASH [LAWS OF THE STATE OF ISRAEL (New Version)] 459 (1971) (Isr.).

119. *Id.*

120. Isr. Pub. Def.'s Office, 2014-2013 תנאי המעצר והמאסר במתקני הכליאה של שירות בתי הסוהר בשנים, [*Conditions of Detention and Imprisonment in IPS Prisons in 2013-2014*] MINISTRY JUST. 8 (July 2015).

121. *Id.*

122. Isr. Pub. Def.'s Office, 2016 תנאי המעצר והמאסר במתקני הכליאה של שירות בתי הסוהר בשנת [*Conditions of Detention and Imprisonment in IPS Prisons in 2016*], MINISTRY JUST. (June 2017), https://www.justice.gov.il/Units/SanegoriaZiborit/DohotRishmi/Documents/PrisonerReport2016.pdf [https://perma.cc/GNN9-5QZC].

123. ISR. ATT'Y GEN., הפרדת אסירים [PRISONER SEGREGATION] 11 (Apr. 16, 1996).

124. Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 521 (1997); *see also* HANS TOCH, MOSAIC OF DESPAIR: HUMAN BREAKDOWNS IN PRISON 49-52 (1992).

segregation as a form of psychological violence toward the prisoner or as a double punishment.[125]

Prolonged time spent in a tiny cell where light and airflow are inadequate does not allow sufficient sensory stimulus. Colin Dayan argues that the absence of external sensory stimuli deteriorates and destroys consciousness and perception, as both are contingent on the ability to perceive the outside world. Since the body remains passively fixed, self-recognition remains but a memory.[126] That is, the prisoner loses touch with how to perceive themselves, which is intertwined with questions about where they go, what they eat, whom they meet, and so on. This impact on one's to ability to self-identify poses significant challenges specifically to TGNC prisoners, whose self-identification is constantly called into question by the gendered nature of incarceration itself.

2. Segregation's Failures

Correctional authorities usually justify additional harm caused by administrative segregation by pointing to its purported benefits, such as the protection of TGNC prisoners from violence. The claim that TGNC prisoners are exposed to violence by other prisoners in the general population has merit. Physical and emotional violence are common to the experience of many TGNC prisoners.[127] Yet the assumption that segregation operates to the benefit of TGNC prisons deserves a critical analysis. Dorin Bilia, for one, states: "I don't understand why they feel a need to protect me from other people?! I am a woman

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125. Gabriel Arkles argues that "[t]his type of segregation itself is a form of psychological violence and can lead to prisoners violently harming or killing themselves." Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 538-39 (2009); *see also* Reena Kapoor, *Taking the Solitary Confinement Debate out of Isolation*, 42 J. AM. ACAD. PSYCHIATRY & L. 2, 2 (2014). For a literature review, see Haney & Lynch, *supra* note 124, at 521.

126. Dayan, *supra* note 115, at 87.

127. A review of cases involving trans prisoners reveals the bullying, harassment, and violence to which they are exposed in prison. In the case of Doe 2, the court's ruling stated that "the defendant described a series of abuse and harsh insults both by the prison staff and by the other detainees, because he is a transgender man." *See* Doe 2, *supra* note 77. Shani Mensi and Meir Zohar described a similar experience. As the court summarized: "during their arrest they suffered harsh treatment from other detainees, on the grounds of them being transgender, and these things are unfortunately clear and known." File No. 10-09-20413 Magistrate Court (Tel Aviv-Yafo), Israel v. Mensi, (Oct. 14, 2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.). Megan Bashari and Eden-Lee Katri also reported harsh treatment inside prison by other detainees and prison staff. *See* Israel v. Bashari, *supra* note 13, and Petition for Order Nisi at sec. 14-15, *supra* note **Error! Bookmark not defined.**. Dorin Bilia described similar experiences:

> Before the count they put me inside this cage, like an animal cage, I do not know how to describe it otherwise because it is semi-open like that, and I hear the guards that are in front of me: 'come on we have to search it, the half/half, the man,' and then they're all embarrassed and start rolling on the floor laughing, joking around about who's stuck with searching me, 'I'm not searching dude, I'm not . . .' and I hear all of this going on around me.

See Interview with Dorin Bilia, *supra* note 2.

who is six feet tall, I do not need to be protected, I can protect myself well enough from both men and women."[128]

Gabriel Arkles, a lawyer and scholar representing TGNC prisoners, provides further examples from his clients' experiences in the United States.[129] Arkles argues that administrative segregation operates against the interests of TGNC prisoners for two main reasons: it prevents them from creating bonds with other prisoners and exposes them to risk in their interactions with prison staff.[130] According to Arkles, the social connections TGNC prisoners might establish with other prisoners are vital both for emotional and moral support and for survival and protection within prison walls. Through contact with other prisoners, prisoners can learn techniques for survival as well as codes of behavior for accessing benefits through the administrative system. Such contact also forms the basis of political alliances, friendships, and support networks.[131]

Lena's story provides an example of such support networks. When she was only starting her gender-affirming process (while still in a maximum-security male prison), Lena was ordered by IPS officials not to share her identity or "externalize" it in front of other prisoners, lest she be sent to protective segregation.[132] The assumption behind that order was that once other prisoners learned about her transition, she would be in immediate danger. As it turned out, however, when word got out that Lena was trans, and this was manifested by visible changes to her appearance, her fellow prisoners accepted her and started calling her by her chosen name.[133] Prior to her transfer to a female facility, her fellow prisoners threw her a farewell party, wishing her good luck and congratulating her on her impending transfer.[134] Recall, similarly, how Dorin received support and even women's attire from her fellow prisoners while in administrative segregation.[135]

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128. Interview with Dorin Bilia, *supra* note 2.

129. *See* Arkles, *supra* note 125.

130. *Id.* at 540.

131. One of the examples Arkles provides of the importance of such social interactions is the story of Victoria Arellano, a twenty-three-year-old trans woman who was diagnosed with HIV and placed in a men's correctional facility without confinement. She was not provided with access to medicine, and her health began to deteriorate. As she became more and more ill, she suffered from physical pain that would make her cry out whenever she was moved, she was vomiting blood, and she had a severe fever. The other prisoners who shared a cell with Arellano provided her with support, placed cold presses on her head to reduce the fever, cleaned up the blood she had vomited, and helped her to use the restroom. They also applied to the clinic to secure her access to care and started a petition (signed by seventy prisoners) for the same purpose. When this was unsuccessful, a group of eighty prisoners refused to attend a count, chanting "hospital" until finally the facility's administrators granted their demands and transferred Victoria to a hospital. *Id.* at 529.

132. Update Notice, *supra* note 27, at art. 11.

133. Telephone Interview with Lena (Aug. 26, 2019).

134. *Id.*

135. *See supra* Part I.A.

Segregation not only prevents these bonds from forming between TGNC and cisgender prisoners, but it also increases the risk that prisoners will be exposed to violence and harassment by correctional personnel. Isolated from others, prisoners in administrative segregation are extremely dependent on prison staff for every basic need. Given the fact that violence perpetrated by correctional personnel is an endemic part of carceral life, administrative segregation should be considered a cause of risk for TGNC prisoners, since it isolates them from other prisoners and makes them easier targets for such violence.[136]

Segregation of TGNC prisoners also sends a message that TGNC prisoners are facing additional punishment for being TGNC. This message is that the problem lies with the "unnatural" identities and practices of TGNC prisoners and not with those who seek to harm them, who are conversely constructed as expressing a "natural" inclination. This indirectly legitimizes the violence that TGNC prisoners experience as a "natural" part of carceral life, not something one can effectively "isolate."

Moreover, isolating TGNC prisoners, rather than those who harm them, fails to deter other prisoners from harming them. In effect, isolating the trans or non-binary prisoner might further promote harming them, as administrative segregation is itself a form of punishment. Perversely, prisoners who wish to harm a TGNC prisoner are absurdly incentivized to do so, or at least to make threats, as these actions can trigger the TGNC prisoner's being sent to administrative segregation. In addition, TGNC segregation also deters victims of violence from reporting it, for fear of being placed in isolation.

Finally, the very fact that TGNC prisoners are marked as vulnerable by being placed in isolation might further expose them to targeting. In much the same way that social marginalization operates outside prison walls, labels can often be self-fulfilling, with some prisoners targeting others who are classified as "vulnerable" to assert their position within a prison's social hierarchy.[137] Thus, the marking of TGNC prisoners as potential victims or as requiring special protective measures renders them more likely to be potential targets of violence by other prisoners.[138]

Therefore, administrative segregation of TGNC prisoners not only contributes to a whole array of physiological reperçussions for TGNC prisoners, but also fails to uphold the protective imperative that supposedly justifies it. In addition to failing to create a safe environment for TGNC prisoners, administrative segregation often removes some of TGNC prisoners' mechanisms for survival, putting them at greater risk of violence.

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136. *See* Arkles, *supra* note 125, at 540.

137. Dolovich, *supra* note 69, at 13-14.

138. Angela Okamura, *Equality Behind Bars: Improving the Legal Protections of Transgender Inmates in the California Prison System*, 8 HASTINGS RACE & POVERTY L.J. 109, 121 (2011).

B. The New (Published) IPS Directive

The pivotal reform in the new IPS directive is its explicit prohibition on the use of administrative segregation. Article 5 states: "**And it should be emphasized, a transgender prisoner is not to be held in segregation** without **reason and legal grounds. Furthermore, a transgender prisoner will not be held in isolation**, as holding a prisoner in isolation can only be done following a disciplinary hearing which ordered such punishment."[139] This prohibition constitutes a 180-degree turn from the previous policy. At first glance, isolation seems to have been removed from the equation. The new directive's prohibition of isolation, however, contains an exception permitting up to five days of "separated holding" at the intake stage to ensure the prisoner's "safe incarceration."[140] The justification for this exception reminds of the previous policy's language. Once again, the connection between prisoners' safety and their holding in isolation is affirmed. Moreover, as the stories of Lena and Dorin—with which we opened this Article—demonstrate, indefinite isolation was still in practical use after the new policy was published. Given that segregation decisions are mostly under IPS officers' discretion, we return in this part to Dorin and Lena's personal experiences at IPS facilities to examine the IPS's commitment to their new directive.

1. Lena

Lena is currently serving a twenty-three-year sentence. She began her process of gender affirmation while in prison. Even after the new directive went into effect, the prison authorities refused to transfer Lena to a female facility, while also barring her from "externalizing" her femininity by talking with other prisoners about her gender identity or growing out her hair and nails. She was also preventing from accessing gender-affirming technologies.[141] Following an internal prison hearing regarding her situation, prison officials informed Lena that if she decided to "externalize" her femininity she would be segregated for an indefinite period. Prison officials also asked Lena whether she felt safe. Knowing that a "no" answer would result in the IPS administration sending her to segregation, Lena replied "yes."[142] In a court hearing, following her appeal, both the judge and the IPS were willing to recognize Lena as trans and even addressed her using female pronouns, yet they agreed among themselves that her

139. ISR. PRISON SERV., *supra* note 8, at art. 5.

140. *Id.* at art. 6.

141. Telephone Interview with Lena, *supra* note 133.

142. *Id.*

requests were too much too soon. If Lena "wants it all" or moves "too fast," the judge warned, she will end up in segregation, for her own safety.[143]

After several IPS high officials closely observed Lena's feminizing body with their own eyes, in summer 2019 Lena was finally transferred to the female facility. There, she was immediately placed in administrative segregation, allegedly for her own safety and the safety of the general population of the prison. Although Lena enjoys several privileges not available to other prisoners held in administrative segregation, her incarceration conditions are still more punitive than those for prisoners in the general population, as she spends many more hours locked in her cell. Lena recently shared with us that despite being treated with respect by the staff, she is nevertheless constantly scrutinized by staff for her femininity.[144]

As Lena's experience shows, even after the new directive went into effect, the IPS and the court supported segregation as a safety measure for TGNC prisoners like Lena and as a means of "protecting" cisgender prisoners. The deciding factor in transferring her seems to have been based solely on her ability to portray a certain version of femininity to prison authorities. Here, the paradoxes of the gender segregation of prisons fully present themselves: prisoners are not allowed to express femininity within the male facility (or they risk segregation), but they cannot be transferred to the female facility (from the male facility) if they do not look feminine enough in the eyes of IPS officials. Lena's gender is not recognized because, as long as her body does not change, she is not allowed to change her gender. Further, "change" is understood as a linear process that culminates in genital surgery, a standard that is both restricting and almost impossible to achieve while incarcerated.

While Lena was housed with men, the IPS invoked a type of "don't ask, don't tell" policy with regard to her desire to transition. This idea that TGNC prisoners should only express their authentic gender identity internally, highlights another aspect of prison geography: in prison, there is no spatial separation between the private and the public. The erosion of any sense of privacy within prisons leads prison authorities to reimagine the private/public dichotomy by demarcating the border on the body of TGNC prisoners. Accordingly, Lena was only able to exercise her right to self-determination and gender recognition within her nonexistent private sphere. Without any walls separating the private and the public, her body itself becomes these walls, rendering her mind the only space in which she is allowed "recognition" as her true self. Furthermore, when Lena was finally transferred to a female facility, she discovered that her femininity—which the IPS had deemed too much for the male facility—was far from enough for the female facility. As one prison officer

143. *Id.*

144. *Id.*

told Lena, "how could we put you with all the other women when you still have stubble?"[145]

The IPS believes it is doing its best to integrate Lena into the women facility gradually and in the face of systemic challenges (mainly the cisgendered nature of incarceration). Yet the IPS's treatment of Lena is still based on assumptions rooted in a gender binary that excludes her. A cisgender prisoner with polycystic ovaries who might have a beard would not be sent to separation/segregation, yet Lena is not allowed in general population if she has stubble.

In a September 2019 court hearing in Lena's case, the judge described her as "transgender prisoner in the midst of the process, whose upper body is feminine and lower body is masculine." [146] This statement by the court reintroduces the idea that genital surgery is a precondition for dignified incarceration. But access to gender affirming surgery is a process that takes unincarcerated people at least one year to complete, and that is without including the years spent waiting for available appointments. This means that for TGNC prisoners who simply do not want to undergo surgery, and even for those who do, the new IPS reform still leads them back to administrative segregation.

The IPS's position in Lena's case assumes that perceived femininity for cisgendered women is inherent and effortless. This assumption is clearly untrue: cisgender women do not wake up in the morning without body or facial hair, sporting a feminine hairstyle, full makeup, and a dress. Many if not most women work tirelessly to maintain their perceived femininity and to feel that they fit within gendered beauty norms. Prison authorities endorse this gender performance by allowing female prisoners to style their hair in a feminine way, to wear makeup, and so on. But when TGNC women seek similar treatment, they are sent to administrative segregation. The moment when Lena unbalanced the gender order of prison by expressing her wish to "externalize" femininity, segregation reappeared as a threat and a regulator of her gender expression.

2. Dorin

Dorin's second stretch in prison provides an additional example of how segregation creeps back into the IPS's new policy as applied. As noted, shortly after she underwent genital surgery and while still recovering, Dorin found herself incarcerated again. This time, perhaps due to undergoing genital surgery while outside of prison, she was placed in the drug rehabilitation program of the female facility. Yet Dorin was denied access to postoperative care and was informed by prison authorities that if she wished to use her vaginal speculum she

145. *Id.*

146. Prisoner's Petition, Anonymous v. Isr. Prison Serv., NO. PP 26994-03-18 (on file with authors).

would have to do so in segregation, as this medical instrument could be used for sexual assault.[147]

In other words, even though the IPS knew that Dorin had a vagina, she was still not allowed into the general women population because of the tools she needed to maintain her gender identity (i.e., a speculum). Instead, she was offered segregation again, despite the new policy's mandate that TGNC prisoners not be forced into administrative segregation. Because Dorin did not want to further risk her physical and mental health and lose her place in the rehabilitation program by going into administrative segregation, she rejected the IPS's offer. The loss of use of the speculum resulted in irreversible harm to Dorin's body.

The IPS's inability to shake the idea of segregation is no coincidence; the question of placement of TGNC prisoners necessarily brings back the practice of segregation, and the inability to answer this question inevitably results in isolation. This is explained through the role of segregation in maintaining the gender order of prisons and the role of prisons as an institution that constructs broader norms. The status of segregation—explicitly prohibited but nevertheless present in TGNC prisoners' carceral experience—sheds light on the structural limitation of the IPS reform specifically, and more broadly, of any incarceration-related reform. In the next section, we argue that this failed logic builds on broader notions of "protection" reflected by the institution of incarceration and its power to constitute dominant norms.

C. Reasons for Failure: Categorization, Separation, and Isolation

Earlier in this Article, we discussed the IPS's policies regarding the placement of TGNC prisoners. This required us to deconstruct the regime underlying gender segregation in carceral spaces. We also examined the implications of differentiating between prisoners whose "sexual identity" is supposedly ambiguous or unambiguous and between those who have "completed" a process and those who have not, asserting that such differentiation constructs the TGNC subject as an eternal "other."

We have argued that lived experience does not support the idea that gender nonconformity is a clearly defined and bounded category that can be coherently isolated from cisgender practices and identities. In this section, we contend that the practice of segregation demarcates the line between TGNC and cisgender individuals, construing TGNC individuals as essentially and ontologically different through spatial separation. In doing so, the gender binary itself is constituted, thus sustaining the dominant gender order within prisons and beyond them.

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147. *See* Interview with Dorin Bilia, *supra* note 22.

1. Administrative Segregation as Constitutive of the Transgender/Cisgender Binary

Any act of categorical segregation depends on constructing an inherent difference between segregated groups. The placement of TGNC prisoners in administrative segregation accordingly claims to reflect a preexisting difference between masculine/man/male and feminine/female/woman, which allows for the drawing of a clearly defined line around both categories. Such a line of differentiation, we argue, shapes the categories themselves and their societal meanings on both sides. In other words, differentiation constitutes both those who are marked for exclusion and those who are not, and society's expectations of each.[148] This explains why isolation for TGNC prisoners prevailed even after the new directive explicitly prohibited it. Isolation is a crucial practice for the policing of dominant gender norms, in both male and female facilities.

In the context of TGNC segregation, a construction of TGNC identity as rigidly distinct from cisgender identity is especially harmful for TGNC prisoners. When the most immediate form of protection provided by the IPS is isolation, the isolated space becomes the space designated for recognition and expression of gender nonconformity. To gain "access" to the double-edged sword of administrative segregation, TGNC prisoners are forced to embody the model of trans identity as perceived by the IPS, by modifying the public body in such a way that it is allowed to "pass."[149] Lena was trapped in the male prison because she could not femininize her appearance to such a degree that it would convince IPS authorities to allow her to transfer to the female facility. At the same time, she was not allowed to externalize her femininity exactly because she is in a male facility. The gender binary of prisons leaves no place for those who challenge it (outside of segregation). Furthermore, administrative segregation serves, in Lena's case, as a steady reminder that she has yet to fully "pass." Stuck in between rigid and archaic categories of "transgender woman" and "cisgender man" enforced by IPS officials examining her body—her stubble, her breasts, and her hair—Lena found herself again in administrative segregation even after it was officially banned in by the new policy.

Gender as both norm and practice is inherently unstable.[150] This is especially true in carceral institutions, where gender and sexuality are subject to constant

148. We again restate a point made by Butler: "[t]he act of differentiating the two oppositional moments of the binary results in a consolidation of each term, the respective internal coherence of sex, gender, and desire." BUTLER, *supra* note 42, at 30-31. Additionally, "these domains of exclusion reveal the coercive and regulatory consequences of that construction, even when the construction has been elaborated for emancipatory purposes." *Id.* at 7.

149. *See supra* text accompanying note 34. The case of Eden-Lee Katri, who was placed in the general population of a male military prison given her insistence on a non-binary gender performance, further illustrates this point. *See supra* note 75 and accompanying text.

150. *See* BUTLER, *supra* note 42, at 8.

reexamination and reconstruction. Some prisoners experience their first homosexual encounters during their period of incarceration.[151] Within female facilities, prisoners sometimes adopt a "male" performance and are subsequently treated as the designated males by fellow prisoners.[152] In men's facilities, tasks traditionally associated with femininity, such as cooking and doing laundry, are completed by male prisoners, and some prisoners are at times designated the prison "women."[153] These practices attempt to reproduce free society's structures and can be considered a form of resistance to the dehumanizing nature of incarceration.[154] In contrast, the IPS's enforcement of strict gender norms is a practice of prisoner subordination. Thus, the practice of routinely identifying and isolating those who do not fit preexisting gender norms is not only futile (relative to its purported intent of protecting TGNC prisoners) but is also a tool for the negation of prisoners' humanity.

Numerous points of convergence exist between the experience of self-identified TGNC prisoners and other prisoners who exhibit "softness" or emotional vulnerability, or who in other ways transgress the expectations of a "coherent" gender performance. Such prisoners are also at risk of being victimized by the general carceral population. They are the most vulnerable gender-nonconforming group of prisoners remaining in the general population once TGNC prisoners are removed. The attempt to identify, separate, and confine prisoners for expressing the desire to transcend gender expectations associated with birth-assigned sex does not address the cycle of gendered violence within carceral institutions. Instead, it exposes some prisoners to gendered violence while reinforcing the general state of insecurity for all prisoners.

In short, the attempt to demarcate and isolate gender transgression within the carceral space can prove a slippery slope. A further illustration of this point may be found in the Virginia Correctional Center for Women (VCCM). VCCM created a segregated wing designated for lesbian and bisexual prisoners in the hope this move would "curb illegal sexual activity."[155] This segregation policy, however, has proved to be less clear-cut than was intended. Prisoners who did not act sufficiently femininely soon found themselves segregated from the

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151. Lauren E. Gibson & Christopher Hensley, *The Social Construction of Sexuality in Prison*, 93 PRISON J. 355, 364 (2013).

152. *See* CHEN & EINAT, *supra* note 105, at 58.

153. Dolovich, *supra* note 69, at 14.

154. We take this idea from historian Iris Rachamimov's work on concentration camps. *See, e.g.*, Iris Rachamimov, *Camp Domesticity: Shifting Gender Boundaries in WWI Interment Camps*, *in* CULTURAL HERITAGE AND PRISONERS OF WAR: CREATIVITY BEHIND BARBED WIRE 291 (Gilly Carr & Harold Mytum eds., 2012).

155. *Va. Women's Prison Segregate Lesbians, Others*, NBC NEWS (Oct. 6, 2009, 4:53 PM ET), https://www.nbcnews.com/id/31209719/ns/us_news-crime_and_courts/t/va-womens-prison-segregated-lesbians-others/#.Va_qQ_lViko [https://perma.cc/6RBU-HNVJ].

general population, with some prisoners being transferred for wearing their hair short, wearing their uniforms loose, or not wearing makeup.[156]

This kind of approach is especially dangerous in male facilities, where the segregation of TGNC prisoners maintains and reinforces the masculine culture of the prison environment. The segregation of TGNC prisoners conveys the idea that the general population "belongs" only to those adhering to dominant gender norms. In an environment where the aggressive aspects of masculinity set the tone and ascribe the norms, men are encouraged to constantly prove their masculinity.[157] Such an environment is dangerous to prisoners who are less adherent to gendered expectations, even if they do not identify as TGNC. Breaking the TGNC/cisgender binary within prisons has the potential not only to allow for a more humanizing expression of gender nonconformity, but also to create a safer space for all prisoners.[158]

2. Isolation as Foundation of Incarceration

The differentiation mechanism of segregation does not stop at the TGNC/cisgender binary, but rather connects to a broader carceral differentiation, between the prisoner and the free citizen. This connection is revealed by considering the role of isolation within the larger philosophical framework of incarceration.

Foucault famously argued that one of the main objectives of carceral systems is to transform the "occasional offender into a habitual delinquent"[159] and to constitute the difference between legitimate and illegitimate illegalities, or in other words, the two sides of the criminal/non-criminal binary.[160] Foucault also positioned isolation as the primary principal around which incarceration evolved: "The first principle was isolation. The isolation of the convict from the

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156. *See, e.g.*, Anna North, *Women Who "Looked Gay" Segregated at Virginia Prison*, JEZEBEL (Nov. 6, 2009, 11:00 AM), https://jezebel.com/5286986/women-who-looked-gay-segregated-at-virginia-prison [https://perma.cc/FJ6Y-NYGA].

157. Dolovich, *supra* note 69, at 14, 16 ("That in men's prisons there are no 'women' as conventionally defined does not mean that there are no gendered relationships. It simply means that for purposes of this particular cultural model, some prisoners must be designated as female. . . . In the prison, those men seeking to prove their masculinity vie for possession of weaker prisoners—the 'women' in this social system—whose utter subordination to them, known to include ongoing sexual access, stands as public proof of their masculine power. In this culture, the performance of rape—the sexual penetration of another prisoner defined as female—is a way to shore up the rapist's own claim to maleness and, thus, his status and power in the prison hierarchy.").

158. *See* Lihi Yona, *Keepin' It "Real": Israel's Segregation of Transgender Prisoners and the Transgender/Cisgender Binary*, 24 BUFF. J. GENDER L. & SOC. POL'Y 43 (2016). One crucial clarification is in order at this point. Our theoretical position accounting for the heterogeneity of TGNC identities and practices is not in denial of the fact that some TGNC women and men consider themselves to be coherently women or men, respectively. We aim our critique at the forms of arbitrary classification and differentiation institutionalized by the criminal justice and incarceration systems.

159. FOUCAULT, *supra* note 10, at 272.

160. *Id.* at 276-77.

external world, from everything that motivated the offence, from the complicities that facilitated it. The isolation of the prisoners from one another. Not only must the penalty be individual, but it must also be individualizing."[161]

Thus, both in the general practice of incarceration and in the specific practice of isolation of TGNC prisoners, the first act is that of identifying and marking individuals who transgress the normative order and removing them from their broader community. In both cases, the act of isolation is posited as a benefit to, among others, the isolated bodies themselves. The rehabilitative rationale of the carceral system was imagined at the same time as the punitive rationale, as two sides of the same coin: discipline and punishment. Prisons are still imagined as places for the rehabilitation of criminalized people, who must be rescued from their own shortcomings. There is a clear continuity here with the protective-imperative basis of the segregation of TGNC prisoners. The core carceral logic of segregating those who do not "fit," combined with the gender binary of prisons constructing TGNC prisoners as outcasts, explains why the attempt to prohibit segregation was bound to fail. In a way, administrative segregation of TGNC prisoners is a quintessential subset of the broader incarceration logic. Isolation through incarceration shapes the noncarceral space beyond prison walls by excluding unwanted behaviors, identities, and practices. TGNC prisoners' segregation, similarly, may be understood as a mechanism for institutionally shaping and policing another binary, the sex/gender binary.

Much as we have argued that the act of isolating TGNC prisoners from the general carceral population constitutes gender norms within the general prison population, the invention of incarceration also has a constitutive effect on non-criminalized societal roles and identities. The carceral space itself segregates those designated "criminals" from those designated as "law-abiding," demarcating the border of normative (gender and otherwise) citizenship. This is why isolation continued as a practice even after the new IPS directive had prohibited the use of administrative segregation—because it is pivotal in constituting the gendered order of prison, which itself is fundamental in policing society outside of prisons.

IV. POLICY RECOMMENDATIONS

"Trans men, trans women, queers, it doesn't matter. They [carceral authorities] treat us like we are monsters, an abnormality, like a deviant, a freak of nature."[162]

Our discussion thus far casts serious doubt on the ability of the carceral system to answer the challenge offered by TGNC prisoners. The abolitionist

161. *Id.* at 236.

162. Interview with Dorin Bilia, *supra* note 2.

nature of our critique, which questions incarceration's logics and axioms, makes offering policy recommendations difficult. We recognize, in this regard, that improving the system further sustains it. We also recognize, however, that a failure to improve the carceral system discounts the humanity of TGNC people who are currently incarcerated or who will be in the future. While we detailed the experiences of TGNC prisoners in service of asking broad questions about the nature of the carceral system—in particular about its reliance on both gender segregation and isolation under the guise of rehabilitation—it is crucial to mobilize these theoretical interventions toward improving the lives of currently incarcerated TGNC people.[163] Accordingly, this section will provide concrete suggestions regarding the placement of TGNC prisoners as well as principles that carceral systems ought to consider when housing TGNC individuals.

Recognizing that some of the proposed solutions will be difficult to implement in the immediate future (as they involve a radical reformation of the entire carceral system) we offer two primary alternatives alongside principles that may be adopted independently. These policy proposals are presented in their most elementary form, and are meant as blueprints to encourage further discussion. An examination of the full implications of each of these proposals would require a wider canvas than this Article permits.

A. Primary Solutions

1. Abolition of Sex Segregation in Correctional Facilities

Carceral systems need to fundamentally reorganize how they understand gender and categorize along gender lines. The inability to properly accommodate TGNC prisoners within the carceral system is a product of its ideological infrastructure. The ontology structuring life in prisons is derived from a matrix of binary assumptions about the identities of those subject to its authority, assumptions that clash against the lived experience and practice of TGNC people. We have demonstrated how this matrix operates oppressively and abusively over the entire carceral population.

The regime of sex-segregation in prisons should be abolished and replaced with a system of separation based on levels of risk, as already in place within some male carceral systems. Within such institutions, prisoners may be granted privacy as the need arises—for instance, for sleep or showers. Prisoners will have the option of requesting to be separated from specific individuals if they feel

163. We echo here Vivian Namaste's critique of scholarship that uses gender-variant individuals as a tool to demonstrate the absurdity of gender binary without acknowledging the real struggles of trans people or their systemic exclusion from access to resources and opportunities. *See supra* note 18, at 19-22.

threatened by them. Of course, all stages of such a reorganization will have to assure the safety and wellbeing of all prisoners.[164]

Although the abolition of gender segregation in carceral institutions may seem like a radical solution, it warrants serious consideration, and not only due to the harms TGNC prisoners suffer by the gender segregation of the current systems. The main principle upon which the gender segregation of prisons rests is stereotypical assumptions regarding the levels of risk and rehabilitative potential of male and female prisoners.[165] Given that female facilities often house together prisoners from low to high risk,[166] these stereotypical assumptions are stretched to their limit, supporting a claim that even female prisoners with the highest risk assessment are less dangerous than men with the lowest risk assessment.

During the 1970s and 1980s there were several attempts to operate co-correctional facilities (i.e., facilities not segregated by gender) in the United States, starting with Fort Worth prison in 1971 and followed by five subsequent prisons during the following decade.[167] These attempts yielded many positive outcomes, including lower recidivism rates and lower levels of violence and assaults reported by both male and female prisoners.[168] Many prisoners reported enjoying a more "relaxed atmosphere" and "overall better behavior."[169] A 1987 *New York Times* article covering the process of integrating women into an all-male facility in Illinois opened with this anecdote:

> Officials and inmates were wary when the state prison here began housing women, as well as men, earlier this year. But of all the potential problems that crossed their minds, there is one that no one anticipated: how difficult it would be for the prison store to keep men's cologne in stock. "We're acting more gentlemanly," said Charles Johnson, a 27-year-old inmate serving time for murder at Logan Correctional Center. "We want to look nice and smell nice, too."[170]

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164. We further propose that prisoners should be allowed consensual sexual contact among themselves without suffering a penalty for it.

165. Note, *The Sexual Segregation of American Prisons*, YALE L.J. 1229, 1231 (1973).

166. That is certainly the case in Israel, where there is only one female facility housing all female prisoners, but is true in other places as well, including the United States, *id.* at 1234.

167. Hillary Potter, *Co-correctional Facilities*, *in* 1 ENCYCLOPEDIA OF PRISONS & CORRECTIONAL FACILITIES 139, 140 (Mary Bosworth ed., 2005).

168. John Ortiz Smykla, *Does Coed Prison Work?*, 59 PRISON J. 61, 65 (1979); *see also* Barry Ruback, *The Sexually Integrated Prison: A Legal and Policy Evaluation*, 3 AM. J. CRIM. L. 301, 315-16 (1975); Sue Mahan et al., *Sexually Integrated Prisons: Advantages, Disadvantages and Some Recommendations*, 3 CRIM. JUST. POL'Y REV. 192, 152, 155 (1989).

169. Mahan et al., *supra* note 168, at 154.

170. Dirk Johnson, *Women Blend in with Men at Illinois Prison*, N.Y. TIMES (June 1, 1987), https://www.nytimes.com/1987/06/01/us/women-blend-in-with-men-at-illinois-prison.html [https://perma.cc/FR5Q-LEM7].

Harkening back to our argument regarding the way in which gender segregation not only reflects gender but also produces and constructs it, this anecdote illustrates the possibility that eliminating gender segregation will relax the hypermasculinity associated with male facilities.

2. Providing TGNC Individuals with Alternatives to Incarceration

An alternative solution to this reorganization of carceral geography is prioritizing alternatives to incarceration with respect to convicted TGNC people. Given that the entire carceral system is structured in a way that poses a potential threat of serious harm to TGNC prisoners, any true solution would have to involve a radical change to its structure. Assuming this type of change is not forthcoming or available in the near future, the criminal justice system must acknowledge that the incarceration of TGNC people is more detrimental to them than to other prisoners, and it must therefore prioritize alternatives to incarceration for this segment of the population (such as community service, rehabilitation, and therapeutic institutions).[171] In this way, the justice system might acknowledge the basic incompatibility of its infrastructures with TGNC people.[172]

While this may appear to be a radical solution, it reflects the system's own occasional response: in the case of Doe 1—in which the initial IPS policy was revealed but went unchallenged—the fact that Doe was to spend his sentence in administrative segregation due to his transness led the Supreme Court to shorten his sentence as a response to the hardship he was to endure.[173] Given the insufficiency of this solution, Doe was subsequently pardoned and did not serve his sentence in prison. The act of pardoning Doe—an inherently exceptional solution—stemmed from a recognition on some level of TGNC prisoners' experiences within prisons in Israel. His pardoning highlights the system's discomfort with its inability to house TGNC prisoners adequately.

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171. One might argue that if this approach were taken, cisgender prisoners would try claim they are TGNC in order to avoid a prison sentence. The fear of the cisgender man "disguising" as a trans woman comes up often in discussions about trans inclusivity; however, it functions as an anti-trans trope and has no factual basis in reality, as there are no documented cases of cisgender men actually behaving in that manner. Accepting this line of argument and this trope could serve as a basis for rejecting any policy focused on trans inclusivity or access to resources and opportunities for TGNC individuals.

172. Many institutions that serve as alternatives to arrest and incarceration also pose unique challenges to trans people. Community service, house arrest, and other such alternatives often lead to the loss of a person's employment—a loss with even graver consequences for groups already systematically excluded from the job market. Many trans people also experience transphobia by staff in therapeutic institutions. We thank Dorin Bilia for this point. While no solution is perfect, providing alternatives for incarceration allows TGNC individuals to choose what they consider to be the safest option.

173. *See* Doe 1, *supra* note 5.

B. Secondary Solutions

In addition to our primary solutions, we offer several secondary solutions and general principles for carceral systems to consider when housing TGNC prisoners. None of the following suggestions fully address the problems that arise from the incarceration of TGNC individuals, but they might alleviate some of the violence experienced by TGNC prisoners.

1. Personal Choice on the Questions of Placement and Administrative Segregation

TGNC prisoners know which facilities (male or female) and what conditions (administrative segregation or placement with the general population) offer them the best chances for personal safety. We propose that the knowledge TGNC prisoners possess regarding the safest environment for them should be a primary criterion for placement. Such knowledge is often a result of previous experiences in the carceral system or of information-sharing within the TGNC community regarding the level of risk and safety in various correctional facilities.

In some cases, TGNC prisoners might prefer to be placed in administrative segregation rather than among the general population for fear of being targeted by violence. On the other hand, in some cases TGNC prisoners might prefer to be housed with other prisoners and consider that a safer environment for them. In either case, placing TGNC prisoners in voluntary separation should be considered a modular approach, that can be partially or fully implemented in accordance with the needs of the prisoner. The best way to achieve this goal is by privileging the prisoners' own preferences.

2. Adjusting Prison Space to TGNC Needs

When TGNC people are incarcerated, the facility in which they are placed should be fitted to their unique needs, as it already is with regard to other prisoners. Some facilities offer personal cubicles for showers, so that TGNC prisoners are not required to shower with other prisoners in a way that would pose a risk to them. Other correctional facilities are structured in a way that allows some prisoners to sleep separately from others while still sharing a space with them during daytime. TGNC prisoners must also be ensured safe access to correctional personnel, and personnel must be educated on the special risks to which this population may be exposed. Body searches by correctional personnel should be kept to a minimum, and, when such a search is required, the TGNC prisoners should be allowed to choose the gender of the officer performing it. TGNC prisoners must also be ensured a right to express their gender identity as they see fit, including dress, makeup, hair style, underwear, et cetera.

Furthermore, they must be ensured access to medical treatment that responds to their needs, including all forms of gender-affirming medical care.

3. Consideration of the Special Hardships of TGNC Incarceration in Sentencing

The special challenges facing TGNC people in prison should be weighed when their sentences are being determined. Here, we seek to undermine one last binary distinction: the separation between carceral logic and judicial logic. Under the traditional philosophy of punishment, the question of how much time a convicted person should serve is understood as separate from the question of how is that time served. Judges decide on punishment according to questions ranging from retribution to rehabilitation, while correctional administrations generally enjoy discretion over issues relating to conditions of confinement. These conditions are subject to lower levels of judicial review, if any.[174]

At a minimum, courts should acknowledge the special hardship TGNC prisoners experience within a carceral system not adapted to their needs and should accordingly reduce their sentences. In the case of Doe 1, the Israeli Supreme Court reduced his sentence for that reason. Even though the policy of administrative segregation was not challenged by the Supreme Court, the Court recognized the unique harm posed by the prospect of prolonged administrative segregation. This decision has the potential to promote a more just treatment of TGNC prisoners. The unique hardships Doe 1 was to suffer reflect the everyday lives of all TGNC prisoners, and the rationale presented in that case should be extended to every case where the sentence of a TGNC defendant is considered.

CONCLUSION

"I think that if I was ever violent toward someone, and if this system is supposed to prevent violence, then the violence it used against me was double that and more. Sexual violence, physical violence, every possible form of violence, verbal, every form of violence."[175]

This Article examined the category of TGNC prisoners as a paradigm from which to observe the instability and ambiguity inherent to the regimes of

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174. Foucault famously called this principle the "Declaration of Carceral Independence—in it is claimed the right to be a power that not only possesses administrative autonomy, but is also a part of punitive sovereignty." FOUCAULT, *supra* note 10, at 247. Colin Dayan has also voiced this critique in the context of the American judicial system. Dayan points to the definition of solitary confinement as an administrative rather than a penal policy, which therefore places it under the authority of the correctional administrative system. She argues that this allows solitary confinement, as a penal practice, to escape judicial review. Dayan, *supra* note 115, at 79.

175. Interview with Dorin Bilia, *supra* note 2.

sex/gender and the carceral penal system, focusing on the Israeli carceral system's attempt to reform the conditions of incarceration for TGNC prisoners and detainees. Examining this specific point in time led us to question the ability of carceral systems to change and, subsequently, to analyze the failure of the Israeli carceral system to change in a meaningful way.

Even though the IPS reform adopted a more progressive discourse on trans and non-binary identities and practices (as reflected in the IPS's willingness to respect Lena's preference to be addressed using female pronouns, for example), this reform was limited by the realities of incarceration. The attempt to distinguish clearly between TGNC people and cisgender people and to identify the completeness of a sex/gender change, after which one is fully recognized as having attained their desired gender identity, is doomed to fail, not simply because lived experiences defy categorization, but also because the process of categorization is in itself a mechanism of discipline and punishment constantly challenged by acts of insurgency.

Looking at the practice of incarceration from the TGNC perspective exposes our societal dependency on systems of classification that attempt to divide human practices into consistent, mutually exclusive categories.[176] The view that one can distinguish coherently between criminals and non-criminals, women and men, and trans and cis people, and spatially segregate them according to such classifications, contradicts the heterogeneity and intersectionality of lived experiences. Unfortunately, the price of this incompatibility between systems of classification and lived experience tends to be paid by those most vulnerable to institutional violence. By examining the IPS's ability to reform around the question of where trans prisoners should be placed, we encountered the difficulties of defining, under the existing system of sex/gender segregation in carceral institutions, who are and are not "real" men or women. By examining the IPS's ability to reform its regulation on incarceration of TGNC prisoners, we exposed the theoretical inconsistencies and perniciousness of incarceration itself. Our attempt to read the carceral system from a TGNC perspective raised pivotal questions relevant to both TGNC and cisgender prisoners. Gender nonconformity serves as a thread that, when pulled, begins to unravel the carceral regime as a whole.

176. The implications of this critique far exceed the scope of this Article and touch on the deepest structures of liberal-democratic governance and the Western-colonial legal tradition of human and civil rights. Such a tradition allocates rights according to a closed system of constructed categories of identity, the transgression of which tends to undermine the coherency of the legal argument made in its name. For a discussion of the costs of human rights policies in the specific context of a feminist struggle, see JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 287 (2006).