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Resistance and Repression: 
The Black Guerrilla Family in Context

AZADEH ZOHRABI*

Introduction

The California Department of Corrections and Rehabilitation (“CDCR”) has identified prison gangs as “a serious threat to the safety and security of California prisons.” In response to this safety concern, the CDCR has developed a “gang validation” system to identify suspected prison gang members and associates and to administratively segregate them from the general population by holding them for years in harsh, highly restrictive security facilities, often referred to as housing units (“SHUs”). This note examines CDCR’s gang validation process as applied to the Black Guerrilla Family (“BGF”), the only Black prison gang that CDCR recognizes. Initial research for this note revealed a glaring void in legal and scholarly writings about the BGF. This Note began with a focus on the serious constitutional issues raised by CDCR’s gang validation policies and procedures as applied to Black inmates. However due to the lack of existing scholarship on the subject, it would be irresponsible to discuss those issues without first examining the history of the BGF, its rise under founding leader George Jackson, and the organization’s political legacy. Many of the inmates who are validated as members of the BGF today are targeted solely because of their interest in the writings of George Jackson or because of their political ideology. This historical review puts CDCR’s current stated

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policies toward the BGF in stark contrast with the insidious involvement of various law enforcement entities, including the FBI and the CDCR, in the creating and criminalizing the group.

Part I begins with an historical examination of the political movement that gave rise to the BGF, specifically focusing on the close working relationship and political alliance between the BGF organization and the Black Panther Party ("BPP"), before the FBI essentially destroyed the BPP. In this section, I also examine the life of George L. Jackson — a writer, political theorist, and BGF leader — who was shot dead by prison guards while a prisoner at San Quentin. Part II covers CDCR’s official “recognition” of BGF as a gang, and provides a detailed review of the gang validation process. This Part also examines current problems faced by Black inmates facing gang validation, as illustrated by two recent court cases. Part III analyzes the constitutional issues at stake under CDCR’s current prison gang policies. Finally, I conclude with recommendations for legal and policy changes that would improve CDCR’s treatment of Black inmates, and bring the gang validation process within constitutional bounds.

I. Resistance: The Black Panther Party, George Jackson, and COINTELPRO

The 1960s mark one of the most socially and politically charged periods in recent American and world history. With intense struggles for racial equality happening in the United States, great gains were made, as well as many setbacks. Black Americans braved assaults by police dogs and water hoses, and risked their lives to demand equal voting rights and the integration of public transportation, schools, and other public facilities. While an earlier phase of the civil rights movement achieved some success through litigation — most notably Brown v. Board of Education, in 1954,2 and Boynton v. Virginia, in 19603 — the Sixties saw Black Americans begin to use direct action and civil disobedience to demand enforcement of these decisions.4 This period also featured explosive race riots in major cities across the country. Watts, Newark, Harlem, the Bronx,

Chicago, and Detroit all erupted in violence, largely in response to ongoing police brutality and a lack of political accountability or enforceable legal remedies available to the Black community.\(^5\) In Oakland, California, the Black community’s concerns with police violence led a group of young activists to create the Black Panther Party for Self Defense. Charting the rise and fall of the BPP is necessary to understanding the current issues facing inmates identified as belonging to the BGF for several reasons. The BPP and the BGF were closely allied and shared a similar ideology.\(^6\) Both groups were inherently political and began through study groups that examined, learned from, and critiqued domestic and international liberation struggles through the lens of law, history, and political theory. They strove to create a public discourse on race and to disseminate this knowledge to the Black community and the broader public through a newspaper, *The Black Panther*, and other widely read writings by members from both groups.\(^7\)

The two groups were also similar in how they were policed and criminalized by various law enforcement agencies. Members of both groups were subject to illegal, brutal, cruel, and inhuman practices at the hands of law enforcement and corrections officers. This aggressive policing was often extra-legal, and sometimes patently illegal, but ultimately dismantled the BPP and reduced the BGF to a prison organization.

Just as importantly, the differences between the groups also make a valuable comparison. Due to the relative freedom and mobility of the surviving members of the BPP, they were better able to share their stories with the public. There is a good amount of scholarly, legal, and autobiographical writing by or about BPP members, which offers insight into the origins and destruction of the BPP. The criminalization of the BGF, however, remains largely hidden from the public view because of restricted access to validated prisoners and escapes meaningful judicial review due to excessive deference to prison officials. As explored in the remainder of Part I, the comparison of similarities and differences between these two groups reveals a pattern of unwarranted criminalization and repression of the BGF based on its political and social beliefs, much the same as befell the BPP before.

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7. Id. at 136-38.
A. The Black Panther Party and COINTELPRO

Huey P. Newton and Bobby Seale, two college students from Oakland, California, created the BPP in 1966 out of concern for widespread police brutality and abuse occurring in Black neighborhoods.8 They began by holding their own political education classes studying and discussing law, history, and international liberation struggles of colonized and oppressed peoples.9 The BPP soon became a nationwide grassroots organization addressing problems faced by Black communities across the country, including police brutality, disproportionate imprisonment of people of color, unemployment, and housing discrimination.10 The BPP worked to improve these conditions by starting several initiatives in the local community, including:

[A] free breakfast program for neighborhood children, a program to test black residents for sickle-cell anemia, and a senior citizens safety program to escort the elderly to local banks and supermarkets. The Party was also involved in educating Oakland’s black residents on issues relating to voter registration and legal aid services.11

They attracted the attention of local police and the FBI when they began armed patrols of Black neighborhoods to monitor the Oakland police, all in response to increasing police brutality and ineffective or nonexistent legal and political remedies.12 Newton later became a law student, and he educated members of the BPP and the wider community about their right to bear arms in self-defense, and how to pressure the police to carry out their duties legally through community observation.13 The BPP also used a newspaper, The Black Panther, to publicize cases of police brutality and provide the broader public with “a way of interpreting events [affecting] the community from a Black perspective.”14 This interpretation was highly critical of the police department and the criminal justice system.15

9. Id. at 111.
10. Seale, 964 F. Supp. at 920.
11. Id.
12. NEWTON, supra note 8, at 120; Seale, 964 F. Supp. at 920.
13. NEWTON, supra note 8, at 114–15; Seale, 964 F. Supp. at 921.
14. NEWTON, supra note 8, at 143.
15. CUMMINGS, supra note 6, at 110.
The FBI responded to the emergence of the BPP and other domestic dissident groups criticizing the government's actions, both at home and abroad. They did this by focusing the covert counter-intelligence program ("COINTELPRO") on these groups. COINTELPRO operatives infiltrated these groups and to gather information and employed militaristic counterintelligence tactics "in part because its chief officials believed that the existing law could not control the activities of certain dissident groups, and that court decisions had tied the hands of the intelligence community." The major activities undertaken by COINTELPRO were extra-legal, clearly in violation of the constitution, and aimed to prevent the rise of "militant black nationalist organizations" such as the BPP, the Southern Christian Leadership Conference, the Student Non-Violent Coordinating Committee, and the Nation of Islam. The FBI felt so threatened by the possibility of effective Black leadership that officials went as far as labeling Reverend Martin Luther King Jr. the "most dangerous" Black leader in the country. In response to the American public's growing concerns about the constitutionality and legitimacy of COINTELPRO's operations, Congress formed the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, chaired by Senator Frank Church and known as the Church Committee. According to the Committee's 1976 report, "during 1967–1971, FBI headquarters approved 379 proposals for COINTELPRO actions against 'black nationalists.'" These operations utilized dangerous, cruel, and inhuman techniques that gave rise to the risk of, and often resulted in, death, while disregarding "the personal rights and dignity of the victims."

COINTELPRO's surveillance and infiltration of the BPP was an illegal violation of the constitution and it imposed a heavy toll on the

19. CHURCH COMMITTEE BOOK II, supra note 17, at 11.
20. Id.
21. CHURCH COMMITTEE BOOK III, supra note 18, at 88.
22. Id.
lives of individual BPP members. 23 According to the Church Committee Report, “the chief investigative branch of the Federal Government, which was charged by law with investigating crimes and preventing criminal conduct, itself engaged in lawless tactics and responded to deep-seated social problems by fomenting violence and unrest.” 24 Moreover, these “lawless tactics” were not isolated incidents; COINTELPRO was a highly organized nationwide project carried out in cooperation with local police and prosecutors offices. 25 In fact, the FBI was actually proud of the widespread violence and chaos it created, “view[ing] this carnage as a positive development,” which it successfully exploited to create tensions in the Black community and delegitimize the BPP. 26 This strategy seemed to work. The FBI relied heavily on informants and infiltrators, often posing as fully fledged members of the BPP, who were put in positions to create violent situations and disruption within the BPP. These infiltrators would then commit crimes and disruptive acts that appeared to have been committed by the BPP. 27 The FBI also encouraged local police to raid BPP offices, many times in clear violation of the constitution. 28 These raids were highly militaristic and frequently resulted in unwarranted arrests, violence, and death. 29

The FBI was not only concerned with the BPP’s activities; it also focused on suppressing the BPP’s political message. A memo from FBI headquarters to the field offices in Chicago, Los Angeles, Miami, Newark, New Haven, San Diego, and San Francisco ordered those offices to submit proposals on effective ways to cripple the BPP newspaper, The Black Panther. 30 The memo stated in part:

The BPP newspaper has a circulation in excess of 100,000 and has reached the height of 139,000. It is the voice of the BPP and if it could be effectively hindered it would result in helping to cripple the BPP. Deadline being set in view of the need to receive recommendations for the purpose of taking appropriate action expeditiously. 31

24. CHURCH COMMITTEE BOOK III, supra note 18, at 189.
25. Id. at 187–223; Elijah, supra note 16, at 131.
26. CHURCH COMMITTEE BOOK III, supra note 18, at 192.
27. Id. at 187–223.
28. Id. at 220–23.
29. Id.
30. Id. at 214.
31. Id.
The offices responded to this memo with numerous strategies, such as: working with the IRS to require the BPP report newspaper sales weekly; attempting to use old statutes, like a “rarely used transportation tax law” against the BPP; entering the BPP printing facilities and spraying a “chemical agent” that would “emit an extremely noxious odor rendering the premises surrounding the point of application uninhabitable”; and sending “threats from another radical organization against the newspaper [that] might convince the BPP to cease publication.” The FBI even contacted United Airlines and advised them to raise the rate they were charging the BPP to transport their newspapers by 40%. By the time this FBI program was retired, “it was responsible for maiming, murdering, false prosecutions and frame-ups, destruction, and mayhem throughout the country.” Many BPP members were killed as a result of the violence orchestrated by the FBI including: Alprentice “Bunchy” Carter, John Huggins, John Savage, Sylvester Bell, Mark Clark, Fred Hampton, Bobby Hutton, and many others. Numerous people affiliated with the BPP were imprisoned because of COINTELPRO’s illegal activities. Although some of these political prisoners, such as Geronimo Pratt and Dhoruba Bin-Wahad, were eventually exonerated after serving twenty-seven and nineteen years respectively for crimes they did not commit, others are still serving time in prison some thirty to forty years later. Huey Newton himself spent time in prison when he was convicted of murdering a police officer in Oakland. That conviction was soon reversed by the appellate court, which held that Newton’s constitutional rights were violated at trial. While in prison,

32. CHURCH COMMITTEE BOOK III, supra note 18, at 215.
33. Id. at 214–18.
34. Elijah, supra note 16, at 130.
35. CHURCH COMMITTEE BOOK III, supra note 18, at 189–92. Carter and Huggins were killed on January 17, 1969, on the UCLA campus by members of the United Slaves (“US”) organization due to the FBI’s misinformation campaign designed to heighten tensions between the groups. Id. After the shootings, the two groups met to talk out their differences and agree not to hold a grudge over the deaths of Carter and Huggins. Id. The FBI responded by intensifying their efforts to create tensions between the groups by mailing derogatory pictures to the BPP offices across the country with the purpose of indicating to “the BPP that the US organization feels they are ineffectual, inadequate, and riddled with graft and corruption.” Id. These efforts led to the shooting of another BPP member, John Savage, by US organization member Jerry Horne. Id.
36. Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979).
39. Id.
Newton became familiar with the writings of George L. Jackson, an inmate at San Quentin. Jackson later requested to join the BPP and often wrote for The Black Panther newspaper.\textsuperscript{41}

\section*{B. George L. Jackson and the Black Guerrilla Family}

George L. Jackson was arrested in 1960 at age eighteen for being an accomplice in a gas station robbery for seventy dollars. Instead of going to trial, Jackson “agreed to confess in return for a light sentence; the judge gave him one-to-life, a sentence designed to allow judicial flexibility, but which ultimately put sentencing in the hands of prison administrators.”\textsuperscript{42} During his long years in solitary confinement, Jackson busied himself studying political theory, law, and history, much like his counterparts in the BPP.\textsuperscript{43} By 1968, he led political education classes with other inmates to further their education. These meetings led to the formation of the Black Guerrilla Family, a radical political organization.\textsuperscript{44} Jackson also joined the BPP, and his contributions to The Black Panther newspaper quickly earned him a reputation as an eloquent writer and insightful political theorist. In 1970, Jackson published his first book, Soledad Brother. It was an overnight best-seller and birthed a “body of political work that spurred crucial points of departure within the lineage of contemporary U.S. prison praxis.”\textsuperscript{45} The book continues to provide “significant conceptual, theoretical, and practical points of departure for imprisoned and non-imprisoned political workers.”\textsuperscript{46} Much like the members of the BPP, who faced severe repression for their political activities, Jackson soon felt the weight of his words. As more people began reading his work, Jackson “became a liability to the state authorities because of his effectiveness as an organizer and educator of fellow prisoners.”\textsuperscript{47}

In 1970, Jackson’s mentor, W.L. Nolen, a “widely respected black prison boxing champion, mentor, legal activist and political organizer,” was killed by the “notoriously racist correctional officer Opie G. Miller.”\textsuperscript{48} Shortly after a grand jury ruled that Nolen’s death

\begin{itemize}
  \item 41. NEWTON, supra note 8, at 306–07.
  \item 42. Joy James, George Jackson, in IMPRISONED INTELLECTUALS 84, 84 (Joy James ed., 2003).
  \item 43. Id. at 85.
  \item 44. Id.
  \item 45. CUMMINGS, supra note 6, at 174.
  \item 46. DYLAN RODRIGUEZ, FORCED PASSAGES 114 (2006).
  \item 47. Id. at 119.
  \item 48. RODRIGUEZ, supra note 46, at 117.
\end{itemize}
was justifiable homicide, correctional officer John V. Mills was killed on the cellblock where Jackson was housed.\(^4^9\) Despite the lack of any physical evidence, Jackson and two other Black inmates, John Clutchette and Fleeta Drumgo, were indicted for killing Mills.\(^5^0\) The three men became known as the "Soledad Brothers," in a case that once again put the spotlight on the problems within California’s prison system.\(^5^1\)

The documents released by the FBI through the Freedom of Information Act show that the FBI was already tracking Jackson’s activities at this time.\(^5^2\) FBI Director J. Edgar Hoover was in constant communication with the FBI’s San Francisco field office regarding progress of the Soledad Brothers’ case and his concerns about its constitutionality.\(^5^3\) Early in February 1971, the FBI informed the California Governor’s office, the state Attorney General, and the superintendent of Soledad Prison about their investigation of Jackson. In mid-February, administrators from the California Department of Corrections and Rehabilitation met with FBI agents at the Bureau’s Salinas Valley location to discuss in detail a civil suit the Soledad Brothers had filed alleging various constitutional violations.\(^5^4\) The records also show that the FBI sent agents to talk with attorneys involved in the case and to the prisons, where corrections officers arranged secret meetings with inmates who appeared to have only second hand knowledge about Officer Mills’ death.\(^5^5\) During this time, Jackson’s defense attorney, Fay Stender, fought constantly with prison administrators to have meaningful access to her client, witnesses, and relevant records.\(^5^6\) Inside the prison, the growing animosity between corrections officers and Black inmates culminated August 21, 1971, with a fatal shooting on

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49. Tom Hall, *Soledad Verdict: 8 Officials Responsible*, S.F. EXAMINER, Apr. 10, 1975, at 3. After George Jackson was killed in 1975, relatives of Nolen and two other inmates killed in the shooting, Cleveland Edwards and Alvin Miller, brought a civil rights action against the corrections officers they believed were responsible for these deaths. The all-White jury found that “eight former or current prison officials are responsible for the deaths of three black convicts shot from a gun tower.” *Id.*

50. James, *supra* note 42, at 85.


53. *Id.*

54. *Id.* (disclosing FBI San Francisco Field Office File #44-1058, report of Feb. 17, 1971).

55. *Id.*

56. *Id.*
the San Quentin yard that left Jackson, three guards, and two other inmates dead.\textsuperscript{57} The entire prison was put on lockdown for more than a month after the shooting, but inmates were able to leak a letter to the outside signed by twenty-seven Black, Latino, and white inmates who were on the yard during the shooting and claimed that Jackson was in "an assassination conspiracy," rather than in an escape attempt, as prison authorities claimed.\textsuperscript{58}

The FBI conducted a limited investigation into the incident after numerous Congressional inquiries, but the report was never made public.\textsuperscript{59} Six inmates, later known as the San Quentin Six, were indicted “[on] three counts of murder of correctional officers, two counts of murder of other inmates, and one count of conspiracy to escape, kidnap, and possess a weapon. They were also indicted in several separate counts charging aggravated assault upon three other officers.”\textsuperscript{60} After a sixteen-month trial, which cost the state nearly two million dollars and took twenty-four days of deliberation, a jury acquitted three of the defendants, and found Johnny Spain, Hugo Pinell, and David Johnson guilty.\textsuperscript{61}

In 1972, the year after Jackson was killed, the all-White jury in the Soledad Brothers case returned a not guilty verdict. Juror John Callahan asserted, "there was no case against them" and commented that "everybody who testified against them was bought."\textsuperscript{62} Despite his death and the not guilty verdict in the Mills case, Jackson's life and political legacy continued to be criminalized by prison administration. In fact, "a wall in the San Quentin prison 'museum' contains a mounted trophy case of the high powered rifle that killed [Jackson] on August 21, 1971, along with a bronze plaque enshrining the name of the guard who pulled the trigger."\textsuperscript{63} Visitors to San Quentin prison are often told the story of this notorious outlaw who was “heroically” killed by prison guards.\textsuperscript{64}

Not long after Jackson was killed, Black inmates in California

\textsuperscript{57} The Law: The Longest Trial, TIME MAG. (July 19, 1976), http://www.time.com/time/magazine/article/0,9171,914334,00.html.
\textsuperscript{58} Michel Foucault et al., The Masked Assassination, in WARFARE IN THE AMERICAN HOMELAND 151 (Sirene Harb trans., Joy James ed., 2007).
\textsuperscript{59} See FBI JACKSON FOIA FILE, supra note 52, at pt. 3-5.
\textsuperscript{60} Spain v. Procunier, 408 F. Supp. 534, 538 n.4 (N.D. Cal. 1976).
\textsuperscript{62} See FBI JACKSON FOIA FILE, supra note 52, at pt. 5 (citing newspaper article with headline “Soledad Witnesses Were Bought, Juror Says of Not Guilty Verdict”).
\textsuperscript{63} RODRIGUEZ, supra note 46, at 119.
\textsuperscript{64} RODRIGUEZ, supra note 46, at 119.
prisons began a tradition they called "Black August" to commemorate George Jackson and the other victims of COINTELPRO, and to mark the global oppression of Black people.\(^{65}\) The tradition also commemorates significant civil rights and freedom struggle events that occurred in August, such as: the Watts riots in August 1965; the march on Washington in August 1963; the MOVE family bombing of 1978; Nelson Mandela's arrest in August 1962; and the murder of Emmitt Till in August 1955. During August each year, people who commemorate Black August would observe the following practices:

[They] did not listen to the radio or watch television. Additionally, they didn't eat or drink anything from sun-up to sundown; and loud and boastful behavior was not allowed. The use of drugs and alcoholic beverages was prohibited and the brothers held daily exercises because, during Black August, emphasis is placed on sacrifice, fortitude, and discipline. Black August is a time to embrace the principles of unity, self-sacrifice, political education, physical training, and resistance.\(^{66}\)

While this tradition began in California prisons, the wider community quickly embraced it. Every year, communities across the country and around the world commemorate Black August with major festivals, with notable examples taking place in Los Angeles, Oakland, New York, Washington D.C., and Atlanta.\(^{67}\) Across the country, Black August commemorative organizations engage in grassroots work aimed at improving Black communities such as food programs, prisoner support services, and youth education programs. Jackson remains one of "the most focused and incisive 'students' of the prison regime's recent historical formation,"\(^{68}\) and his writings articulate a radical praxis that is still widely read, cited, and assigned for undergraduate courses at the University of California.\(^{69}\)

\(^{68}.\) RODRIGUEZ, supra note 46, at 114.
II. Repression: The Creation of the Black Guerrilla Family as a “Gang”

The CDCR has identified five organizations that it recognizes as prison gangs, and the Black Guerrilla Family is the only one whose members are Black.\textsuperscript{70} Prison administrators believed that BGF "pose[d] a new type of correctional problem" because the members were "younger, more politicized, and tended to be organized along racial and ethnic lines."\textsuperscript{71} While it is true that the BGF organized mostly along racial lines, the organization was not originally formed as a gang. Rather, the organization grew out of increasing inmate interest and concern about prison conditions in California and across the country and with the patterns of brutal repression and abuse on the inside.\textsuperscript{72} This was also a time when COINTELPRO and other law enforcement agencies proceeded to criminalize social change movements and effectively neutralized many dissenters through aggressive surveillance, harassment, and policing. The Black Guerrilla Family was created to raise awareness, concern, and unity among inmates and the American public about both the harsh conditions that Black people faced as a whole, and the intense repression that Black inmates, especially those with unpopular political beliefs, faced inside California’s prison.

In order to develop a rigorous understanding of the gang problem in California’s prisons it is necessary to understand a few things about the different types of gangs. First, the CDCR makes a strong distinction between street gangs and prison gangs.\textsuperscript{73} Members of street gangs mostly self identify as gang members or affiliates upon entering the prison for general classification and placement purposes. The demographics and the number of members in prison often reflect the characteristics of the members in the streets. On the other hand, prison administrators, usually from the Institution of Gang Investigations ("IGI"), specifically seek out, identify, and validate prison gang members. These inmates are often, but not always, members of a street gang before they are validated as prison gang members. However, as discussed below, validation of prison gang members is often not the result of actual

\textsuperscript{72} James, supra note 42, at 85.
\textsuperscript{73} Tachiki, supra note 71, at 1148.
gang activity, but rests mainly on the fruits of an IGI investigation of their property and surveillance of their correspondence. Based on these materials, validated gang members and associates are preemptively placed in segregated, higher security housing as an administrative measure to prevent “actual” gang activity.

A. The Gang Validation Process

The California Code of Regulations governs all gang validations in the California prison system. In order for the IGI to validate someone as a member or associate of a prison gang, the IGI must complete a gang validation package documenting three independent sources of evidence indicating gang association or membership. These sources can include any admissions, tattoos, symbols, photographs, books, newsletters, and other written and verbal communications, including legal documents. At least one of these sources must provide a “direct link” to a current or former validated gang member. All of the source items must contain “factual information,” and when this information comes from a confidential source, the item must meet a reliability test. Before this package is submitted to the Office of Correction Safety (“OCS”) for review, the IGI must interview the inmate after giving at least twenty-four-hour prior notice of the interview. At the time of notification, prison officials must disclose to the inmate what source items will be used for the validation review. During the interview, the inmate may respond to the source items. These responses are documented by the IGI and included in the validation package that is sent to OCS. OCS is responsible for approving or rejecting gang validations based on the materials presented in the gang validation package.

75. Id. § 3378(c)(8) (itemizes the sources that can be used to determine gang identification, but the code as written is over broad because it fails to codify the terms of the Castillo settlement — especially the provision regarding actual gang activity versus status).
76. Id. § 3378(c)(3).
77. Id. § 3378(c)(2).
78. Id. § 3378(c)(6)(B).
79. Id. § 3378(c)(6)(C).
80. Id. § 3378(c)(6)(D); see also CHARLES CARBONE & STEVE M. CASTILLO, PRISONER SELF HELP MANUAL: HOW TO CHALLENGE PRISON GANG VALIDATION AND SEGREGATION 5 (California Prison Focus, 3d ed. 2008).
81. tit. 15, § 3378(c)(6)(E).
Once a person is validated as a gang member or associate, OCS must also determine whether that person is "active" or inactive. The validation and supporting documents are then placed in the inmate's central file. Based on this status, the Institution Classification Committee decides whether the inmate can be housed in the general population, or whether he should be confined to a SHU. Validated inmates must have their status reviewed for inactivity every two years if they are housed in general population and every six years if they are housed in a SHU.

Once an inmate is validated as a prison gang member or associate, they can be placed in the SHU if they are found to be active. Life in a SHU is not like life in the general population. Inmates housed in a SHU are locked in small, windowless cells for at least 22.5 hours a day. Food is served to them through slots in their cell doors. The only regular opportunities to leave their cell is to shower a few times a week and to exercise in small concrete cages, either alone or with a cellmate if they are double celled. Additionally, inmates are strip searched, shackled at the waist and ankles, and escorted by two corrections officers any time they leave their cells. They are not allowed to participate in any classes, work programs, trainings, or meetings. At best, the California's SHUs impose "stark sterility and unremitting monotony. Inmates can spend years without ever seeing any aspect of the outside world except for a small patch of sky." At worst, California's SHUs have been sites of severe physical and mental abuse caused by "a pattern of correctional officers using excessive force against inmates."

82. Id. § 3378(c)(2)-(5). A member is defined as having been accepted into membership by the gang, while an associate is only involved "periodically or regularly with members or associates." Id. § 3378(c)(4) A dropout is a previous member or associate who is no longer affiliated with the gang and has formally debriefed. Id. § 3378(c)(5).
83. Id. § 3378(c)(6)(G).
84. Id. § 3378(d).
85. Id. §§ 3378(d)-(e).
86. Id.
88. Id.
89. Id.
90. Tachiki, supra note 71, at 1124.
91. Id.
93. Id. at 1229-30.
B. Changes Required by the 2004 Castillo Settlement

In 2004, the CDCR entered into a settlement with Steve Castillo, an inmate who filed a civil rights action challenging various aspects of CDCR’s gang validation policies and procedures. Castillo first filed suit in 1994, and after over ten years of litigation, Castillo was successful in getting a court to order CDCR to codify its validation and debriefing policies and requiring some changes to department policy. One of the changes was the twenty-four-hour prior notice requirement, discussed above and codified in §3378(c)(6)(B).

Other significant changes intended to afford inmates greater due process protections were made in regards to the “source items” that can be used to validate an inmate. First, CDCR agreed to ascertain the date of any photograph used as a source item and agreed that no photograph older than six years will be used. Additionally, CDCR agreed that, “at the time the photograph is taken, at least one person in the photograph shall have been validated, or be validated no more than six months after the photograph was taken.” Second, the CDCR agreed that for any tattoo or symbol being used as a source item, prison staff would provide an explanation “as to why the particular tattoo or symbol has a specific association with a particular prison gang.” Third, CDCR agreed that for any written material or communication used as a source item, the staff must have an “easily understood basis” for why the evidence is a reliable indication of gang membership or association. Lastly, the agreement requires that in order for a validated inmate to be transferred to secure housing, he must first be “found to be a current, active gang member or associate.”

“Current activity” is “defined as any documented gang activity within the past six years.” Gang activity is described as an inmate “knowingly commit[ting] unlawful acts or acts of serious misconduct on behalf of a gang.” Finally, CDCR also agreed to train all relevant staff members in the nuances of the new procedural protections. It is not clear whether this requirement has been met:

94. CARBONE & CASTILLO, supra note 80, at 11.
95. Id.
96. Id. at 17.
97. Id. at 18.
98. Id.
99. Id.
100. Id. at 19.
101. Id.
102. Id. at 13.
however, prisoner advocacy groups continue to receive mail from inmates with serious concerns about the validity of their gang validations.\textsuperscript{103}

C. Black Guerrilla Family Gang Validations

Based on the few cases that have been published on BGF gang validations, there is a strong appearance that Black inmates are being validated as members of BGF based on their possession of any materials that mention George Jackson or Black August, regardless of whether they are tied to actual gang activity. In this section, I will discuss two recent California cases in order to show that gang validations based on these materials are problematic and possibly unconstitutional. My focus in discussing these cases will be on the judicial treatment of BGF and materials related to George Jackson and Black August, rather than on the nature of the case or the outcome of the claims.

\textit{i. In Re Furnace}

In the case \textit{In re Furnace}, the California Court of Appeals for the Fifth Appellate District denied Furnace’s petition for a writ of habeas corpus, holding that a BGF gang validation, “which was based in part on his possession of a book, newspaper article, pictures and CD,” did not violate his first amendment rights.\textsuperscript{104} Furnace, an inmate at Salinas Valley State Prison, was validated as a member of BGF based on source items that were discovered during an IGI search of his property. These items included a piece of paper with the contact information of Hugo Pinell (a validated BGF member), a book by George Jackson, an audio CD outlining the life and ideology of George Jackson, a flyer promoting a 2005 Black August community event in Oakland, and a newspaper article explaining the meaning of Black August.\textsuperscript{105} He challenged the validation on the grounds that his Fourteenth Amendment due process rights were violated because the evidence used to validate him was insufficient. He also argued that his “First Amendment rights have been violated

\textsuperscript{103} California Prison Focus (CPF) is an organization that investigates and documents human rights abuses in California SHU facilities and advocates on behalf of people housed in SHUs. CPF also publishes a quarterly magazine, \textit{Prison Focus}, which is widely distributed both inside and outside prisons. \textit{See Publications, CAL. PRISON FOCUS, http://www.prisons.org/publications.htm} (last visited Sept. 30, 2011).

\textsuperscript{104} \textit{In re Furnace}, 185 Cal. App. 4th 649, 666 (2010).

\textsuperscript{105} \textit{Id. at} 654-55.
by use of protected materials — the book, CD, and newspaper articles — to validate him as a BGF associate."\textsuperscript{106} The court denied the petition, concluding that the prison regulations were constitutional.

In assessing the due process claim, the court concluded that its power of judicial review was "limited to determining whether the classification decision is arbitrary, capricious, irrational, or an abuse of the discretion granted to those given the responsibility for operating prisons."\textsuperscript{107} This standard only requires that "some evidence" support the decision of prison administrators. This standard is very deferential to prison administrators because the Supreme Court has asserted, "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform."\textsuperscript{108} Therefore, the court deferred to the IGI's knowledge and understanding of the BGF, and its operations in determining who is a gang member or associate.

The IGI counts any book, photo, CD, flyer, article, newsletter, drawing or tattoo which refers to George Jackson or Black August as "gang materials" if they are possessed by a Black inmate.\textsuperscript{109} Much of the concern about these materials is in regards to the ideology they convey. In Furnace, the IGI repeatedly expressed his concerns that Black inmates were being "indoctrinated with the ideology of the BGF," rather than identifying actual gang activity.\textsuperscript{110} Furnace was interviewed by IGI after his validation package was submitted to OCS for review, although according the regulations he should have been interviewed prior to submission so that his response could be recorded and included.\textsuperscript{111} During the interview, he was asked about his possession of the George Jackson book. He responded, "it’s just a book," and went on to state that "the book did not make him a BGF member any more than reading Stalin made him a communist or reading the Koran made him Al Qaeda."\textsuperscript{112} It would not be an incredibly surprising discovery to find all these "source items" in the backpack of a college student in any major U.S. city. In that context, possession of such materials could not be considered a legitimate or

\textsuperscript{106} In re Furnace, 185 Cal. App. 4th at 659.
\textsuperscript{107} Id. at 666.
\textsuperscript{109} Johnson v. California, 543 U.S. 499, 517 (2005). Since all of the prison gangs are recognized by the CDCR are strictly defined along racial lines, only Black inmates can be validated as BGF members.
\textsuperscript{110} In re Furnace, 185 Cal. App. 4th at 666.
\textsuperscript{111} See supra Part II.A.
\textsuperscript{112} In re Furnace, 185 Cal. App. 4th at 656.
reasonable reason to suspect gang membership. However, if the person happens to be a Black man in a California prison, he could be validated as a member of a prison gang and given an indeterminate sentence in a SHU facility simply as an “administrative measure,” without any finding of actual gang activity.

This problem is further amplified by the IGI’s assertion that possession of certain materials, even though completely unrelated to “planning, organizing, threatening, financing, soliciting, or committing unlawful acts or acts of misconduct” are considered gang “activity.”113 Before a validated member or associate can be transferred to a SHU facility, the Castillo Settlement requires that the inmate be determined to be “currently active.” Current activity refers to “documented gang activity within the past six years.”114 In Scales v. United States, the Supreme Court found that ‘active’ membership in an organization is “more than nominal, passive, inactive, or purely technical membership” and that to be “active” a person must devote “all or a substantial part of his efforts to the [gang].”115 The California Supreme Court adopted the language in Scales for defining “active membership.” The Court has held that due process requires that liability for “active membership” in a criminal organization includes a requirement to show that the accused actually has guilty knowledge and intent.116 Specifically, the California Court held that the usual and ordinary meaning of “actively” is “being in a state of action: not passive or quiescent,” “characterized by action rather than contemplation or speculation.” Further, one “actively participates” in some enterprise of activity by taking part in it in a manner that is not passive.”117 If possession of books, CDs, articles, and other materials can be used as source items, even though there is no actual “activity” involved, the six-year requirement becomes unworkable. It is not clear whether the item has to be created, written, or recorded within the past six years; or if the inmate must have been in possession of it within the past six years. It is also unclear when the date would start running, as it could be when he actually comes to possess the item or when it is discovered, both of which could be wholly irrelevant to whether he is actually a member of a prison gang. Additionally, if BGF is defined by CDCR as a Black prison gang, meaning only Black men

114. CARBONE & CASTILLO, supra note 80, at 11.
117. Id. at 747.
can be validated as BGF members, it appears that possession of materials related to Black August or George Jackson is only criminalized and can only lead to a gang validation and SHU placement if possessed by a Black inmate. Inmates who belong to other races could possess the same materials and not be validated as BGF gang members because they are not Black.

**ii. Harrison v. Institution of Gang Investigations**

In *Harrison v. IGI*, the U.S. District Court for the Northern District of California denied the IGI’s motion for summary judgment in a case arising out of the confiscation of mail related to George Jackson and Black August and resulting in a subsequent BGF gang validation.\(^{118}\) The IGI at Pelican Bay State Prison seized several items from Harrison’s outgoing mail including: some writings on Black August; letters “promoting the New Afrikan Revolutionary Nationalism; the New Afrikan Collective Think Tank; and the New Afrikan Institute of Criminology addressed to Coalition Against Police Abuse; and one manila envelope containing a drawing of a dragon.”\(^{119}\) Prison officials at Pelican Bay also confiscated Harrison’s incoming mail including “an envelope containing pictures of George Jackson, Joanne Chesimard (also known as Assata Shakur), Malcolm X, Nat Turner and others.”\(^{120}\) This envelope was eventually returned after Harrison filed an appeal.

Here, the court began its analysis by acknowledging that prisoners only retain those first amendment rights “not inconsistent with their status as prisoners or with legitimate penological objectives of the corrections system.”\(^{121}\) Further, “prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions” or to censor “expression of inflammatory political, racial, religious or other views.”\(^{122}\) The IGI argued that Black August was established:

> [T]o honor deceased members of both the Black Movement and the BGF. Black August is observed by both present and former BGF members and is promoted by BGF affiliates (ex-felons) residing in the community. During Black August members of the

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119. *Id.* at *7*.
120. *Id.*
121. *Id.* at *10–11*.
122. *Id.* at *13–14* (emphasis in original).
BGF advocate retaliation against correctional officers and others for the deaths of BGF ‘comrades’ who have allegedly been murdered by prison officials.\textsuperscript{123}

They also argued that the BGF was “attempting to use other groups and entities as ‘cover’ to lend respectability to the BGF, and facilitate communication between BGF affiliates.” The IGI considered the New Afrikan organizations, discussed above, as “entities that promote BGF.”\textsuperscript{124}

These arguments are problematic because they conflate a political ideology and politically and culturally oriented social movements with criminal activity. As discussed in Section I, the BGF was originally created as a cultural and political organization and was later characterized as a gang by the CDCR. An overwhelmingly large portion of the source items that are being used to validate Black men as members of the BGF are essentially political or cultural in nature and content, and unrelated to actual gang activity. In fact, when California Prison Focus, an organization that investigates and documents conditions in California SHU facilities, included an article on Black August in their quarterly newsletter, they received numerous letters from inmates who stated that the newsletter had been used as a source item to validate Black inmates as BGF.\textsuperscript{125}

Through its gang validation procedures, the IGI is attempting to place a categorical ban on anything related to Black August, George Jackson, and certain cultural and political ideologies by connecting them to criminal activity. By characterizing supporters of Black August as “ex-felons,” it appears that they are attempting to strip these cultural and political events of their relevancy in Black communities across the country. As discussed in Part I, these events, and the organizations that support them, are designed to raise cultural, historical, and political awareness, not to further gang activity. If the IGI’s arguments were accepted as valid, that would mean that thousands of people who find value in the commemoration of Black August or the scholars and students who find value in the writings of George Jackson, could be characterized and criminalized as gang affiliates due solely to their cultural and political identification or choice of reading material they send to a Black inmate or parolee.

\textsuperscript{123} Harrison, 2010 U.S. Dist. LEXIS 14944, at *3.
\textsuperscript{124} Id. at *4.
\textsuperscript{125} Interview with California Prison Focus staff, in Oakland, Cal. (May 2010).
In addition to having cultural and political significance, Black August, George Jackson, and related movements also have a noteworthy presence in pop culture. In 2003, Grammy nominated artist Ja Rule, released an album entitled *Blood in My Eye*, named after George Jackson’s second book. In the same year, hip-hop artist Killah Priest also released an album entitled *Black August* and in 2007, while Warner Brothers released a film entitled *Black August*. References to Black August and George Jackson in these and other pop culture outlets makes clear that any categorical criminalization of them is overbroad and unconstitutionally vague. Additionally, because these materials are widely consumed by people outside prison, the First Amendment rights of people who are not imprisoned could also be affected by the application of this prison policy because the IGI can designate community members as gang affiliates and gang runners based on their communications with inmates and parolees who are validated.

The *Harrison* court expressed concern about “the possibility that defendants may have taken a race-based shortcut and assumed anything having to due [sic] with African American culture could be banned under the guise of controlling the BGF.” In the opinion of the court, the tenuous “connection between the BGF and the subject matter of the pieces of mail” was not enough of a threat to “the interests of preserving security and order at the prison” to warrant the confiscation. The court also observed that in applying the IGI’s gang validation policies, the IGI took “a very expansive view of what might ‘promote’ a prison gang’s illicit activities and appl[ied] it with gusto.” The court emphasized that on the fundamental issue of restrictions on a person’s political and cultural views, “the First Amendment requires a more nuanced approach.” Based on this reasoning, the court denied the defendants’ motion for summary judgment.

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127. *Id.* at *16.
128. *Id.* at *17.
Conclusion and Recommendations

There are many areas of concern that arise from the CDCR’s gang validation process as applied to Black inmates. First, the practice of validating people as members of the BGF based on possession of certain politically or culturally oriented materials without a showing of any involvement in actual gang activity is extremely problematic. Second, the excessive judicial deference given to corrections officers in determining what is gang related exacerbates the problem because, as the Harrison court noted, there is a strong indication that the IGI is taking a “race-based short cut” and criminalizing things having to do with Black culture and political thought, especially if it is related to George Jackson or Black August.

The Harrison court’s decision is an important because it recognizes the impropriety of letting prison administrators place categorical bans on materials having to do with Black culture by associating them with gang activity. However, the opinion was limited to the issues before it in a motion for summary judgment on the First Amendment claim; therefore, the court could not discuss the “current activity” requirement. As mentioned in the discussion of Furnace, the Castillo settlement requires “current activity” in order for a validated inmate or associate to be housed in SHU for their affiliation with a prison gang. The CDCR agreed in the settlement that the “current activity” must have taken place within six years and that “gang activity” would be defined by reading § 3000 and § 3023 together. Section 3023(a) states “inmates and parolees shall not knowingly promote, further, or assist any gang as defined in section § 3000.” Section 3000 defines gangs as organizations “whose members and/or associates, individually or collectively, engage or have engaged, on behalf of that organization, association, or group, in two or more acts which include, planning, organizing, threatening, financing, soliciting, or committing unlawful acts or acts of misconduct.” When read together, the definition of current gang activity becomes when someone, “knowingly commits unlawful acts or serious acts of misconduct on behalf of a gang.” However, Furnace, Harrison, and other recent cases show that the “current activity” requirement is not being met before inmates are transferred to the SHU.

130. CARBONE & CASTILLO, supra note 80, at 19.
132. Id. § 3000.
133. CARBONE & CASTILLO, supra note 80, at 13.
A close examination of the historical and legal treatment of Black political ideology and movements reveals an extreme abuse of discretion by law enforcement at state, local, and federal levels. The two cases discussed above demonstrate that the explanations offered by IGI and other prison officials regarding these validations are ill-reasoned, illogical, and discriminatory. By essentially taking a "hands off" approach, the courts are closing the only door open to inmates' attempts to assert their constitutional rights. Due to the courts' inaction, inmates are spending their entire prison terms in SHU facilities based on deeply flawed gang validations. In Turner v. Safley, the Supreme Court established a deferential standard for analyzing the constitutionality of prison regulations.\(^1\) This standard allows prison administrators to enforce regulations restricting an inmate's constitutional rights, so long as there is a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it."\(^1\)\(^3\) The interest of safety is generally the legitimate penological goal used to justify gang validation policies and practices. In a prison context, institutional safety is undoubtedly a fundamental goal, which courts may not be equipped to deal with. However, as seen in the Harrison case, it is reasonable for courts to require that the CDCR make a stronger showing that the materials used to validate inmates as BGF members or associates is actually gang related material. The court should use the gang activity definitions discussed above to determine whether the source items used to validate the inmate actually fit the definition of what is required for gang activity. This may help prevent the overbroad application of the validation procedure to Black inmates.

Applying greater judicial scrutiny to gang validations, the source items used, and the "current activity" requirement for SHU placement would help curb abuse of the validation procedure. However, in order to better protect the rights of inmates and ensure against further abuse of discretion, § 3378, dealing with prison gang validations, should be amended to clearly and correctly incorporate the terms of the Castillo Settlement, especially the "current activity" requirement. Since the term is not clearly defined in the regulations, it could make the application of the requirement difficult. Therefore, the section should be amended to clearly reflect that before the inmate can be transferred to SHU, the OCS must make a determination that the inmate has been involved in "gang activity".


\(^{135}\) Id. (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)).
within the past six years.

With multiple crises currently plaguing California’s prison system, it has become clear that the CDCR is in need of greater third party oversight mandated by the courts or by the legislature. It is time for some of this oversight to focus on race-based gang validations and long-term isolation to ensure that all inmates are protected and treated equally.