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Gendered Laws, Racial Stories

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Abstract

In this Article, I argue that, in prisons and in Title VII jurisprudence, the legal response to same-sex sexual harassment and abuse enforces the norms of masculinity that abusers enact in the practice of such abuse and harassment. Prison guards and administrators routinely refuse to prevent or punish sexual abuse, telling the victim to “Be a man. Stand up and fight.” If he is raped, the victim is often told that he is—or has been made—“gay,” and therefore “liked it.” Similar norms, albeit in less violent and more coded form, inflect Title VII jurisprudence of same-sex sexual harassment. In prison and in court, legal actors depart from ordinary legal rules to enforce the norms of masculinity as law, authorizing straight-identified manly men to police the gender conformity of less manly men by sexually abusing them.

Although correctional actors often respond to sexual abuse by enforcing gender rules, the story they tell about prison rape often features a familiar, but misleading, cultural trope of white vulnerability to black violence. This racial narrative obscures institutional responsibility for the gendered legal practices that condone and foster sexual violence, making prison rape seem inevitable. By casting sexual (and nonsexual) violence as a “complex and intractable problem” for which administrators are not to blame, this racial narrative bolsters the rationale for the rules and immunities which largely exempt prisons from the enforcement of constitutional norms. Thus the perception (and reality) of unchecked prison violence supplies a reason for courts not to interfere with the unlawful institutional practices that foster it.

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GENDERED LAWS, RACIAL STORIES

Introduction

Prison rape is a canard of popular culture. Comedians from Jay Leno to street-corner wiseguys recycle the tired joke: “Don’t drop the soap.”¹ “A running joke throughout movies concerns the theme in which a very large Black male prisoner threatens a boy with rape. ... The audience is encouraged to laugh at the possibility of an adolescent boy being raped or ‘punked’ by a Mike Tyson-esque character.”² These jokes reveal one of men’s biggest fears about prison: they will be unmanned or “made gay” by being sexually assaulted by a big black man.³

These stories present prison rape as the deviant act of criminal men in a violent culture where social norms and behavior are “radically different from free-society standards,”⁴ implying that free society, by contrast, abhors sexual violence.⁵ “Most people want to believe that the penitentiary is a place where prisoners are locked up and

¹ Ezra Klein, *There’s Nothing Funny About Prison Rape*, Los Angeles Times, March 30, 2008 (citing a board game making light of prison rape, entitled “Don’t Drop the Soap”); ANDY BOROWITZ, WHO MOVED MY SOAP? A CEO’S GUIDE TO SURVIVING IN PRISON (2003); Tanyika Brime, *We Can Do Better: The State of Custodial Misconduct by Correctional Staff in New York*, 15 Cardozo J.L. & Gender 303, 329-330 (2009); Kiran Mehta, *Male Rape Victims: Breaking the Silence*, 13 Pub. Int. L. Rep. 93, 93 (2008); A recent episode of The Daily Show presented a comedic sketch in which a very large, aggressive, tattooed, foul-mouthed former prisoner threatens Harvard and M.I.T. MBA students with the prospect of prison rape if they continue to refuse to sign a voluntary ethical oath: “Sign the f***in’ paper! ... You better talk to me when you come to prison, because you’re gonna be my bitch. Remember that.” The Daily Show, August 12, 2009, <http://www.thedailyshow.com/watch/wed-august-12-2009/mba-ethics-oath>. In 2002, MTV ran a commercial for 7Up which featured a young, perky African-American soft-drink salesman handing out cans of 7Up in prison. He drops a can, begins to stoop, then remembers: “I’m not picking *that* up.” See: http://www.youtube.com/watch?v=IHvD5_qSV-U. Cadbury Schweppes was forced to withdraw the commercial under pressure by prisoners’ rights advocacy groups: Doug Young, *7 Up spikes TV ad blasted for jail rape jokes*, Reuters, May 24, 2002. Mark L. Fleisher & Jessie S. Krienert, *The Culture of Prison Sexual Violence*, National Criminal Justice Reference Service 1, 128-29 (November 2006), <http://www.ncjrs.gov/pdffiles1/nij/grants/216515.pdf>, observe that in prison as outside, the rape of women is not treated as a laughing matter as it often is for men.

² PATRICIA HILL-COLLINS, BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER, AND THE NEW RACISM 172 (2004).

³ Terry A. Kupers, *Rape and the Prison Code*, in PRISON MASCULINITIES 111, 112 (Don Sabo et al, eds. 2001). See, e.g. “The dark and hurtful sides of masculinity can be projected onto prisoners. ... The darkest and most secret fear that straight, heterosexist men harbor – being ‘butt-fucked’ and un-manned by a more dominant male – is deemed an appropriate fate for those at the bottom of the heap who have been disappeared and forgotten.” Don Sabo et al, *Gender and the Politics of Punishment*, in PRISON MASCULINITIES 14 (Don Sabo et al, eds 2001). See also REGINA KUNZEL, CRIMINAL INTIMACY: PRISON AND THE UNEVEN HISTORY OF MODERN AMERICAN SEXUALITY 169-180 (2008) (tracing the dominance of a black-on-white rape narrative in prison sex research literature from the 1970s to the present). Note, though, that the prison rapist is not invariably portrayed as black: the Daily Show episode and the 7Up commercial, supra note 2, both feature white actors in the role of prison rapist. In the Daily Show episode, the middle-class potential victims are white and Asian, while in the 7Up commercial, the law-abiding prospective victim is black.

⁴ Fleisher & Krienert, 176

⁵ See, e.g. Fleisher & Krienert, 176 (suggesting that in the outside world, sexual violence is understood as an “abhorrent, unjustifiable act”).

segregated from the rest of society. The culture inside of prisons is supposed to be different from the culture of the outside world.”⁶

Thus, some scholars argue that “Men’s prisons are violent because they contain people who would be violent in any setting.”⁷ The notion that prisoners are a breed apart can be deployed to excuse prison violence as inevitable.⁸ Justice Thomas, for example, has argued that “Prisons are necessarily dangerous places” because “they house society’s most antisocial and violent people in close proximity with one another.” Quoting Judge Easterbrook of the Seventh Circuit, Justice Thomas concludes: “Regrettably, ‘[s]ome level of brutality and sexual aggression among [prisoners] is inevitable no matter what the guards do ... unless all the prisoners are locked in their cells 24 hours a day and sedated.’”⁹

In this Article, I challenge this assumption. I contend that, in men’s prisons, institutional actors condone and legitimize sexual abuse, following a distinctive gendered pattern of legal response to sexual abuse that is shared with the outside world.¹⁰ In men’s

⁶ Olga Giller, *Patriarchy on Lockdown: Deliberate Indifference and Male Prison Rape*, 10 *Cardozo Women’s LJ* 659, 675 (2004).

⁷ James E. Robertson, “*Fight or F...*” and *Constitutional Liberty: An Inmate’s Right to Self-Defense when Targeted by Aggressors*, 29 *Ind. L. Rev.* 339, 343 (1995); see also Fleisher & Krienert, *supra*. Robertson is right to point out that several pre-existing inmate characteristics contribute to prison violence:

The inmate population’s propensity for violence is attributable to several factors. Its youthfulness places a resident among the most violent age-cohort. Many inmates, particularly those who are “state-raised,” come from subcultures that embrace violence as an appropriate medium for settling disputes and securing justice. Virtually all offenders partake of a broader, cultural legitimization of defensive violence by males facing threats to their manhood, property, or families. Robertson, *id.* (footnotes omitted).

In this Article, though, I highlight the overlooked role of institutional governance in fostering sexual and physical violence in prison.

⁸ Prison sexual abuse “is almost wholly preventable, as made clear by the fact that some U.S. facilities are plagued by this type of violence, while others are not.” Melissa Rothstein and Lovisa Stannow, *Improving Prison Oversight to Address Sexual Violence in Detention* 4 (American Constitution Society White Paper, July 2009). See the results of the Bureau of Justice’s recent National Inmate Survey, *infra* note 49.

⁹ *Farmer v. Brennan*, 511 U.S. 825, 858-59 (1994), per Thomas J., concurring, quoting *McGill v. Duckworth*, 944 F.2d 244, 248 (CA7 1991).

¹⁰ In this Article, I do not draw a sharp distinction between sexual harassment and sexual assault. Rape and sexual harassment are informed by common assumptions about race, gender, sexuality and power. Rape is widely used as a feminist analytical paradigm for sexual harassment in part because the two rely on common assumptions about gender and sexuality: Crenshaw, *Sexual Harassment*, 1469; see also MacKinnon. As Susan Estrich points out, the unique doctrines, “rules and prejudices” of traditional rape law have been “borrowed almost wholesale” and applied to sexual harassment adjudication under Title VII: Estrich, *Sex at Work*, 43 *Stan. L. Rev.* 813, 815, 850-51 (1991).

Moreover, sexual harassment and sexual assault fall along a continuum, and tend to occur together. Social psychology researchers observe that men who test “likely to sexually harass” also test “likely to rape.” Katharine Franke, *What’s Wrong with Sexual Harassment*, in CATHARINE A. MACKINNON AND REVA B. SIEGEL, EDS. *DIRECTIONS IN SEXUAL HARASSMENT LAW* (2003), citing John B. Pryor, “Sexual Harassment Proclivities in Men,” 17 *Sex Roles* 269 (1987); John B. Pryor et al., “A Social Psychological Model for Predicting Sexual Harassment,” 51 *J. Social Issues* 1 (1995). In prison, “unwanted and sexually suggestive touching are more common occurrences ... than the act of rape itself.”¹⁰ Nancy Wolff et al, *Understanding Sexual Victimization Inside Prisons: Factors that Predict Risk*, 6 *Criminology & Pub. Pol’y* 535, 537 (2007); see also BOJ Statistics Special Report, *Sexual Victimization in Local Jails Reported by Inmates, 2007* (June 2008), at <http://www.ojp.gov/bjs/pub/pdf/svljri07.pdf> (“BJS, Jails”); BOJ Statistics Special Report, *Sexual Victimization in State and Federal Prisons Reported by Inmates, 2007* (December 2007), at <http://www.ojp.gov/bjs/pub/pdf/svsfpri07.pdf> (“BJS, Prisons”). Most harassment that

prisons, legal authorities—prison staff and administrators—routinely ignore constitutional, statutory and institutional rules which require them to protect inmates against physical and sexual violence. Instead, these legal actors respond to sexual violence by enforcing the rules of masculinity. This informal but overt legal practice of institutional governance, described in detail below, permits manly men to sexually abuse unmanly men. This gendered rule of institutional governance reflects, in more extreme and violent form, a gendered pattern that scholars of same-sex sexual harassment have also identified in Title VII jurisprudence.

Katherine Franke has observed that sexual harassment as a social practice perpetuates heteronormative “gender norms and orthodoxies”¹¹ about “what ‘real men’ and ‘real women’ should be.”¹² Critical criminologists such as Don Sabo have observed that “men’s behavior in prison is not a unique aberration but an exaggeration of many culturally accepted forms of masculinity.”¹³ In this Article, I bring these observations to bear on the law. I argue that, in prison and outside, the *legal response* to same-sex sexual abuse and harassment enforces the same gender norms that abusers enact in the *practice* of such abuse and harassment. In prison and in court, legal actors depart from ordinary legal rules to enforce the norms of masculinity as law.

Although correctional actors respond to sexual abuse by enforcing gender norms, the story they tell about prison rape often features a familiar cultural trope of white vulnerability to black violence. This racial narrative obscures institutional responsibility for the gendered legal practices that condone and foster sexual violence, making prison rape seem inevitable. By casting sexual (and nonsexual) violence as a “complex and intractable problem”¹⁴ for which administrators are not to blame, the racial narrative bolsters the rationale for the rules and immunities which largely exempt prisons from the enforcement of constitutional norms.¹⁵ Thus the perception (and reality) of unchecked prison violence supplies a reason for courts not to interfere with the unlawful institutional policies that foster it.

By offering a critical race feminist analysis of the law of same-sex sexual abuse, my argument addresses two theoretical gaps in legal academic scholarship. First, it offers a critical gender analysis of law in men’s prisons. In prison law scholarship, references to

results in liability under Title VII involves an element of physical assault. Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 Cornell L. Rev. 548, 555, 571 (2001) (“successful claims involve allegations of physical harassment [as well as] verbal harassment of a sexual nature”). Furthermore, institutional toleration of widespread sexual harassment may signal and increase the risk of sexual abuse. Terry Kupers observes that “when there is an acceptance of misogynist jokes, of ... little slaps on the bottom ... when the management does not stop that and does not want to hear about it, that is where sexual assault occurs.” Terry Kupers, quoted in NATIONAL PRISON RAPE ELIMINATION COMMISSION, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 56 (June 2009) (“NPREC”).

¹¹ Franke, 2003, 177.

¹² Franke, . See also Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 Mich. L. Rev. 2479 (1994), 2531.

¹³ DON SABO ET AL, EDS. PRISON MASCULINITIES 13 (2001). See also JAMES MESSERSCHMIDT, MASCULINITIES AND CRIME: CRITIQUE AND RECONCEPTUALIZATION OF THEORY (1993); Joe Sim, *Tougher than the Rest? Men in Prison*, in TIM NEWBURN & ELIZABETH STANKO, EDS. JUST BOYS DOING BUSINESS? MEN, MASCULINITIES AND CRIME 109 (1994); Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 Wisc. J. L. Gender & Soc’y 201, 220 (2008).

¹⁴ *Procunier v. Martinez*, 396, 404-05 (1974).

¹⁵ See generally Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women’s Prisons*, 42 HARV. C.R.-C.L. L. REV. 64-86 (2007).

“gender” and imprisonment almost always address women prisoners.¹⁶ The treatment of men in prison is often analyzed as race, but legal scholarship has not theorized it as gender.¹⁷ Neither legal nor social science scholarship has analyzed the administration of men’s prisons as a gendered legal practice.

Second, this Article theorizes the intersection of race and gender in the law of same-sex sexual abuse. Race is well understood to affect the gendered law and practice of man-on-woman sexual harassment and abuse on the outside¹⁸ and in prison,¹⁹ but the existing scholarship of same-sex sexual harassment has yet to engage with race.²⁰

¹⁶ See, e.g. Buchanan; Angela Y. Davis, *Public Imprisonment and Private Violence: Reflections on the Hidden Punishment of Women*, 24 New Eng. J. on Crim. & Civ. Confinement 339 (1998); Brenda V. Smith, *Reforming, Reclaiming or Reframing Womanhood: Reflections on Advocacy for Women in Custody*, 29 Women’s L. Rep. 1 (2007); Brenda V. Smith, *Sexual Abuse of Women in United States Prisons: A Modern Corollary of Slavery*, 33 Fordham Urb. L.J. 571 (2006); Brenda V. Smith, *Watching You, Watching Me*, 15 Yale J. L. & Feminism 225 (2003); Myrna S. Raeder, *Gender-Related Issues in a post-Booker Federal Guidelines World*, 37 McGeorge L. Rev. 691 (2006); Sarah Turnbull & Kelly Hannah-Moffatt, *Under These Conditions: Gender, Parole, and the Governance of Reintegration*, 49 Brit. J. Criminology 532 (2009) (addressing reintegration of women prisoners but not men); BARBARA H. ZAITZOW AND JIM THOMAS, EDS. *WOMEN IN PRISON: GENDER AND SOCIAL CONTROL* (2003).

See Angela P. Harris, *Gender, Violence, Race and Crime*, 52 Stan. L. Rev. 777, 779 (2000) (“Feminist legal theorists, of course, are well familiar with the concept of “gender violence,” but for the most part they have focused only on violence against women.”). But see Alice Ristoph, *Sexual Punishments*, 16 Colum. J. Gender & L. 139, 145-46, 178-181 (2006) (arguing for an application of the insights of feminist rape law scholarship to sexual violence in men’s prisons). “Too often, in legal scholarship, “we continue to act as if gender applied only to women. Surely the time has come to make gender visible to men.” Michael S. Kimmel, *The Gendered Society* (2d ed. 2004), quoted in Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 Wisc. J. Law, Gender & Soc’y 201, 213 (2008).

¹⁷ See, e.g. James E. Robertson; Philip Goodman, “*It’s Just Black, White or Hispanic*”: *An Observational Study of Racializing Moves in California’s Segregated Prison Reception Centers*, 42 Law & Soc’y Rev. 735, 763 (2008) (“[P]risons are not just a product of a racialized society ... they are also places in which ‘race’ is made and remade.”); Loïc Wacquant, *Race as Civic Felony*, 57 International Social Science J. 127, 128 (2005) (prisons as “the main machine for ‘race-making’” in society); AULI EK, *RACE AND MASCULINITY IN CONTEMPORARY PRISON NARRATIVES* 10 (2005).

¹⁸ For a few examples, see Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1280 (1991); Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. Cal. L. Rev. 1467 (1992); Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 Mich. L. Rev. 2479, 2498-2502 (1994); Ruth Colker, *Whores, Fags, Dumb-Ass Woman, Surly Blacks, and Competent Heterosexual White Men: The Sexual and Racial Morality Underlying Anti-Discrimination Doctrine*, 7 Yale J.L. & Feminism 195 (1995); Tanya Kateri Hernández, *A Critical Race Feminism Empirical Research Project: The Internal Complaints Black Box*, 39 U.C. Davis L. Rev. 1235 (2006); Tanya Kateri Hernández, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 Gender Race & Just. 183 (2001); Andrea Dennis, *Because I am Black, Because I am Woman: Remediating the Sexual Harassment Experience of Black Women*, 1996 Ann. Surv. Am. L. 555 (1996); Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 Golden Gate U. L. Rev. 817 (1993); Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. Rev. 251, 274 (2002); Crenshaw, *Sexual Harassment*; Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. Gender Race & Just. 177 (1997); Janeille Zorina Matthews, *The Color of Sexual Harassment and the Public/Private Divide*, 4 Hastings Race & Poverty L.J. 181 (2006); Iglesias; Harris

¹⁹ See, e.g. Buchanan, *supra*; Smith, *supra*; Davis, *supra*

²⁰ See, e.g. Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L.J. 1, 2, 47 (1995) (arguing gender-nonconformity is read as gayness and excluded from Title VII anti-harassment protection); Katherine Franke, *What’s*

The gendered law and racial story of prison rape parallel gendered rules and racial narratives in the outside world. In prison, though, inequalities of race and gender take on more extreme and violent forms. The violent expression of these inequalities in prison reflects the fact that, as I have previously argued, the legal rules that seek to mitigate institutionally-sponsored violence and inequality are practically unenforceable in prison.²¹

On the outside, a man who is sexually threatened or abused may, depending on his circumstances, invoke various legal protections: the criminal law²² (including rape laws which have been reformed to address gender and racial bias²³), antidiscrimination laws such as Title VII or state human rights codes, and constitutional laws which purport to constrain race and gender bias in government action.²⁴

In prison, by contrast, none of these protections is available. On paper, prisons owe an affirmative constitutional duty to protect prisoners against sexual violence,²⁵ and the *Prison Rape Elimination Act (PREA)* reaffirms that duty.²⁶ When guards or correctional authorities knowingly permit sexual violence, they violate the Eighth Amendment.²⁷ Moreover, both violence and sex among prisoners are prohibited by internal prison rules.²⁸ But, as I demonstrated in a previous article, an edifice of “near-

Wrong with Sexual Harassment? 49 Stan. L. Rev. 691 (1997); Franke, 2003; Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 Stan. L. Rev. 353, 446-458 (2000); David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U.Pa. L. Rev. 1697 (2002); Richard F. Storrow, *Same-Sex Sexual Harassment Claims after Oncale: Defining the Boundaries of Actionable Conduct*, 47 Am. U. L. Rev. 677, 737 (1998); Elizabeth J. Kramer, *When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape*, 73 NYU L. Rev. 293, 297; Zachary A. Kramer, *Heterosexuality and Title VII*, 103 Northwestern L. Rev. 205, 216 (2009); Hilary S. Axam & Debora Zalesne, *Simulated Sodomy and Other Forms of Heterosexual ‘Horseplay:’ Same Sex Sexual Harassment, Workplace Gender Hierarchies, and the Myth of the Gender Monolith Before and After Oncale*, 11 Yale J.L. & Feminism 155 (1999); Franke notes that “Sometimes sex is used to subordinate, or has the effect of subordinating, another person on the basis of gender or race, or both,” but does not explore this racial dynamic: Katherine M. Franke, *Putting Sex to Work*, 76 DENV. U.L. REV. 1139, 1140, 1143 (1998).

²¹ Buchanan, 69-86.

²² Prisoners also lack access to criminal protections. At the most basic level, a prisoner who is sexually assaulted cannot invoke the criminal process: he (or she) cannot dial 911. The assault will reach a prosecutor only if prison administrators refer his case to one, and they rarely do: Buchanan, 46-47 n6. Prosecutors, in turn, are reluctant to prosecute sexual assaults: Brenda V. Smith, *Prosecuting Sexual Violence in Correctional Settings: Examining Prosecutors’ Perceptions*, 4 Crim. L. Brief 19, 20 (2008), <http://ssrn.com/abstract=1129816>.

²³ See, e.g. Siegel, *Why Equal Protection No Longer Protects*; Estrich, *Sex at Work*; MacKinnon, *Sexual Harassment*; SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975).

²⁴ These rules and their enforcement may still be infused with the gender norms and racial inequalities that pervade our culture, but such laws seek to attenuate their effect.

²⁵ *Farmer v. Brennan*; *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 199–200 (1989) (“[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being.”); *Logan v. United States*, 144 U.S. 263, 284 (1892) (holding that the government owes a duty to protect prisoners against “assault or injury from any quarter” and that prisoners have a corresponding substantive due process right to such protection); see also *Helling v. McKinley*, 509 U.S. 25, 32 (1993); *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976).

²⁶ Prison Rape Elimination Act of 2003 (“PREA”), P.L. 108-79, 42 U.S.C. §§15601-15609 (2003), § 3(7).

²⁷ *Farmer v. Brennan*

²⁸ NPREC, *supra* note 10; Eigenberg, 421.

insurmountable obstacles”²⁹ to prisoner litigation, including the *Prison Litigation Reform Act*,³⁰ constitutional deference,³¹ the Eighth Amendment requirement of subjective “deliberate indifference,”³² and Eleventh Amendment and other institutional immunities,³³ shields correctional authorities from enforcement of these legal rules.

In the outside world, courts have challenged the exclusion of gay men and lesbians from sexual harassment protections;³⁴ the Supreme Court has held that “rape is not part of the penalty,” and prisons owe a constitutional duty to prevent it;³⁵ and Congress passed the *PREA* in 2003. But social change comes slowly to prison.³⁶

Inside prison, the most effective external legal rule is the Supreme Court’s mandate of “wide-ranging deference” to prison administrators in the “adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.”³⁷ Freed from the rules that

²⁹ Buchanan, 69. I argued that these rules establish a racialized and gendered status which excludes prisoners’ litigation in ways that parallel nineteenth-century rules that excluded slaves, women and other low-status litigants from the courts. *Id.* 57-64.

³⁰ The *Prison Litigation Reform Act of 1995* (Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321, 1321-66 to 1321-77 (1996) (codified as amended at 11 U.S.C. § 523 (2000); 42 U.S.C. §§ 1997a-1997f, 1997h (2000)) blocks the overwhelming majority of prisoner lawsuits, regardless of their merit: Buchanan, 71-75; Margot Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1559 (2003); Margot Schlanger & Giovanna Shay, *Preserving the Rule of Law in America’s Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U.Pa. J. Const. L. 139 (2008). The PLRA imposes many hurdles to prisoner litigation that are insurmountable for many prisoners, for example: a grievance exhaustion requirement that mandates dismissal of a prisoner’s civil claim if s/he has failed to exhaust the prison’s internal grievance procedure, even if the procedures are complex, inefficient, unfair, unsafe, or incapable of offering a remedy for the prisoner’s claim (PLRA, *id.* 42 U.S.C. § 1997e(a) (2000); *see also* *Booth v. Churner*, 532 U.S. 731, 739 (2001)); the PLRA blocks any lawsuit “without a prior showing of physical injury” (PLRA, *id.* §1997e(e)), so that prisoners may not seek judicial protection against indifferent or abusive jailers until *after* s/he has been sexually assaulted (Buchanan, *id.* 73); it severely restricts prisoners’ access to counsel by imposing strict caps on attorneys’ fees, yet authorizes dismissal of a claim if it is improperly pled (28 U.S.C. § 1915A(a) (2000); Buchanan, 74); and it severely curtails the scope and duration of consent decrees to remedy constitutional violations (18 U.S.C. § 3626(a)(1)(A), (b)(1)(A)(iii), 3626(b)(3); Buchanan, 74-75.

³¹ Since the Supreme Court’s 1987 opinion in *Turner v. Safley*, the Supreme Court has applied a diminished level of scrutiny to virtually all constitutional claims brought by prisoners. A prisoner’s constitutional claim must be upheld if it is “reasonably related to legitimate penological interests,” 482 U.S. 78, 89 (1987), a standard which is akin to rational-basis scrutiny: Buchanan, 79-81. The only exception to this deferential standard of review is *Johnson v. California* (2005), in which the Court held that strict scrutiny was appropriate for an institutional policy of racial segregation in correctional facilities (California had defended its policy as satisfying the *Turner v. Safley* “reasonable relationship” standard). *See also Bell v. Wolfish*, 441 U.S. at 547.

³² To establish an Eighth Amendment violation, a prisoner-plaintiff must prove subjective “deliberate indifference,” that is, the defendant subjectively knew of the risk, but chose to do nothing: *Farmer v. Brennan*, 511 U.S. 825, 835 (1994).

³³ *See* Buchanan, 75-78, discussing qualified immunity, the *Monell* doctrine, and Eleventh Amendment immunities.

³⁴ *See, e.g.* *Oncale* (clarifying that Title VII protects against same-sex sexual harassment); *Doe v. Belleville* (same); *Higgins*, 194 F.3d at 261 n4; *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2001); *Doe v. Belleville*; *Higgins*; *Centola v. Potter*, 183 F.Supp.2d 403, 412-13 (D.Mass. 2002); *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498 (2001)

³⁵ *Farmer v. Brennan*

³⁶ *See* Buchanan (in prison, sexual abuse of nonwhite women by persons in authority as if the clock had been turned back to slavery)

³⁷ *See also Turner v. Safley*, 90; *Johnson v. Phelan*, 69 F.3d 144, 145 (7th Cir. 1995).

constrain legal actors in the outside world, prison officials respond to prison rape in ways that enforce the rules of masculinity in its crudest and most violent forms. As far as prisoners are concerned, the response of guards and administrators *is* the law in prison—however unlawful it may be.

To set my argument in context, Part I of this Article debunks several of the stereotypes presented in the mainstream cultural narrative of prison rape. First, prison rape is less common than “don’t-drop-the-soap” narratives might suggest. Its main targets are not straight-identified white-collar criminals like Bernie Madoff, but men who are deemed by other prisoners to be unmasculine: gay, bisexual or transgendered³⁸ (“GBT”) prisoners, and men who are small, young, naïve, or judged by other prisoners to be pretty, effeminate or womanish. Moreover, recent nationwide and statewide victimization surveys indicate that prison rape is not committed exclusively, or even primarily, by violent felons. More male prisoners report sexual abuse by prison staff than by fellow inmates. Finally, I point out that the results of three recent nationwide and statewide prison victimization surveys, which provide the most current and reliable data available,³⁹ challenge the conventional wisdom that prison rape is disproportionately black-on-white. These surveys indicate that white prisoners are *less* likely than nonwhites to say they have been victimized in prison.

In Part II.A of this Article, I document a widespread practice of institutional governance by which, rather than enforce laws and prison rules that ban sexual violence, guards and administrators enforce the rules of masculinity instead. Prison is a hypermasculine environment in which prisoners and guards understand sexual aggression in heterosexist terms that read masculinity as dominance. Prison officials routinely refuse to protect prisoners against sexual abuse. Instead, they often tell prisoners to “Be a man. Stand up and fight”—or, more crudely, to “Fight or fuck.” If a prisoner cannot protect himself by fighting, he is often told that he is “gay” and therefore “liked it,” and does not deserve protection. These rules permit manly men to sexually abuse weaker men, who deserve what they get for having failed as men.

The enforcement of gender norms as law is not unique to prison. In Part II.B of this Article, I contend that gender conventions distort and supplant doctrinal rules in the Title VII law of same-sex sexual harassment, in much the same ways they do in prison. In hypermasculine environments, free men, like prisoners, often engage in aggressive sexual talk and touching to establish their masculinity and heterosexuality by challenging that of other men. In the outside world, unlike in prison, permissible male-male hazing goes too far if it escalates to rape. But many Title VII courts interpret the law of same-sex sexual harassment in ways that enforce masculinity as dominance, much as prison officials do. Title VII courts rely on statutory language—often finding that straight men’s harassing behavior is not “because of sex”—rather than on bald assertions about the sexual entitlement of real men. But the net result is similar: as several Title VII scholars have observed, the law of same-sex sexual harassment effectively authorizes straight-identified, manly men to police the gender conformity of less-manly men by sexually harassing them.

³⁸ “[M]ost male-to-female transgender individuals who are incarcerated are placed in men’s prisons, even if they have undergone surgery or hormone therapies to develop overtly feminine traits. Their obvious gender nonconformity puts them at extremely high risk for abuse.” NPREC, *supra* note 10, 74.

³⁹ See *infra* notes – through –, and accompanying text.

In Part III of this Article, I demonstrate that a racial narrative helps to maintain and obscure the gendered practices of institutional governance that foster prison rape. When prison officials respond to rape, they are doing gender, albeit in a racialized way. But the story they tell is often about race. Correctional officials understand and present prison rape as disproportionately black-on-white. Guards say that they are more likely to believe an allegation of sexual assault if the victim is white, and the results of their investigations tend to confirm their preconceptions. Correctional and survey data suggest that prison investigators are more likely to believe an allegation of sexual violence when the victim is white. Other official sources—courts and the Bureau of Justice—often present information about prison rape in ways that omit racial data when it tends to contradict from the black-on-white rape narrative, but highlight racial data when aggressors are black and victims are white. This narrative practice frames prison rape as a crime committed by hypermasculine black men against vulnerable whites.

Although corrections data suggest that white victims are more likely to be believed, they are, like most prisoners, still usually unprotected. In prison as in the outside world, the story of black-on-white rape serves not so much to protect white victims as to justify racial inequalities and gendered legal practices. The racial narrative obscures institutional responsibility for sexual abuse, locating the problem in violent black sexual deviance. It stokes a racialized fear of crime that justifies mass incarceration: even if many prisoners are serving time for nonviolent property or drug offenses, this narrative furnishes a reason for “them” to stay in prison, and for “us” (middle-class white professionals) to stay out of trouble with the law. Moreover, in prison as outside, when judges and litigants invoke the specter of black-on-white sexual violence, they tend to urge a departure from ordinary legal rules in favor of institutional discretion to do gender instead of law. Furthermore, in its constitutional deference cases, the Supreme Court cites the prevalence of sexual (as well as physical) violence in prison as a reason to defer to institutional discretion to deal with it. Thus, mediated through gendered practices and racial narratives, legal impunity perpetuates itself.

Part I. The Prison Rape Narrative

“In the popular imagination, prison rape is what happens to white boys unfortunate enough to wind up behind bars despite the odds.”⁴⁰ Andy Borowitz published a jocular guide to prison life entitled *Who Moved My Soap? The CEO’s Guide to Surviving Prison*. Comedian David Feldman’s website features a photograph of white-collar criminal Bernie Madoff being led to prison, superimposing the words: “Bernie Madoff: Accepting New Deposits.”⁴¹ In 2004, the attorney general of California, Bill Lockyer, sparked a controversy when he declared, “I would love to personally escort [Ken] Lay to an 8-by-10 cell that he could share with a tattooed dude who says, ‘Hi, my name is Spike, honey.’”⁴²

⁴⁰ Just Detention International, *Mass Incarceration and Rape: The Savaging of Black America*, The Black Commentator, June 17, 2004 <http://www.justdetention.org/en/sprnews/2004/0617.aspx>

⁴¹ David Feldman, *Bernie Madoff’s First Prison Rape*, March 13, 2009, at <http://www.davidfeldmancomedy.com/content/bernie-madoff%2526%2523039%3Bs-first-prison-rape>

⁴² JDI, 2004

These jokes imply, none too subtly, that prison rape is part of the punishment for criminal wrongdoing. At the same time, they send a message to the listener: if you don't want to get raped, you better obey the law.⁴³ In a recent episode of *The Daily Show*, for example, reporter John Oliver interviews a group of (white and Asian-looking) MBA students from Harvard and M.I.T. who have refused to sign a voluntary oath of professional ethics. To try to scare the students straight, he introduces them to "Larry," a very large, aggressive, tattooed, foul-mouthed white man with a shaved head "whose curriculum vitae includes eleven years in a federal penitentiary." Larry shouts at the students, "I'm gonna show you something I learned in prison. You've got seven extra inches in your anal canal to hide something. ... You think you know what prison's all about? You better go to shower with your boots on. ... Sign the f***in' paper! ... You better talk to me when you come to prison, because you're gonna be my bitch. Remember that."⁴⁴

Although *The Daily Show*'s "prison rapist" is white, news articles often invoke a racialized specter of prison rape, inviting the reader to indulge a light frisson of horror at the idea that he could be unmanned, and casting the rape threat in coded racial terms. The *Los Angeles Times*, for example, constructs the potential victim of prison violence this way: "You're small, frail, haven't used your fists since the fifth grade," but are arrested for "petty fraud or drunk driving."⁴⁵ "You," the reader, are "about to meet some seriously hard-core dudes at the county jail." It asks, "Could you defend yourself? Or would you be victimized and face years of therapy?"⁴⁶

In this narrative, the potential victim of prison rape is vulnerable, nonviolent—and stereotypically white. (He calls other men "dudes." He seeks psychotherapy. He doesn't know anyone in the county jail. And he remains essentially innocent even if he breaks the law.) The perpetrator of prison rape, by contrast, is a real criminal: a "tattooed gang member." Another recent news article invited its readers to imagine:

You've just been arrested for drunk driving in Pasadena ... Thoughts of heavily tattooed gang members with shaved heads and a penchant for beating and raping wimps who haven't thrown a punch since that haymaker in primary school flood your mind, and suddenly you're very alert for a drunk."⁴⁷

In this Section, I address several misconceptions arising from the pop-culture narrative of prison rape. First, in men's prisons, rape is less common than the mainstream narrative suggests. Moreover, the perpetrators are not always the perverted criminals or tattooed gang members of the popular imagination: according to recent surveys, prisoners disclose more incidents of sexual abuse by staff than by inmates. Finally, the main targets of prison rape are not straight-identified middle-class drunk

⁴³ Prison officials in Florida and Texas are reported to have encouraged or committed sexual abuse against juvenile inmates and young prison visitors in a supposed effort to scare young men "straight." Pinar, 844-845, citing reports that Florida boot camp officers mock-raped 14-year-old inmate as a method of rehabilitation and deterrence: "That's how they do it when you get to prison!" [the drill instructor] yelled." Id. 844. He cites another report that Texas correctional officers "permitted inmates to fondle five teenage boys" who visited the prison on a "scared straight" field trip. Id. 844-45.

⁴⁴ *The Daily Show*, August 12, 2009, supra note 1.

⁴⁵ Joe Mozingo, *An inmate's guide to four-star jail cells* *Los Angeles Times* B1 (July 9, 2000).

⁴⁶ Mozingo, id.

⁴⁷ Robert Lusetich, *A jail they're paying to get into* *The Australian* 9 (July 11, 2000)

drivers and white-collar criminals. The victims of prison rape are usually targeted for being unmasculine: they tend to be gay, bisexual, transgendered, young, small, weak or effeminate. Moreover, the most reliable victimization survey data suggest that most victims of prison rape are nonwhite.

The mainstream narrative implies that prison rape is ubiquitous.⁴⁸ The prevalence of sexual abuse varies widely between institutions,⁴⁹ but recent victimization surveys indicate overall prevalence rates of about 4%.⁵⁰ Moreover, the risk of rape is not distributed equally across the prison population. Once a man is sexually assaulted, he becomes a target for further sexual abuse.⁵¹ a 2006 study found that almost 75% of male prisoners were sexually assaulted more than once, and 30% of them were sexually assaulted six or more times.⁵² Anthropologists Mark Fleisher and Jessie Krienert found that inmates believe that only “weak” men worry about rape⁵³—although it seems plausible that “strong” prisoners might hesitate to admit to any such fear. In any case, survey data suggest that straight-identified men are at especially low risk of abuse: only about 2% of them tell survey researchers that they have been sexually abused.⁵⁴

⁴⁸ see, e.g. Kamal Ghali, *No Slavery Except as Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. Rev. 607, 615-16 (2008), quoting Robert Weisberg & David Mills, *Violence Silence: Why No One really Cares About Prison Rape*, Slate, Oct. 1, 2003): “sexual slavery following rape is ... an ordinary occurrence.” See also Jonathan A. Willens, *Structure, Content, and Exigencies of War: American Prison Law After Twenty-Five Years 1962-1987*, 37 Am. U. L. Rev. 41, 56 (1987) (describing prison as “a community of murder, rape, gangster-style intimidation, and extortion”).

⁴⁹ See BOJ Statistics Special Report, *Sexual Victimization in Local Jails Reported by Inmates, 2007* (June 2008), at <http://www.ojp.gov/bjs/pub/pdf/svljri07.pdf> (“BJS, Jails”) (while national average was 3.2%, survey found individual jail prevalence rates to range from 0 to 13.8%); BOJ Statistics Special Report, *Sexual Victimization in State and Federal Prisons Reported by Inmates, 2007* (December 2007), at <http://www.ojp.gov/bjs/pub/pdf/svsfpri07.pdf> (“BJS, Prisons”) (national average 4.5%, with prevalence rates in men’s facilities ranging from 0 to 15.7%).

Sexual violence tends to be most common in institutions in which physical violence is widespread: JOHN J. GIBBONS ET AL, *CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA’S PRISONS* 12, 21-26 (2006); NPREC, *supra* note 10, .

⁵⁰ See, e.g. BJS, *Jails*, *supra* note 48, id. 6 (2.9% of male prisoners report sexual victimization, 1.3% by inmates and 2.0% by staff (six-month prevalence)); BJS, *Prisons*, id. (4.5% of all prisoners report sexual victimization, 2.1% by inmates and 2.9% by staff (12-month prevalence)). No breakdown by sex is provided); Valerie Jenness et al, *VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT* 26 (2007), http://ucicorrections.seweb.uci.edu/pdf/FINAL_PREA_REPORT.pdf (4.4% of random sample of male California inmates reported sexual victimization (during the current incarceration)); Wolff (2006), 841 (in a statewide survey, 4.3% of male inmates reported sexual victimization by other inmates, and 7.6% reported sexual victimization by staff (six-month prevalence)).

⁵¹ One prisoner told Fleisher & Krienert, “Everybody sees you as something weak, can’t turn yourself around, once you get a [weak] jacket, it sticks with you.” Id. 169 (parentheses in original). See also NPREC, *supra* note 10, 71.

⁵² Cindy Struckman-Johnson & David Struckman-Johnson, *A Comparison of Sexual Coercion Experiences Reported by Men and Women in Prison*, 21 J. Interpersonal Violence 1591, 1599 (2006). See generally *Confronting Confinement*, 29-30 (prisoners who have been raped are seen as vulnerable and are often revictimized; NPREC, *supra* note 10 (same); JDI, 2009 (same)).

⁵³ Fleisher & Krienert, 102, 123

⁵⁴ Jenness, *supra* note 50, 55 (about 2% of heterosexual inmates reported sexual abuse); BJS, *Jails*, *supra* note 49, 6 (2.7% of heterosexual inmates reported sexual abuse). BJS, *Prisons* did not break down sexual abuse prevalence by sexual orientation.

Straight-identified men are not the primary targets of sexual abuse in prison, although they may be targeted for being disabled or for being small, weak, young, naïve, effeminate or womanish.⁵⁵ Correctional officers, courts, prisoners, advocates, and survey data agree: gay, bisexual, transgendered and effeminate prisoners face greatly elevated risk of sexual abuse.⁵⁶ The 2007 National Inmate Survey conducted by the Bureau of Justice Statistics (BJS) in state and federal prisons and local jails found that 18.5% of gay inmates and 9.8% of men of “other” sexual orientation reported having been sexually abused in jail in the past six months, compared to only 2.7% of straight-identified men.⁵⁷ In a recent survey of a statewide probability sample of California prisons, criminologist Valerie Jenness found that 67% of GBT inmates reported having been sexually assaulted in prison, compared to 2% of straight men.⁵⁸

The popular narrative also implies that forcible rape is the most common form of prison sex. In her comprehensive historical study of prison sex research,⁵⁹ historian Regina Kunzel observes that since the 1970s, rape has been the “primary representation” of sex in prison in academia, as well.⁶⁰ In reality, though, most prison sex is voluntary.⁶¹ This is not to say all of it is fully consensual. Prison sex may fall anywhere on a spectrum between wanted, mutual, consensual sex, at one end, and forcible rape, on the other.⁶² Much prison sex may be voluntary but coerced, either through extortion or as a weaker prisoner’s exchange of sex with one powerful prisoner for “protection” against violence by others.⁶³

Another misconception about prison rape is that most prison rapists are prisoners. In the National Inmate Survey and both statewide surveys, male prisoners disclosed more

⁵⁵ Just Detention International, for example, observes: “While anyone can be a victim of sexual violence behind bars, typical victims are young, nonviolent, first-time offenders who are feminine, physically small, weak, and/or shy. LGBTQ detainees or those perceived as such are exceptionally vulnerable to rape.” JDI, *Call for Change: Protecting the Rights of LGBTQ Detainees*, 3 (May 2007), http://www.justdetention.org/pdf/Call_for_Change1.pdf

⁵⁶ See, e.g. NPREC, *supra* note 10, ; JDI (2009), ; Farmer v. Brennan (plaintiff’s transgender status and feminine appearance arguably alerted prison officials to risk of sexual abuse); Helen M. Eigenberg, *Correctional Officers and Their Perceptions of Homosexuality, Rape, and Prostitution in Male Prisons*, 80 Prison J. 415, 420 (2000) (guards acknowledge that gay prisoners are at greater risk of sexual abuse); see also notes – through -, *infra*, and accompanying text (prisoners perceive gay inmates to be targets).

⁵⁷ BJS, *Jails*, *supra* note 48, 6. In the Prisons report, sexual abuse victimization was not broken down by sexual orientation.

⁵⁸ Jenness, 55.

⁵⁹ Kunzel, *supra* note 3

⁶⁰ Kunzel, 189; Auli Ek, in her meta-analysis of the literature of prison memoirs, made the same observation: Ek, *supra* note 16, 66

⁶¹ The recent victimization surveys did not ask about consensual sex, so reliable statistical estimates are not available. But see, e.g. Sabo; Donaldson; NPREC, *supra* note 10; JDI; TED CONOVER, *NEWJACK*, 262; etc.; Mary Koscheski et al, *Consensual Sexual Behavior*, in PRISON SEX: PRACTICE AND POLICY 115-118 (Christopher Hensley, ed., 2002).

⁶² See, e.g. Just Detention International, *Call for Change: Protecting the Rights of LGBTQ Detainees* 43, 45 (February 2009) at <http://www.justdetention.org/pdf/CFCLGBTQJan09.pdf>; Stephen Donaldson, *A Million Jockers, Punks and Queens*, in PRISON MASCULINITIES 118-25 (Don Sabo et al, eds. 2001), ; Koscheski, id. 131; Brenda V. Smith, *Analyzing Prison Sex: Reconciling Self-Expression with Safety*, 13 Hum. Rts. Brief 17 (2006)

⁶³ See, e.g. JDI (2009), 43, 45 (“protective pairing” or “hooking up” in a sexual relationship with a powerful inmate in exchange for protection, an arrangement that may “appear to be consensual to observers”); Eigenberg (2000), 420; Donaldson, 125-26

sexual abuse by correctional staff than by other prisoners.⁶⁴ It seems that, in prison, much sexual abuse is committed by staff, rather than by the perverted criminals of the popular imagination. Although this Article focuses on institutional responses to inmate rape,⁶⁵ in prison, it seems that law-enforcers may sexually assault prisoners as much or more than lawbreakers do.

A final misconception arising from the pop-culture prison rape narrative is that white men are the usual, or preferred, victims of prison rape.⁶⁶ Courts,⁶⁷ guards⁶⁸ and prisoners⁶⁹ tend to assume that white men are especially vulnerable to prison rape.⁷⁰ In the outside world, the myth of black-on-white interracial rape has been debunked as a racist gender trope that obscures the ordinary dynamics of sexual assault: most sexual assaults are intraracial,⁷¹ and occur between acquaintances.⁷² Although its influence has

⁶⁴ See note 50, supra. Note, though, that the definitions of sexual abuse are broader for staff-prisoner sexual conduct than for sexual conduct among prisoners. While truly consensual, wanted, uncoerced sex between prisoners does not fit the definition of “sexual victimization” in the BJS survey, *all* sexual conduct between staff and prisoners is criminally prohibited. Thus the BJS survey counts all sexual contact between staff and prisoners as sexual victimization. The BOJ defines “sexual victimization” as “all types of sexual activity, e.g., oral, anal, or vaginal penetration, handjobs, touching of the inmate’s butt, thighs, penis, breasts, or vagina in a sexual way and other sexual acts. Includes nonconsensual sexual acts, abusive sexual contacts, and both willing and unwilling sexual activity with staff.” BJS, Prisons, 11; BJS, Jails, supra note 49, 8. But the Wolff (2006) survey used the same definition of sexual victimization for sexual abuse by inmates and by staff, and found rates of staff sexual abuse even more elevated than those found in the BOJ and Jenness surveys: see note 50, supra.

⁶⁵ I focus on inmate rape because issues of institutional self-protection may mediate the dynamics of race and gender I am exploring here. For example, institutions have been known to cover up sexual abuse by their employees. It is less clear that prisons’ direct institutional self-interest is served by allowing one inmate to sexually abuse another.

⁶⁶ See, e.g. Christopher D. Man and John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for “Deliberate Indifference”*, 92 J. L. & Criminology 127, 158-64 (2001); HUMAN RIGHTS WATCH (“HRW”), NO ESCAPE: MALE RAPE IN US PRISONS (2001), www.hrw.org/legacy/reports/2001/prison/report.html; O’Donnell; Knowles; Wolff (2006) (asserting, based on 1974 and 1977 sources, that “inmate-on-inmate sexual victimization has an interracial bias,” id. 836, in spite of the fact that Wolff’s own study showed no statistically significant relationship between race and sexual victimization, id. 844, and Nancy Wolff et al, *Racial and Ethnic Disparities in Types and Sources of Victimization Inside Prison*, 88 Prison J. 451, 459 (2008) (analyzing racial findings of Wolff, 2006 study, id., and finding no statistically significant racial differences in reported sexual abuse overall, and no statistically significant racial differences in reported victimization by inmates. Wolff et al also found that white prisoners reported significantly *lower* levels of sexual victimization by staff than black and Latino prisoners reported. Nonetheless, Wolff devoted the entire Discussion section of her 2008 article to white vulnerability to racially motivated sexual violence: Wolff, 2008, id. 466-70).

⁶⁷ See, e.g. McGill v. Duckworth, 726 F.Supp. 1144, 1156 (7th Cir. 1989) (jury may infer that “smaller young white boys” were at risk of sexual abuse in protective custody) (internal quotation marks omitted)

⁶⁸ Eigenberg (2000), 422; Helen Eigenberg, *Male Rape: An Empirical Examination of Correctional Officers’ Attitudes Toward Rape in Prison*, 69 Prison J. 39, 51 (“Officers are less willing to believe black victims than white victims”). See also McGill v. Duckworth, id. 1155 (guard testifying that he had seen “many” inmates assaulted in protective custody, “especially young white boys”) (internal quotation marks omitted)

⁶⁹ Ek, supra note 17; Fleisher & Krienert, 170.

⁷⁰ See, e.g. Man & Cronan, 158-64; HRW;

⁷¹ See, e.g. Robert M. O’Brien, *The Interracial Nature of Violent Crimes: A Re-Examination*, 92 Am. J. Soc. 817, 817 (1987); Larry W. Koch, *Interracial Rape: Examining the Increasing Frequency Argument*, 26 Am. Sociologist 76, 79 (1995); Bouffard, *Predicting Type of Sexual Assault Case Closure from Victim, Suspect and Case Characteristics*, 28 J. Crim. Just. 527, 534 (2000) (76.6% of victims and 85.1% of

faded,⁷³ this stereotype continues to influence the law and reality of sexual assault and harassment in the outside world.⁷⁴ In prison, however, the truthiness⁷⁵ of this trope retains its power.

Some contemporary academic commentators continue to evoke the familiar nightmare of white vulnerability to black sexual threat. Many of them claim, without attribution or by citing to thirty-year-old sources,⁷⁶ that prison rape is mainly about black

assailants were African-American); Spohn and Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 Justice Q. 651, 669 n3 (2001); George and Martinez, *Victim Blaming in Rape: Effects of Victim and Perpetrator Race, Type of Rape, and Participant Racism*, 26 Psych. of Women Q. 110, 110 (2002).

⁷² See, e.g. Estrich; Crenshaw; Elizabeth Iglesias, *Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 Vand. L. Rev. 869, 888; Abrams; LaFree; etc.

⁷³ A few recent studies have found, against the weight of most such studies, that black-on-white rape cases were not treated more harshly than other racial combinations: Tellis and Spohn, *Testing Assumptions about Simple versus Aggravated Rape*, 36 Journal of Criminal Justice 252, 259 (2008) (finding no effect of racial composition of victim/offender dyad on San Diego prosecutorial discretion or charging decisions); Kingsworth et al, *Adult Sexual Assault: The Role of Racial/Ethnic Composition in Prosecuting and Sentencing*, 26 Journal of Criminal Justice 359, 369 n.5 (1998) (finding no effect of racial composition of victim/offender dyad on sentence length in Sacramento County, California); Jeffrey A. Bouffard, *Predicting type of sexual assault case closure from victim, suspect, and case characteristics*, 28 Journal of Criminal Justice 527, 536, 539 (2000) (no effect on unfounding rates).

⁷⁴ See notes 375 through 388, *infra*, and accompanying text.

⁷⁵ Stephen Colbert introduced the use of the word “truthiness” to refer to “the truth [that] comes from ... the gut,” not from facts (Colbert Report, Oct. 17, 2005: <http://www.colbertnation.com/the-colbert-report-videos/24039/october-17-2005/the-word---truthiness>). Merriam-Webster defines “truthiness” as “the quality of preferring concepts or facts one wishes to be true,” as opposed to the facts. Merriam-Webster online, <http://www.merriam-webster.com/info/06words.htm>

⁷⁶ Nancy Wolff, for example, claimed in 2006 that “Inmate-on-inmate sexual victimization has an interracial bias, with victims most likely being White and sexual aggressors most likely being black,” citing to only two sources: H. Toch, *Living in Prison: The Ecology of Survival* (1977) and L. Carroll, *Hacks, Blacks, and Cons: Race Relations in a Maximum Security Prison* (1974) – in spite of the fact that her own survey had not found a statistically significant relationship between race and sexual victimization: Nancy Wolff et al, *Sexual Violence Inside Prisons: Rates of Victimization*, 83 J. Urban Health 835, 836, 844 (2006). See also, e.g. Man & Cronan, 158-164; William F. Pinar, *The Gender of Racial Politics and Violence in America: Lynching, Prison Rape, and the Crisis of Masculinity, 1031-1060* (2001) (citing numerous sources published between 1964 and 1984 as evidence that black-on-white “[s]exual assault is still feared in prisons today”, id. 1031, and that prison rape is black prisoners’ means of racial “revenge”: id.); Ian O’Donnell, *Prison Rape in Context*, 44 Brit. J. Criminol. 241, 247-48, 250 (2004); Knowles, 268, 275-80; Cindy Struckman-Johnson, *Sexual Coercion Reported by Men and Women in Prison*, 33 J. Sex. Research 67, 71 (1996); Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 Prison J. 379 (2000); Fleisher & Kleinert, 41-42, 48-49, 51 (citing Lockwood, 1980, reporting on research from 1974-75, as authority that in “modern decades”, prison “sexual aggression often has racial overtones”); PAUL BREST ET AL, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 990-91, 990 n103 (2006), reproducing an excerpt from James Jacobs, *Race Relations and the Prison Subculture*, in 1 Crime and Justice: An Annual Review of Research (1979) alleging that “white prisoners ... [a]re highly vulnerable to exploitation” because, in prison, black prisoners use “their greater solidarity and ability to intimidate whites” to identify white “scapegoats” who “become the sexual victims” of higher-ranking, mostly black, men in the prison hierarchy. Jacobs claims that “Whites, especially outside the south, have had almost no experience in grouping together on the basis of being white. ... ‘Whiteness’ simply possesses no ideological or cultural significance in American society, except for racist fringe groups.” Brest et al point out in a footnote that Jacobs suggests that “Neo-Nazi

men attacking vulnerable whites. The sources relied upon by these authors,⁷⁷ mainly from the late 1960s, 1970s and early 1980s,⁷⁸ share significant methodological flaws. In 2004, Gerald G. Gaes and Andrew L. Goldberg, senior research scientists with the National Institute of Justice,⁷⁹ conducted a comprehensive meta-analysis of the existing prison rape research literature as part of the Bureau of Prisons' research efforts pursuant to the PREA.⁸⁰ Gaes and Goldberg, as well as economist Nancy Wolff and criminologist Helen Eigenberg,⁸¹ identified serious methodological limitations in all the sources commonly relied upon as evidence of the black-on-white prison rape story (as well as

prisoner movements ... may in the long run be the basis on which white prisoners achieve solidarity." Id. 990 n103.

Several commentators exaggerate or misstate others' research findings to support exaggerated formulations of the black-on-white rape narrative. Gordon James Knowles, for example, claimed, id., in 1999 that "blacks continually and almost exclusively rape whites in prison." The studies he cites in support of this contention, which were published between 1968 and 1984, found that prison rape was *disproportionately*, but not "continually and exclusively", black-on-white prison. He also cites Adam Starchild, an incarcerated white-collar criminal, whose unsourced essay claims, without citation or attribution, that "studies by sociologists have shown that well over 90% of rapes are inter-racial," Starchild 145, a claim which Knowles repeats as true, Knowles, id. 275. None of the sociological studies had found over 90% of rapes to be interracial.

⁷⁷ The sources most often cited as authority for the assertion that most prison rape is black-on-white include Davis, A. J. (1968). *Report on Sexual Assaults in the Philadelphia Prison System and Sheriff's Vans*. Philadelphia: District Attorneys Office and Police Department (republished several times between 1968 and 1977), cited in O'Donnell, Knowles, and Man & Cronan; ANTHONY M. SCACCO, RAPE IN PRISON 5 (1975), cited in O'Donnell, Knowles, and Man & Cronan; Carroll, L. (1977). Humanitarian reform and biracial sexual assault in a maximum security prison. *Urban Life*, 5(4), 417-437, cited in Knowles, Man & Cronan, and Wolff; Toch, H. (1977). *Living in Prison: The Ecology of Survival*. New York: The Free Press, cited in Wolff, Man & Cronan, and Knowles; Lockwood (1980), cited in O'Donnell, Knowles, and Man & Cronan; Nacci, P. L., & Kane, T. R. (1982). *Sex and sexual aggression in federal prisons*. Washington, DC: Federal Bureau of Prisons, Nacci, P. L., & Kane, T. R. (1983). The incidence of sex and sexual aggression in federal prisons. *Federal Probation*, 47(4), 31-36., and Nacci, P. L., & Kane, T. R. (1984). Sex and sexual aggression in federal prisons. *Federal Probation*, 48(1), 46-53 (reports on a 1982 Bureau of Prisons survey), cited in Knowles and Man & Cronan; Wooden, W. S., & Parker, J. (1982). *Men Behind Bars: Sexual Exploitation in Prison*. New York: Plenum Press; Chonco, N. R. (1989). Sexual assaults among male inmates: A descriptive study. *The Prison Journal*, 69(1), 72-82, cited by Man & Cronan; Struckman-Johnson, C., Struckman-Johnson, D., Rucker, L., Bumby, K., & Donaldson, S. (1996). Sexual coercion reported by men and women in prison. *The Journal of Sex Research*, 33(1), 67-76 and Struckman-Johnson, C., & Struckman-Johnson, D. (2000). Sexual coercion rates in seven midwestern prison facilities for men. *The Prison Journal*, 80(4), 379-390, cited by Man & Cronan and O'Donnell.

⁷⁸ In 1987, Willens claimed that "Commentators do not dispute that prison rape is something Blacks do to whites. Explanations range from the accident that Black prisoners are better organized than whites, to the conscious policy of Blacks taking revenge for their mistreatment outside." Willens, 58 n84.

⁷⁹ Gaes, a visiting scholar with the National Institute of Justice, had been Director of Research for the Bureau of Prisons for 14 years until his retirement in 2002: GERALD G. GAES, REPORT TO THE REVIEW PANEL ON PRISON RAPE IN THE BUREAU OF JUSTICE: STATISTICS STUDY *SEXUAL VICTIMIZATION IN FEDERAL AND STATE PRISONS REPORTED BY INMATES*, 2007 1 (2008), at http://www.ojp.usdoj.gov/reviewpanel/pdfs_mar08/testimony_gaes.pdf

⁸⁰ GERALD G. GAES AND ANDREW L. GOLDBERG, PRISON RAPE: A CRITICAL REVIEW OF THE LITERATURE (2004), <http://www.ncjrs.gov/pdffiles1/nij/grants/213365.pdf>.

⁸¹ See, e.g. Wolff (2006), 836-37 (critiquing the representativeness, validity and reliability of pre-2006 prison rape studies); Eigenberg (1989), 39 (noting that Lockwood and Wooden and Parker based their studies on "populations of victims which have been formally identified by prison officials", rather than on random samples of the prison population).

with all other prison rape studies conducted prior to 2004).⁸² These limitations, Gaes and Goldberg point out, “included vague or unclear question wording; lack of detail in the various types of potential sexual victimization; extremely small samples; very low response rates that raised significant questions about bias in the responses; survey methods that are not ideal to elicit responses on sensitive subjects; and long time horizons that produce errors in recall.”⁸³

⁸² See generally G&G, id. pp. – through -.

⁸³ Gaes, 3, summarizing flaws found and described in detail in Gaes & Goldberg, id. See also Wolff, id. 836-37. Goldberg and Gaes note that none of the studies cited above, note 77, except Nacci & Kane, used a national probability sample: G&G, 1. “It is only with such a sample that we can ever attempt to understand the scope of the problem.” All these studies involved fewer than eight prisons, and usually only one. Most of these studies used either in-person interviews, which are less effective means of eliciting sensitive and stigmatized information, or mailed-in questionnaires, which raise the possibility that data would be contaminated by consultation among prisoners answering the survey. Moreover, most of these studies had very low response rates of 30% or lower, with little or no analysis of differences between inmates who responded to the surveys and those who refused to respond, and made no effort to “adjust the victimization estimates to make them valid estimates of the actual level of victimization.” Id. Executive Summary, 3, id. 35.

For example, Davis (1968, reprinted 1977) was a District Attorney who estimated the incidence of prison rape based on interviews of prisoners conducted between 1966 and 1968 based on interviews conducted in person by himself, his staff, and police officers. Scacco did no original research of his own, but relies heavily on Davis’ survey to argue that “there are a disproportionate number of black aggressors and white victims in studies of sexual assaults in jails and prisons.” Scacco, 47. Lockwood (1980) conducted in-person interviews of 89 prisoners in two New York prisons. 76 prisoners responded, and only one had been sexually assaulted, while another reported having been sexually pressured. Goldberg & Gaes excluded Toch from their literature review on the basis that it appeared that Toch was reusing the survey data obtained by Lockwood: G&G, 20. Chonco (1989) did not purport to conduct a survey of incidence or prevalence prison rape, but interviewed 40 prison inmates “to explain why African Americans chose whites as their victims in a sexual assault.” G&G, 22. Chonco concluded that “perceived weakness and naivety, rather than race was a more salient factor leading toward victimization.” G&G, 22. Notably, Man and Cronan cite Chonco for the black-on-white narrative without acknowledging this conclusion. Finally, Struckman-Johnson (1996) and (2000) used paper-and-pencil questionnaires completed by inmates in their cells, and returned to researchers by mail later, a procedure which G&G observed “is probably not the most reliable way to collect these type of data. Inmates who participated in this study could have discussed the survey with each other before returning the questionnaire. [It] also raises suspicions about collusion and lack of independence in filling out the answers, especially when one considers how low the response rates were in these studies.” G&G, 10-11. The Struckman-Johnson studies used convenience samples (rather than randomized probability samples) of four Nebraska prisons (1996) and seven “Midwestern” prisons (2000). G&G, 8. Although the response rates were 28.7% and 25% respectively, Struckman-Johnson did not adjust survey results using stratification procedures, or assess non-respondents’ reasons for refusing to answer the survey. G&G, 34-35. The 1996 survey respondents overrepresented whites relative to the prison population, and also overrepresented older inmates and “offenders who had committed crimes against persons.” G&G, 34. G&G describe this unrepresentativeness as “a major flaw in the [1996] study.” The 2000 study, G&G point out, “also raises questions of validity since no attempt was made to assess the representativeness of the sample. Because of such a low unit response rate, and a lack of information to compare the survey and population characteristics,” G&G found it “impossible to know how to adjust the victimization estimates to make them valid estimates of the actual level of victimization.” Id. 35.

Probably the most reliable of the flawed studies relied on for the black-on-white prison rape narrative comes from three reports on a sexual victimization study conducted by Nacci & Kane (1982, 1983, 1984), two social scientists with the Federal Bureau of Prisons (see Nacci & Kane, 1984, 46). Gaes & Goldberg identify their survey as “one of the few studies on [prison rape] with a sound approach to the sampling methodology in its attempt to draw a sample representative of all inmates under the custody of a

Nonetheless, the notion that prison rape is disproportionately black-on-white seems to have entered the conventional wisdom about prison rape.⁸⁴ The preamble to the *Prison Rape Elimination Act*, for example, asserts, “The frequently interracial character of prison sexual assaults significantly exacerbates interracial tensions, both within prison and, upon release of perpetrators and victims from prison, in the community at large.”⁸⁵

Three large-scale victimization surveys conducted in 2006 and 2007 address the methodological deficiencies of the earlier studies.⁸⁶ Their results contradict the black-on-white account, indicating that most victims of prison violence are nonwhite.⁸⁷ The most robust of these surveys is the 2007 National Inmate Survey conducted by the Bureau of Justice (BOJ), surveying a national probability sample of more than 63,000 inmates⁸⁸ in 146 state and federal prisons and 282 local jails nationwide.⁸⁹ The Bureau of Justice Statistics produced two reports on the National Inmate Survey: one summary of findings on sexual victimization in state and federal prisons,⁹⁰ and a more detailed report on sexual victimization in local jails.⁹¹ Gerald Gaes describes the National Inmate Survey as “the most comprehensive and systematic assessment of sexual victimization in prisons that has ever been conducted.”⁹²

jurisdiction”: G&G, 13. Their study obtained what Gaes & Goldberg describe as a “respectable” response rate of 64%, but the survey sample overrepresented blacks and underrepresented whites, and the survey interview was conducted by “an articulate, black ex-offender”: G&G, 13. G&G note, though, that Nacci and Kane do not provide the “factor, cluster and reliability analyses” on which they rely for their claims to high reliabilities for the survey items: G&G, 14, and they do not provide data or statistical evidence to support the conclusions they draw from the studies.

For example, Nacci & Kane observe (1984, at 50): “Inmates and staff both believe that the likelihood of sexual assault is greater when the population is comprised by a greater proportion of blacks, relative to whites. This probably represents a general belief that black inmates are more aggressive and the data reveal that there are relatively more black assailants,” but do not provide the statistical data that supports these claims. Likewise, they also observe that “assault events are as likely to involve white assailants as black assailants; however, overall, blacks predominate in numbers because they tend to assault in large groups.” *Id.* 47. Without the supporting data, it is impossible to determine how they found these racial differences, whether the differences were statistically significant (and at what power), or how great the disproportion was.

⁸⁴ See note 76, *supra*, and accompanying text.

⁸⁵ PREA

⁸⁶ BJS, *Jails*, *supra* and BJS, *Prisons*, *supra* (reporting on the 2007 National Inmate Survey); Jenness, *supra* (statewide randomized probability sample of California state prisons); Wolff (2006) and Wolff (2008) (reporting on a statewide randomized probability sample of state prisons in an unidentified state).

⁸⁷ Black, Latino and “Other” prisoners comprise nearly two thirds of the prison population nationwide, while whites comprise about 35%: BOJ Statistics Bulletin, *Prison Inmates at Midyear 2006* 9 (June 2007), <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf>. If sexual victimization is distributed equally across racial or ethnic groups in prison, one would expect most victims to be nonwhite. The National Inmate Survey and the Jenness survey, both discussed *infra* notes – through – and accompanying text, found that nonwhite prisoners were *more* likely than nonwhites to disclose having been sexually abused. Wolff found no statistically significant racial differences in (Wolff (2006), 844; Wolff (2008), 459), except that black and Latino prisoners were more likely than whites to report having been sexually abused *by staff*: Wolff (2008), 459 (analyzing racial data from 2006 survey).

⁸⁸ The BOJ surveyed 23,398 inmates held in 146 sampled state and federal prisons, and 40,419 inmates held in sampled local jails: BJS, *Jails*, *supra* note 49, 1.

⁸⁹ BJS, *Jails*, *supra* note 49, 1.

⁹⁰ BJS, *Prisons*, *supra* note 49,

⁹¹ BJS, *Jails* *supra* note 49

⁹² Gaes, 2

Two other statewide victimization surveys were published at close to the same time: Nancy Wolff, an economist with Rutgers University, and her colleagues surveyed a statewide probability sample of 6,694 male inmates (and 594 women inmates) in an unnamed state. The Wolff survey, though methodologically sound, obtained only a 39% response rate, so that, the authors caution, their findings “may not generalize to the full population.”⁹³ Valerie Jenness, a criminologist at U.C. Irvine, and her colleagues surveyed a statewide probability sample in California prisons for the California Department of Corrections. This survey, although also methodologically sound and having a high response rate of 85-93%, had a relatively low sample size (370 respondents), which, Jenness *et al* caution, may limit the generalizability of their findings.⁹⁴ Unlike the BOJ and Wolff surveys, the Jenness survey (which sought qualitative as well as quantitative data about prison sexual abuse) was conducted through in-person interviews, rather than through an audio computer-assisted self-administered computer survey.

Unlike the sources relied on in support of the black-on-white prison rape narrative, these surveys used probability samples representative of the entire jurisdiction surveyed; they had large sample sizes and (except Wolff) obtained high response rates,⁹⁵ they analyzed differences between survey respondents and non-respondents, and weighted their statistical findings accordingly;⁹⁶ they used clear and precise questions that defined sexual victimization consistently;⁹⁷ and the BOJ and Wolff surveys used audio computer-assisted self-administered computer surveys, the gold standard of social science research methodology for surveys about sensitive or stigmatized behavior.⁹⁸ All three surveys were conducted in English or Spanish, at the inmate’s option.⁹⁹ These surveys, and particularly the National Inmate Survey, provide the best available evidence of current patterns of sexual victimization in prison.¹⁰⁰

⁹³ Wolff (2006), 842.

⁹⁴ Jenness, *supra* note 50, 27.

⁹⁵ The BJS surveyed 40,419 inmates of 282 local jails and 23,398 inmates of 146 state and federal prisons, obtaining response rates of 67% in jails and 72% in prisons: BJS, *Jails*, *supra* note 49, 1; BJS, *Prisons*, *supra* note 49, 2. Jenness *et al* surveyed 370 inmates of seven California jails, obtaining a response rate of 86.3% in the general population and 93.5% of the transgender sample: Jenness, *supra* note 50, 21. Wolff *et al* surveyed 6,694 men (and 564 women) in 12 prisons, obtaining a response rate of 39%: Wolff, 837.

⁹⁶ Gaes, 5 (re BJS, *Prisons*); BJS, *Jails*, *supra* note 49; Jenness; Wolff

⁹⁷ Gaes, 3; **quote definitions of sexual victimiz’n from NIS and Jails/Prisons reports**

⁹⁸ Gaes, 3 (Research has demonstrated audio-CASI techniques are better than other survey methods to elicit responses to sensitive questions”); Gaes & Goldberg, 37-44 (reviewing social science research on validity of different methods of survey administration, and finding that self-administered computer surveys, with audio features to “reduce literacy problems,” *id.* 44, generate the highest and most accurate levels of reporting of stigmatized behaviors such as abortion, unmarried or same-sex sex, and drug use); Wolff, 2006 (audio-CASI “the most reliable method for collecting information about activities or events that are shaming or stigmatizing).

⁹⁹ Gaes, 3; Jenness, *supra* note 50, 17; Wolff, 838.

¹⁰⁰ This is not to say that the victimization survey results perfectly capture the dynamics of sexual abuse in prison. The BJS cautions, in *Prisons*, *supra* note 49 2: “Despite efforts of survey staff to reassure inmates that their survey responses about sexual violence would be kept confidential, some inmates may not have felt confident to report experiences of sexual victimization since admission or in the past 12 months. At the same time, some inmates may have made false allegations.” As Gaes points out, “Since there is no independent assessment of the actual occurrence of a sexual assault, there is no way of knowing whether these competing biases cancel each other out, or one is more influential than the other.” Gaes, 6.

Unlike the impressionistic older studies, the results of these surveys tend to contradict the stereotype that prison rape is disproportionately black-on-white. The National Inmate Survey report on local jails found that black, Latino, mixed and “Other” prisoners were all *more likely* than whites to say they had been sexually assaulted in prison.¹⁰¹ Jenness found, in her California survey, that black prisoners were more likely than nonblacks to say they had been sexually assaulted.¹⁰² While Wolff did not ask about the race of the perpetrator¹⁰³ and the BOJ asked the question but did not publish the results,¹⁰⁴ Jenness found that most sexual assault occurred among members of the same ethnic group.¹⁰⁵ Wolff’s survey found no statistically significant relationship between race and sexual victimization.¹⁰⁶ Wolff found no statistically significant racial differences in vulnerability to sexual abuse *by other inmates*, but did find that black and Latino prisoners were almost twice as likely as white prisoners to say they had been sexually abused *by prison staff*.¹⁰⁷ None of these victimization surveys provides any support for the conventional wisdom that white prisoners face a higher risk of sexual abuse than nonwhites face. Since, nationwide, about 65% of inmates are black, Latino or “Other”,¹⁰⁸ it is likely that a large majority of victims of prison sexual abuse are nonwhite.

Part II. Real Men vs. Sissies: The Heterosexual Defense

In this Part, I argue that, in practice, prison officials and courts often depart from ordinary legal rules, exercising their authority in ways that permit straight-identified, manly men to sexually harass or abuse other men for being unmasculine. The legal response to sexual harassment, much like the practice, validates aggressors as manly and heterosexual, while refusing protection to their less-manly victims. I describe this legal convention as a “heterosexual defense.”

In Section A of this Part, I demonstrate that, in men’s prisons, constitutional, statutory and institutional rules that nominally prohibit sexual harassment and abuse are routinely ignored. Instead, guards and prison administrators enforce the norms of

¹⁰¹ BJS, Jails, *supra* note 49, 6 (4.2% of prisoners of “two or more races” reported sexual victimization, as did 4.1% of “Other” prisoners, 3.2% of blacks, 3.2% of Latinos and only 2.9% of whites). Although the questions asked in the two BJS surveys were identical (see National Inmate Survey), the BJS report on state and federal prisons did not provide a racial breakdown of sexual victimization: BJS, Prisons.

¹⁰² Jenness, *supra* note 50, 55. Although African Americans comprised 36% of study sample, they comprised 50% of the GBT inmates who had been sexually assaulted, and 83% of the straight inmates who had been sexually assaulted.

¹⁰³ Wolff, 845-46

¹⁰⁴ See notes – through -, *infra*, and accompanying text.

¹⁰⁵ 82.8% of prison sexual assaults were intraracial: Jenness, *supra* note 50, 91 Table 12. See also HRW, ch.4 (finding that most sexual victimization is intraracial). It should be noted, though, that the HRW report did not purport to be a scientific survey of prison victimization, and lacked the methodological rigor of the BJS and Jenness studies.

¹⁰⁶ Wolff (2006), 844; Wolff (2008), 459 (analyzing racial data from the 2006 survey).

¹⁰⁷ Wolff (2008), 459 (7.6% of Hispanic prisoners and 8.1% of black prisoners disclosed sexual abuse by staff, compared to 4.6% of white prisoners). Nonetheless, Wolff devotes the entire Discussion section of her 2008 racial analysis to the potential vulnerability of white prisoners to racially motivated sexual violence by nonwhite prisoners: *id.* 466-470.

¹⁰⁸ BJS Statistics Bulletin, Inmates at Midyear 2009, *supra* note 87.

masculinity in their most extreme and brutal form.¹⁰⁹ If a prisoner is too wimpy to “be a man” by fighting off a man who tests his masculinity by pressuring him for sex, he is often told that he “must be gay,” therefore “liked it,” and does not deserve protection.

In Section B, I show that many federal courts depart from the ordinary rules of Title VII jurisprudence to enforce similar norms of masculinity. In spite of Supreme Court jurisprudence which would seem to preclude such reasoning, these courts often deem severe, pervasive and unwelcome male-male sexual talk and touching by straight-identified men to be permissible under Title VII on the basis that it is not “because of sex.” This heterosexual defense authorizes straight men to sexually harass gay or effeminate men, while prohibiting gay men’s same-sex sexual harassment as a Title VII violation.

A. Sexual Abuse in Prison: Legal Responses

Unlike the federal courts, which must give legitimate reasons for decision, prison officials face no such constraint. Their responses to prisoner reports of sexual harassment and abuse can be particularly raw, frank and revealing. Guards and inmates tell it like it is.

i. Underenforcement

Despite their constitutional obligation to keep prisoners safe,¹¹⁰ many prison authorities do little or nothing to protect prisoners against sexual abuse. When prisoners are sexually harassed or assaulted, they do not usually report it to correctional authorities.¹¹¹ When they do hear about sexual harassment or threats, prison officials often refuse to take action until the prisoner has already been hurt¹¹²—if at all. Guards

¹⁰⁹ The 1990s prison drama *Oz* offers a depiction of prison life that, as Lara Stemple observes, is “both too terrible and not terrible enough.” Nonetheless, she notes, the following observation, though indelicate, is accurate:

Augustus Hill, the wheelchair-bound inmate whose introductions anchor each episode, sees it this way: “They call this the penal system. But it’s really the penis system. It’s about how big, it’s about how long, it’s about how hard. Life in *Oz* is all about the size of your dick and anyone who tells you different ain’t got one.”

Lara Stemple, *HBO’s Oz and the Fight against Prisoner Rape: Chronicles from the Front Line*, in *THIRD WAVE FEMINISM AND TELEVISION: JANE PUTS IT IN A BOX* 166, 167 (Merri Lisa Johnson, ed. 2007)

¹¹⁰ *Farmer v. Brennan*, 511 U.S. 825, 833 (Eighth Amendment obligates prison officials to take reasonable precautions to protect prisoners against inmate violence); *US v. Logan*; *Prison Rape Elimination Act*

¹¹¹ “Administrative records alone cannot provide reliable estimates of sexual violence. Due to fear of reprisal from perpetrators, a code of silence among inmates, personal embarrassment, and lack of trust in staff, victims are often reluctant to report incidents to correctional authorities.” BOJ Statistics Special Report, *Sexual Violence Reported by Correctional Authorities, 2005 2* (July 2006), <http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca05.pdf> (“Correctional Authorities, 2005”); BOJ Statistics Special Report, *Sexual Violence Reported by Correctional Authorities, 2006* (August 2007) <http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca06.pdf> (“Correctional Authorities, 2006”); BOJ Statistics Special Report, *Sexual Violence Reported by Correctional Authorities, 2004 2* (July 2005) <http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca04.pdf> (“Correctional Authorities, 2004”).

¹¹² See, e.g. *Redman v. San Diego Cty*; *Meyers v. Stubblefield*, 2008 U.S. Dist. LEXIS 50655, 50658 (E.D. Mo. 2008);

routinely fail or refuse to protect prisoners against sexual assault or harassment, whether they see the abuse while it is happening, or it is reported to them afterward.¹¹³ By their own account, prison officials deem more than 80% of prisoner reports of sexual abuse to be either “unsubstantiated” (unproven) or “unfounded” (false).¹¹⁴ When a prisoner is brave or desperate enough to report sexual assault to correctional officials, in most cases, nothing is done.¹¹⁵

Meanwhile, prison rapists are rarely punished: nationwide, only a few prosecutions happen each year.¹¹⁶ More often, Human Rights Watch and others report, prison rape results in protective custody (an institutional euphemism for solitary confinement) for the victim.¹¹⁷ While this placement is ostensibly designed for prisoners’ protection, they experience solitary confinement as punitive¹¹⁸—solitary confinement is also the main disciplinary sanction for prisoners who break the rules.¹¹⁹ Prisoners describe solitary confinement as “the hole.”¹²⁰ “LGBT inmates often feel forced to seek protective custody, knowing that this will mean being placed in solitary confinement, locked in a cell for 23 hours a day, and losing access to programming and other services” that could affect their eligibility for parole.¹²¹

Moreover, because administrative segregation places inmates “in close physical proximity to inmates who are violent or predatory, including perpetrators of sexual abuse,”¹²² many prisoners are revictimized while in protective custody.¹²³ Prison officials are also involved in sexual assaults in protective custody—they may arrange for

¹¹³ See, e.g. JDI (2009), 44, 45 (inmate requested protection from guards, but it was denied; JDI reports its stories “not ... because they were unusually egregious; they represent some of the patterns and common forms of sexual abuse that LGBT prisoners share with JDI on a daily basis.”) Prison officials often ignore reports of sexual assault. Stop Prisoner Rape, *Texas Update: Texas State Prisons Plagued by Sexual Abuse* 4 (March 2008) at <http://www.justdetention.org/pdf/TexasUpdate.pdf> (“engrained staff acceptance of predatory behavior by inmates); Jenness, supra note 50, 49 (inmate reports, “The administration at this place doesn’t give a fuck about transgender inmates”); NPREC, supra note 10, ch.5 (inmate Kendall Spruce raped 27 times; staff ignored reports); HRW, ch. 8 (prison officials witnessed rape, but logged it as an “allegation”).

¹¹⁴ Correctional Authorities, 2005; Correctional Authorities, 2006

¹¹⁵ NPREC, supra note 10, 102. See, e.g. McGill v. Duckworth, 726 F.Supp. 1144, 1156 (N.D. Ind. 1989) (in response to prisoner report of sexual assault, guard said, “Piss on you.”).

¹¹⁶ Between October 1999 and April 2009, federal prosecutors accepted 166 cases for prosecution, an average of 17 cases per year: NPREC, supra note 10, 119-120; see also HRW. See also Smith (2008) (prosecutors are reluctant to accept inmate rape cases for prosecution because they are so difficult to win).

¹¹⁷ See, e.g. BJS, Correctional Authorities, 2006; BJS, Correctional Authorities, 2005; Philip Ellenbogen, *Beyond the Border: A Comparative Look at Prison Rape in the United States and Canada*, 42 Colum. J. L. & Social Problems 335, 369 (2009); JDI (2009), 44-45.

¹¹⁸ Ellenbogen, 369; see also NPREC, supra note 10, 79 (conditions in protective custody can cause psychological distress and exacerbate prior mental illness).

¹¹⁹ “Isolative housing is intended for inmates who violate prison rules or are a serious threat to other inmates or staff.” JDI (2009), 44.

¹²⁰ See, e.g. JDI (2009), 44.

¹²¹ JDI (2009), 44; NPREC, supra note 10, 78-80.

¹²² JDI (2009), 44.

¹²³ See, e.g. Riccardo v. Rousch, 375 F.3d 521,525 (7th Cir. 2004) (prisoner sexually assaulted in protective custody); 786 F.2d, 518 (same); 995 F.2d, 1532 (same); 375 F.3d, 521 (same). See also James Austin et al, *Sexual Violence in The Texas Prison System*, iv (September 2006), at <http://www.ncjrs.gov/pdffiles1/nij/grants/215774.pdf>.

one prisoner to rape the prisoner being “protected,”¹²⁴ and sometimes they sexually assault the prisoner themselves.¹²⁵ When inmate perpetrators are punished at all, they are usually placed in administrative segregation, rather than being prosecuted.¹²⁶ Even among the tiny proportion of inmate sexual abuse cases that prison investigators consider to be “substantiated,” only 12-16% result in arrest.¹²⁷

The reasons behind the failure of most prisons to prevent and punish sexual abuse are undoubtedly complex.¹²⁸ Prisons may be underfunded, understaffed, and often ill-designed to protect prisoners against violence by inmates or guards.¹²⁹ Prison officials may be overworked and overwhelmed.¹³⁰ They may not know how to respond to reports of sexual harassment, they may have difficulty distinguishing consensual from coerced sex,¹³¹ or they may simply not care.¹³² But when prison officials refuse to act, the reasons they give tend to critique the prisoner’s performance of masculinity: they blame him for failing to fight hard enough, or for being gay. They cite the rules of masculinity to disclaim their legal responsibility to protect prisoners.

ii. “Be a man. Stand up and fight”

First, prison officials tell prisoners to “Be a man. Stand up and fight,”¹³³ or, more crudely, to “Fight or fuck.”¹³⁴ The warden of an Arkansas prison testified that “inmates in the prison had to ‘fight’ against sexual aggressors”¹³⁵ and that it was ‘the inmate[’]s own responsibility to let people understand that they’re not going to put up with that.’¹³⁶ Prison officials often assume – sometimes as a matter of official policy – that

¹²⁴ See, e.g. Villante, 786 F.2d, 518, 522; Smith v. Cummings, 445 F.3d 1254, 1257 (10th Cir. 2006); Liberto v. Shelby Cty., 115 Fed. Appx. 794, 795 (6th Cir. 2004) (guard watched and taunted prisoner during sexual assault). See also JDI (2009), 44.

¹²⁵ JDI (2009), 44.

¹²⁶ BJS, Correctional Authorities, 2006; BJS, Correctional Authorities, 2005.

¹²⁷ BOJ Statistics Special Report, *Sexual Violence Reported by Correctional Authorities, 2006* 6 (August 2007), at <http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca06.pdf> (“BJS, Correctional Authorities 2006”) (in 2006, 16% of “substantiated” cases resulted in arrest; in 2005, 12% did).

¹²⁸ US v. Logan; PREA

¹²⁹ JOHN J. GIBBONS ET AL, CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA’S PRISONS 12, 21-26 (2006) (prison overcrowding contributes to violence and abuse among prisoners).

¹³⁰ See, e.g. Gibbons, *Confronting Confinement* 21-26 (prison overcrowding contributes to violence and abuse among prisoners).

¹³¹ See Eigenberg (2000), 429-30; NPREC, supra note 10, 113

¹³² See, e.g. NPREC, supra note 10, 107.

¹³³ HRW, ch.8; Philip Weiss, *Uncovered Prison Rapes Show Failure of Media*, New York Observer, April 29, 2001, <http://www.observer.com/node/44342>; see also infra, and accompanying text.

¹³⁴ “In the prison vernacular, [correctional officers] told them to ‘fight or fuck.’ At the same time, [correctional officers] would caution them that fighting was a rule violation and that they would be punished – possibly losing good time or parole dates as a sanction for ‘their’ violence”: Fleisher & Krienert, 180. See also, e.g. Sabo et al, 7; Giller, 664; Johnson v. Johnson, ; Human Rights Watch; James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 Am. Crim. L. Rev. 1, 37; Man & Cronan, 145;

¹³⁵ Spruce v. Sargent, 149 F.3d 783, 786 (8th Cir. 1998)

¹³⁶ Spruce v. Sargent, 149 F.3d 783, 786 (8th Cir. 1998)

“heterosexual inmates c[an] protect themselves.”¹³⁷ When prison officials offer this rationale for refusing protection, they require prisoners to perform masculinity as toughness and violence—on pain of rape.

One Los Angeles County deputy sheriff says, “If a new inmate comes up to me in tears and says, ‘I’m scared to death,’ my first piece of advice is dry your eyes. Don’t let them see you scared.”¹³⁸ Another inmate reported, “You can’t show any fear, they pick up on that. You gotta show strength ... Never look down, like you’re afraid to look ’em in the eye. ... You gotta be a man all the time, and a man according to the standards in here.”¹³⁹ “[I]nmates who look scared, shy, or nervous face immediate danger because they exude signs of weakness.”¹⁴⁰

Thus when a young Texas inmate who had been raped in prison sought protective custody, prison officials transferred him to the general population, telling him he needed to “grow up.”¹⁴¹ When the mother of a young inmate told prison officials of sexual threats against her son, prison officials told her that prison was “not a babysitting service.”¹⁴² As one prisoner lay in a hospital bed after a brutal rape and suicide attempt, one guard said, in front of him, “Well, he should have fought back if he didn’t want to get raped.”¹⁴³

Prisoners share this attitude. As Fleisher and Krienert found in their survey of prison culture, prisoners believe that “A man cannot be raped unless he wants to be.”¹⁴⁴ They believe that “mentally tough” inmates cannot be raped; if a man is sexually assaulted, it is because he is “mentally weak.”¹⁴⁵ “Mental toughness,” in turn, “refers to an inmate’s decision to stand up and be a man and be beaten up instead of raped.”¹⁴⁶ “[I]f you don’t fight, you’re weak.”¹⁴⁷

In spite of prison administrators’ concern that violence is *the* major threat to security in men’s prisons,¹⁴⁸ and of the fact that fighting is invariably against prison rules,¹⁴⁹ guards routinely tell prisoners to fight in order to protect themselves against

¹³⁷ See, e.g. *Redman v. San Diego*, 1445, 1445 n11 (official policy that “young and tender” and “passive homosexual” detainees “need protection” and are kept in separate units, while “aggressive homosexual” prison rapist placed in general population pursuant to assumption that “heterosexual inmates could protect themselves”).

¹³⁸ Joe Mozingo, *An Inmate’s Guide to Four-Star Jail Cells* Los Angeles Times (July 9, 2000)

¹³⁹ NPREC, *supra* note 10, 70.

¹⁴⁰ Man & Cronan, 166.

¹⁴¹ NPREC, *supra* note 10, 69.

¹⁴² *Redman v. San Diego Cty*, 942 F.2d 1435, 1438 (9th Cir. 1991).

¹⁴³ Stop Prisoner Rape, *Stories from Inside: Prisoner Rape and the War on Drugs*, 12 (2007)

¹⁴⁴ Fleisher & Krienert, 103.

¹⁴⁵ Fleisher & Krienert, 103.

¹⁴⁶ Fleisher & Krienert, 103.

¹⁴⁷ Fleisher & Krienert, 169

¹⁴⁸ Philip Goodman, “*It’s Just Black, White or Hispanic*”: *An Observational Study of Racializing Moves in California’s Segregated Prison Reception Centers*, 42 Law & Soc’y Rev. 735, (2008). See also *Johnson v. California* (California argued, unsuccessfully, that the threat of gang violence was such a dire threat to prison security that racial segregation in prison should not be subjected to strict scrutiny, but to the lesser *Turner v. Safley* standard, see *supra* note 31.).

¹⁴⁹ Eigenberg

sexual abuse. In one case, when a prisoner asked a guard for protection, the guard gave him a knife.¹⁵⁰

Even when a prisoner has been placed in protective custody (presumably because administrators have determined that he cannot protect himself in the general population), he may be told that he must fight off his attackers. One prison supervisor testified that “he routinely told inmates on protective custody to protect themselves because he had seen many such inmates assaulted.”¹⁵¹

The state of California considers ethnic gang violence such a serious and intractable problem that it defended its policy of racial segregation all the way to the Supreme Court.¹⁵² Nonetheless, prison officials there urge prisoners to join violent ethnic prison gangs in order to protect themselves. Philip Goodman found, in a recent ethnographic study of a central California reception center, that the reception officer gave a “welcome speech” to incoming prisoners in which he encouraged them to join ethnic prison gangs to protect themselves against sexual violence. “[M]ore than 100 inmates hear this speech daily at Central, and . . . it is for some their first impression of the state prison system.”¹⁵³ When inmates arrive, the officer who does initial interviews at this reception center “launches into a well-rehearsed orientation speech,”¹⁵⁴ which “typically goes as follows:”¹⁵⁵

Just some friendly advice, men. Whites, Brothers, Northerners, Southerners, Paisas, listen up. The Bulldogs are bombing on you. They don’t care – three on one, four on one, it doesn’t matter to them. So keep your eyes open. You don’t have any problems with the cops here. You got problems with the dogs. Now I’m not giving you a green light to go and retaliate, but go talk to your peoples and see what’s up.¹⁵⁶

In this environment, it is not surprising that less manly men—GBT prisoners; prisoners who’ve previously been sexually assaulted; younger, smaller men with less prison experience; men with developmental disabilities; and prisoners who are deemed by guards and other prisoners to be pretty or effeminate—are at the greatest risk of sexual abuse.¹⁵⁷ “Any characteristic perceived in prison as feminine puts an inmate at severe risk.”¹⁵⁸ “Once an inmate has been turned out, he’s considered a target wherever he goes.”¹⁵⁹ As a result, a GBT prisoner or one who has been “punked” will often form a “protective partnership” with one man, in which sex and domestic services are exchanged for protection against violence by other prisoners.¹⁶⁰

¹⁵⁰ *LaMarca v. Turner*, 995 F.2d 1526, 1533 (11th Cir. 1993). Another guard told prisoner to make a knife to defend himself. *Stop Prisoner Rape, Stories from Inside*, 26.

¹⁵¹ *McGill v. Duckworth*, 726 F.Supp. 1144, 1156 (7th Cir. 1989).

¹⁵² *Johnson v. California* (2005)

¹⁵³ Goodman, 748 (internal quotation marks omitted).

¹⁵⁴ Goodman, 747.

¹⁵⁵ Goodman, 747.

¹⁵⁶ Goodman, 747.

¹⁵⁷ Jenness; JDI; NPREC, *supra* note 10, 69-74; Man & Cronan, 164-175. See, e.g. *Redman v. San Diego*, 1437-38, 1445 fn11 (jail operated “young and tender” and “homosexual” units to vulnerable offenders from other inmates).

¹⁵⁸ Man & Cronan, 166.

¹⁵⁹ NPREC, *supra* note 10, 71; JDI (2007), 1.

¹⁶⁰ Kupers, 116; Donaldson, *A Million Jockers, Punks and Queens*, 120-23, 125; Eigenberg (2000), 420

Correctional officers often view such voluntary-but-coerced sex as consensual.¹⁶¹ As a result, the exploited partner in a “protective partnership” may hesitate to report the sexual coercion for fear of punishment for violating prison rules against sex between prisoners.¹⁶² In prison, “Physical weakness, the inability to physically protect oneself, or mental weakness, the inability to withstand external forces to engage in sex or resist threats, represent cultural anathema. Weakness can be met only with contempt.”¹⁶³

iii. “You’re gay. You must have liked it.”

Prison officials often give a second reason for failing to respond to prisoners’ reports of sexual threats or abuse which boils down to, “You’re gay. You must have liked it.”¹⁶⁴ As correctional administrators have long recognized, gay, bisexual and transgender prisoners are targets for prison rape.¹⁶⁵ Nonetheless, many guards say they feel that gay men do not deserve protection against sexual assault.¹⁶⁶

Guards and administrators tell GBT prisoners that they think it is “okay for a ‘faggot’ to be raped. They said, ‘Oh, you must like it.’”¹⁶⁷ Guards share with prisoners the view that rape is not rape if the victim is gay. One prisoner said, “Have a friend who was gay so not really rape, they put a broomstick up in him cause he owed them money or something.”¹⁶⁸ A guard told another prisoner, “You’re an admitted homosexual, you can’t be raped. We’re denying you. You learn how to defend yourself.”¹⁶⁹

Prison officials tend to assume that GBT prisoners consent to sex with any and all men.¹⁷⁰ Roderick Johnson, a black gay man in a Texas prison,¹⁷¹ was repeatedly beaten

¹⁶¹ JDI (2009), 43; Eigenberg (2000), 429-30; Donaldson, 125

¹⁶² JDI (2009), 43; HRW, ch.8; Donaldson, 123; see, e.g. N.Y. Comp. Codes R. & Regs. tit. 7, s§ 202.2, Standards of Inmate Behavior: Rule 101.10 (“An Inmate shall not engage in or encourage, solicit, or attempt to force another to engage in any sexual act.”).

¹⁶³ Fleisher & Krienert, 151

¹⁶⁴ See, e.g. Johnson v. Johnson, 385 F.3d 503, 513 (5th Cir. 2004); JDI, Call for Change 1; See, e.g. JDI (2009), 43 (prisoner denied protection by Florida Corrections officials “because I’m gay, Afro-American, and ... incarcerated for prostitution”); NPREC, supra note 10, 113 (training required to teach some correctional officers “not to assume that a sexual encounter is consensual simply because ... the alleged victim or perpetrator is homosexual”); Fleisher and Krienert, 157.

¹⁶⁵ See, e.g. BJS, Jails; Farmer v. Brennan; National Prison Rape Elimination Commission Report 73-74 (2009); WOODEN, W. S., & PARKER, J. MEN BEHIND BARS: SEXUAL EXPLOITATION IN PRISON. (1982); JENNESS, supra note 50, supra; Struckman-Johnson, C., & Struckman-Johnson, D. (2006); Peter L. Nacci & Thomas R. Kane, *Sex and Sexual Aggression in Federal Prisons: Inmate Involvement and Employee Impact*, 48 Fed. Probation 46, 48 (1984) (the authors, who were chief of research and senior research analyst of the Federal Bureau of Prisons, observe that “officers are more willing to protect heterosexual inmates when, actually, homosexual/bisexual inmates are quite likely to be targeted for assaults”). See also Howard, 534 F.3d 1227, 1238 (10th Cir. 2008) (jury could infer that administrators had been aware of risk that plaintiff “was particularly vulnerable to sexual assault” because he was “openly gay and slight of build”)

¹⁶⁶ See, e.g. Eigenberg (2000), 421-22 (corrections officials describe themselves as more willing to protect heterosexual inmates against sexual assault); Nacci & Kane, supra note 165 (same); Human Rights Watch.

¹⁶⁷ Just Detention International, *Call for Change: Protecting the Rights of LGBTQ Detainees 1* (February 2009) at <http://www.justdetention.org/pdf/CFCLGBTQJan09.pdf>

¹⁶⁸ Fleisher & Krienert, 126.

¹⁶⁹ Stop Prisoner Rape, *Texas Update: Texas State Prisons Plagued by Sexual Abuse 5*

¹⁷⁰ NPREC, supra note 10, 73. See also Eigenberg (2000).

¹⁷¹ [Johnson v. Johnson, 385 F.3d 503, 512-13 \(5th Cir. 2004\)](http://www.judicialbranch.org/cases/Johnson_v_Johnson_385_F3d_503_512-13_5th_Cir_2004)

and raped in the general population. He reportedly “begged prison officials to move him to a unit called safekeeping, where white and Hispanic homosexuals, former gang members and convicted police officers lived,”¹⁷² but prison administrators refused to protect him. Instead, he was repeatedly told, “There’s no reason why Black punks can’t fight and survive in general population if they don’t want to f***,”¹⁷³ “You need to get down there and fight or get you a man,”¹⁷⁴ and “remarks to the effect that, since Johnson was homosexual, he probably liked the sexual assaults he was experiencing.”¹⁷⁵

As in the outside world, a man who is not big, strong or violent enough to fight off an attacker is judged to be gay, or at least effeminate, “for not being able to fight off his abuser.”¹⁷⁶ One investigating officer told an inmate that he “must be gay” for “letting them make you suck dick.”¹⁷⁷ If a prisoner’s size, strength, connections or fighting skills are inadequate to protect him against sexual abuse, both prison officials and other prisoners tend to view him as a failed man who has been “punked,” “turned out,” or “made gay,” regardless of his sexual desires, or those of his assailant.¹⁷⁸

Often, other inmates, as well as guards, will refuse to protect a raped prisoner.¹⁷⁹ One prisoner observes, “if they don’t defend themselves they’re seen as a person who is not worth defending.”¹⁸⁰ As a result, Lara Stemple observes,

[P]risoner rapists ... are at the top of the prison hierarchy. They maintain their dominant position by subjugating others. Despite the fact that the prisoners are, by definition, the ones initiating the same-sex sexual contact, they remain heterosexual in their social role and in their self-perception. *Oz*, unlike the movie *Shawshank Redemption*, gets this right. In *Shawshank*, the perpetrators are depicted as a gang of tough but overtly gay rapists, who call themselves “the Sisters.” Not only does this smack of the gay-predation paranoia propagated by Christian fundamentalists, but it gets it exactly wrong. In prison the rapists are the straight guys. The victims are feminine (small, weak, or gay) and feminized (called “my bitch” or “my woman” and made to clean cells, provide back rubs, and give blowjobs).¹⁸¹

Inmates’ status as men is shaped by their conformity to a gender role ethos that

¹⁷² Adam Liptak, *Ex-Inmate’s Suit Offers View into Sexual Slavery in Prisons*, New York Times (October 16, 2004).

¹⁷³ Johnson, 513.

¹⁷⁴ Id.

¹⁷⁵ Johnson, 513. According to Johnson’s appellate brief, a guard captain “Captain Norwood told him, ‘I personally believe you like dick,’ and that he had probably consented to the sex acts. [Two other guards] laughed at this comment.” Brief of the Plaintiff-Appellee, *Johnson v. Johnson*, Civil Action No. 7:02-CV-87-R (5th Cir. 2003).

¹⁷⁶ Patricia Wencelblat, *Boys Will Be Boys? An Analysis of Male-on-Male Heterosexual Sexual Violence*, 38 Colum. J.L. & Soc. Probs. 37, 64 (2004), citing *United States v. Funds Held in the Name or Benefit of John Hugh Wetterer*, 991 F.Supp. 112, 117 (E.D.N.Y. 1998).

¹⁷⁷ HRW, ch.8

¹⁷⁸ See, e.g. James E. Robertson, *A Punk’s Song About Prison Reform*, 24 Pace L. Rev. 527 (2004); Stemple; Eigenberg (2000), 417, 419; Donaldson, 125.

¹⁷⁹ Fleisher & Krienert, 181-82

¹⁸⁰ Fleisher & Krienert, 181

¹⁸¹ Lara Stemple, *HBO’s OZ and the Fight against Prisoner Rape: Chronicles from the Front Line*, Third Wave Feminism and Television: Jane Puts it in a Box 166, 167 (2007)

“put[s] a premium on strength and masculinity.”¹⁸² In prison slang, prison rapists are called “jocks,” “daddies” or “booty bandits,” while their targets are named “punks,” “fags,” “queens,” or men who have been “turned out” or “made gay.”¹⁸³ As one prisoner put it, “A man can’t be raped because he is gay but hasn’t realized it—being gay is already in him.”¹⁸⁴ In memoirs of their prison experiences, prisoners “often represent one of the parties in sexual acts as feminized and submissive, as the weak ‘punk’ or ‘old lady’ of the dominant male.”¹⁸⁵ Guards’ and prisoners’ understandings of prison sexuality “seem to propose the logic that, if a heterosexual man is not careful enough and secure enough in his masculinity, he may be ‘turned’ into a homosexual in prison.”¹⁸⁶

Although dominant prisoners are seen, and see themselves, as straight, they do not necessarily deny getting sexual pleasure from sex with other men. They retain their heterosexual identity by attributing their own arousal to the femininity of the targeted men.¹⁸⁷ Rape “mak[es] a woman out of the victim.”¹⁸⁸ “[B]efore long another man begins to look like a woman to you,” one prisoner observed.¹⁸⁹ “‘Young feminine looking dudes cause assaults,’ one white prisoner reported. ‘The other dude may give off vibes of wanting to be fucked,’ a black prisoner responded in agreement. ‘Someone comes in weak showin’ homosexual overtones,’ another commented.”¹⁹⁰

Reciprocal gay relationships—whether the reciprocity is emotional or sexual—are not accepted in prison culture, in part because this would disrupt the construction of prison relationships as heterosexual.¹⁹¹ Prison observers have long noticed that prison relationships often involve emotional or sexual mutuality, but it is taboo, and kept secret.¹⁹² “Jocks” value “catchers” for their feminine appearance and behavior.¹⁹³ They often pressure their less-manly partners into dressing and acting as women, refer to them

¹⁸² Just Detention International (“JDI”), *The Rape of LGBT Prisoners – A Hidden Hate Crime*, in HATE VIOLENCE AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE US, 2008 42 (National Coalition of Anti-Violence Programs, ed. 2009); see also NPREC, supra note 10, 73.

¹⁸³ See, e.g. JDI (2009), 42; Stephen Donaldson, *A Million Jockers*, 118-19; Sabo, 9; Robertson, *A Punk’s Song*, 535; Stemple; Ek, supra note 17, 62-63 (it is “widely understood” that sexual assault “turns” men gay); Eigenberg (2000), 417, 419; Fleisher & Krienert, 107, 134, 146

¹⁸⁴ Fleisher & Krienert, 153

¹⁸⁵ Ek, supra note 17, 54;

¹⁸⁶ Ek, supra note 17, 62

¹⁸⁷ See, e.g. *Wilson v. Wright*, 998 F.Supp. 650, 652 (1998) (inmate targeted for his youth, small stature and “protrud[ing]” buttocks).

¹⁸⁸ Kunzel, 173; Ek, supra note 17, 54; Sabo, 14; JDI; NPREC, supra note 10, 34; Stemple; Eigenberg (2000).; In prison as outside, men who are sexually harassed or abused have been unmanned. See, e.g. Sabo, 14; JDI; NPREC, supra note 10, 34 (prisoner testified that his assailants “had stolen my manhood, my identity, and part of my soul. . . . as a gay man, I blamed myself for many years. You’re degraded so much in there that after a while you start to believe it.”)

¹⁸⁹ Kunzel, supra note 4, 184.

¹⁹⁰ Kunzel, supra note 4, 179.

¹⁹¹ “For the majority of prisoners, penetrative sex with a punk or queen remains a psychologically heterosexual and, in the circumstances of confinement, normal act; the relationships involved are also psychologically heterosexual to them (as well as to most of their partners, willing or not).” Donaldson, 125. See also id. 120.

¹⁹² Donaldson, 120, 122; Kunzel, supra note 4, 185-87, quoting a 1962 description: “San Quentin inmate and novelist Edward Bunker cited a ‘jocular credo’ that ‘after one year behind walls it was permissible to kiss a kid or a queen. After five years it was okay to jerk them off. . . . After ten years, ‘making tortillas’ or ‘flip-flopping’ was acceptable, and after twenty years anything was fine.” Kunzel, id. 185

¹⁹³ Donaldson, 119-121.

them as “she,” and require them to perform “wifely” chores, such as laundry, cleaning and serving coffee.¹⁹⁴ Stephen Donaldson, who was raped repeatedly in prison, observed that “for these guys to be turned on and horny doesn’t really require any kind of feminine qualities in you, though the jockers usually prefer to imagine such qualities so they won’t have to think of their attraction as homosexual.”¹⁹⁵

This leaves little room for a masculine gay identity. One gay man told Jenness et al that he had to adopt feminine dress and mannerisms to fit in:

When you come into prison being homosexual, you’re automatically a girl. It’s your place to play the female role. If you’re open with your homosexuality.... But if you’re a guy and you’re fucking around with me, they’re the man and I’m the girl. I don’t understand it because you’re doing the same things I am doing.... When I first got here I had a bald head and was more tough. One transgender told me, ‘you have to gay it up!’ And then the guys were really receptive. Real life is so different than prison life. Here, you’re gay so there’s pressure right away to grow your hair out.... If you’re a manly gay boy you don’t fit in with the guys or the homosexuals. You have to adapt or be a total loner. I came in more manly and now am more feminine so people are more receptive. It’s an adaptation.¹⁹⁶

Prison rapists also use violence to retain their straight identity. Tops who have sex with men see themselves, and are seen by others, as “dispassionate, and their partners [a]re merely receptacles to ensure sexual gratification. The use of violence also help[s] to ensure that there [i]s no perception of emotional attachment, and help[s] protect these men from the stigma of being labeled homosexual.”¹⁹⁷ Twentieth-century prison sex researchers accepted this reasoning, claiming that prison rapists “experienced ‘no sexual pleasure’ whatsoever. Instead, the prisoner ‘rapes to prove he has power—power to dominate his prey.’”¹⁹⁸

While most prisoners and guards view prison rapists as masculine straight men, “[g]ay and transgender prisoners are viewed by many corrections officials as weak and contemptible.”¹⁹⁹ Their gayness alone disqualifies them for protection against sexual harassment and assault.²⁰⁰ One inmate who had been raped repeatedly was told, by various correctional officers, “Nobody is going to believe you because you are a known homosexual.”²⁰¹ Human Rights Watch reports that correctional officers will label an inmate “homosexual” in order to record the assault as consensual, and avoid having to

¹⁹⁴ Donaldson, 119-121; JDI

¹⁹⁵ Donaldson, quoted in Kunzel, *supra* note 4, 185.

¹⁹⁶ Valerie Jenness, *Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men’s Prisons*, 24

¹⁹⁷ Eigenberg (2000), 419.

¹⁹⁸ Kunzel, *supra* note 4, 173.

¹⁹⁹ JDI (2009), 43.

²⁰⁰ See notes – through –, *supra*, and accompanying text. Courts dealing with prisoner rapes, as well as rapes on the outside, treat evidence of the victim’s non-straight sexual orientation as evidence that he consented to sexual assault. E. Kramer, 319-22; *State v. Rodgers*, No. 01-C-01-9011-CR-00312, Tenn. Crim. App. LEXIS 648 (August 16, 1991) (reversing trial court’s exclusion of evidence that victim had had prior sex with two other inmates as evidence of consent). But see *id.* 321 n58 (most courts have rejected this reasoning).

²⁰¹ Just Detention International, *The Rape of LGBT Prisoners* 42, 46.

investigate it.²⁰² One inmate insightfully describes the “laws” of sexual abuse in prison: “Homosexuals put yourself at high risk; laws claim he has no evidence and because homosexual he likes it.”²⁰³

In addition to their failure to punish aggressors or protect victims, it is not unusual for guards to facilitate or arrange for sexual assault by another inmate,²⁰⁴ or to sexually assault the prisoner themselves.²⁰⁵ One gay inmate reports that, when he reported an inmate rape to correctional officers, three of the officers gang-raped him with a nightstick.²⁰⁶ During the assault, he says, the officers were “laughing, saying, ‘shut up, faggot, you’re enjoying it,’ then laughing while they left.”²⁰⁷

It seems unlikely that even the most homophobic of corrections officers believes that a gay man enjoys being injured by violent gang-rape. Rather, such statements and attacks reflect the low regard in which corrections officers hold gay prisoners. Many guards and prisoners share a belief that gay men “deserve to be raped.”²⁰⁸ Men who are raped by definition deserve it because they are “weak.”²⁰⁹

In prison, we see a gender dynamic of sexual abuse that is shared with the outside world: gender conformity is the measure of legal entitlement to protection and redress for sexual wrongs. Guards and administrators enforce norms of masculinity by authorizing real men to police the gender conformity of less-manly men by sexually abusing them. In prison, the legal response to same-sex sexual harassment depends on conformity to conventions that equate masculinity with dominance – even though the embrace of such norms may have landed many men in prison in the first place.²¹⁰

²⁰² HRW, at “Summary and Recommendations”

²⁰³ Fleisher & Krienert, 157

²⁰⁴ “My name is Owen and I was raped. I repeatedly told the officers in my building about my problem and they refused to re-house me. I eventually got a bed move and these officers and another sergeant reversed it stating I was ‘in check in that dorm’ and they didn’t want any of my fag shenanigans going on in other dorms. I was then eventually raped twice by my dorm-mate which led to me battering him. I am sitting in the hole for it. I told them about the rapes and they are not charging him.” JDI (2009), 45. See also Stop Prisoner Rape, Texas Update 5 (guards told inmate, “If you file one more life endangerment [grievance], we will physically put you in a cell with someone who will beat your ass.”).

²⁰⁵ JDI (2009), 43.

²⁰⁶ JDI (2009), 46.

²⁰⁷ JDI (2009), 46.

²⁰⁸ Eigenberg (2000) found that 46% of Texas guards and 12-24% of midwestern guards said they thought some inmates “deserved to be raped” if they were gay, effeminate, or had sex with men: id. 422, 423. See also Fleisher & Krienert, 173.

²⁰⁹ Fleisher & Krienert, 173 (quoting prisoners as saying: “Yes, just because, basically you are showing a weakness and then everything else counts. It all fall on showing weakness.” “Yes. He’s weak and if you’re weak you can take anything he’s has.” “Probably. It’s one of the first things he feeds on; this guy is weak, I can have him.”)

²¹⁰ For example, 53% of inmates of state prisons are being held for violent crimes. BJS, Prisoners in 2007, 21 (2009), at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p07.pdf> Norms of masculinity may also influence property and drug crimes to the extent that men with limited legitimate access to material wealth may turn to unlawful activities to demonstrate their manliness: Dowd, *supra* (describing theories of “compensatory masculinities”).

It is not clear why, given that such gender performances make prisons more violent and ungovernable, prison guards and administrators would encourage them. One possibility might be that gender is so ingrained as a meta-role (see West & Zimmerman, *Doing Gender*, 25 *Gender & Soc’y* 125 (1987)) that institutional actors consider it appropriate to require prisoners to act masculine in every situation. Prisons are not alone among institutions that require men to perform masculinity in ways that are

B. Dominance and Sexuality: Making Men

In this Subsection, I argue that prisoners and prison officials import the gender rules of the outside world to prison life. While the gender norms enforced in prison are extreme, they are not foreign to this culture.²¹¹ Prisoners and guards form part of American culture, especially since the United States imprisons more of its citizens than any other country in the world.²¹² In 2001, the Bureau of Justice Statistics estimated that, if then-current incarceration rates remained unchanged (they have since increased²¹³), 11.3% of American men would serve time in prison during their lifetime.²¹⁴ For Latinos, it was 17.2%, and for African-American men, 32.2%.²¹⁵ These men are not a different breed, set apart from society: median time served in jail or prison is only about two years, though most imprisoned men are reincarcerated for brief stints following parole violations.²¹⁶ Two thirds of men who have ever been to prison are now free of correctional supervision.²¹⁷ Prisoners, and the institution of mass incarceration, form part of our society.²¹⁸

As criminologist Helen Eigenberg found in her surveys of correctional officers' attitudes toward prison rape, prison guards' "culturally derived attitudes about women

completely unrelated to the central mission of the business. One Title VII employer supported postal employees' violent sexualized and physical assaults on a coworker because he was "effeminate"—a quality seemingly unrelated to performance of duties as a postal clerk: *Dillon v. Frank*, 992 U.S. App. LEXIS 766 (6th Cir. Jan. 15, 1992). A transgender woman was fired for wearing a pink pearl necklace to work as an engineer at Boeing. Doe, 846 P.2d at 433-34, 438. This might explain how one Arizona prison administrator considered the threat of rape to have a salutary effect on prisoners: he said that it teaches inmates to "assert themselves." See *infra* notes 241 to 242, and accompanying text.

It is also possible that prison officials hope that the threat or experience of prison rape (and violence more generally) will deter further lawbreaking upon release: see note 43, *supra*. This strategy, though, may be counterproductive: see, e.g. M. Keith Chen and Jesse M. Shapiro, *Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-Based Approach*, 9 Am. L. & Econ. Rev. 1 (2007) (finding that more violent prison conditions increase the risk of recidivism upon release).

²¹¹ Ordinarily, "criminality is defined as the non-normative so that the non-criminal can be perceived as the norm." Ek, *supra* note 17, 7.

²¹² International Center for Prison Studies at King's College, London, *World Prison Brief*

²¹³ BJS Bulletin, Prison Inmates at Midyear 2007, 6 (2008),

<http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf>; Today, 2% of the adult male population is in jail or prison right now. PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, 6 (2009). One in 30 men between the ages of 20 and 34 is behind bars; for black men, the figure is one in nine. *Id.* http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf

²¹⁴ Bureau of Justice Statistics, Criminal Offenders Statistics (2002),

<http://www.ojp.usdoj.gov/bjs/crimoff.htm>

²¹⁵ BJS Special Report, *Prevalence of Imprisonment in the US Population, 1974-2001*, 1 (2003),

<http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf>.

²¹⁶ Steven Raphael and Sills (2005), "Urban Crime in the United States," in Richard Arnott and Dan McMillan (eds.) *Companion to the Handbook of Urban Economics* (median time served is two years; two thirds of released men subsequently serve briefer stints for parole violations); Raphael (2005), "The Socioeconomic Status of Black Males: The Increasing Importance of Incarceration," in Auerbach, Alan J; Card, David and John M. Quigley (eds.) *Poverty, the Distribution of Income, and Public Policy*, New York: Russell Sage Foundation (similar findings in California prisons).

²¹⁷ BJS, *Prevalence of Imprisonment*, 2.

²¹⁸ See, e.g. David Garland, *Mass Incarceration*; Jonathan Simon, *Governing through Crime*; Devon Carbado (race, crime and citizenship)

and homosexuality ... strongly predict their willingness to engage in victim blaming as well as their definitions of rape in prison.”²¹⁹ The legal response to sexual abuse in prison reflects, in distorted form, patterns of masculinity we see—and enforce by law—in the outside world.

In Subsection i of this Section, I show that, in prison as outside, men use same-sex sexual abuse and harassment to reaffirm that they are straight and manly, and that their victims as deserve mistreatment and contempt for being effeminate or gay. In Subsection ii, I show that Title VII courts, like prison officials, deploy a heterosexual defense that, in practice, treats harassers and victims the way harassers see them.

i. Gendered understandings of sexual abuse in prison and outside

In the outside world as in prison, one important way for men to establish their masculinity is to bond with other men through ritual forms of sexualized talk and touching. Crude sexual jokes, gay-baiting insults, homophobic threats, butt-slapping, ass-grabbing, nipple-twisting and ball-squeezing are all relatively familiar and normative ways for boys and men to establish their heterosexuality by challenging that of other men. If the newbie is a real man, he can withstand such hazing, join the team, and dish it out in turn.²²⁰ Sexual hazing is a way of making men, outside prison²²¹ as well as inside.

When straight-identified men sexually harass coworkers they deem to be unmanly, they tend to follow a pattern of behavior so distinctive that it is almost as though the harassers are following a script.²²² Typically, the straight-identified harasser derides the targeted man as girly or “gay,”²²³ grabs and squeezes the targeted man’s

²¹⁹ Eigenberg (2000), 423; see also Eigenberg (1989), 51 (suggesting that negative attitudes toward homosexuality may reduce officers’ willingness to believe inmates’ reports of rape).

²²⁰ Marc Spindelman, *Discriminating Pleasures*, in Siegel & MacKinnon, eds. 201; Yoshino, 448, 450; Elizabeth J. Kramer, *Note: When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape*, 73 NYU L. Rev. 293, 296-97.

²²¹ “[T]he men who can take (and dish out) hazing, razzing, or horseplay are constituted as ‘real’ men, while those who cannot (or who choose to opt out) are constituted as ‘failed’ men.” Yoshino, 448 (parentheses in original).

²²² See, e.g. *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2001); *McWilliams; Oncale v. Sundowner Offshore Services*; *Schmedding*, 187 F.3d at 865; Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 Stan. L. Rev. 353, 446-458 (2000); *Doe v. Belleville*, 119 F.3d 353, 566-67 (7th Cir. 1997); *Johnson v. Hondo*, 125 F.3d 408, 410 (7th Cir. 1997); Katherine Franke, 1997; Franke, 2003; Julie A. Seaman, *Form and (Dys)Function in Sexual Harassment Law: Biology, Culture, and the Spandrels of Title VII*, 37 Ariz. St. L. J. 321, 335 (2005); *Martin v. Norfolk Southern Rwy Co.*, 926 F.Supp. 1044 (N.D. Ala. 1996); *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996). Axam & Zalesne, 201-02. This form of sexual harassment is not limited to the workplace, or even to adults: see, e.g. *Montgomery v. Independent School District No. 709*, 109 F.Supp.2d 1081, 1084, 1086 (2000) (middle-school student subjected to these forms of abuse); *Nabozny v. Podlesny*, 450-53 (same)

²²³ “Because many heterosexual men regard any failure to conform to their own preconceived notion of masculinity as a sign of homosexuality--and homosexuality as a failure to conform to their preconceived notion of masculinity--such harassment frequently includes antigay sentiments.” Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683, 1776-77 (1998) See also Franke, 2003, 177-78; Hilary S. Axam and Deborah Zalesne, *Simulated Sodomy and Other Forms of Heterosexual ‘Horseplay’: Same Sex Sexual Harassment, Workplace Gender Hierarchies, and the Myth of the Gender Monolith Before and After Oncale*, 11 Yale J L & Feminism 155, 196-97 (1999);

buttocks and genitals, threatens to rape him, forces him into mock anal or oral sex, and shoves phallic objects against his anus.²²⁴

This pattern of male-male sexual harassment is not limited to the Title VII workplace. It is seen in many other settings: policing,²²⁵ the military,²²⁶ fraternities and sports teams,²²⁷ school bullying,²²⁸ and other hierarchical, largely male contexts,²²⁹ including men's prisons.²³⁰ These "hypermasculine" environments²³¹ share certain institutional features which, sociologists have found, greatly increase the likelihood that men will sexually harass and assault others:²³² organizational tolerance for sexual harassment, and a rigid and widely shared "hypermasculine" sex-role ethos by which violence is manly, danger is exciting, some women deserve to be raped, and "effeminate" men deserve to be ridiculed.²³³ In such an environment, the straight-identified same-sex harasser is conforming to conventional gender norms that equate masculinity with dominance, as long as he denies any sexual gratification from the sexual talk and touching he inflicts on the other man.²³⁴

²²⁴ See note 222, *supra*.

²²⁵ See, e.g. Rachanee Srisavasdi, *City to Pay Gay Officer up to \$2.15 Million*, Orange County Register (June 30, 2008), at <http://www.ocregister.com/articles/bereki-gay-police-2080981-department-lawsuit> (settling lawsuit alleging that a fellow officer was subjected to physical and verbal harassment, including another officer "simulating anal sex on him during a training class in front of supervisors" and saying "the only thing (Bereki) handles are gay sex crimes"); Angela P. Harris, *Gender, Violence, Race and Crime*, 52 Stan. L. Rev. 777 (2000) (police beating and sexual assault upon Abner Louima); Elizabeth J. Kramer, *When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape*, 73 NYU L. Rev. 293; John B. Pryor and Nora J. Whalen, *A Typology of Sexual Harassment: Characteristics of Harassers and the Social Circumstances Under Which Sexual Harassment Occurs*, in *SEXUAL HARASSMENT: THEORY, RESEARCH AND TREATMENT* 129, 142-43 (William O'Donohue, ed. 1997)

²²⁶ Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. Rev. 499 (1991); Sabo et al, 6; see also, e.g. Aaron Belkin, *Is Hazing a Form of Torture?* Huffington Post (September 2, 2009), http://www.huffingtonpost.com/aaron-belkin/is-hazing-a-form-of-tortu_b_275593.html (documenting violent, homosocial hazing among, *inter alia*, Navy SEALs and private security contractors, targeting gay men and men who refused to have sex with prostitutes)

²²⁷ Wencelblat, 62

²²⁸ Nabozny; Goluszek; Henkle

²²⁹ Pryor & Whalen, 139-43;

²³⁰ Sabo; Robertson

²³¹ Hypermasculinity, enacted as dominance over other men, is prized in prison: Robertson, 535; Don Sabo et al, *Gender and the Politics of Punishment*, in *Prison Masculinities 3* (Don Sabo et al, eds, 2001) ("Prison is an ultramasculine world")

²³² John B. Pryor and Nora J. Whalen, *A Typology of Sexual Harassment: Characteristics of Harassers and the Social Circumstances Under Which Sexual Harassment Occurs*, in *SEXUAL HARASSMENT: THEORY, RESEARCH AND TREATMENT* 129, 140, 142-43 (William O'Donohue, ed. 1997) (anti-gay male-male sexual harassment most common in "traditionally male work settings" where most workers are men); see also Wencelblat, 62.

²³³ Pryor & Whalen; Wencelblat, 62.

²³⁴ See, e.g. Kenneth Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. Rev. 263, 285-86 (1995):

What is clear is the mythic script a man must follow if he is to maintain his superior "masculine" identity. He must suppress the feminine -- not just by controlling women (especially in the realm of sexuality), but also by embracing a form of masculinity that entirely rejects any internal impulses that are feminine or homoerotic.

[footnotes omitted]

In the outside world, of course, homosocial “horseplay” or hazing goes too far if it escalates to rape—although it sometimes does.²³⁵ Men are raped outside prison as well as inside.²³⁶ Outside as inside, male perpetrators of same-sex sexual assault are often straight-identified.²³⁷ Men are targeted for sexual harassment and assault because they are, or seem to be, unmanly, disabled or gay.²³⁸ In the outside world, too, transgender women²³⁹ are at much higher risk of physical or sexual assault than are other Americans women or men.²⁴⁰

In prison, the threat of rape serves a socially normative gender-making function akin to that of aggressive sexual hazing on the outside. Bill Gaspar, an Arizona prison warden, claims that the threat of rape teaches inmates to “assert themselves.”²⁴¹ New prisoners, he says, “com[e] to an environment where they have to learn how to carry themselves so that they don't present as victims or in some way call attention to themselves.”²⁴² The threat of sexual assault teaches them to resist it by becoming real men. If they can't, well, they should just “grow up.”²⁴³

Cultural anthropologists Fleisher and Krienert contend that prisoners participate in an “inmate culture” in which, they claim, social norms and behavior are “radically different from free-society standards.”²⁴⁴ Free society, they suggest, views sexual violence as “abhorrent, unjustifiable acts.”²⁴⁵ In “inmate culture,” they report, it is presumed that that a victim could prevent rape if he or she really wanted to; that victims may report sexual assault “to garner attention” or “to falsely blame” an alleged assailant; that they may be to blame for having incurred financial debts to the assailant; or that they may have “sexually enticed” the assailant “by flirting and then failed to fulfill a silent promise of a sexual affair.” This “inmate culture,” they point out, presumes that, “if rape occurs, fault lies with the victim.”²⁴⁶

²³⁵ See, e.g. Wencelblat (discussing 2003 incident in which upperclass high school football players committed severe and violent sexual assaults on three first-year football players, as well as the severe and violent sexual assault committed upon Abner Louima by Justin Volpe and other police officers in 2001). She observes, *id.* 62, that “hazing”-related sexual assaults have been documented on “other high school football teams where older players were accused of sexually assaulting a younger player, in a boarding school dormitory between older students and both new or younger students, and in fraternity initiations.”

²³⁶ See generally, e.g. Nicholas Groth & Ann Wolbert Burgess, *Male Rape: Offenders and Victims*, 137 *Am. J. Psychiatry* 806 (1980); Pinar, 841-847; E.Kramer; Axam & Zalesne?

²³⁷ E.Kramer, 315, citing Groth & Burgess; Pinar, 841-47.

²³⁸ see, e.g. E.Kramer, 316-18; Pinar, *id.*

²³⁹ State and federal correctional policies require that male-to-female transpeople be housed in men's prisons. See, e.g. Farmer v. Brennan; JDI (2009)

²⁴⁰ While 2-3% of free Americans report being victims of violent crime in a given year, 37% of transpeople report being physically assaulted because of their gender presentation alone: Rand & Catalano, quoted in Jenness, *Margins* 21. Outside prison, estimates of lifetime risk of sexual assault for trans women range from 13.5 to 60%, compared to a one in six lifetime risk for all women: Jenness, *id.* 22. “Lifetime prevalence of physical assault while presenting as female outside of prison is 61.1%, a number that rises to 85.1% when considering assault both in and out of a carceral setting.” *Id.* 22.

²⁴¹ JDI, 2004

²⁴² JDI, 2004

²⁴³ NPREC, *supra* note 10, 69

²⁴⁴ Fleisher & Krienert, 176

²⁴⁵ Fleisher & Krienert, 176

²⁴⁶ Fleisher & Krienert, 177.

These beliefs are not deviant. They are traditional. As we have seen, these beliefs are shared, and enforced, by guards and others in the law-abiding world. They are some of the classic “rape myths” that gave rise to the feminist movement for rape law reform, and to the continuing critique of the laws of rape and sexual harassment in the outside world.²⁴⁷

Outside as in prison, jurors and other factfinders tend to assume that “a man who is not gay will never consent to sex with another man,”²⁴⁸ so that any man who reports sexual abuse must be gay. Like unchaste women, gay men are assumed to consent to sex with any and all men, regardless of the circumstances or the degree of violence used.²⁴⁹ Like women who do not conform to the “good victim” archetype,²⁵⁰ “men who are sexually assaulted may be accused of having ‘wanted it’ and confronted with the incorrect belief that men cannot be assaulted against their will.”²⁵¹

Like prisoners, free “men who transgress gender norms by exhibiting insufficient masculinity are maligned as gay,”²⁵² regardless of their actual sexual orientation.²⁵³ In prison as outside, “the raped man becomes subject to many of the stereotypes surrounding the rape of women – he is lying, must have asked for it, probably enjoyed it, and so on.”²⁵⁴ In prison as outside, evidence of gay sexual orientation is treated as evidence of consent in the investigation of sexual abuse.²⁵⁵

Thus sexual harassment may be excused on the basis that gay men deserve to be abused. For example, when boys who are out as gay seek protection from school officials who bear a legal responsibility to protect them, these officials sometimes refuse to do so, laugh at the victim,²⁵⁶ and blame the battering and harassment on the young man for being gay.²⁵⁷ For example, when one gay student told a vice-principal that other students had beaten him up and threatened to lynch him, the vice-principal just laughed.²⁵⁸ A principal refused to protect him, telling him to “keep quiet about his sexual orientation” and “stop acting like a fag.”²⁵⁹ In another case, a thirteen-year-old middle-school student was attacked in front of twenty students in a science classroom. Two boys “held [him] down and performed a mock rape on [him], exclaiming that [he] should enjoy it.” When he sought protection from the principal, she told the boy and his parents that he should

²⁴⁷ See generally, e.g. Heike Gerger et al., *The Acceptance of Modern Myths About Sexual Aggression (AMMSA) Scale: Development and Validation* 33 *Aggressive Behavior* 422, 425 (2007); JENNIFER TEMKIN & BARBARA KRAHÉ, *SEXUAL ASSAULT AND THE JUSTICE GAP: A QUESTION OF ATTITUDE* 31-40 (2008); Irina Anderson, *What Is a Typical Rape? Effects of Victim Participant Gender in Female and Male Rape Perception*, 46 *Brit. J. Soc. Psychol.* 225, 228 (2007).

²⁴⁸ E.Kramer, 316.

²⁴⁹ Spindelman; Kramer, 319-323.

²⁵⁰ See note - , supra.

²⁵¹ E.Kramer, 318; see also Fleisher and Krienert, 156 (quoting inmates as saying “you just can’t do that to someone who don’t want it,” and “if a person do get raped he wanted it or he would have said something, just like in a man and woman relationship.”)

²⁵² Axam & Zalesne, 197.

²⁵³ See also, e.g. Schultz, *Reconceptualizing Sexual Harassment*

²⁵⁴ E. Kramer, .

²⁵⁵ E.Kramer, 319-323 (evidence of victim’s sexual orientation introduced as evidence of consent in rape prosecutions)

²⁵⁶ Nabozny, 452; Henkle, 1069

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²⁵⁸ Henkle, 1069.

²⁵⁹ Henkle, 1070.

“expect” such behavior if he was “going to be so openly gay.”²⁶⁰ When the beatings and harassment intensified in high school, a school administrator “laughed and told [him] that [he] deserved such treatment because he is gay.”²⁶¹

In the outside world as in prison, sexual harassment masculinizes the harasser and feminizes the target, regardless of their sex.²⁶² Men who are sexually harassed or assaulted experience the violence as emasculating.²⁶³ Harassers aggrandize their own masculinity as “sexual aggressiveness and conquest,” and degrade their victims as feminine by enforcing their “sexual vulnerability and availability.”²⁶⁴

As in male-dominated institutions in the outside world, “Men’s correctional facilities tend to have very rigid cultures that reward extreme masculinity and aggression and perpetuate negative stereotypes about men who act or appear different. In this environment, gay, bisexual, and gender-nonconforming individuals are often the targets of sexual abuse precisely because the dominant ‘straight’ males expect and demand submission.”²⁶⁵

Gay-baiting is an important means of imposing gender conformity among men in the outside world: “Heterosexuality is an especially rigid norm, and much policing is done by labeling one who deviates from the norm as being ‘gay’ or a ‘fag.’”²⁶⁶ Harassers often “explicitly question the target’s sex, thereby expressing their disdain for persons who diverge from appropriate standards of masculinity or femininity. . . . both male and female targets are ostracized and ridiculed by harassers who object to their failure to conform, in appearance and demeanor, to prescribed gender roles.”²⁶⁷ Men are targeted for being gay, or they are “presumed to be homosexual [because] they are the subject of explicit sexual advances.”²⁶⁸ Outside as inside, to be gay is to have failed as a man; failure to act like a “real man” raises suspicions of gayness regardless of the man’s actual desires.²⁶⁹

²⁶⁰ Nabozny, 92 F.3d 451, 452.

²⁶¹ Nabozny, 452.

²⁶² Catharine MacKinnon observes, in *TOWARD A FEMINIST THEORY OF THE STATE* 178 (1989) (quoting Shafer and Frye, “Rape and Respect” at 334):

‘Rape is a man’s act, whether it is a male or a female man and whether it is a man relatively permanently or relatively temporarily; and being raped is a woman’s experience, whether it is a female or a male woman and whether it is a woman relatively permanently or relatively temporarily.’ To be rapable, a position that is social not biological, defines what a woman is.

See also Wencelblat, 62, pointing out the “emasculating impact” of sexual assault on the male victim. Sexual assault thus effects “a two-fold attack on the victim’s masculinity: (1) the attacker reduces the victim to ‘a woman’ in the encounter and the victim is no longer ‘not a woman’, and (2) the attacker forces the victim into /63/ homosexual contact. Calling it ‘sexual’ and calling the perpetrators ‘perverted’ makes the perpetrators seem like aberrations and exceptions to the rule rather than the embodiment of the rule.” See also Franke; E.Kramer, 316-317; Igelsias, 949; Axam & Zalesne, 198-205; Spindelman,

²⁶³ Janet Halley, *Sexuality Harassment*, in CATHARINE A. MACKINNON AND REVA SIEGEL, eds. *DIRECTIONS IN SEXUAL HARASSMENT LAW* 182, 190 (2004); Franke; Kendall, 225;

²⁶⁴ Franke (1997)

²⁶⁵ NPREC, supra note 10, 73.

²⁶⁶ Dowd, 245. See also id. 222.

²⁶⁷ Axam & Delesne, 195. See also id. 203-04.

²⁶⁸ Colker, 207. See also Yoshino, id.

²⁶⁹ Yoshino, 448-49. See also Schwartz, 1791; Schultz, *Reconceptualizing Sexual Harassment*.

As Don Sabo points out, “The prison code is very familiar to men in the United States because it is similar to the male code that reigns outside of prison.”²⁷⁰ Prisoners share with the broader society gendered norms and values which, *inter alia*, “instruct males that masculinity must be aggressively acquired by controlling people and resources.”²⁷¹ A manly man is supposed to be dominant, unfeeling, and strong.²⁷² He is aggressively heterosexual, and is “expected to be the initiator of sexual relations.”²⁷³ He should be able to use violence to defend himself when necessary. He can protect himself and others; he does not need to seek protection.²⁷⁴

Yet, as scholars of masculinity observe, most men, whether on the outside or in prison, don’t feel very powerful.²⁷⁵ They feel insecure and anxious about their masculinity, and face considerable pressure, both socially and self-imposed,²⁷⁶ to measure up to an ideal that is unattainable for most men.²⁷⁷ For young men and adolescents on the outside, as well as for the millions of (mostly young²⁷⁸) men held in prison, “The dominant masculinity is that identified with the ‘jocks,’ and even those who are not part of this group often use sports as a means to construct identity.”²⁷⁹ Many of these young men, who are “at an age of establishing their own sexual identities,” engage in anti-gay sexual harassment when they are in hypermasculine environments where such behavior is tolerated.²⁸⁰ Prison is one such environment.

The classification of prison rapists as “straight” may seem dissonant in light of contemporary understandings of sexual identity. But until recent decades, Americans viewed the man who penetrates another man as the straight one. As Elizabeth Kramer observes,

Turn-of-the-century Americans considered only men who behaved in an effeminate manner and were the passive partner in sexual intercourse to be homosexual. ‘Normal’ men were able to engage in sexual intercourse with effeminate men, often called ‘fairies,’ without risk of being identified as homosexual so long as they played only the active role in sex. In fact, using a ‘fairy’ sexually became an effective means to enhance one’s masculinity. . . . male rapists of men were not seen as gay because they chose to assault men, but were rather perceived as more masculine.²⁸¹

²⁷⁰ Sabo, 10

²⁷¹ Robertson, 536; see also Iglesias, 948.

²⁷² Christopher N. Kendall, *Gay Male Liberation Post Oncale: Since When is Sexualized Violence Our Path to Liberation?* in Siegel & MacKinnon, 221, 225; Karst; Dowd; Martha Fineman (vulnerable subject)

²⁷³ Cynthia Willis, 213. See also Sylvia A. Law, *Heterosexuality and the Social Meaning of Gender* 208.

²⁷⁴ Fineman?

²⁷⁵ Karst; William N. Eskridge, Jr., *Theories of Harassment ‘Because of Sex’*, in REVA B. SIEGEL AND CATHARINE A. MACKINNON, EDS., *DIRECTIONS IN SEXUAL HARASSMENT LAW* 155 (2003); Iglesias, 953; Dowd

²⁷⁶ West & Zimmerman, *Doing Gender* (many people feel obligated to “perform gender” appropriately even when they are alone and no one is observing them).

²⁷⁷ Karst; Eskridge, *GayLegal Narratives*, 46 *Stan. L. Rev.* 607 (1994); Iglesias, 953

²⁷⁸ BJS, *Prison Midyear Report 2007*, 7 (one third of prison inmates are age 20-29; more than half are aged 18- 35); Pew Center, 3

²⁷⁹ Dowd, 246.

²⁸⁰ Pryor & Whalen, 143.

²⁸¹ E. Kramer, 311.

Today, despite the advances of gay liberation, many men who have sex with men do not consider themselves to be gay; many of them see penetration as a manly act, and being penetrated as “gay.”²⁸² In his recent study of men’s same-sex racial preferences in online dating, Russell Robinson found that, even among gay-identified men in the outside world, bottoms are stigmatized, while tops are framed as real men (and black men are stereotyped as tops).²⁸³ Thus even today, many free men, like prisoners, associate “gayness” with effeminacy and straightness with masculinity, regardless of sexual orientation.²⁸⁴

Free victims of sexual harassment or abuse hesitate to report it to legal authorities for the same reasons prisoners give: fear, shame, self-blame, fear of retaliation by the abuser, fear that they will be disbelieved by police or juries, fear of humiliation in the investigation process, and fear that a trial will expose their sexual history.²⁸⁵ Men on the outside, like men in prison, “are worried about being stigmatized by their mere status as victims. They also fear being perceived as unmasculine or gay, or, if they are gay, being forced to come out publicly. They suspect that verdicts in criminal cases can be compromised because of anti-gay bias, regardless of the evidence.”²⁸⁶

In prison, men have additional reasons to fear reporting sexual abuse. They are rightly concerned that reports of sexual assaults will not be kept confidential,²⁸⁷ and that leaks can lead to retaliation by abusers, labelling as a snitch,²⁸⁸ or revictimization at the hands of staff²⁸⁹ or other prisoners.²⁹⁰ One Texas prisoner reports that in his institution, if an inmate reports sexual threats and harassment to the prison administration, he is locked in solitary confinement, and guards tell the alleged harassers that he has reported them.²⁹¹ “Of course, the inmates are going to deny it. So they pull us out of solitary and put us right back over there with them.”²⁹²

²⁸² Russell K. Robinson, *Structural Dimensions of Romantic Preferences*, 76 *Fordham L. Rev.* 2787 (2008); Hill-Collins, 174.

²⁸³ Robinson, *id.* 2811-14; see also Russell K. Robinson, *Racing the Closet*, 61 *Stan. L. Rev.* 1491, 1498 (2009). Ek found a similar pattern in her review of prison narratives, *supra* note 17, 54.

²⁸⁴ Schultz, *Reconceptualizing Sexual Harassment*

²⁸⁵ See, e.g. Estrich, *Sex at Work*; E. Kramer, 294; BJS Correctional Authorities 2006, 2005, 2004; A major reason for failure or refusal to report sexual abuse, on the inside as on the outside, is fear of the investigation process. Catharine MacKinnon, *Reflections on Sex Equality Under Law*, 100 *Yale LJ* 1281, 1303 (1991) (“fear of the criminal justice system” is the most frequently reported reason for nonreporting).

The Bureau of Justice acknowledges that sexual abuse is underreported, in part because of “fear of reprisal from perpetrators, a code of silence among inmates, personal embarrassment, and lack of trust in staff.” Correctional Authorities, 2005, at 2; Correctional Authorities, 2004, at 2

²⁸⁶ E.Kramer, 296-97

²⁸⁷ NPREC, *supra* note 10; HRW

²⁸⁸ Fleisher & Krienert, 172

²⁸⁹ Correctional Authorities, 2; NPREC, *supra* note 10, 103-04; HRW.

²⁹⁰ Once an inmate has been sexually assaulted, he is “gay” or a “punk,” and this reputation makes him a target for further sexual assaults. See, e.g. Fleisher & Krienert, 169. When sexual abuse is reported to correctional authorities, some staff expose the inmate to sexual abuse or abuse the inmate themselves: JDI, 2009.

²⁹¹ “[W]hen an inmate like me makes a complaint to the administration about certain inmates pressuring me, they lock us up in a solitary confinement cell and pull the individuals that we named out of their cell blocks and say, ‘Hey, this inmate has made complaints about you that you are trying to pressure him in doing this and doing that.’” Stop Prisoner Rape, *Stories from Inside* 13

²⁹² *Stories from Inside*, 13.

Men on the outside, including those who go to prison, are socialized to deny feelings of vulnerability.²⁹³ In prison, though, the stakes are higher: to admit vulnerability “could mean that they would become more vulnerable to abuse and retaliation from staff and other male inmates.”²⁹⁴

The most significant difference between prison masculinities and the masculinities enacted in manly environments on the outside—such as the military, police and firefighters, fraternities, men’s sports and other male-dominated places of work and play—is that these free masculinities are socially affirmed. Prison masculinities, of course, are “simultaneously hypermasculine and stigmatized.”²⁹⁵ Angela Harris observes that police and criminal gangs share a culture of hypermasculinity, and view themselves as opposing sides in a turf war.²⁹⁶

The use of violence to prove masculinity is not unique to prison. In the outside world, violence is an important, though by no means the only, means of expressing masculinity.²⁹⁷ Men serving in the police or military, as well as pop-culture action heroes, routinely engage in socially approved violence.²⁹⁸ As Kenneth Karst and William Eskridge have observed, in the military as elsewhere in social life, “‘combat’ is a synonym for ‘power,’”²⁹⁹ and a marker of manhood and full citizenship.³⁰⁰ Violence against other men, whether sexual or physical, demonstrates masculinity.³⁰¹

Violence is also the normative means by which heterosexual men are expected to resist sexual advances by other men. In the free world as inside, a real man is expected to “fight off” his attacker.³⁰² Police, employers, parents and principals often refuse to help harassed men and boys on the basis that, if they are gay, they do not deserve protection, and if they are straight, they should fight.³⁰³ Some courts have accommodated this convention through the rightly excoriated “homosexual panic defense.”³⁰⁴ Because the Supreme Court’s Title VII jurisprudence, discussed below, has expressly left room for

²⁹³ Brenda V. Smith, *Watching You, Watching Me*, 15 Yale J. L. & Feminism 225, 279 (2003)

²⁹⁴ Smith, *Watching You*, 279.

²⁹⁵ Ek, supra note 17, 49.

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²⁹⁷ Harris; Ek, supra note 17, 12

²⁹⁸ Ek, supra note 17, 12.

²⁹⁹ Karst, 524, quoting H. ROGAN, *MIXED COMPANY: WOMEN IN THE MODERN ARMY* 296 (1981); see also Eskridge

³⁰⁰ Karst.

³⁰¹ Harris

³⁰² E. Kramer, 318 (citing examples of parents and police officers who failed to respond to sexual abuse of young men on the basis that a real man would be able to fight off his attacker).

³⁰³ For example, when one nineteen-year-old told his father that he had been raped, his father “ask[ed] him why he had not prevented it by fighting off the defendant.” *Commonwealth v. Gonzales*, 199 N.E.2d 1229, 1231 (Mass. App. 1986)

³⁰⁴ The “homosexual panic” defense, which mitigates murder to manslaughter, posits that a “reasonable” straight-identified man would respond to another man’s nonviolent sexual advance with lethal violence. See, e.g. Robert B. Mison, *Note, Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 Calif. L. Rev. 133, 158 (1992); Martha C. Nussbaum, “*Secret Sewers of Vice: Disgust, Bodies, and the Law*,” in *THE PASSIONS OF LAW* 19, 35-38 (Susan A. Bandes ed., 1999); Joshua Dressler, [When “Heterosexual” Men Kill “Homosexual” Men: Reflections on Provocation Law, Sexual Advances, and the “Reasonable Man” Standard](#), 85 J. Crim. L. & Criminology 726, 754-56 (1995); Christina Pei-Lin Chen, *Note, Provocation’s Privileged Desire: The Provocation Doctrine, “Homosexual Panic,” and the Non-Violent Unwanted Sexual Advance Defense*, 10 Cornell J.L. & Pub. Pol’y 195 (2000); Cynthia Lee, *The Gay Panic Defense*, 42 U.C. Davis L. Rev. 471, 488 (2008)

socially approved intermale “roughhousing,”³⁰⁵ the allegedly unmanly targets of sexualized hazing are often unprotected against severe, pervasive and unwelcome sexual talk and touching by straight-identified men.³⁰⁶ They have to “take it like a man.”³⁰⁷ As one shop-floor supervisor put it, “if [the plaintiff] were a ‘real man,’ he would address the matter in a manner other than by filing a sexual harassment complaint.”³⁰⁸ A real man should fight off his abusers, not hide behind the skirts of legal authority.

ii. The heterosexual defense in the law of same-sex sexual harassment

Prisons’ disregard for laws and rules against sexual violence shows a pattern of underenforcement quite similar to that identified by Sasha Natapoff in the outside world: “the state routinely and predictably fails to enforce the law to the detriment” of the least-valued members of society. In prison, laws against sexual abuse are underenforced (or just unenforced), with similar effects: prisoners who are marginal on the outside because of their sexual orientation, race or gender presentation “tend also to be the most vulnerable to abuse while in detention.”³⁰⁹ Like prison guards, “Police concede that they will not arrest certain sorts of perpetrators; many victims expect that they will remain unprotected.”³¹⁰ As in prison, “violators rest secure in the knowledge that their crimes are the sort that will go unpunished.”³¹¹ In prison as in the outside world, laws against sexual abuse are underenforced along familiar lines of gender, race and class.³¹²

In the free world as inside, the legal response to sexual harassment and abuse departs from ordinary legal rules to enforce the norms of masculinity that abusers enforce through sexual harassment. In adjudicating claims of same-sex sexual harassment in the workplace, many Title VII courts, like prison officials, enforce a gender convention I describe as a “heterosexual defense” which authorizes straight men to punish the gender-nonconformity of unmanly men by sexually harassing them.

Katherine Franke argues that sexual harassment is a “technology of sexism,”³¹³ and it is.³¹⁴ It “perpetuates larger cultural norms of women as both subordinate and sexually vulnerable to men.”³¹⁵ Whether the targets are men or women, sexual harassment and sexual violence are often “used by men to assert their own masculinity while emasculating their victims.”³¹⁶ Sexual harassment perpetuates heteronormative “gender norms and orthodoxies”³¹⁷ about “what ‘real men’ and ‘real women’ should

³⁰⁵ Oncale, see note -, *infra*, and accompanying text.

³⁰⁶ Title VII prohibits unwelcome, “severe and pervasive” harassment that occurs “because of sex”: *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

³⁰⁷ Spindelman

³⁰⁸ *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 502 (6th Cir. 2001).

³⁰⁹ JDI, *The Rape of LGBT Prisoners*, 42

³¹⁰ Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715, 1717 (2006).

³¹¹ Natapoff, 1717.

³¹² Natapoff, 1718.

³¹³ Franke, 1997; see also Franke, 2003, 179 (sexual harassment is a “tool or instrument of sexual regulation”)

³¹⁴ See, e.g. Law, *Heterosexuality and the Social Meaning of Gender*; Case; Abrams; Colker

³¹⁵ Franke, 2003, 179

³¹⁶ Wencelblat, 60.

³¹⁷ Franke, 2003, 177.

be,³¹⁸ either “by enacting these norms—as in the case of men harassing female subordinates in the workplace—or by punishing gender nonconformists.”³¹⁹ Outside as in prison, the legal response to sexual harassment reinforces gender norms and orthodoxies (that is, the rules of masculinity) in much the same way.

To the extent that a same-sex harasser targets a male coworker for severe, pervasive and unwelcome sexual talk and touching on the basis that the target is feminine, unmanly or gay, a straightforward application of the Supreme Court’s decisions in *Price Waterhouse v. Hopkins*³²⁰ and *Oncale v. Sundowner Offshore Services*³²¹ would seem to establish liability for enforcing gender stereotypes in the workplace.³²² *Price Waterhouse* established that Title VII bans employment practices that require workers to conform to gender stereotypes, or punish them for failing to conform.³²³ The Court held that “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”³²⁴ If Title VII prohibits discrimination against a woman for failing to meet stereotyped expectations of femininity, many scholars have argued, it must also prohibit discrimination against men who fail to meet stereotyped expectations of masculinity.³²⁵

Any doubt in this regard should have been resolved in 1998, when a unanimous Supreme Court determined in *Oncale* that Title VII protections apply to same-sex sexual harassment, regardless of the sex or sexual orientation of harasser or victim.³²⁶ Title VII liability was not limited to gay or lesbian harassers. Although the court did not adopt the sex-stereotyping argument, it did hold that “harassing conduct need not be motivated by sexual desire to support an inference of discrimination because of sex.”³²⁷

This holding would seem to make it doctrinally clear that a straight man violates Title VII when he sexually harasses a male colleague he thinks is unmanly or gay. Franke explains, “Where men use offensive sexual conduct as a means by which to enforce particular orthodoxies of masculinity in men – clearly Title VII has been violated, just as it was when Ann Hopkins was denied partnership at Price Waterhouse because she wasn’t feminine enough.”³²⁸

³¹⁸ Franke, 1997, 763. See also Abrams, 2531.

³¹⁹ Franke, 1997, 763. See also Rachel L. Toker, *Multiple Masculinities: A New Vision for Same-Sex Harassment Law*, 34 Harv. C.R.-C.L. L. Rev. 577, 601 (1999);

³²⁰ 490 U.S. 228 (1989).

³²¹ 523 U.S. 75 (1998).

³²² See, e.g. Case, 4; Franke (2003), 178; Schwartz, 1742; Eskridge (in Sexual Harassment), 166.

³²³ In *Price Waterhouse*, the Court found a Title VII violation when Ann Hopkins, a senior associate at an accounting firm, was told that in order to make partner, she should, *inter alia*, “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” *Price Waterhouse*, at 235. Although she had “generated more business” for the firm and had “billed more hours than any of the other candidates for consideration,” was denied promotion because the partners considered her unfeminine. The partners described her as “abrasive” and “macho.” Despite the partners’ and clients’ high praise for her professionalism and work ethic, she was denied promotion for her lack of “interpersonal skills . . . she was sometimes overly aggressive, unduly harsh, difficult to work with, and impatient with staff.” One partner suggested she take “a course at charm school.” *Id.*

³²⁴ *Id.* 250.

³²⁵ See, e.g. Case; Schwartz, 1742-43; see also *Doe v. Belleville; Montgomery*, 1091.

³²⁶ *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998).

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³²⁸ Franke, 2003, 178.

Many commentators have made this sex-stereotyping argument,³²⁹ and several federal appellate courts have endorsed it.³³⁰ The sex-stereotyping analysis is also used by courts to adjudicate (and punish) same-sex harassment in the context of anti-gay bullying in schools.³³¹ Yet even after the *Oncale* decision, many federal courts, including the Courts of Appeals of the Second, Third, Sixth, and Seventh Circuits, have continued to insist that straight men's sexual harassment of effeminate or gender-nonconforming men is permitted by Title VII.³³²

Unlike prison guards, federal appellate courts do not claim that gay men and sissies deserve to be sexually harassed. Rather, these courts offer three main reasons for finding that the classic pattern of male-male sexual harassment is not "because of sex": (1) because the harasser is a man, he is unlikely to harbor any animus against men as a class,³³³ (2) an avowedly straight man could not be attracted to the man he was

³²⁹ See, e.g. Franke; Case; Yoshino; Eskridge, in *Sexual Harassment* 166; Janet Halley, *Sexuality Harassment*, in Siegel & MacKinnon, *supra* 182, 191; Franke; Christopher N. Kendall, *Gay Male Liberation Post Oncale: Since When is Sexualized Violence Our Path to Liberation?* in Siegel & MacKinnon, 221, 225; Schwartz, 1742; Spindelman; Z.Kramer

³³⁰ See, e.g. Doe v. Belleville; Higgins, 194 F.3d at 261 n4; Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2001); Centola v. Potter, 183 F.Supp.2d 403, 412-13 (D.Mass. 2002); EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498 (2001).

³³¹ See, e.g. Nabozny v. Podlesny 92 F.3d 446 (7th Cir. 1996) (school refusal to protect against homophobic bullying and assaults could support Equal Protection sex discrimination claim); Montgomery v. Indep. School District 109 F. Supp. 2d 1081, 1090-92 (2000); Henkle v. Gregory 150 F. Supp.2d 1067 (2001) (school failure to protect against homophobic bullying and assaults could support sex discrimination claim under Title IX or Equal Protection). Cases involving children, of course, may be distinguishable (and more sympathetic to reviewing courts) in that it is socially appropriate for children, including male children, to seek parental, institutional or legal protection against sexual abuse. They aren't expected to be able to fend entirely for themselves, and their need for protection is not a failure of masculinity as it is for a grown man. See notes – through -, *infra*. Also, because most parents, judges and other adults prefer not to think of children as having sexual desires, they may be less likely to view an eleven-year-old target of sexual abuse as effeminate or gay, and therefore undeserving of legal protection. See, e.g. Montgomery, *id.*: "[P]laintiff's peers began harassing him as early as kindergarten. It is highly unlikely that at that tender age plaintiff would have developed any solidified sexual preference, or for that matter, that he even understood what it meant to be 'homosexual' or 'heterosexual.' The likelihood that he openly identified himself as gay or that he engaged in any homosexual conduct at that age is quite low. It is much more plausible that the students began tormenting him based on feminine personality traits ... and the perception that he did not engage in behaviors befitting a boy. ... [This pleading] would support a claim of harassment based on the perception that he did not fit his peers' stereotypes of masculinity." *But see* Nabozny, *id.*; Henkle, *id.* (students harassed and assaulted because they came out as gay).

³³² See, e.g. Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000); Philadelphia Coca Cola Bottling Co., 260 F.3d 257 (3d Cir. 2001), cert. denied 122 S.Ct. 1126 (2002); King v. Super Service, Inc., 2003 WL 2150008 (6th Cir. 2003); Hamner v. St. Vincent Hospital, 224 F.3d 701, 707 (7th Cir.) ("The reality is that there is a distinction between one's sex and one's sexuality under Title VII, and that the statute only prohibits employers from harassing employees because of their sex.") (citation omitted); Hamm v. Weyauwega Milk Products, Inc., 332 F.3d 1058, 1062 (7th Cir. 2007). See also Bibby v. Hudson v. Norfolk Southern Rwy. Co., 209 F.Supp.2d 1301, 1315 (N.D. Ga. 2001); Klein v. McGowan, 36 F.Supp.2d 885, 889-90 (D.Minn. 1999); Centola v. Potter, 183 F.Supp.2d 403 (D.Mass. 2002); Humphries v. Consolidated Grain & Barge Co., 412 F.Supp.2d 763 (S.D. Ohio 2005); Mims v. Carrier Corp., 88 F.Supp. 2d 706 (E.D. Tex. 2000); Rene v. MGM Grand, 243 F.3d 1206 (9th Cir. 2001), rev'd en banc 305 F3d, 1066 (9th Cir.).

³³³ See, e.g. McWilliams, 1196; Goluszek, Ashworth v. Roundup, Vandeventer v. Wabash. As Abrams points out, especially when courts adjudicate harassment cases by an unacknowledged analogy to race, it is difficult for them to conceive of discrimination against members of a (gender or racial) group

harassing;³³⁴ and (3) harassment of a man derided as a “bitch” or a “faggot” is based on his real or perceived “sexual orientation,”³³⁵ not his sex, and is therefore not prohibited by the language of Title VII.³³⁶

The persistence of the sexual-orientation-not-sex reasoning may in part be attributed to ambiguities in Justice Scalia’s opinion for the Court in *Oncale*, which leaves the door open to some sort of heterosexual defense.³³⁷ In spite of its holding that the sexual orientations of harasser and target do not affect Title VII liability, the Court suggested in dicta that the harasser’s sexual orientation might be somehow relevant. Where there is “credible evidence” that a harasser is gay, the Court held, a “chain of inference” is available by which a court can assume, as it does in cases of men harassing women, that sexual talk or advances “would not have been made to someone of the same sex.”³³⁸ As Janet Halley observes, this dicta offers “a quick and easy route to homophobia via the inference that because the defendant is a homosexual, he probably has done this bad sexual thing.”³³⁹

Moreover, the *Oncale* court suggested that a zone of non-sexual “horseplay” may survive its holding. Disavowing any effort to establish “a general civility code for the

by members of the same group. Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 Mich. L. Rev. 2479, 2515 (1994).

³³⁴ “Men who make sexual overtures toward other men are presumed to be solidly heterosexual, absent proof to the contrary.” Schultz, *supra* 1781. See, e.g. McWilliams, 72 F.3d 1191, 1195-96 (4th Cir. 1996); Rene v. MGM Grand (9th Cir, rev’d by 9th Cir. en banc); King v. Super Service, Inc; Johnson v. Hondo, 125 F.3d 408, 413 (7th Cir. 1997); English, 190 F.Supp.2d at 845; Martin v. Norfolk Southern Rwy Co., 926 F.Supp. 1044 (N.D. Ala. 1996); See Storrow, 738, 740; DelPo, 10-11; Zylan (harassment based on “hatred” distinguished from harassment based on “desire).

³³⁵ Janet Halley has expressed concern that the Supreme Court’s decision in *Oncale* would lead to “sexuality harassment,” in which gay men and lesbians would face spurious Title VII claims from homophobic plaintiffs. See also Schwartz, 1746.

³³⁶ Sexual orientation is not a ground of discrimination explicitly prohibited by Title VII. Some federal courts have explained the “horseplay” exemption by finding that the harassment is based on “sexual orientation,” not sex: see, e.g. Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) As David Schwartz observes, “Either they decide that ‘sexual orientation’ is the ‘only’ motivation for the discrimination or harassment, or they reason in effect that discrimination against someone on account of their sexual orientation is a kind of loophole or ‘safe harbor’ that can legalize conduct that would otherwise be unlawful sex discrimination.” Schwartz, 1791. See, e.g. Vickers v. Fairfield Medical Center, 453 F.3d 757, 762-64 (6th Cir. 2006) (“In all likelihood, any discrimination based on sexual orientation would be actionable under a sex stereotyping theory if this claim is allowed to stand, as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices.” *Id.* 764); Hamner v. St. Vincent Hospital, 224 F.3d 701, 707 (7th Cir.) (“The reality is that there is a distinction between one’s sex and one’s sexuality under Title VII, and that the statute only prohibits employers from harassing employees because of their sex.”) (citation omitted); Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000); Bibby v. Philadelphia Coca Cola Bottling Co., 85 F.Supp.2d 509 (2d Cir. 2000); Hudson v. Norfolk Southern Rwy. Co., 209 F.Supp.2d 1301, 1315 (N.D. Ga. 2001); Hamm v. Weyauwega Milk Products, Inc., 332 F.3d 1058, 1062 (7th Cir. 2007); Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2005). See also Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259, 261 n4 (1st Cir 1999) (it is “settled law” that Title VII does not prohibit harassment based on sexual orientation, but a gay plaintiff, like a straight plaintiff, can claim harassment because s/he did not “did not meet stereotyped expectations of femininity ... [or] masculinity.”). See also, e.g. Z. Kramer, 216; Schwartz, *infra* 1788-92.

³³⁷ Franke, 2003.

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³³⁹ Halley, 191

American workplace,”³⁴⁰ Justice Scalia’s opinion reassured us that courts and juries would use “common sense” to distinguish “severely hostile or abusive” harassment from “simple teasing or roughhousing among members of the same sex.”³⁴¹ “A professional football player’s working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach’s secretary (male or female) back at the office.”³⁴²

The most generous reading of the football-player example is that certain forms of crude conduct may be permissible in some workplaces but not others. But the lower courts’ toleration of homophobic sexual harassment is not limited to sports teams. In their comprehensive survey of every Title VII sexual harassment case decided between 1986 and 1996, Juliano and Schwab found that the type of workplace had no significant impact on the outcome of Title VII sexual harassment claims (and found that successful claims involved physical assaults more serious than a single slap on the buttocks). Zylan’s survey of post-1998 cases found that *Oncale* had not changed this pattern much. Courts have permitted homophobic sexual harassment in workplaces as diverse as a shop floor,³⁴³ a mailroom,³⁴⁴ a private police service,³⁴⁵ and an upscale hair salon.³⁴⁶ Moreover, it seems improbable that a slap to the buttocks would seem as self-evidently benign if the coach were male and the player female. The “common sense” distinction the Court entrusts to juries seems to rely more on widely-held gender expectations than on individual workplace cultures.

Moreover, courts have rejected all three of these rationales in the jurisprudence of different-sex sexual harassment. When a man’s sexual talk and touching of a woman is severe, pervasive and unwelcome, it violates Title VII – even if he harbors no general hostility toward women;³⁴⁷ even if he is not attracted to his target;³⁴⁸ and even if he is gay.³⁴⁹ There is no inquiry into the harasser’s sexual orientation.³⁵⁰ Even if he targets a woman like Ann Hopkins because he thinks she is unfeminine, his behavior is (or should be³⁵¹) recognized as prohibited discrimination based on “sex,” not permissible discrimination based on her unfemininity.³⁵² Thus the heterosexual defense can hardly be argued to be mandated by the text or jurisprudence of Title VII.

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³⁴² *Oncale*, 523 U.S. 75, 81 (1998).

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³⁴⁴ *Dillon v. Frank*

³⁴⁵ *Vickers v. Fairfield Medical Center*

³⁴⁶ *Dawson v. Bumble & Bumble*

³⁴⁷ *Meritor v. Vinson*? Abrams, 2515

³⁴⁸ See, e.g. Franke; Axam & Zalesne, 184;

³⁴⁹ Schultz; Franke; Case; Z.Kramer.

³⁵⁰ Schultz; Franke; Z. Kramer; Axam & Zalesne, 186.

³⁵¹ *But see*, e.g. *Jespersen v. Harrah’s Operating Co., Inc.*, 392 F.3d 1076 (9th Cir. 2004) (upholding dismissal of female casino card dealer for failing to wear makeup in accordance with grooming code that required makeup for women, and forbade it to men); *Dawson v. Bumble & Bumble* (excusing sexual harassment and dismissal of a lesbian hairdressing trainee because it was based on “sexual orientation”, not sex).

³⁵² See *Price Waterhouse*. *But see Dawson v. Bumble and Bumble*.

Nonetheless, the heterosexual defense, in its modernized iteration as “sexual orientation, not sex,”³⁵³ continues to persuade the courts in many circuits,³⁵⁴ in part because of their reluctance to “bootstrap protection for sexual orientation into Title VII.”³⁵⁵ But, as Zachary Kramer points out, when the sex-discrimination plaintiff is (or is assumed to be) straight, Title VII courts protect his or her heterosexuality without acknowledging that they are doing so.³⁵⁶

Thus many Title VII courts reject a sex-stereotyping argument that is well established in Title VII doctrine, creating an unprincipled exception for pervasive, unwelcome sexual behavior which is objectively severe, pervasive and usually violent. Katherine Franke, Kenji Yoshino and others argue that this reflects a judicial determination to deny any homoerotic content in socially approved forms of hierarchy among men.³⁵⁷ They observe that the “horseplay” exemption preserves the heterosexual identity of straight men who sexually harass and abuse other men, and safeguards those “homosocial acts [which] are so valued that they cannot afford to be tainted with homosexuality.”³⁵⁸ As Justice Scalia’s football-player example demonstrates, “‘Male bonding’ ... comes close to the edge of homoerotic expression. This proximity threatens the very identity that the ideology of masculinity demands.”³⁵⁹ The heterosexual defense preserves the privilege of straight-identified gender-conforming men to engage in bullying sexual talk and touching of other men in socially approved contexts.³⁶⁰

Meanwhile, gay (or lesbian) same-sex harassers are held liable for severe, pervasive and unwelcome workplace conduct which straight men are in practice allowed to inflict on them.³⁶¹ Even after *Oncale*, male plaintiffs who bring Title VII lawsuits against straight-identified male harassers almost always lose.³⁶² Thus, as Ruth Colker

³⁵³ See generally Francisco Valdes, *Queers, Sissies, Dykes and Tomboys*, 123-24, 146-47 (the “sexual orientation loophole” in employment discrimination law enables defendants to argue that discrimination is lawful because it is based on “sexual orientation”, not “sex”).

³⁵⁴ See note -, supra; Schwartz, 1788-92; *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir 1999) (it is “settled law” that Title VII does not prohibit harassment based on sexual orientation. On the other hand, the court held that a gay plaintiff, like a straight plaintiff, could ground a claim because, as a woman, she “did not meet stereotyped expectations of femininity,” or because, as a man, he “did not meet stereotyped expectations of masculinity.” *Id.* 261 n4). Moreover, Congress has repeatedly rejected the addition of “sexual orientation” to the list of prohibited grounds of discrimination in Title VII.

³⁵⁵ Z. Kramer, 204.

³⁵⁶ “[A] plaintiff’s homosexuality spoils what may be an otherwise actionable discrimination claim based on the plaintiff’s failure to conform to stereotypical gender expectations.” Z. Kramer, 220. See generally *id.* 219-30.

³⁵⁷ Yoshino. But see, e.g. *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), vac’d and remanded, 118 S.Ct. 1183 (1998) **Shepardize**: “A man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers’ idea of how men are to appear and behave, is harassed ‘because of’ his sex.” *Doe*, 581. **See also** *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir 1999); **more**

³⁵⁸ Yoshino, 548. See also Franke, 1149-43; Wencelblat, 63.

³⁵⁹ Karst, 545.

³⁶⁰ “Perhaps the problem is not an overreaction to these sexual assaults, but rather an under-reaction to ordinary bullying and physical abuse.” Wencelblat, 63.

³⁶¹ Schwartz, 1746-47. See, e.g. Abrams; Franke; Colker; Case; Zylan etc.; Yoshino, 435-36; Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683, 1785 (1998).

³⁶² See note -, infra. See also Juliano & Schwab, 587 (pre-*Oncale*, claims brought against male harassers who were straight-identified were “uniformly unsuccessful”). Zylan, 404-05 (post-*Oncale*, lesbian and gay

observes, the law of sexual harassment effectively “add[s] the word ‘heterosexual’ to Title VII. The existing case law reads: a man can recover for being stereotyped as a ‘fag’ and a woman can recover for being stereotyped as ‘macho’ or ‘lesbian’ if they are considered heterosexual.”³⁶³ Thus “gay men and lesbians find themselves practically and symbolically excluded from workplace protections afforded heterosexuals.”³⁶⁴

In practice, same-sex sexual harassment is prohibited only if the harasser is gay. If he is straight, such behavior is often allowed.³⁶⁵ As Franke and Yoshino observe, same-sex sexual harassment is treated in law as a status crime,³⁶⁶ actionable only when a gay man harasses a straight man, and not the other way around.

Thus the law of sexual harassment protects the honor of straight men against sexual affront by gay men. It excludes gay men and other purported gender-nonconformists from protections against sexual harassment and abuse,³⁶⁷ and it rewards gender-conforming men with sexual freedom and the authority to police the gender-conformity of unmanly men by sexually harassing them³⁶⁸—patterns we see replicated in prison in more violent form.

Part III. The Official Narrative of Black-on-White Rape

As we have seen in Part II, the institutional response to prison sexual abuse is a gendered one: correctional officials tend to instruct prisoners to perform masculinity as dominance. But, in describing prison rape to outsiders, the story that guards, courts and correctional officials tell is often about race. Guards, courts and correctional authorities, as well as prisoners, understand prison rape to be mostly, or disproportionately, committed by black men against vulnerable whites.

In this Part, I argue that the black-on-white rape narrative helps to maintain and obscure the gendered practices of institutional governance that foster prison rape. When they present sexual abuse in racial terms, prisoners and institutional actors draw upon a familiar cultural narrative of white vulnerability to black violence. This racial narrative frames prison rape as inevitable, obscuring the gendered institutional practices that allow it. In prison as in the outside world, invocation of the black-on-white rape trope often signals and justifies a departure from ordinary legal rules. Moreover, the Supreme Court cites prison violence as a reason to defer to institutional discretion in the “inordinately

plaintiffs continue to lose same-sex sexual harassment cases, while claims against gay or lesbian harassers are “almost uniformly” successful). See also Spindelman; Kendall; Eskridge; Franke, 2003.

³⁶³ Colker, 207.

³⁶⁴ Zylan, 392

³⁶⁵ See, e.g. Case; Abrams; Franke; Colker; Schultz; Schwartz; Zylan; Z.Kramer; Yoshino, 435-36 (“horseplay exemption is pernicious because it makes liability turn on status rather than on conduct-- more specifically, on the sexual orientation of the actors rather *436 than on the nature of the allegedly harassing acts”).

³⁶⁶ Franke, 2003, 177; see also Yoshino, 435-36.

³⁶⁷ See, e.g. Case; Z. Kramer; Toker, 600

³⁶⁸ Franke, 2003, 177-78. She points out that Title VII jurisprudence reaffirms “the male harasser as a sexual subject, who has the power to subordinate a female [or feminized] coworker through sexual means by sexualizing her.” Id. 177. See also, e.g. Axam & Zalesne, 198 (“derisions of the target’s sexuality are most accurately understood as yet another means of enforcing gender stereotypes in the workplace by punishing individuals – whether male or female – who deviate from established gender norms.”).

difficult undertaking³⁶⁹ of prison administration. Prison violence becomes a reason for courts not to interfere with the institutional policies that foster it.

A. The cultural specter of interracial rape: Black violence, white vulnerability

Guards,³⁷⁰ prisoners³⁷¹ and courts,³⁷² as well as outside observers,³⁷³ understand prison rape to be largely a black-on-white phenomenon. As one white inmate puts it, “I’m not getting on the blacks for it but it’s more prevalent with them. They seem to have this thing that gives them a sense of empowerment over the whitey to take that from him. ... It’s definitely an empowerment thing. It’s just like on the streets when you see a black male with a white girl. It’s to let the white boys know [they] can get your girls. I’ve talked to black guys about that in here. They say it’s true.”³⁷⁴

The image of black-on-white interracial rape has long been a powerful cultural trope in the outside world, as well.³⁷⁵ Although most sexual assault occurs between men and women of the same race who know each other,³⁷⁶ police, prosecutors, judges and jurors have addressed rape cases in accordance with a paradigm of “real” rape, which is commonly (and too often judicially) understood to involve a violent black stranger who attacks a virtuous white woman.³⁷⁷ As Susan Estrich and many other commentators have observed, only in cases of “real rape” has sexual harassment or assault consistently been

³⁶⁹ Turner v. Safley, 84-85.

³⁷⁰ Eigenberg (2000), 422; HRW; Man and Cronan?; WILBERT RIDEAU AND RON WIKBERG, EDS. LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS (1992)

³⁷¹ Ek, supra note 17; Fleisher & Krienert, *The Culture of Prison Sexual Violence* 103, 170. Their study involved a survey of 400 male (and 200 female) high-security inmates in the general populations of prisons across the United States: id. 69-70. One prisoner wrote to Human Rights Watch: “I’m a tall white male, who unfortunately has a small amount of feminine characteristics. These characteristics have got me raped [in prison] so many times I have no more feelings physically. I have been raped by up to 5 black men and two white men at a time.” Human Rights Watch, Excerpts from Prisoners' Letters to Human Rights Watch, <http://www.hrw.org/press/2001/04/rapetest.htm>

³⁷² See notes – through –, infra, and accompanying text

³⁷³ See notes – through –, supra, and accompanying text.

³⁷⁴ Fleisher & Krienert, 170.

³⁷⁵ See generally, e.g. ROBYN WIEGMAN, AMERICAN ANATOMIES: THEORIZING RACE AND GENDER 95-113 (2005); ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 8-11 (1999). As many scholars have observed with regard to the law of different-sex sexual harassment, the legal response to sexual abuse is shaped by sexualized racial stereotypes about women and men of all ethnic groups. See, e.g. Harris; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1280 (1991) (in rape cases, the victim’s blackness serves as a proxy for gender-nonconforming behavior); Tanya Katerí Hernández, *A Critical Race Feminism Empirical Research Project: The Internal Complaints Black Box*, 39 U.C. Davis L. Rev. 1235 (2006); Tanya Katerí Hernández, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 Gender Race & Just. 183 (2001); Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. Rev. 251, 274 (2002); Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. Gender Race & Just. 177 (1997); Iglesias. The sexual abuse of white women is also racialized in accordance with racialized sexual stereotypes: see, e.g. Tanya Katerí Hernández, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 Gender Race & Just. 183, 196; Ehrenreich, 274.

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³⁷⁷ Estrich, *Rape*; Temkin and Krahe

treated as “a serious crime.”³⁷⁸ Today, prosecutors continue to cite deviations from the “real rape” scenario as reasons to reject cases for prosecution.³⁷⁹

In the outside world, “crimes involving White victims and African American offenders are treated more harshly than are crimes involving African American victims,” a trend which is “particularly pronounced for sexual violence.”³⁸⁰ Sexual assaults upon white victims remain more likely than sexual assaults upon nonwhites to be investigated and tried, to result in conviction, and to receive longer sentences – especially if the assailant is black.³⁸¹ A 2003 study found that 68% of black men serving prison sentences for sexual assault had had white victims, even though only 15% of white sexual assault victims report that their assailant was black, and 98% of black victims report a black assailant.³⁸²

Whether black men’s supposed propensity to rape is attributed to their animalistic sexual drive or to racial revenge, the stereotypical rape narrative portrays black men as a serious, but somehow exciting, sexual threat to white women. Thus, in mainstream straight men’s pornography, “in movies and magazines that feature Black men, the focus of the camera and plot is often on the size of the Black penis and on Black men’s allegedly insatiable sexual appetite for White women.”³⁸³ In both gay and straight cultures, “stereotypes about the sexual abilities of African American men often emphasize their male prowess.”³⁸⁴ The “huge penis” is depicted “as a feature that distinguishes Black men from White men.”³⁸⁵

The myth of the black rapist is not restricted to heterosex. In pornography³⁸⁶ as elsewhere in popular culture,³⁸⁷ black men are understood not only as the rapists of white women, but also of vulnerable white men:

The pimp, thug/hustler black man of the ‘hood’ with the out-of-control body is not only a favorite of white straight men, but also seems to be a popular object of desire for gay white men. Titles such as *Blacks on White Boys*, *Ebony Dicks in White Ass Holes*, and

³⁷⁸ Estrich, *Sex at Work*, 814; Pakorak, 38-42 (deviations from “real rape” scenario cited as reasons for case rejection by prosecutors).

³⁷⁹ Pakorak, 38-43.

³⁸⁰ Tellis and Cassia Spohn, *The Sexual Stratification Hypothesis Revisited: Testing Assumptions About Simple versus Aggravated Rape*, 36 J. Crim. Just. 252, 252 (2008). See also Maxwell et al, *The Impact of Race on the Adjudication of Sexual Assault and Other Violent Crimes*, 31 J. Crim. Just. 523, 534 (2003) (“evidence seems to suggest that African-American sexual assault victims receive less protection from the criminal justice system than White victims.”) See also generally DAVID C. BALDUS ET AL, *EQUAL JUSTICE AND THE DEATH PENALTY* (1990) and *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview with Recent Findings from Philadelphia*, 83 Cornell L. Rev. 1638, 1658-60 (1998) (in general, violent crimes against white victims receive longer sentences than violent crimes against nonwhite victims, and black defendants tend to be treated more harshly than white defendants, especially if their victims are white).

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³⁸² Maxwell, Robinson and Post, *The Impact of Race on the Adjudication of Sexual Assault and Other Violent Crimes*, 31 J. Crim. Just. 523, 534 (2003).

³⁸³ Hill-Collins, 161.

³⁸⁴ Wyatt, *The Sociocultural Context of African American and White American Women’s Rape*, 48 J. Social Issues 77, 79 (1992).

³⁸⁵ Gail Dines, *King Kong and the White Woman: Hustler Magazine and the Demonization of Black Masculinity*, 4 Violence Against Women 291, 294 (June 1998).

³⁸⁶ See generally Dines, *supra*.

³⁸⁷ Robinson

Black Bros and White Twinks make clear who does what to whom in interracial gay porn.³⁸⁸

B. Presenting the narrative: Official sources

Prison staff, courts, and correctional authorities tend to present prison rape in accordance with pervasive cultural narratives of white vulnerability to the sexual violence of hypermasculine black men.

i. Prison staff

Prisoners and guards, like academic commentators,³⁸⁹ believe that white inmates are “weak” and “cannot fight as well as black inmates,”³⁹⁰ putting them at risk of rape. Correctional officers acknowledge that they are more sympathetic to white victims. They say that they are more likely to believe an allegation of sexual assault if the victim is white. In Helen Eigenberg’s two surveys of guards’ attitudes toward prison rape, she found that correctional “officers are less willing to believe black victims than white victims.”³⁹¹ In 2000, she found that “officers were more apt to believe rape victims who conformed to a stereotypical definition of a rape victim (i.e., young, white, weak, homosexual, and effeminate men).”³⁹² By contrast, Roderick Johnson—who, as a black gay man, was probably a more typical victim—was told, “There’s no reason why Black punks can’t fight and survive in general population if they don’t want to fuck.”³⁹³

Prison officials and guards also acknowledge that gay, bisexual and transgender prisoners are at the highest risk of sexual assault³⁹⁴—but they say that they are *less* likely to believe GBT prisoners, or to punish assaults upon them.³⁹⁵ To explain this contradiction, Eigenberg suggests that “officers may be unwilling to believe homosexual inmates if they have negative attitudes toward homosexuality. Or ... officers may be less willing to believe homosexual victims because they associate homosexuality with

³⁸⁸ Gail Dines, *The White Man’s Burden: Gonzo Pornography and the Construction of Black Masculinity*, 18 *Yale J.L. & Feminism* 283, 294 (2006)

³⁸⁹ See notes – through –, supra, and accompanying text.

³⁹⁰ Fleisher & Krienert, 103.

³⁹¹ Eigenberg (1989), 51; see also Eigenberg (2000), 422. During the mid-1980s, Nacci & Kane found the same attitudes: Nacci and Kane (1984) at 48, supra.

³⁹² Eigenberg (2000), 422.

³⁹³ Johnson v. Johnson

³⁹⁴ See, e.g. Eigenberg (1989), 51; Eigenberg, 2000, 420. Thus, several states operate segregated ranges for gay, bisexual and transgendered inmates to protect them against sexual assault: James Ricci, *Gay Inmates Get Chance to Learn* Los Angeles Times, April 7, 2004 (Los Angeles Men’s Central Jail segregated housing unit for gay, bisexual and transgender prisoners); *Closure of Gay Housing Unit at Rikers Draws Complaints*, Los Angeles Times, December 30, 2005 (New York jail had operated segregated housing for gay prisoners to protect gay inmates against abuse); JDI, 2004 (Arizona operated segregated housing for gay prisoners to protect them against sexual abuse). Just Detention International opposes housing transgender prisoners in the general population based only on their genitalia, and also opposes automatic segregation of gay prisoners into separate housing units, advocating instead that prisons adopt “thoughtful housing options, including single cells when available, separate units for detainees at risk of being targeted for sexual assault, and voluntary, non-punitive forms of segregation.” JDI, Call for Change: Protecting the Rights of LGBTQ Detainees 3 (May 2007), at http://www.justdetention.org/pdf/Call_for_Change1.pdf

³⁹⁵ Eigenberg (2000), 421, 422

voluntary participation.”³⁹⁶ In prison as outside, gayness in men, like unchastity in women, establishes a low status that disqualifies the victim from legal protection.³⁹⁷

Unlike prisoners whose vulnerability is attributed to their gayness, prisoners whose vulnerability is attributed to their whiteness seem to enjoy enhanced credibility, especially when their assailants are black men. When correctional authorities investigate prisoners’ allegations of sexual assault, the results of their investigations tend to confirm their preconceptions. When prisoners report sexual harassment or assault to correctional officials, the overwhelming majority of allegations – over 80% – are deemed by prison investigators to be “unsubstantiated” (unproven) or “unfounded” (false).³⁹⁸ The remaining 13-20% of sexual assault reports are “substantiated”: prison investigators believe and may act upon them.³⁹⁹ Correctional officials find that 72-73% of “substantiated” allegations of sexual assault involve a white victim.⁴⁰⁰ Moreover, a plurality of “substantiated” incidents—nearly half—involve black-on-white sexual assaults.⁴⁰¹

Whites comprise only 35% of the prison population nationwide;⁴⁰² nearly two thirds of the prison population is black or Latino.⁴⁰³ If “substantiated” reports reflect what is really happening in prison—and correctional authorities do not claim that they do⁴⁰⁴—the results of prison investigations would suggest that whites are being sexually

³⁹⁶ Eigenberg, 1989, 51. See also Giller, 679 (the low status of GBT and other vulnerable prisoners may inform guards’ and courts’ indifference to violence against them).

³⁹⁷ See, e.g. E.Kramer; Axam and Zalesne; Crenshaw; Iglesias; Hernandez (2006); Hernandez (2001).

³⁹⁸ Correctional Authorities, 2005, 2; Correctional Authorities, 2006, 2. Some state prison systems have even higher rates of “unsubstantiated” findings: NPREC, supra note 10, 117-18.

³⁹⁹ Id.

⁴⁰⁰ See BOJ Statistics Special Report, *Sexual Violence Reported by Correctional Authorities, 2006 4* (August 2007), at <http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca06.pdf> (in 2005-06, 72-73% of “substantiated” victims were white, 12-16% were black, and 9% were Latino).

See also BOJ Statistics Special Report, *Sexual Violence Reported by Correctional Authorities, 2005 6* (July 2006), <http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca05.pdf> (73% of victims are white; blacks comprise 39% of perpetrators).

⁴⁰¹ Correctional Authorities, 2006, 4 (47% of perpetrators of sexual assaults on white men were perpetrated by blacks).

⁴⁰² BOJ Statistics Bulletin, *Prison Inmates at Midyear 2006*, 9, supra note 87.

⁴⁰³ In 2006, whites made up only 35.1% of male prison inmates. Blacks made up 40.1%, Latinos made up 20.9% and the rest (less than 5%) were American Indians, Alaska Natives, Asians, Native Hawaiians, and other Pacific Islanders. BJS, *Midyear 2006*, 9

⁴⁰⁴ Correctional authorities do not claim that the results of “substantiated” cases accurately reflect what is happening in prison. On the contrary, the BJS states that the results of the National Inmate Survey are more reliable than the data on sexual assaults reported to correctional authorities:

Past surveys of administrative records could not provide reliable facility-level estimates of sexual violence because they were limited to incidents reported to correctional authorities. Some victims may be reluctant to report incidents to correctional authorities due to lack of trust in staff, fear of reprisal from perpetrators, a code of silence among inmates, or personal embarrassment.

Moreover, administrative records may vary in the way incidents and allegations are defined, reported, and recorded, which further complicate facility-level comparisons.

The NIS [National Inmate Survey] is a self-administered survey which provides anonymity to respondents and encourages fuller reporting of victimization. The survey employs computer-assisted technology to provide more uniform conditions under which inmates complete the survey. Facility-level comparisons in the NIS are further enhanced through the application of statistical methods that ensure that the estimates reflect the entire population of each facility, rather than only the inmates who participated in the survey. BJS, *Prisons*, 1-2 (emphasis added).

assaulted at about four times the rate of nonwhites. This seems improbable: both the national and California sexual victimization surveys found whites to be victimized at *lower* rates than nonwhites.⁴⁰⁵ None of the victimization surveys provides any evidence to suggest that whites might be at much higher risk.

Unfortunately, the Bureau of Justice does not provide any information about the racial distribution of sexual abuse allegations which correctional officials deem “unfounded” or “unsubstantiated.”⁴⁰⁶ Given the underreporting of sexual abuse,⁴⁰⁷ it would not be safe to assume that the sexual abuse that prisoners report to correctional authorities looks like the sexual abuse which is not reported to them. It is impossible to determine, based on the BJS reports, whether the overrepresentation of whites (relative to population) in “substantiated” cases reflects that white inmates are more likely than nonwhites to report sexual abuse to correctional officials, or correctional officials are more likely to believe them, or both. As Eigenberg points out, it is quite possible that, knowing that guards and investigators are more likely to believe white victims, victims who do not fit the stereotype might be reluctant to disclose sexual abuse to corrections officials.⁴⁰⁸

This illustrates an empirical difficulty of obtaining direct evidence of underenforcement. As Natapoff points out, while “there is a myriad of data regarding the crimes that law enforcement chooses to pursue, much less information exists about crimes for which police fail to make an arrest or for which prosecutors decline to bring charges.”⁴⁰⁹ A complete picture of the underenforcement phenomenon, she observes, requires indirect and anecdotal evidence, as well.

The overrepresentation of whites in “substantiated” cases is consistent with police practice in the decades before rape law reform: most reports of sexual assault, especially those by nonwhite women, were dismissed by police investigators as “unfounded,” based on racialized and gendered notions of sexual credibility.⁴¹⁰ Today, rapes of nonwhite victims are still rejected for prosecution about twice as often as white-victim rapes.⁴¹¹ Intraracial rapes of nonwhite victims are sometimes excused by a “cultural defense.”⁴¹²

There is a broad consensus among correctional authorities that sexual abuse is underreported. *Id.* 1; BJS, Correctional Authorities, 2005, 2; BJS, Correctional Authorities, 2004, 2; NPREC, *supra* note 10, 102; Eigenberg, 1989, 50 (“officers are relatively confident that inmates will not report victimization”). The National Prison Rape Elimination Commission, which includes correctional authorities as well as academics and prisoners’ rights advocates, notes that there is “no reason to believe” that these low substantiation rates reflect a high number of false complaints. NPREC, *supra* note 10, 118. Although prison may offer some “motivations and rewards for falsely reporting sexual abuse” that have no parallel in the community, NPREC points out that “the real risks associated with reporting even genuine sexual abuse are a strong disincentive to fabricating allegations.” *Id.*

⁴⁰⁵ See *infra* note -.

⁴⁰⁶ See 2004, 2005 and 2006 Correctional Authorities reports

⁴⁰⁷ See note 404, *supra*.

⁴⁰⁸ Eigenberg (1989), 52.

⁴⁰⁹ Natapoff, 1719-20.

⁴¹⁰ Susan Estrich, *Real Rape* 15-20 (1987); Iglesias, 888; Catharine MacKinnon, *Reflections on Sex Equality Under Law*, 1303.

⁴¹¹ Pakorak, 40-43 (citing research into effect of victim race on prosecution decisions).

⁴¹² See, e.g. Leti Volpp, *Feminism vs. Multiculturalism*, 101 *Colum. L. Rev.* 1181 (2001); Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 *Cal. L. Rev.* 1063 (1994); Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 *Golden Gate U. L. Rev.* 817, 824-255 (1993), (stereotypes of gender discrimination among nonwhites excuse

Thus, in sexual assault cases, the race of the victim continues to serve as a better predictor of the likelihood of prosecution, conviction and sentence than the race of the perpetrator.⁴¹³ In short, prosecutors “undervalu[e] and under-prosecut[e] the rape of Black women.”⁴¹⁴ A racial breakdown of the “unfounded” and “unsubstantiated” cases could illuminate whether prison officials underinvestigate sexual abuse of nonwhite prisoners, as well.

ii. Courts

Official sources, including courts, prisons, and the BJS reports, present racial data about prison rape in accordance with a narrative practice which underplays racial information when it tends not to confirm the black-on-white rape stereotype, but highlights racial data that tend to confirm it. While it does not seem that this narrative practice is intentional, it leaves the impression that prison rape is ordinarily black-on-white.

In Eighth Amendment sexual abuse cases, for example, judicial opinions rarely mention the race of either victim or perpetrator. The invisibility of race in most⁴¹⁵ cases is to be expected, since it is not obviously relevant to the main issue in an Eighth Amendment claim: the prisoner-plaintiff must prove that the defendants were “deliberately indifferent,” that is, that they knew the prisoner was at risk, yet did nothing.⁴¹⁶ When Eighth Amendment courts adjudicate sexual abuse claims, they ordinarily highlight factors, such as the victim’s youth, small stature, “feminine” looks, or GBT identity, which are alleged to have put prison officials on notice that the inmate was vulnerable.⁴¹⁷ Thus, for example, the Supreme Court opinion in *Farmer v. Brennan* highlights the fact that plaintiff Dee Farmer is a feminine-looking transperson in a men’s prison, but nowhere mentions the race of her attacker or the fact that Farmer is black.⁴¹⁸

Race seems to be especially salient when a white plaintiff has been assaulted by a black man. In the few decisions that do mention race, it is usually to point out that the perpetrator is black and the victim is white.⁴¹⁹ For example, in *Butler v. Dowd*, the Eighth

gender violence by men of color); Crenshaw, quoting Orlando Patterson excusing Clarence Thomas’ alleged sexual harassment of Anita Hill on the basis that “even if testimony about Thomas’ gross pornography-laden harassment was actually true, Thomas was justified in lying about it given that such behavior was recognizable (and apparently acceptable) to Black women as asimplly a style of ‘down home courting.’” Crenshaw, SH, 1471.

⁴¹³ See, e.g. Cassia Spohn, *Courts, Sentences, and Prisons*, 247, 256-267, in *AN AMERICAN DILEMMA REVISITED: RACE RELATIONS IN A CHANGING WORLD* (Obie Clayton Jr., ed. 1996); Pakorak, 38-43 (summarizing research on effect of victim’s race on prosecution decisions and criminal outcomes); Baldus, *supra* note 380.

⁴¹⁴ Pakorak, 43.

⁴¹⁵ The only Eighth Amendment case I could find that identified the race of a nonwhite victim was *Johnson v. Johnson*, a case in which prison officials gave racial reasons for refusing to protect the victim, whom they described as a “black punk.”

⁴¹⁶ *Farmer v. Brennan*

⁴¹⁷ See, e.g. *Farmer v. Brennan*; *Wilson v. Wright*, 998 F.Supp. 650, 652 (E.D. Va. 1998) (inmate targeted for his youth, small stature and “protrud[ing]” buttocks); **more examples**

⁴¹⁸ Rachel Wyatt, *Note: Male Rape in US Prisons: Are Conjugal Visits the Answer?* 37 *Case Western Res. J. Int’l L.* 579, 585 (2006) (describing Farmer as a “young black man”).

⁴¹⁹ See, e.g. *Butler v. Dowd*, 665; *Wilson*, 998 F.Supp., 652.

Circuit Court of Appeals observed: “Hershel Marsh, a nineteen-year-old, white, first-offender convicted of child abuse, arrived at FCC in July 1988. According to Marsh's testimony, prisoner William Stapleton, a black man, approached Marsh within 1 1/2 hours of his arrival at FCC and told him Stapleton would ‘fuck’ him that night.”⁴²⁰ Similarly, in *Wilson v. Wright*, a federal district court judge observed, “Plaintiff, a 5’8” tall, 136 pound white male was 18 years old when he was ... assigned to share a double cell with inmate Robert Ramey, a thirty-eight-year-old, six-foot one-inch, 290-pound African-American male serving a thirty-three-and-one-half year sentence ... for forcible sodomy and abduction-with-intent-to-defile a twelve-year-old white male.”⁴²¹ Unless these references to race are entirely gratuitous, the black-on-white racial dynamic seems relevant to judges because it underlines the plaintiff’s vulnerability.

When a black man sexually assaults a white man, these courts tend to assume that race was relevant to his selection of victim: in *Wilson*, the judge held that because the assailant was in prison “for raping a small, young, white male,” a jury could reasonably find that he posed a serious risk of harm to the plaintiff, “a small, young, white male.”⁴²² Although it is not unusual for plaintiffs to argue in Eighth Amendment cases that prison officials knew that the assailant had raped before,⁴²³ I was unable to find any case in which the court pointed out that an assailant of a nonwhite plaintiff had previously assaulted another black, Latino, Asian or Native American victim. Race of nonwhite men is nowhere portrayed as a factor that made them vulnerable.⁴²⁴

iii. *The Bureau of Justice*

The BOJ, like these courts, presents racial data about prison rape in ways that highlight race when the data tend to confirm the stereotype of black-on-white prison rape, but rarely mention race when the data tend to refute the stereotype.

After the passage of the Prison Rape Elimination Act in 2003, the BJS (through the US Census Bureau⁴²⁵) collected statistics from every correctional authority in the country to comprise statistical reports on the occurrence of prison rape, and of correctional authorities’ responses to it. As part of this process, it collected data from correctional authorities on their disposition of sexual abuse allegations they received from prisoners. The first report on “Sexual Violence Reported to Correctional Authorities”, in 2004, provided no information on race,⁴²⁶ but the the 2005 and 2006 reports (the most recent available) selectively provide such information in ways which tend to reinforce the black-on-white rape stereotype.

In both years, the BJS reports graphically highlighted the racial dynamics of “substantiated” sexual violence in a chart that presents incidents by race of the

⁴²⁰ *Butler v. Dowd*, 979 F.2d 661, 665 (8th Cir. 1992).

⁴²¹ *Wilson v. Wright*, 998 F.Supp. 650, 652 (E.D. Va. 1998).

⁴²² *Wilson*, 655.

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⁴²⁴ On the contrary, as Brenda Smith observes, for black men, “the difficulty lies in overcoming the stereotype as being sexual victimizers as opposed to victims.” Brenda V. Smith, *Watching You, Watching Me*, 15 *Yale J.L. & Feminism* 225, 281 (2003).

⁴²⁵ US Census Bureau, *Survey on Sexual Violence*, <http://www.census.gov/econ/overview/go2700.html> (April 2003, 2009)

⁴²⁶ BJS, *Correctional Authorities*, 2004

perpetrator and victim.⁴²⁷ As the BJS points out, the pattern for both years is substantially similar:⁴²⁸ the overwhelming majority of victims—72-73%—are white, and almost half their assailants are black.⁴²⁹ The “substantiated” cases also suggest that black perpetrators are more than twice as likely to sexually assault white as black victims. The 2006 chart is reproduced below:

<i>Victim</i>	<i>Perpetrator</i>			
	White	Black	Hispanic	Other
Total	200	227	52	8
White	171	146	32	7
Black	9	58	7	0
Hispanic	14	19	11	0
Other	6	4	2	1

The BOJ’s National Inmate Survey, which asked inmates of jails and state and federal prisons whether they had experienced sexual coercion or assault, regardless of whether they had disclosed it to correctional authorities, obtained results quite different from those in the “substantiated” cases. The BJS survey report on state and federal prisons provides no racial data, but the limited racial data that are made available in the BJS survey report for local jails tend to refute the stereotype of black-on-white interracial rape. The National Inmate Survey found that, in jails, whites were *less likely* than any other race or ethnicity to tell researchers that they had been sexually abused: 2.9% of whites reported sexual victimization, compared to 3.2% of Latinos and blacks, 4.1% of “Other” prisoners, and 4.2% of prisoners of “two or more races.”⁴³⁰

While the results of the National Inmate Survey are inconsistent with the conventional narrative of white vulnerability to black sexual violence, they seem consistent with patterns of sexual abuse in the outside world: Black, Latina and Native women are more likely to be sexually assaulted than white (or Asian) women,⁴³¹ but are less likely to report it.⁴³²

The National Inmate Survey asked jail and prison inmates about their race and ethnicity,⁴³³ and asked inmates who said they had been sexually abused about the race

⁴²⁷ BJS, *Correctional Authorities*, 2006, 4.

⁴²⁸ BJS, *Correctional Authorities*, 2005 6. The first such report, *Correctional Authorities*, 2004, did not provide a racial breakdown of sexual abuse. See also BJS, *Jails*, supra note 49 (providing race of victim but not perpetrator), and BJS, *Prisons*, supra note 49 (providing no racial data).

⁴²⁹ BJS, *Correctional Authorities*, 2005 6

⁴³⁰ BJS, *Jails*, supra note 49 6.

⁴³¹ See, e.g. Callie Rennison, U.S. Dep’t of Justice, *Violent Victimization and Race, 1993-98* at 2 (2001) (Native women assaulted at 5.8 per 1,000; black women at 2.2 per 1,000; white at 1.8 per 1,000 and Asian women at 1.2).

⁴³² Hernandez, 2006, 1254; Hernandez, 2001; George & Martinez, 111; Wyatt, *The Sociocultural Context of African American and White American Women’s Rape*, 83 n1 (black women reported 23% of their sexual assaults, while white women reported 31%); Patricia Hill-Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* 178-79 (1990)

⁴³³ The survey asked inmates about their race, descent and ethnicity: see questions A5-A7. National Inmate Survey: Year 1 Questionnaire Specifications Final, at http://www.ojp.usdoj.gov/bjs/pub/pdf/nis_acasi_spec.pdf (“National Inmate Survey”)

and ethnicity of their inmate assailants.⁴³⁴ Thus a similar chart could have been presented in the victimization survey reports, showing the racial distribution of perpetrators and victims in sexual assaults regardless of whether they were reported to correctional authorities. This would seem particularly important since everyone involved in corrections, including the BOJ, prison administrators and guards,⁴³⁵ agrees that most rapes go unreported in prison. Unfortunately, no such chart is provided.

C. Consequences of the racial narrative: Bending the rules

In prison, selective attention to black-on-white prison rape does not ensure that white victims can expect sympathy or respect. One white prisoner was told by a correctional captain, “You’re a homosexual, right? You asked for this. You wanted this nigger with his telephone pole up your ass? That is what you have been going for, isn’t it?”⁴³⁶

The fact that judges, jurors or prison officials may believe an allegation of sexual abuse does not mean they will be willing to do anything about it. Even though it seems that assaults on white victims are more likely to be deemed “substantiated,” only 12-16% of “substantiated” allegations result in arrest.⁴³⁷

Nor does the black-on-white stereotype mean that white prisoners will win their Eighth Amendment claims—the white plaintiffs in *Butler* and *Wilson*, like Roderick Johnson and most other prisoner-plaintiffs of any race,⁴³⁸ both essentially lost their cases. Although the district court found that Ronald Wilson had raised “a triable issue of material fact . . . as to whether defendant was deliberately indifferent to the risk of harm to plaintiff when she assigned plaintiff to share a cell with Ramey,”⁴³⁹ his claim was dismissed on summary judgment based on qualified immunity.⁴⁴⁰ Hershel Marsh and his co-plaintiffs (whose race was unspecified) won at trial, but the jury awarded damages of only \$1 each for multiple sexual assaults. The Eighth Circuit upheld the jury award.⁴⁴¹

In the outside world, police investigators are typically much more sympathetic to white women who allege that their rapists are black.⁴⁴² The disproportionate legal and extralegal reaction to allegations of black-on-white sexual assault did not necessarily extend to low-status white women who were labelled unchaste. As Tanya Hernández points out, “The Klan often sought retribution for any spurious allegation of a Black man communicating with a White ‘lady,’ but did not concern itself for the most part with Black male interactions with ‘bad’ White women or with any Black woman. In addition, class distinctions across gender often informed which White women were classified as

⁴³⁴ National Inmate Survey, qq. F7, F7a (asking whether inmate assaulter was Hispanic and whether s/he was white, black, Native, Asian, Native Hawaiian or Pacific Islander). The survey also asked about sexual abuse by staff, but did not ask the race or ethnicity of staff abusers: See National Inmate Survey, qq.G1-G26.

⁴³⁵ See note -, supra

⁴³⁶ Stop Prisoner Rape, *Stories from Inside*, 51

⁴³⁷ Correctional Authorities, 2006, 6.

⁴³⁸ See generally Margo Schlanger, *Inmate Litigation*

⁴³⁹ *Wilson*, 656.

⁴⁴⁰ *Wilson*, 657. Hershel Marsh won only nominal damages: *Butler*, 669

⁴⁴¹ *Butler*, 669.

⁴⁴² See, e.g. Estrich, *Real Rape*; Pakorak

‘ladies’ or as ‘bad.’⁴⁴³ Sexual assault of low-status victims—women of color,⁴⁴⁴ unchaste white women,⁴⁴⁵ gay men,⁴⁴⁶ and prisoners⁴⁴⁷—was traditionally much less likely to be seriously investigated or criminally punished.

Apart from the fact that the black-on-white rape narrative made it more difficult for white women who had been raped by white men to have their allegations taken seriously, the violent (legal or extralegal) overreaction to high-profile allegations of black-on-white sexual misconduct that plagued US legal culture throughout the twentieth century⁴⁴⁸ did not protect white women against sexual assault even when their alleged assailants were black. Often, the white woman had not been assaulted at all;⁴⁴⁹ in another high-profile case, the wrong black men were punished for the rape.⁴⁵⁰ In all these cases, the creation of the black-on-white public narrative of sexual assault served political purposes that had little, if anything, to do with protecting the physical integrity or sexual autonomy of white women.⁴⁵¹

Likewise, in prison, the black-on-white rape narrative does little to keep white (or any other) victims safe. As in the era before rape law reform, the racial narrative creates the illusion that institutions make serious efforts to prevent and punish sexual abuse, when in most cases they do nothing.⁴⁵²

The image of black men as violent criminals who pose a threat to vulnerable whites also makes their mass incarceration appear normal and fair.⁴⁵³ The burgeoning population in prison is not limited to the murderers and rapists who populate the popular rape narrative: nationally, about half of prisoners are serving time for nonviolent property or drug crimes.⁴⁵⁴ To the extent that prison rape is understood to be ubiquitous, the inevitable consequence of crowding violent black criminals and perverts into a

⁴⁴³ Hernandez (2001), 197.

⁴⁴⁴ Crenshaw; Iglesias; Hernandez

⁴⁴⁵ Balos & Fellows; Estrich

⁴⁴⁶ Axaam & Zalesne; E.Kramer

⁴⁴⁷ Buchanan

⁴⁴⁸ See, e.g. Wiegman, 95-113

⁴⁴⁹ See, e.g. lynchings (many of which were based on spurious allegations of black-on-white rape); the Scottsboro boys (convicted and imprisoned based on fabricated allegations of raping two white women); Emmett Till (lynched for allegedly whistling at a white woman).

⁴⁵⁰ See, e.g. the Central Park Jogger (five youths arrested, convicted, imprisoned and later exonerated)

⁴⁵¹ As Mary Dudziak points out, in racial narratives of American justice and identity, “What happens to the person at the center of the story is, at best, secondary.” Mary L. Dudziak, *The Case of ‘Death for a Dollar Ninety-Five’: Miscarriages of Justice and Constructions of American Identity*, in Charles J. Ogletree and Austin Sarat, *When Law Fails: Making Sense of Miscarriages of Justice* 25, 26 (2009).

See also, e.g. Willie Horton (a black man who did rape and kill a white woman while released on furlough was used during George H.W. Bush’s 1988 presidential campaign as the prime example of Democratic presidential candidate Michael Dukakis’ alleged softness on crime).

⁴⁵² For example, Anthony Scacco, one of the primary sources for the black-on-white story of prison rape (see note -, supra), argues: “In the final analysis the correctional system cannot be blamed for causing the behavior within the walls for, ... the community gives the criminal his materials and habits.” ANTHONY M. SCACCO, *RAPE IN PRISON* 5 (1975).

⁴⁵³ See Hill-Collins, 158; Angela Harris?; Marc Mauer & Meda Chesney-Lind, *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (2002); Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 *Punishment & Soc’y* 95 (2001)

⁴⁵⁴ See note 210, supra.

confined space, it is more plausible that all the men in prison belong there⁴⁵⁵—and deserve whatever happens to them.⁴⁵⁶

Moreover, as Jonathan Simon points out, racialized crime narratives tend to strengthen the power of the penal state not only in relation to the low-income minority communities targeted by penal enforcement, but also in relation to white middle-class citizens. For law-abiding middle-class whites, he argues, fears of black and nonwhite crime increase trust in police, fuel demand for intrusive and abusive police tactics,⁴⁵⁷ and create greater dependency on “a command-and-control police and penal state,”⁴⁵⁸ even when such measures reduce the freedom of law-abiding white middle-class citizens.⁴⁵⁹ The black-on-white story of prison rape, like other racialized crime narratives, helps to “regulat[e] the self-governing activity of the people who are not targets of criminal justice repression, but instead eager consumers of public and private governmental tools against crime risk.”⁴⁶⁰ In the Daily Show episode and other comic narratives, prison rape is not a brutal reality, but a comic bogeyman invoked by middle-class citizens as a reason to obey the law.⁴⁶¹

If the appeal of the black-on-white prison rape narrative does not lie in greater protection for white victims, and its empirical foundation is weak, why does the story remain so compelling? Regina Kunzel suggests that the black-on-white narrative may be psychologically comforting. The focus on black-on-white rape tends to relieve anxieties about the reality that, in prison, many straight-identified men have sex with men.⁴⁶² Kunzel observes that until the 1960s, the racialized narrative was absent from academic discussions of prison sex. Midcentury prison sex researchers focused on gender, rather than race. In their work, raped prisoners were “referred to as punks, made homosexuals, involuntary recruits, and jail house turnouts. Like true homosexuals, these men are described as stereotypically effeminate and weak, although researchers claimed that inmates were more contemptuous of punks than fags. Punks were viewed as weak cowards who sacrificed their manhood.”⁴⁶³

⁴⁵⁵ Devon Carbado, Marc Mauer and others have observed that stereotypes of black violence and criminality are reinforced by law enforcement practices that disproportionately target African Americans, thereby confirming the notion that they are dangerous. Devon Carbado, *Racial Naturalization*, in MARY L. DUDZIAK & LETI VOLPP, EDS. *LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS* 41, 57 (2006); MARC MAUER AND MEDA CHESNEY-LIND, EDS. *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (2003).

Jonathan Simon, likewise, argues that the racialized stigma of criminality justifies mass incarceration of low-income minority men: “Police may believe that, regardless of his responsibility for a particular crime, a suspect who fits the profile of the criminal class is a ‘gang banger’ ... who exists as a mortal risk and shares the same moral stigma with one who has actually killed or raped.” Jonathan Simon, *Recovering the Craft of Policing*, in Dudziak & Volpp, eds. 115, 121.

⁴⁵⁶ As Jonathan Simon points out, the contemporary warehouse prison “promises to promote security in the community simply by creating a space physically separated from the community in which to hold people whose propensity for crime makes them appear an intolerable risk to society.” JONATHAN SIMON, *GOVERNING THROUGH CRIME* 142-43 (2007).

⁴⁵⁷ Simon, id. 118-19.

⁴⁵⁸ Simon, id. 7.

⁴⁵⁹ Simon, id. 16-17, 76-77

⁴⁶⁰ Simon, 16.

⁴⁶¹ See notes – through –, supra, and accompanying text.

⁴⁶² Kunzel, supra note 4; Eigenberg (2000), 420

⁴⁶³ Eigenberg (2000), 419.

The black-on-white prison rape narrative emerged in the 1970s, just as nationwide prison demographics were changing from predominantly white to predominantly African-American and Latino.⁴⁶⁴ This racial narrative, Kunzel points out, evoked academic expressions of concern for victims' health and well-being that had been absent when prison sex was understood to involve white men abusing each other.⁴⁶⁵ Once black men were imagined to be "on top," sociological commentators moved away from questioning victims' masculinity, and instead treated prison sexual abuse as a threat to white supremacy.⁴⁶⁶ For example, Anthony Scacco, a leading proponent of the black-on-white narrative of prison rape, argued in 1975 that "Many of the whites stated that they would have defended their manhood against the sexual attacks ... but they accepted the humiliation ... because they knew that the blacks as well as the Puerto Ricans carried weapons of various sorts."⁴⁶⁷ The white men succumbed not because they were unmanly, but because they knew that "for a white to resist an attack meant his risking serious injury or mutilation."⁴⁶⁸ As Kunzel observes, "The discomfiting fact of the participation of heterosexual men in homosexual sex was explained away by discourses of race. The unsettling possibility of love between men was elided altogether."⁴⁶⁹

Questions about the black-on-white rape narrative are particularly pressing today because we are at a critical moment for policy reform.⁴⁷⁰ Since 2003, the federal government, pursuant to the *PREA*, has been funding prison rape research and analysis in order to develop recommendations for reducing prison rape.⁴⁷¹ The *PREA* embraces the notion that "The frequently interracial character of prison sexual assaults significantly exacerbates interracial tensions, both within prison and, upon release of perpetrators and victims from prison, in the community at large,"⁴⁷² implying that policy responses must accommodate the supposedly interracial character of prison rape. It seems particularly urgent, then, that the empirical basis of this assumption be examined before it is acted upon.

Even if it turns out that (contrary to the results of the National Inmate Survey, and the Wolff and Jenness surveys) prison rape *is* disproportionately black-on-white, the dominance of this narrative gives reason for concern. In prison, as in the outside world,⁴⁷³

⁴⁶⁴ Kunzel, *supra* note 4. See also Ek, *supra* note 17, 13.

⁴⁶⁵ Kunzel, 169.

⁴⁶⁶ Kunzel, *supra* note 4, 170.

⁴⁶⁷ Scacco, 54-55

⁴⁶⁸ Scacco, 55.

⁴⁶⁹ Kunzel, *supra* note 4, 189.

⁴⁷⁰ Because NPREC submitted its report and recommendations on June 23, 2009, the US Attorney General must publish national standards for prison rape prevention by June 23, 2010: Rothstein & Stannow, *supra* note 8; 42 U.S.C. § 15607(a)(1).

⁴⁷¹ The *PREA*, for example, aims, *inter alia*, to "develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape." Prison Rape Elimination Act of 2003 ("PREA"), P.L. 108-79, 42 U.S.C. §§15601-15609 (2003), § 3(3).

BJS, Prisons, *supra* note 49; BJS, *supra* note 49; Correctional Authorities Reports, 2004, 2005, 2006; Goldberg and Gaes, 2004; Wolff, 2006; Jenness, *supra* note 50, 2007; and NPREC, *supra* note 10, 2009 all form part of the *PREA* initiative.

⁴⁷² *PREA*, Congressional findings.

⁴⁷³ Many feminist commentators have observed that selective enforcement of rape laws against black men accused of raping white women leaves most women unprotected against all other instances of sexual harassment and assault. Estrich; Hernandez; Iglesias; Crenshaw. It enforces race and gender hierarchy by

the narrative of black-on-white rape “erase[s] the existence of white assailants and black victims,”⁴⁷⁴ as well as other nonwhite perpetrators and victims who are invisible in the black-on-white account. This narrative inaccurately suggests that white prisoners are the most vulnerable, or the most important, victims of sexual violence.

The black-on-white rape narrative may also give rise to policy prescriptions that are both misguided and pernicious. Several scholars who present prison rape as a form of black-on-white aggression propose racial segregation as the solution.⁴⁷⁵ Moreover, eight states intervened as *amici* in *Johnson v. California* to argue (unsuccessfully) that the threat of interracial rape made California’s racial segregation policy not only constitutionally tolerable under the *Turner v. Safley* standard, but constitutionally required.⁴⁷⁶

The prison rape narrative also furnishes a quasi-legitimate reason to depart from ordinary legal rules—a pattern we also see in the outside world. Traditionally, judges and juries exempted allegations of black-on-white rape from the usual requirements of force and consent, which were often fulfilled by gendered racial stereotype:⁴⁷⁷ police, prosecutors and factfinders presumed that “no White woman would ever consent to sex with a Black man,”⁴⁷⁸ unless she were a prostitute.⁴⁷⁹ Other gendered legal practices, such as prompt complaint, skepticism of the victim, and the corroboration requirement, were quickly dispensed with, “or excused outright. Even the relevance of a woman's

excluding women of color from protection altogether, and by showing white women that they are not protected against sexual assault when they “ac[t] outside of traditional gender roles.” Iglesias, 884.

⁴⁷⁴ Kunzel, *supra* note 4, 180.

⁴⁷⁵ See, e.g. Knowles; James B. Jacobs, *The Limits of Racial Integration*, in James B. Jacobs, ed. *New Perspectives on Prisons and Imprisonment* 86 (1983) (arguing that prisoners be granted the “freedom” to choose racially segregated custody).

Unlike these authors, Wolff (2008) does not explicitly call for racial segregation, but obliquely suggests it. After devoting almost the entire Discussion section of her analysis to the idea—unsupported by any of her statistically significant findings—that white prisoners are especially vulnerable to rape by nonwhite aggressors (*id.* 466-69), she states that sexual victimization against whites is “compatible with notions of racial vengeance or rage, where the heretofore underclass (people of color) dominate the upper class (Whites) and exert this dominance through acts of victimization that are humiliating, shaming, and degrading (Carroll, 1974; Davis, 1968; Scacco, 1975)”: *id.* 468-69 (parentheses in original). She then suggests that “whether [victimization and violence] are coincident with or motivated by racism is relevant only to the extent that . . . [such] knowledge can be used to inform practices and policies that minimize their opportunities.” *Id.* 469-70. She advocates “reducing opportunities for victimization, separating those with characteristics that make them likely targets from other inmates with predatory characteristics,” *id.* 470, a proposal which on its face is laudable, but whose context in her racial discussion implies that whites are the likely targets and nonwhites are the predators.

⁴⁷⁶ Brief of the States of Utah, Alabama, Alaska, Delaware, Idaho, Nevada, New Hampshire and North Dakota as *Amici Curiae* in Support of Respondent, 2004 WL 1776910 (U.S.) (Appellate Brief) at 18, (citing HRW, Willens and Man & Cronan for the proposition that integration would foster prison rape: “Closely related to the problem of race-related gangs is the problem of inter-racial rape in prisons . . . celling together men who are ‘racially antagonistic,’ is one of the factors that increase the threat of prison rape.” These *amici* also argued that the threat of interracial rape and violence made racial segregation constitutionally required: “the failure to take segregative measures ‘could be considered “deliberate indifference” to prisoners’ safety and could itself create a constitutional violation””, quoting *Johnson*, 321 F.3d at 807; *Robinson v. Prunty*, 249 F.3d 862 (9th Cir. 2001)).

⁴⁷⁷ Estrich, *Sex at Work*, 813-14

⁴⁷⁸ Pokorak, 22

⁴⁷⁹ See note 443, *supra*, and accompanying text.

sexual past was considered dubious at best.⁴⁸⁰ Because respectable⁴⁸¹ white women are stereotyped as virtuous and vulnerable,⁴⁸² the racism of the black-rapist myth supplanted the usual skepticism of women who reported sexual assaults.⁴⁸³

In prison law, likewise, the black-on-white rape narrative has also signaled a departure from the ordinary legal rules in favor of the gendered exercise of administrative discretion. In *Dothard v. Rawlinson*,⁴⁸⁴ for example, the Supreme Court evoked a racialized specter of interracial rape as it rejected a Title VII challenge by Dianne Rawlinson, a white woman,⁴⁸⁵ to an Alabama law that excluded women from 75% of Alabama correctional jobs.⁴⁸⁶ The Court found sex to be a bona fide occupational qualification because Alabama prisons were “characterized by ‘rampant violence’ and a ‘jungle atmosphere’”⁴⁸⁷ which a district court had recently found to be “constitutionally intolerable.”⁴⁸⁸ The Supreme Court found an unacceptable risk that prisoners would sexually assault women, like Rawlinson, if they were employed as guards.⁴⁸⁹

The racial implications of *Dothard*’s language were not accidental. In *Pugh v. Locke*,⁴⁹⁰ the district court decision the Supreme Court had quoted in *Dothard*, the judge had noted that the inmate population was “predominantly black,”⁴⁹¹ while guards were “practically all white and rural,”⁴⁹² and “address[ed] black inmates with racial slurs, further straining already tense relations.” “In view of the foregoing,” the district court continued, “the rampant violence and jungle atmosphere existing throughout Alabama’s penal institutions are no surprise.”⁴⁹³

The *Dothard* Court acknowledged that “[t]he environment in Alabama’s penitentiaries is a peculiarly inhospitable one for human beings of whatever sex.”⁴⁹⁴ But men were the victims of the rampant physical and sexual violence the court cited as a

⁴⁸⁰ Estrich, Sex at Work, 813.

⁴⁸¹ Balos & Fellows

⁴⁸² See, e.g. Ehrenreich, 274; Crenshaw etc.

⁴⁸³ See generally Estrich, Sex at Work, 813-14.

⁴⁸⁴ 433 U.S. 321 (1977).

⁴⁸⁵ See photo of Dianne Rawlinson at the Southern Poverty Law Center website, which represented her, at www.splcenter.org/legal/docket/files.jsp?cdrID=7

⁴⁸⁶ *Dothard*, 327-28.

⁴⁸⁷ *Dothard*, 334, quoting *Pugh v. Locke*, 406 F.Supp. 318, 325 (MD Ala. 1976).

⁴⁸⁸ *Dothard*, 334, quoting *Pugh v. Locke*, 406 F.Supp. 318, 325 (MD Ala. 1976). In *Pugh*, the district court had subjected Alabama to a consent decree for unconstitutional overcrowding, understaffing, unsafe housing, lack of security classification, and institutional approval of inmate physical and sexual violence, and other institutional practices in violation of the Eighth and Fourteenth Amendments.

⁴⁸⁹ *Dothard*, 335-36.

There is a basis in fact for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison. There would also be a real risk that other inmates, deprived of a normal heterosexual environment, would assault women guards because they were women. In a prison system where violence is the order /336/ of the day, where inmate access to guards is facilitated by dormitory living arrangements, where every institution is understaffed, and where a substantial portion of the inmate population is composed of sex offenders mixed at random with other prisoners, there are few visible deterrents to inmate assaults on women custodians.

⁴⁹⁰ 406 F.Supp. 318 (M.D. Ala. 1976).

⁴⁹¹ *Pugh*, 325

⁴⁹² *Pugh*, 325

⁴⁹³ *Pugh*, 325.

⁴⁹⁴ *Dothard*, 325

valid reason to exclude women. Rawlinson's "womanhood" could "directly reduc[e]" her "relative ability to maintain order in a male, maximum-security, unclassified penitentiary of the type Alabama now runs."⁴⁹⁵ By administering its prisons in ways that violated the Eighth and Fourteenth Amendments and lent credibility to the prospect of black-on-white rape, Alabama was able to justify sex discrimination that would not have been permitted if its prisons had conformed to constitutional standards.

Gendered institutional practices condone and often facilitate prison rape. The black-on-white rape narrative implies that prison rape is somehow inevitable, and prisons are not to blame if they allow it to become widespread. Thus, in dissenting from the Court's holding in *Farmer v. Brennan* that the Eighth Amendment forbids prison officials to knowingly allow an inmate to be raped, Justice Thomas argued: "Prisons are necessarily dangerous places; they house society's most antisocial and violent people in close proximity with one another. Regrettably, '[s]ome level of brutality and sexual aggression among [prisoners] is inevitable no matter what the guards do ... unless all the prisoners are locked in their cells 24 hours a day and sedated.'"⁴⁹⁶

While Justice Thomas' argument did not persuade the Court in *Farmer*, this reasoning informs the constitutional deference that exempts prisons from vigorous enforcement of constitutional norms. The Supreme Court declares that prison administration is an "inordinately difficult undertaking"⁴⁹⁷ and that "the problems of prisons in America are complex and intractable,"⁴⁹⁸ so that it is inappropriate to hold prison administrators to ordinary constitutional standards. "Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration."⁴⁹⁹

This deferential approach to constitutional adjudication is in part based on the premise that prisoners are, or may become, violent: "Some [inmates] are first offenders, but many are recidivists who have repeatedly employed illegal and often very violent means to attain their ends. They may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life."⁵⁰⁰ Thus, the Court affirms, "federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment."⁵⁰¹

The exclusion of constitutional standards and legal rules from prison facilitates the gendered practices of institutional governance which may make the violence problem all the more "complex and intractable." The racial narrative obscures the unlawful institutional practices that require prisoners to "fight or fuck," while simultaneously helping to justify prisons' exemption from constitutional standards.

⁴⁹⁵ *Dothard*, 335. The type of prison Alabama was then running one in which, the *Pugh v. Locke* court had found, overcrowding, understaffing, unsafe living conditions, nonexistent security classification, race discrimination, and the use of inmate trustees had created a climate of physical and sexual violence so pervasive that it violated the Eighth and Fourteenth Amendments: *Pugh*, 325.

⁴⁹⁶ *Farmer v. Brennan*, 511 U.S. 825, 858-59 (1994), per Thomas J., concurring, quoting *McGill v. Duckworth*, 944 F.2d 244, 248 (CA7 1991).

⁴⁹⁷ *Turner v. Safley*, 84-85.

⁴⁹⁸ *Procunier v. Martinez*, 416 U.S. 396, 404-405 (1974).

⁴⁹⁹ *Turner v. Safley*, 89.

⁵⁰⁰ *Wolff v. McDonnell*, 418 U.S. 539, 561-62 (1974), per White J., for the Court.

⁵⁰¹ *Sandin v. Conner*, 515 U.S. 472, 482 (1995), per Rehnquist C.J., for the Court.

Conclusion

Prison rape is not an inevitable consequence of the brutality or perversion of prison rapists. Prison officials administer prisons in accordance with recognizable gender norms they draw from the broader culture. In prison, they adapt these norms to enforce a violent ethos of masculinity that fosters and excuses sexual abuse. Guards and administrators authorize real men to police the gender conformity of unmanly men by raping them—a pattern we also see in Title VII, in milder form. Correctional authorities also draw upon a familiar cultural narrative of black-on-white sexual threat to justify their gendered departure from the ordinary legal rules. The black-on-white rape narrative suggests that prison rape is inevitable, obscuring the institutional role in encouraging sexual violence.

The perception and reality of rampant prison violence supply a reason for courts not to interfere with the institutional policies that foster it. Mediated through gendered legal practices and racial narratives, prison law impunity perpetuates itself.