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IT COULD HAPPEN TO “YOU”: PAY-TO-STAY JAIL UPGRADES

*Kim Shayo Buchanan** †

INTRODUCTION

In the jails of Los Angeles County, about 21,000 detainees are held in filthy cells so overcrowded—four men in a cell built for two, six to a four-man cell—that, as federal judge Dean D. Pregerson observed in 2006, inmates must stay in their bunks at all times because there is not enough room for them to stand. These men—ninety percent of whom are pretrial detainees—are held in these conditions twenty-four hours per day, seven days per week, and are typically allowed only a single three-hour exercise period weekly. Other inmates are held for days in a county “reception center” where twenty, thirty-five, or even (according to inmates) up to fifty men are crammed into each 15½ x 12-foot holding cell.

With young men packed so densely that they can barely move, it is unsurprising that fights break out. County jail inmates are routinely assaulted and even raped. Los Angeles County Sheriff Leroy Baca reported in 2006 that recent funding cutbacks have reduced the guard-to-inmate ratio to about one guard per 100 inmates (compared to the national average of one guard per ten inmates). In such circumstances, overburdened jail administrators and staff may feel there is little they can do to prevent the violence.

Thus, Human Rights Watch and others have observed, guards routinely tell male prisoners who have been sexually assaulted, “Be a man. Stand up and fight.” As Deputy Sheriff Todd Zerbel observes, “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.”

Conditions in the Los Angeles County jails are exactly those identified by the Commission on Safety and Abuse in America’s Prisons as likely to result in violence: overcrowding, idleness, inadequate security classification, lack of direct supervision by staff, and a near-complete absence of recreational activities and rehabilitative programs. As a result, even though most county jail inmates are being held on nonviolent property or drug charges, they are trapped in an environment where—to forestall beating or rape—they must fight, or at least appear ready to fight.

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Any detainee would want to be protected against such danger—and some of them are. Approximately fifteen municipalities in Los Angeles and Orange counties offer pay-to-stay accommodation in police lockups or municipal jails, where inmates can pay \$75 to \$175 per night to serve their time in a safer environment, away from the chaotic county jails.

Thus, when people are arrested in southern California, they face a two-tiered jail system in which the overwhelming majority of detainees and offenders are crammed together in crowded, dirty, violent, unsafe conditions that Judge Pregerson recently observed violate “basic human values.” Governments offer certain inmates an escape hatch: in exchange for payment, their jailers will keep them safe. The perceived legitimacy of this arrangement, I will explain, depends in part on the implicit acceptance of two racial stereotypes: that most criminals are violent black men, and that white people, including white lawbreakers, are vulnerable victims.

I. THE PAY-TO-STAY PRIVILEGE

For more than a hundred years, the Supreme Court has acknowledged that when government takes people into custody, depriving them of the ability to protect themselves, it owes an affirmative duty to protect them against injury. But when mismanaged, overburdened prison systems fail to fulfill this duty, our courts have too often attempted to justify such institutional failure by linking prison violence to the stereotype of the brutal black rapist or murderer. They attribute violence not to institutional mismanagement or overcrowding, but to what the Supreme Court in *Dothard v. Rawlinson* called a “jungle atmosphere” created by prisoners’ inherent brutality. Justice Thomas argued, in his concurrence in *Farmer v. Brennan* (quoting Judge Easterbrook in *McGill v. Duckworth*), that prisons should not be held responsible for allowing inmate violence:

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.”

In the county jails, violence is too often tolerated as the inevitable cause and consequence of prisoners’ brutal nature. By contrast, pay-to-stay jail officials affirm the humanity of pay-to-stay inmates, and undertake to keep them safe. For example, Lieutenant Jim Strona of the La Verne pay-to-stay facility observed, “Our job is not to punish people. It’s to incarcerate people.” A Pasadena pay-to-stay jailer said, “Despite where these folks are, they deserve to be treated with some dignity.”

In municipal jails and lockups, paying inmates enjoy privileges denied to inmates in the general population of the county jails. Paying inmates get cells to themselves. They are “allowed to watch television or select movies from the video library. They can ride the exercise bike, sip coffee and use

the bathroom in privacy. Most important, they are kept away from others in the facility who could be murderers and rapists.”

Unlike their counterparts in the county jail, pay-to-stay inmates are expected to act rationally, despite their crimes. Some pay-to-stay lockups, including La Verne, according to the *Los Angeles Times*, allow inmates to freely roam grounds from which “they could make a jail break without even jumping a fence.” Jail officials trust that a paying inmate won’t try this because “that would earn . . . a transfer to the type of lockup he is trying to avoid.” Lieutenant Strona commented, “You’d go from 100 days in the La Verne Jail to three years in the state pen. Have at it.” If other inmates were believed to be rational, they would be expected to respond the same way to the behavioral incentive of a safer, more comfortable lockup. But county jail inmates are not offered the opportunity to demonstrate their rationality. They are confined by force.

Sheriffs and other proponents of pay-to-stay jails are remarkably sanguine about the violence that is institutionalized in the county jails. As Orange County Lieutenant John Petropoulos observed, “If you’re going to be in jail, it’s the best \$75 per day you’ll ever spend in your life. You don’t have to worry about getting beat up by a guy with a shaved head and tattoos.” Flyers in police stations tout municipal pay-to-stay accommodations: “Serve your time in our clean, safe, secure facility!”—a pitch that would be ineffective if county jails were clean, safe, and secure.

At the same time, though, “Sheriff’s officials say there are no more assaults per capita in the [Men’s Central Jail] than at most municipal facilities and . . . that graphic scenes in such movies as ‘American Me’ have overstated the personal dangers.” But municipal officials have little incentive to dispel this belief when they perceive that they can make money from it.

The pay-to-stay upgrade is pitched to the public as a privilege for basically decent people who have run afoul of the law. It is, the *Los Angeles Times* observed, “for those who have no business being in places such as the Los Angeles men’s county jail.” When the Pasadena jail started its pay-to-stay program in the early 1990s, “Our sales pitch . . . was, ‘Bad things happen to good people.’” The pay-to-stay upgrade is said to serve the goals of incarceration by locking up first-time offenders “without unduly exposing otherwise law-abiding citizens to the criminal element.”

The difficulty, of course, is finding a legitimate basis for distinguishing the criminals who are “good people” from the “criminal element.” Sheriffs, jailers, and news reporters discussing pay-to-stay lockups portray them as reserved for nonviolent, first-time or petty offenders. But actor Christian Slater, who had at least two previous convictions, served a ninety-day sentence at the La Verne pay-to-stay lockup after being convicted of drug crimes and battery of his then-girlfriend. Former Orange County assistant sheriff George Jaramillo is currently paying to serve a twelve-month sentence at Montebello City Jail for felony perjury and misappropriation of public funds for his personal use. News stories quote repeat offenders who compare their pay-to-stay treatment favorably to their prior stints in the county jail.

Eligibility for a jail upgrade, then, is not necessarily based on the nature of the offender's crimes. In some cases, eligibility may not even depend on ability to pay: the deluxe La Verne lockup reportedly requires only that inmates "work off their rent by washing cars, serving food or raking the grounds." What these offenders do have in common is their ability to pass the screening interview.

Pay-to-stay facilities are not open to everyone who can pay the daily fee. Admission is invariably subject to screening interviews, for which there are no acknowledged criteria. The *New York Times* reports that pay-to-stay jail administrators "can operate like bouncers, rejecting anyone they wish."

Pay-to-stay eligibility is thus in some inchoate way contingent on who the inmate is, not on what he (or, less often, she) has done. A spokesperson for three private pay-to-stay jails in Orange County described the benefits this way: "You can avoid gang issues. You are restricted in terms of the number of people you are encountering and they are a similar persuasion such as you."

In most cases, convicted offenders must be referred to the jail by the sentencing judge. Municipal Judge Gregory O'Brien, an early defender of pay-to-stay upgrades, "stressed that a sentence in a municipal jail is not appropriate punishment for most offenders," but can be fitting for the few inmates who are "otherwise respectable citizens who find themselves on the wrong side of the law." These inmates, he suggested, were visually distinguishable from the inmates of the County Jail: "I think if you go down and look at the . . . inmates down at County Jail, you'll see very few who fit that profile." Unlike county jail inmates, he explained, pay-to-stay offenders "need the shock of being behind bars and having their freedom taken away. They don't need to have their safety threatened."

II. IT COULD HAPPEN TO "YOU"

The *Los Angeles Times* describes the county jail as a "dingy" environment that would "intimidate the uninitiated," where "[i]nmates with shaved heads and tattoos stare and flash gang signs." In news articles, the fear that "the uninitiated" would feel upon entering this environment is explained in a racially loaded, second-person narrative. One such passage in *The Australian* reads, "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."

Similarly, a *Los Angeles Times* article begins, "You're busted, heading to jail for a one-time mistake, say, petty fraud or drunk driving. You're small, frail, haven't used your fists since the fifth grade and are about to meet some seriously hard-core dudes at county jail. Could you defend yourself? Or would you be victimized and face years of therapy? . . . Those not eager to learn the answers firsthand might be relieved to discover . . . [y]ou can rent a cell in a much quieter, presumably safer municipal lockup."

The person addressed in these narratives—the imagined newspaper reader—is depicted as a physically weak, psychologically vulnerable drunk driver who will be vulnerable, like you, to the real criminals, who are identifiable on sight as gang members. The racial ascription (or “persuasion”) of the person like “you” is not made explicit in these articles, but the pay-to-stay inmate’s vulnerability is constructed by the difference between his race and that of the criminal “gang members.” For example, one article quoted a drunk driver as saying, “I heard that county jail is dirty and dangerous, especially for Asian guys like me. . . . There’s so many gang members, they beat us up.”

The racial ascription of the “gang members” is also coyly left unsaid, but gang members are so strongly stereotyped as Latino and black that, as the Justice Policy Institute points out, white gang members are “virtually absent from most law enforcement and media accounts of the gang problem,” despite their involvement in comparable levels of criminal activity. As a recent Northern California ACLU report observed, in places like San Jose and Orange County, 97% of police-identified gang members are nonwhite. The gang members portrayed in pay-to-stay narratives are impliedly black or Latino tough guys who, unlike “you,” know how to fight.

Statistics on the racial breakdown of the county and pay-to-stay jails are not publicly available. But although surveys consistently show that most Americans’ image of the criminal is a violent black man, most California prisoners are not black; according to the California Department of Corrections and Rehabilitation, about 38% of California prisoners are Latino/a, 29% are African-American, and about 27% are white. And not all pay-to-stay “clients” are white: the inmates described in the news articles include a Korean-American, two Latinos, and African-American rapper Dr. Dre. Nonetheless, imagery of “gang” violence and white vulnerability pervades media coverage of pay-to-stay jails.

In the news stories, the fear of rape and violence is almost always illustrated from the perspective of the economically comfortable, impliedly white man addressed in these second-person narratives. From this perspective, it is difficult to imagine that some of these intimidating brown and black men may be locked up for the first time, too. It is invisible or irrelevant to “you” that most of the men in this environment feel intimidated by the others, and that they may look tough because they feel they have to.

In these narratives, the immediacy of the pay-to-stay inmate’s terror owes much to gendered expectations and racialized fears. The gendered racial stereotype of black men is that they are supermasculine—huge, oversexed, criminal, strong, angry, violent men with a penchant for raping white women—a stereotype that, in prison, is transposed into a threat to white men. Through the lens of these images, it is almost impossible to view black men as anything but tough. It becomes hard to see that a black criminal (or Latino “gang member”) with a shaved head and tattoos may be just as terrified of rape and beating as the imagined reader of the *Los Angeles Times*.

Consistent with the black-rapist trope, many anecdotal and official narratives about prison rape assert that the most common scenario involves a black perpetrator and a white victim. However, in a recent victimization survey conducted by the University of California at Irvine, researchers found that, as in the outside world, the overwhelming majority—over 82%—of prison sexual assaults are intraracial. The two demographic factors that most affected an inmate's risk of sexual assault were nonheterosexual status and African-American racial ascription. It is well-known in corrections that gay, transgendered, and bisexual inmates are at heightened risk of sexual assault in men's prisons. Contrary to stereotype, so are straight black men. Although African-American prisoners comprised only 36% of the survey sample, 50% of the non-heterosexual inmates who reported being sexually assaulted were black. Of the straight men who reported having been sexually assaulted, 83% were black.

Gendered racial stereotypes make it hard for authorities to see that black men are harmed by rape in prison, and make it even harder to get those authorities to do anything about it. For example, Roderick Johnson, the plaintiff who alleged in *Johnson v. Johnson* that he was repeatedly sexually assaulted in a Texas prison, said that prison officials told him many times that because he was gay, he probably liked being raped. But because he was black, he was supposed to be able to defend himself without protection from guards: "You need to get down there and fight or get you a man," they told him. "There's no reason why Black punks can't fight and survive in general population if they don't want to f***." From this perspective, black men are, or should be, so violent that they do not need, or deserve, guards' protection.

Gendered racial images make it seem fair that governments confine tens of thousands of men to conditions in which they have to fight for a measure of safety, even as it seems equally fair that wealthier lawbreakers (stereotyped as white drunk drivers) should not have to. Today, the notion that black men are subhuman brutes is rarely endorsed in polite company, but black people are still stereotyped as criminals, and criminals are still stereotyped as black.

Such gendered racial images also make it easy for law enforcers, decision makers, and pay-to-stay inmates to imagine, as many do, that most prisoners are "murderers and rapists." But California Department of Corrections and Rehabilitation data on new felon admissions suggest that only a tiny proportion—less than five percent—actually are.

Even though most inmates are not black, the stereotypes that link black men to notions of violence and criminality condemn offenders of all racialized groups to an environment of government-sponsored violence where the weak are victimized and the strong are compelled to act like the violent henchmen of racist stereotype, thereby confirming the assumption that they are the brutes of our most racist nightmares. But the racial stereotypes that justify the abandonment of most prisoners' safety also make it seem harsh and excessive to subject a respectable lawbreaker like "you" to the kind of violence we tolerate for them.

CONCLUSION

There is no principled basis on which a low-income drunk driver, drug dealer, or batterer “deserves to have [his] safety threatened” in a way his wealthier counterpart does not. The government is constitutionally required to protect both of them—and it can. The institutional design and management practices required to prevent prison violence have been identified by various correctional organizations, including the Commission on Safety and Abuse in America’s Prisons. These practices have been implemented in other parts of the state and the country, where jail systems are able to function without an escape hatch for wealthier lawbreakers. The jails of Santa Clara County, for example, are widely characterized as better managed and safer than those of Los Angeles. In Santa Clara, reports spokesperson Mark Cursi, “Jail is jail. No extras.”