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# YALE LAW & POLICY REVIEW

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## Our Prisons, Ourselves: Race, Gender and the Rule of Law

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INTRODUCTION .....	2
I. THE PRISON RAPE NARRATIVE .....	12
II. REAL MEN VS. SISSIES: THE HETEROSEXUAL DEFENSE .....	23
A. <i>The Legal Response to Sexual Abuse in Prison</i> .....	23
1. Underenforcement .....	25
2. “Be a man. Stand up and fight.” .....	29
3. “You’re gay. You must have liked it.” .....	32
B. <i>Dominance and Sexuality: Making Men</i> .....	37
1. Masculinities and the Social Meaning of Same-Sex Sexual Abuse .....	37
2. Masculinities in Title VII: The Heterosexual Defense .....	46
III. THE OFFICIAL NARRATIVE OF BLACK-ON-WHITE RAPE .....	53
A. <i>The Black-on-White Prison Rape Myth: The Evidence</i> .....	54
B. <i>The Cultural Specter of Interracial Rape: Black Violence and         White Vulnerability</i> .....	61
C. <i>The Racial Rape Myth: Legal Exceptionalism</i> .....	64
D. <i>Presenting the Narrative: Official Sources</i> .....	66
1. Prison Staff: Race in Sexual Abuse Investigations .....	67

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2.	Courts: Selective Racial Identification.....	69
3.	The Bureau of Justice Statistics: Selective Presentation of Racial Data .....	71
E.	<i>Consequences of the Black-on-White Rape Narrative</i> .....	74
1.	The Ideology of Black-on-White Sexual Threat .....	74
2.	Calls for Racial Segregation .....	78
	CONCLUSION .....	80

## 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,” or some big, scary criminal will make you his “bitch.”<sup>2</sup> This jocular fear is often racialized: “A running joke throughout movies concerns the theme in which a very large Black male prisoner threatens a boy . . . [who may be] raped or ‘punked’ by a Mike Tyson-esque character.”<sup>3</sup> These jokes reveal one of men’s starkest

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1. See ANDY BOROWITZ, WHO MOVED MY SOAP? THE CEO’S GUIDE TO SURVIVING IN PRISON (2003); Tanyika Brime, Note, *We Can Do Better: The State of Custodial Misconduct by Correctional Staff in New York*, 15 CARDOZO J.L. & GENDER 303, 329-30 (2009); Ezra Klein, *Prison Rape Isn’t a Punch Line*, L.A. TIMES, March 30, 2008, at M7 (noting the existence of a board game making light of prison rape, entitled “Don’t Drop the Soap”). In 2002, MTV ran a commercial for 7UP, which featured a young, perky soft-drink salesman handing out cans of 7UP in prison. He drops a can, begins to stoop, and then remembers: “I’m not picking that up.” See *7up Captive Audience*, YOUTUBE (Mar. 22, 2007), [http://www.youtube.com/watch?v=IHuD5\\_qSV-U](http://www.youtube.com/watch?v=IHuD5_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*, FORBES.COM, May 30, 2002, available at [http://www.justdetention.org/en/jdinews/2002/7up\\_forbes.aspx](http://www.justdetention.org/en/jdinews/2002/7up_forbes.aspx). For a discussion of how the rape of women is not treated as a laughing matter as it often is for men both inside and outside of prison, see MARK L. FLEISHER & JESSIE S. KRJENERT, THE CULTURE OF PRISON SEXUAL VIOLENCE 128-29 (2006), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/216515.pdf>.
  2. A 2009 episode of *The Daily Show with Jon Stewart* 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 refused to sign a voluntary ethical oath. *The Daily Show with Jon Stewart* (Comedy Central television broadcast Aug. 12, 2009) [hereinafter *The Daily Show*], available at <http://www.thedailyshow.com/watch/wed-august-12-2009/mba-ethics-oath>.
  3. PATRICIA HILL COLLINS, BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER, AND THE NEW RACISM 172-73 (2004).

fears about prison: that they will be unmanned or “made gay” by being sexually assaulted by a big black man.<sup>4</sup>

These stories present prison rape as the deviant act of criminal men whose violent subculture condones forms of violence that would be unacceptable in free society.<sup>5</sup> Some scholars argue that male prisoners, unlike other men, are “by nature hypersexual, violent, and lacking in the ability to maintain strong, respectful interpersonal relationships, often motivated by racial tensions, and wanting in many ways to express interpersonal dominance,”<sup>6</sup> making them “people who would be violent in any social setting.”<sup>7</sup> This notion can be deployed to excuse prison violence as inevitable.<sup>8</sup> For example, Justice Clarence Thomas writes that: “Prisons are necessarily dangerous places” because “they house society’s most antisocial and violent people in close proximity with one

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4. Terry A. Kupers, *Rape and the Prison Code*, in *PRISON MASCULINITIES* 111, 112 (Don Sabo, Terry A. Kupers & Willie London eds., 2001); see, e.g., Don Sabo, Terry A. Kupers & Willie London, *Gender and the Politics of Punishment*, in *PRISON MASCULINITIES*, *supra*, at 3, 14 (“The dark and hurtful sides of masculinity can be projected onto prisoners. . . . The darkest and most secret fear that straight, heterosexual 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.”); see also REGINA KUNZEL, *CRIMINAL INTIMACY: PRISON AND THE UNEVEN HISTORY OF MODERN AMERICAN SEXUALITY 169-80* (2008) (tracing the dominance of a black-on-white rape narrative in prison sex research literature from the 1970s to the present). On the other hand, some cultural sources that seek to appeal to a broad or liberal audience, such as the 7UP commercial and the *Daily Show* episode, feature white actors in the role of prison rapist. In the latter case, the middle-class potential victims look white (although one might be Asian), while in the commercial, the law-abiding prospective victim is black.
  5. See JANET I. WARREN ET AL., *RISK MARKERS FOR SEXUAL PREDATION AND VICTIMIZATION IN PRISON* 272 (2009), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/230522.pdf>; see also FLEISHER & KRIENERT, *supra* note 1, at 176 (noting that interpretations of prison violence are based on premises “radically different from free-society standards”).
  6. WARREN ET AL., *supra* note 5, at 288 (emphasis added).
  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). Robertson rightly points out that several preexisting inmate characteristics contribute to prison violence. *Id.* This Article, though, highlights 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 & LOVISA STANNOW, *JUST DETENTION INT’L, IMPROVING PRISON OVERSIGHT TO ADDRESS SEXUAL VIOLENCE IN DETENTION* 4 (2009) [hereinafter *JDI REPORT*], available at <http://www.justdetention.org/pdf/ACSBrief.pdf>. Rates of sexual abuse vary widely across institutions. See *infra* notes 54-55 and accompanying text.

another. Regrettably, “[s]ome level of brutality and sexual aggression among [prisoners] is inevitable no matter what the guards do . . . unless all prisoners are locked in their cells 24 hours a day and sedated.”<sup>9</sup>

This Article challenges three elements of this conventional prison rape narrative. First, it questions whether sexual assault happens because *prisoners* are so dangerous, or because *prisons* are. I contend that, in many prisons for men, institutional actors condone and legitimize sexual abuse,<sup>10</sup> addressing it

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9. Farmer v. Brennan, 511 U.S. 825, 858-59 (1994) (Thomas, J., concurring) (quoting McGill v. Duckworth, 944 F.2d 344, 348 (7th Cir. 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. See Kimberle Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1469 (1992). 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. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 815 (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.” Katherine M. Franke, *What’s Wrong with Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 169, 174 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (citing John B. Pryor, *Sexual Harassment Proclivities in Men*, 17 SEX ROLES: J. RESEARCH 269 (1987); John B. Pryor, Janet L. Giedd & Karen B. Williams, *A Social Psychological Model for Predicting Sexual Harassment*, 51 J. SOC. ISSUES 69 (1995)). In prison, “unwanted and sexually suggestive touching are more common occurrences . . . than the act of rape itself.” Nancy Wolff et al., *Understanding Sexual Victimization Inside Prisons: Factors that Predict Risk*, 6 CRIMINOLOGY & PUB. POL’Y 535, 537 (2007); see also ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN LOCAL JAILS REPORTED BY INMATES, 2007 (2008) [hereinafter BJS 2007 JAILS REPORT], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svljrio7.pdf>; ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008-09, at 10 (2010) [hereinafter BJS 2008-09 PRISONS AND JAILS REPORT], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjrio809.pdf>; ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORTED BY INMATES, 2007 (rev. ed. 2008) [hereinafter BJS 2007 PRISONS REPORT], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svsfprio7.pdf>. Most harassment that results in liability under Title VII also involves an element of physical assault. Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 554 (2001) (“[S]uccessful 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

with a distinctly gendered response that is shared with the outside world. In these prisons, legal authorities—prison staff and administrators—routinely ignore constitutional, statutory, and institutional rules that require them to protect inmates against physical and sexual violence. Instead, these legal actors respond to sexual violence by enforcing the rules of masculinity: A prisoner must “be a man” by fighting, or else he deserves to be abused because he is “gay.”<sup>11</sup> The conventional account of prison rape obscures the responsibility of staff and administrators for institutional practices that foster prison rape.

This Article also challenges a second element of the conventional prison rape narrative. The popular story presents prison violence as unique or aberrant. “Most people want to believe that the penitentiary is a place where prisoners are locked up and segregated from the rest of society. The culture inside of prisons is supposed to be different from the culture of the outside world.”<sup>12</sup> The conventional narrative divorces prison rape from sexual violence and inequality on the outside, implying that free society, by contrast, abhors sexual violence.<sup>13</sup> I demonstrate that this contrast is exaggerated: The gendered institutional practices that foster prison rape actually parallel gendered patterns we also see in the jurisprudence of male-male sexual harassment in the outside world. In prison, though, gender violence and racial inequality take more extreme and violent forms—in part because, as I have previously argued, the legal rules that seek to mitigate institutionally sponsored violence and inequality are practically unenforceable in prison.<sup>14</sup>

A third element of the conventional narrative that I challenge is the notion that prison rape is usually, or disproportionately, black-on-white. The results of the only methodologically rigorous, large-scale randomized surveys of prison sexual victimization indicate that it is not.<sup>15</sup> In this Article, I examine how the racial narrative relates to the gendered practices of institutional governance that foster prison rape and, more broadly, how it serves to justify the exemption of prisons from the rule of law.

The institutional response to sexual abuse in prison is a legal practice, albeit an informal one. In the outside world, a man who is sexually threatened or

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hear about it, that is where sexual assault occurs.” See NAT’L PRISON RAPE ELIMINATION COMM’N, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 56 (2009) [hereinafter NPREC REPORT] (quoting Kupers), available at <http://www.ncjrs.gov/pdffiles1/226680.pdf>.

11. See *infra* Section II.A.
12. Olga Giller, Note, *Patriarchy on Lockdown: Deliberate Indifference and Male Prison Rape*, 10 CARDOZO WOMEN’S L.J. 659, 675 (2004).
13. See, e.g., FLEISHER & KRIENERT, *supra* note 1, at 176 (suggesting that sexual violence also is understood inside prisons as an “abhorrent, unjustifiable act[.]”).
14. See Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women’s Prisons*, 42 HARV. C.R.-C.L. L. REV. 45, 69-86 (2007).
15. See *infra* notes 336-343.

abused may, depending on his circumstances, invoke various legal protections: the criminal law,<sup>16</sup> including rape laws that have been reformed to address gender and racial bias;<sup>17</sup> antidiscrimination laws such as Title VII or state human rights codes; and constitutional laws that purport to constrain race and gender bias in government action.<sup>18</sup>

In prison, by contrast, none of these protections is readily available. On paper, prisons owe an affirmative constitutional duty to protect prisoners against sexual violence.<sup>19</sup> When guards or correctional authorities knowingly permit sexual violence, they violate the Eighth Amendment.<sup>20</sup> Moreover, both violence and sex among prisoners are prohibited by internal prison rules.<sup>21</sup> But, as I have argued previously, an edifice of “near-insurmountable”<sup>22</sup> constitutional, statutory and common-law obstacles to prisoner litigation immunizes correctional

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16. 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 the case to one, and they rarely do. Buchanan, *supra* note 14, at 46-47 n.6. Prosecutors, in turn, are reluctant to prosecute these sexual assaults. See Brenda V. Smith & Jaime M. Yarussi, *Prosecuting Sexual Violence in Correctional Settings: Examining Prosecutors' Perceptions*, CRIM. L. BRIEF, Spring 2008, at 19, 20; see also Martin Horn, Testimony Before the National Prison Rape Elimination Commission (Mar. 23, 2006) (transcript available at [http://nprec.us/docs/miami\\_correctionsoverview\\_horn.pdf](http://nprec.us/docs/miami_correctionsoverview_horn.pdf)) (“[P]rosecutors . . . are overburdened and choose not to prosecute crimes when committed behind bars by individuals already serving a long sentence.”).
17. See generally SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975); Estrich, *supra* note 10; Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).
18. 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.
19. *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (“In particular . . . ‘prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners.’”) (quoting *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 558 (1st Cir. 1988)); *DeShaney v. Winnebago Cnty. 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).
20. *Farmer*, 511 U.S. at 828.
21. NPREC REPORT, *supra* note 10, at 56.
22. Buchanan, *supra* note 14, at 69-86.

authorities against enforcement of these legal rules.<sup>23</sup> Prison administration is effectively exempted from the rule of law.

The Supreme Court has held that “[b]eing violently sexually assaulted is simply not part of the penalty.”<sup>24</sup> In 2003, Congress passed the Prison Rape Elimination Act<sup>25</sup> (PREA). Furthermore, in the outside world, courts have challenged the exclusion of gay men and lesbians from sexual harassment protections.<sup>26</sup> But social (and legal) change comes slowly to prison.<sup>27</sup> 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.”<sup>28</sup> Thus, to the extent that prison administrators deal with sexual abuse in ways that violate statutory or constitutional standards, it is extraordinarily difficult to hold them accountable in court.

In this Article, I contend that the suspension of external laws in prison does not create a mere “Hobbesian space in which there is no law . . . in which as a consequence the strong dominate and the weak acquiesce.”<sup>29</sup> Rather, in the absence of enforceable external laws, prison guards and administrators devise their own.<sup>30</sup> As far as prisoners are concerned, the response of guards and ad-

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23. See Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321, 1321-66 to -77 (codified as amended at scattered sections of 11, 18, 28, and 42 U.S.C. (2006)) (blocking the overwhelming majority of prisoner lawsuits, regardless of their merit); see also Buchanan, *supra* note 14, at 71-75; Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1559 (2003).
24. *Farmer*, 511 U.S. at 834 (internal quotation marks omitted).
25. Pub. L. No. 108-79, 117 Stat. 972 (2003) (codified as amended at 42 U.S.C. §§ 15601-15609 (2006)).
26. See, e.g., *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (affirming that Title VII prohibits sexual harassment between persons of the same sex as well as sexual harassment between men and women).
27. See Buchanan, *supra* note 14, at 55 (“Inside prison, it is as though the clock has been turned back to the nineteenth century. Women, especially women of color, are exposed to institutionalized sexual abuse . . .”).
28. *Bell v. Wolfish*, 441 U.S. 520, 547 (1979); see also *Turner v. Safley*, 482 U.S. 78, 90 (1987).
29. Robin West, *Gay Marriage and Liberal Constitutionalism: Two Mistakes*, in *DEBATING DEMOCRACY’S DISCONTENT: ESSAYS ON AMERICAN POLITICS, LAW, AND PUBLIC PHILOSOPHY* 260, 265 (Anita L. Allen & Milton C. Regan, Jr. eds., 1998).
30. See generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 10 (1991) (observing that “to govern their workaday interactions, members of a close-knit group develop informal norms” that govern their behavior in spite of whatever legal framework nominally governs them). In prison, though, the norms that guards develop do not seem to be “welfare-maximizing” in the way the norms that Ellickson found among free landholding

ministrators is the law in prison—however unlawful it may be. Freed from the rules that constrain legal actors in the outside world, prison officials respond to prison rape by enforcing the rules of masculinity in their crudest and most violent forms.

The rules of masculinity enforced by prison officials (as well as prisoners) represent an exaggeration of culturally accepted forms of masculinity.<sup>31</sup> In prison, as outside, sexual harassment perpetuates heteronormative “gender norms and orthodoxies” about what “real men” and “real women” should be.<sup>32</sup> In this Article, I argue that 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 most toxic norms of masculinity<sup>33</sup> 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, and normalizes prison rape. By casting sexual (and nonsexual) violence as a “complex and intractable” problem<sup>34</sup> for which administrators are not to blame, the racial narrative bolsters the rationale for the rules and immunities that largely exempt prisons from the enforcement of constitutional norms.<sup>35</sup> Thus the perception (and reality) of unchecked prison violence sup-

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neighbors are. *See id.* at 167-83. Certainly, the institutional norms described in this Article are not “welfare-maximizing” with respect to prisoners. *See* Lauren B. Edelman, *Law at Work: The Endogenous Construction of Civil Rights*, in *HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES* 337 (Laura Beth Nielsen & Robert L. Nelson eds., 2005) (arguing that law is “endogenous,” that is, that external laws are generated in and shaped by sociolegal practices within the social realms they seek to regulate).

31. Don Sabo and his coauthors have observed that “men’s behavior in prison is not a unique aberration but an exaggeration of many culturally accepted forms of masculinity.” Sabo et al., *supra* note 4, at 13; *see also* JAMES W. MESSERSCHMIDT, *MASCULINITIES AND CRIME: CRITIQUE AND RECONCEPTUALIZATION OF THEORY* (1993); Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 *WIS. J.L. GENDER & SOC’Y* 201, 220 (2008); Terry A. Kupers, *Toxic Masculinity as a Barrier to Mental Health Treatment in Prison*, 61 *J. CLINICAL PSYCHOL.* 713, 718 (2005); Joe Sim, *Tougher than the Rest? Men in Prison*, in *JUST BOYS DOING BUSINESS? MEN, MASCULINITIES AND CRIME* 100, 108 (Tim Newburn & Elizabeth A. Stanko eds., 1994).
32. Franke, *supra* note 10, at 177.
33. Terry Kupers distinguishes the “toxic” norms of hegemonic masculinity, such as “misogyny, homophobia, greed, and violent domination,” from its more benign aspects, such as “a man’s pride in his ability to win at sports, to maintain solidarity with a friend . . . or to provide for his family.” Kupers, *supra* note 31, at 716.
34. *Procunier v. Martinez*, 416 U.S. 396, 405 (1974).
35. *See generally* Buchanan, *supra* note 14, at 64-86.



plies 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, this Article addresses two theoretical gaps in current legal academic scholarship. First, it offers a critical gender analysis of law in men's prisons. In prison law scholarship, references to "gender" and imprisonment almost always address women prisoners.<sup>36</sup> The treatment of men in prison is often analyzed in racial terms, but legal scholarship has not substantively theorized it as gender.<sup>37</sup>

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36. See, e.g., *WOMEN IN PRISON: GENDER AND SOCIAL CONTROL* (Barbara H. Zaitzow & Jim Thomas eds., 2003); Buchanan, *supra* note 14; 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); Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 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.") (footnote omitted); Myrna S. Raeder, *Gender-Related Issues in a Post-Booker Federal Guidelines World*, 37 *MCGEORGE L. REV.* 691 (2006); Brenda V. Smith, *Reforming, Reclaiming or Reframing Womanhood: Reflections on Advocacy for Women in Custody*, 29 *WOMEN'S RTS. L. REP.* 1 (2007) [hereinafter Smith, *Reforming, Reclaiming or Reframing Womanhood*]; Brenda V. Smith, *Sexual Abuse of Women in United States Prisons: A Modern Corollary of Slavery*, 33 *FORDHAM URB. L.J.* 571 (2006) [hereinafter Smith, *Sexual Abuse of Women*]; Brenda V. Smith, *Watching You, Watching Me*, 15 *YALE J.L. & FEMINISM* 225 (2003) [hereinafter Smith, *Watching You, Watching Me*]; Sarah Turnbull & Kelly Hannah-Moffatt, *Under These Conditions: Gender, Parole and the Governance of Reintegration*, 49 *BRIT. J. CRIMINOLOGY* 532 (2009) (addressing the reintegration of women prisoners but not men). But see MICHAEL S. KIMMEL, *THE GENDERED SOCIETY* 6 (2d ed. 2004) ("[W]e continue to act as if gender applied only to women. Surely the time has come to make gender visible to men."); Teresa A. Miller, *Sex & Surveillance: Gender, Privacy & the Sexualization of Power in Prison*, 10 *GEO. MASON U. C.R. L.J.* 291, 300-09 (2000) (noting the participation of guards and prisoners in a hypermasculine, sexualized culture of dominance and submission); Alice Ristorph, *Sexual Punishments*, 15 *COLUM. J. GENDER & L.* 139, 145-46, 178-81 (2006) (arguing for an application of the insights of feminist rape law scholarship to sexual violence in men's prisons).
37. See, e.g., AULI EK, *RACE AND MASCULINITY IN CONTEMPORARY PRISON NARRATIVES* 10 (2005) ("[P]risoner bodies—male prisoners as work force or as material for experimentation . . . are sold to private enterprises."); 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."); James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly," Equal Protection Analysis*, 37 *HARV. J. ON LEGIS.* 105, 124-40 (2000) (pointing out that prisoners are stereotyped disproportionately as African-American and arguing by analogy to race discrimination that prisoners should constitute a suspect class for the purposes of equal protection analysis); Loïc Wacquant, *Race as Civic Felony*, 57 *INT'L SOC. SCI. J.* 127, 128 (2005) (observing the role of prisons as "the main machine for

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 both inside<sup>38</sup> and outside<sup>39</sup> prison, but the existing scholarship of same-sex sexual harassment has yet to engage with race.<sup>40</sup>

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'race making' in American society). *But cf.* NANCY E. DOWD, *THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE* 87-100 (2010) (discussing the gendered impact of juvenile justice on boys).

38. *See, e.g.*, Buchanan, *supra* note 14; Davis, *supra* note 36; Smith, *Sexual Abuse of Women*, *supra* note 36.
39. *See, e.g.*, Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 *MICH. L. REV.* 2479, 2498-2502 (1994); Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 *J. GENDER RACE & JUST.* 177 (1997); Ruth Colker, *Whores, Fags, Dumb-Ass Women, Surly Blacks, and Competent Heterosexual White Men: The Sexual and Racial Morality Underlying Anti-Discrimination Doctrine*, 7 *YALE J.L. & FEMINISM* 195 (1995); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241, 1278-80 (1991); Crenshaw, *supra* note 10; Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 *UMKC L. REV.* 251, 274 (2002); Harris, *supra* note 36; Tanya Kateri Hernández, *A Critical Race Feminism Empirical Research Project: Sexual Harassment & the Internal Complaints Black Box*, 39 *U.C. DAVIS L. REV.* 1235 (2006) [hereinafter Hernández, *Critical Race Feminism*]; Tanya Kateri Hernández, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 *J. GENDER RACE & JUST.* 183 (2001) [hereinafter Hernández, *Sexual Harassment*]; Elizabeth M. Iglesias, *Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 *VAND. L. REV.* 869 (1996); Janelle Zorina Matthews, *The Color of Sexual Harassment and the Public/Private Divide*, 4 *HASTINGS RACE & POVERTY L.J.* 181 (2006); Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 *GOLDEN GATE U. L. REV.* 817 (1993); Andrea L. Dennis, Note, *Because I Am Black, Because I Am Woman: Remediating the Sexual Harassment Experience of Black Women*, 1996 *ANN. SURV. AM. L.* 555.
40. *Cf.* Hilary S. Axaam & 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); 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 (1995); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 *STAN. L. REV.* 691 (1997) [hereinafter Franke, *What's Wrong with Sexual Harassment*]; Franke, *supra* note 10; Zachary A. Kramer, *Heterosexuality and Title VII*, 103 *Nw. U. L. REV.* 205 (2009) [hereinafter Kramer, *Heterosexuality and Title VII*]; 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*

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. Prison rape is neither ubiquitous nor inevitable. Its main targets are not straight-identified white-collar criminals like Bernard (“Bernie”) Madoff, but men other prisoners deem to be unmasculine: gay, bisexual, or transgender<sup>41</sup> (GBT) prisoners, and men who are small, young, naïve, or judged by other prisoners to be pretty, effeminate, or womanish. Moreover, recent large-scale victimization survey data contradict the widespread stereotype that prison rape is disproportionately black-on-white. Furthermore, prison rape is not inevitable. It can be greatly reduced by well-established institutional best practices that are known to correctional administrators.

Nonetheless, as I show in Part II, many institutions adopt a practice of institutional governance by which guards and administrators often respond to sexual abuse by enforcing the rules of masculinity. This institutional practice parallels a similar pattern in the Title VII jurisprudence of same-sex sexual harassment: Gender conventions distort and supplant the law on the books<sup>42</sup> in much the same way they do in prison. In both environments, the legal response to same-sex sexual harassment effectively authorizes straight-identified, manly men<sup>43</sup> to police the gender conformity of less-masculine men by sexually harassing them.

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*Conduct*, 47 AM. U. L. REV. 677 (1998); Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000); Elizabeth J. Kramer, Note, *When Men Are Victims: Applying Rape Shield Laws to Male Same-Sex Rape*, 73 N.Y.U. L. REV. 293 (1998) [hereinafter Kramer, *When Men Are Victims*]. 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 she does not explore the racial dynamic in more detail. Katherine M. Franke, *Putting Sex to Work*, 75 DENV. U. L. REV. 1139, 1143 (1998) [hereinafter Franke, *Putting Sex to Work*].

41. Incarcerated transwomen (male-to-female transgender persons) are placed in men’s prisons, even if they have undergone surgery or hormonal treatments that make them look feminine. NPREC REPORT, *supra* note 10, at 74.
42. As Lauren Edelman observes, administrative and corporate practices adapt legal rules to suit institutional needs and priorities. See Edelman, *supra* note 30. These sublegal practices come to shape the “law on the books,” and courts adapt Title VII jurisprudence to accommodate them. As I explain in Part III, a similar dynamic may be at work in prison law.
43. In this Article, I use the descriptor “manly” in relation to the heteronormative, toxic model of masculinity, see *supra* note 33, enforced in many prisons by staff, administrators, and prisoners, as well by some federal courts deciding Title VII cases of same-sex sexual harassment. See *infra* Part II. In this model of masculinity, a man is “manly” if he is straight-identified and gender-conforming and demonstrates his willingness to use violence. As I describe in Part II, prisoners who fail to conform to this standard are often treated by staff and prisoners alike as failed men who deserve to be abused.

When prison officials respond to rape, they are doing gender, albeit in a racialized way. But, as I show in Part III, the story they tell is often about race. Correctional officials, courts, and the Bureau of Justice Statistics frame prison rape as a crime committed by hypermasculine black men against vulnerable whites. The racialized account of prison rape obscures institutional responsibility for sexual abuse, locating the problem in violent black sexual deviance. Moreover, in prison as outside, when judges and litigants invoke the specter of black-on-white sexual violence, they tend to depart from ordinary legal rules. The racialized specter of prison violence furnishes a rationale for courts' deference to the unlawful institutional practices that foster it.

### I. THE PRISON RAPE NARRATIVE

The dominant pop-cultural narrative portrays prison rape as "what happens to white boys unfortunate enough to wind up behind bars despite the odds."<sup>44</sup> Comedians and other public figures publicly joke that high-profile white-collar criminals, such as Bernie Madoff and Kenneth Lay, will be anally raped when they go to prison.<sup>45</sup> In 2004, the Attorney General of California, Bill Lockyer, sparked a controversy when he declared: "I would love to personally escort [Kenneth] Lay to an 8-by-10 cell that he could share with a tattooed dude who says, 'Hi, my name is Spike, honey.'"<sup>46</sup> Such 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.

In mainstream cultural narratives about prison rape, whether in comedy, dramatic film, or in the news, the "prison rapist" is often, though not invariably, black, and the victim is almost always white.<sup>47</sup> News articles, for example,

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44. *Mass Incarceration and Rape: The Savaging of Black America*, THE BLACK COMMENTATOR (June 17, 2004), [http://www.blackcommentator.com/95/95\\_cover\\_prisons.html](http://www.blackcommentator.com/95/95_cover_prisons.html).

45. See David Feldman, *Video of Bernie Madoff's First Prison Rape*, DAVID FELDMAN COMEDY (Mar. 13, 2009), <http://davidfeldmancomedy.com/video/2009/03/13/bernie-madoff%2526%2523039%3Bs-first-prison-rape> (featuring a cartoon video of white-collar criminal Bernie Madoff being raped in a prison shower); see also sources cited *supra* notes 1-2.

46. Tom G. Palmer, Op-Ed., "Hi, My Name Isn't Justice, Honey," and Shame on Lockyer, L.A. TIMES, June 6, 2001, at B11 (quoting Lockyer).

47. For examples in feature film, see EDMOND (First Independent Pictures 2005); and AN INNOCENT MAN (Touchstone Pictures 1989) (each featuring the prison rape of middle-class white men by African-American toughs). This pattern is not invariable, though. See, e.g., AMERICAN HISTORY X (New Line Cinema 1998) (depicting a white victim raped by members of the Aryan Nation); AMERICAN ME (Universal Pictures 1992) (showing the prison rape of a vulnerable white man by tough Latino gang members); see also *The Daily Show*, *supra* note 2 (white aggressor, white

present the threat of rape in coded—yet somehow thrilling—racial terms. Recent news articles invite the reader to indulge a light frisson of horror (or excitement) at the prospect of prison rape by “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.”<sup>48</sup> “You,” the imagined reader, are addressed as a vulnerable, nonviolent, and essentially law-abiding citizen, but you find yourself arrested for “petty fraud or drunk driving.”<sup>49</sup> You are told that you’re “about to meet” the real criminals: the “seriously hard-core dudes at county jail.”<sup>50</sup> The *Los Angeles Times* asks its imagined reader: “Could you defend yourself? Or would you be victimized and face years of therapy?”<sup>51</sup>

In this Part, 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. Nonetheless, the myth that prison rape is ubiquitous and interracial pervades pop culture and influences public policy in ways that reveal the race and gender dynamics of the outside world. Moreover, the perpetrators are not always the perverted criminals or tattooed gang members of popular stereotype: All recent surveys that asked about sexual abuse by nonprisoners found that correctional staff abuse prisoners far more often than prisoners do. Furthermore, the main targets of prison rape are not straight-identified, middle-class drunk 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. Recent victimization survey data also suggest that victims of rape in prison may be disproportionately nonwhite. Finally, prison sexual abuse is not inevitable. Correctional authorities recognize that it can be prevented through alternative, lawful strategies of institutional governance.

Although the mainstream narrative implies that prison rape is ubiquitous,<sup>52</sup> it is almost wholly preventable: The prevalence of sexual abuse varies widely

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targets); 74p *Captive Audience*, *supra* note 1 (white prisoner as harasser, black nonprisoner as target).

48. Robert Lusetch, *A Jail They’re Paying To Get in to*, AUSTRALIAN, July 11, 2000, at 9.
49. Joe Mazingo, *An Inmate’s Guide to Four-Star Jail Cells*, L.A. TIMES, July 9, 2000, at B1.
50. *Id.*
51. *Id.*
52. See, e.g., Kamal Ghali, *No Slavery Except as a Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. REV. 607, 615 (2008) (“[S]exual slavery following rape is . . . an ordinary occurrence.”) (quoting Robert Weisberg & David Mills, *Violence Silence: Why No One Really Cares About Prison Rape*, SLATE (Oct. 1, 2003), <http://www.slate.com/id/2089095/>); 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, 55 (1987) (describing prison as “a community of murder, rape, gangster-style intimidation, and extortion”).

among institutions. The 2007 National Inmate Survey (NIS), conducted by the Bureau of Justice Statistics (BJS), found that approximately one-third of jails had sexual victimization rates “indistinguishable from zero.”<sup>53</sup> The BJS’ 2008-2009 NIS found sixteen men’s and four women’s facilities where inmates reported no incidents of sexual victimization.<sup>54</sup> In other jails and prisons, by contrast, the NIS found that from 13% to nearly 16% of inmates reported sexual victimization.<sup>55</sup> The NIS and other recent victimization surveys indicate overall prevalence rates of about 4%.<sup>56</sup> This 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.<sup>57</sup> According to the 2008-09 NIS, prior sexual abuse was the single inmate characteristic most predictive of further sexual victimization by

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53. BJS 2007 JAILS REPORT, *supra* note 10, at 3-4.

54. BJS 2008-09 PRISONS AND JAILS REPORT, *supra* note 10, at 10.

55. *See id.* at 33-39 app. tbl.1 (finding twelve-month prevalence rates in state and federal prisons ranging from 0 to 14.6%); *id.* at 58-65 app. tbl.5 (finding six-month prevalence rates in jails ranging from 0 to 10.0%); *see also* BJS 2007 JAILS REPORT, *supra* note 10, at 19-24 app. tbl.2 (reporting that eighteen jails had no reported incidents, a weighted national average victimization rate of 3.2%, and six-month prevalence rates at individual jails ranging from 0 to 13.4%); BJS 2007 PRISONS REPORT, *supra* note 10, at 2, 17-20 app. tbl.2 (indicating that six prisons had no reported incidents; a weighted national average victimization rate of 4.5%, and twelve-month prevalence rates at individual prisons ranging from 0 to 15.7%).

56. *See* BJS 2007 JAILS REPORT, *supra* note 10, at 6 tbl.7 (showing that 2.9% of male prisoners reported some sexual victimization over the past six months, 1.3% by inmates and 2.0% by staff); BJS 2008-09 PRISONS AND JAILS REPORT, *supra* note 10, at 7 tbl.1 (showing that 4.4% of all prisoners reported some sexual victimization over the past twelve months, 2.1% by prisoners and 2.8% by staff and that 3.1% of jail inmates reported some sexual victimization over the past twelve months, 1.5% by other inmates and 2.0% by staff); BJS 2007 PRISONS REPORT, *supra* note 10, at 1 (showing that 4.5% of all prisoners reported some sexual victimization over the past twelve months, 2.1% by inmates and 2.9% by staff); *see also* VALERIE JENNESS ET AL., VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT 27 (2007), available at [http://ucicorrections.seweb.uci.edu/pdf/FINAL\\_PREA\\_REPORT.pdf](http://ucicorrections.seweb.uci.edu/pdf/FINAL_PREA_REPORT.pdf) (finding that 4.4% of male California inmates reported sexual victimization during their current incarceration); Nancy Wolff et al., *Sexual Violence Inside Prisons: Rates of Victimization*, 83 J. URB. HEALTH 835, 841 (2006) (finding that 4.3% of male inmate respondents reported sexual victimization by other inmates, while 7.6% reported sexual victimization by staff over a six-month period).

57. 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) (finding that almost 75% of male victims were sexually assaulted more than once, and about 30% of them were sexually assaulted six or more times). *See generally* NPREC REPORT, *supra* note 10, at 69-81 (documenting risk factors for prisoners who are seen as vulnerable, have been raped, and are often revictimized); JDI REPORT, *supra* note 8, at 3 (same).

either inmates or staff.<sup>58</sup> Both fellow prisoners and staff tend to treat victims as though they deserve abuse for having failed as men.<sup>59</sup> Anthropologists Mark Fleisher and Jessie Krienert found that inmates believe that only “weak” men worry about rape<sup>60</sup>—although it seems plausible that “strong” prisoners might hesitate to admit to any such fear.

A prisoner’s conformity to conventional norms of manliness greatly decreases the likelihood that he will be targeted for sexual assault: Nonstraight sexual orientation and prior sexual abuse are the two characteristics most predictive of sexual abuse by either inmates or staff.<sup>61</sup> Thus straight-identified men—especially the middle-class, middle-aged white-collar criminals of the pop-cultural narrative—are not the primary targets of sexual abuse in prison. Prisoners are more often targeted for being unmasculine: small, weak, young, disabled, naïve, pretty, effeminate, or womanish.<sup>62</sup> Correctional officers, courts, prisoners, advocates, and survey data agree: Gay, bisexual, transgender, and effeminate prisoners face greatly elevated risks of sexual abuse.<sup>63</sup> The 2007 NIS 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 2.7% of straight-identified men.<sup>64</sup> In a recent survey of a statewide probability

58. BJS 2008-09 PRISONS AND JAILS REPORT, *supra* note 10, at 91 app. tbl.10.
59. See NPREC REPORT, *supra* note 10, at 71. One prisoner told Mark Fleisher and Jessie Krienert: “Everybody sees you as something weak, can’t turn yourself around, once you get a [weak] jacket, it sticks with you.” FLEISHER & KRIENERT, *supra* note 1, at 169 (emphasis omitted).
60. FLEISHER & KRIENERT, *supra* note 1, at 123.
61. BJS 2008-09 PRISONS AND JAILS REPORT, *supra* note 10, at 91 app. tbl.10.
62. Analysts associated with Stop Prisoner Rape (now called Just Detention International), for example, observe: “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.” STOP PRISONER RAPE, CALL FOR CHANGE: PROTECTING THE RIGHTS OF LGBTQ DETAINEES 2 (2007) [hereinafter SPR, CALL FOR CHANGE], available at [http://www.justdetention.org/pdf/Call\\_for\\_Change1.pdf](http://www.justdetention.org/pdf/Call_for_Change1.pdf).
63. See, e.g., *Farmer v. Brennan*, 511 U.S. 825 (1994) (recounting how the petitioner’s transgender status and feminine appearance arguably alerted prison officials to the risk of sexual abuse); BJS 2007 JAILS REPORT, *supra* note 10, at 6; JENNESS ET AL., *supra* note 56, at 55; NPREC REPORT, *supra* note 10, at 73-74; SPR, CALL FOR CHANGE, *supra* note 62, at 2; Helen M. Eigenberg, *Correctional Officers and Their Perceptions of Homosexuality, Rape, and Prostitution in Male Prisons*, 80 PRISON J. 415, 420 (2000).
64. BJS 2007 JAILS REPORT, *supra* note 10, at 6 tbl.7. The 2008 BJS Prisons Report does not disaggregate victimization by sexual orientation. The BJS 2008-09 Prisons and Jails Report found that 11.2% of nonstraight prison inmates reported sexual victimization by other inmates, and 6.6% of them reported sexual abuse by staff, compared to 1.3% and 2.5% of straight-identified prisoners, respectively. In jails, 7.2%

sample of inmates in California prisons, criminologist Valerie Jenness, a criminologist at the University of California, Irvine, and her colleagues found that 67% of GBT inmates reported sexual victimization in prison, compared to 2% of straight men.<sup>65</sup>

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, historian Regina Kunzel observes that, since the 1970s, rape has been the “primary” representation of sex in prison in academia.<sup>66</sup> In reality, though, most prison sex is voluntary.<sup>67</sup> This is not to say all of it is fully consensual. Prison sex may fall anywhere along a spectrum between wanted, mutual, consensual sex, at one end, and forcible rape, on the other.<sup>68</sup> Much prison sex may be voluntary yet coerced, either through extortion or as a weaker prisoner’s exchange of sex with one powerful prisoner for “protection” against violence by others.<sup>69</sup>

Another powerful misconception reflected in popular and academic understandings of prison rape is that white men are its usual, or preferred, victims.<sup>70</sup> Courts,<sup>71</sup> guards,<sup>72</sup> and prisoners<sup>73</sup> tend to assume that prison rape is primarily

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of nonstraight inmates reported sexual victimization by other inmates, compared to 1.1% of straight inmates; inmates’ sexual orientation, however, was not a significant predictor of sexual victimization by staff. BJS 2008-09 PRISONS AND JAILS REPORT, *supra* note 10, at 14 tbl.8.

65. JENNESS ET AL., *supra* note 56, at 55.
66. See KUNZEL, *supra* note 4, at 188-89. Auli Ek, in her meta-analysis of the literature of prison memoirs, makes a similar observation. Ek, *supra* note 37, at 66.
67. The recent victimization surveys did not ask about consensual sex, so reliable statistical estimates are not available. *But see* Mary Koscheski et al., *Consensual Sexual Behavior*, in PRISON SEX: PRACTICE AND POLICY 111, 115-118 (Christopher Hensley ed., 2002) (providing statistics on consensual sex in male prisons).
68. See, e.g., Stephen “Donny” Donaldson, *A Million Jockers, Punks and Queens*, in PRISON MASCULINITIES, *supra* note 4, at 118; Koscheski et al., *supra* note 67, at 131; Brenda V. Smith, *Analyzing Prison Sex: Reconciling Self-Expression with Safety*, HUM. RTS. BRIEF, Spring 2006, at 17.
69. See Donaldson, *supra* note 68, at 125-26; Eigenberg *supra* note 63, at 420.
70. See *supra* notes 44-46 and accompanying text; *infra* notes 312-313 and accompanying text. The empirical studies cited in support of this assertion (if any empirical support is cited at all) mainly date from the 1960s, 1970s, and early 1980s, and their methodology is conspicuously weak. See *infra* notes 312-317 and accompanying text.
71. See *infra* notes 398-402 and accompanying text.
72. Eigenberg, *supra* note 63, at 422; Helen Eigenberg, *Male Rape: An Empirical Examination of Correctional Officers’ Attitudes Toward Rape in Prison*, PRISON J., Oct. 1989, at 39, 51 (“Officers are less willing to believe black victims than white victims.”); see also *McGill v. Duckworth*, 726 F. Supp. 1144, 1155 (N.D. Ind. 1989) (noting a guard’s testimony that he had seen “many” inmates assaulted in protective custody, “especially young white boys”) (internal quotation marks omitted).



or disproportionately black-on-white. However, the results of the only methodologically sound sexual victimization surveys that have ever been conducted, all published since 2006,<sup>74</sup> indicate that white prisoners are not disproportionately at risk.<sup>75</sup> Rather, the BJS's 2007 NIS found that nonwhite survey respondents disclosed *higher* overall rates of sexual victimization than white prisoners did: 2.9% of whites reported sexual victimization, compared to 3.2% of Hispanics and blacks, 4.1% of "other" prisoners, and 4.2% of prisoners of "two or more races."<sup>76</sup> In a 2006 statewide survey of California prisons, criminologist Valerie Jenness and her coauthors found that black prisoners reported higher rates of inmate sexual victimization than nonblacks did.<sup>77</sup> Another statewide survey, conducted by health economist Nancy Wolff and her colleagues, found no significant racial differences in racial victimization *by inmates*—although it did find that black and Latino prisoners were significantly more likely than white prisoners to report sexual victimization *by prison staff*.<sup>78</sup> None of these surveys found any evidence that white prisoners might be at heightened overall risk of sexual abuse. Moreover, because about two-thirds of male inmates nationwide are black, Latino, mixed, or "other,"<sup>79</sup> the results of these surveys indicate that a large majority of victims of prison sexual abuse is almost certainly nonwhite.

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73. Ek, *supra* note 17; Fleisher & Krienert, *supra* note 1, at 170.

74. See *infra* notes 322-335 and accompanying text.

75. See *infra* notes 336-341 and accompanying text.

76. BJS 2007 JAILS REPORT, *supra* note 10, at 6. The BJS 2008-09 Prisons and Jails Report does not disaggregate rates of sexual victimization by race. It does provide a racial breakdown of sexual victimization *by staff* and *by inmates*—finding that multiracial and white inmates reported higher rates of inmate sexual abuse, while black inmates reported higher rates of staff sexual abuse. In this survey, as in all others, sexual abuse by staff was found to be considerably more common than sexual abuse by inmates, so it seems likely that white prisoners do not face a higher overall risk. It is impossible, however, to determine this conclusively from the BJS 2008-09 Prisons and Jails Report because victims may be abused by inmates, staff, or both.

77. Jenness and her coauthors found that, although African-Americans comprised 36% of the survey sample, JENNESS ET AL., *supra* note 56, at 75 tbl.5, they represented 50% of GBT inmates and 83% of straight inmates, who had been sexually assaulted. *Id.* at 33.

78. See Nancy Wolff, Jing Shi & Cynthia L. Blitz, *Racial and Ethnic Disparities in Types and Sources of Victimization Inside Prison*, 88 PRISON J. 451, 460 tbl.2 (2008) (finding no significant racial differences in sexual victimization by inmates but finding that black and Latino prisoners were almost twice as likely as white prisoners to say they had been sexually abused by staff).

79. The 2009 overall male prison population was 40.1% black, 33.1% white, 21.1% Hispanic, and 5.7% "other" (comprising American Indians, Alaska Natives, Asians, Native Hawaiians, other Pacific Islanders, and persons identifying two or more races). See HEATHER C. WEST, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2009—STATISTICAL TABLES 19 tbl.16 (2010) [hereinafter BJS 2009

Although neither statewide survey found white men to be at significantly higher risk of sexual abuse by other inmates, the three nationwide BJS studies that published any racial data<sup>80</sup> did consistently find that white inmates and inmates who identified with “two or more races” were significantly more likely than black or Latino prisoners to report sexual abuse *by other inmates*.<sup>81</sup> Moreover, according to victims’ descriptions of their assailants, white and especially black inmates appear to be overrepresented as perpetrators,<sup>82</sup> offering limited support for the black-on-white stereotype of prison rape. (Because none of the BJS victimization reports links the race or ethnicity of victims to that of their assailants, though, it is impossible to determine from the most recent BJS report whether most assaults were intraracial or interracial, and, if interracial, what the racial dynamics were.) But the BJS’ comprehensive multivariate logistic regression analysis of the factors contributing to prison sexual victimization in its most recent report showed that, after controlling for other explanatory variables (such as prior sexual abuse, sexual orientation, and criminal justice history) that contribute to prison rape, white inmates’ likelihood of sexual victimization was not significantly different from that of black inmates or those of other races.<sup>83</sup> Thus none of the recent victimization surveys supports the notion that non-white inmates target their white counterparts for sexual abuse.

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MIDYEAR REPORT], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim09st.pdf>.

80. BJS 2007 JAILS REPORT, *supra* note 10; BJS 2008-09 PRISONS AND JAILS REPORT, *supra* note 10; ALLEN J. BECK, PAIGE M. HARRISON & PAUL GUERINO, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2008-09 (2010) [hereinafter BJS 2008-09 JUVENILE REPORT], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svjfy09.pdf>.
81. BJS 2008-09 PRISONS AND JAILS REPORT, *supra* note 10, at 12 tbl.6, found that white prisoners (3.0%) and multiracial prisoners (4.4%) reported significantly higher rates of sexual victimization *by other inmates* than black (1.3%), Hispanic (1.4%) and “other” (2.7%) prisoners did; see also BJS 2008-09 JUVENILE REPORT, *supra* note 80, at 11 tbl.8 (4.4% of white youth reported sexual victimization *by other youth*, significantly higher than the 2.1% of black and 0.9% of Hispanic youth who reported the same experience); BJS 2007 JAILS REPORT, *supra* note 10, at 6 tbl.7 (noting, without mention of statistical significance, that 1.8% of white inmates and 2.1% of multiracial prisoners reported sexual victimization *by other inmates*, compared to 1.3% of black, 1.5% of Hispanic, and 1.6% of “other” inmates).
82. In 2008-2009, 64.6% of male victims in prisons identified a black assailant, and 38.9% reported a white one, while 23.8% reported a Hispanic assailant, 7.4% a Native assailant, and 6.3% an assailant of “other” ethnicity. BJS 2008-09 PRISONS AND JAILS REPORT, *supra* note 10, at 21 tbl.15. These numbers total more than 100% because many victims—nearly 25%—reported more than one perpetrator.
83. After controlling for other factors, the BJS found that race was a predictive factor for sexual victimization, but only for inmates who identified with “two or more races,” not for whites. See *id.* at 18 tbl.12, 91 app. tbl.10.

All five surveys that reported racial data on sexual abuse found significant racial disparities in vulnerability to sexual abuse, but the disparities did not conform to the black-on-white stereotype. After controlling for other factors, inmates of “two or more races,” not whites, were the only ethnic or racial group that reported higher rates of sexual victimization by *other inmates*.<sup>84</sup> Meanwhile, after controlling for other factors, African-American (and sometimes Latino) male inmates remained significantly more likely than whites to report sexual abuse by *correctional staff*.<sup>85</sup> Yet these racial disparities—unlike the groundless black-on-white stereotype—go unmentioned in popular and policy discourse about prison rape.<sup>86</sup>

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84. *Id.* at 18 tbl.12

85. *Id.* (finding that, after controlling for all factors contributing to sexual vulnerability, whites were at significantly lower risk than blacks to be sexually abused by staff). The report showed further that predicted victimization by *correctional staff* in prisons was 2.2% for black inmates compared to 1.4% for whites, and in jails, the same figures were 1.6% for blacks compared to 0.9% for whites. *Id.*; see also BJS 2008-09 JUVENILE REPORT, *supra* note 80, at 11 tbl.8 (noting that 9.7% of white youth in custody reported sexual abuse by staff, significantly lower than the 11.9% of black youth in custody reporting the same); BJS 2007 JAILS REPORT, *supra* note 10, at 6 (indicating that 1.5% of white inmates reported sexual victimization by staff, compared to 2.1% of black, 2.0% of Hispanic, 2.9% of “other,” and 2.6% of multiracial inmates). Wolff also found that black and Latino inmates were significantly more likely than white inmates to report sexual abuse by staff. See Wolff et al., *supra* note 78.

86. For example, the National Prison Rape Elimination Commission (NPREC), a major panel established by the PREA, heard testimony from current and former prisoners, staff, administrators, politicians, and the public between March 2005 and December 2007. In June 2009, it issued a comprehensive report recommending standards for the elimination of prison rape. See NPREC REPORT, *supra* note 10. My review of the NPREC hearing transcripts and of its report and recommendations located no mention of the racial disparities that the BJS victimization surveys substantiate. No witness or commissioner mentioned—and the NPREC report and recommendations did not address—the vulnerability of multiracial prisoners to other inmates’ sexual abuse, nor did anyone mention the vulnerability of black prisoners to sexual abuse by staff. See *id.*; Public Proceedings Before the National Prison Rape Elimination Commission (Mar. 31, 2005 - Dec. 6, 2007) (transcript available at [http://nprec.us/home/public\\_proceedings](http://nprec.us/home/public_proceedings)).

Meanwhile, a witness did testify, inaccurately, that his own study had found prison rape to be disproportionately black-on-white, and the NPREC recommendations addressed this concern. Dr. James Austin testified before the NPREC: “White inmates are attacked more frequently than any other race, about 60 percent, while two-thirds of the [incidents] were involving black assailants. 19 percent were Hispanics and—I’m sorry, 19 percent being Hispanic assailants, and 12 percent white assailants.” James Austin, Testimony Before the National Prison Rape Elimination Commission (Mar. 27, 2007) (transcript available at [http://nprec.us/docs/lockupsintx\\_austin.pdf](http://nprec.us/docs/lockupsintx_austin.pdf)). But Austin’s research only addressed sexual assault allegations that had been officially reported to correctional

In the outside world, the myth that black men long to rape white women has been debunked as a racist gender trope that obscures the ordinary dynamics of sexual assault, and has often been deployed to justify violence against African-American men.<sup>87</sup> In fact, most sexual assault is intraracial, and occurs between acquaintances.<sup>88</sup> Although its influence has faded,<sup>89</sup> the black-on-white rape myth continues to influence the law and reality of sexual assault and harassment in the outside world.<sup>90</sup> In the prison context, however, the truthiness<sup>91</sup> of this trope retains much of its power.

A final misconception about prison rape is that it is “inevitable,” as Justice Thomas and Judge Easterbrook suggest.<sup>92</sup> Rather, as the Commission on Safety

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authorities. According to his published study, a review of administrative records could assess only “‘what officials know’ and ‘how many allegations were reported,’” not which inmates were attacked. JAMES AUSTIN ET AL., JFA INST., SEXUAL VIOLENCE IN THE TEXAS PRISON SYSTEM 7 (2006), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/215774.pdf>. For a discussion of the NPREC’s recommendations related to race, see *infra* notes 452-453 and accompanying text.

87. See, e.g., GAIL BEDERMAN, *MANLINESS & CIVILIZATION: A CULTURAL HISTORY OF GENDER AND RACE IN THE UNITED STATES, 1880-1917*, at 45-76 (1995); ROBYN WIEGMAN, *AMERICAN ANATOMIES: THEORIZING RACE AND GENDER* 95-113 (1995); N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315 (2004).
88. See, e.g., Iglesias, *supra* note 39, at 959; Larry W. Koch, *Interracial Rape: Examining the Increasing Frequency Argument*, 26 AM. SOCIOLOGIST 76, 79 (1995); Robert M. O’Brien, *The Interracial Nature of Violent Crimes: A Reexamination*, 92 AM. J. SOC. 817, 827 (1987) (“Each of the analyses . . . points to the same conclusion: the rates of interracial rapes . . . are less than expected, and rates of intraracial rapes . . . are greater than expected.”).
89. A few recent studies have found, against the weight of the interracial rape myth, that black-on-white rape cases were not treated more harshly than other racial combinations. See Jeffrey A. Bouffard, *Predicting Type of Sexual Assault Case Closure from Victim, Suspect, and Case Characteristics*, 28 J. CRIM. JUST. 527, 536 tbl.5, 539 (2000) (reporting no effect of interracial victimization on the unfounding decision); Rodney Kingsnorth et al., *Adult Sexual Assault: The Role of Racial/Ethnic Composition in Prosecuting and Sentencing*, 26 J. CRIM. JUST. 359, 369 & tbl.7 (1998) (finding no effect of victim/offender dyad on sentence length in Sacramento County, California); Katharine M. Tellis & Cassia C. Spohn, *The Sexual Stratification Hypothesis Revisited: Testing Assumptions About Simple Versus Aggravated Rape*, 36 J. CRIM. JUST. 252, 259 (2008) (finding no effect of racial composition of victim/offender dyad on San Diego prosecutorial discretion or charging decisions).
90. See *infra* notes 346-357 and accompanying text.
91. The word “truthiness,” coined by television personality Stephen Colbert, refers to “the truth [that] comes from . . . the gut,” not from facts. *The Colbert Report* (Comedy Central broadcast Oct. 17, 2005), available at <http://www.colbertnation.com/the-colbert-report-videos/24039/october-17-2005/the-word---truthiness>.
92. See *supra* text accompanying note 9.

and Abuse in America's Prisons observed in 2006: "Violence and abuse are not inevitable. Every correctional environment can provide a safe environment for prisoners and staff."<sup>93</sup> The 2007 NIS found rates of sexual abuse "statistically indistinguishable from zero" in many of the prisons and nearly one-third of the jails it surveyed.<sup>94</sup> While some of these findings may result from sampling error or nondisclosure by survey respondents, it seems likely that methodologically rigorous survey results that show zero reported incidents of sexual victimization in some institutions and 15% prevalence in others<sup>95</sup> reflect real differences.

Although the survey data do not explain the variation in sexual victimization rates among institutions, such differences may reflect differences in institutional practices. Two recent national commissions have documented the institutional measures required to prevent sexual and physical violence. These measures are well known to many correctional administrators.<sup>96</sup> Some preventive measures, such as reducing prison overcrowding and rethinking architectural design,<sup>97</sup> are outside the immediate control of prison administrators and require governmental cooperation. But correctional officials know that sexual abuse can be greatly reduced by improved practices of institutional governance, including: the use of reliable, objective security classification measures so that prisoners are housed with other inmates who are about as dangerous as they are,<sup>98</sup> direct supervision of inmates by guards;<sup>99</sup> prevention of physical vi-

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93. COMM'N ON SAFETY & ABUSE IN AMERICA'S PRISONS, *CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS* 12 (2006) [hereinafter CSAAP REPORT], available at [http://www.prisoncommission.org/pdfs/Confronting\\_Confinement.pdf](http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf); see also NPREC REPORT, *supra* note 10, at 67 ("With strong leadership and clear policies, corrections administrators can foster a culture within every facility that promotes safety.").
94. See *supra* notes 53-54 and accompanying text.
95. See *supra* note 55 and accompanying text.
96. See CSAAP REPORT, *supra* note 93, at 12 ("We know which conditions in correctional facilities fuel violence and, therefore, how to prevent violence.").
97. *Id.* at 23, 26-27, 29-30.
98. See *id.* at 29-31; Glenn Goord, Testimony Before the National Prison Rape Elimination Commission (Mar. 23, 2006) (transcript available at [http://nprec.us/docs/miami\\_promisingpractices\\_goord.pdf](http://nprec.us/docs/miami_promisingpractices_goord.pdf)) [hereinafter Goord Testimony] ("In addition, correctional systems also carry the responsibility to identify inmates who may be potential targets and those who may be potential predators. This is a process that can be carried out both at reception and in general confinement so that inmates are housed appropriately and the potential of incidents are reduced."); Joseph Oxley, Testimony Before the National Prison Rape Elimination Commission (Mar. 23, 2006) (transcript available at [http://nprec.us/docs/miami\\_correctionsoverview\\_oxley.pdf](http://nprec.us/docs/miami_correctionsoverview_oxley.pdf)) ("I think we also need greater access to proven inmate classification models and well-managed incident reporting systems that provide correctional administrators with additional tools to better monitor the status of their facilities.").

olence;<sup>100</sup> zero tolerance policies for sexual violence;<sup>101</sup> immediate and thorough investigation of every allegation of sexual abuse;<sup>102</sup> the use of modern surveillance technology;<sup>103</sup> and internal and external monitoring.<sup>104</sup> To the extent that prison administrators and staff maintain a hands-off approach to sexual violence in their institutions, they are electing a mode of institutional governance that they know falls short of institutional best practices.

These reforms have been suggested before. The project of this Article is not to reiterate the need for such changes—although they are urgently needed—but to offer one explanation for the persistence of practices of institutional governance that tolerate, and in some cases encourage, sexual abuse. Why do prison officials, administrators, and correctional authorities adopt unlawful practices of institutional governance that foster sexual abuse when alternative, lawful practices of institutional governance are available to suppress it? Why do courts allow them to? How does sexual abuse come to seem inevitable, and therefore constitutionally tolerable? Why do courts and Congress immunize administrators and correctional authorities from liability for such unlawful practices?

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99. See JAY FARBSTEIN ET AL., A COMPARISON OF “DIRECT” AND “INDIRECT” SUPERVISION CORRECTIONAL FACILITIES (1989), available at <http://www.nicic.org/pubs/pre/007807.pdf>.
100. See, e.g., Jeffrey A. Beard, Testimony Before the National Prison Rape Elimination Commission (Mar. 23, 2006) (transcript available at [http://nprec.us/docs/miami\\_promisingpractices\\_beard.pdf](http://nprec.us/docs/miami_promisingpractices_beard.pdf)) (“I would ask this commission to begin looking at a broad range of performance measures . . . [that] all directly relate to facility performance, inmate safety, and as such the extent of prison rape[:] . . . the amount of assaults on staff, the amount of assaults on inmates, fights, distances, [and] the amount of suicides we’re having in institutions . . . .”); see also Richard Stalder, Testimony Before the National Prison Rape Elimination Commission (Mar. 23, 2006) (transcript available at [http://nprec.us/docs/miami\\_correctionsoverview\\_stalder.pdf](http://nprec.us/docs/miami_correctionsoverview_stalder.pdf)) [hereinafter Stalder Testimony] (“I want you to understand, though, that from my perspective there are many endicies [sic] of instability and they have to do with violence and which—which exemplifies itself in sexual abuse, but also in many other ways.”).
101. See Goord Testimony, *supra* note 98 (“Long before the enactment of PREA, we recognized that when it comes to the matter of sexual abuse of inmates, the only acceptable policy is zero tolerance.”).
102. See NPREC REPORT, *supra* note 10, at 107.
103. See CSAAP REPORT, *supra* note 93, at 34; NPREC REPORT, *supra* note 10, at 215; Goord Testimony, *supra* note 98 (“We continue to make capital investments in installation and operations of fixed video and recording systems.”).
104. See CSAAP REPORT, *supra* note 93, at 77-87; NPREC REPORT, *supra* note 10, at 85-88.

## II. REAL MEN VS. SISSIES: THE HETEROSEXUAL DEFENSE

In this Part, I demonstrate that, in practice, prison officials and courts often exercise their authority in ways that depart from ordinary legal rules, permitting straight-identified, manly men to sexually harass or abuse other men they judge to be 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.”<sup>105</sup>

In Section II.A, I demonstrate that guards and prison administrators routinely ignore constitutional, statutory, and institutional rules that nominally prohibit sexual harassment and abuse. Instead, they enforce norms of masculinity in their most extreme and brutal forms. Guards and administrators often require the prisoner to “be a man” by fighting off his assailants. If the prisoner is unable to protect himself, he is often told that he does not deserve their protection because he is “gay.” This practice requires prisoners to prove their manhood by fighting, on pain of rape.

In Section II.B, I describe the heterosexual defense in Title VII jurisprudence. Many federal courts depart from ordinary statutory and doctrinal rules to enforce norms of masculinity similar to those enforced in prison. In spite of Supreme Court doctrine that would seem to preclude such reasoning, these courts often find that severe, pervasive, and unwelcome male-male sexual talk and touching by straight-identified men is permissible under Title VII on the basis that it is not “because of sex.” Either the conduct is not sexual because the harasser says he is straight, or, because the harasser thinks the targeted man is (or seems) gay, the harassment occurred because of “sexual orientation,” not sex. This heterosexual defense, which contradicts the courts’ doctrinal approach to man-woman sexual harassment, effectively 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. *The Legal Response to Sexual Abuse in Prison*

The institutional response to sexual abuse in prison is a legal practice, albeit an informal one. Prison guards and administrators exercise authority that is conferred by law and respected by courts. The Supreme Court mandates “wide-ranging deference” to prison administrators in the “adoption and execution of policies and practices that in their judgment are needed to preserve internal or-

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105. The “heterosexual defense” does not necessarily refer to a legal issue raised by a defendant or respondent (although heterosexuality often does, in practice, serve exactly that function in the Title VII context). Rather, the “heterosexual defense” expression is in keeping with this Article’s broad conception of “law”: In prison, as outside, the heterosexual defense is a legal (though often unlawful) practice that authorizes manly men to police the gender conformity of less manly men by sexually abusing them.

der and discipline and to maintain institutional security.”<sup>106</sup> Because the Supreme Court considers “[r]unning a prison [to be] an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources,”<sup>107</sup> one which the federal courts are “ill equipped to deal with,”<sup>108</sup> the courts have largely abandoned their supervisory role. The Court mandates that any administrative action that may infringe a prisoner’s constitutional rights must be upheld as long as it is “reasonably related to legitimate penological interests.”<sup>109</sup> Moreover, the Prison Litigation Reform Act of 1995<sup>110</sup> and judge-made immunities largely preclude supervisory or institutional liability for crimes, torts, or constitutional violations against prisoners.<sup>111</sup> Since prisoners lack effective access to the courts, prison officials serve as police, prosecutor, judge, jury, and court of appeals.

The exercise of this administrative discretion is not random or arbitrary. Prison officials often respond to sexual abuse in systematic and gender-targeted ways. In prison as in the outside world, “the state routinely and predictably fails to enforce the law to the detriment of vulnerable [individuals].”<sup>112</sup> As Alexandra Natapoff has observed of criminal law underenforcement in the outside world, prison guards, like police, “concede that they will not arrest certain sorts of perpetrators; many victims expect that they will remain unprotected.”<sup>113</sup> In many prisons as in communities subject to underenforcement of criminal law, “violators rest secure in the knowledge that their crimes are the sort that will go unpunished.”<sup>114</sup> In such prisons, men whose size, strength, connections, or fighting skills do not suffice to deter attackers know that they cannot expect prison staff to protect them.

Unlike federal courts, which must give legitimate reasons for deciding sexual harassment claims, 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. In many prisons, guards and administrators adopt a practice of institutional governance that ex-

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106. *Bell v. Wolfish*, 441 U.S. 520, 547 (1979); *see also* *Turner v. Safley*, 482 U.S. 78, 90 (1987); *Johnson v. Phelan*, 69 F.3d 144, 145 (7th Cir. 1995).

107. *Turner*, 482 U.S. at 84-85.

108. *Procunier v. Martinez*, 416 U.S. 396, 405 (1974).

109. *Turner*, 482 U.S. at 89. *But see* *Johnson v. California*, 543 U.S. 499 (2005) (holding that strict scrutiny applies to an explicit institutional policy of racial segregation in prisoner housing).

110. Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321, 1321-66 to -77 (codified as amended at scattered sections of 11, 18, 28, and 42 U.S.C. (2006)).

111. *See supra* note 23 and accompanying text.

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

113. *Id.*

114. *Id.*



plicitly requires each prisoner to “be a man” by fighting. If he fails to do so, he does not deserve protection because he is, or has been made, “gay.”

Although I characterize this as a quasi-legal (though unlawful) practice, the gender theory articulated by guards can also be understood as a rationalization for official inaction in response to almost all victims, regardless of their gender conformity. “Real men” do not need protection, while unmanly men do not deserve it. Nonetheless, this Article contends that a better understanding of the practice is that it enforces an informal legal norm—one that closely parallels informal legal practices in the outside world. On the outside, laws against criminal violence are underenforced against low-status victims: criminalized nonwhite men;<sup>115</sup> low-status victims of sexual abuse or harassment who are considered to be unchaste or undeserving;<sup>116</sup> and gender nonconformists such as lesbians, gay men, and transgender people.<sup>117</sup> Outside prison, legal protection against sexual abuse is often reserved for high-status victims who conform to racialized gender norms;<sup>118</sup> sexual violence against low-status, nonwhite women is less often prosecuted, regardless of the woman’s chastity.<sup>119</sup> Institutional refusal to protect the disproportionately gay and largely nonwhite victims of prison sexual abuse is consistent with this outside legal pattern.

Even if the gendered reasons guards give for their refusal to act are understood as rationalizations for inaction rather than genuine or prospective rules, it is significant that prison staff so often offer gendered explanations for refusing to protect prisoners, rather than basing their refusal on, say, the prisoner’s race, or just saying that they do not care. Prison rules as articulated by prison guards establish manliness as the measure of entitlement to legal protection—a pattern that echoes one we also see in the outside world.

### 1. Underenforcement

Despite their constitutional obligation to keep prisoners safe, many prison authorities do little or nothing to protect prisoners against sexual abuse. Prisoners rarely report their sexual harassment or abuse to correctional authorities.<sup>120</sup>

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115. *Id.* at 1719.

116. Crenshaw, *supra* note 39, at 1281; Iglesias, *supra* note 39, at 884.

117. Axam & Zalesne, *supra* note 40, at 159.

118. See generally Beverly Balos & Mary Louise Fellows, *A Matter of Prostitution: Becoming Respectable*, 74 N.Y.U. L. REV. 1220 (1999); Case, *supra* note 40; Iglesias, *supra* note 39.

119. Crenshaw, *supra* note 39, at 1269; Iglesias, *supra* note 39, at 883-85.

120. ALLEN J. BECK & PAIGE M. HARRISON, *SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2005*, at 2 (2006) [hereinafter BJS 2005 SEXUAL VIOLENCE REPORT], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrca05.pdf> (“Administrative records alone cannot provide reliable estimates of sexual violence. Due to fear of reprisal from perpetrators, a code of silence among inmates,

When prison officials do hear about sexual harassment or threats, they often refuse to take action until the prisoner has already been hurt<sup>121</sup>—if at all. Guards 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.<sup>122</sup> By their own account, prison officials deem more than 80% of sexual assault reports they hear from prisoners to be either “unsubstantiated” (unproven) or “unfounded” (false).<sup>123</sup> When a prisoner is brave or desperate enough to report sexual assault to correctional officials, in most cases, nothing is done.<sup>124</sup>

Meanwhile, prison rapists are rarely punished. Nationwide, only a few prosecutions occur each year.<sup>125</sup> More often, prison officials respond to prison rape by placing the *victim* in protective custody (an institutional euphemism for

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personal embarrassment, and lack of trust in staff, victims are often reluctant to report incidents to correctional authorities.”).

121. See, e.g., *Redman v. Cnty. of San Diego*, 942 F.2d 1435, 1437-39 (9th Cir. 1991); *Meyers v. Stubblefield*, No. 4:06CV01329 ERW, 2008 U.S. Dist. LEXIS 50655, at \*1-3 (E.D. Mo. July 2, 2008).
122. See, e.g., Just Detention Int’l, *The Rape of LGBT Prisoners—A Hidden Hate Crime*, in *HATE VIOLENCE AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE US*, 2008, at 42, 44-47 (Nat’l Coal. of Anti-Violence Programs ed., 2009) [hereinafter *JDI LGBT Report*], available at <http://www.avp.org/documents/2008HVRReportDraft3smallerfile.pdf> (reporting on how inmates request, but often are denied, protection from guards and noting that these stories are included “not . . . because they were unusually egregious; they represent some of the patterns and common forms of sexual abuse that LGBT prisoner rape survivors share with [Just Detention International] on a daily basis”); see also HUMAN RIGHTS WATCH, *NO ESCAPE: MALE RAPE IN U.S. PRISONS 143-58* (2001); JENNESS ET AL., *supra* note 56, at 49 (quoting an inmate: “The administration at this place doesn’t give a fuck about transgender inmates.”); NPREC REPORT, *supra* note 10, at 102 (“Kendell Spruce testified to the Commission that he was raped by 27 different inmates. ‘I reported it, but it didn’t ever get me anywhere.’”); STOP PRISONER RAPE, *TEXAS UPDATE: TEXAS STATE PRISONS PLAGUED BY SEXUAL ABUSE 4* (2008) [hereinafter *SPR TEXAS REPORT*], available at <http://www.justdetention.org/pdf/TexasUpdate.pdf> (“Unfortunately, [Stop Prisoner Rape] regularly receives reports from inmates nationwide describing an engrained staff acceptance of predatory behavior by inmates . . .”).
123. BJS 2005 SEXUAL VIOLENCE REPORT, *supra* note 120, at 3.
124. Among the 15-20% of allegations that correctional authorities find to be “substantiated,” only 12-16% result in arrest. Most perpetrators are placed in solitary confinement instead. *Id.* at 6 & tbl.6; see also *McGill v. Duckworth*, 726 F. Supp. 1144, 1156 (N.D. Ind. 1989) (“[W]hen Mr. McGill tried to tell Officer Webb [about a sexual assault], Officer Webb cut him off with the statement, ‘Piss on you.’”).
125. Between October 1999 and April 2009, federal prosecutors accepted 166 cases for prosecution, an average of 17 cases per year. NPREC REPORT, *supra* note 10, at 119.

solitary confinement).<sup>126</sup> While this placement is ostensibly designed for victims' protection, they generally experience solitary confinement as punitive<sup>127</sup>—solitary confinement is also the main disciplinary sanction for prisoners who break the rules.<sup>128</sup> Prisoners describe solitary confinement as “the hole.”<sup>129</sup> Conditions in protective custody, or “administrative segregation,” can be so harsh that victims are deterred from reporting sexual assault.<sup>130</sup> The most vulnerable inmates may “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.<sup>131</sup>

Moreover, because administrative segregation places victims in close proximity to other inmates who are being punished for fighting or sexual assault,<sup>132</sup> many prisoners are revictimized while in protective custody.<sup>133</sup> Prison officials may also be involved in sexual assaults in protective custody. They may arrange for other prisoners to rape the prisoner being “protected,”<sup>134</sup> and sometimes

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126. BJS 2005 SEXUAL VIOLENCE REPORT, *supra* note 120, at 6 (“The most common response to a reported incident of sexual violence among inmates was to place the victim in administrative segregation or protective custody and to move the perpetrator to solitary confinement or other higher level of custody.”); *see also* JDI LGBT Report, *supra* note 122, at 44; Philip Ellenbogen, Note, *Beyond the Border: A Comparative Look at Prison Rape in the United States and Canada*, 42 COLUM. J.L. & SOC. PROBS. 335, 368 (2009).
127. JENNESS ET AL., *supra* note 56, at 49 (quoting a prisoner kept in “the hole” for six months after being brutally raped by his cellmate: “I felt punished and abused. Prison is hell.”); NPREC REPORT, *supra* note 10, at 79 (indicating that conditions in protective custody can cause psychological distress and exacerbate prior mental illness); Ellenbogen, *supra* note 126, at 368.
128. JDI LGBT Report, *supra* note 122, at 44 (“Isolative housing is intended for inmates who violate prison rules or are a serious threat to other inmates or staff.”).
129. For example, one transgender inmate who had been raped repeatedly said: “You keep your mouth shut. Take it. Get it over with. No fight. If I fight it I go to the hole and lose programming—no visits in [administrative segregation]. . . . You try to keep the bruises to a minimum so you don’t go to ad-seg. You just get through it.” JENNESS ET AL., *supra* note 56, at 46.
130. *Id.* at 61-62.
131. JDI LGBT Report, *supra* note 122, at 44.
132. *Id.*
133. *See, e.g.,* Riccardo v. Rausch, 375 F.3d 521, 525 (7th Cir. 2004) (recounting the experience of a prisoner sexually assaulted while in protective custody); LaMarca v. Turner, 995 F.2d 1526, 1532 (11th Cir. 1993) (same); Villante v. Dep’t of Corr. of N.Y., 786 F.2d 516, 518 (2d Cir. 1986) (same); *see also* AUSTIN ET AL., *supra* note 86, at iv; SPR TEXAS REPORT, *supra* note 122, at 3.
134. *See, e.g.,* Smith v. Cummings, 445 F.3d 1254, 1257 (10th Cir. 2006); Liberto v. Shelby Cnty., Tenn., 115 F. App’x 794, 795 (6th Cir. 2004) (describing how a guard

they sexually assault the prisoner themselves.<sup>135</sup> When inmate perpetrators are punished at all, they are usually placed in administrative segregation rather than being prosecuted.<sup>136</sup> Even among the tiny proportion of inmate sexual abuse cases that prison investigators consider to be “substantiated,” only 12-16% result in arrest.<sup>137</sup>

The reasons behind most prisons’ failure to prevent and punish sexual abuse are undoubtedly complex. Many prisons are underfunded, understaffed, and ill-designed to protect prisoners against violence by inmates or guards.<sup>138</sup> Prison officials may be overworked and overwhelmed. In the most violent institutions, they may be afraid that interference with sexual abuse among prisoners might put their own safety at risk.<sup>139</sup> Physical and sexual violence establish a hierarchy among prisoners and undermine their solidarity, making it easier for guards to maintain control.<sup>140</sup> Guards and administrators may not know how to respond to reports of sexual harassment, and they may have difficulty distinguishing consensual from coerced sex.<sup>141</sup> They may hesitate to believe and act upon the word of a known criminal who claims to be a victim.<sup>142</sup> Some prison

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watched and taunted a prisoner during a sexual assault incident); *Villante*, 786 F.2d at 518, 522; see also *JDI LGBT Report*, *supra* note 122, at 44.

135. *JDI LGBT Report*, *supra* note 122, at 42, 44.

136. BJS 2005 SEXUAL VIOLENCE REPORT, *supra* note 120.

137. See *supra* note 124.

138. CSAAP REPORT, *supra* note 93, at 12, 21-27 (claiming that prison overcrowding contributes to violence and abuse among prisoners); Stalder Testimony, *supra* note 100 (same).

139. Some commentators suggest that guards and administrators in overcrowded, understaffed prisons deliberately may allow physical and sexual violence among prisoners in order to establish a hierarchy in which prisoners may control each other and guards need only control the top of the hierarchy. See, e.g., Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC’Y 95, 119 (2001).

140. JAMES GILLIGAN, *VIOLENCE: OUR DEADLY EPIDEMIC AND ITS CAUSES* 172 (1996) (“The . . . natural inclination of the institutional security force is to be tolerant of any type of situation that divides the prisoners into predators and prey . . . a situation [that] prevents the development of any unity among prisoners that could tear down the institution.”); Sabo et al., *supra* note 4, at 12.

141. See NPPEC REPORT, *supra* note 10, at 113; Eigenberg *supra* note 63, at 429-30.

142. Correctional officers may hesitate to act on inmate reports of sexual abuse because they believe inmates may fabricate them in order to gain assignment to more favorable housing arrangements. See, e.g., Kathleen Dennehy, Testimony Before the National Prison Rape Elimination Commission (Mar. 23, 2006) (transcript available at [http://nprec.us/docs/miami\\_correctionsmgmt\\_dennehy.pdf](http://nprec.us/docs/miami_correctionsmgmt_dennehy.pdf)); Harley Lappin, Testimony Before the National Prison Rape Elimination Commission (Mar. 23, 2006) (transcript available at [http://nprec.us/docs/miami\\_correctionsmgmt\\_lappin.pdf](http://nprec.us/docs/miami_correctionsmgmt_lappin.pdf)); Cindy Malm, Testimony Before the National Pris-

officials may think that criminals deserve to be raped or that sexual victimization will deter reoffending.<sup>143</sup> Or they may simply not care. But, when prison officials refuse to act, they do not refuse at random. The rules they impose often require inmates to perform some of the most toxic forms of masculinity. The prisoner must “be a man” by fighting. Otherwise, guards will not protect him because he must be “gay.”

2. “Be a man. Stand up and fight.”

When prison staff members receive prisoners’ reports of sexual threats or assault, they often respond by telling prisoners: “Be a man . . . Stand up and fight.”<sup>144</sup> For example, the warden of an Arkansas prison testified that “inmates in the prison had to ‘fight’ against sexual aggressors”<sup>145</sup> and that it was “the in-

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on Rape Elimination Commission (Mar. 23, 2006) (transcript available at [http://nprec.us/docs/miami\\_correctionsmgmt\\_malm.pdf](http://nprec.us/docs/miami_correctionsmgmt_malm.pdf)); *see also* Fisher v. Goord, 981 F. Supp. 140, 162 (W.D.N.Y. 1997) (quoting a correctional officer: “[W]e don’t just move inmates because [sic] based on allegations. If we did that, we’d have inmates moving all over the system—just they would make up allegations.”); Questions & Answers Before the National Prison Rape Elimination Commission (Mar. 23, 2006) (transcript available at [http://nprec.us/docs/miami\\_correctionsmgmt\\_qa.pdf](http://nprec.us/docs/miami_correctionsmgmt_qa.pdf)) (quoting Cindy Malm: “[A] lot of times we have inmates who just [sic]they want to go into that housing unit because they enjoy who is there or they have friends there or whatever, so we have to be very careful with that.” and quoting Kathleen Dennehy: “I think staff are very skilled to know [whether] . . . inmates [are] faking . . . or doing something to . . . get into a segregated situation . . .”).

143. 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.” WILLIAM F. PINAR, *THE GENDER OF RACIAL POLITICS AND VIOLENCE IN AMERICA: LYNCHING, PRISON RAPE, & THE CRISIS OF MASCULINITY* 844 (2001) (citing reports that a Florida boot camp officer mock-raped a fourteen-year-old boy as a method of rehabilitation and deterrence and yelled: “That’s how they do it when you get to prison!”); *id.* (citing another report that Texas correctional officers “permitted inmates to fondle five . . . teenage boys” who visited the prison on a “scared straight field trip”); *see also* Michael K. Block, *Supply Side Imprisonment Policy*, in *TWO VIEWS ON IMPRISONMENT* 9, 12 (Nat’l Inst. of Justice ed., 1997) (“[T]he most severe punishment regularly imposed is prison. . . . Recent jurisprudence on the rights of prisoners and the standards of confinement appear to leave policymakers with only the weakest instrument (sentence length) for increasing the severity of punishment. Policy initiatives aimed at increasing the unpleasantness of prison life would likely be a cost-effective method of fighting crime.”); *The Daily Show*, *supra* note 2 (comically depicting the threat of prison rape to scare MBA students into ethical behavior).

144. HUMAN RIGHTS WATCH, *supra* note 122, at 153.

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

mates' own responsibility to 'let people understand that [they]'re not going to put up with that."<sup>146</sup> Prison officials often assume—sometimes as a matter of official policy—that “heterosexual inmates c[an] protect themselves.”<sup>147</sup> Such responses require prisoners to prove their manhood by fighting.

The words and actions of prison staff tend to present fighting as an appropriate demonstration of mature masculinity. One Los Angeles County deputy sheriff stated: “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.”<sup>148</sup> Likewise, an Arizona prison warden claims that the threat of rape teaches inmates to “assert themselves.”<sup>149</sup> 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.’”<sup>150</sup> When the mother of a young inmate told prison officials of sexual threats against her son, prison officials told her that prison was “not operating a ‘baby-sitting service.’”<sup>151</sup>

Even when a prisoner has been placed in protective custody (presumably because administrators have determined that he cannot protect himself in the general population), officials may require that he 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.”<sup>152</sup> If an inmate is not good enough at fighting to prevent a rape, some guards consider the rape to be his own fault. 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.”<sup>153</sup>

Thus, in her statewide survey of California prisons, Jenness and her colleagues did not find “a single incident . . . [in which] an attempted rape [was]

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146. *Id.* (alteration in original); see also JENNESS ET AL., *supra* note 56, at 44 (documenting how prison officials told an inmate who had reported sexual assault: “If you don’t want to do it, then you’d better fight back.”).

147. See, e.g., *Redman v. Cnty. of San Diego*, 942 F.2d 1435, 1444 n.11, 1451 (describing an official policy whereby “young and tender” and “passive homosexual” detainees needed protection and were kept in separate units, while “aggressive homosexual” prison rapists were placed in the general population pursuant to the assumption that “heterosexual inmates could protect themselves”).

148. *Mozingo*, *supra* note 49.

149. *Mass Incarceration and Rape: The Savaging of Black America*, *supra* note 44.

150. NPREC REPORT, *supra* note 10, at 69.

151. *Redman*, 942 F.2d at 1438.

152. *McGill v. Duckworth*, 726 F. Supp. 1144, 1155 (N.D. Ind. 1989).

153. STOP PRISONER RAPE, STORIES FROM INSIDE: PRISONER RAPE AND THE WAR ON DRUGS 12 (2007) [hereinafter SPR, STORIES FROM INSIDE], available at <http://www.justdetention.org/pdf/storiesfrominside032207.pdf>.

averted as a result of intervention by correctional officials.”<sup>154</sup> Rather, the researchers found that those inmates who said they had escaped attempted rape “avoided it by ‘fighting back.’”<sup>155</sup> Prisoners in such institutions know that they cannot expect prison staff to protect them.

In spite of prison administrators’ concern that violence is *the* major threat to security in men’s prisons<sup>156</sup> and of the fact that fighting is invariably against prison rules,<sup>157</sup> guards routinely tell prisoners to fight in order to protect themselves against sexual abuse. In one case, when a prisoner asked a guard for protection, the guard gave him a knife.<sup>158</sup> Too often, prisoners’ conformity to violent norms of masculinity determines their access to respect and security from guards and prisoners alike.

When prison staff advise prisoners to fight to defend their manhood, they enforce this violent model of masculinity at the expense of their overarching responsibility for prison security. The State of California, for example, 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.<sup>159</sup> 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 the following “welcome speech” to more than one hundred incoming prisoners every day:

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.<sup>160</sup>

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154. JENNESS ET AL., *supra* note 56, at 46.

155. *Id.* For example, Jenness and her coauthors mention the story of one straight-identified white prisoner in which “another inmate described by the respondent as a ‘White gay guy’ grabbed his ‘ass’ and said he would make him his ‘girlfriend.’ The inmate providing this report threw the other inmate off the tier, which was about a 12 foot drop, and thereafter nothing else happened.” *Id.* at 42-43.

156. Goodman, *supra* note 37; see also *Johnson v. California*, 543 U.S. 499 (2005) (reviewing the state’s unsuccessful argument that the threat of gang violence was so dire for prison security that racial segregation in prison should not be subjected to strict scrutiny, but rather to the more lenient *Turner v. Safley* standard).

157. See *supra* note 21 and accompanying text.

158. *LaMarca v. Turner*, 995 F.2d 1526, 1533 n.10 (11th Cir. 1993). In another case, a guard told a prisoner to make a knife to defend himself. See SPR, *STORIES FROM INSIDE*, *supra* note 153, at 27.

159. *Johnson*, 543 U.S. 499.

160. Goodman, *supra* note 37, at 747-48 (footnote omitted).

In this environment, “[e]ven men who were not especially aggressive and misogynistic when they entered prison” find that they must adopt “hypermasculine posturing and violence,” since “the best way to avoid a fight is to look like [one] is not particularly averse to violence. Predators usually move on and seek victims who will not put up a ferocious fight.”<sup>161</sup> The less manly men—GBT prisoners; prisoners who have been sexually assaulted before; 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 the ones who face the greatest risk of sexual abuse.<sup>162</sup> As one witness before the National Prison Rape Elimination Commission (NPREC) described: “Once an inmate has been turned out, he’s considered a target wherever he goes.”<sup>163</sup> 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.<sup>164</sup>

Correctional officers often view such voluntary-but-coerced sex as consensual.<sup>165</sup> 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.<sup>166</sup> In prison, “[p]hysical 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,” and “[w]eakness can be met only with contempt.”<sup>167</sup>

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

Prison officials tend to assume that gay, bisexual, or transgender prisoners consent to sex with any and all men.<sup>168</sup> Roderick Johnson, a black gay man in a Texas prison, was repeatedly beaten and raped in the general population.<sup>169</sup> He

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161. Kupers, *supra* note 31, at 717.

162. Prior sexual abuse and nonstraight sexual orientation are, by far, the two individual characteristics most predictive of sexual abuse by either inmates or staff. See *supra* note 61 and accompanying text.

163. NPREC REPORT, *supra* note 10, at 71.

164. See Donaldson, *supra* note 68, at 120-22; Kupers, *supra* note 4, at 115.

165. Donaldson, *supra* note 68, at 125; Eigenberg, *supra* note 63, at 429-30; *JDI LGBT Report*, *supra* note 122, at 43.

166. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 7, § 270.2 (2010) (“An Inmate shall not engage in or encourage, solicit or attempt to force another to engage in any sexual act.”).

167. FLEISHER & KRIENERT, *supra* note 1, at 151.

168. See NPREC REPORT, *supra* note 10, at 73.

169. *Johnson v. Johnson*, 385 F.3d 503, 512-13 (5th Cir. 2004).



“begged prison officials to move him to a unit called safekeeping, where white and Hispanic homosexuals, former gang members and convicted police officers lived,”<sup>170</sup> but prison administrators refused to protect him. Instead, he was repeatedly told: “You need to get down there and fight or get you a man. . . . There’s no reason why Black punks can’t fight and survive in general population if they don’t want to f\*\*\*” . . . .<sup>171</sup> Prison officials also made “remarks to the effect that, since Johnson was homosexual, he probably liked the sexual assaults he was experiencing.”<sup>172</sup>

As Lara Stemple has observed: “In prison the rapists are straight guys.”<sup>173</sup> Prison guards and administrators acknowledge that gay, bisexual, and transgender prisoners are at the highest risk of sexual assault,<sup>174</sup> but they say that they

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170. Adam Liptak, *Ex-Inmate’s Suit Offers View into Sexual Slavery in Prisons*, N.Y. TIMES, Oct. 16, 2004, at A1.

171. *Johnson*, 385 F.3d at 513.

172. *Id.* According to Johnson’s appellate brief, a guard captain “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 Plaintiff-Appellee at 31, *Johnson v. Johnson*, No. 03-10455 (5th Cir. Dec. 29, 2003).

173. 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, 170 (Merri Lisa Johnson ed., 2007).

174. See, e.g., Eigenberg, *supra* note 63, at 420; Eigenberg, *supra* note 72, at 51; Peter L. Nacci & Thomas R. Kane, *Sex and Sexual Aggression in Federal Prisons: Inmate Involvement and Employee Impact*, FED. PROBATION, Mar. 1984, at 46, 48 (observing that “officers are more willing to protect heterosexual inmates when, actually, homosexual/bisexual inmates are quite likely to be targeted for assaults”); Questions & Answers Before the National Prison Rape Elimination Commission (Mar. 23, 2006) (transcript available at [http://nprec.us/docs/miami\\_correctionsoverview\\_qa.pdf](http://nprec.us/docs/miami_correctionsoverview_qa.pdf)) (quoting Richard Stalder describing openly gay prisoners as a “special needs population” with respect to sexual abuse).

Thus, several states operate or have operated segregated ranges for GBT inmates to protect them against sexual assault. See, e.g., James Ricci, *Gay Jail Inmates Get Chance To Learn*, L.A. TIMES, Apr. 7, 2004, at B1 (noting that Los Angeles County automatically segregates gay inmates for housing purposes); Paul von Zielbauer, *City Prepares To Close Rikers Housing for Gays*, N.Y. TIMES, Dec. 30, 2005, at B9 (“For at least three decades, gay and transgender inmates had their own housing unit inside Rikers Island’s sprawling jail complex.”). 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.” SPR, CALL FOR CHANGE, *supra* note 62, at 3.

are less likely to believe GBT prisoners or to punish assaults upon them.<sup>175</sup> In men's prisons, alleged gayness (like alleged unchastity in rape trials outside prison) tends to establish a low status that, in practice, often disqualifies the victim from legal protection.<sup>176</sup> Like an unchaste woman, the GBT prisoner is either deemed to have consented, or is told that he deserved the abuse whether he consented or not.

Thus, when abused prisoners seek institutional protection against sexual threats or abuse, prison officials commonly give a response which boils down to: "You're gay. You must have liked it."<sup>177</sup> Guards told one prisoner that it is "okay for a 'faggot' to be raped. They said, 'Oh, you must like it.'"<sup>178</sup> Another investigating officer told an inmate that he "must be gay" for "letting them make you suck dick."<sup>179</sup> Yet another gay inmate reported that, when he reported an inmate rape to correctional officers, three of the officers gang-raped him with a nightstick.<sup>180</sup> During the assault, he says, the officers were "laughing, saying, 'shut up, faggot, you're enjoying it,' then laughing while they left."<sup>181</sup>

Guards share with prisoners the view that rape is not rape if the victim is gay. One guard told a prisoner: "You're an admitted homosexual, you can't be raped. We're denying you. You learn how to defend yourself."<sup>182</sup> Victims are often told that their gayness disqualifies them from protection against sexual harassment and assault. As correctional officers told one raped prisoner: "Nobody is going to believe you because you are a known homosexual."<sup>183</sup> Human Rights Watch reports that correctional officers will label an inmate "homosexual" in order to record the assault as consensual and avoid having to investigate

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175. See Eigenberg, *supra* note 63, at 421-22; see also Eigenberg, *supra* note 72, at 51 ("[O]fficers 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 voluntary participation.").

176. See generally Crenshaw, *supra* note 39; Hernández, *Sexual Harassment*, *supra* note 39.

177. See, e.g., *Johnson v. Johnson*, 385 F.3d 503, 513 (5th Cir. 2004); FLEISHER & KRIENERT, *supra* note 1, at 156.

178. JUST DETENTION INT'L, A CALL FOR CHANGE: PROTECTING THE RIGHTS OF LGBTQ DETAINEES 1 (2009), available at <http://www.justdetention.org/pdf/CFCLGBTQJan09.pdf>.

179. HUMAN RIGHTS WATCH, *supra* note 122, at 152.

180. *JDI LGBT Report*, *supra* note 122, at 46.

181. *Id.*

182. *SPR TEXAS REPORT*, *supra* note 122, at 5 (italics in original).

183. *JDI LGBT Report*, *supra* note 122, at 46.

it.<sup>184</sup> Thus, one inmate insightfully describes the “laws” of sexual abuse in prison as such: “Homosexuals put yourself at high risk; laws claim he has no evidence and because homosexual he likes it.”<sup>185</sup>

It seems unlikely that even the most homophobic of corrections officers believes that a gay man enjoys being injured in a 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.”<sup>186</sup> Men who are raped by definition deserve it because they are “weak.”<sup>187</sup>

If a prisoner’s size, strength, demeanor, connections, or fighting skills prove inadequate to protect him against sexual abuse, both prison officials and other prisoners tend to view him as a failed man. Prison officials, like prisoners, judge prisoners by their conformity to a gender role ethos that “put[s] a premium on strength and masculinity.”<sup>188</sup> In prison slang, the prison rapist is a real man: a “jocker,” “daddy,” or “booty bandit.”<sup>189</sup> His target is a “fag” or a “queen,” or he has been “punk[ed],” “turn[ed] out,” or “made gay.”<sup>190</sup> Some guards and prisoners share an understanding of sexuality by which “if a heterosexual man is not careful enough and secure enough in his masculinity, he may be ‘turned’ into a homosexual in prison,”<sup>191</sup> regardless of his sexual desires or those of his assailant.<sup>192</sup>

Thus, prison staff and other prisoners tend to treat prison rapists the way the rapists see themselves: as straight and masculine.<sup>193</sup> Prison rapists retain their heterosexual identity by attributing their own arousal to the femininity of the targeted men.<sup>194</sup> Rape “mak[es] a woman’ out of the victim.”<sup>195</sup> He becomes

184. HUMAN RIGHTS WATCH, *supra* note 122, at 8.

185. FLEISHER & KRIENERT, *supra* note 1, at 157 (italics in original).

186. One study 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. Eigenberg, *supra* note 63, at 422-23; *see also* FLEISHER & KRIENERT, *supra* note 1, at 173 (documenting inmate perceptions).

187. *See* FLEISHER & KRIENERT, *supra* note 1, at 173.

188. *JDI LGBT Report*, *supra* note 122, at 42.

189. *See, e.g.*, Donaldson, *supra* note 68, at 118.

190. *Id.* at 119, 121, 125.

191. Ek, *supra* note 37, at 62.

192. *See, e.g.*, Donaldson, *supra* note 68, at 125; Eigenberg, *supra* note 63, at 417-19.

193. *See* Sabo et al., *supra* note 4, at 12-13.

194. *See, e.g.*, *Wilson v. Wright*, 998 F. Supp. 650, 652 (E.D. Va. 1998) (describing an inmate whose “buttocks protrude[d], inviting abusive remarks by other inmates”); *see also* JENNESS ET AL., *supra* note 56, at 50 (discussing an inmate who “blames himself . . . for being feminine, really attractive, and wearing his hair in jheri curls”); *id.* at 49 (quoting an inmate: “[The assailant] would come to my bed

the aggressor's "girlfriend" or his "bitch." As one prisoner observed: "[B]efore long another man begins to look like a woman to you."<sup>196</sup>

Like women in the outside world who diverge from gender norms by being unchaste, unfeminine, nonstraight, or nonwhite, male prisoners who diverge from gender norms (by being GBT or by having been "weak" enough to get raped) are, in practice, excluded from protection in spite of criminal laws and institutional rules that ostensibly prohibit sexual violence. Thus, in prison as outside, gender conformity is the measure of legal entitlement to protection and redress for sexual wrongs. Guards and administrators authorize 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 the most toxic<sup>197</sup> conventions of masculinity—even though the embrace of such norms may have landed many men in prison in the first place.<sup>198</sup>

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and make comments about me. How nice my butt was. . . . He was trying to seduce me.").

195. KUNZEL, *supra* note 4, at 173; see also Ek, *supra* note 37, at 54.

196. KUNZEL, *supra* note 4, at 184 (footnote omitted).

197. As Terry Kupers points out, the continual humiliations of prison life foster a hypermasculine gender dynamic that emphasizes and rewards masculine posturing and violence among both prisoners and staff. Kupers, *supra* note 31, at 717 (characterizing this form of masculinity as "extreme competition and greed, insensitivity to or lack of consideration of the experiences and feelings of others, a strong need to dominate and control others, an incapacity to nurture, a dread of dependency, a readiness to resort to violence, and the stigmatization and subjugation of women, gays, and men who exhibit feminine characteristics").

198. For example, 53% of state prison inmates in 2005 were held for violent crimes. HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2007, at 22 app. tbl.11 (rev. ed. 2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/po7.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. See, e.g., Harris, *supra* note 36, at 785 (noting that working-class men may resort to "hypermasculinity" in order to compensate for their lack of access to economic, social, and political power); see also Karen D. Pyke, *Class-Based Masculinities: The Interdependence of Gender, Class, and Interpersonal Power*, 10 GENDER & SOC'Y 527, 531-32 (1996) (discussing "compensatory" masculinity).

It is not clear why, given that such gender performances make prisons more violent and ungovernable, prison guards and administrators would encourage them. It is possible that some prison officials may hope that the threat or experience of prison rape (and violence more generally) will deter further lawbreaking upon release. This strategy, though, may be counterproductive. See, e.g., M. Keith Chen & 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).

Another possibility may be that gender is so ingrained as a meta-role that people can be held accountable for appropriate gender performance in any cir-

### B. *Dominance and Sexuality: Making Men*

In this Section, I argue that the gender norms enforced by guards (and prisoners) represent an extreme version of paradigms of masculinity we see enforced, in milder form, by legal and social practices in the free world. Free men, too, use same-sex sexual abuse and harassment to reaffirm that they are straight and manly and that their victims deserve abuse and contempt for being effeminate or gay. Outside as in prison, these norms tend to displace formal statutory and doctrinal rules in the legal response to same-sex sexual harassment and abuse. Title VII courts, like prison officials, often recognize a heterosexual defense that, in practice, authorizes straight-identified men to police the gender conformity of less manly men by sexually harassing them. In both contexts, legal actors depart from the law on the books to enforce norms of masculinity instead.

#### 1. Masculinities and the Social Meaning of Same-Sex Sexual Abuse

While the gender norms that officials enforce in prison are extreme, they are not foreign to our culture. Prisons form part of our society, especially since the United States imprisons more of its citizens than any other country in the world.<sup>199</sup> In her surveys of correctional officers' attitudes toward prison rape,

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cumstances. Candace West and Don H. Zimmerman have argued persuasively that:

[A] person engaged in virtually any activity may be held accountable for performance of that activity as a *woman* or a *man*, and their incumbency in one or the other sex category can be used to legitimate or discredit their other activities . . . . [T]o 'do' gender is not always to live up to normative conceptions of femininity or masculinity; it is to engage in behavior *at the risk of gender assessment*."

Candace West & Don H. Zimmerman, *Doing Gender*, 1 GENDER & SOC'Y 125, 136 (1987) (emphasis added). Institutional actors may take it for granted that they may legitimately require male prisoners to act masculine in every situation. Prisons are not alone among institutions that require men to perform masculinity in ways that are 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 his duties as a postal clerk. Cf. *Dillon v. Frank*, No. 90-2290, 1992 U.S. App. LEXIS 766, at \*11 (6th Cir. Jan. 15, 1992) (declining to accept appellant's definition that "because of sex" meant "because of anything relating to being male or female, sexual roles, or to sexual behavior").

199. Adam Liptak, *More than 1 in 100 Adults Are Now in Prison in U.S.*, N.Y. TIMES, Feb. 29, 2008, at A14; INT'L CTR. FOR PRISON STUDIES, *World Prison Brief: Highest to Lowest Rates: Entire World—Prison Rates per 100,000 of the National Population*, KING'S COLL., LONDON, <http://www.kcl.ac.uk/depsta/law/research/>

criminologist Helen Eigenberg noted that prison guards' "culturally derived attitudes about women and homosexuality . . . strongly predict their willingness to engage in victim blaming as well as their definitions of rape in prison."<sup>200</sup> Their use of gender conformity as a criterion of entitlement to legal protection against sexual violence reflects, in exaggerated form, a pattern we see—and enforce by law—in the outside world.

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, and aggressive sexualized touching (e.g., crass behaviors such as 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.<sup>201</sup> If the newbie is a real man, he can withstand such hazing, join the team, and dish it out in turn.<sup>202</sup> Sexualized hazing is a way of making men, outside prison as well as inside.

When straight-identified men sexually harass coworkers they deem unmanly, they tend to follow a pattern of behavior so distinctive that it is almost as though the harassers are following a script.<sup>203</sup> Typically, the straight-identified harasser derides the targeted man as girly or "gay,"<sup>204</sup> grabs and squeezes the

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icps/worldbrief/wpb\_stats.php?area=all&category=wb\_poprate (last visited Dec. 14, 2010).

200. Eigenberg, *supra* note 63, at 423; *see also* Eigenberg, *supra* note 72, at 51 (positing that negative attitudes toward homosexuality may reduce officers' willingness to believe inmates' reports of rape).
201. *See* Yoshino, *supra* note 40, at 448, 450.
202. *Id.* at 448 ("[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.").
203. *See, e.g.,* *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998); *McWilliams v. Fairfax Cnty. Bd. of Supervisors*, 72 F.3d 1191, 1196 (4th Cir. 1996), *abrogated by* *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1064 (9th Cir. 2002); *Schmedding v. Tnemec Co.*, 187 F.3d 862, 865 (8th Cir. 1999); *Johnson v. Hondo, Inc.*, 125 F.3d 408, 410 (7th Cir. 1997); *Doe v. Belleville*, 119 F.3d 563, 566-67 (7th Cir. 1997); *Quick v. Donaldson Co.*, 90 F.3d 1372, 1374-75 (8th Cir. 1996); *Martin v. Norfolk S. Ry. Co.*, 926 F. Supp. 1044, 1046-47 (N.D. Ala. 1996); *Axam & Zalesne, supra* note 40, at 201-03; 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); Yoshino, *supra* note 40, at 446-58. This form of sexual harassment is not limited to the workplace or even to adults. *See, e.g.,* *Nabozny v. Podlesny*, 92 F.3d 446, 451-53 (7th Cir. 1996) (recounting how a middle-school student was subjected to these forms of abuse); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1084, 1086 (D. Minn. 2000) (*same*).
204. *See* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1776-77 (1998) ("Because many heterosexual men regard any failure to conform to their

targeted man's buttocks and genitals, threatens to rape him, forces him into mock anal or oral sex, and shoves phallic objects against his anus.<sup>205</sup>

This pattern of male-male sexual harassment is not limited to the Title VII workplace. It is seen in many other settings, such as policing,<sup>206</sup> the military,<sup>207</sup> fraternities and sports teams,<sup>208</sup> school bullying,<sup>209</sup> and other hierarchical, largely male contexts, including men's prisons.<sup>210</sup> These "hypermasculine" environments share certain institutional features, which, sociologists have found, greatly increase the likelihood that men will sexually harass and assault others<sup>211</sup>: organizational tolerance for sexual harassment and a rigid, 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.<sup>212</sup> Similarly, many young men who are "at an age of establishing their

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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.”); see also Axam & Zalesne, *supra* note 40, at 196-97; Franke, *supra* note 10, at 178.

205. See sources cited *supra* note 203.
206. See, e.g., Harris, *supra* note 36, at 777, 778 (describing how New York City police officers brutally and sexually assaulted Haitian immigrant Abner Louima); Rachanee Srisavasdi, *Gay H.B. Officer May Get \$2.15 Million from City*, ORANGE COUNTY REG., July 1, 2008, at B1 (reporting that the City of Huntington Beach “settled a discrimination lawsuit brought by a gay police officer who alleged his peers harassed him, including placing a gay escort ad in his locker, commenting that he handled only gay sex crimes and suggesting that he was infected with HIV”).
207. See, e.g., Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 501 (1991) (“[O]ur armed forces have . . . excluded and segregated blacks in the pursuit of manhood, and today’s forms of exclusion and segregation are similarly grounded in the symbolism of masculine power.”); Aaron Belkin, *Is Hazing a Form of Torture?*, HUFFINGTON POST (Sept. 2, 2009, 4:00 PM), [http://www.huffingtonpost.com/aaron-belkin/is-hazing-a-form-of-tortu\\_b\\_275593.html](http://www.huffingtonpost.com/aaron-belkin/is-hazing-a-form-of-tortu_b_275593.html) (documenting violent, homosocial hazing within the Navy, which targeted gay men and men who refused to have sex with prostitutes).
208. See Patricia Wencelblat, Note, *Boys Will Be Boys? An Analysis of Male-on-Male Heterosexual Sexual Violence*, 38 COLUM. J.L. & SOC. PROBS. 37, 62 (2004).
209. See, e.g., *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081 (D. Minn. 2000).
210. John B. Pryor & 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, 140-43 (William O’Donohue ed., 1997).
211. *Id.* at 143 (concluding that antigay male-male sexual harassment is most common in “[t]raditionally masculine work settings” where most workers are men).
212. Wencelblat, *supra* note 208, at 61-63.

own sexual identities” engage in antigay sexual harassment when they are in hypermasculine environments where such behavior is tolerated.<sup>213</sup> As we have seen, this happens among the millions of mostly young men held in prison as well.<sup>214</sup> In a hypermasculine environment, the straight-identified same-sex harasser conforms 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.<sup>215</sup> In the outside world, of course, most people agree that homosocial “horseplay” or hazing goes too far if it escalates to rape—although it sometimes does.<sup>216</sup> Nonetheless, the gender dynamics of same-sex sexual harassment are shared between prison and the outside world. The perpetrators are usually straight-identified<sup>217</sup> and target their victims for being (or seeming) unmanly, disabled, transgender, or gay.<sup>218</sup> But, unlike in some prisons, sexual assault is non-normative in the cultural mainstream.

Cultural anthropologists Mark Fleisher and Jessie Krienert contend that prisoners participate in a “cultural logic” in which, they claim, social norms and behavior are “radically different from free-society standards.”<sup>219</sup> Free society, they say, views sexual violence as an “abhorrent, unjustifiable act[.]”<sup>220</sup> 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 victims may be to blame for having incurred financial debts to the assailant; or that victims may have “sexually enticed” the assailant “by flirting and then fail[ing] to fulfill a si-

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213. Pryor & Whalen, *supra* note 210, at 143.

214. BJS 2009 MIDYEAR REPORT, *supra* note 79, at 20 tbl.17 (showing that one-third of prison inmates are between the ages twenty and twenty-nine and that more than half are between the ages eighteen and thirty-five).

215. See Karst, *supra* note 207, at 285-86.

216. See Wencelblat, *supra* note 208, at 38 (describing a 2003 incident in which upper-class high school football players committed severe and violent sexual assaults on three underclass football players).

217. PINAR, *supra* note 143, at 842.

218. See Kramer, *When Men Are Victims*, *supra*, at 40; PINAR, *id.* In the outside world as in prison, transgender people are disproportionately targeted for gender violence: Although 2-3% of free Americans report being victims of violent crime in a given year, 37% of transgender people report being physically assaulted because of their gender presentation alone. See Lori Sexton, Valerie Jenness & Jennifer Macy Sumner, *Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men's Prisons*, 27 JUSTICE Q. 835, 857-58 (2010). Outside prison, estimates of lifetime risk of sexual assault for transgender women range from 13.5-60%, compared to a 1 in 6 lifetime risk for all women. *Id.* at 858.

219. FLEISHER & KRIENERT, *supra* note 1, at 176.

220. *Id.*



lent promise of a sexual affair.”<sup>221</sup> This “inmate culture,” they point out, presumes that “if rape occurs, fault lies with the victim.”<sup>222</sup>

But these beliefs are not deviant. They are traditional. Prisoners share these beliefs with guards and many other denizens of 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.<sup>223</sup>

Outside as in prison, jurors and other fact-finders tend to assume that any man who reports sexual abuse must be gay, because “a man who is not gay will never consent to sex with another man.”<sup>224</sup> Like unchaste women, gay men have transgressed gender norms. Like unchaste women, gay men are often presumed to consent to sex with any and all men, regardless of the circumstances or the degree of violence used.<sup>225</sup> Like unchaste women, “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.”<sup>226</sup> 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.”<sup>227</sup>

Thus employers and authority figures may excuse antigay sexual harassment 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,<sup>228</sup> and blame the battering and harassment on the young man for be-

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221. *Id.* at 177.

222. *Id.*

223. See, e.g., JENNIFER TEMKIN & BARBARA KRAHÉ, *SEXUAL ASSAULT AND THE JUSTICE GAP: A QUESTION OF ATTITUDE* 31-38 (2008); Irina Anderson, *What Is a Typical Rape? Effects of Victim and Participant Gender in Female and Male Rape Perception*, 46 *BRIT. J. SOC. PSYCHOL.* 225, 228 (2007); Heike Gerger et al., *The Acceptance of Modern Myths About Sexual Aggression Scale: Development and Validation in German and English*, 33 *AGGRESSIVE BEHAV.* 422, 425 (2007).

224. Kramer, *When Men Are Victims*, *supra* note 40, at 316; see also Marc Spindelman, *Discriminating Pleasures*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW*, *supra* note 10, at 201, 204 (“But Oncale’s ‘feeling’ about his attackers’ sexual orientation tells us nothing about whether he was—or wasn’t—sexually harassed.”).

225. See Spindelman, *supra* note 224; Kramer, *When Men Are Victims*, *supra* note 40, at 319-23.

226. Kramer, *When Men Are Victims*, *supra* note 40, at 318; see also FLEISHER & KRIENERT, *supra* note 1, at 156 (quoting inmates as saying: “[Y]ou just can’t do that to someone who don’t want it,” and “[I]f a person do get raped he wanted it or he would have said something, just like in a man and woman relationship.”).

227. Kramer, *When Men Are Victims*, *supra* note 40, at 318.

228. See, e.g., *Nabozny v. Podlesny*, 92 F.3d 446, 452 (7th Cir. 1996).

ing gay.<sup>229</sup> In one 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.”<sup>230</sup> The principal told the victim and his parents that they should “expect” such behavior because “he is ‘openly’ gay.”<sup>231</sup> 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.”<sup>232</sup> In another case, a school official just laughed when a gay student reported that other students had beaten him up and threatened to lynch him.<sup>233</sup> The principal refused to protect the young man, telling him to “keep quiet about his sexual orientation” and “stop acting like a fag,”<sup>234</sup> instead.

Thus, as Don Sabo and his coauthors point out, “[t]he prison code is very familiar to men in the United States because it is similar to the male code that reigns outside of prison.”<sup>235</sup> In the outside world as in prison, sexual harassment masculinizes the harasser and feminizes the target, regardless of their sex.<sup>236</sup>

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229. *Id.*; *Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1070 (D. Nev. 2001).

230. *Nabozny*, 92 F.3d at 451.

231. *Id.*

232. *Id.* at 452.

233. *Henkle*, 150 F. Supp. 2d at 1069.

234. *Id.* at 1070.

235. Sabo et al., *supra* note 4, at 10; see also Kupers, *supra* note 31, at 718.

236. Catharine MacKinnon observes:

“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.

CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 178 (1989) (quoting Carolyn M. Shafer & Marilyn Frye, *Rape and Respect*, in *FEMINISM AND PHILOSOPHY* 333, 334 (Mary Vettefling-Braggin et. al. eds., 1977)); see also Wencelbat, *supra* note 208, at 62 (pointing out the “emasculating impact” of sexual assault on the male victim). Sexual assault thus

affects 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 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.

Wencelbat, *supra* note 208, at 62-63; see also Axam & Zalesne, *supra* note 40, at 198-205; Iglesias, *supra* note 39, at 949; Kramer, *When Men Are Victims*, *supra* note 40, at 316-17.

Men who are sexually harassed or assaulted often experience the violence as emasculating.<sup>237</sup> Harassers aggrandize their own masculinity as “sexual aggressiveness and conquest” and degrade their victims as feminine by enforcing their “sexual vulnerability and availability.”<sup>238</sup>

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.’”<sup>239</sup> Like prisoners, free “men who transgress gender norms by exhibiting insufficient masculinity are maligned as gay,” regardless of their actual sexual orientation.<sup>240</sup> Same-sex harassers often “explicitly question the target’s sex, thereby expressing their disdain for persons who diverge from appropriate standards of masculinity . . . [T]argets are ostracized and ridiculed by harassers who object to their failure to conform, in appearance and demeanor, to prescribed gender roles.”<sup>241</sup> Men are targeted for being gay, or they are “presumed to be homosexual when they are the subject of explicit sexual advances.”<sup>242</sup> 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.<sup>243</sup>

Meanwhile, straight men’s sexual harassment of less manly men conforms to widely held gender values that, among other things, “instruct males that masculinity must be aggressively acquired by controlling people and resources.”<sup>244</sup> A manly man is aggressively heterosexual and is “expected to be the initiator of sexual relations.”<sup>245</sup> 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.

The classification of prison rapists as “straight” may seem dissonant in light of contemporary understandings of sexual identity. But, until recent decades,

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237. See Janet Halley, *Sexuality Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW*, *supra* note 10, at 182, 190 (“[T]here is nothing socially negotiable about [harassed men’s] fate ‘as men’; because of the harassment they are feminized.”) (footnote omitted).

238. Franke, *supra* note 10, at 177.

239. Dowd, *supra* note 31, at 245 (footnote omitted).

240. Axam & Zalesne, *supra* note 40, at 197; see also Schultz, *supra* note 204.

241. Axam & Zalesne, *supra* note 40, at 195.

242. Colker, *supra* note 39, at 207.

243. See Yoshino, *supra* note 40, at 448-49; see also Schwartz, *supra* note 40, at 1791.

244. James E. Robertson, *A Punk’s Song About Prison Reform*, 24 *PACE L. REV.* 527, 536 (2004).

245. Cynthia E. Willis, *The Effect of Sex Role Stereotype, Victim and Defendant Race, and Prior Relationship on Rape Culpability Attributions*, 26 *SEX ROLES* 213, 213 (1992).

many 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. Similarly, . . . male rapists of men were not seen as gay because they chose to assault men, but were rather perceived as more masculine.<sup>246</sup>

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.”<sup>247</sup> 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 (those being penetrated) are stigmatized, while tops are framed as real men—and black men are stereotyped as tops.<sup>248</sup> Thus even today, many free men, like prisoners, associate “gayness” with effeminacy and straightness with masculinity, regardless of sexual orientation.

The most significant difference between prison masculinities and the masculinities enacted in hypermasculine 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.<sup>249</sup> Prison masculinities, by contrast, are stigmatized.<sup>250</sup> Nonetheless, hypermasculine cultures both inside and outside prison call upon men to use violence to establish a straight, masculine identity. Dominant prisoners who penetrate other men present themselves—and are seen by many others in prison—as “dispassionate, and their partners [a]re merely receptacles to ensure sexual gratification.”<sup>251</sup> Twentieth-century prison sex researchers accepted this reasoning, asserting that prison rapists “experienced no sexual pleasure what-

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246. Kramer, *When Men Are Victims*, *supra* note 40, at 311 (footnotes omitted).

247. See COLLINS, *supra* note 3, at 174; Russell K. Robinson, *Structural Dimensions of Romantic Preferences*, 76 *FORDHAM L. REV.* 2787, 2815 (2008).

248. Robinson, *supra* note 247, at 2808-10.

249. See, e.g., Harris *supra* note 36, at 793 (observing that police and criminal gangs share a culture of hypermasculinity and view themselves as opposing sides in a turf war).

250. Ek, *supra* note 37, at 49.

251. Eigenberg *supra* note 63, at 419; see also *id.* (“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.”) (internal citations omitted).

soever. Instead, the prisoner rapes to prove he has power—power to dominate his prey.”<sup>252</sup>

Free men, too, use violence as an important, though by no means the only, method to express masculinity. Men serving in the police or military, as well as pop-culture action heroes, routinely engage in socially approved violence. For example, as Helen Rogan has observed, in the military as elsewhere in social life, “‘combat’ is a synonym for ‘power,’”<sup>253</sup> and Kenneth Karst has noted that both serve as markers of manhood and full citizenship.<sup>254</sup> Violence is also a 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.<sup>255</sup> 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.<sup>256</sup> As one shop-floor supervisor put it: “[I]f [the plaintiff] were a ‘real man,’ he would address the matter in a manner other than by filing a sexual harassment complaint.”<sup>257</sup> Some courts have accommodated this cultural convention through the rightly excoriated “homosexual panic” defense.<sup>258</sup> Because the Supreme Court’s Title VII jurisprudence, discussed below, has expressly left room for socially approved intermale “roughhousing,”<sup>259</sup> the allegedly unmanly targets of sexualized workplace hazing are often unprotected against severe, pervasive, and unwel-

252. KUNZEL, *supra* note 4, at 173 (internal quotation marks omitted).

253. HELEN ROGAN, *MIXED COMPANY: WOMEN IN THE MODERN ARMY* 296 (1981).

254. Karst, *supra* note 207, at 524-29.

255. See Kramer, *When Men Are Victims*, *supra* note 40, at 318 (citing examples of parents and police officers who failed to respond to the sexual abuse of young men on the basis that a real man would be able to fend off his attacker).

256. 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. Gonsalves*, 499 N.E.2d 1229, 1231 (Mass. App. 1986).

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

258. The “homosexual panic” defense, which mitigates murder to manslaughter, posits that a “reasonable” straight-identified man would respond to another man’s non-violent sexual advance with lethal violence. See, e.g., 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); Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 488 (2008); 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); 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); Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 158-77 (1992).

259. See *infra* text accompanying notes 274-276.

come sexual talk and touching by straight-identified men.<sup>260</sup> They have to “take it like a man.”<sup>261</sup> A real man should fight off his abusers, not hide behind the skirts of legal authority.

## 2. Masculinities in Title VII: The Heterosexual Defense

In the free world as in prison, the legal response to sexual harassment and abuse departs from ordinary statutory and doctrinal 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, embrace a heterosexual defense that 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,”<sup>262</sup> which it is. It “perpetuates larger cultural norms of women as both subordinate and sexually vulnerable to men.”<sup>263</sup> 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.”<sup>264</sup> Sexual harassment perpetuates heteronormative “gender norms and orthodoxies”<sup>265</sup> about “what ‘real men’ and ‘real women’ should be,”<sup>266</sup> either “by enacting these norms—as in the case of men harassing female subordinates in the workplace—or by punishing gender nonconformists.”<sup>267</sup> 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*<sup>268</sup> and *Oncale v. Sundowner*

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260. Title VII prohibits unwelcome, “severe and pervasive” harassment that constitutes “discrimination based on sex.” *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986); see also *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

261. Spindelman, *supra* note 224, at 201 (internal quotation marks omitted).

262. Franke, *What’s Wrong with Sexual Harassment*, *supra* note 40, at 693.

263. Franke, *supra* note 10, at 179; see also Franke, *What’s Wrong with Sexual Harassment*, *supra* note 40, at 728.

264. Wencelblat, *supra* note 208, at 60.

265. Franke, *supra* note 10, at 177.

266. Franke, *What’s Wrong with Sexual Harassment*, *supra* note 40, at 763.

267. *Id.*; see also Rachel L. Toker, Note, *Multiple Masculinities: A New Vision for Same-Sex Harassment Law*, 34 HARV. C.R.-C.L. L. REV. 577, 601 (1999).

268. 490 U.S. 228 (1989).

*Offshore Services, Inc.*<sup>269</sup> would seem to establish Title VII liability for enforcing gender stereotypes in the workplace. *Price Waterhouse* established that Title VII bans employment practices that require workers to conform to gender stereotypes, or punish them for failing to conform.<sup>270</sup> 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.”<sup>271</sup> If Title VII prohibits discrimination against a woman for failing to meet stereotyped expectations of femininity, as many scholars have argued,<sup>272</sup> it must also prohibit discrimination against men who fail to meet stereotyped expectations of masculinity.<sup>273</sup>

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.<sup>274</sup> Although the Court did not rely upon 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.”<sup>275</sup> Thus, it should be doctrinally clear that a man violates Title VII when he sexually harasses a male colleague for being unmanly or gay.<sup>276</sup> Many commentators have

269. 523 U.S. 75 (1998).

270. In *Price Waterhouse*, the Court found a Title VII violation when Ann Hopkins, a senior associate at the accounting firm, was told that in order to make partner, she should, among other practices, “walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry.” *Price Waterhouse*, 490 U.S. at 272 (O’Connor, J., concurring) (internal quotation marks omitted). Although she “was generally viewed as a highly competent project leader who worked long hours, pushed vigorously to meet deadlines and demanded much from the multidisciplinary staffs with which she worked,” *id.* at 234 (internal quotation marks omitted), Hopkins was denied promotion because the partners considered her unfeminine. The partners described her “abrasiveness” and as being “macho.” *Id.* at 234-35 (internal quotation marks omitted). Despite the partners’ and clients’ high praise for her professionalism and work ethic, they denied her promotion for what they called her lack of “interpersonal skills. . . . [S]he was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff.” *Id.* (internal quotation marks omitted). One partner suggested she take “a course at charm school.” *Id.* at 235 (internal quotation marks omitted).

271. *Id.* at 250.

272. See, e.g., Case, *supra* note 40, at 2; William N. Eskridge, Jr., *Theories of Sexual Harassment “Because of Sex”*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW*, *supra* note 10, at 155, 166; Franke, *supra* note 10; Franke, *What’s Wrong with Sexual Harassment*, *supra* note 40; Schwartz, *supra* note 40, at 1742; Yoshino, *supra* note 40, at 437.

273. See, e.g., Schwartz, *supra* note 40, at 1742-43.

274. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

275. *Id.* at 80.

276. See, e.g., Franke, *supra* note 10, at 178.

made this argument,<sup>277</sup> and several federal courts have endorsed it.<sup>278</sup> The courts have used this sex-stereotyping analysis to adjudicate (and punish) same-sex harassment in the context of antigay bullying in schools.<sup>279</sup> Yet even after the *Oncale* decision, many federal courts, including the Courts of Appeals of the Second,<sup>280</sup> Third,<sup>281</sup> Sixth,<sup>282</sup> and Seventh Circuits,<sup>283</sup> have continued to insist

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277. See sources cited *supra* note 272.

278. See, e.g., *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir. 2001); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999); *Doe v. Belleville*, 119 F.3d 563, 580 (7th Cir. 1997); *Centola v. Potter*, 183 F. Supp. 2d 403, 412-13 (D. Mass. 2002); cf. *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 522 n.6 (6th Cir. 2001) (Guy, J., concurring in part and dissenting in part).

279. See, e.g., *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996) (holding that a school's refusal to protect plaintiff against homophobic bullying and assaults could support an equal protection sex discrimination claim); *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001) (holding that a school's failure to protect against homophobic bullying and assaults could support a sex discrimination claim under Title IX or the Equal Protection Clause); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1092 (D. Minn. 2000) ("The Court . . . concludes that by pleading facts from which a reasonable fact-finder could infer that he suffered harassment due to his failure to meet masculine stereotypes, plaintiff has stated a cognizable claim under Title IX."). 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 are not expected to fend entirely for themselves, and their need for protection is not a failure of masculinity as it may be for a grown man. 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 underserving of legal protection. See, e.g., *Montgomery*, 109 F. Supp. 2d at 1090 ("[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.") (footnote omitted). *But see Nabozny*, 92 F.3d, at 446 (student harassed and assaulted after coming out as gay); *Henkle*, 150 F. Supp. 2d at 1067 (same).

280. E.g., *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000).

281. E.g., *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001).

282. E.g., *King v. Super Serv., Inc.*, 68 F. App'x 659 (6th Cir. 2003).

283. E.g., *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058 (7th Cir. 2003); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 707 (7th Cir. 2000)



that straight men's sexual harassment of effeminate or gender-nonconforming men is permitted by Title VII.

Unlike prison guards, federal appellate courts do not assert 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." In some cases, especially before *Oncale*, some courts assumed that same-sex sexual harassment was not sex-based because a male harasser was unlikely to harbor any animus against men as a class.<sup>284</sup> More often, federal courts have tended to rely on two other arguments: Either they assume that an avowedly straight man could not be attracted to the man he has been harassing,<sup>285</sup> or they find that harassment of a man derided as a "bitch" or a "faggot" is based on his (real or perceived) "sexual orientation," not his sex, and is therefore not prohibited by the language of Title VII.<sup>286</sup> The heterosexual de-

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("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.") (citations omitted).

284. See, e.g., *McWilliams v. Fairfax Cnty. Bd. of Supervisors*, 72 F.3d 1191, 1196 (4th Cir. 1996), *abrogated by* *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998); *Ashworth v. Roundup Co.*, 897 F. Supp. 489, 494 (W.D. Wash. 1995); *Vandeventer v. Wabash Nat'l Corp.*, 887 F. Supp. 1178, 1180-81 (N.D. Ind. 1995). As Kathryn Abrams points out, when courts adjudicate harassment cases by an unacknowledged analogy to race, it is difficult for judges to conceive of discrimination against members of a gender or racial group by members of the same group. Abrams, *supra* note 39, at 2523.
285. See, e.g., *King*, 68 F. App'x 659; *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2001); *Johnson v. Hondo, Inc.*, 125 F.3d 408 (7th Cir. 1997); *McWilliams*, 72 F.3d 1191; *English v. Pohanka of Chantilly, Inc.*, 190 F. Supp. 2d 833, 845 (E.D. Va. 2002); *Martin v. Norfolk S. Ry. Co.*, 926 F. Supp. 1044 (N.D. Ala. 1996); see also Schultz, *supra* note 204, at 1781 ("Men who make sexual overtures toward other men are presumed to be solidly heterosexual, absent proof to the contrary." (footnote omitted)).
286. 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) (per curiam). 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, *supra* note 40, at 1791 (footnotes omitted); see *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (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."); see also, e.g., *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005); *Hamm*, 332 F.3d at 1062; *Bibby*, 85 F. Supp. 2d 509; *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000); *Hamner*, 224 F.3d at 707.

fense, in its contemporary iteration as “sexual orientation, not sex,” continues to persuade the courts in many circuits, in part because of their reluctance to “bootstrap protection for sexual orientation into Title VII.”<sup>287</sup>

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. 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 somehow be 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 amount to sex discrimination.<sup>288</sup> Where the alleged same-sex harasser is not gay, though, the Court suggests that additional evidence might be required: for example, that the harassment was “motivated by general hostility” toward workers of the plaintiff’s sex, or that the harasser treated men and women differently in the workplace.<sup>289</sup> Thus one plausible reading of *Oncale* is that it creates a rebuttable presumption that unwelcome, severe, and pervasive same-sex sexual talk and touching by straight-identified men (or women) does not amount to sex discrimination.

Moreover, the *Oncale* Court sought to preserve a zone of permissible same-sex “horseplay” that might survive its holding. Disavowing any effort to establish “a general civility code for the American workplace,”<sup>290</sup> Justice Scalia’s opinion reassured us that courts and juries would use “[c]ommon sense” to distinguish “severely hostile or abusive” harassment from “simple teasing or roughhousing among members of the same sex.”<sup>291</sup>

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.<sup>292</sup>

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287. Kramer, *Heterosexuality and Title VII*, *supra* note 40, at 207 (internal quotation marks omitted).

288. *Oncale*, 523 U.S. at 80. As the *Oncale* Court points out, in cases of man-woman sexual harassment, the courts find “the inference of discrimination easy to draw in most male-female sexual harassment situations,” because the courts find it “reasonable to assume those proposals would not have been made to someone of the same sex.” *Id.* 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.” Halley, *supra* note 237, at 191.

289. *Oncale*, 523 U.S. at 80-81.

290. *Id.* at 80.

291. *Id.* at 82.

292. *Id.* at 81.

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 federal 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, Ann Juliano and Stewart Schwab found that the type of workplace had no significant impact on the outcome of Title VII sexual harassment claims.<sup>293</sup> Yvonne Zylan's 2006 survey of post-1998 cases found that *Oncale* had not changed this pattern much.<sup>294</sup> Courts have permitted homophobic sexual harassment in workplaces as diverse as a construction site,<sup>295</sup> a mailroom,<sup>296</sup> a private police service,<sup>297</sup> and an upscale hair salon.<sup>298</sup> 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 protect widely held gender expectations rather than individual workplace cultures.

Furthermore, 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,<sup>299</sup> even if he is not attracted to his target,<sup>300</sup> and even if he is gay.<sup>301</sup> There is no inquiry into the ha-

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293. Juliano & Schwab, *supra* note 10, at 594 app. A (finding that neither plaintiffs' occupational status—blue-collar, clerical, management, professional, or white-collar—nor the gender demographics of the workplace—mostly male, mostly female, or both—had a statistically significant impact on their success rates in Title VII claims).
294. Yvonne Zylan, *Finding the Sex in Sexual Harassment: How Title VII and Tort Schemes Miss the Point of Same-Sex Hostile Environment Harassment*, 39 U. MICH. J.L. REFORM 391, 404-05 (2006).
295. *E.g.*, EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498 (6th Cir. 2001).
296. *E.g.*, Dillon v. Frank, No. 90-2290, 1992 U.S. App. LEXIS 766 (6th Cir. Jan. 15, 1992).
297. *E.g.*, Vickers v. Fairfield Med. Ctr., 453 F.3d 757 (6th Cir. 2006).
298. *E.g.*, Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2005).
299. *Cf.* Abrams, *supra* note 39, at 2514-15 (distinguishing Showalter v. Allison Reed Grp., 767 F. Supp. 1205 (D.R.I. 1991), from Goluszek v. Smith, 697 F. Supp. 1452 (N.D. Ill. 1988)).
300. *E.g.*, Pease v. Alford Photo Indus., Inc., 667 F. Supp. 1188, 1202 (W.D. Tenn. 1987).
301. *E.g.*, Miller v. Edward Jones & Co., 355 F. Supp. 2d 629, 638 (D. Conn. 2005) (rejecting the defendant's argument that the gay sexual orientation of the alleged harasser "negate[d] any possible inference that [the defendant] could have harassed [the plaintiff] on the basis of her sex" and noting that "[h]arassing conduct need not be motivated by a sexual desire to support an inference of discrimination on the basis of sex." (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998))); *see also* Alphonse v. Omni Hotels Mgmt. Corp., 643 So. 2d 836, 839 (La. Ct. App. 1994).

rasser's sexual orientation. Even if he targets a woman like Ann Hopkins because he thinks she is unfeminine, his behavior is (or should be)<sup>302</sup> recognized as prohibited discrimination based on "sex," not permissible discrimination based on her unfeminine demeanor.<sup>303</sup> Thus the heterosexual defense can hardly be argued to be required by the text or jurisprudence of Title VII.

In cases of male-male sexual harassment, many Title VII courts reject a sex-stereotyping argument that is well established in Title VII doctrine, instead creating an unprincipled exception for pervasive, unwelcome sexual behavior that is objectively severe, pervasive, and usually violent. As Katharine Franke and Kenji Yoshino contend, this pattern may reflect a judicial determination to deny any homoerotic content in socially approved forms of hierarchy among men. The "horseplay" exemption preserves the heterosexual identity of straight men who sexually harass and abuse other men, and safeguards those "homosocial acts [that] are so valued that they cannot afford to be tainted with homosexuality."<sup>304</sup> 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."<sup>305</sup> 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.

Meanwhile, gay (or lesbian) same-sex harassers are held liable for severe, pervasive, and unwelcome workplace conduct that straight men are in practice allowed to inflict on them.<sup>306</sup> Even after *Oncale*, male plaintiffs who bring Title VII lawsuits against straight-identified male harassers almost always lose.<sup>307</sup>

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302. *But see Dawson*, 398 F.3d 211 (excusing the sexual harassment and dismissal of a lesbian hairdressing trainee because it was based on "sexual orientation," not sex); *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076 (9th Cir. 2004) (upholding the dismissal of a female casino card dealer for failing to wear makeup in accordance with a grooming code that required makeup for women and forbade it for men).

303. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

304. Yoshino, *supra* note 40, at 457; *see also Franke, Putting Sex to Work, supra* note 40, at 1149; Wencelblat, *supra* note 208, at 63.

305. Karst, *supra* note 207, at 545 (footnote omitted).

306. *See Schwartz, supra* note 40, at 1746-47; *see also Schultz, supra* note 204, at 1785; Yoshino, *supra* note 40, at 435-36.

307. *See Juliano & Schwab, supra* note 10, at 587 (finding that pre-*Oncale* claims brought against male harassers who were straight-identified were "uniformly unsuccessful"); Zylan, *supra* note 294, at 404-05 (reporting that post-*Oncale* lesbian and gay plaintiffs continue to lose same-sex sexual harassment cases, while claims against gay or lesbian harassers are "almost uniformly" successful); *see also Colker, supra* note 39, at 207 ("[T]he courts have added 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.").

Thus, “gay men and lesbians find themselves practically and symbolically excluded from workplace protections afforded heterosexuals.”<sup>308</sup>

In practice, same-sex sexual harassment is prohibited only if the harasser is gay. If he is straight, such behavior is often allowed. As Franke and Yoshino observe, same-sex sexual harassment is treated in law as a status crime,<sup>309</sup> actionable only when a gay man harasses a straight man—and not the other way around. Thus, courts, like prison officials, often recognize a heterosexual defense, diverging from formal legal rules that ostensibly prohibit same-sex sexual abuse to selectively permit sexual abuse when it reinforces traditional norms of masculinity. In court, the heterosexual defense protects the honor of straight men against sexual affront by gay men; in prison, guards selectively allow fighting as an appropriate response to sexual affront. As prison practice does, Title VII jurisprudence often excludes gay men and other purported gender-nonconformists from protections against sexual harassment and abuse even as it rewards straight-identified manly men with sexual freedom and the authority to police the gender conformity of unmanly men by sexually harassing them.<sup>310</sup> While the federal courts do not authorize workplace rape, we see the heterosexual defense replicated in prison, in a more violent form.

### III. THE OFFICIAL NARRATIVE OF BLACK-ON-WHITE RAPE

As we have seen in Part II, the institutional response to prison sexual abuse is often 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: They often portray prison rape as a black-on-white crime. As I show in this Part, the black-on-white rape myth lacks a sound empirical foundation, and it is contradicted by the results of the five large-scale victimization surveys that have been conducted to date.

Many guards, courts, and correctional authorities, as well as prisoners, understand prison rape to be mostly, or disproportionately, committed by black men against vulnerable whites. This Part unpacks the narrative practices by which guards, courts, and the Bureau of Justice Statistics reinforce, however unintentionally, the impression that prison rape is disproportionately black-on-white. Like accounts of black-on-white rape in the outside world, the prison ac-

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308. Zylan, *supra* note 294, at 392.

309. See Franke, *supra* note 10, at 177; see also Yoshino, *supra* note 40, at 435.

310. Franke, *supra* note 10, at 177-78. Franke 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.* at 177; see also Axxam & Zalesne, *supra* note 40, at 198 (“[D]erisions 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.” (footnote omitted)).

count serves ideological purposes unrelated to the safety of white victims. It obscures institutional responsibility for inmate rape, reinforces racialized fear of crime, and bolsters calls for racial segregation in prisons.

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 a natural or inevitable outcome of racial interaction or conflict, obscuring the gendered institutional practices that condone it. In this Part, I contend that, 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 difficult undertaking”<sup>311</sup> of prison administration. Prison violence then offers a reason for courts not to interfere with the institutional policies that foster it.

### A. *The Black-on-White Prison Rape Myth: The Evidence*

Many contemporary academic commentators assert, without attribution or by citing to thirty-year-old sources,<sup>312</sup> that prison rape typically involves black

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311. *Turner v. Safley*, 482 U.S. 78, 85 (1987).

312. In 2006, for example, Nancy Wolff and her coauthors relied on only two sources to claim that “inmate-on-inmate sexual victimization has an interracial bias, with victims most likely being White and sexual aggressors most likely being Black” even though her own survey research had found no statistically significant racial variation in sexual victimization by inmates. Wolff et al., *supra* note 56 at 836 (citing LEO CARROLL, *HACKS, BLACKS, AND CONS: RACE RELATIONS IN A MAXIMUM SECURITY PRISON* (1974); HANS TOCH, *LIVING IN PRISON: THE ECOLOGY OF SURVIVAL* (1977)). In 2004, Mark Fleisher and Jessie Krienert asserted, on the basis of research conducted between 1974 and 1975, that in “modern decades,” prison “sexual aggression often has racial overtones.” FLEISHER & KRIENERT, *supra* note 1, at 41-42, 51 (citing DANIEL LOCKWOOD, *PRISON SEXUAL VIOLENCE* (1980)). In 2001, William Pinar cited numerous sources published between 1964 and 1984 as evidence that black-on-white “[s]exual attacks are still feared in prisons today” and that prison rape is a means for black prisoners to seek racial vengeance. PINAR, *supra* note 143, at 1031-32; *see also id.* at 1032-60 (reviewing the literature on interracial prison victimization). Finally, in 1999, James Robertson claimed that “African-American inmates disproportionately comprise the population of sexual harassers” and that most victims are white. James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1, 18-19 (1999) (citing LOCKWOOD, *supra*, at 104-05; Alan J. Davis, *Sexual Assaults in the Philadelphia Prison System and Sheriff's Vans*, TRANS-ACTION, Dec. 1968, at 8, 15; Richard Tewksbury, *Fear of Sexual Assault in Prison Inmates*, PRISON J., Apr. 1989, at 62, 63). Other examples include: Gordon James Knowles, *Male Prison Rape: A Search for Causation and Prevention*, 38 HOWARD J. CRIM. JUST. 268, 275-80 (1999); Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for “Deliberate Indifference”*, 92 J. CRIM. L. & CRIMINOLOGY 127, 158-64 (2001); Ian O'Donnell, *Prison Rape in Context*, 44 BRIT. J. CRIMINOLOGY 241, 247-

men attacking vulnerable whites. The sources relied upon by these authors, mainly from the late 1960s, 1970s, and early 1980s,<sup>313</sup> share significant methodological flaws. In 2004, Gerald Gaes and Andrew Goldberg, senior research scientists at the National Institute of Justice, conducted a comprehensive meta-analysis of the existing prison rape research literature as part of the Bureau of Prisons' research efforts pursuant to the Prison Rape Elimination Act (PREA).<sup>314</sup> Gaes and Goldberg and other analysts<sup>315</sup> have identified serious me-

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48, 250 (2004); Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Reported by Men and Women in Prison*, 33 J. SEX RES. 67, 71 (1996) [hereinafter Struckman, *Prison*]; Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 PRISON J. 379 (2000) [hereinafter Struckman, *Midwestern Prison Facilities*].

Several commentators exaggerate or misstate others' research findings to support more extreme formulations of the black-on-white rape narrative. Gordon James Knowles, for example, claimed in 1999 that "blacks continually and almost exclusively rape whites in prison." Knowles, *supra*, at 268. 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. He also cites Adam Starchild, an incarcerated white-collar criminal, who claims that "studies by sociologists suggest that more than 90% of rapes are inter-racial," but provides no citation or attribution. *Id.* at 275 (citing Adam Starchild, *Rape of Youth in Prisons and Juvenile Facilities*, 18 J. PSYCHOHISTORY 145, 145 (1990)).

313. The sources most often cited as authority for the assertion that most prison rape is black-on-white include: A.J. Davis, *Report on Sexual Assaults in the Philadelphia Prison System and Sheriff's Vans*, in *SEXUAL DEVIANCY IN SOCIAL CONTEXT* (C. Byrant ed., 1968) (cited by O'Donnell, *supra* note 312, at 243, 246, 247); LOCKWOOD, *supra* note 312 (cited by Man & Cronan, *supra* note 312, at 129, 163, 168; O'Donnell, *supra* note 312, at 243, 244, 246-48, 252); ANTHONY M. SCACCO, JR., *RAPE IN PRISON* (1975) (cited by Knowles, *supra* note 312, at 276, 279; Man & Cronan, *supra* note 312, at 151); TOCH, *supra* note 312 (cited by Man & Cronan, *supra* note 312, at 151, 163-64, 173; Wolff et al., *supra* note 56, at 835); Nobuhle R. Chonco, *Sexual Assaults Among Male Inmates: A Descriptive Study*, PRISON J., Apr. 1989, at 72 (cited by Man & Cronan, *supra* note 312, at 153, 159, 164-66, 171, 173, 175); Nacci & Kane, *supra* note 174, at 31 (reporting on a 1982 Bureau of Prisons survey); Struckman, *Prison*, *supra* note 312; Struckman, *Midwestern Prison Facilities* (cited by Man & Cronan, *supra* note 312, at 161, 179, 184; O'Donnell, *supra* note 312, at 246-47, 252).
314. GERALD G. GAES & ANDREW L. GOLDBERG, *PRISON RAPE: A CRITICAL REVIEW OF THE LITERATURE* (2004), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/213365.pdf>.
315. See, e.g., Eigenberg, *supra* note 72, at 39 (noting that LOCKWOOD, *supra* note 312, and WAYNE S. WOODEN & JAY PARKER, *MEN BEHIND BARS: SEXUAL EXPLOITATION IN PRISON* (1982), based their studies on "populations of victims which have been formally identified by prison officials," rather than on random samples of the prison population); Wolff et al., *supra* note 56, at 836-37 (critiquing the representativeness, validity, and reliability of pre-2006 prison rape studies).

thodological limitations in all the sources that are commonly cited as evidence of the black-on-white prison rape story (as well as with every other prison rape study conducted prior to 2004).<sup>316</sup> These limitations, Gaes notes:

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.<sup>317</sup>

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316. See GAES & GOLDBERG, *supra* note 314, at 7-25, 28-54.

317. GERALD G. GAES, REPORT TO THE REVIEW PANEL ON PRISON RAPE IN THE BUREAU OF JUSTICE STATISTICS STUDY SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORTED BY INMATES, 2007, at 3 (2008), available at [http://www.ojp.usdoj.gov/reviewpanel/pdfs\\_mar08/testimony\\_gaes.pdf](http://www.ojp.usdoj.gov/reviewpanel/pdfs_mar08/testimony_gaes.pdf). Gaes and Goldberg note that none of the problematic studies, see *supra* note 313, except the work of Nacci and Kane, used a jurisdiction-wide probability sample. GAES & GOLDBERG, *supra* note 314, at 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 them 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 (30% or less), 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.* at 35.

For example, Alan Davis, a district attorney, estimated the incidence of prison rape based on interviews of prisoners conducted by himself, his staff, and police officers between 1966 and 1968. See Davis, *supra* note 312. Anthony Scacco appears to have done no original research but relies heavily on Davis’s 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, Jr., *supra* note 313, at 47. Daniel Lockwood’s study, *supra* note 312, was based on personal interviews of eighty-nine prisoners in two New York prisons. Of these subjects, only one had been sexually assaulted, while another reported having been sexually pressured. Gaes and Goldberg excluded TOCH, *supra* note 312, from their literature review since it appeared that Toch was reusing the survey data obtained by Lockwood. GAES & GOLDBERG, *supra* note 314, at 20. Nobuhle Chonco did not purport to conduct a survey of incidence or prevalence prison rape but interviewed forty prison inmates “to explain why African Americans chose whites as their victims in a sexual assault.” *Id.* at 22. Chonco concluded that “perceived weakness and naivety, rather than race was a more salient factor leading toward victimization.” *Id.* Finally, Struckman-Johnson and Struckman-Johnson, *supra* note 313, and Struckman-Johnson et al., *supra* note 313, used paper-and-pencil questionnaires completed by inmates in their cells and returned to researchers by mail, a procedure that Gaes and Goldberg observe “is probably not the most reli-



Nonetheless, the black-on-white rape myth seems to have entered the conventional wisdom about prison rape.<sup>318</sup> This belief is not limited to prisoners, correctional authorities, and academics. Even some human rights advocates as-

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able way to collect these type of data” due to the probability that participants “could have discussed the survey with each other before returning the questionnaire. . . . [This fact] 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.” GAES & GOLDBERG, *supra* note 314, at 10-11. The Struckman-Johnson studies used convenience samples (rather than randomized probability samples) of four Nebraska prisons and seven Midwestern prisons. *Id.* at 8. Although the response rates were 28.7% and 25% respectively, the Struckman-Johnsons and their colleagues did not adjust survey results using stratification procedures or assess non-respondents’ reasons for refusing to answer the survey. *Id.* at 34-35. The 1996 survey respondents overrepresented whites relative to the prison population and also overrepresented older inmates and “offenders who committed crimes against persons.” *Id.* at 34. The 2000 study, Gaes and Goldberg point out, “also raises questions of validity since no attempt was made to assess the representativeness of the sample” and due to “such a low unit response rate, and a lack of information to compare the survey and population characteristics, it is impossible to know how to adjust the victimization estimates to make them valid estimates of the actual level of victimization.” *Id.* at 35.

Probably the most reliable of the flawed studies used to support the black-on-white account of prison rape derive from reports on a sexual victimization study conducted by Peter Nacci and Thomas Kane, two social scientists with the Federal Bureau of Prisons. Gaes and 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 jurisdiction” *Id.* at 13. Their study obtained what Gaes and 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.” *Id.* (internal quotation marks omitted). Gaes and Goldberg 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, *id.* at 14, and they do not provide data or statistical evidence to support the conclusions they draw from the studies.

For example, Nacci and Kane observe that inmates and staff “believe that the likelihood of sexual assault is greater when the population is comprised by a greater proportion of blacks, relative to whites,” which would represent “a general belief that black inmates are more aggressive and the data reveal that there are relatively more black assailants.” Nacci & Kane, *supra* note 174, at 50. They do not provide, however, the statistical data that support these claims. Likewise, Nacci and Kane 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.* at 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.

318. See *supra* notes 312-313 and accompanying text.

sert that prison rape is typically committed by violent black men against vulnerable whites.<sup>319</sup> Congress, too, embraced the myth in the congressional findings of the PREA: “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.”<sup>320</sup> Likewise, even after the publication of several large-scale victimization surveys whose results contradict the black-on-white stereotype of prison rape, the 2009 recommendations of the National Prison Rape Elimination Commission (NPREC) asserted, without evidence, that “being in the racial minority within a given facility characterized by marked racial tension” constitutes a risk factor for sexual victimization.<sup>321</sup>

All six large-scale victimization surveys conducted since 2006 address the methodological deficiencies of the earlier studies.<sup>322</sup> Their results contradict the

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319. Human Rights Watch, for example, claims that prison rape often involves a black aggressor and a white victim. See *No Escape: Male Rape in U.S. Prisons*, Human Rights Watch (2001), [www.hrw.org/reports/2001/prison/report.html](http://www.hrw.org/reports/2001/prison/report.html). Progressive prisoners’ rights advocates, such as Lara Stemple, former president of Stop Prisoner Rape (now Just Detention International), accepted—based on the limited and flawed data available in 2005—the empirical possibility that prison rape was often interracial and that “white inmates are the ones who are most often targeted in prison.” (At the time, no rigorous empirical surveys of prison sexual victimization had yet been conducted, so no data existed to contradict the stereotypical racial findings of studies conducted before 2004.) Wash. Coal. of Sexual Assault Programs, *Interview with Lara Stemple, JD Executive Director of Stop Prisoner Rape*, RES. & ADVOC. DIG., May 2005, at 3, 4. Nonetheless, Stemple challenged the disproportionate focus on white prisoners as victims, pointing out that because of the “disproportionately high rates of incarceration” of African-Americans, “young black men are more overwhelming [sic] likely to go to prison and therefore are at higher risk.” *Id.*

320. Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, § 2(9), 117 Stat. 972, 973.

321. NAT’L PRISON RAPE ELIMINATION COMM’N, STANDARDS FOR THE PREVENTION, DETECTION, RESPONSE, AND MONITORING OF SEXUAL ABUSE IN ADULT PRISONS AND JAILS 29 (2009) [hereinafter NPREC STANDARDS], available at <http://www.ncjrs.gov/pdffiles1/226682.pdf>. Nationwide, white inmates comprise about one-third of the male prison population. A plurality is African-American, and nearly two-thirds are nonwhite, i.e., black, Latino, mixed, or “other.” See *supra* note 79 and accompanying text. In the circumstances and context of a widely held, though erroneous, stereotype of interracial rape, “being in the racial minority within a given facility” seems to be a euphemism for “being white.”

322. The six studies are: BJS 2008-09 PRISONS AND JAILS REPORT, *supra* note 10; BJS 2008-09 JUVENILE REPORT, *supra* note 80; BJS 2007 JAILS REPORT, *supra* note 10 (reporting on the 2007 NIS); BJS 2007 PRISONS REPORT, *supra* note 10 (same); JENNESS ET AL., *supra* note 56 (using a statewide randomized probability sample of California state prisons); Wolff et al., *supra* note 56 (reporting on a statewide randomized probability sample of state prisons in an unidentified state); and Wolff et al., *supra* note 78 (reporting on the same 2006 survey).

black-on-white account of prison rape, and they indicate that most victims of prison sexual violence are nonwhite.<sup>323</sup> The most robust of these surveys are the 2007 and 2008-2009 National Inmate Surveys (NIS) conducted by the Bureau of Justice Statistics (BJS). Gerald Gaes describes the NIS as “the most comprehensive and systematic assessment of sexual victimization in prisons that has ever been conducted.”<sup>324</sup> In 2008-2009, the BJS surveyed a nationwide probability sample of more than 81,500 inmates in 167 state and federal prisons and 286 local jails nationwide.<sup>325</sup> The BJS also produced two reports based on its 2007 NIS: one summary of findings on sexual victimization in state and federal prisons<sup>326</sup> and a more detailed report on sexual victimization in local jails.<sup>327</sup>

Two other statewide victimization surveys were published at about the same time. In 2006, Nancy Wolff, an economist at Rutgers University, and her colleagues surveyed a statewide probability sample of 6,694 male inmates (and 594 women inmates) in an unidentified state.<sup>328</sup> In 2007, Valerie Jenness and her colleagues surveyed a statewide probability sample in California prisons for the California Department of Corrections.<sup>329</sup>

Unlike the sources relied on in support of the black-on-white prison rape narrative, all these surveys, as well as the BJS’ 2008-2009 victimization survey of incarcerated youth,<sup>330</sup> used randomized probability samples representative of the entire jurisdiction surveyed; they had large sample sizes and (except the

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323. See *supra* notes 77-86 and accompanying text.

324. GAES, *supra* note 317, at 2.

325. The BJS surveyed 32,029 inmates held in state and federal prisons and 48,066 inmates held in local jails. BJS 2008-09 PRISONS AND JAILS REPORT, *supra* note 10, at 6. In 2007, the BJS surveyed more than 63,000 inmates of state and federal prisons and local jails. BJS 2007 JAILS REPORT, *supra* note 10, at 1.

326. BJS 2007 PRISONS REPORT, *supra* note 10.

327. BJS 2007 JAILS REPORT, *supra* note 10.

328. Wolff et al., *supra* note 56 (reporting on a statewide randomized probability sample of state prisons in an unidentified state); and Wolff et al., *supra* note 78. The underlying survey, though methodologically sound, obtained only a 39% response rate, which led the authors to caution that their findings “may not generalize to the full population.” Wolff et al., *supra* note 56, at 842.

329. JENNESS ET AL., *supra* note 56, at 13-16. This survey, although also methodologically sound and yielding a high response rate of 85-93%, had a relatively low sample size (370 respondents), which led the authors to caution against rash generalizations based on their findings. Unlike the BJS and Wolff et al. surveys, the Jenness et al. survey (which sought qualitative as well as quantitative data about prison sexual abuse) was conducted using in-person interviews rather than an audio-based, computer-assisted, self-administered survey.

330. BJS 2008-09 JUVENILE REPORT, *supra* note 80.

Wolff et al. survey) obtained high response rates;<sup>331</sup> they analyzed differences between survey respondents and nonrespondents and weighted their statistical findings accordingly;<sup>332</sup> they used clear and precise questions that defined sexual victimization consistently;<sup>333</sup> and the BJS and Wolff et al. surveys used audio-based, computer-assisted, self-administered surveys, the gold standard of social science research methodology for questionnaires about sensitive or stigmatized behavior.<sup>334</sup> These surveys, and particularly the NIS, provide the best available evidence of current patterns of sexual victimization in prison.<sup>335</sup>

Unlike the impressionistic older studies, the results of these surveys tend to contradict the stereotype that prison rape is disproportionately black-on-white. The 2007 NIS found that black, Latino, mixed, and “other” prisoners were all *more likely* than whites to say they had been sexually assaulted in prison.<sup>336</sup> Jen-

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331. See *supra* note 328. The BJS’s 2007 NIS obtained response rates of 67% in jails and 72% in prisons. BJS 2007 JAILS REPORT, *supra* note 10, at 1; BJS 2007 PRISONS REPORT, *supra* note 10, at 2. Its 2008-2009 NIS obtained response rates of 68% in jails and 71% in prisons. BJS 2008-09 PRISONS AND JAILS REPORT, *supra* note 10, at 28-29. Jenness et al. surveyed 370 inmates in 7 California jails, obtaining a response rate of 85.3% in the general population and 93.5% of the transgender sample. JENNESS ET AL., *supra* note 56, at 21.
332. See, e.g., GAES, *supra* note 317, at 5 (discussing the methodology in BJS 2007 PRISONS REPORT, *supra* note 10).
333. *Id.* at 3. The BJS defines sexual victimization as “all types of sexual activity, e.g., oral, anal, or vaginal penetration; hand jobs; touching of the inmate’s buttocks, thighs, penis, breasts, or vagina in a sexual way; abusive sexual contacts; and both willing and unwilling sexual activity with staff.” BJS 2008-09 PRISONS AND JAILS REPORT, *supra* note 10, at 31.
334. GAES, *supra* note 317, at 3 (“Research has demonstrated [audio computer-assisted self-interview] techniques are better than other survey methods to elicit responses to sensitive questions.”); GAES & GOLDBERG, *supra* note 314, at 39-44 (reviewing social science research on the validity of different methods of survey administration and finding that self-administered computer surveys, with audio features to “reduce literacy problems” generate the highest and most accurate levels of reporting of stigmatized behaviors such as abortion, unmarried or same-sex sex, and drug use).
335. This fact does not imply that the victimization survey results perfectly capture the dynamics of sexual abuse in prison. The BJS cautions that in spite of “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.” BJS 2007 PRISONS REPORT, *supra* note 10, at 2. 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, *supra* note 317, at 6.
336. BJS 2007 JAILS REPORT, *supra* note 10, at 6 (documenting that 4.2% of prisoners of “two or more races” reported sexual victimization, as did 4.1% of “other” prison-

ness and her colleagues found in their California survey that black prisoners were more likely than nonblacks to say they had been sexually assaulted.<sup>337</sup> While Wolff did not ask about the race of the perpetrator,<sup>338</sup> and the BJS asked the question but did not publish the results,<sup>339</sup> Jenness found that most sexual assault occurred among members of the same ethnic group.<sup>340</sup> Wolff's survey found no statistically significant relationship between race and sexual victimization by inmates.<sup>341</sup> In 2010, the BJS found that multiracial prisoners faced a significantly elevated risk of sexual abuse by inmates, and black prisoners faced a significantly elevated risk of sexual abuse by staff, but that the higher rates of inmate sexual victimization reported by white prisoners were explained by non-racial factors.<sup>342</sup> None of these victimization surveys substantiates the conventional wisdom that white prisoners are targeted by nonwhite prisoners for sexual abuse. Rather, since about two-thirds of inmates are black, Latino, mixed or "other,"<sup>343</sup> it is likely that a large majority of victims of prison sexual abuse are nonwhite.

*B. The Cultural Specter of Interracial Rape: Black Violence and White Vulnerability*

Guards, prisoners and courts, as well as many outside observers, understand prison rape to be largely a black-on-white phenomenon.<sup>344</sup> As one white inmate put 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

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ers, 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, the BJS report on state and federal prisons did not provide a racial breakdown of sexual victimization. See BJS 2007 PRISONS REPORT, *supra* note 10.

337. JENNESS ET AL., *supra* note 56, at 55.

338. Wolff et al., *supra* note 56, at app. 845-46.

339. See *supra* note 76.

340. JENNESS ET AL., *supra* note 56, at tbl.12 (reporting that 82.8% of prison sexual assaults were intraracial).

341. Cf. Wolff et al., *supra* note 56, at 844 ("Overall, rates of sexual victimization were found to vary significantly by gender, age, perpetrator (inmate or staff), question wording, and facility.").

342. See *supra* notes 80-83 and accompanying text.

343. See *supra* note 79 and accompanying text.

344. See *supra* notes 71-73 and accompanying text.

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."<sup>345</sup>

This belief (and its conflation of interracial dating with interracial rape) exemplifies a longstanding and powerful cultural trope in the outside world: the specter of black-on-white interracial rape.<sup>346</sup> Although most sexual assault occurs between men and women of the same race who know each other,<sup>347</sup> police, prosecutors, judges, and jurors have traditionally dealt with 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.<sup>348</sup> As Susan Estrich and others have observed, only in cases of "real rape" has sexual harassment or assault consistently been treated as "a serious crime."<sup>349</sup> Today, prosecutors continue to cite deviations from the "real rape" scenario as reasons to reject cases for prosecution.<sup>350</sup>

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."<sup>351</sup> Sexual assaults upon white victims remain more likely than sexual

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345. FLEISHER & KRIENERT, *supra* note 1, at 170 (italics in original).

346. See *supra* note 87 and accompanying text.

347. MICHAEL R. RAND, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION, 2008, at 5 tbl.6 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cv08.pdf> (reporting that 63% of sexual assaults on women and 100% of all—admittedly rare—sexual assaults on men were committed by nonstrangers, i.e., intimate partners, relatives, friends, or acquaintances of the victim).

348. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1089 & n.2 (1986).

349. See, e.g., Estrich, *supra* note 10, at 813; Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1, 39 (2006).

350. Pokorak, *supra* note 349, at 43-44.

351. Tellis & Spohn, *supra* note 89, at 252; see also DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 162-64 (1990) (claiming that, in general, violent crimes against white victims receive longer sentences than violent crimes against nonwhite victims and that black defendants tend to be treated more harshly than white defendants, especially if their victims are white); David C. Baldus et al., *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) (same); Christopher D. Maxwell, Amanda L. Robinson & Lori A. Post, *The Impact of Race on the Adjudication of Sexual Assault and Other Violent Crimes*, 31 J. CRIM. JUST. 523, 534 (2003) (citing studies indicating 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).

assaults upon nonwhites to be investigated and tried, to result in conviction, and to result in longer sentences—especially if the assailant is black.<sup>352</sup>

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 "that feature[s] 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."<sup>353</sup> In both gay and straight cultures, "stereotypes about the sexual abilities of African American men often emphasize their male prowess."<sup>354</sup> The "huge penis" is depicted "as a feature that distinguishes Black men from White men."<sup>355</sup> These pornographic representations reflect a more general racialized gender stereotype that frames black men as being stronger, more violent, and more sexual than white men.<sup>356</sup>

Thus the myth of the black rapist is not restricted to heterosex. In pornography as elsewhere in popular culture, black men are cast 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 *Black Bros and*

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352. *Id.*; see also Cassia Spohn, Dawn Beichner & Erika Davis-Frenzel, *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the "Gateway to Justice,"* 48 *SOC. PROBS.* 206, 224 tbl.3 (2001) (reporting that, among sexual battery cases cleared for arrest, 58.1% of all rejections and dismissals of charges involved black victims, while only 31.1% involved white victims).

353. COLLINS, *supra* note 3, at 161.

354. Gail Elizabeth Wyatt, *The Sociocultural Context of African American and White American Women's Rape*, 48 *J. SOC. ISSUES* 77, 79 (1992).

355. COLLINS, *supra* note 3, at 161.

356. As Angela Harris points out, "racist stereotypes leave room for a sneaking desire and envy on the part of white men for the supposed sexual potency, athleticism, and sensual physicality of black men," which leads to a scenario in which "men divided by racial power may look at one another with admiration, envy, or desire." Harris, *supra* note 36, at 784; see also BEDERMAN, *supra* note 87, at 86 ("[Civilized white men at the turn of the century] could be recognized by the European bodily traits, which contrasted utterly with the coarse features of the stereotypical 'savage.' [White men] were distinguished by their 'fine soft hair, delicate skin, nicely chiselled features.'"); ELDRIDGE CLEAVER, *SOUL ON ICE* 164 (1968) (portraying white men (Omnipotent Administrators) as idealizing the physical aspects of black men (Supermasculine Menials)).

*White Twinks* make clear who does what to whom in interracial gay porn.<sup>357</sup>

The pervasive cultural myth of white vulnerability to hypermasculine black sexual aggression shapes institutional, popular, and legal perceptions of the racial dynamics of prison rape.

### C. *The Racial Rape Myth: Legal Exceptionalism*

Prison rape is not disproportionately black-on-white. Nonetheless, many people involved in prisons and their administration—prisoners, guards and administrators, Congress, academics and even some human rights advocates—continue to believe that it is. In prison as outside, the specter (or fantasy) of black-on-white prison rape furnishes a quasi-legitimate reason to depart from ordinary legal rules, often allowing judges, juries, and prison administrators to do what feels right—which is to enforce gender stereotypes in place of formal law.

Traditionally, judges and juries tended to exempt allegations of black-on-white rape from the usual requirements of force and consent, which were often fulfilled by gendered racial stereotype.<sup>358</sup> Police, prosecutors, and fact-finders often presumed that “no White woman would ever consent to sex with a Black man,”<sup>359</sup> unless she were a prostitute. 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 sexual past was considered dubious at best.”<sup>360</sup> Because respectable white women are stereotyped as virtuous and vulnerable,<sup>361</sup> the racism of the black-rapist myth often supplanted the usual skepticism toward women who reported sexual assaults.

In prison law, likewise, the black-on-white rape narrative can signal a departure from the ordinary legal rules in favor of the gendered exercise of administrative discretion. In *Dothard v. Rawlinson*,<sup>362</sup> for example, the Supreme Court invoked a racialized specter of interracial rape as it rejected a Title VII challenge by Dianne Rawlinson, a white woman, to an Alabama law that excluded women from 75% of Alabama correctional jobs.<sup>363</sup> The Court found sex to be a bona fide occupational qualification because Alabama prisons were “characterized by

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

358. Estrich, *supra* note 10, at 813-14.

359. Pokorak, *supra* note 349, at 22.

360. Estrich, *supra* note 10, at 813.

361. See, e.g., Ehrenreich, *supra* note 39, at 274.

362. 433 U.S. 321 (1977).

363. *Id.* at 327-28.



'rampant violence' and a 'jungle atmosphere,'" which a district court had found to be "constitutionally intolerable."<sup>364</sup> The Supreme Court found an unacceptable risk that prisoners would sexually assault women, like Rawlinson, if they were employed as guards.<sup>365</sup>

The *Dothard* Court acknowledged that "[t]he environment in Alabama's penitentiaries is a peculiarly inhospitable one for human beings of whatever sex."<sup>366</sup> But *men* were the victims of the rampant physical and sexual violence the court cited as a valid reason to exclude *women*. Rawlinson's "womanhood," the Court held, could "directly reduce[]" her "relative ability to maintain order in a male, maximum-security, unclassified penitentiary of the type Alabama now runs."<sup>367</sup> By administering its prisons in unconstitutional ways that lent credibility to the prospect of black-on-white rape,<sup>368</sup> Alabama was able to justify sex discrimination that would have been prohibited if the state had complied with its constitutional obligations.

The black-on-white rape narrative implies that prison rape is a normal or expected result of racial interaction in prison, so that prison administrators are not to blame if they allow it to become widespread. Thus, in his concurrence in *Farmer v. Brennan*, Justice Thomas quoted Judge Easterbrook of the Seventh Circuit: "[B]rutality and sexual aggression among [prisoners] is inevitable no matter what the guards do . . . unless all prisoners are locked in their cells 24 hours a day and sedated."<sup>369</sup> Although Justice Thomas's argument did not persuade the *Farmer* Court, such reasoning informs the constitutional deference

364. *Id.* at 334 (quoting *Pugh v. Locke*, 406 F. Supp. 318, 325 (M.D. Ala. 1976)). In *Pugh*, the district court had subjected Alabama to a consent decree for unconstitutional overcrowding, understaffing, unsafe housing, lack of security classification, institutional approval of inmate physical and sexual violence, and other institutional practices in violation of the Eighth and Fourteenth Amendments. See *Pugh*, 406 F. Supp. at 331-35.

365. *Dothard*, 433 U.S. at 335 ("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.") (footnote omitted).

366. *Id.* at 334.

367. *Id.* at 335.

368. The racial implications of *Dothard's* "jungle atmosphere" language were not accidental. In *Pugh*, the decision quoted in *Dothard*, the district court had noted that the inmate population was "predominantly black," while guards were "practically all white and rural" and "address[ed] black inmates with racial slurs, further straining already tense relations." The court concluded that "[i]n view of the foregoing, the rampant violence and jungle atmosphere existing throughout Alabama's penal institutions [were] no surprise." *Pugh*, 406 F. Supp. at 325.

369. 511 U.S. 825, 858-59 (1994) (Thomas, J., concurring) (quoting *McGill v. Duckworth*, 944 F.2d 344, 348 (7th Cir. 1991)).

that exempts prisons from vigorous enforcement of constitutional norms. The Supreme Court declares that prison administration is an “inordinately difficult undertaking”<sup>370</sup> and that “the problems of prisons in America are complex and intractable,”<sup>371</sup> so that it would be 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.”<sup>372</sup>

This deferential approach to constitutional adjudication is in part based on the premise that prisoners are, or may become, violent. The Court has held:

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.<sup>373</sup>

Thus, the Court affirms, “federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment.”<sup>374</sup>

The exemption of prisons from constitutional standards and legal rules facilitates the unlawful gendered practices of institutional governance that 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.

#### D. *Presenting the Narrative: Official Sources*

As we have seen, many academics have been far less skeptical of the empirical basis of the black-on-white rape myth than they should be.<sup>375</sup> Prison staff, courts, and correctional authorities fall into a similar pattern: They tend to present prison rape in accordance with pervasive cultural narratives of white vulnerability to the sexual violence of hypermasculine black men, accepting evidence that tends to confirm the stereotype while disregarding evidence that contradicts it.

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370. *Turner v. Safley*, 482 U.S. 78, 85 (1987).

371. *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974).

372. *Turner*, 482 U.S. at 89.

373. *Wolff v. McDonnell*, 418 U.S. 539, 561-62 (1974).

374. *Sandin v. Conner*, 515 U.S. 472, 482 (1995).

375. *See supra* Section III.A.

## 1. Prison Staff: Race in Sexual Abuse Investigations

Many prisoners and guards believe that white inmates are “weak” and “cannot fight as well as black inmates,”<sup>376</sup> putting them at risk of rape. In Helen Eigenberg’s two surveys of guards’ attitudes toward prison rape, she found that correctional “[o]fficers are less willing to believe black victims than white victims.”<sup>377</sup> She also found that “[o]fficers 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).”<sup>378</sup> 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 f\*\*\* . . .”<sup>379</sup>

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 officers, the overwhelming majority of allegations—over 80%—are deemed by prison investigators to be “unsubstantiated” (unproven) or “unfounded” (false).<sup>380</sup> The few remaining reports are “substantiated”: Prison investigators believe and may act upon them.<sup>381</sup> Of “substantiated” allegations, about 72 to 73% involve a white victim.<sup>382</sup> Nearly half of “substantiated” incidents are black-on-white.<sup>383</sup>

Whites comprise less than one-third of the incarcerated male population nationwide; about two-thirds of the male prison population is nonwhite (black, Latino, Asian/Pacific Islander, indigenous or mixed).<sup>384</sup> If “substantiated” reports reflect what is really happening in prison—and correctional authorities do

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376. FLEISHER & KRIENERT, *supra* note 1, at 103.

377. Eigenberg, *supra* note 72, at 51. During the mid-1980s, Nacci and Thomas Kane found evidence of the same attitudes. See Nacci & Kane, *supra* note 174, at 48.

378. Eigenberg, *supra* note 63, at 422.

379. Johnson v. Johnson, 385 F.3d 503, 513 (5th Cir. 2004) (internal quotation marks omitted).

380. See *supra* note 123 and accompanying text. Some state prison systems have even higher rates of “unsubstantiated” findings. NPREC REPORT, *supra* note 10, at 117-18.

381. BJS 2005 SEXUAL VIOLENCE REPORT, *supra* note 120, at 8.

382. See, e.g., *id.* at 6 tbl.4.

383. *Id.* at 6.

384. See *supra* note 79 and accompanying text.

not claim that they do<sup>385</sup>—the results of prison investigations would suggest that whites are being sexually assaulted at about four times the rate of nonwhites. This conclusion seems improbable: the nationwide and statewide victimization surveys have found that white inmates are victimized at *the same or lower* rates than nonwhites.<sup>386</sup> None of the victimization surveys provides any evidence to suggest that whites might face a much higher risk.

Unfortunately, the BJS does not provide any information about the racial distribution of sexual abuse allegations that correctional officials deem “unfounded” or “unsubstantiated.” Given the underreporting of sexual abuse, it is not safe to assume that the sexual abuse that prisoners report to correctional authorities looks like the sexual abuse that 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 indicates 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. It is quite possible that, knowing guards and investigators are more likely to believe white victims, victims who do not fit the stereotype might hesitate to disclose sexual abuse to corrections officials.<sup>387</sup>

These limitations illustrate the empirical difficulty of obtaining direct evidence of underenforcement. As Natapoff points out, while “there is a myriad of

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385. There is broad consensus among correctional authorities that sexual abuse is underreported. *See, e.g.*, BJS 2008 PRISONS REPORT, *supra* note 10, at 102; NPREC REPORT, *supra* note 10, at 102; Eigenberg, *supra* note 72, at 50 (“[O]fficers are relatively confident that inmates will not report victimization.”). The BJS cautions that “surveys of administrative records *could not provide reliable facility-level estimates of sexual violence because they were limited to incidents reported to correctional authorities.*” BJS 2008 PRISONS REPORT, *supra* note 10, at 1 (emphasis added). Additional reporting issues include victims’ reluctance to report incidents “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.” *Id.*

The NPREC, 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 REPORT, *supra* note 10, at 118. Although prison may offer some “motivations and rewards for falsely reporting sexual abuse” that have no parallel in the community outside, the NPREC points out that “the real risks associated with reporting even genuine sexual abuse are a strong disincentive to fabricating allegations.” *Id.*

Thus, the BJS takes the position that that the results of the NIS are more reliable than its data on sexual assaults reported to correctional authorities. BJS 2008 PRISONS REPORT, *supra* note 10, at 1. (“The NIS is a self-administered survey designed to encourage reporting by providing anonymity to respondents.”)

386. *See supra* notes 336-342 and accompanying text.

387. Eigenberg, *supra* note 72, at 52.

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.”<sup>388</sup> A complete picture of the under-enforcement phenomenon 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.<sup>389</sup> Today, rapes of nonwhite victims are still rejected for prosecution about twice as often as white-victim rapes.<sup>390</sup> Intra-racial rapes of nonwhite victims are sometimes excused by a “cultural defense.”<sup>391</sup> 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.<sup>392</sup> In short, prosecutors “undervalu[e] and under-prosecut[e] the rape of Black women.”<sup>393</sup> A racial breakdown of the “unfounded” and “unsubstantiated” cases could illuminate whether prison officials underinvestigate sexual abuse of nonwhite prisoners, as well.

## 2. Courts: Selective Racial Identification

Official sources, including courts, prisons, and BJS reports, present racial data about prison rape in accordance with a narrative practice that underplays racial information that tends to disconfirm 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 sustains the misleading 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

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388. Natapoff, *supra* note 112, at 1719-20.

389. See SUSAN ESTRICH, *REAL RAPE* 15-20 (1987); Iglesias, *supra* note 39, at 887-88; Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *YALE L.J.* 1281, 1303 (1991).

390. Pokorak, *supra* note 349, at 40-41 (citing research into the relationship between the victim’s race and prosecution decisions).

391. See Leti Volpp, *Talking “Culture”: Gender, Race, Nation, and the Politics of Women of Multiculturalism*, 96 *COLUM. L. REV.* 1573, 1575-76 (1996); Daina C. Chiu, Comment, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 *CAL. L. REV.* 1053 (1994).

392. See, e.g., Pokorak, *supra* note 349, at 36-43 (summarizing research on the relationship between prosecution decisions, criminal convictions, and victims’ race); Cassia C. Spohn, *Courts, Sentences, and Prisons*, in *AN AMERICAN DILEMMA REVISITED: RACE RELATIONS IN A CHANGING WORLD* 247, 256-60 (Obie Clayton Jr. ed., 1996).

393. Pokorak, *supra* note 349, at 43.

in most cases<sup>394</sup> is unsurprising, 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.<sup>395</sup> 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.<sup>396</sup> 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.<sup>397</sup>

Pervasive racial stereotypes may also influence perceptions about whether and when race is relevant to sexual assault. In judicial decisions, 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. For example, in *Butler v. Dowd*, the Eighth Circuit noted: “Hershel Marsh, a nineteen-year-old, white, first-offender convicted of child abuse, arrived at [the facility] in July 1988. According to Marsh’s testimony, prisoner William Stapleton, a black man, approached Marsh within 1½ hours of his arrival . . . and told him Stapleton would ‘fuck’ him that night.”<sup>398</sup> Similarly, in *Wilson v. Wright*, a federal district court judge pointed out that the 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 abduction-with-intent-to-defile and forcible sodomy of a twelve-year-old boy.”<sup>399</sup> Unless these references to race are entirely gratuitous, the black-on-white racial dynamic may seem relevant to judges because it underscores the plaintiff’s vulnerability.

In these black-on-white sexual assaults, the *Butler* and *Wilson* courts mention race in ways that imply that race was relevant to the (black) rapist’s selection of (a white) victim. In *Wilson*, the judge held that, because the assailant was in prison “for raping a small, young, white male,” a jury could reasonably infer that he posed a serious risk of harm to the plaintiff, “a small, young, white

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394. The only Eighth Amendment sexual assault case I could find that identified the race of a nonwhite victim was *Johnson v. Johnson*, 385 F.3d 503, 513 (5th Cir. 2004), in which prison officials gave racial reasons for refusing to protect the victim, whom they described as a “Black punk.”

395. See *Farmer v. Brennan*, 511 U.S. 825, 831 (1994).

396. See, e.g., *Wilson v. Wright*, 998 F. Supp. 650, 652 (E.D. Va. 1998).

397. For information on Farmer’s identity, see Rachel Wyatt, Note, *Male Rape in U.S. Prisons: Are Conjugal Visits the Answer?*, 37 CASE W. RES. J. INT’L L. 579, 585 (2006).

398. 979 F.2d 661, 665 (8th Cir. 1992).

399. 998 F. Supp. at 652.

male.”<sup>400</sup> Although it is not unusual for plaintiffs to allege in Eighth Amendment cases that prison officials knew the assailant had raped before,<sup>401</sup> I have been unable to find any case in which the court pointed out that an assailant of a nonwhite plaintiff had assaulted another black, Latino, Asian, mixed, or Native American victim. The race of a nonwhite victim is nowhere portrayed as a factor that made him vulnerable.<sup>402</sup>

### 3. The Bureau of Justice Statistics: Selective Presentation of Racial Data

The BJS reports, like the federal courts, present racial data about prison rape in ways that highlight race when the data tend to confirm the black-on-white prison rape stereotype, but rarely mention race when the data tend to refute it. After the 2003 passage of the PREA, the BJS (through the U.S. Census Bureau) collected statistics from every correctional authority in the country to generate reports on the occurrence of prison rape and of correctional authorities’ responses to it. As part of this process, the BJS gathered data from correctional authorities on their disposition of sexual abuse allegations they received from prisoners. The first such report, published in 2004, provided no information on race,<sup>403</sup> but the 2005 and 2006 reports (the latter being the most recent available) selectively provide racial information in ways that tend to reinforce the black-on-white rape stereotype.

Both of the two more recent BJS reports on “Sexual Violence Reported to Correctional Authorities” graphically highlight the racial dynamics of “substantiated” sexual violence in a chart that presents incidents by race of the perpetrator and victim.<sup>404</sup> As the BJS points out, the pattern for both years is substantially similar: The overwhelming majority of victims—72 to 73%—are white,

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400. *Id.* at 655.

401. *See, e.g.,* *Velez v. Johnson*, 395 F.3d 732, 734 (7th Cir. 2005); *Langston v. Peters*, 100 F.3d 1235, 1239 n.2 (7th Cir. 1996); *Redman v. County of San Diego*, 942 F.2d 1435, 1437-38 (9th Cir. 1991); *Richardson v. Penfold*, 839 F.2d 392, 394 (7th Cir. 1988); *Moore v. Honeycutt*, No. 09-3067-SAC, 2009 U.S. Dist. LEXIS 33108, at \*3 (D. Kan. Apr. 17, 2009).

402. On the contrary, as Brenda Smith observes, for black men, “the difficulty lies in overcoming the stereotype of being sexual victimizers as opposed to victims.” Smith, *supra* note 36, at 281.

403. ALLEN J. BECK & TIMOTHY A. HUGHES, BUREAU OF JUSTICE STATISTICS, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2004 (2005) [hereinafter BJS 2004 SEXUAL VIOLENCE REPORT], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrca04.pdf>.

404. *See, e.g.,* BJS 2005 SEXUAL VIOLENCE REPORT, *supra* note 120, at 6.

and almost half their assailants are black.<sup>405</sup> 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<sup>406</sup>:

	PERPETRATOR			
	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 BJS NIS, by contrast, asked inmates in jails and state and federal prisons whether they had experienced sexual coercion or assault, regardless of whether they had disclosed it to correctional authorities. The NIS obtained results quite different from those in the cases correctional investigators deemed to be “substantiated.” The 2007 NIS report on sexual victimization in state and federal prisons provides no racial data, but the limited racial data that are made available in the 2007 NIS report on sexual victimization in local jails tend to refute the black-on-white rape stereotype. The NIS found that, in jails, whites were *less likely* than any other race or ethnicity to say they had been sexually abused.<sup>407</sup>

Every NIS asked jail and prison inmates about their race and ethnicity<sup>408</sup> and asked inmates who said they had been sexually abused about the race and ethnicity of their inmate assailants.<sup>409</sup> 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. Unfortunately, no such chart was provided.

In 2008-2009, as in 2007, the NIS found that white inmates reported significantly higher rates of sexual victimization *by inmates* than were reported by black and Latino inmates, and they reported significantly lower rates of sexual

405. ALLEN J. BECK, PAIGE M. HARRISON & DEVON B. ADAMS, BUREAU OF JUSTICE STATISTICS, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2006, at 4 & tbl.4 (2007) [hereinafter BJS 2006 SEXUAL VIOLENCE REPORT].

406. *Id.* at tbl.4.

407. BJS 2007 JAILS REPORT, *supra* note 10, at 6 tbl.7.

408. See NATIONAL INMATE SURVEY : YEAR 1 QUESTIONNAIRE SPECIFICATIONS FINAL 2-3 (2007), available at [http://bjs.ojp.usdoj.gov/content/pub/pdf/nis\\_acasi\\_spec.pdf](http://bjs.ojp.usdoj.gov/content/pub/pdf/nis_acasi_spec.pdf) (questions A5 through A7).

409. *Id.* at 31 (asking in questions F7 and F7a whether the inmate assaulter was Hispanic and whether s/he was white, black, Native American, 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. *Id.* at 34-38 (questions G1 through G26).



victimization *by staff*. (Multiracial inmates' reported rates of victimization, by staff or inmates, were much higher than those of white, black or Latino inmates.) In the "Highlights" section of the 2008-2009 report, the BJS declares that "[r]ates of inmate-on-inmate sexual victimization in prisons and jails were *significantly* higher among inmates who were white or multi-racial compared to blacks . . ." <sup>410</sup> The Highlights do not mention that white inmates' higher inmate-victimization rates disappeared upon controlling for other factors, while those of multiracial inmates remained significantly elevated.

By contrast, the Highlights describe the racial findings with respect to staff sexual abuse as follows: "After controlling for multiple inmate characteristics, rates of reported staff sexual misconduct were lower among white inmates (compared to black inmates) . . ." <sup>411</sup> This language emphasizes white inmates' vulnerability while underplaying that of black inmates. For example, *all* the BJS' victimization survey data depend on inmate self-reporting. Yet the BJS treats whites' reports of sexual victimization as fact ("rates of inmate-on-inmate sexual victimization . . . were significantly higher among inmates who were white or multi-racial"), while treating blacks' reports of sexual victimization as allegations (blacks' "rates of *reported* staff sexual misconduct were lower"). The Highlights describe whites' vulnerability as "significant," even though the BJS' "final" statistical analysis shows it not to be, <sup>412</sup> and neglects to describe blacks' vulnerability as "significant" when it is. <sup>413</sup> It characterizes inmate abuse of whites as "victimization," while describing staff abuse of blacks as "misconduct." <sup>414</sup> All these descriptive differences tend to downplay the counter-stereotypical findings of the survey: that whiteness is not a significant risk factor for sexual abuse by other prisoners; that multiracial identity *is* a significant risk factor for inmate

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410. BJS 2008-09 PRISONS AND JAILS REPORT, *supra* note 10, at 5 (emphasis added).

411. *Id.*

412. The raw prevalence of inmate-on-inmate sexual abuse was significantly higher among white than black inmates (3.0% for whites in prison, compared to 1.3% for blacks and 1.5% for whites in jail, compared to 1.2% for blacks). *Id.* at 12 tbl.6. But the BJS's "final multivariate logistic regression model" of sexual victimization showed that, after controlling for other factors, white inmates did not face significantly elevated risk of inmate-on-inmate sexual abuse, compared to blacks. *Id.* at 18 tbl.12.

413. Black inmates' significantly higher raw prevalence of staff-on-inmate sexual abuse (3.2% of blacks in prison compared to 2.3% of whites and 2.4% of blacks in jail compared to 1.5% of whites), *id.* at 12 tbl.6, remained statistically significant after controlling for other factors. *Id.* at 18 tbl.12.

414. The description of staff sexual abuse as "misconduct" rather than "victimization" may reflect the fact that, because all sexual contact between staff and prisoners is *criminally prohibited*, the BJS's definition of sexual victimization by staff includes "willing" sexual contact, whereas its definition of sexual victimization by prisoners includes only sexual activity that is unwanted (pressured, coerced, or physically forced). *Id.* at 7.

sexual abuse; and that blackness is a significant risk factor for sexual abuse by staff.<sup>415</sup>

### E. Consequences of the Black-on-White Rape Narrative

#### 1. The Ideology of Black-on-White Sexual Threat

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?”<sup>416</sup> 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.<sup>417</sup>

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,<sup>418</sup> 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 [the perpetrator],”<sup>419</sup> his claim was dismissed on summary judgment based on qualified immunity.<sup>420</sup> Hershel Marsh and his co-plaintiffs (whose racial ascriptions were unspecified) won at trial, but the jury awarded damages of only \$1 each for multiple sexual assaults. The Eighth Circuit upheld the jury award.<sup>421</sup> Like other prisoner-plaintiffs, white prisoner-plaintiffs are likely to lose.

In the outside world, police investigators are typically much more sympathetic to white women who allege that their rapists are black.<sup>422</sup> However, the disproportionate legal and extralegal reaction to allegations of black-on-white

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415. See *id.* at 18 tbl.12, 91 app. tbl.10.

416. SPR, STORIES FROM INSIDE, *supra* note 153, at 51.

417. See *supra* note 124.

418. See generally Schlanger, *supra* note 23.

419. *Wilson v. Wright*, 998 F. Supp. 650, 656 (E.D. Va. 1998).

420. *Id.* at 657.

421. *Butler v. Dowd*, 979 F.2d 661, 669 (8th Cir. 1992).

422. See, e.g., ESTRICH, *supra* note 389, at 37 (“The stranger (particularly the black stranger engaging in intercourse with the white woman) is at one end of the spectrum of appropriateness, where no resistance is required [to establish a rape charge].”).

sexual assault did not usually extend to low-status white women who were labeled 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 “ladies” or as “bad.”<sup>423</sup>

By contrast, sexual assaults upon low-status victims, such as women of color,<sup>424</sup> unchaste white women,<sup>425</sup> gay men,<sup>426</sup> and prisoners,<sup>427</sup> have traditionally been much less likely to be investigated or punished, either by formal law enforcement or by unlawful vigilante sanctions. Institutional and legal indifference to sexual abuse in men’s prisons also fits this pattern. Like other groups tainted by racial and moral stigma, prisoners hold such low status that investigators and legal decision-makers—whether inside or outside prison—are unlikely to investigate or punish sexual assaults upon them.<sup>428</sup>

Moreover, the intense (legal or extralegal) overreaction to sensational allegations of black-on-white sexual misconduct that plagued U.S. legal culture throughout the twentieth century,<sup>429</sup> like the racialized response to prison rape, did little to protect victims. Historically, in many high-profile cases of black-on-white “rape,” no assault had occurred,<sup>430</sup> or the black men who were punished were innocent.<sup>431</sup> The racial rape myth made it more difficult for white women who had been raped by white men to have their allegations taken seriously because their (much more common) situation did not fit the stereotype.<sup>432</sup> The

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423. Hernández, *Sexual Harassment*, *supra* note 39, at 197 (footnote omitted).

424. See, e.g., Hernández, *Critical Race Feminism*, *supra* note 39, at 1262.

425. See, e.g., Balos & Fellows, *supra* note 118, at 1227.

426. See, e.g., Axam & Zalesne, *supra* note 40, at 159.

427. See, e.g., Buchanan, *supra* note 14, at 48.

428. See *supra* Subsection II.A.1.

429. See WIEGMAN, *supra* note 87, at 95-113.

430. Consider, for example, lynchings (many of which were based on spurious allegations of black-on-white rape), Duru, *supra* note 87, at 1325-33; the Scottsboro defendants (convicted and imprisoned based on fabricated allegations of raping two white women), *id.* at 1333-39; and Emmett Till (lynched for allegedly whistling at a white woman), *id.* at 1329.

431. See, e.g., *id.* at 1346-60 (describing how five black youths were arrested, convicted, imprisoned, and later exonerated for the rape and beating of the Central Park jogger, a white woman).

432. See MACKINNON, *supra* note 236, at 176, 181 (noting that “rape comes to mean a strange (read Black) man who does not know his victim,” whereas the law infers consent “to the extent an accused knows the woman and they have sex”).

creation of a black-on-white public narrative of sexual assault traditionally served political purposes that had little, if anything, to do with the physical integrity or sexual autonomy of white victims.<sup>433</sup> The racial account of prison rape conforms to this pattern. Disproportionate attention to allegations of black-on-white rape creates the illusion that institutions make serious efforts to prevent and punish sexual abuse, when in most cases they do nothing.

The black-on-white prison rape story also obscures institutional responsibility for the unlawful institutional practices that foster prison rape. If prison rape results from black men's desire for racial revenge against whites—the position argued by Anthony Scacco, one of the leading proponents of the black-on-white prison rape narrative—then “[i]n the final analysis the correctional system cannot be blamed for causing the behavior within the walls for . . . [t]he community gives the criminal his materials and habits . . . .”<sup>434</sup>

The image of black men as violent criminals who pose a threat to vulnerable whites helps their mass incarceration to appear normal and fair.<sup>435</sup> The burgeoning prison population is not limited to the murderers and rapists of popular stereotype: Nationally, almost two-thirds of all prisoners are serving time for nonviolent property or drug crimes.<sup>436</sup> To the extent that prison rape is understood to be ubiquitous, the inevitable consequence of crowding violent black criminals and perverts into a confined space, it seems more plausible that all the men in prison belong there<sup>437</sup> and deserve whatever happens to them.

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433. As Mary Dudziak points out, in racial narratives of American justice and identity, “[w]hat 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 *WHEN LAW FAILS: MAKING SENSE OF MISCARRIAGES OF JUSTICE* 25, 26 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2009).

434. SCACCO, JR., *supra* note 313, at 5 (internal quotation marks omitted).

435. See COLLINS, *supra* note 3, at 158.

436. See WILLIAM J. SABOL, HEATHER C. WEST & MATTHEW COOPER, *BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2008*, at 38 app. tbl.17 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/po8.pdf>.

437. 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. See, e.g., Devon Carbado, *Racial Naturalization*, in *LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS* 41, 57 (Mary L. Dudziak & Leti Volpp eds., 2006); *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (Marc Mauer & Meda Chesney-Lind eds., 2002). Jonathan Simon likewise argues that the racialized stigma of criminality justifies mass incarceration of low-income minority men. Jonathan Simon, *Recovering the Craft of Policing: Wrongful Convictions, the War on Crime, and the Problem of Security*, in *WHEN LAW FAILS*, *supra* note 433, at 115, 121 (“Police may believe that, regardless of his responsibility for a particular crime, a suspect who

As Jonathan Simon points out, racialized crime narratives tend to strengthen the power of the penal state not only against the low-income minority communities targeted by penal enforcement, but against white middle-class citizens, as well. 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,<sup>438</sup> and create greater dependency on “a command-and-control police and penal state,”<sup>439</sup> even when such measures reduce the freedom of law-abiding, white, middle-class citizens. The black-on-white story of prison rape, like other racialized crime narratives, helps to “regulate[] the self-governing activity of people who are not targets of criminal justice repression but are instead eager consumers of public and private governmental tools against crime risk.”<sup>440</sup>

If the appeal of the black-on-white prison rape narrative does not lie in greater security 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 tends to relieve anxieties about the reality that, in prison, many straight-identified men have sex with other men.<sup>441</sup> She observes that until the 1960s, the racialized narrative was absent from academic discussions of prison sex. Mid-century prison sex researchers focused on masculinity rather than race. In mainstream scholarly work, raped prisoners were “referred to as punks, made homosexuals, involuntary recruits, and jail house turnouts” and, like gay men, were “described as stereotypically effeminate and weak.”<sup>442</sup>

Kunzel notes that 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. The new racial narrative, she points out, evoked academic sympathy for victims who had been absent when prison sex was understood to involve white men abusing each other.<sup>443</sup> Once black men were imagined to be “on top,” sociological commentators moved away from impugning victims’ masculinity and instead treated prison sexual abuse as a threat to white supremacy.<sup>444</sup> For example, Scacco argued in 1975 that “[m]any of the whites stated that they would have defended their

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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.”).

438. JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 96-101 (2007).

439. *Id.* at 7.

440. *Id.* at 16.

441. KUNZEL, *supra* note 4, at 180.

442. Eigenberg, *supra* note 63, at 419.

443. KUNZEL, *supra* note 4, at 165-69.

444. *Id.* at 170.

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.”<sup>445</sup> 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.”<sup>446</sup> 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.”<sup>447</sup>

## 2. Calls for Racial Segregation

Questions about the black-on-white rape narrative are especially pressing today because we are at a critical moment for policy reform.<sup>448</sup> 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.<sup>449</sup> The PREA itself endorses the notion that “[t]he frequently interracial character of prison sexual assaults significantly exacerbates interracial tensions,”<sup>450</sup> implying that policy responses must accommodate the supposedly interracial character of prison rape. Likewise, the NPREC’s 2009 proposed standards, which are to form the basis of prevention regulations to be released by the Attorney General,<sup>451</sup> repeatedly urge correctional agencies to review institutions’ collected data to “identif[y] problem areas, including any racial dynamics

445. SCACCO, JR., *supra* note 313, at 54-55.

446. *Id.* at 55.

447. KUNZEL, *supra* note 4, at 189.

448. Because the NPREC submitted its report and recommendations on June 23, 2009, the U.S. Attorney General must publish national standards for prison rape prevention by June 23, 2010. JDI REPORT, *supra* note 8, at 1 (“In accordance with PREA, Attorney General Eric Holder has until June 23, 2010, to publish a final rule adopting national standards.”).

449. The PREA, for example, aims to “develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape.” Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, § 3(3), 117 Stat. 972, 974. The PREA initiative includes BJS 2008-09 JUVENILE REPORT, *supra* note 80; BJS 2007 JAILS REPORT, *supra* note 10; BJS 2008-09 PRISONS AND JAILS REPORT, *supra* note 10; BJS 2007 PRISONS REPORT, *supra* note 10; BJS 2004 SEXUAL VIOLENCE VIOLENCE REPORT, *supra* note 403; BJS 2005 SEXUAL VIOLENCE VIOLENCE REPORT, *supra* note 120; BJS 2006 SEXUAL VIOLENCE VIOLENCE REPORT, *supra* note 405; GAES & GOLDBERG, *supra* note 314; JENNESS ET AL., *supra* note 56; NPREC Report, *supra* note 10; Wolff et al., *supra* note 56; and Wolff et al., *supra* note 78.

450. See *supra* note 320 and accompanying text.

451. At the time of writing, this report is overdue. See Amy Fettig, *Each Day, More Victims*, ACLU BLOG OF RIGHTS (Aug. 26, 2010, 11:50 AM), <http://www.aclu.org/blog/prisoners-rights/each-day-more-victims>.

underpinning patterns of sexual abuse.”<sup>452</sup> They exhort correctional staff to “consider whether incidents were motivated by racial or other group dynamics at the facility” and require that “officials immediately notify the agency head and begin taking steps to rectify those underlying problems.”<sup>453</sup> None of the data collection recommendations mandates that correctional officials consider—or take immediate steps to rectify—any nonracial institutional problems that have been identified as factors contributing to sexual violence, for example: inadequate supervision, inappropriate security classification, overcrowding, high rates of physical violence, homophobia, or an institutional culture in which staff and inmates expect inmates to prove their masculinity by fighting.

Correctional authorities seem to more readily believe allegations of sexual abuse when the victim is white and the perpetrator is black. It seems likely, then, that the NPREC’s call for data collection based on correctional investigators’ perception of institutional racial dynamics risks generating more data that reinforce the stereotype that gave rise to the standards’ disproportionate focus on race in the first place. Given the troubling inconsistency between the racial dynamics of sexual abuse found in survey results and the racial dynamics of sexual abuse that correctional authorities deem to be “substantiated,”<sup>454</sup> it seems particularly urgent that the empirical basis of racial assumptions be examined before correctional authorities base policy recommendations upon them.

Even if it turns out that (contrary to the results of all the recent victimization surveys) prison rape is disproportionately black-on-white, the dominance of this narrative still gives reason for concern. In prison, as in the outside world, the narrative of black-on-white rape “erase[s] the existence of white assailants and black victims,”<sup>455</sup> 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 compelling fantasy of black-on-white inmate rape seems to have eclipsed the racial disparities that are actually substantiated by the survey data. Multiracial prisoners seem to face heightened risk of sexual abuse by other inmates, while black inmates seem to face heightened risk of sexual abuse by staff, but no policy recommendations address these disparities. Policy reforms should seek to protect all victims, regardless of their race.

Finally, the black-on-white rape narrative may 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.<sup>456</sup> Moreover, eight state governments recently argued (unsuccess-

452. NPREC STANDARDS, *supra* note 321, at 55.

453. *Id.* at 53.

454. See *supra* note 124 and accompanying text.

455. KUNZEL, *supra* note 4, at 180.

456. See, e.g., James B. Jacobs, *The Limits of Racial Integration*, in *NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT* 80, 87 (James B. Jacobs ed., 1983) (“Just as it is the case with affirmative action that there are legitimate reasons for treating

fully) before the Supreme Court that racial segregation policies in prisons are not only constitutionally tolerable, but are constitutionally *required*.<sup>457</sup> An empirical and theoretical challenge to the black-on-white rape myth is required to finally put segregationist policy initiatives to rest.

## CONCLUSION

Prison rape is not an inevitable consequence of the brutality or perversion of prison rapists. Rather, prison conditions and practices reveal the consequences of suspending the rule of law within an authoritarian institution. This observation provides important lessons for prison law and policy as well as for the rule of law in the outside world.

In the absence of enforceable external laws, prison officials, who serve as police, prosecutor, judge, jury, and court of appeals, apply their own rules. Even though an alternative, lawful model of institutional governance is available to suppress violence in prison, some officials' embrace of toxic norms of masculinity often seems to override their interest in administering a less violent prison. As we see in Title VII litigation, masculinity supplies a powerful source of normative authority that can challenge existing legal rules. In prison, however, where formal legal rules are weak or absent, guards and administrators often enforce those gender norms as law.

Moreover, prisons' unlawful practice of institutional governance shapes the external laws that govern them. Unlawful gendered institutional practices foster the violence that courts invoke when they exempt prisons from vigorous en-

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people as members of a racial group, so too in prisons there may be good reasons for taking race into account.”); Wolff et al., *supra* note 78 at 468-69 (arguing for racial segregation because nonwhite inmates may harbor “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”). Wolff and her coauthors state that their racial analysis “is relevant only to the extent that . . . [it] can be used to inform practices and policies that minimize their opportunities.” *Id.* at 469-70. They advocate “reducing opportunities for victimization, separating those with characteristics that make them likely targets from other inmates with predatory characteristics.” *Id.* at 470. The context of this proposal implies that whites are the “likely targets” who should be separated from the “predators” the authors characterize as nonwhite prisoners out for racial revenge.

457. See Brief of the States of Utah, Alabama, Alaska, Delaware, Idaho, Nevada, New Hampshire and North Dakota as Amici Curiae in Support of Respondent at 18-20, *Johnson v. California*, 543 U.S. 499 (2005) (No. 03-636) (“Closely related to the problem of race-related gangs is the problem of inter-racial rape in prisons. . . . [C]elling together men who are racially antagonistic, is one of several factors that increase the threat of prison rape. . . . [T]he failure to take segregative measures could be considered deliberate indifference to prisoners’ safety and could itself create a constitutional violation.”) (internal citations and quotation marks omitted).



forcement of constitutional standards and legal rules. The black-on-white account of inmate rape contributes to the perception that prison staff and administrators bear little or no responsibility for sexual violence within their institutions.

As Lauren Edelman has observed, when institutional practices shape external rules and legal doctrines, they undermine the rule of law.<sup>458</sup> For example, when Congress passed the Prison Litigation Reform Act of 1996, it adopted the position advocated by the institutional defendants to prisoner litigation. The major reason cited by lawmakers for the Prison Litigation Reform Act's draconian restrictions on prisoner litigation was that prisoner litigation typically involved frivolous complaints,<sup>459</sup> such as receiving chunky, rather than creamy, peanut butter.<sup>460</sup> This and other examples relied upon in the congressional debates were supplied to them by the National Association of Attorneys General, whose members defend correctional officials against prisoner litigation. Similarly, since 1987, the Supreme Court has rolled back its earlier protection of prisoners' rights, embracing institutional defendants' view that administrators are not to blame for prison violence, and that that courts should accord them considerable leeway in devising institutional responses to it. Rather than constraining institutional action, the Court and Congress have authorized correctional administrators to decide what law means in prison.

The gendered practices of institutional governance described in this Article demonstrate the need for more law in prison, not less. Congress should repeal the PLRA.<sup>461</sup> Judges should apply ordinary constitutional standards to prisoners' claims, and they should reject unnecessary governmental immunities.<sup>462</sup>

458. See Edelman, *supra* note 30.

459. See 141 CONG. REC. 27,042-44 (1995). For a discussion of frivolous lawsuits in the prison context, see Jamie Ayers, Comment, *To Plead or Not To Plead: Does the Prison Litigation Reform Act's Exhaustion Requirement Establish a Pleading Requirement or an Affirmative Defense?*, 39 U.C. DAVIS L. REV. 247, 248 n.2 (2005) (describing frivolous claims discussed in the congressional debates, including claims allegedly arising from an unsatisfactory prison haircut and the wrong brand of sneakers).

460. The "crunchy peanut butter" case and other examples were provided to lawmakers by the National Association of Attorneys General, which solicited "top ten lists" of frivolous prisoner lawsuits, one of which was the "crunchy peanut butter case." The Association published the list and distributed it to lawmakers. See Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 520-21 (1996). Judge Newman has criticized the list as misleading, since the "frivolous" lawsuits advanced much more serious claims. *Id.* at 521-22.

461. Many commentators, including members of the Commission on Safety and Abuse in America's Prisons and the NPREC, have advocated the amendment or repeal of the PLRA. See CSAAP REPORT, *supra* note 93, at 84-87 (arguing for repeal of the most substantial barriers to prisoner litigation erected by the PLRA); NPREC REPORT, *supra* note 10, at 93-95 (arguing for repeal of the PLRA's grievance

There is no reason, though, to think such reform is presently on the agenda of Congress or the Supreme Court. Even if these laws were changed, prisoner litigation alone would have limited effects on institutional practice.<sup>463</sup> Most prisoners lack education, money, and access to effective constitutional litigators, while jurors and judges are often predisposed to reject prisoners' cases or "low-ball their damages" as an expression of disregard for them.<sup>464</sup> The most effective way to prevent sexual abuse in prison would be for correctional authorities to replace unlawful practices of institutional governance with the lawful practices that are known to make prisons safer.

Finally, the gendered practice and racial story of prison sexual abuse should warn against complacency about the rule of law in the outside world. The persistence of the black-on-white prison rape narrative—and its uncritical acceptance among administrators, academics, and reformers—demonstrates its continued hold on the public imagination. The rules of masculinity enforced by prison officials are not unique to prison, either. These gender norms and racial narratives still permeate the surrounding culture. Outside prison, norms of masculinity continue to challenge doctrinal and statutory antidiscrimination rules, and sometimes they supplant them. On the other hand, antidiscrimination laws seem to suppress some sexual violence: In spite of the heterosexual defense in Title VII jurisprudence, men are not allowed to rape each other at work. The unlawful governance practices we see in prison expose the racism and gender violence that are held in check by criminal, constitutional, and anti-discrimination laws in the outside world. These practices highlight the continuing need for vigilant enforcement of laws that suppress, but do not eliminate, institutionalized racism and gender violence in the outside world.

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ance exhaustion and physical injury requirements); Buchanan, *supra* note 14, at 86 (advocating complete repeal of the PLRA); Margo 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).

462. See Buchanan, *supra* note 14, at 69-86.

463. *But cf.* MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS TRANSFORMED AMERICA'S PRISONS* (1998) (arguing that prisoner litigation was responsible for improving prison conditions in the 1980s and 1990s).

464. Schlanger, *supra* note 23, at 1605-26.